



ABRA Update #216 – February 7, 2019

Legal Challenges to the ACP Abound: Here's Where Things Stand

It has been fifty-seven months since Dominion Energy first announced its proposal to build a 600-mile natural gas pipeline from the Marcellus Shale fields of north-central West Virginia to the southern part of North Carolina. At first called the Southeast Reliability Project, and later named the Atlantic Coast Pipeline (ACP) when Duke Energy and The Southern Company became partners, the project since it was first announced in May 2014 has been vigorously opposed by citizen groups and numerous communities along the route's path through West Virginia, Virginia and North Carolina.

The project is – by Dominion Energy's own admission in a February 1 press statement – now some two years behind schedule and 50% over budget. Construction of the ACP, which began early last year in West Virginia, is currently stopped due to court actions. A common theme running through all of the cases that have been filed is that permitting judgments were inadequately considered, and/or without merit, and rushed.

The plaintiffs in the legal challenges of the inept permitting processes that enabled construction of the ACP to begin in the first place are in most instances ABRA member organizations and the firms representing them are also ABRA members: Appalachian Mountain Advocates and the Southern Environmental Law Center. Kudos to both firms for their tireless work.

Below is a summary of the status of the principal cases that have to date been filed:

1. FERC Certificate – A challenge to the Federal Energy Commission's (FERC) issuance of a certificate for the ACP on October 13, 2017 was filed with the Fourth Circuit Court of Appeals on August 16, 2018. The plaintiffs are 14 conservation groups, represented by the Southern Environmental Law Center (SELC) and Appalachian Mountain Advocates. The suit could not be filed until FERC formally rejected a request for a rehearing of the certificate, which did not occur until August 10. The basis of the suit is the petitioners' contention that FERC did not look behind the affiliate agreements that Dominion Energy and Duke Energy, (principal partners in the project) claim demonstrate that the pipeline is needed in Virginia and North Carolina markets. Jurisdiction of the case has been transferred to the D.C. Circuit Court of Appeals. A briefing schedule for the case has not yet been established, but oral arguments are not expected until probably the fall of 2019.
2. Forest Service Permit – On January 23, 2018, the U.S. Forest Service granted the ACP a Special Use Permit to cross national forest lands and a right-of-way to cross beneath the Appalachian National Scenic Trail (ANST). This action followed a November 17, 2017 decision by the Forest Service to amend the Forest Plans for the George Washington and Monongahela National Forests to accommodate the ACP. A suit was filed on February 5,

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2018 by seven conservation/environmental organizations represented by SELC, arguing that the Forest Service had rushed to judgment to approve the project, notwithstanding raising serious questions about the project's ability to be built over steep mountain terrain without serious environmental damage. The case was argued before a three-judge panel on September 28. On December 13, the Fourth Circuit ruled to vacate the Forest Service permit, expressing agreement with the petitioners about environmental threats being improperly evaluated and ruling that the Forest Service lacked the authority to grant the project permission to cross the ANST.

Atlantic Coast Pipeline, LLC on January 28 filed with the Fourth Circuit requesting a rehearing en banc, meaning a hearing on the case before all fifteen judges of the Fourth Circuit. The petitioners argue that the three-judge panel decision ignored several precedential U.S. Supreme Court decisions. A decision on the en banc request is not expected until at least the latter half of February.

3. National Park Service Permit – The National Park Service's (NPS) December 2017 approval for the ACP to cross underneath the Blue Ridge Parkway was challenged in the Fourth Circuit by the Sierra Club and the Virginia Wilderness Committee, represented by SELC. The Court vacated the permit on August 6, and FERC issued a stop-work order for the entire project on August 10. The stop-work order was lifted September 17 when the NPS issued a new permit that purported to remedy the deficiencies in the earlier permit. That permit was challenged again by the petitioners in the Fourth Circuit.

But, before the case was argued, the Park Service asked the Court to vacate the previously issued permit for the ACP to cross the Blue Ridge Parkway so the agency could "consider whether issuance of a right-of-way permit for the pipeline to cross an adjacent segment of the Parkway is appropriate." The Fourth Circuit granted that motion on January 23. Thus, at this writing, there is no permit for the ACP to cross the Blue Ridge Parkway. (For additional information, see separate article below.)
4. Fish and Wildlife Service – The U.S. Fish and Wildlife Service's (FWS) biological opinion on threats to endangered species by the ACP was vacated by the Fourth Circuit Court of Appeals on May 5, 2018, but an opinion from the Court explaining its order was not issued until August 6, as part of the same order vacating the NPS permit. As with the NPS permit, a new biological opinion was issued by the FWS that sought to meet the court's objections. That re-issued opinion has also been challenged by the petitioners in the first case, the Sierra Club and the Virginia Wilderness Committee, represented by SELC. That challenge is scheduled to be argued before the Fourth Circuit in May.
5. Army Corps of Engineers – The U.S. Army Corps of Engineers filed a motion on January 18 with the Fourth Circuit Court of Appeals for a remand and vacating of the permit that the Huntington District of the Corps had issued for the Atlantic Coast Pipeline (ACP) to cross rivers and streams in West Virginia. The Court had previously issued a stay of the Nationwide 12 (NWP12) permit issued for the ACP by the Huntington District, as well as other NWP12 permits issued for the project by Corps districts in Pittsburgh, Norfolk and Wilmington that have jurisdiction over other portions of the ACP project. The motion was unopposed and subsequently granted by the Court. While the action only directly affects the portion of the ACP subject to the Huntington District's jurisdiction (West Virginia portions of the route), the stays on stream and river crossings for the ACP in the other Corps districts remain in effect.
6. Virginia State Water Board 401 Certification – The Virginia water quality certification under Section 401 of the Clean Water Act was granted December 12, 2017 by the State Water Control Board. The action was challenged in a suit filed by SELC on behalf of several conservation group clients and argued before the Fourth Circuit Court of Appeals on September 28, 2018. The principal contention in the case was that the Board's

