



ABRA Update #274 – April 30, 2020

Issue Highlights . . .

- Appeals Court Hears Arguments Challenging FERC’s “Tolling Order” Policy
- Court Denies Request for A Stay of Keystone XL Decision Affecting NWP 12
- Concerns Expressed About Proposed ACP Yard in Goshen, VA
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Appeals Court Hears Arguments Challenging FERC’s “Tolling Order” Policy

The long practice of the Federal Energy Regulatory Commission (FERC) to delay making decisions on appeals of its rulings – so-called “tolling orders” – was challenged in oral arguments before the D.C. Circuit Court of Appeals on Monday, April 27. The oral arguments, presented via telephone, were before all of the 11 active judges on the D.C. Circuit. The case, *Allegheny Defense project v. FERC*, had initially been decided 2-1 last August in FERC’s favor, but a stinging dissent by Judge Patricia Millet led to the full court to hear the case.

During the course of Monday’s session, several judges expressed skepticism about FERC’s tolling order policy, which effectively permits a project to proceed in taking property through eminent domain and completing a pipeline before affected parties, including landowners, receive a decision on their appeal of the project’s certificate and, if denied, proceed to appeal it in court. It was not clear, though, what decision the DC Circuit might make in the case.

In an [amicus brief](#) filed by the Southern Environmental Law Center, Earthjustice, Natural Resources Defense Council and the Chesapeake Bay Foundation on behalf of several ABRA members and numerous affected landowners argued that FERC habitually tolls requests for rehearing in such a way that a timely judicial review is precluded. The brief goes on to note that the practice is inconsistent with the Supreme Court’s evaluation of Access-to-Justice Principles.

For a recording of the April 27 argument, click [here](#). However, for those choosing to listen to it, pop extra popcorn: the session lasted 3 1/2 hours.

Court Denies Request for A Stay of Keystone XL Decision Affecting NWP 12

Chief Judge Brian Morris for the U.S. District Court for the District of Montana said on April 28 that he would not issue an administrative stay to his April 15 order blocking the Army Corps’ Nationwide Permit 12 (NWP12) program, pending consultation with other federal agencies under the Endangered Species Act. The judge’s earlier decision (see [ABRA Update #273](#) for earlier story) effectively halted the authority of the U.S. Corps of Engineers from issuing any permits for any project subject to NWP12. This includes the Atlantic Coast Pipeline, which at this date does not have a valid NWP12 permit in any of the four Corps districts in which the project’s route runs. Last week, the Corps suspended issuing any NWP12 permits. Judge Morris in his April 28 ruling establish a briefing schedule for the April 15 decision to be appealed.

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Concerns Expressed About Proposed ACP Yard in Goshen, VA

A proposed construction storage yard has drawn expressions of deep concern from a coalition of Rockbridge County citizens plus ABRA, Augusta County Alliance and the Rockbridge Area Conservation Council, both of whom are ABRA members. The proposed yard site is proximate to wetlands and streams on the edge of Goshen that empty into the Calfpasture River and then the scenic Maury River.

In an April 28 letter to the Rockbridge County Planning Commission and County Administrator (with copies to the County Supervisors), Rockbridge resident Molly Petty wrote on behalf of the coalition:

We are especially concerned that the absence of an open public hearing and further limits on public comment under pandemic guidelines will prevent adequate opportunity for scrutiny of the concerns many of us have about the construction yard. The public will have access to the entire Planning Commission packet only one week prior, and in an unknown form (online?) and place (since the public library is closed, the packet will be unavailable for the usual viewing of Planning documents). These conditions are not conducive to public transparency. In addition, presumably ACP will make a presentation at the May 13 meeting and answer commissioners' questions. The public should be able to hear this entire presentation and discussion and participate fully; unfortunately, citizen participation will be nigh impossible for those who have bandwidth or cell phone issues from their rural homes.

Given the public health and safety issues at stake, we respectfully request that the Planning Commission postpone consideration of the site plan or any other site work until full public participation and hearing can take place; given the Governor's Executive Order 55 et al. and positive developments on COVID-19, that could likely be in early summer.

For a copy of Ms. Petty's letter, click [here](#).

In the News:

Local/Atlantic Coast Pipeline

How a GOP-backed plan threatens the Atlantic Coast pipeline

- E&E News – 4/24/20

<https://www.eenews.net/stories/1062955273>

The law stipulates a utility cannot recoup the costs of large new gas pipelines from its captive ratepayers unless it can prove that infrastructure is necessary for reliability and is the least-cost way to meet electricity demands.

At the cusp of historic energy investments in Virginia, COVID-19 handed us a lemon. Let's make lemonade.

