



ABRA Update #263 – February 13, 2020

Issue Highlights . . .

- FERC Restarts New Fish and Wildlife Permit Process for ACP
- Army Corps Warned Not to Issue New Permit for ACP
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FERC Restarts New Fish and Wildlife Permit Process for ACP

The Federal Energy Regulatory Commission (FERC) has requested in [a February 10 letter that the U.S. Fish and Wildlife Service](#) (FWS) reinstate formal consultation with Atlantic Coast Pipeline, LLC (ACP, LLC) to develop a new Biological Opinion (BO) and Incidental Take Statement (ITS) on the company's proposed pipeline. The BO and ITS for the ACP, required under Section 7 of the Endangered Species Act (ESA), was vacated for the second time by the Fourth Circuit Court of Appeals in July 2019 (see [ABRA Update #239](#) for more). Because of the Fourth Circuit's action, construction on the ACP ceased in December 2018 and ACP, LLC has indicated it would not seek to resume construction until a new BO and ITS was approved.

The Southern Environmental Law Center (SELC) [wrote to FWS in a February 11 letter](#) on behalf of its clients (Defenders of Wildlife, Sierra Club and Virginia Wilderness Committee) in the legal challenge to the ACP's BO and ITS, contending that the "FWS cannot complete consultation on the ACP until it knows the final route of the pipeline." The SELC letter points out that the project's route is in question because of last year's decision of the Fourth Circuit Court of Appeals in *Cowpasture River Preservation Ass'n v. Forest Service* ruling that approval of the pipeline to cross the Appalachian Trail was illegal (see related story below).

Continuing, the letter states:

“. . . a route will not be decided until the Forest Service assesses, and potentially chooses, off-forest alternatives. That will require at least the Forest Service, and potentially FERC, to go back through the process of issuing approvals including offering comment and administrative objection opportunities. That is unlikely before Fall 2020 at the earliest and potentially not until significantly later. Meeting consultation requirements before the path of the project is known is not possible making reinitiation of formal consultation premature at this point.”

Another question raised in SELC's letter is the impact the project would have on the endangered clubshell mussel. The FWS had previously raised concerns about the clubshell population in Hackers Creek, located near Buckhannon, West Virginia. SELC notes that to address the problem, FWS authorized ACP, LLC to relocate the clubshell population to a place out of the path of the pipeline. The effort failed when nearly all of the mussels removed from Hackers Creek died in captivity, thus making the preservation of any remaining clubshell mussels in Hackers Creek critical.

SELC's letter also argues that the formal consultation should not proceed until the FWS concludes its assessment of the impacts of the project on the candy darter, a species recently added to the ESA. In a [January 25 letter to FWS, ABRA raised several questions](#) with the agency about the status of its evaluation of projects affecting the candy darter habitat, including the ACP and Mountain Valley Pipeline. ABRA's letter cites the recent decision by the Forest Service to cancel a major timber harvesting project in West Virginia due to habitat concerns related to the candy darter.

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Army Corps Warned Not to Issue New Permit for ACP

The Norfolk District of the U.S. Army Corps of Engineers (Corps) has been told that it would violate legal requirements should it reinstate the suspended verification for the Atlantic Coast Pipeline (ACP) using the Corps' Nationwide 12 Permit (NWP12). The argument was set forth in a [February 11 letter from the Southern Environmental Law Center](#) (SELC), Appalachian Mountain Advocates (Appalmad) and the Chesapeake Bay Foundation. Pipeline projects like the ACP that cross waterbodies under the jurisdiction of the Corps are required by the Clean Water Act to have a NWP12 permit. The Corps had suspended the NWP12 for the ACP in November 2018 in response to a legal challenge by Appalmad on behalf of its client group of ABRA members (Sierra Club, West Virginia Rivers Coalition, West Virginia Highlands Conservancy, Appalachian Voices, and Chesapeake Climate Action Network). The February 11 letter said that the permit for the ACP cannot be reinstated because:

- General Condition 10 of Nationwide Permit 12 requires Atlantic to “comply with applicable FEMA-approved state or local floodplain management requirements.”
- Nelson County, Virginia’s floodplain ordinance adopts a FEMA recommendation that critical facilities not be located within floodplains by mandating that any such facility proposed to be located in a special flood hazard area receive a variance.
- Atlantic sued the County in federal court, claiming that the variance requirement is preempted as applied to the Atlantic Coast Pipeline.
- Atlantic will not satisfy General Condition 10 unless Atlantic complies with the variance requirement, regardless of the outcome of Atlantic’s separate lawsuit.
- The Corps cannot lawfully excuse Atlantic’s plan to violate General Condition 10.

