With coal in crisis, will Virginia be saddled with millions in mine cleanup costs?

By **Sarah Vogelsong** - July 24, 2020

A CSX train carrying a load of coal stops near the James River in Richmond in July 2019. (Sarah Vogelsong/ Virginia Mercury)

As the COVID-19 pandemic accelerates King Coal's decline, Virginia could be on the hook for millions in cleanup costs if an anticipated wave of bankruptcies destabilizes its bond pool system for managing the risks of company failures.

One of six states, all in or near the Appalachian basin, that allow coal companies to post partial assurances that they will cover the costs of reclamation if they cease operations, Virginia has known there are vulnerabilities in its system for almost a decade.

"The program has sufficient resources to withstand the forfeiture of one or two smaller permits," wrote actuaries in a 2012 report commissioned by Virginia's Department of Mines, Minerals and Energy. "The more significant risk to the Fund is from the exposure to companies with multiple permits and possibly from larger parent companies should they forfeit multiple permits simultaneously."

Eight years later, the situation has taken on an added urgency with the continued shrinkage of the coal industry.

"Any state that has a bond pool is at enormous risk and is almost guaranteed to have to find other sources of funds to pay for the reclamation of abandoned coal mines," said Peter Morgan, an attorney with the Sierra Club who has been tracking Virginia's bonding program for more than a decade.

Virginia's DMME is "concerned" with the system's stability given the ongoing industry contractions, said Division of Mine Land Reclamation Director Randy Casey in an email to the Mercury, pointing out that "major industry-wide forfeitures would strain any bonding system, not just those in Virginia."

Fixes, however, won't be easy. In Virginia, any major alterations to the current system would need to be passed by the General Assembly, and many industry players disagree on the best way to proceed given the belief prevalent among regulators that if coal operators are pushed too far, they will walk away from their permits and leave the public to bear the burden of cleanup.

Still, said Joe Pizarchik, who between 2009 and 2017 served as the longest-running director of the U.S. Office of Surface Mining and Reclamation, the longer state governments and regulators delay in grappling with the problem, "the more severe and dangerous it becomes."

"Eventually these bond pools are going to fail," he said. "And when they fail, the state and federal government will probably be sued, and … then the state will have to come up with the money to complete reclamation."

An insurance system for the states

Since the late 1970s, coal companies have been required under the federal Surface Mining Control and Reclamation Act to guarantee that if they go out of business, the costs of cleaning up the significant damage left in coal mining's wake, from routine destruction like the removal of topsoil, rock and forest to more severe problems like acid mine drainage and the clogging of waterways by discarded gob, will be covered.

The conventional way of guaranteeing that happens is for a mining company to obtain a bond equal to the full cost of the cleanup, usually from a surety company. If all goes well, once the company has finished mining the land and reclaiming it, the state releases the bond. But if the company fails, it forfeits its bond to the state, which then uses those funds to reclaim the land itself.

The federal act, however, didn't mandate full-cost bonding. Instead, Congress allowed individual states to opt for several alternatives. The most notorious was self-bonding, under which a company with a strong track record could simply give the state its word that it was good for the costs without providing any financial assurances at all.

The idea, said Morgan, was that "there are just some companies that are so big that there is just zero risk that they will ever go bankrupt."

The other alternative was the bond pool. Favored by the mining industry, this system allowed a company to put up a smaller bond that would partially cover reclamation costs as long as it also paid into a pool of funds that the state could draw from in the event that a mine failed.

At the time, the system made sense. When SMCRA was passed, said Pizarchik, "we didn't have the consolidation and the huge monolithic companies that we have now." In the Appalachian basin, which has long been home to a patchwork of mines — unlike the larger but less numerous operations found in the West — the bond pool seemed to offer a solution that put less pressure on business while spreading risk out.

Still, there were always cracks. Self-bonding was the largest.

