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Pipeline developer, opponents stake out positions

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BY ANNE ADAMS • STAFF WRITER

MONTEREY — Last week, Dominion Energy released a statement regarding the effects of the May 15 Fourth Circuit Court of Appeals ruling about its proposed Atlantic Coast Pipeline.

The court had invalidated ACP's Incidental Take Statement under the U.S. Fish and Wildlife Service, following a suit brought by environmental advocates. Those groups were represented by the Southern Environmental Law Center, and the ruling sent a wave of hope through pipeline opponents, who believe all construction on the pipeline must stop until a valid statement is issued.

Last Wednesday, May 16, Jen Kostyniuk, Dominion Energy communications director, said only a small portion of pipeline construction would be on hold, however.

“We spent more than three years developing the safest and most environmentally responsible route for the pipeline,” he said. “We carefully studied more than 6,000 miles of potential routes before choosing the best 600-mile route with the least impact. After consulting with landowners and performing extensive field surveys, we made more than 300 route adjustments to avoid environmentally sensitive areas such as wetlands, wildlife habitats, drinking water sources and sensitive geologic features.

“We are continuing to analyze the order and the effects it will have on the project. We can say that the impact of the U.S. Fourth Circuit Court of Appeals ruling is on a small portion of the 600-mile route and there will be no impact in North Carolina. Through our project planning, we purposefully avoided areas of endangered species which is why the impact of this ruling is relatively limited.

“We are consulting with federal and state agencies, as we have throughout this project. Our next steps will be to consult with the U.S. Fish and Wildlife Service who we expect will revise the Incidental Take Statement to provide limits that are more specific.

“While we do not have a specific date of when the revised Incidental Take Statement will be prepared, ACP has conducted extensive survey work for all six species over the past four years and there is a robust record on which to resolve this matter in an expedited manner.

“We will fully comply as required while we continue to construct the project. We will continue to move forward with construction as scheduled,” Kostyniuk said.

FERC issues instructions

The same afternoon, FERC sent a letter to Matthew Bley of Dominion about the court ruling. It noted the court had indicated it would later explain its reasoning behind the decision to vacate the Incidental Take Statement and that, as a result of the judges’ order, Atlantic Coast Pipeline LLC had informed FERC it will not proceed with construction in any areas where such activities may affect listed species covered by the statement for the project.

“Atlantic should, within five days, file documentation that specifically identifies by milepost/stationing the habitat areas that will be avoided with respect to each of the listed species, and confirms the company’s commitment to avoid construction in these areas,” FERC said.

Dominion submits more info

Tuesday this week, Kostyniuk sent another filing to federal regulators for Dominion, noting the areas it believes endangered species exist that it will avoid for now.

“Dominion Energy will not undertake any activity identified in the Biological Opinion as likely to adversely affect protected species within construction areas until vacatur of the Fish and Wildlife Service Incidental Take Statement is resolved,” he said.

Kostyniuk explained that by law, the information Dominion provided this week should be treated as “controlled, unclassified information and privileged and confidential.” As such, he said, it should not be released to the public because it contains the locations of sensitive species.

In his cover letter providing the information, Kostyniuk reminded FERC “the impact of the U.S. Fourth Circuit Court of Appeals ruling is on a small portion of the 600-mile route and there will be no impact in North Carolina. Based on our analysis, we will avoid approximately 21 miles in West Virginia and 79 miles in Virginia until a revised Incidental Take Statement is issued. Approximately 10 of these miles are in 2018 construction spreads, which is less than 2 percent of the total project mileage.”

He added, “We will continue to move forward with construction as scheduled and fully comply as required with all permits and agency requirements.”

Kostyniuk said Dominion will coordinate with the USFWS “who we expect will revise the Incidental Take Statement to provide limits that are more specific for certain species and address the concerns raised by the court. While we do not have a specific date when the revised

Incidental Take Statement will be prepared, we note that ACP has conducted extensive survey work for all six species over the past four years and we believe there is a robust record on which to resolve this matter in an expedited manner.”

Opponents respond

The Southern Environmental Law Center and Appalachian Mountain Advocates filed with FERC Tuesday afternoon, on behalf of their respective client groups, a letter explaining why the FERC should not allow construction to proceed.

“FERC also should not assume that it knows what remedy the court will order, nor FWS’s response to it,” SELC said. “For instance, FERC cannot know if (the Fish and Wildlife Service) will have to consider additional habitat areas not assessed in the original biological opinion and incidental take statement in order to comply with the court’s opinion. FERC puts itself at considerable risk by assuming it or Atlantic can predict what the court will order and how that will play out on the ground.”

Further, the letter said, “Allowing pipeline construction to proceed outside areas Atlantic identified as used by endangered species could dangerously lock FERC and Atlantic into a pipeline route that FWS’s analysis may require it to change. That is part of the reason the ESA prohibits ‘any irreversible or irretrievable commitment of resources’ during consultation – to ensure the action agency does not wed itself to a proposal that it ultimately cannot complete.

“FERC should not assume that it is going to be allowed to take species or impact habitat until FWS shows it can issue a valid biological opinion and incidental take statement for this project. As it stands today, this project could not be completed as planned.”

The letter noted that in FERC’s Oct. 13, 2017 order issuing a certificate for the ACP, a biological opinion and incidental take statement was required.

“To be clear, this is not a situation where the limits of a valid incidental take statement have been exceeded, requiring FERC to reinitiate previously completed ... consultation. Here, the underlying incidental take statement has been vacated, and consultation is incomplete. FERC’s order prohibited commencement of construction before obtaining its first, now invalid, incidental take statement; it likewise does not allow that construction would continue in the absence of an incidental take statement ... The face of FERC’s order does not allow the possibility that construction would continue in the absence of such an authorization required under federal law,” the attorneys claimed

The letter noted habitat for some species is widespread. The potential Madison cave isopod habitat, for example, covers 267,000 acres in western Virginia, and of the 11,776 acres of land that would be disturbed by construction, at least 4,448 of them are Indiana bat territory. If the USFWS requires route modifications, they could be significant, the attorneys said. Furthermore, the attorneys noted, “We are aware of no map that guarantees take will not, or likely will not, occur, as Atlantic seems to envision by suggesting it can provide FERC a map of areas to avoid. And such a map would have zero legal effect, in any event. The ESA does not contemplate a

process by which a developer can say where and when its project goes forward— that obligation rests with FWS and is accomplished through consultation, the process uncompleted here.”

As of Wednesday this week, the Fourth Circuit had not issued its full order on the court decision.