



## ABRA Update #209 – December 13, 2018

### Fourth Circuit Throws Out Forest Service Approvals for the ACP

The Fourth Circuit Court of Appeals vacated on December 13 the U.S. Forest Service’s approval for the Atlantic Coast Pipeline (ACP) to cross two national forests and the Appalachian Trail. The [Court’s 60-page opinion](#) came on a case brought by several ABRA members and others that was argued on September 28 (see [ABRA Update #200 for details](#)). The plaintiffs, represented by Southern Environmental Law Center, were Cowpasture River Preservation Association, Highlanders for Responsible Development, Shenandoah Valley Battlefields Foundation, Shenandoah Valley Network, Sierra Club, Virginia Wilderness Committee and Wild Virginia.

The Court concluded that the Forest Service’s decisions amending its Forest Plans and granting a Special Use Permit (SPU) for the ACP violate the National Forest Management Act (NFMA) and National Environmental Protection Act (NEPA), and that the Forest Service lacked statutory authority pursuant to the Mineral Leasing Act (MLA) to grant a pipeline right of way across the Appalachian National Scenic Trail. The Court granted the petition for review of the Forest Service’s SPU and its Record of Decision to amend the Forest Plans, as sought by the plaintiffs, vacated those the Forest Service’s decisions and remanded the case to the Forest Service “for further proceedings consistent with this opinion.”

In its opinion, the Court detailed how the Forest Service initially expressed serious skepticism about the ACP’s ability to be constructed through the steep slopes of the central Appalachian mountains in West Virginia and Virginia. In an October 24, 2016 letter to the Atlantic Coast Pipeline, LLC (Atlantic), the Court noted that the Forest Service had requested ten site-specific stabilization designs for selected areas of challenging terrain to demonstrate the effectiveness of Atlantic’s proposed steep slope stability program, which Atlantic called the “Best in Class” (“BIC”) Steep Slopes Program” because the agency needed to be able to determine that the project was consistent with the Forest Plans of the George Washington National Forest (GWNF) and the Monongahela National Forest (MNF). The ACP would cross a combined 21-miles of National Forest lands in the two forests. Then, the Court noted, the Forest Service changed its mind and without explanation ultimately approved the project without requiring the requested ten stabilization designs for the project. (For more on the Forest Service request to Atlantic, see [ABRA Update #103](#))

The NFMA establishes a procedure for managing forest plans through the use of Forest Plans and directs the Forest Service to ensure that all activities on forest lands are consistent with those Plans. The Court ruled that the Forest Service, in amending the GWNF and MNF plans, did not follow its own criteria and procedures for doing so. Among reasons cited in the opinion was the Forest Service’s failure to do a proper analysis of whether the ACP could be reasonably routed through non-national forest lands.

In considering the Forest Service’s compliance with NEPA in its evaluation of the ACP, the Court concluded that the agency violated that law “by failing to take a hard look at the

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environmental consequences of the ACP project. The Forest Service expressed serious concerns that the DEIS (Draft Environmental Impact Statement of the Federal Energy Regulatory Commission for the project) lacked necessary information to evaluate landslide risks, erosion impacts, and degradation of water quality, and it further lacked information about the effectiveness of mitigation techniques to reduce those risks.”

Regarding the violation of the MLA, the Court faulted the Forest Service for approving the ACP crossing the ANST on national forest land when the agency did not have the authority to do so. In its concluding paragraph of the opinion, the Court stated:

We trust the United States Forest Service to “speak for the trees, for the trees have no tongues.” Dr. Seuss, *The Lorax* (1971). A thorough review of the record leads to the necessary conclusion that the Forest Service abdicated its responsibility to preserve national forest resources. This conclusion is particularly informed by the Forest Service’s serious environmental concerns that were suddenly, and mysteriously, assuaged in time to meet a private pipeline company’s deadlines.

Reacting to the Court’s opinion, SELC attorney Patrick Hunter said:

“The George Washington National Forest, Monongahela National Forest and the Appalachian Trail are national treasures. The Administration was far too eager to trade them away for a pipeline conceived to deliver profit to its developers, not gas to consumers. This pipeline is unnecessary and asking fracked gas customers to pay developers to blast this boondoggle through our public lands only adds insult to injury.”

For more on the opinion, see the stories below in In the News from the *Virginia Mercury* and the *Recorder*.

