

Pipeline wins Appalachian Trail battle but may lose war

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The U.S. Supreme Court yesterday granted a victory to developers of the Atlantic Coast pipeline when justices overturned a lower court's ruling, throwing out a key permit for the natural gas project. But the pipeline faces more obstacles before it can come online. Francis Chung/E&E News

The Supreme Court yesterday removed one hurdle for developers of the Atlantic Coast pipeline, but the natural gas project remains in legal limbo as a host of other obstacles stand in the way of construction.

In a 7-2 decision, the justices reversed a 4th U.S. Circuit Court of Appeals ruling stating that the Forest Service could not authorize a permit for the pipeline to cross hundreds of feet beneath the scenic Appalachian Trail.

The ruling was a win for pipeline developers Dominion Energy Inc. and Duke Energy Corp., as well as the Trump administration, but it did not resolve problems with other permits the 4th Circuit has scrapped.

"My big takeaway on this is it's a fairly narrow issue on the Mineral Leasing Act," Cale Jaffe, director of the University of Virginia's Environmental and Regulatory Law Clinic, said

of yesterday's ruling. "But the broader implications on pipeline development will be what happens on the environmental issues that the Atlantic Coast pipeline has lost on."

The majority of the Supreme Court's justices found that the National Park Service had limited authority to administer the trail and that federal law only granted NPS an easement to maintain the trail on federal lands. However, the court found, the lands the trail traverses remain part of the George Washington National Forest under the Forest Service's jurisdiction.

Justice Clarence Thomas, writing for the majority, compared the distribution of authority between the federal agencies to easements a rancher might grant to a neighbor that provided only limited rights to the property.

"Sometimes a complicated regulatory scheme may cause us to miss the forest for the trees, but at bottom, these cases boil down to a simple proposition: A trail is a trail, and land is land," he wrote ([*Energywire*](#), June 15).

Proponents of the project lauded the court's ruling and gave little indication of the challenges ahead for the Atlantic Coast pipeline, which — once completed — would carry natural gas 600 miles from West Virginia to North Carolina.

"Today's decision is an affirmation for the Atlantic Coast Pipeline and communities across our region that are depending on it for jobs, economic growth and clean energy," said Ann Nallo, Dominion spokeswoman for the project.

Nallo briefly acknowledged the work ahead following yesterday's ruling, noting the company was "looking forward" to resolving the remaining legal challenges facing the project. She said the pipeline is still expected to be in service by early 2022.

West Virginia Attorney General Patrick Morrisey (R) called the Supreme Court ruling a major victory. Morrisey led an 18-state coalition that submitted an amicus brief in support of the project.

"The Supreme Court's decision will help put back to work thousands of men and women," Morrisey said in a statement. "The Supreme Court's opinion overturns a devastating decision and will go a long way to building a stronger economy and tax base nationwide, especially in north central West Virginia."

But environmental groups warned that there is a lot of work ahead for the pipeline, which only saw a small part of construction completed before grinding to a halt in late 2018.

"We're disappointed the petitioners told the court a story about dramatic sweeping national consequences, and unfortunately they accepted that," said D.J. Gerken, a senior attorney at the Southern Environmental Law Center.

"We're also aware of how narrow a question this was and how many channels the pipeline still must overcome to be completed."

Other permits

The Atlantic Coast pipeline still lacks several authorizations from both state and federal agencies, with some approvals still dependent on the outcome of litigation in other courts.

For example, the Atlantic Coast pipeline is still awaiting a new Forest Service permit. The 4th Circuit, in an aspect of the Forest Service permit decision not challenged in the Supreme Court, said the federal agency could not authorize the pipeline to cross under the Appalachian Trail until it finds that no other alternative routes are viable, Gerken said.

The Forest Service is expected to issue a draft supplemental environmental impact statement next month, with a final version coming later in the year, ClearView Energy Partners LLC wrote in a note to clients yesterday.

Forest Service permits for the project could be among the approvals to get expedited under President Trump's latest executive order meant to spur infrastructure development in the midst of the coronavirus pandemic, ClearView suggested.

Among the other federal permits the project still requires are a biological opinion and an incidental take statement from the Fish and Wildlife Service. The "vast majority" of construction could resume if these permits are obtained and survive legal challenge, ClearView said.

The 4th Circuit has also axed the Virginia Air Pollution Control Board's authorization for one of the pipeline's compressor stations — sited in Buckingham County, Va. — for failing to consider certain technology for pollution control and due to the environmental justice impacts of the planned facility ([*Energywire*](#), Jan. 8).

The appeals court also tossed water permits for the pipeline under Section 404 of the Clean Water Act because they were not consistent with state laws, said Gerken. Getting those approvals will be complicated by a recent order from Chief Judge Brian Morris for the U.S. District Court for the District of Montana.

Morris blocked the use of the Nationwide Permit 12 program for the construction of all new oil and gas pipelines. The Army Corps of Engineers has asked the Supreme Court to intervene to thaw the freeze while the 9th U.S. Circuit Court of Appeals considers the merits of Morris' order ([*see related story*](#)).

Meanwhile, the U.S. Court of Appeals for the District of Columbia Circuit is set to reboot litigation over the Federal Energy Regulatory Commission's certificate authorizing the pipeline.

The case is already fully briefed and expected to reach oral argument in the fall, said Gerken. He noted that this case was a rare opportunity for the D.C. Circuit to hear a challenge to the merits of a FERC certificate for a pipeline that hasn't been fully constructed.

The Atlantic Coast pipeline, he said, is only 6% complete.

'A lot of weak links'

Each of the pending approvals could prove problematic for the Atlantic Coast project, said UVA's Jaffe.

"There are a lot of weak links in various parts of this chain," said Jaffe, who wrote an amicus brief highlighting the pipeline's expected harm to local Virginia economies.

While the majority of the Supreme Court's justices saw the case as a fairly narrow question, Jaffe said, "these broader federalism and agency issues remained in the background not perfectly teed up in this case."

Justice Ruth Bader Ginsburg joined the majority but declined to sign on to its finding as to how much authority Congress delegated to federal agencies and how much authority could be delegated under the Constitution.

In a dissenting opinion joined by Justice Elena Kagan, Justice Sonia Sotomayor called for the court to follow NPS's long understanding of its own authority.

Sotomayor called the court's reasoning "self-defeating." She noted that the majority also recognized that NPS administers the Appalachian Trail but didn't say how it could do that without administering the land beneath the trail.

"Neither does the court explain how the Trail could be a unit of the Park System if it is not land," she wrote. "The Court declares that the Trail's status as a System 'unit' does not 'indicat[e] that the trail and the land are the same.'

"But the Court cites no statutory authority for this view."