

# The Recorder

*Inclusive, independent, indispensable.*

## Fourth Circuit issues stay on pipeline a 3rd time

*September 27, 2018*

BY JOHN BRUCE • STAFF WRITER

MONTEREY — For the third time this year, a federal appeals court has granted a stay to stop construction of the proposed Atlantic Coast Pipeline.

Tomorrow, Friday, Sept. 28, the Fourth Circuit Court of Appeals will hear oral arguments in conservation groups' challenge to approvals issued by the U.S. Forest Service and the Commonwealth of Virginia.

Monday, the Fourth Circuit Court of Appeals granted a stay of the National Forest Service decisions allowing Atlantic Coast Pipeline construction. The stay puts an immediate stop to any construction in the National Forest until an appeal filed by the Southern Environmental Law Center and Sierra Club, on behalf of Cowpasture River Preservation Association, Highlanders for Responsible Development, Shenandoah Valley Battlefields Foundation, Shenandoah Valley Network, Sierra Club, Wild Virginia and Virginia Wilderness Committee is decided.

“This decision is very good news for the forest,” said SELC senior attorney DJ Gerken. “After the Federal Energy Regulatory Commission’s decision to reauthorize construction last week, Atlantic was poised to resume clear-cutting its way across the two national forests today. Because of this decision, Atlantic’s chainsaws will remain idle until the court has had an opportunity to decide our case. For the same reason, FERC should stop construction elsewhere until these issues are resolved, to avoid wasting ratepayer dollars building a route that may not be viable.”

“We’re glad to see construction of the fracked gas ACP halted in our national forests,” added Kelly Martin, director of the Sierra Club’s “Beyond Dirty Fuels” campaign for the ACP. “There is no need for this dirty, dangerous pipeline and while we’re pleased with today’s decision, our air, water and communities won’t truly be protected until it’s permanently halted. The Sierra

Club, our partners, and communities along the entire route will keep fighting this project until construction is finally stopped.”

SELC insists the stop-work order must be reinstated.

“As the commission is aware, this is the third time in four months that the Fourth Circuit has vacated or stayed federal authorizations for the ACP that represent mandatory conditions of the certificate order,” SELC senior attorney Greg Buppert said in a letter to FERC. “On May 15, 2018, and Aug. 6, 2018, respectively, the court vacated the incidental take statement issued by the United States Fish and Wildlife Service and the right of way permit issued by the National Park Service. In response, the commission issued a stop-work order on Aug. 10 directing Atlantic to immediately cease all construction activity along all portions of the ACP and Supply Header Project, with the exception of any measures deemed necessary by appropriate federal agencies to ensure the stabilization of work areas.”

Buppert explained, “The commission lifted the stop-work order on Sept. 17, only upon the issuance of a revised incidental take statement by FWS and a revised right of way permit by NPS. Now that the Fourth Circuit has once again suspended a federal permit, the commission should reinstate the stop-work order for the ACP ... As the commission explained in its August stop-work order, ‘allowing continued construction poses the risk of expending substantial resources and substantially disturbing the environment by constructing facilities that ultimately might have to be relocated or abandoned.’ As a result of the Fourth Circuit’s Sept. 24 order staying the Special Use Permit and record of decision, the same is again true. Accordingly, the commission must reinstate its stop-work order for all aspects of the Atlantic Coast Pipeline.”

Investor-owned utility Dominion, the majority pipeline project owner and builder, argued FERC should reject that request and allow all previously authorized construction activity not on National Forest Service Lands to continue.

“To begin with, the Fourth Circuit has not yet reached a merits decision of the pending appeal challenging the Forest Service’s actions on ACP. Oral argument in the appeal is scheduled for Sept. 28, with a decision on the merits to follow later,” Dominion attorneys said.

“The (special use permit) has not been vacated; rather, the court stayed only its implementation by the Forest Service while the appeal remains pending,” they continued. “Furthermore, only about 21 miles of the total ACP route of approximately 600 miles cross National Forest Service lands. The Forest Service special use permit is an applicable federal authorization required for construction activity only with respect to that relatively small portion of ACP. Thus, the stay issued by the Fourth Circuit applies only with regard to construction activity on Forest Service lands.”

Further, they stressed, “While the stay of the special use permit issued by the Fourth Circuit is in effect, Atlantic and DETI will not resume any construction activity on National Forest Service lands ... The court’s stay, however, does not affect any previously issued authorizations for construction of ACP in areas other than on Forest Service lands. The petitioners’ suggestion that

Atlantic must have on hand all federal authorizations before proceeding with any construction, if adopted, would dramatically impede and delay the construction of needed infrastructure.”

Dominion attorneys said that in their Sept. 25 letter, the petitioners quoted an environmental condition on the ACP providing that Atlantic had to receive all authorizations required before it can get written authorization to proceed with construction. But the petitioners, they said, “emphasize the word ‘all’ and seek to ignore the related terms ‘applicable’ and ‘required.’ When issuing notices to proceed with construction, the commission’s Office of Energy Projects ensures that the required federal authorizations have been received.”

The petitioners had two other claims about the court’s action that warranted a response, Dominion said.

“First, they point out that the Fourth Circuit previously vacated the incidental take statement issued by the FWS and the right of way permit issued by the National Park Service for ACP. Yet, those permits have been reissued, as recognized in the lifting of the stop work order and, therefore, that history provides no current basis to order ACP to stop any construction activities,” Dominion said.

“Second, petitioners suggest that the court may likely vacate the special use permit and (if it does), ‘Atlantic may need to revise portions of the ACP route.’ Again, though, the court has not vacated the special use permit and theories about potential future impacts on the ACP route of a possible vacatur are mere speculation at this time.”

Dominion attorneys said even if the petitioners prevail on procedural challenges to the USFS’s decision-making, the pipeline route should not be affected.

“For all of these reasons, the commission should reject the petitioners’ pleas for a halt of all construction activity and recognize that only activity on National Forest Service lands is implicated by the Fourth Circuit’s order to stay the implementation of the Forest Service’s decision pending the outcome of an ongoing appeal,” Dominion said.