



Status of Principal Court Challenges to Permits and Certifications for the Atlantic Coast Pipeline

July 11, 2019

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. One 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. The petitioners argue that FERC’s Environmental Justice Impact Statement is fatally flawed. Jurisdiction of the case has been transferred to the D.C. Circuit Court of Appeals. Oral arguments are expected to occur in 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, 2018 by seven conservation/environmental organizations (most members of ABRA) 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, 2018. 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 the Forest Service’s failure to assess off-forest alternatives, and in addition ruled that the Forest Service lacked the authority to grant the project permission to cross the ANST.
Atlantic Coast Pipeline, LLC (ACP, 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 Fourth Circuit rejected the ACP, LLC petition for rehearing and an appeal to the U.S. Supreme Court was filed June 25. The Supreme Court is expected to decide in October whether to take the case.
3. 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. A new biological opinion was issued by the FWS that sought to meet the court’s objections. That re-issued opinion was also been challenged by the petitioners, (Defenders of Wildlife, Sierra Club and the Virginia Wilderness Committee) represented

by SELC. That challenge was argued before the Fourth Circuit on May 9, 2019. A decision is expected later in the summer. The re-issued biological opinion is currently stayed pending a ruling by the court.

4. 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 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, just five weeks later, 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.

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.

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. Buckingham County Compressor Station Air Permit – The Virginia Air Pollution Control Board voted on January 8, 2019 to grant an air permit for the proposed ACP compressor station in Buckingham County, VA. The vote had been delayed several times and was particularly contentious because of concerns over air emissions that would affect the immediate area, as well as the Chesapeake Bay to the east, but also be because it would be build proximate to an historic African American community, raising the issue of environmental justice. The Southern Environmental Law Center (SELC), on behalf of Friends of Buckingham, challenged on February 8 the Virginia Air Pollution Control Board’s decision to approve Dominion’s Atlantic Coast Pipeline Buckingham County compressor station. Joining SELC in the lawsuit, filed with the Fourth Circuit Court of Appeals, was the Chesapeake Bay Foundation. SELC filed its opening brief on May 31. Response briefs are due to be filed by July 24. Oral arguments are expected in the Fall.

7. 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.