

SOUTHERN ENVIRONMENTAL LAW CENTER

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September 25, 2018

Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, DC 20426

Re: Fourth Circuit's Stay of Implementation of Forest Service Special Use Permit and Record of Decision for Atlantic Coast Pipeline Docket Nos. CP15-554-000 *et seq.* & CP15-555-000 *et seq.*

Dear Secretary Bose:

Yesterday, the United States Court of Appeals for the Fourth Circuit issued an order staying implementation of the Special Use Permit and Record of Decision previously issued by the United States Forest Service for the Atlantic Coast Pipeline ("ACP"). *Cowpasture River Pres. Ass'n v. Forest Serv.*, No. 18-1144 (4th Cir. Sept. 24, 2018). A copy of the Fourth Circuit's order is attached.

As a result of the Fourth Circuit's order, Atlantic Coast Pipeline, LLC ("Atlantic") is no longer in compliance with a mandatory condition of the Certificate of Public Convenience and Necessity issued for the ACP on October 13, 2017 ("Certificate Order"). Environmental Condition 10 of the Certificate Order requires that Atlantic "receive[] *all* applicable authorizations required under federal law" before it can "receive written authorization" from the Commission to commence construction. 161 FERC ¶ 61,042, at 137 (Oct. 13, 2017) (emphasis added). The Special Use Permit, which had authorized the construction and operation of the ACP on national forest lands in Virginia and West Virginia, is an "applicable authorization[] required under federal law" that the Certificate Order requires Atlantic to obtain prior to proceeding with construction of the ACP. Now that implementation of the Special Use Permit and Record of Decision have been stayed pending further review by the Fourth Circuit, the Commission must issue a stop-work order halting all construction activities on the ACP.

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. On May 15, 2018, and

August 6, 2018, respectively, the court vacated the incidental take statement issued by the United States Fish and Wildlife Service (“FWS”) and the right-of-way permit issued by the National Park Service (“NPS”). In response, the Commission issued a stop-work order on August 10, 2018, 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. The Commission lifted the stop-work order on September 17, 2018, 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. Not only is Atlantic currently lacking a mandatory federal authorization for the ACP, but to impose a stay pending review, the Fourth Circuit was required to find, *inter alia*, that the applicants for the stay had “made a strong showing that [they were] likely to succeed on the merits” of their challenge to the permit. *Nken v. Holder*, 556 U.S. 418, 434 (2009). Vacatur of the Special Use Permit and Record of Decision would mean that Atlantic may need to revise portions of the ACP route after additional review by the Forest Service. As the Commission explained in its August 2018 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 September 24, 2018 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.

Sincerely,

/s/ Gregory Buppert

Gregory Buppert

SOUTHERN ENVIRONMENTAL LAW CENTER

On behalf of Cowpasture River Preservation Association, Friends of Buckingham, Highlanders for Responsible Development, Piedmont Environmental Council, Shenandoah Valley Battlefields Foundation, Shenandoah Valley Network, Sound Rivers, Inc., Virginia Wilderness Committee, and Winyah Rivers Foundation, Inc.

/s/ Benjamin A. Lockett
Benjamin A. Lockett
APPALACHIAN MOUNTAIN ADVOCATES

*On behalf of Appalachian Voices, Chesapeake Climate
Action Network, Sierra Club, and Wild Virginia, Inc.*

/s/ Jon A. Mueller
Jon A. Mueller
CHESAPEAKE BAY FOUNDATION, INC.

On behalf of Chesapeake Bay Foundation, Inc.

FILED: September 24, 2018

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-1144

COWPASTURE RIVER PRESERVATION ASSOCIATION; HIGHLANDERS
FOR RESPONSIBLE DEVELOPMENT; SHENANDOAH VALLEY
BATTLEFIELDS FOUNDATION; SHENANDOAH VALLEY NETWORK;
SIERRA CLUB; VIRGINIA WILDERNESS COMMITTEE; WILD VIRGINIA,
INC.

Petitioners

v.

FOREST SERVICE, an agency of the U.S. Department of the Agriculture;
KATHLEEN ATKINSON, in her official capacity as Regional Forester of the
Eastern Region; KEN ARNEY, in his official capacity as Acting Regional
Forester of the Southern Region

Respondents

ATLANTIC COAST PIPELINE LLC

Intervenor

ORDER

Upon consideration of submissions relative to petitioners' motion to stay U.S.

Forest Service's decisions, the court grants the motion and stays implementation of the Record of Decision ("ROD") and the Special Use Permit ("SUP") pending this appeal.

Entered at the direction of Chief Judge Gregory, with the concurrence of Judge Wynn and Judge Thacker.

For the Court

/s/ Patricia S. Connor, Clerk

CERTIFICATE OF SERVICE

I hereby certify that I have on September 25, 2018, caused the foregoing document to be served upon each person designated on the official service list compiled by the Secretary in this proceeding.

/s/ Gregory Buppert
Gregory Buppert
SOUTHERN ENVIRONMENTAL LAW CENTER

Document Content(s)

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