Information About the Supreme Court Argument of the Cowpasture Case

The U.S. Supreme Court argument of the Cowpasture River Preservation Association v. Forest Service will take place on Monday, February 24 at 10 am. One-hour is scheduled for the case; another case is scheduled to be heard by the Court at 11 a.m.

To review briefs that have been filed on the *Cowpasture* case, click [here](#). The *ABRA Update* article on the Fourth Circuit Court of Appeals decision of December 2018 that is being appealed is available [here](#).

The U.S. Forest Service and Atlantic Coast Pipeline, LLC are the appellants in the case. The respondents are seven ABRA members: Cowpasture River Preservation Association, Highlanders for Responsible Development, Shenandoah Valley Battlefields Association, Shenandoah Valley Network, Sierra Club, Virginia Wilderness Committee and Wild Virginia.

Those who plan to attend the argument should consult instructions on the Supreme Court website, [here](#). Note that space in the courtroom is limited and there is no guarantee that all who wish to attend will be seated. Therefore, it is advised that attendees for the argument arrive very early. The Supreme Court is at 1 First St., SE, Washington, DC, located 0.3 miles from the Capital South Metro Station. The closest parking garage is at Union Station, located 0.5 miles from the Court.

Audio recordings of all oral arguments heard by the Supreme Court are posted online on Fridays of each argument

In the News:

Local/Atlantic Coast Pipeline

Feds seek to resume Atlantic Coast Pipeline Construction

- The Recorder – 2/13/20

https://www.abralliance.org/wp-content/uploads/2020/02/Feds-seek-to-resume-Atlantic-Coast-Pipeline-construction-Recorder_20200213.pdf

The move to support construction comes after multiple requests by citizen groups for FERC to issue a stop-work order since several key pipeline permits have been rejected.

Dominion agrees to buy Southern stake in Atlantic Coast Pipeline as project costs soar

- S&P Global 2/11/20

<https://www.spglobal.com/platts/en/market-insights/latest-news/natural-gas/021120-dominion-agrees-to-buy-southern-stake-in-atlantic-coast-pipeline-as-project-costs-soar>

Related:

- <https://www.baconsrebellion.com/wp/huge-dominion-pipeline-project-loses-partner>

Dominion Pipeline Clashes With Appalachian Trail at High Court

- Bloomberg Environment – 2/10/20

<https://news.bloombergenvironment.com/environment-and-energy/natural-gas-pipeline-iconic-trail-at-odds-in-supreme-court-case>

The Supreme Court hears oral arguments Feb. 24 in the high-stakes battle over the \$7.8 billion Atlantic Coast pipeline. The justices must decide whether federal officials overstepped when they approved the project's path across the Appalachian Trail.

America needs to stop its natural gas pipeline mania

- The Week – 2/10/20

<https://theweek.com/articles/882813/america-needs-stop-natural-gas-pipeline-mania>

Earlier this week, this article was entitled “The Atlantic Coast Pipeline Must Be Stopped”.

Dominion and Virginia Lawmakers Race to Define Clean Energy Goals, Offshore Wind Plans

- Greentech Media – 2/11/20

<https://www.greentechmedia.com/articles/read/dominion-virginia-lawmakers-race-to-define-clean-energy-goals-offshore-wind-plans>

History would tell you where to put your money...but let's hope it won't repeat itself this time!

Dominion sets net-zero carbon goal by 2050

- Virginia Business – 2/11/20

<https://www.virginiabusiness.com/article/dominion-sets-net-zero-carbon-goal-by-2050/>

From a related article: “Dominion said it expects its gas infrastructure to yield net zero emissions by 2040 through renewable natural gas projects that capture methane.” I'm sorry, but there just *isn't* enough pig...*stuff*...to accomplish this.

After long delay, Democrats unveil Clean Economy Act energy omnibus

- Virginia Mercury – 2/6/20

<https://www.virginiamercury.com/2020/02/06/after-long-delay-democrats-unveil-clean-economy-act-energy-omnibus/>

Regional/Mountain Valley Pipeline, other

Despite ‘Considerable Progress,’ USFWS Seeking Longer Review of 2 Bcf/d MVP

- Natural Gas Intelligence – 2/12/20

<https://www.naturalgasintel.com/articles/121024-despite-considerable-progress-usfws-seeking-longer-review-of-2-bcf-d-mvp>

In a letter dated Friday, USFWS officials told the Federal Energy Regulatory Commission they will need another 45 days to complete their consultation on MVP under Section 7 of the ESA.