- Virginia Mercury – 4/30/20

<https://www.virginiamercury.com/2020/04/30/at-the-cusp-of-historic-energy-investments-in-virginia-covid-19-handed-us-a-lemon-lets-make-lemonade/>

Eventually, however, the virus will run its course or be defeated through vaccine or cure. At that point, we will face a choice: we can stagger blinking out into the sunlight aimlessly wondering now what?, or we can execute the well-developed plan we have spent these weeks and months formulating.

Let's go with the second option.

D.C. Circuit Hears Challenge to Unjust FERC Practice Used to Advance Construction of Unnecessary Atlantic Coast Pipeline

- Southern Environmental Law Center – 4/27/20

<https://www.southernenvironment.org/news-and-press/press-releases/d.c-circuit-hears-challenge-to-unjust-ferc-practice-used-to-advance-construction-of-unnecessary-atlantic-coast-pipeline>

In a rare telephonic argument before the full court, challengers to the Atlantic Sunrise gas pipeline project argued for an end to FERC's practice of issuing "tolling orders," which allows construction to begin—and, in some cases, allows entire pipelines to be completed—before court challenges to FERC's approval can proceed.

Regional/Mountain Valley Pipeline, other

Mountain Valley says pipeline still on track despite issues with permit program

- The Roanoke Times – 4/24/20

https://www.roanoke.com/business/mountain-valley-says-pipeline-still-on-track-despite-issues-with-permit-program/article_8a404b1a-f2d9-50a6-9903-8099141a61fc.html

The Justice Department is likely to ask the judge to narrow the scope of his ruling, and to then appeal if he does not, according to Height Capital Markets, an investment banking firm that has followed Mountain Valley.

Two Controversial Virginia Gas Plants Face Increasing Uncertainty, Documents Show

- Energy and Policy Institute – 4/29/20

<https://www.energyandpolicy.org/two-controversial-virginia-gas-plants-face-increasing-uncertainty-documents-show/>

Related:

- <https://www.virginiamercury.com/2020/04/24/state-corporation-commission-should-pause-process-on-natural-gas-project/>

Big Picture:

Renewables Are the Only Winners in Historic Decline in Energy Demand

- Bloomberg – 4/30/20

<https://www.bloomberg.com/news/articles/2020-04-30/renewables-are-the-only-winners-in-historic-decline-in-energy-demand>

As people around the world consume less oil, gas and coal, electricity generated from the wind and sun will keep flowing, resulting in an unprecedented 8% decline in global carbon dioxide emissions this year, according to a report from the International Energy Agency.

Judges tussle over FERC pipeline 'limbo'

- E&E News – 4/28/20

<https://www.eenews.net/stories/1062990483>

A federal appeals court yesterday appeared open to modifying a long-standing natural gas pipeline approval process that a judge last year condemned for putting landowners in "administrative limbo," but the details of the potential changes were far from clear.

Related:

- <https://www.abralliance.org/wp-content/uploads/2020/04/Chatterjee-defends-how-FERC-treats-protesting-landowners-EE-Energywire-4-28-20.pdf>

- <https://oversight.house.gov/news/press-releases/subcommittee-releases-preliminary-findings-showing-ferc-pipeline-approval>

Covid-19 is closing Canada's carbon-intensive oil sands for business

- Quartz – 4/29/20

<https://qz.com/1846830/covid-19-is-closing-canadas-carbon-intensive-oil-sands/>

Plunging oil prices have forced Canada's oil producers to curtail production, plug wells, and shut down some facilities. And private capital has begun to abandon the 1,179-mile Keystone XL, intended to transport close to a million barrels of oil a day to Gulf Coast refineries.

Exclusive: Chesapeake Energy preparing bankruptcy filing

- Reuters – 4/29/20

<https://mobile.reuters.com/article/amp/idUSKBN22B31M>

The oil and gas exploration and production company that was at the forefront of the past decade's U.S. shale boom, is preparing a potential bankruptcy filing as it grapples with an unprecedented rout in energy prices.

ET facing nearly 600 pipeline violations in Pennsylvania

- Kallanish Energy – 4/30/20

<https://www.kallanishenergy.com/2020/04/30/et-facing-nearly-600-pipeline-violations-in-pennsylvania/>

The talks come just a few months after Pennsylvania imposed a \$30.6 million fine for a 2018 pipeline explosion and fire in Beaver County.

Don't Leave America's Post-Pandemic Energy Policy to Chance

- Bloomberg Opinion – 4/29/20

<https://www.bloomberg.com/opinion/articles/2020-04-29/don-t-leave-america-s-post-pandemic-energy-policy-to-chance>

Government planning is the key to building the sustainable, competitive and resilient energy system we need.