## **FERC Requested to Revoke ACP’s Certificate**

In a filing late December 13, the Federal Energy Regulatory Commission (FERC) was asked to revoke the certificate for the Atlantic Coast Pipeline in light of the decision earlier in the day by the Fourth Circuit Court of Appeals to vacate the U.S. Forest Service’s approval for the pipeline to cross national forest lands and the Appalachian National Scenic Trail. In its [65-page letter FERC](#), the Southern Environmental Law Center stated:

Crucially, the court held that the Forest Service does not have statutory authority to authorize the pipeline to cross the Appalachian Trail. As a result, under federal law, Atlantic Coast Pipeline, LLC (“Atlantic”) cannot obtain authorization from federal agencies to cross the Trail as proposed. Thus, the Commission’s Certificate approves a project that cannot be constructed in compliance with federal law. Further, the proposed Appalachian Trail crossing is a linchpin in the Commission’s alternatives analysis—almost every alternative considered in the Final EIS includes this crossing point. See ACP Final EIS at 3-18 to 3-19. In light of the court’s decision, that analysis is not valid and cannot be used to approve a re-route of the project at this stage. The Commission must therefore revoke the Certificate of Public Convenience and Necessity. Further, the Commission must issue a formal stop-work order, effective immediately, halting all construction activities because the court’s decision means that Atlantic continues to be out of compliance with a mandatory condition of its Certificate of Public Convenience and Necessity.

## State Water Board Votes to Reconsider MVP 401 Certificate

At its December 13 meeting, the Virginia State Water Control Board voted 4-3 to initiate the formal hearing process to consider revoking the 401 Certification of the Mountain Valley Pipeline (MVP). The motion was made by new Board member James Lofton in response to extensive public comment regarding the ongoing damage being done by the Mountain Valley Pipeline's construction through Southwest Virginia. Other Board members voting in favor of Lofton's motion were new member Paula Jasinski, Nissa Dean and Robert Wayland. During discussion, Board member Tim Hayes acknowledged concerns about the issues, but did not vote in favor of initiating the formal hearing process.

Roberta Bondurant, Co-Chair of the POWHR Coalition that has led the fight against the MVP, said:

"We are encouraged that the Board is taking the necessary steps to stop the destruction we've experienced in our region resulting from this project. The construction imposed on landowners and communities since the federal court granted early entry has been nothing short of devastating, and the Board is finally acting on the evidence we've shown them.

"The newest members of the Board were engaged with the public right out of the gate, and we applaud the Board for their persistent inquiry and for supporting the safety and welfare of the public. This decision is a leap in the direction of better protecting the water resources so vital to Southwest Virginia and the Commonwealth."

## Fish and Wildlife Approval of ACP Stayed by Fourth Circuit

The U.S. Fish and Wildlife Service's Biological Opinion and Incidental Take Statement for the Atlantic Coast Pipeline (ACP) were [stayed on December 7 by the Fourth Circuit Court of Appeals](#). The Court's Order was the result of a motion filed November 30 by the Southern Environmental Law Center on behalf of Defenders of Wildlife, Sierra Club and The Virginia Wilderness Committee (discussed in [last week's ABRA Update](#)). Dominion Energy, managing partner for the ACP project, issued a [statement taking issue with the Court's Order](#). But, for the time being, the company has halted construction on the entire project, stating in a filing with the Federal Energy Regulatory Commission: "Dominion Energy, on behalf of Atlantic and itself, has stopped construction on the entire project, except for stand-down activities needed for safety and that are necessary to prevent detriment to the environment."

## *In the News:*

### Local/Atlantic Coast Pipeline

#### **'If I were Dominion I'd be panicked:' Federal court vacates another Atlantic Coast Pipeline permit**

- Virginia Mercury – 12/13/18

<https://www.virginiamercury.com/2018/12/13/if-were-dominion-id-be-panicked-federal-court-vacates-another-atlantic-coast-pipeline-permit/>

An environmental attorney who worked on the case says the decision denies Dominion a critical crossing that the pipeline needs to proceed as planned.

## Court vacates key permit for pipeline

- The Recorder – 12/13/18

[https://www.abralliance.org/wp-content/uploads/2018/12/Court-vacates-key-permit-for-pipeline-Recorder\\_20181213.pdf](https://www.abralliance.org/wp-content/uploads/2018/12/Court-vacates-key-permit-for-pipeline-Recorder_20181213.pdf)

“A thorough review of the record leads to the necessary conclusion that the Forest Service abdicated its responsibility to preserve national forest resources,” the court concluded.

## More hurdles block pipeline plan

- The Recorder – 12/13/18

[https://www.abralliance.org/wp-content/uploads/2018/12/More-hurdles-block-pipeline-plan-Recorder\\_20181213.pdf](https://www.abralliance.org/wp-content/uploads/2018/12/More-hurdles-block-pipeline-plan-Recorder_20181213.pdf)

ACP suspends work along entire 600-mile length of project. Depending on whether Dominion convinces the court to rethink its action, the project could face a substantial pause. Oral argument in the underlying case is scheduled for March and some activities face time-of-year restrictions.

