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Appeals court judge takes aim at U.S. Forest Service role in approving pipeline

By [MICHAEL MARTZ Richmond Times-Dispatch](#), September 28, 2017



Chief Judge Roger L. Gregory in his office in the historic 4th U.S. Circuit Court of Appeals courthouse.

The chief judge of the 4th U.S. Circuit Court of Appeals took close aim on Friday at what he called the shifting position of the U.S. Forest Service in protecting national forestlands on steep mountain slopes in the path of the Atlantic Coast Pipeline.

In a hearing by a three-judge panel on environmental groups' appeal of U.S. Forest Service permits for the \$6.5 billion natural gas pipeline, Chief Judge Roger L. Gregory repeatedly questioned a Justice Department lawyer about the federal agency's alleged change in position on protection of steep slopes.

"Why would you lower your standards?" Gregory asked Avi Kupfer, the Justice Department lawyer for the Forest Service. "When was that done?"

The judge found the answer he expected later from an environmental group's attorney. The lawyer pointed to a message in December 2016 — the month after the presidential election — that appears to commit the Forest Service to a regulatory timeline that had been requested by Dominion Energy, the pipeline's lead developer.

"I thought it was," Gregory said in response to the assertion by D.J. Gerken, attorney for the Southern Environmental Law Center.

The law center, based in Charlottesville, obtained emails among officials for the Forest Service and Dominion in November and December 2016 through the Freedom of Information Act. The group referenced the emails in its appeal of the permits the Forest Service issued for the project in November 2017.

The emails refer to a meeting between officials at the Richmond-based energy company and the U.S. Department of Agriculture, which oversees the Forest Service, on Nov. 9, the day after the presidential election.

The meeting marked an effort by Dominion to coordinate a timetable for regulatory action by the Forest Service with the anticipated release of a final environmental impact statement for the project by the Federal Energy Regulatory Commission the following June.

Lawyers for the Forest Service and the developer of the 600-mile pipeline strongly objected to suggestions in court that the federal agency had reversed its position and lowered its standards for protecting steep slopes in the George Washington and Monongahela national forests.

Kupfer cited a Forest Service letter to the pipeline company last fall that set 15 requirements for the project to meet. That was in addition to what he called a "robust" set of measures that had been negotiated to address concerns about erosion and sediment runoff from steep mountain slopes.

Brooks M. Smith, a Richmond attorney for the pipeline, objected to "mischaracterizations in saying the Forest Service walked away from its steep slope concerns." On the contrary, Smith said, "the Forest Service never relented."

But Gregory expressed skepticism about what he called a "reversal" of the agency's concerns about the effectiveness of proposed measures to stabilize steep slopes traversed by the pipeline.

"Who's running the train station?" he asked the Forest Service attorney. "Is it the private company?"

Dominion spokesman Aaron Ruby defended the Forest Service's approval of permits for the project and its defense of the decision at the hearing.

"The agency conducted a thorough and rigorous review of the project for more than three years and built a strong public record in support of its decision," he said. "We will await the court's ruling."

Ruby also defended the process of collaboration between the company and Forest Service to protect the environment and improve the project, including what he called “one of the most protective programs ever used by the industry for steep slope construction.”

“The fact that these improvements helped address the agency’s concerns is a positive thing and shows that the process is working,” he said. “This is not a political process; it’s a collaborative process that has resulted in meaningful improvements to the project and important protections for the environment.”

Water quality permit

The 4th Circuit panel, which included Judges Stephanie D. Thacker of West Virginia and James A. Wynn Jr. of North Carolina, also heard arguments Friday in environmental groups’ appeal of a water quality permit the State Water Control Board issued for the Atlantic Coast Pipeline.

On Monday, the same three-judge appeals court panel issued a stay of the Forest Service permits for the Atlantic Coast Pipeline while the appeal is pending. The court put the permits on hold as Dominion and its partners were preparing to resume tree-cutting in the George Washington National Forest with permission from the Forest Service.

The 4th Circuit already has vacated Forest Service approvals for the Mountain Valley Pipeline through the Jefferson National Forest in Southwest Virginia. A ruling by a three-judge panel on July 27 cites what it called the agency’s “silent acquiescence” to unrealistic claims for the effectiveness of erosion controls on steep slopes that the pipeline would cross.

The Forest Service has not reissued the permits for the Mountain Valley project to cross 3.6 miles of the national forest. Work has resumed on the rest of the 303-mile pipeline after the Federal Energy Regulatory Commission ordered it stopped in response to the court action.

In an Aug. 3 ruling written by Gregory, a 4th Circuit panel struck down federal permits that allow the Atlantic Coast Pipeline to cross beneath the Blue Ridge Parkway and cause incidental harm to endangered or threatened species.

The ruling prompted the federal commission to order work to stop on the project in North Carolina and West Virginia. Work has not begun in Virginia, except for tree felling, because of pending regulatory reviews of erosion and sediment control plans for the project.

The commission lifted the stop-work order on Sept. 17 after the National Park Service and U.S. Fish and Wildlife Service issued revised permits, which environmental groups also have challenged.

On Aug. 1, the 4th Circuit upheld the state water quality permit for the Mountain Valley Pipeline, a precedent that lawyers for the State Water Control Board and Atlantic Coast Pipeline touted in their arguments in the appeal of the water permit for the Dominion-led project.

Appalachian Mountain Advocates argues in its appeal that sediment runoff from construction of the Mountain Valley Pipeline demonstrates the inadequacy of water quality protections in the permits issued for both projects.

It's unclear when the judges will rule on the appeals.

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