As confidence that some mining companies were in essence "too big to fail" waned, regulators realized the state's safety net was tenuous at best. When Virginia in 2011 hired Pinnacle Actuarial Resources to assess the soundness of its bonding system, the pool bond fund had a balance of $7.3 million and the state had signed off on $26 million worth of self-bonds associated with mines owned by A&G Coal Corporation, a company controlled by the family of now-West Virginia Gov. Jim Justice. If the company walked away from its permits, Pinnacle warned, Virginia's bond pool would be wiped out, leaving the state responsible for millions in additional reclamation costs.

West Virginia Gov. Jim Justice, owner of the Greenbrier Resort, is connected to companies responsible for performing millions of dollars worth of yet-to-be finished mine reclamation work. He is pictured here at the first round of the Greenbrier Classic on The Old White Course *at the Greenbrier Resort on July 29, 2010 in White Sulphur Springs, West Virginia. (Photo by Scott Halleran/Getty Images)*

The actuaries' warnings spurred the General Assembly to act. In 2014, the legislature prohibited the issuance of additional self-bonds, although it left Justice's holdings intact. They would become a bone of contention that continues to this day.

In April 2017, the advisory board that oversees Virginia's bond pool estimated A&G's total reclamation liabilities were more than $134 million, making the company "the largest liability to the pool at this time." DMME regulators have struggled for years to force Justice-owned companies to reclaim their Virginia mine lands without pushing them far enough to forfeit their bonds.

But self-bonding wasn't the only problem Pinnacle found — and the Justice mines weren't the only threat to the bond pool's stability.

One of the most concerning findings of the actuarial study was the fragility of the pool. On paper, the risk seemed to be well spread out among 44 companies holding 219 permits. But in reality, over 70 percent of those permits were controlled by three large parent companies, Pinnacle noted. That changed the risk calculation.

"We assume that … if a permit holder should reach a point where they can no longer finance further reclamation, the parent company is highly likely to, if not certain to, forfeit its other permits to the Reclamation Fund to complete the reclamation process," the study concluded.

One such company was Alpha Natural Resources, then the second-largest coal operator in the U.S. and the holder of 75 permits in Virginia's bond pool. As part of a "shock loss" test, Pinnacle imagined what would happen if Alpha forfeited all its permits and bonds. The results weren't pretty: the actuaries calculated that Virginia's bond pool would be drained in five years and would be $50 million in the red in eight years.

Still, they pointed out, this "highly unlikely, but plausible" event would almost certainly be followed by other coal companies rushing to buy Alpha's permits and assume its reclamation liabilities. That's what had always happened before; it had been years since Virginia had seen a bond forfeiture. It's a point Virginia's Division of Mine Land Reclamation Director Casey also made, noting that "in previous bankruptcies we saw other companies choosing to take the mines through a permit transfer and therefore taking over reclamation responsibilities."

But that optimistic outlook, several industry watchers told the Mercury, was more the result of the methodology of an actuarial study, which looks backward to assess risk and uses those patterns to project what will happen in the future. Pinnacle, in fact, prefaced its 2012 report by saying it had "not anticipated any extraordinary changes to the economic, legal, or social environment which might affect the cost and frequency of default."

"That approach is completely inappropriate" when it comes to the coal mining industry, said Morgan.

Alpha is a good example. In 2015, the "highly unlikely, but plausible" outcome imagined by Pinnacle came to pass when the company filed for bankruptcy, followed the next year by coal giants Arch and Peabody.

To Pizarchik, far from being a surprise, the failures were predictable: "Alpha was doomed to fail from the day it was formed. It was just a matter of time."

The 'harbinger' of a new era

"Extraordinary changes" would in fact be one of the best ways to describe the landscape of coal over the past decade — never, even in its earliest days, immune to unpredictable cycles of boom and bust.

From the glut of domestic gas unearthed by the shale revolution to ever-falling prices of renewables and a rising distaste for fossil fuels driven by concerns about climate change, coal is under economic siege. Metallurgical coal, used in steel production, offers a rare bright spot, especially in Virginia, which saw a small boom in mining beginning around 2015. But the thermal coal used in power plants that dominates the industry, said Pizarchik, "is in a market-driven death spiral that is accelerating."

