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## Va. attorney general seeks pipeline case dismissal

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“Because it planned to cross National Forest land, Atlantic needed a permit from the United States Forest Service — an agency that describes its own mission as caring for the land and serving people. Unfortunately, the service’s evaluation of the permit fell far short of that promise,” Herring contended. This National Forest picnic area sits near the proposed pipeline path. (File photo)

MONTEREY — State attorney general Mark Herring filed a brief on Jan. 22 with the U.S. Supreme Court stating the proposed Atlantic Coast Pipeline threatens Virginia’s natural resources without clear corresponding benefits.

Petitioners U.S. Forest Service and Atlantic Coast Pipeline challenge the appellate court decision finding the Forest Service is unauthorized to issue Atlantic a right of way to cross the Appalachian Trail. They seek reversal of the Fourth Circuit Court of Appeals ruling in favor of groups including Highlanders for Responsible Development, Cowpasture River Preservation Association, Shenandoah Valley Battlefields Foundation, Shenandoah Valley Network, and Virginia Wilderness Committee, Sierra Club and Wild Virginia Inc.

Herring cut to the heart of whether the pipeline is needed. It is not, he said, for a variety of reasons. He argued whatever the justices' decision, it would not influence the case's outcome. He requested dismissal. Plus, the underlying need for a project widely characterized as a debacle was unfounded and unbacked, he said.

"In their effort to garner public and political support for the pipeline project, Atlantic and its allies have insisted that it will address a growing and unmet demand for natural gas from customers in Virginia and North Carolina," Herring said in the brief. "But there is reason to doubt those claims.

"In its application for a certificate of public convenience and necessity from the Federal Energy Regulatory Commission, Atlantic cited studies forecasting that 'demand for natural gas for power generation in Virginia and North Carolina will grow 6.3 percent annually between 2014 and 2035.'"

#### **'Faulty premise'**

"Its pipeline, Atlantic argues, is needed to meet the growing energy demands of these customers," Herring continued. "Atlantic's argument, however, rests on a faulty premise. In 2017, for example, a federal agency charged with collecting information to promote sound energy policy-making projected that demand for natural gas for electricity would actually decrease between 2015 and 2020 — and not return to 2015 levels until 2034.

"The numbers for Atlantic have not improved since then," he continued. "In its most recent long-term Integrated Resource Plan, the electric utility affiliate of Dominion Energy — the majority stakeholder in the pipeline joint venture — modeled five scenarios for meeting electricity demand through 2033. All but one of the models showed no significant increase in natural gas consumption, and the only model that included annual consumption numbers actually showed a decrease at the end of that time frame.

"Even these estimates may be overstated. In 2018, Virginia's State Corporation Commission rejected Dominion's annual IRP, expressing considerable doubt regarding the accuracy and reasonableness of the company's load forecast. For one thing, the Commission pointed out that Dominion's forecasted load growth exceeded the forecast of the regional transmission organization by more than 50 percent. The Commission also criticized Dominion for consistently failing to meet expectations, observing that the record ... reflects that the load forecasts contained in the Company's past IRPs have been consistently overstated, particularly in years since 2012, with high growth expectations despite generally flat actual results each year," Herring explained.

“Complicating matters further, natural gas is increasingly at a competitive disadvantage due to technical advances and cost reductions in renewable energy. Unfortunately for Virginians, regardless of the need for the pipeline and whether it is ultimately completed, the ever-rising costs of building it will be passed on to consumers by the companies that have contracted with Atlantic to carry gas through the pipeline — all of which are affiliates of the pipeline’s sponsors, Dominion, Duke Energy, and Southern Company.

“Although demand for the pipeline may be questioned, there is no debate about the value of the natural resources it will invariably impact. In Virginia alone, the proposed route crosses three celebrated natural features: the George Washington National Forest, the Blue Ridge Parkway, and the Appalachian Trail,” Herring stated.

“Combined with the adjacent Jefferson National Forest, the George Washington National Forest spans more than 1.6 million acres, extending along the Appalachians and following Virginia’s northwest border with Kentucky and West Virginia. Together, the two forests afford virtually every type of outdoor recreation activity ... imaginable,” including hiking, mountain biking, camping, fishing, bird watching, horseback riding, photography, orienteering, and cross-country skiing, he said. “Given their natural beauty and varied offerings, it is not surprising the forests attract three million visitors per year.

“The Blue Ridge Parkway runs for nearly 500 miles through Virginia and North Carolina, following the Blue Ridge Mountains and linking the Shenandoah National Park to the Great Smoky Mountains National Park. It was the product of numerous public works projects undertaken in the 1930s, which helped the Appalachian region climb out of the Great Depression. Labeled America’s favorite drive, the Parkway boasts stunning long-range vistas and close-up views of the rugged mountains and pastoral landscapes of the Appalachian Highlands. According to the National Park Service, the Parkway protects a diversity of plants and animals, and provides opportunities for enjoying all that makes this region of the country so special,” Herring said.