approval of the certificate for the ACP was, on several grounds, arbitrary and capricious. On January 14, 2019, the Court rejected the arguments of the petitioners.

In a related matter, the Water Board in December voted to consider revoking the 401-certification for the Mountain Valley Pipeline due to erosion and sediment control failures along the project's route in Virginia. In doing so, the Board chose not to extend a similar review of the ACP 401 certificate because construction on the project had not yet begun in Virginia, so at that time there were no examples to point to of non-compliance to support an argument that the certificate as improperly issued.

Dominion Seeks Congressional Action on ACP Crossing Blue Ridge Parkway

Dominion Energy is making a concerted effort to convince Congress to grant permission for the Atlantic Coast Pipeline to cross the Blue Ridge Parkway, authority for which was withdrawn by the National Park Service (per article above). This is according to several news reports and conversations that some ABRA members have had with Members of Congress and staff. The company attempted to have an amendment added to the continuing spending resolutions passed in December separately by the House and Senate, but neither bill contained such an amendment. And, of course, a final bill was not agreed to, leading to the shutdown by the Federal Government.

At this time, there is no Dominion amendment attached to any piece of pending legislation in the Congress. ABRA member organizations with Washington representation are following the situation closely and have had their own meetings with key Members of Congress and staff.

ABRA will continue to keep abreast of developments on this fluid situation and will advise our member organizations and supporters if any action on their part is warranted.

In the News:

Local/Atlantic Coast Pipeline

Dump Dominion

- The Recorder – 2/7/19

<https://www.abralliance.org/wp-content/uploads/2019/02/Dump-Dominion-Recorder-editorial20190207.pdf>

At what point does Dominion's investment in the Atlantic Coast Pipeline (and your investment in Dominion Energy stock) cease to make sense?

SELC asks federal regulators to stop pipeline project

- The Recorder – 2/7/19

https://www.abralliance.org/wp-content/uploads/2019/02/SELC-asks-federal-regulators-to-stop-pipeline-project-Recorder_20190207.pdf

"Atlantic Coast Pipeline LLC now lacks effective versions of seven federal authorizations that are mandatory conditions of the commission's certificate of public convenience and necessity issued for the ACP," SELC attorney Greg Buppert said in a letter to FERC.

Atlantic Coast permit pileup: Where things stand

- E&E News – 2/7/19

<https://www.eenews.net/stories/1060119601>

Perhaps the most useful timeline of ACP's legal battles we've seen and a simple, yet comprehensive discussion of ACP's stalled permits.

Related:

- <https://www.naturalgasintel.com/articles/117311-dominion-remains-committed-to-acp-despite-setbacks-says-top-exec>

The Pipeline vs. The Trail: How the A.T. Saved the South – for now

- Blue Ridge Outdoors – 2/2019

https://www.blueridgeoutdoors.com/magazine/february-2019/the-pipeline-vs-the-trail-how-the-a-t-saved-the-south-for-now/amp/?fbclid=IwAR3ZI2VyXCjBZgZ2xa-17edNemcmkSQjhBTnfvS_zc7ZZq2ztanu6QTbRE4

The A.T. may have just saved the South from a 600-mile, \$6 billion blunder—at least for now—and helped change the course of our energy future. How did it happen?

Our View: Is this a pause or a crash for gas pipeline?

- The Fayetteville Observer – 2/7/19

<https://www.fayobserver.com/opinion/20190207/our-view-is-this-pause-or-crash-for-gas-pipeline>

While the pipeline's sponsors stop to review their progress and prognosis, it would be wise for government agencies to do the same. The need for the pipeline needs another look, and so does its financial viability at this new, more breathtaking cost.

Dominion “Still Committed” to Building Atlantic Coast Pipeline

- Marcellus Drilling News – 2/7/19

https://www.abralliance.org/wp-content/uploads/2019/02/Dominion-Still-Committed-to-Building-Atlantic-Coast-Pipeline-Marcellus-Drilling-News_20190207.pdf

And if their project ultimately falls apart...they just *might* be!