The coronavirus pandemic has only worsened that spiral. The U.S. Energy Information Administration has forecast that coal will generate only 18 percent of the nation's electricity this year, down from 24 percent in 2019. And while EIA expects a slight bump in its share of generation in 2021 — rising to 21 percent as the pandemic eases and demand normalizes — use of the fuel continues to trend downward.

Moody's Investor Service, in a July comment first reported by E&E News, downgraded the long-term ratings for most U.S. coal companies and called them "highly vulnerable to further downgrades."

"While we expect some bounce-back for coal in 2021, the long-term trajectory remains downward and our view is that the coronavirus pandemic will accelerate energy transition around the world," the firm concluded.

Those contractions will have serious implications not only for the companies themselves and their workers, but for states like Virginia with bond pools that rely on the robust presence of other companies to make up for the failures of one or two.

"Pooling makes more sense when the industry is stable and the risk of multiple forfeitures is low," said a recent report on bonding policies by the Alliance for Appalachia. "However, during a market collapse, such as the coal mining industry is experiencing now, too many bonds being drawn from the pool each year could eventually collapse the fund. Every indication is that the industry will continue its decline. Gambling the future on the current bond pool no longer has promise."

Forfeitures of bonds tied to the bond pool continue to be low in Virginia, with the last occurring in January 2015 for a permit held by Circle L. Coal. The current fund balance is just over $10 million, with $119 million worth of associated bonds for 151 permits posted. Casey told the Mercury that while "there are concerning 'what if' scenarios," the pool bond system "has been very stable to date — even with the downturn in the coal industry."

Still, there are clear signs that trouble may be coming.

A Blackjewel mine near Appalachia, Va. (Sarah Vogelsong/ Virginia Mercury)

Most telling is last summer's Blackjewel bankruptcy. The abrupt collapse of what was then the nation's sixth-largest coal company was unusual from the start, with the operation teetering on the edge of Chapter 7 bankruptcy — total liquidation — rather than staying on track for the more standard Chapter 11 bankruptcy pursued by most coal operators to reorganize troubled finances and get them on more solid footing.

As the case has wound its way through U.S. bankruptcy court, the tortuous proceedings have uncovered ever more evidence that times have changed. For the first time, mining permits being unloaded during bankruptcy have been unable to find a buyer. A letter sent to the bankruptcy court in November 2019 by the firm representing Blackjewel in response to a list of concerns from environmental groups acknowledged that if the company was "unsuccessful" at finding purchasers, "those permits may 'eventually be abandoned.'"

In Virginia, a dispute between two operators, Eagle Specialty Materials and Rhino Energy, about who will take control of 22 permits and their associated cleanup liabilities has dragged on for months. (Rhino filed for Chapter 11 bankruptcy on July 22, adding another layer to the already chaotic situation.) In Kentucky, 53 permits remained unsold as of July 9, according to a court filing.

"This is one of the first big bankruptcies where the company has been very clear that they're going to be abandoning approximately 50 permits," said Morgan. "And we're just going to be seeing more and more of that."

Blackjewel, which at the time it shuttered employed almost 500 workers in Virginia, held more than $2 million in surety bonds for Virginia's mines, and a report by DMME to the advisory board that oversees the pool in fall 2019 stated there isn't "any kind of jeopardy to the Pool" from the bankruptcy. If a related company, Harold Keene Surface, does forfeit its permits, Casey told the board, enough funds should be available to cover needed reclamation.

But the company's inability to pass on its assets spells trouble for other struggling companies in the pool, signaling that forfeitures may come sooner rather than later.

"This whole wave of many bankruptcies puts pressure and stress on the entire system," said Matt Hepler, an environmental scientist with environmental and consumer protection group Appalachian Voices who has worked extensively with reclamation bonding issues throughout the entire Appalachian region. "They were not designed to handle widespread systematic collapse of an industry."