“The Appalachian Trail stretches from Maine to Georgia, with more than a quarter of its 2,000 miles traversing Virginia. The trail has a rich history, both in its creation nearly 100 years ago and in the public-private partnerships that have stewarded its preservation through the years. Virginia is home to several of the Trail’s most visited sites, including Grayson Highlands and Mount Rogers. These and other highlights draw countless visitors each year to enjoy the solitude and natural beauty of the Trail — the same attributes that led Congress to designate the Trail as one of the first two scenic trails under the National Trails System Act more than 50 years ago.

“The challenged permitting decision violated numerous federal statutes and regulations,” Herring continued. “Because it planned to cross National Forest land, Atlantic needed a permit from the United States Forest Service — an agency that describes its own mission as caring for the land and serving people. Unfortunately, the service’s evaluation of the permit fell far short of that promise.”

## **Erratic tactics**

Herring went on to explain that initially, the Forest Service appeared skeptical of the pipeline project and prepared to conduct the type of rigorous review envisioned by its governing statutes and regulations.

“In October 2016, the service expressed concern about Atlantic’s plan to construct the pipeline on the steep slopes of the George Washington and Monongahela National Forests. Because the project would need to be consistent with Forest Plan standards that limit activities in areas that are at high risk for slope and soil instability, the Service explained that it needed further evidence before it could continue processing Atlantic’s permit application,” Herring said. “Specifically, the Forest Service requested plans for 10 sites that could demonstrate that Atlantic’s technology would meet stabilization requirements.”

He said the USFS said those plans would be “merely representative,” and the forest service had cautioned, “Should the ACP project be permitted, multiple additional high hazard areas would need to be addressed on a sitespecific basis.”

Months later, Herring noted, in February 2017, the USFS confirmed all 10 site-specific stabilization designs would be required, and told Atlantic it was “not comfortable” with proceeding with the permit without seeing the plans.

Then, in December 2016, Herring explained, Atlantic circulated a timeline for FERC and USFS review, looking to complete the administrative process by October 2017. Consistent with that timeline, FERC completed its draft Environmental Impact Statement in late 2016. In April 2017, the USFS commented on the draft, noting repeatedly that FERC lacked adequate information to draw the conclusions it reached, particularly about sensitive soils and steep slopes, he said. “Most significantly, the Forest Service commented that no analysis of a National Forest Avoidance Alternative has been conducted, and environmental impacts of this alternative have not been considered or compared to the proposed action. The Service explained that it could not support the recommendation that the National Forest Avoidance Alternative be dropped from consideration and reiterated its request for evaluation of such an alternative.”

Herring said that around the same time, the USFS provided critical comments on the company’s draft biological evaluation. USFS had cautioned the pipeline plans would likely create long-term negative impacts to the ecosystem, including on potentially sensitive species.

“Just a month later, however, the Forest Service abruptly changed course,” Herring explained. “Without acknowledging its change of position, the Service now told Atlantic that the eight additional site-specific exemplars it had requested would not be required and the two previously provided designs would be adequate to proceed with the permit review.”

Herring noted the USFS released its draft Record of Decision, which proposed granting the permit and exempting the pipeline from a number of forest plan standards. “Directly contradicting its prior position, the Forest Service agreed to drop its request for an analysis of alternatives that did not cross National Forest land, stating that such alternatives — never

analyzed — would not offer a significant environmental advantage when compared to the proposed route or would not be economically practical,” Herring said.

“In response to comments, the Service stated that FERC had adequately considered alternatives and concluded these alternatives would not provide a significant environmental advantage over a shorter route that passes through National Forests. In a similar about-face, the Service responded to Atlantic’s updated biological evaluation by amending its previous conclusion to find that the pipeline would not result in a loss of sensitive species.

“Given the Forest Service’s whiplash-inducing approach to Atlantic’s permit, it is hardly surprising that the Fourth Circuit invalidated its decision on a number of separate grounds,” Herring said.

“Observing that the National Environmental Policy Act requires particular care when a proposed project would cross a National Forest, the court of appeals found that the Service had failed to offer a detailed discussion of steps Atlantic could take to mitigate landslide risks, erosion impacts, and water-quality degradation. The court recognized that the Forest Service had expressed numerous concerns in its comments on FERC’s draft EIS and had insisted that the permit should not be issued unless Atlantic provided 10 site-specific designs to demonstrate that its technology would be effective at mitigating the risks posed by steep slopes,” Herring explained.

“Given statements made in the final EIS — including that slope instability/ landslide risk reduction measures have not been completed or have not been adopted — the court determined that the final EIS could not have addressed the Service’s concerns.

“In other words, to support its decision to approve the project and grant the (permit), the Forest Service relied on the very mitigation measures it previously found unreliable. In the Fourth Circuit’s view, that was insufficient to satisfy NEPA, and did not constitute the necessary hard look at the environmental consequences of the ACP project.”

