

The Recorder

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Arbitrary, capricious decisions spell trouble for pipeline

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Editor, The Recorder,

In taking leadership for the proposed Atlantic Coast Pipeline, Dominion saw an opportunity to capitalize on the federal government's push for "clean" power, the advent of new drilling technologies (fracking), favorable regulatory policies and agencies, and state governments eager for economic stimulus and jobs in the wake of the Great Recession.

The proposed Mountain Valley Pipeline, an obvious competitor, spurred Dominion to move as quickly as possible.

All of these factors contributed to a rush for profits that led to poorly conceived plans and reliance on public relations and politics more than careful planning.

Dominion counted on weak governmental regulation to gain the permits it needed. The Federal Energy Regulatory Commission, long captured by industry and with a reputation for rubber-stamping proposals, came through as expected with the critical permit for "public convenience and necessity."

After the final environmental impact statement was issued, Dominion appeared to catch a break with a change in the White House and an administration intent on clearing the way for a massive expansion of fossil fuel projects.

All was going according to plan, for Dominion and the ACP, until the judicial branch of government weighed in and the balance began to shift. Federal appellate decisions vacated or suspended eight permits. Of the eight lost permits, three illustrate the old truth that "haste makes waste."

First, consider the U.S. Forest Service's permit allowing the ACP to cross the Monongahela and George Washington national forests. Throughout the early stages of the lengthy review process,

field level Forest Service staff did their job of protecting the forest with exemplary diligence, pointing out numerous concerns that should have been resolved before the permit was granted.

Then, the new federal administration arrived and things changed abruptly. The hard work done at the forest level was set aside and the permit was granted. The intrusion of politics was evident to all; the Fourth Circuit Court wrote that the field-level concerns were “suddenly, and mysteriously assuaged in time to meet a private pipeline company’s deadlines.” The court called the Forest Service’s decisions “arbitrary and capricious” and contrary to law, and they vacated the permit.

Second, the U.S. Fish and Wildlife Service’s “biological opinion” for “allowable take” (i.e., killing) of endangered species failed at the circuit court level for lack of specificity and was deemed “arbitrary and capricious.” The service’s second try also failed, and a third try is now in progress.

Third, the Fourth Circuit vacated the state air quality permit for the Buckingham compressor station. The court found that the Virginia Air Pollution Control Board and Department of Environmental Quality failed to consider non-polluting electric compressors and did a very poor job of addressing concerns about environmental justice. Once again, the court called the process leading to the permit “arbitrary and capricious.”

All three of these rulings are grounded in large part in the 1946 Administrative Procedure Act. The APA is a federal law crafted to assure that government agencies adhere to rules intended to assure fairness and accountability for affected publics.

Sen. Patrick McCarran, who sponsored the APA, called it “a bill of rights for the hundreds of thousands of Americans whose affairs are controlled or regulated by federal government agencies.”

Following the loss of the compressor station permit, Dominion sought to reassure shaky stockholders and lenders. They asserted confidence they would prevail in the Supreme Court appeal concerning crossing the Appalachian Trail, and that would open the door to regaining all the other lost permits and moving ahead to construction this summer and putting the ACP into service by the end of 2021.

Maybe, maybe not — the headwinds facing the ACP are strong. Public concerns about climate change are high, and political leaders at all levels are striving to cut greenhouse gas emissions.

This might be an opportune time for Dominion to take the high road by admitting the ACP’s time has passed, and shifting their attention to big, bold renewable energy initiatives like their offshore wind project.

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