ACP Cost Bill Passes House With Bipartisan Vote

- Bacon's Rebellion – 2/6/19

<https://www.baconsrebellion.com/wp/ACP-cost-bill-passes-house-with-bipartisan-vote/>

The presence of the entire Dominion lobbying team in the Capitol Tuesday was a sign of a full court press on the bill, as was the emergence of a new argument that it might cause natural gas shortages.

Gov. Cooper wants public airing of GOP's questions about Atlantic Coast Pipeline

- The News & Observer – 2/4/19

https://www.newsobserver.com/news/politics-government/article225497220.html?fbclid=IwAR2TxprjSfb5CQwhZoW7jroyNtq_dTRG2hGzNmXfPPsW7Gc1RMBq2O_N4XM

Following criticism for refusing to allow agency employees to be interviewed by private investigators hired by the legislature, Gov. Roy Cooper's administration is requesting a public committee meeting where agency representatives would answer questions about the Atlantic Coast Pipeline approval process.

Regional/Mountain Valley Pipeline, other

Appeals court allows quick-take of land for Mountain Valley Pipeline

- The Roanoke Times – 2/5/19

https://www.roanoke.com/business/news/appeals-court-allows-quick-take-of-land-for-mountain-valley/article_bf5acaa0-c20d-5eb4-976d-57bb4222ef4c.html

The ruling Tuesday by the 4th U.S. Circuit Court of Appeals was a blow to pipeline foes, who have long decried the use of eminent domain to take parts of family farms and rural homeplaces to make way for a 303-mile natural gas pipeline.

Pipeline protest continues despite challenging weather conditions

- WDBJ7 News – 1/31/19

https://www.wdbj7.com/content/news/Pipeline-protest-continues-despite-challenging-weather-conditions-505173791.html?fbclid=IwAR1-SPd1Yqux7Wvz-82Ccl7HOZ75-Xi9qn3g3QsXOdRokkN8NT1jc6of_Ik

This past week's 50+-degree temperature swing was surely tough for protesters, and offers a warning for the rest of us. "Global Weirding" is here, and affecting us all.

Public use and private profit: U.S. landowners question forced purchases

- Reuters – 2/5/19

https://af.reuters.com/article/africaTech/idAFL8N1ZP57L?fbclid=IwARoWmNunOBOrQzJtJbexaolU-n46bUkZj6EwfViPmoMAcDbB72b-lf_kLFY

The use of eminent domain for private projects that are said to fulfill some public good remains relatively new, but legal experts say it has resulted in a spate of legal battles.

Fire at pipeline construction site under arson investigation

- WTOP News – 2/5/19

<https://wtop.com/virginia/2019/02/fire-at-pipeline-construction-site-under-arson-investigation/>

Big Picture:

Alexandria Ocasio-Cortez unveiled a Green New Deal that will force 2020 Democrats to take an aggressive stance on climate change

- Insider – 2/7/19

<https://www.thisinsider.com/alexandria-ocasio-cortez-ed-markey-green-new-deal-climate-change-2020-democrats-2019-2>

Ambitious Green New Deal will face more than its share of headwinds...but what is it really promoting...and what is it *not*? Does it really intend to go carbon-free without nuclear power? Can it actually be funded by “creating money”? Can racial, environmental and worker justice issues really be tackled? We'll follow this story in the coming months.

Related:

- <https://thehill.com/opinion/energy-environment/428932-the-green-new-deal-is-what-our-planet-has-been-waiting-for>
- <https://thehill.com/blogs/congress-blog/energy-environment/428588-this-climate-solution-is-an-economic-opportunity>

US FERC, DOE to examine potential incentives to bolster investment in energy security

- S&P Global – 2/5/19

<https://www.spglobal.com/platts/en/market-insights/latest-news/electric-power/020519-us-ferc-doe-to-examine-potential-incentives-to-bolster-investment-in-energy-security>

FERC, DOE to explore cyber and physical security best practices. Cost recovery policies, investment incentives also on tap for discussion.

States' Rights? Not When It Comes to Pipeline Permitting.

- Sierra Club – 2/5/19

<https://www.sierraclub.org/sierra/states-rights-not-when-it-comes-pipeline-permitting>

The Trump administration appears poised to launch an effort to limit states' powers to regulate energy projects like pipelines—but it will likely find itself in yet another legal battle if it does so.

Fossil fuels are bad for your health and harmful in many ways besides climate change

- The Conversation – 2/7/19

<http://theconversation.com/fossil-fuels-are-bad-for-your-health-and-harmful-in-many-ways-besides-climate-change-107771>

Depending on fossil fuels for energy harms people and communities at every point along fossil fuel supply chains, especially where coal, oil and natural gas are extracted.

These countries are leading the charge to clean energy

- World Economic Forum – 2/6/19

<https://www.weforum.org/agenda/2019/02/these-countries-are-leading-the-charge-to-clean-energy/>

Most nations have taken on the challenge to switch from a reliance on fossil fuels to a sustainable energy system – some faster than others.