### **‘Striking and inexplicable’**

Herring went on to note the Fourth Circuit also found the USFS had not complied with its “Planning Rule” when it applied project-specific amendments to 13 standards, including nine related to the plan for the George Washington National Forest. Those amendments relaxed forest plan standards for soil, water, riparian, threatened and endangered species, and recreational and visual resources.

“Despite acknowledging that the purpose of the amendments was to allow Atlantic to meet the requirements of the National Forest Management Act and accompanying regulations because it could not meet those standards without amendments, the Service failed to analyze whether the substantive requirements of the 2012 Planning Rule were directly related to the purpose of the amendments.”

As the Fourth Circuit explained, he noted, “The lengths to which the Forest Service apparently went to avoid applying the substantive protections of the 2012 Planning Rule — its own regulation intended to protect national forests — in order to accommodate the ACP project through national forest land on Atlantic’s timeline are striking, and inexplicable.”

And, Herring pointed out, the court of appeals found the USFS had violated NEPA and other laws by failing to consider alternatives that did not cross National Forest land. In the court’s view, it was improper for the USFS to rely on FERC’s final EIS for several reasons.

- First, the standard FERC applied to determine whether an alternative route should be used was different from the standard imposed on the USFS, Herring said.
- Second, despite expressing concerns about the lack of study of off-forest alternatives in the draft EIS, the final EIS the USFS adopted included a discussion of National Forest Avoidance Route Alternatives that was identical to the draft. “The court simply could not conclude that the Forest Service undertook an independent review and determined that its comments and concerns were satisfied when it seemingly dropped its demand that off-forest alternative routes be studied before the ACP was authorized without any further analysis,” Herring said. “The court thus determined that the Service had acted arbitrarily and capriciously.”

“The writ of certiorari should be dismissed,” Herring argued. “It is undisputed that this court’s decision will not change the outcome of this case. As just described, the Fourth Circuit determined that the Forest Service violated its statutory and regulatory obligations in three different ways that are separate and apart from its authority under the Mineral Leasing Act to issue a pipeline right-of-way crossing the Appalachian Trail. Atlantic and the Service challenge none of those holdings and each is independently sufficient to invalidate the permit. Because this court reviews . . . judgments, not statements in opinions, that fact alone provides a sufficient basis to dismiss the writ of certiorari.”

Herring said the reasons Atlantic and the USFS offer for deciding the question presented now are both “unpersuasive” and “betray a fundamentally misguided and troubling understanding of the Service’s task on remand.”

Focusing on the Fourth Circuit’s holding that the Service was required to consider non-forest alternatives, Herring said, “the government doubles down on the very reasoning the court rejected — that FERC’s final EIS properly analyzed all non-forest alternatives and there is nothing left for the Forest Service to do. But as the Fourth Circuit explained, that argument fails on multiple levels, including that the Service was required to undertake an independent review to determine whether FERC had addressed its concern that no analysis of a National Forest Avoidance Alternative had been conducted, and environmental impacts of that alternative had not been considered or compared to the proposed action. By promising to repeat its blind adherence to FERC’s analysis on remand, the government endorses nothing less than an abdication of the Forest Service’s responsibilities,” he said.

“Atlantic’s arguments are even more dismissive of the Forest Service’s important statutory and regulatory mandate,” Herring continued. “Atlantic insists that even if it were somehow possible

to divert the pipeline to permissibly cross the Trail on state or private land, that diversion would involve additional unnecessary cost, cause needless delay, and make no sense. But diverting the pipeline away from National Forest land where appropriate is precisely what the statutes and regulations were intended to accomplish, and what they require of the Forest Service. Atlantic's suggestion that doing what existing law demands would impose costs and make no sense is an argument for changing the law, not ignoring it as the Service did here."

### **'All-out push'**

"Even more striking," Herring added, "Atlantic characterizes respondents' effort to defer review of the question presented until after remand, if necessary, as particularly disingenuous given the Fourth Circuit's apparent discomfort with pipelines."

According to Atlantic, he noted, "this court should ignore a United States court of appeals' unanimous analysis and the multiple independent reasons it found for remand because a private petitioner asserts that court cannot fairly decide an entire category of cases."

Instead, he noted, Atlantic is asking the court to join it and the federal government in their "all-out push to see that a particular pipeline is constructed when, where, and how the pipeline company wants it to be. But as the Fourth Circuit appropriately recognized, the Service's statutory and regulatory obligations are not optional, nor are they speed bumps to be hurried over and driven around if necessary."

Herring argued the requirements the USFS ignored when it granted the pipeline permit were crafted by Congress with an eye toward protecting the National Forests for generations to come.

"Virginians rightly should be able to count on the Forest Service to fulfill its congressionally mandated obligations — not to mention its self-professed mission of caring for the land and serving people," Herring said. "This court should not endorse the dismissive attitude the Service and Atlantic demonstrate toward the Forest Service's critical responsibilities by prematurely deciding a question whose resolution will not impact the outcome of this case."