Related:

- <https://www.ecowatch.com/atlantic-coast-pipeline-endangered-species-2623037745.html>
- <https://www.naturalgasintel.com/articles/116731-acp-halts-all-construction-as-legal-challenges-mount>

## In first, Virginia regulators reject Dominion Integrated Resource Plan

- Utility Dive – 12/10/18

<https://www.utilitydive.com/news/in-first-virginia-regulators-reject-dominion-integrated-resource-plan/543988/>

Electrical system load forecasts, at the heart of Dominion’s assertion of need for the ACP, were at the heart of the SCC’s rejection of the plan.

Related:

- [https://www.greentechmedia.com/articles/read/virginia-utility-regulator-dominion-resource-plan-more-accurate#gs.QG\\_JQ4](https://www.greentechmedia.com/articles/read/virginia-utility-regulator-dominion-resource-plan-more-accurate#gs.QG_JQ4)
- <https://energynews.us/2018/12/13/southeast/dominion-energy-refutes-criticism-linking-rejected-energy-plan-to-pipeline/>

## Big company, big dollars, small community: Dominion deal sparks dissent in community facing gas project

- The Washington Post – 12/09/18

[https://www.washingtonpost.com/local/virginia-politics/dominion-deal-sparks-dissent-in-community-facing-pipeline-project/2018/12/09/050e5f52-f99d-11e8-863c-9e2f864d47e7\\_story.html?utm\\_term=.aa3848f3a1a9](https://www.washingtonpost.com/local/virginia-politics/dominion-deal-sparks-dissent-in-community-facing-pipeline-project/2018/12/09/050e5f52-f99d-11e8-863c-9e2f864d47e7_story.html?utm_term=.aa3848f3a1a9)

Related:

- [http://www.phillytrib.com/news/naacp-duped-into-backing-pipeline-in-virginia-foe-says/article\\_51a9dbf3-7266-5e7e-b6fc-f58efcf3a764.html](http://www.phillytrib.com/news/naacp-duped-into-backing-pipeline-in-virginia-foe-says/article_51a9dbf3-7266-5e7e-b6fc-f58efcf3a764.html)

## Accusing GOP of ‘political showmanship,’ Cooper’s office seeks public records on pipeline probe

- The News & Observer – 12/12/18

<https://www.newsobserver.com/news/politics-government/article222993225.html>

Cooper’s office requested public records from the legislators in a bid to expose the political machinations behind their planned investigation of him, just hours before the legislators hired a private eye firm to start investigating Cooper.

Related:

- <http://pulse.ncpolicywatch.org/2018/12/12/lawmakers-hire-eagle-intel-to-investigate-gov-cooper-atlantic-coast-pipeline-deal/>

## Mallek expresses regret over county’s acceptance of pipeline mitigation funds

- The Daily Progress – 12/10/18

[https://www.dailyprogress.com/news/local/county/mallek-expresses-regret-over-county-s-acceptance-of-pipeline-mitigation/article\\_3d34069c-fcd7-11e8-a709-1b2c08608f5c.html](https://www.dailyprogress.com/news/local/county/mallek-expresses-regret-over-county-s-acceptance-of-pipeline-mitigation/article_3d34069c-fcd7-11e8-a709-1b2c08608f5c.html)

One Albemarle supervisor is having second thoughts about the county’s acceptance of \$5 million in Atlantic Coast Pipeline mitigation money for a future park.

## Regional/Mountain Valley Pipeline, other

### Water control board starts process of revoking MVP permit

- The Recorder – 12/13/18

[https://www.abralliance.org/wp-content/uploads/2018/12/Water-control-board-starts-process-of-revoking-MVP-permit-Recorder\\_20181213.pdf](https://www.abralliance.org/wp-content/uploads/2018/12/Water-control-board-starts-process-of-revoking-MVP-permit-Recorder_20181213.pdf)

The State Water Control Board, which had issued the Mountain Valley Pipeline a permit a year ago, met this morning and voted to reconsider that certification.

### Virginia files lawsuit against Mountain Valley Pipeline

- The Roanoke Times – 12/7/18

[https://www.roanoke.com/news/local/virginia-files-lawsuit-against-mountain-valley-pipeline/article\\_bac7f07d-f210-5c68-9af9-779d3f9cd9bf.html](https://www.roanoke.com/news/local/virginia-files-lawsuit-against-mountain-valley-pipeline/article_bac7f07d-f210-5c68-9af9-779d3f9cd9bf.html)

The company building a natural gas pipeline through Southwest Virginia violated environmental regulations more than 300 times, a lawsuit filed Friday by Virginia's top lawyer alleges.

