



## ABRA Update #239 – August 1, 2019

### Fourth Circuit Vacates Fish and Wildlife Permit for ACP . . . Again

The Fourth Circuit of the U.S. Court of Appeals on July 26 struck down the latest permit the U.S. Fish and Wildlife Service (FWS) had issued for the Atlantic Coast Pipeline (ACP). The issue arose from a requirement in the Endangered Species Act that (quoting from the decision) "the proposed pipeline will not jeopardize the continued existence of several endangered and threatened species that are likely to be impacted by pipeline construction. As relevant here, the Biological Opinion concluded that the pipeline will not jeopardize four species: the rusty patched bumble bee, clubshell, Indiana bat, or Madison Cave isopod."

The FWS issued an opinion in 2017 stating that the ACP did not endanger any endangered species. The permit was challenged in a lawsuit filed by the Southern Environmental Law Center (SELC) on behalf of the Defenders of Wildlife, Sierra Club and the Virginia Wilderness Committee (the latter two organizations are ABRA members).

In response to that legal challenge the Fourth Circuit in May 2018 vacated the FWS permit, which it explained in its opinion (not issued until August 6) that the "FWS's vague and unenforceable take limits are arbitrary and capricious." The agency reissued a new permit in September 2018, which was again challenged by the same plaintiffs. The Fourth Circuit stayed the new permit and, in response to that, the Atlantic Coast Pipeline, LLC suspended all construction of the project in late 2018. The case was argued on May 9, 2019 (see ABRA Update #232, May 10, 2019).

In its July 26 [opinion](#), the Fourth Circuit stated:

*Specifically, Petitioners assert that FWS improperly determined that pipeline construction will not jeopardize the rusty patched bumble bee or the clubshell, and they challenge the validity of the take limits imposed for the Indiana bat and the Madison Cave isopod. Because we find that FWS arbitrarily reached its no-jeopardy conclusions and failed to correct the deficiencies in the take limits that we identified in the previous appeal, we grant the petition and vacate the 2018 Biological Opinion (BiOp) and Incidental Take Statement.(ITC)*

Much of the Court's opinion focused on the inadequacies of FWS in analyzing the potential impact of the ACP on the rusty patch bumblebee (RPBB). It concluded:

*In sum, the 2018 BiOp's conclusion that the ACP will not jeopardize the RPBB in Bath County, Virginia, is arbitrary and capricious because it runs counter to available evidence, relies on data without providing a meaningful basis for that reliance, fails to consider the species's status as a whole, and fails to consider the pipeline's impacts on RPBB recovery.*

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The Court also criticized the agency for its rush to judgment in issuing the second BiOp:

*We cannot ignore that it took FWS a mere 19 days to issue the 2018 BiOp and ITS after FERC resumed formal consultation with the agency following our first decision in this matter. In fast-tracking its decisions, the agency appears to have lost sight of its mandate under the ESA: “to protect and conserve endangered and threatened species and their habitats.”*

In response to the Court’s decision, Dominion Energy Aaron Ruby stated:

*“Based on the clear direction provided by the court in today’s opinion, we expect FERC and the Fish and Wildlife Service will be able to immediately begin working to correct the issues identified by the court. Once the new Biological Opinion and Incidental Take Statement are issued, we will seek the necessary approval from the Federal Energy Regulatory Commission to resume construction. We’re confident we remain on track to complete the project by late 2021.”*

## **Sixteen State AGs Urge Supreme Court to Take Forest Service Case**

Sixteen Republican State Attorneys General, led by West Virginia AG Patrick Morrisey, filed an amicus brief with the U.S. Supreme Court asking it to accept the appeal made by the Atlantic Coast Pipeline, LLC (ACP, LLC) to overturn the Fourth Circuit Court of Appeals decision to vacate the U.S. Forest Service permit for the Atlantic Coast Pipeline to cross the Appalachian Trail.

The [ACP, LLC filed its appeal with the Supreme Court on June 25](#). It was joined in that request by the U.S. Solicitor General.

The [AGs’ brief, filed July 29](#), stated as reasons for its support of the ACP appeal:

- The Fourth Circuit decision was wrong, as it misread the Mineral leasing Act (MLA) and because it undermined the MLA’s goal to balance conservation with energy development;
- Shuttering construction on the Atlantic Coast Pipeline harms states on both ends of its route;
- The decision could severely constrain energy development nationwide; and
- The decision undermines important interests beyond pipeline development. (On this final point, the brief claims that the decision “could thus disable any federal agency from being able to authorize power lines and telecommunications infrastructure across the Appalachian Trail, as well as other trails that cross forest land.”)

