

# E&E News Energywire

## PIPELINES

### 4th Circuit casts critical eye on Atlantic Coast permits

Pamela King, E&E News reporter

Published: Friday, May 10, 2019



Construction crews working on an Atlantic Coast pipeline metering station in North Carolina. Atlantic Coast Pipeline LLC

RICHMOND, Va. — A federal appellate court yesterday considered reinstating key permits for the stymied Atlantic Coast natural gas pipeline.

Judges for the 4th U.S. Circuit Court of Appeals considered whether to lift their stay of the Fish and Wildlife Service's biological opinion and incidental take statement — analyses related to the pipeline's impacts on rare species.

The court's stay last year pushed lead stakeholder Dominion Energy Inc. to stop construction on Atlantic Coast.

The same panel of judges has stalled several critical approvals for the 600-mile pipeline designed to deliver gas from West Virginia to markets as far south as North Carolina ([\*Energywire\*](#), Feb. 7).

"We saw nothing at today's oral argument that suggests that FWS succeeded in persuading the court to reject the appeal and continue to think that the probability that the court upholds

the reissued permits is low," analysts for ClearView Energy Partners LLC wrote in a note to clients yesterday.

"We do not think that ACP will be able to resume construction under the reissued permits this fall."

During oral arguments, Chief Judge Roger Gregory and Judges Stephanie Thacker and James Wynn Jr. scrutinized the federal government's analysis of harm that would be sustained by endangered bumblebees, mussels, bats and isopods in Atlantic Coast's path.

Southern Environmental Law Center attorney D.J. Gerken, representing Defenders of Wildlife and other petitioners in the case, argued that the government abandoned its responsibilities under the Endangered Species Act in its "haste to restart" the project after the 4th Circuit vacated the original FWS permit.

Thacker, an Obama appointee, grilled Justice Department attorney Kevin McArdle, arguing on behalf of FWS, on the government's estimate of the project's impact on rusty patched bumblebees.

One finding appears to stem from a four-line email from an expert hazarding a "wild guess" as to the impact on queen bees, Thacker said.

"A wild guess is not scientific," she said.

McArdle argued that the finding was based on the expert's "best estimate."

Thacker appeared unconvinced.

"The word 'estimate' is not in here, and the word 'best' isn't in here," she said.

Wynn, also an Obama pick, wanted more information on the government's analysis on impacts to the Madison Cave isopod, which is a type of freshwater crustacean.

Troutman Sanders LLP attorney Brooks Smith, arguing on behalf of Atlantic Coast, noted that the company's approach to blasting and ground disturbance near the cave is based on prior successful projects.

Gregory, a Clinton and George W. Bush appointee, asked no questions during the proceedings.

The 4th Circuit is expected to issue its ruling in the case this summer.

## **Supreme Court battle**

Experts say the Supreme Court now holds the keys to Atlantic Coast's future.

In a related case, the 4th Circuit this year declined to reconsider its finding in *Cowpasture River Preservation Association v. Forest Service* that authority to approve the pipeline's crossing of the Appalachian Trail fell instead to the National Park Service.

Dominion said to expect a Supreme Court petition by the end of this month ([\*Energywire\*](#), Feb. 26).

"Dominion appears to be betting the barn on the Supreme Court hearing the *Cowpasture* case — an extremely low-probability event given the Fourth Circuit declined to rehear the case *en banc*," Josh Price, energy and utilities analyst at Height Capital Markets, wrote in a recent note.

"If the Supreme Court declines to hear the case this summer, we expect Duke and Dominion will decide to terminate the project."

Duke Energy Corp. is the project's second-largest stakeholder.

Lynn Good, the utility's president and CEO, recently told Bloomberg Television that the company is considering alternative plans in case Atlantic Coast's legal hurdles are too difficult to surmount ([\*Energywire\*](#), March 27).

If the Supreme Court decides to take the case and Atlantic Coast prevails, the project could be in service by the first quarter of 2021, Price projected.

"[H]owever, the odds of SCOTUS hearing the case *and* ruling in favor of the project are still incredibly small," he wrote.