Offset for pipeline damage to more than double size of Read Mountain Preserve

- The Roanoke Times – 2/11/20

https://www.roanoke.com/news/local/offset-for-pipeline-damage-to-more-than-double-size-of/article_abcab915-aca2-559c-b9bc-2a4e7b2dc5d1.html

Roanoke County plans to use the new area for passive recreation, including hiking trails, picnic facilities, kiosks, wayfinding signs and a new trailhead.

Bill to criminalize trespassing at infrastructure facilities takes heat during public hearing

- WV Metro News – 2/10/20

<http://wvmetronews.com/2020/02/10/bill-to-criminalize-trespassing-at-infrastructure-facilities-takes-heat-during-public-hearing/>

"This bill... is aimed at silencing indigenous people, water protectors, and environmentalists by banning the non-violent tactics that have been most successful in getting their message heard." – Joseph Cohen, ACLU

Environmental problems continue with Mountain Valley Pipeline, group says

- The Roanoke Times – 2/7/20

https://www.roanoke.com/news/local/environmental-problems-continue-with-mountain-valley-pipeline-group-says/article_oabf8051-62ed-57a1-978a-761e6e62bd85.html

Problems with erosion along the construction zone of the Mountain Valley Pipeline continued from September through December of last year, despite a slowdown in work.

Related:

- <https://bluevirginia.us/2020/02/mountain-valley-pipeline-continues-violations-even-during-work-stoppage-wild-virginia-insists-deq-enforce-mvp-consent-decree-impose-penalties>

Big Picture:

Planting Trees Won't Save the World

- The New York Times – 2/12/2020

<https://www.nytimes.com/2020/02/12/opinion/trump-climate-change-trees.html>

Focusing on trees as the big solution to climate change is a dangerous diversion.

FERC Defends Tolling Orders in Atlantic Sunrise Case, Makes Effort to Appease Critics

- Natural Gas Intelligence – 2/11/20

<https://www.naturalgasintel.com/articles/121019-ferc-defends-tolling-orders-in-atlantic-sunrise-case-makes-effort-to-appease-critics>

FERC counsel told the court that the relevant section of the NGA “does not require a final rehearing decision on the merits within 30 days.” Further, a 30-day time limit would be “incompatible” with the amount of work required to properly consider rehearing requests given the complexity of many cases under its purview, according to the Commission. To paraphrase: *‘Daddy says I don’t have to. And it’s Hard!’*

Erring on the side of trampling on states' rights

- Utility Dive – 2/10/20

<https://www.utilitydive.com/news/erring-on-the-side-of-trampling-on-states-rights/571954/>

Constitutional law is not within FERC’s field of expertise. It has no business venturing there, especially when the questions at hand are being litigated in federal courts.

How Louisiana Lawmakers Stop Residents' Efforts to Fight Big Oil and Gas

- ProPublica – 2/7/20

<https://www.propublica.org/article/how-louisiana-lawmakers-stop-residents-efforts-to-fight-big-oil-and-gas>

Louisiana has pioneered ways for other states to discourage environmental protests around “critical infrastructure” projects. Much of it can be traced back to efforts by corporate lobbyists.

Related:

- <https://energynews.us/2020/02/12/midwest/ohio-anti-protest-bill-could-criminalize-support-for-pipeline-demonstrations/>

Correcting Anti-Renewable Energy Propaganda

- Clean Technica -

<https://cleantechnica.com/2020/02/09/correcting-anti-renewable-energy-propaganda/>

I cannot validate this guy's research or numbers. But I do think it's worth reading and getting one's head around, even if it may not be 100% correct. The “opposition” to the energy transition has no qualms about shooting down aspirations of a clean economy with nothing more than sound bites from TV talking heads. This is more substantial.

Energy Emissions Stall as Rich Nations Kick Their Coal Habit

- Bloomberg – 2/11/20

<https://www.bloomberg.com/news/articles/2020-02-11/world-emissions-kept-in-check-as-rich-nations-kick-coal-habit?sref=yLCixKPR>

A little good news is always welcomed, but this is a drop in the bucket.