



ABRA Update #235 – June 27, 2019

ACP Appeals Forest Service Decision to U.S. Supreme Court

Atlantic Coast Pipeline, LLC (ACP, LLC) on [June 25 filed an appeal with the U.S. Supreme Court](#) asking it to review the [December 13, 2018 decision of the Fourth Circuit Court of Appeals](#) that said the U.S. Forest Service lacked the authority to grant a right-of-way for the Atlantic Coast Pipeline (ACP) to cross the Appalachian National Scenic Trail (Trail). The filing by ACP, LLC of a Writ of Certiorari (appeal to a higher court a lower court's decision) was accompanied by a similar petition by the U.S. Solicitor General. Both had been anticipated.

In its petition to the Court, ACP, LLC argued that:

- “Several environmental groups challenged the pipeline on numerous grounds, including the novel theory that the Forest Service lacked statutory authority to grant a right-of-way because the entire Trail and the land underneath is National Park System land under the exclusive authority of the National Park Service. Because the MLA does not authorize any federal agency to grant pipeline rights-of-way across National Park System land, the import of this theory was not that the wrong federal agency had granted the right-of-way under the Trail, but that no agency had that power.”
- “. . .the decision imperils not just the billions of dollars invested in this pipeline, but future projects that will cross under the Trail, the 50-some pipelines that already cross under the Trail that require ongoing regulatory approvals from other state and federal agencies, and potentially other projects (including electrical transmission lines, telecommunications sites, municipal water facilities, roads, and grazing areas) that cross national trails administered by the National Park Service.
“In short, the decision below is both profoundly wrong and profoundly important. It misreads federal statutes that make clear that the designation of a trail does not transfer authority over the land being crossed. It will chill investment, harm millions of energy consumers, and unsettle long-held agency views. This decision plainly warrants this Court’s plenary review.”

The [Solicitor General’s petition](#) echoes the contentions made in the ACP, LLC petition:

“. . . the court of appeals misread the National Trails System Act, decreeing that long sections of the Appalachian Trail within national forests rest on lands that are rendered part of the National Park System as a result of the presence of the Trail on the surface, and therefore cannot be subject to rights-of-way granted under the Mineral Leasing Act. That ruling threatens to hamper the development of energy infrastructure in the eastern United States, including the construction and operation of the natural gas pipeline at issue in this case.”

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The Southern Environmental Law Center (SELC), which represents the petitioners that brought the original lawsuit before the Fourth Circuit, has 30 days (until July 25) to file a brief with the Court commenting on the ACP, LLC and Solicitor General petitions. The seven petitioners represented by SELC – all members of ABRA – are: Cowpasture River Preservation Association, Highlanders for Responsible Development, Shenandoah Valley Battlefields Foundation, Shenandoah Valley Network, Sierra Club, Virginia Wilderness Committee and Wild Virginia. For more, see the article below.

SELC Comments to Forest Service on Appalachian Trail Issue

The Southern Environmental Law Center (SELC) wrote the U.S. Forest Service (USFS) on June 24 regarding the Fourth Circuit Court of Appeals' December 18 decision that the USFS lacked the authority to grant a right-of-way for the Atlantic Coast Pipeline (ACP) to cross the Appalachian National Scenic Trail (ANST). The SELC letter follows an April 30 communication from USFS to the Atlantic Coast Pipeline, LLC (ACP, LLC) asking the company if it would like the USFS to “renew is consideration of the right-a-way application for the ACP.” The company responded in the affirmative.

The [SELC letter](#) points out that:

“(1) the Cowpasture decision does not affect the Forest Service's other management authorities for the ANST;

“(2) reasonable off-forest alternatives exist for the ACP to cross the ANST; and

“(3) while the Forest Service has never before and cannot now issue a new gas pipeline right-of-way across the ANST, options exist for new pipelines to be built in the eastern United States, and existing pipelines are unaffected by the Cowpasture decision.”

SELC further explains to USFS:

- “We have examined every existing crossing of the ANST by an oil or gas pipeline and confirmed that the Forest Service has never before granted a new right-of-way for an oil or gas pipeline to cross the ANST where it traverses a national forest, until it did so for the Atlantic Coast and Mountain Valley pipelines.”
- “Of the pipelines that do cross the Appalachian Trail on federally-owned land, nearly all existed before the creation of the Appalachian Trail or before the land was acquired by the federal government. The Mineral Leasing Act applies only to the initial grant of a right-of-way or the renewal of temporary rights-of-way for oil and gas pipelines. See 30 U.S.C. § 185(a), (q). Permanent rights-of-way granted before the creation of the ANST as land in the National Park System are unaffected by the Cowpasture decision because they require no new authorization under the Mineral Leasing Act. Similarly, the federal government took ownership subject to any property rights for permanent rights-of-way that existed prior to federal acquisition; such property rights do not require renewal under the Mineral Leasing Act and are unaffected by the Cowpasture decision.”