To Morgan, "Blackjewel is a harbinger, and it's representative of what I'm calling this next phase of bankruptcies."

Further exacerbating concerns, Kentucky has warned that even the reclamation bonds Blackjewel had in place at the time of its bankruptcy are insufficient to cover cleanup. A January 13 letter from the state's Energy and Environment Cabinet told the bankruptcy court that an agency assessment of only 20 percent of the company's permits found that actual reclamation costs would likely exceed the bond amounts by roughly $38 million "due to current on-the-ground conditions" related to ongoing environmental problems stalled by the slow process of unwinding Blackjewel's affairs.

West Virginia officials are also fretting about threats to their own bond pool due to a different wave of mine closures. In March, the state's Department of Environmental Protection filed a suit against the ERP mining company after it shuttered its operations, leaving behind a string of environmental violations, including rising water levels in a mine that threatened to contaminate the Tygart River that is the source of drinking water for thousands. In its filing, the department acknowledged the state could take ERP's surety bonds and take over reclamation responsibilities through its bond pool, known as the Special Reclamation Fund, but said that would come with considerable risks.

Among them? "Potentially bankrupting (ERP's) principal surety and administratively and financially overwhelming the Special Reclamation Fund, the State's principal backstop for all revoked and forfeited mine sites in West Virginia."

An A&G Coal mine in Wise County, July 2019. (Sarah Vogelsong/Virginia Mercury)

Adjusting to a new normal

As the six states that still maintain bond pools grapple with how to keep them on sound footing, Pennsylvania may offer a potential path forward.

The Keystone State previously operated a pool bond, but in the late 1990s, fearful of the risks it posed to taxpayers, the state initiated a thorough review of its bonding system that found the bond pool was "not adequate to ensure reclamation of forfeited sites." The review would ultimately lead Pennsylvania the next year to abandon pool bonding entirely, returning to the conventional system of full-cost bonding.

Pizarchik said other states could follow in Pennsylvania's footsteps if the political will exists — but at a minimum, "it is in the interest of the governor, the regulators and the state legislature to assess the situation, analyze it and figure out the least painful way to solve the problem and reduce or eliminate the risk."

The last major review of Virginia's system was the 2012 Pinnacle report that not only led to the elimination of new self-bonding but pushed the General Assembly to also raise the cap on the bond pool from $2 million to $20 million. The state submitted the proposed changes to the federal Office of Surface Mining Reclamation and Enforcement in 2015, but federal review has dragged: as of July 2020, OSMRE had still not signed off on the amendments.

In the meantime, other recommendations put forward by Pinnacle — including changing the structure that governs coal tax payments into the pool fund and getting rid of the pool cap entirely to let funds "build up to levels that would cover the largest loss possible from the default of the largest parent in the system" — have stalled. Casey said eliminating the cap wouldn't be practical: "It could take decades or longer for funds to accumulate at $20 million or more — unless there is a significant increase in coal mining." And because coal production in Virginia is at a historic low, he said, increasing coal taxes would likely have little impact on the pool bond fund while adding to the financial burdens on coal companies.

Regulators, caught between a rock and a hard place, have focused most of their efforts on keeping mine operators in compliance while trying to avoid spurring forfeitures that would endanger the bond pool.

"DMME has not requested (getting rid of the bond pool system) nor do we plan to at this point," said Casey. Besides the historic stability of the pool, he said, "there is also concern that eliminating this fund could actually increase forfeitures due to the high cost of replacement bonds. We want to avoid that."

Morgan, however, said states could benefit from being more aggressive with companies and preparing to participate more closely in bankruptcy proceedings to ensure that public obligations are considered by judges parsing who is owed what from a bankrupt operation's estate.

"It's just past time for the states to open their eyes and realize that these companies are all functionally insolvent," he said. "And so the question is how much the state can force these companies to put whatever resources they have toward reclamation."