Joining WV Attorney General Morrisey (who is the principal author of the brief) in signing on to the brief were the AGs of Alabama, Alaska, Georgia, Idaho, Kansas, Louisiana, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Dakota, Texas, Utah and Wyoming.

## **Dominion Has Sufficient Pipeline Capacity, Witnesses Tell Virginia SCC**

Two witnesses appearing before a July 30 Virginia State Corporation Commission (SCC) hearing on the proposed fuel factor for Dominion Energy to use in calculating future customer rates testified that the company has sufficient pipeline capacity to meet future energy demands.

Greg Lander, an energy consultant representing Appalachian Voices (an ABRA member), testified that Dominion “has sufficient pipeline capacity to serve its existing generation fleet. Further, because of the frequency, magnitude, and duration of the non-power plant deliveries

under its existing pipeline contracts, I conclude that the Company has ample pipeline capacity to serve additional power generation load should that be necessary.” Mr. Lander’s analysis was echoed by Bernadette Johnson, a consultant retained by the SCC staff. Mr. Lander’s filed testimony is available [here](#). Ms. Johnson’s filed testimony is available [here](#) and [here](#).

The SCC is expected to decide about Dominion’s fuel factor proposal in 2-3 weeks.

## ***In the News:***

### **Local/Atlantic Coast Pipeline**

#### **Federal court strikes down Fish and Wildlife permit for Atlantic Coast Pipeline**

- Richmond Times-Dispatch – 7/26/19

[https://www.richmond.com/news/virginia/government-politics/federal-court-strikes-down-fish-and-wildlife-permit-for-atlantic/article\\_c5c40622-f38c-59a3-a248-f16d1c50ed44.html](https://www.richmond.com/news/virginia/government-politics/federal-court-strikes-down-fish-and-wildlife-permit-for-atlantic/article_c5c40622-f38c-59a3-a248-f16d1c50ed44.html)

Chief Judge Roger L. Gregory, took note of the federal agency’s quick action and warned, “In fast-tracking its decisions, the agency appears to have lost sight of its mandate under the [Endangered Species Act]: ‘to protect and conserve endangered and threatened species and their habitats.’”

Related:

- <https://www.jdsupra.com/legalnews/the-trump-administration-provides-22845/>

#### **Pipeline permit vacated by court**

- The Recorder – 8/01/19

[https://www.abralliance.org/wp-content/uploads/2019/08/Pipeline-permit-vacated-by-court-Recorder\\_20190801.pdf](https://www.abralliance.org/wp-content/uploads/2019/08/Pipeline-permit-vacated-by-court-Recorder_20190801.pdf)

In its rush to reissue permit, federal agency abdicated its responsibility to protect the environment by requiring the best information available...abandoning its mission (and the law) in the eyes of the court.

#### **Judge Halts Atlantic Coast Pipeline’s Land-Grab Attempt**

- Blue Virginia – 7/26/19

<https://bluevirginia.us/2019/07/judge-halts-atlantic-coast-pipelines-land-grab-attempt>

US District Judge Terrence Boyle extended a stay on Atlantic Coast Pipeline’s (ACP) request to use “quick-take” proceedings in order to gain access to properties along the route of the pipeline.

#### **‘Decision is completely wrong’: W.Va. Attorney General leads move to overturn pipeline ruling**

- Bluefield Daily Telegraph – 8/1/19

[https://www.bdtonline.com/news/decision-is-completely-wrong-w-va-attorney-general-leads-move/article\\_44c8c516-b3fa-11e9-81f1-034ec366531b.html](https://www.bdtonline.com/news/decision-is-completely-wrong-w-va-attorney-general-leads-move/article_44c8c516-b3fa-11e9-81f1-034ec366531b.html)

Morrisey is leading a 16-state alliance of attorneys general in an attempt to convince the Supreme Court to overturn the Fourth Circuit Court ruling that denied Atlantic Coast Pipeline rights-of-way through national forestland beneath the Appalachian Trail (AT).

#### **Dominion to focus on Supreme Court to get Atlantic Coast Pipeline to finish line**

- SP Global – 7/31/19

<https://www.spglobal.com/platts/en/market-insights/latest-news/natural-gas/073119-dominion-to-focus-on-supreme-court-to-get-atlantic-coast-pipeline-to-finish-line>

Dominion Energy will focus more attention in the months ahead on gaining a win at the US Supreme Court rather than publicly discussing administrative or legislative actions to get its stalled Atlantic Coast Pipeline completed, amid investor concerns about the project’s future.