Complaint Filed with FERC Over MVP Violations, Water Board Action Sought

The Federal Energy Regulatory Commission (FERC) has been asked to revoke the certificate of the Mountain Valley Pipeline (MVP) in a [Formal Complaint filed June 21](#) by Wild Virginia, Preserve Craig, Indian Creek Watershed Association and two private landowners. The complaint requests FERC to:

- a. Suspend or revoke its approval for construction of the MVP;
- b. Issue a project-wide stop-work order for construction of the project; and
- c. Require MVP to submit a plan and schedule to repair damage caused to the environment and property by its activities.

Under the Formal Complaint process within FERC, the request must be taken up by the Commissioners. The action was accompanied by a [June 22 letter to the Virginia State Water Control Board from David Sligh](#), Conservation Director for Wild Virginia, asking the Board to support the request to FERC. The Water Board, in its June 27 meeting, acknowledged the request but did not take any action.

FERC and ACP, LLC File Response Briefs in Challenge to ACP Certificate

The lawsuit challenging the certificate of the Atlantic Coast Pipeline (ACP) moved a step closer to being considered by the DC Circuit Court of Appeals with the filing of response briefs by the Federal Energy Regulatory Commission (FERC), on June 18, and Atlantic Coast Pipeline, LLC (ACP, LLC), on June 26. The pending case consolidates several individual suits brought by a group of ABRA members and other organizations, as well as several individual landowners. Counsel representing the plaintiffs include Southern Environmental Law Center and Appalachian Mountain Advocates.

The [plaintiffs' brief, filed on April 5](#), argued that: 1) FERC's authorization of the ACP served no demonstrated need and that its finding of need based solely on precedent agreements between the project sponsors and affiliated utilities was insufficient; 2) the certification was based on unsupported assumptions and thus violated the Federal Environmental Protection Act (NEPA); 3) environmental justice considerations were improperly evaluated; and 4) the exercise of eminent domain was in violation of the Natural Gas Act and the U.S. Constitution because required conditions of the certificate were not followed.

[FERC's response brief](#) argues that all required issues were properly addressed in the agency's consideration of the project's certification. The brief further states:

Over the course of an extensive three-year regulatory review process culminating in a rehearing order issued in August 2018, the Commission carefully weighed the evidence of public benefits against the potential adverse economic and environmental effects of authorizing the Atlantic Coast Pipeline and related Supply Header Project (together, the "Project"). Although the Commission found that the Project may result in some adverse environmental impacts, the Commission ultimately concluded that the Project, if constructed and operated in accordance with federal standards and specific environmental, safety, and regulatory conditions imposed by the Commission, will serve the public interest.

The [ACP, LLC response brief](#) makes contentions similar to FERC's, that the agency's decision-making process in issuing the certificate was supported by substantial evidence and was in full compliance with all applicable legal procedures. It is worth noting that many of the points made in the April 5 plaintiffs' brief to which FERC and ACP, LLC responded are not addressed in their briefs.

The case has not yet been scheduled for oral argument before the DC Circuit.

In the News:

Local/Atlantic Coast Pipeline

Virginia Legislators Promoting the Atlantic Coast Pipeline Have Big Personal Investments in the Pipeline's Owners

- Little Sis – Eyes on the Ties – 6/27/19

<https://news.littlesis.org/2019/06/27/virginia-legislators-promoting-the-atlantic-coast-pipeline-have-big-personal-investments-in-the-pipelines-owners/>

Sure, lots of Virginians own stock in Dominion. But they are not in positions of power that allow them to legislatively aid the corporation and its goals (raise its stock price). Also, it makes approximately zero difference to *anybody* if you or I advocate for Dominion and its pipeline. However, when legislators talk, people listen.

Pipeline backers set stage for Appalachian Trail fight

- E&E News – 6/26/19

<https://www.eenews.net/stories/1060656847>

ACP and DOJ are basing their case on a questionable argument, which should be countered by data provided by SELC this week.

Change Virginia's 'hush and hurry' tendency on environmental regulation

- Virginia Mercury – 6/24/19

<https://www.virginiamercury.com/2019/06/24/change-virginias-hush-and-hurry-tendency-on-environmental-regulation/>

The DEQ, the agency charged with protecting Virginia's environment, does everything it can to usher energy companies through the regulatory process, rather than actually question whether these permits pose a danger to the environment and the communities of Virginia.