Federal changes are another possible route. The "National Economic Transition" platform for coalfield communities released this June with the endorsement of 80 groups from coal-dependent areas called for a federal requirement for state regulatory authorities to develop "bond forfeiture contingency plans and response plans" as well as the review of all bonds to ensure they can cover reclamation costs.

With the coal industry continuing to contract, the clock for strengthening protections before a company files for bankruptcy is ticking. And those pressures will only grow, Pizarchik warned.

"We are, I believe," he said, "going to see more coal companies close, more forfeitures, more bankruptcies and the market is going to continue to shrink."

Sarah Vogelsong

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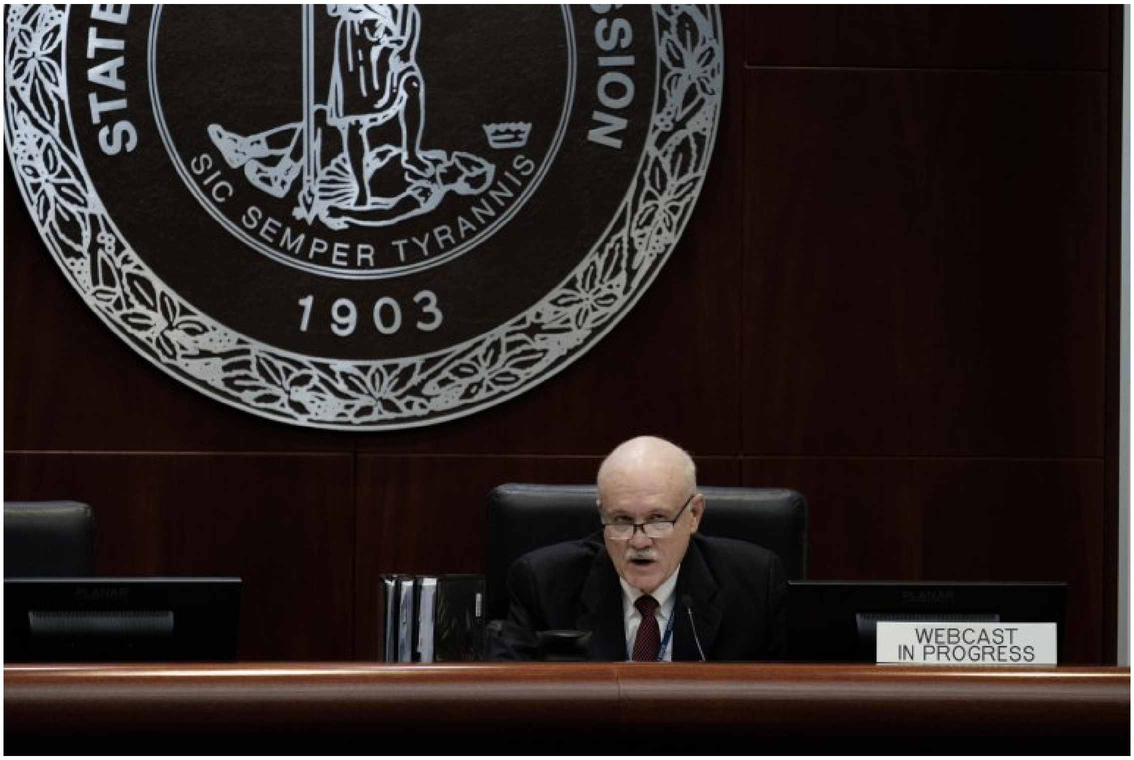
With new energy regime only months away, regulators grapple with gas expansion proposal

By **Sarah Vogelsong** - May 19, 2020



State Corporation Commission Judge Mark Christie. (Photo by Ned Oliver/Virginia Mercury)

Three years after private backers secured state regulators' approval to build a major new natural gas plant in Charles City County, the fate of the facility has become a key factor in a controversial proposal by Virginia Natural Gas to expand its pipeline infrastructure throughout Northern and Central Virginia.