## Regional/Mountain Valley Pipeline, other

### FERC: Southgate pipeline would have ‘some adverse impacts’ that could be reduced

- Virginia Mercury – 7/30/19

<https://www.virginiamercury.com/blog-va/ferc-southgate-pipeline-would-have-some-adverse-impacts-that-could-be-reduced/>

FERC’s draft statement found that the Southgate project would have only “minor” geologic and soil impacts and “would not significantly affect water resources” in any of the 224 water bodies that it will cross.

### Pipe coating is safe, Mountain Valley tells regulator

- The Roanoke Times - 7/31/19

[https://www.roanoke.com/business/pipe-coating-is-safe-mountain-valley-tells-regulators/article\\_e41a00ce-9242-59c8-8ae4-0822c9b4d9b8.html](https://www.roanoke.com/business/pipe-coating-is-safe-mountain-valley-tells-regulators/article_e41a00ce-9242-59c8-8ae4-0822c9b4d9b8.html)

The Federal Energy Regulatory Commission asked for information on the coating July 10, following concerns from some critics that prolonged exposure to the elements could cause toxins to degrade from the pipe and contaminate the surrounding air, soil and water.

### Pipeline vital for current and future customers of Roanoke Gas, company says

- The Roanoke Times – 7/30/19

[https://www.roanoke.com/business/pipeline-vital-for-current-and-future-customers-of-roanoke-gas/article\\_935b6648-7c67-5b5c-ba56-bc268aacbd94.html](https://www.roanoke.com/business/pipeline-vital-for-current-and-future-customers-of-roanoke-gas/article_935b6648-7c67-5b5c-ba56-bc268aacbd94.html)

The arguments come one month after a staff analysis by the regulatory agency questioned whether the growth of Roanoke Gas’ customer base is strong enough to support an investment by its sister company in the 303-mile pipeline.

### Mountain Valley Pipeline Contractor Has a History of Killing its Own Workers

- Blue Virginia – 8/1/19

<https://bluevirginia.us/2019/08/mountain-valley-pipeline-contractor-has-a-history-of-killing-its-own-workers>

Precision Pipeline, the main contractor building the MVP, has at best a checkered history when it comes to worker safety.

## Big Picture:

### California farmers are planting solar panels as water supplies dry up

- Los Angeles Times – 7/31/19

<https://www.latimes.com/business/la-fi-agriculture-farmlands-solar-power-20190703-story.html>

Running out of water, and with lots of marginal land, California’s San Joaquin Valley may have found a new crop: electrons.

### LaFleur cautions on administrative interference as she exits FERC

- Utility Dive – 7/29/19

<https://www.utilitydive.com/news/lafleur-cautions-on-administrative-interference-as-she-exits-ferc/559551/>

In an interview Thursday with Utility Dive, LaFleur reflected on the changes at FERC and noted the difference between the presence of the Obama and Trump administrations.

### 'It was terrible': 1 dead, up to 7 missing after natural gas line explosion in Kentucky

- USA Today – 8/1/19

<https://www.usatoday.com/story/news/nation/2019/08/01/gas-line-explosion-kentucky/1886568001>

The explosion happened about in the Moreland community near Junction City and Hustonville.

### **Flaring natural gas turns 'drill, baby, drill' to 'burn, baby, burn'**

- USA Today – 7/30/19

<https://www.usatoday.com/story/opinion/2019/07/30/flaring-natural-gas-drill-baby-drill-burn-baby-burn-editorials-debates/1807010001/>

Oil companies are still allowed to pull billions of cubic feet of natural gas from the ground and simply set it on fire.

### **The Catch-22 of low natural gas prices**

- Pittsburg Post-Gazette – 8/1/19

<https://www.post-gazette.com/business/powersource/2019/08/01/low-natural-gas-prices-futures-drilling-fracking-marcellus-utica-shale-appalachia/stories/201908010047>

Takeaway: more pipelines in Appalachia aren't going to help anybody.

### **Climate Activists Set Sights on Ending Fossil Fuel Exports in Pacific Northwest Once and For All**

- Common Dreams – 7/31/19

<https://www.commondreams.org/views/2019/07/31/climate-activists-set-sights-ending-fossil-fuel-exports-pacific-northwest-once-and>

The region is home to the proposed Jordan Cove LNG export terminal (LNG being short for liquefied natural gas) and the Pacific Connector pipeline that would connect to it. Together, they are among the last major Northwest fossil fuel export proposals still moving forward.

### **Just 10% of fossil fuel subsidy cash 'could pay for green transition'**

- The Guardian – 8/1/19

<https://www.theguardian.com/environment/2019/aug/01/fossil-fuel-subsidy-cash-pay-green-energy-transition>

Switching just some of the huge subsidies supporting fossil fuels to renewables would unleash a runaway clean energy revolution, according to a new report, significantly cutting the carbon emissions that are driving the climate crisis.