Woman rides along pipeline route

- Rocky Mount Telegram – 6/27/19

<http://www.rockymounttelegram.com/News/2019/06/27/Woman-rides-along-pipeline-route.html>

Sarah Murphy and her horse Rob Roy are on the southern stretch of their journey to bring awareness to the pipeline.

Virginia isn't making the grade for environmental justice

- Virginia Mercury – 6/20/19

<https://www.virginiamercury.com/2019/06/20/virginia-isnt-making-the-grade-for-environmental-justice/>

Seems more like Virginia didn't even show up for the exam...much less make the grade!

Natural Gas Shortage? What Natural Gas Shortage?

- Bacon's Rebellion – 6/24/19

<https://www.baconsrebellion.com/wp/natural-gas-shortage-what-natural-gas-shortage/>

"If gas is supposedly in such short supply to require Dominion's pipeline, why, then, does Virginia Natural Gas apparently have no problem supplying two giant natural gas generating stations?"

Regional/Mountain Valley Pipeline, other

Water board should support call for federal action to halt pipeline damage

- Virginia Mercury – 6/25/19

<https://www.virginiamercury.com/2019/06/25/water-board-should-support-call-for-federal-action-on-pipeline-damage/>

The State of Virginia can become an official party in this case, by intervening and back up its citizens. But will Northam allow it?

Pipeline opponents fight Roanoke Gas rate increase

- WDBJ7 – 6/25/19

<https://www.wdbj7.com/content/news/Pipeline-opponents-fight-Roanoke-Gas-rate-increase-request-511812602.html>

Attorney John Fishwick said the company has benefited from a corporate tax cut, and has reported record profits.

Pipeline opponents, spurned by the state, ask federal agency to stop work

- The Roanoke Times – 6/22/19

https://www.roanoke.com/business/pipeline-opponents-spurned-by-the-state-ask-federal-agency-to/article_926fb634-ff56-5d70-bd16-98af644c2960.html

Trying a new angle, opposition groups have file the latest complaint directly to the FERC commissioners themselves...bypassing middlemen and office drones. Hopefully this more-involved process will gain a bit of traction.

Big Picture:

As Coal Fades in the U.S., Natural Gas Becomes the Climate Battleground

- The New York Times – 6/26/19

<https://www.nytimes.com/2019/06/26/climate/natural-gas-renewables-fight.html>

Related:

- <https://www.energyandpolicy.org/utility-carbon-targets/>

Former FERC Chair Cheryl LaFleur to End Nine-Year Term in August

- Natural Gas Intelligence – 6/21/19

<https://www.naturalgasintel.com/articles/118756-former-ferc-chair-cheryl-lafleur-to-end-nine-year-term-in-august>

LaFleur's departure restores a Republican majority at FERC.

Wehrum Resigns from EPA, Leaving Climate Rule Rollbacks in His Wake

- Inside Climate News – 6/26/19

<https://insideclimatenews.org/news/26062019/bill-wehrum-resigns-epa-fossil-fuel-industry-influence-climate-change-air-pollution-auto-standards-deregulation>

The former fossil fuel industry attorney was under investigation by Congress for contacts with former clients that stand to benefit from his deregulation efforts.

The Energy Wars Part 1: Natural Gas Under Fire as States Favor Alternatives in Climate Policy Push

- Natural Gas Intelligence – 6/21/19

<https://www.naturalgasintel.com/articles/118752-the-energy-wars-part-1-natural-gas-under-fire-as-states-favor-alternatives-in-climate-policy-push>

Detailed and interesting article from the industry looking at its (now more) uncertain future. Long, but worth the read.

Investors with \$34 trillion demand urgent climate change action

- Reuters – 6/25/19

<https://www.reuters.com/article/us-climatechange-investment-letter-exclu/exclusive-investors-with-34-trillion-demand-urgent-climate-change-action-idUSKCN1TQ31X?feedType=RSS&feedName=topNews>

Investors managing nearly half the world's invested capital, are demanding urgent action from governments on climate change, piling pressure on leaders of the world's 20 biggest economies meeting this week.

UCS Calls Curtailment Of Renewable Energy An Opportunity, Not A Problem

- Clean Technica – 6/27/19

<https://cleantechnica.com/2019/06/27/ucs-calls-curtailement-of-renewable-energy-an-opportunity-not-a-problem/>

Interior delays, costs may dim offshore wind's prospects

- E&E News – 6/27/19

<https://www.eenews.net/stories/1060661149>

Renewables will likely outpace coal for the entire second quarter of 2019

- IEEFA – 6/26/19

<http://ieefa.org/ieefa-u-s-renewables-will-likely-outpace-coal-for-the-entire-second-quarter-of-2019/>