### Legal Action Challenges Virginia, North Carolina Fracked Gas Pipeline

- Center for Biological Diversity – 12/11/18

[https://www.biologicaldiversity.org/news/press\\_releases/2018/mountain-valley-pipeline-southgate-12-11-2018.php](https://www.biologicaldiversity.org/news/press_releases/2018/mountain-valley-pipeline-southgate-12-11-2018.php)

On Monday the Center and allies Appalachian Mountain Advocates, Appalachian Voices, Sierra Club, Haw River Assembly, and Chesapeake Climate Action Network filed a motion to intervene in the Federal Energy Regulatory Commission's proceedings on whether to green-light the Mountain Valley Pipeline Southgate Project, known as MVP Southgate.

### Resident wants answers about Roanoke Gas gate station

- The Franklin News-Post – 12/7/18

[https://www.thefranklinnews.com/news/resident-wants-answers-about-roanoke-gas-gate-station/article\\_068b6f02-f9a5-11e8-a0c1-131bf09f04d1.html](https://www.thefranklinnews.com/news/resident-wants-answers-about-roanoke-gas-gate-station/article_068b6f02-f9a5-11e8-a0c1-131bf09f04d1.html)

### First grants awarded from Mountain Valley Pipeline mitigation fund

- The Roanoke Times – 12/6/18

[https://www.roanoke.com/news/local/roanoke\\_county/first-grants-awarded-from-mountain-valley-pipeline-mitigation-fund/article\\_f02fd32a-d81d-508c-a591-10187768b4df.html](https://www.roanoke.com/news/local/roanoke_county/first-grants-awarded-from-mountain-valley-pipeline-mitigation-fund/article_f02fd32a-d81d-508c-a591-10187768b4df.html)

## Big Picture:

### Mayors And Governors Rebut Trump Administration Position At Climate Summit

- NPR – 12/12/18

<https://www.npr.org/2018/12/12/676001283/mayors-and-governors-rebut-trump-administration-position-at-climate-summit>

U.S. governors, mayors and other local authorities say they are committed to reducing greenhouse gases even if the federal government is not.

### Glick predicts return to resilience debate as McNamee prepares to take FERC seat

- Utility Dive – 12/11/18

<https://www.utilitydive.com/news/glick-predicts-return-to-resilience-debate-as-mcnamer-prepares-to-take-ferc/544042/>

Related:

- <https://www.spglobal.com/platts/en/market-insights/latest-news/electric-power/120718-mcnamer-faces-calls-for-recusal-on-ferc-fuel-security-matters>

### U.S. Oil Exports Are Rising. So Is the Trade Deficit.

- The New York Times – 12/6/18

<https://www.nytimes.com/2018/12/06/us/politics/us-oil-exports-trade-deficit.html>

To President Trump, increased sales of oil and gas are a way to rebalance trade and close the gap between what the United States buys from foreign countries and what it sells. So far that strategy is not working.

## **As climate change bites in America's midwest, farmers are desperate to ring the alarm**

- The Guardian – 12/12/18

<https://www.theguardian.com/us-news/2018/dec/12/as-climate-change-bites-in-americas-midwest-farmers-are-desperate-to-ring-the-alarm>

'The changes have become more radical': farmers are spending more time and money trying to grow crops in new climates.

## **Judge grants first eminent domain case to PennEast in Pennsylvania**

- StateImpact Pennsylvania – 12/10/18

<https://stateimpact.npr.org/pennsylvania/2018/12/10/judge-grants-first-eminent-domain-case-to-penneast-in-pennsylvania/>

Company says ruling will allow it complete surveys; N.J. landowners await ruling from another judge  
Related:

- <https://www.lehighvalleylive.com/news/2018/12/penneast-notches-milestone-in-push-to-begin-building-pipeline-in-2019.html>

## **We Don't Mine Enough Rare Earth Metals to Replace Fossil Fuels With Renewable Energy**

- Motherboard – 12/12/18

[https://motherboard.vice.com/en\\_us/article/a3mavb/we-dont-mine-enough-rare-earth-metals-to-replace-fossil-fuels-with-renewable-energy](https://motherboard.vice.com/en_us/article/a3mavb/we-dont-mine-enough-rare-earth-metals-to-replace-fossil-fuels-with-renewable-energy)

Rare earth metals are used in solar panels and wind turbines—as well as electric cars and consumer electronics. We don't recycle them, and there's not enough to meet growing demand.

## **Offshore transmission seeks second wind**

- E&E News – 12/12/18

<https://www.eenews.net/stories/1060109405>

The original offshore transmission “backbone” was killed off years ago...too far ahead of its time. But new, smaller versions of the same idea are gaining traction.