"The big issue here is risk, and how are we going to allocate the risk and who's going to be holding the bag if this plant doesn't get built," said Judge Mark Christie during a Wednesday hearing conducted via Skype.

The facility, known as C4GT, has been in the works since 2016, when private developers first applied to the State Corporation Commission for a certificate of public convenience and necessity. A combined-cycle natural gas plant, the facility is expected to produce some 1,060 megawatts of power — about two-thirds the size of Dominion Energy's most recent natural gas plant, the Greensville Power Station, which is capable of powering some 400,000 homes.

Yet despite securing regulators' thumbs-up in 2017, the project stalled. Last March, the backers asked for a two-year extension of their certificate, citing declining interest from investors in light of changes in the regional PJM power grid's capacity market.

Since then, Virginia's energy landscape has also changed significantly.

The passage this spring of the Virginia Clean Economy Act and a law that will join the state to the Regional Greenhouse Gas Initiative, a carbon cap-and-trade market, have committed Virginia to transitioning off fossil fuels and toward renewable energy sources. Mandatory renewable portfolio standards for electric utilities and ambitious targets for solar and wind development are all designed to phase out the use of coal and natural gas by 2045.

"This legislation casts serious doubt on the financial viability of the C4GT plant and the likelihood it will ever be built," said Greg Buppert, an attorney with the Southern Environmental Law Center representing environmental and consumer protection groups Appalachian Voices and Virginia Interfaith Power and Light, at the beginning of Wednesday's hearing.

But Virginia Natural Gas, in arguing that regulators should approve its pipeline expansion proposal, dismissed those concerns, seeking instead to focus the proceedings on what it described as a "simple need solution" to its obligation as a utility to serve any customer in its territory that requests service.

"This application is not the place to debate public policy and legislation," said VNG attorney Lisa Crabtree. "We're not here to speculate on what will happen in 2045 and beyond."

The proposal

The Header Improvement Project regulators have been charged with considering was first outlined by Virginia Natural Gas this December, when it filed an application with the State Corporation Commission for approval to construct.

The proposal would add about 24 new miles of pipeline to VNG's system: the 6.2 mile Transco Interconnect Pipeline running between VNG infrastructure in Quantico and the Transco pipeline in Catlett in Fauquier County, the 3.3 mile Quantico Parallel Pipe in Fauquier running alongside an existing company pipeline, and the 14.6 mile Mechanicsville Parallel Pipe running alongside another existing VNG line in Hanover, New Kent and Charles City counties.

Two new compressor stations would also be built: the Transco Interconnect station in Prince William and the Gidley station in Chesapeake, while a third station at Ladysmith in Caroline County would be expanded.

And while three parts of the project are directly tied to C4GT's operation, three others — the Transco Interconnect Pipeline, Transco Interconnect Compressor Station and Quantico Parallel Pipe — would be required for any expansion of

Virginia Natural Gas' capacity, testified the company's director of gas supply, Kenneth Yagelski.

Currently, VNG's system is supplied from the north by an interconnection with the Dominion Energy Transmission pipeline at Quantico that is responsible for providing capacity to about half of VNG's customers.

An expansion plan submitted by Virginia Natural Gas to the State Corporation Commission to meet the needs of the planned C4GT natural gas plant and increase system capacity.

But the Dominion pipeline has no more capacity, said Yagelski, and VNG has concerns about its continued reliability.

"It's never resulted in an outage to our customers, but we've come very close in the past," he told the State Corporation Commission, and an extended outage "we believe is a possibility."

That means that for any expansion of VNG's service, the utility must look for other sources of supply, said Yagelski.

"We've often looked at a new connection to Transco at this location for reliability purposes, but it would be very expensive for VNG to justify on its own the 6.2 miles of pipe and the compressor station," he told regulators. "This is an opportunity for VNG to essentially take advantage of the larger HIP project to get that reliability increase when some of those costs are shared with the other HIP participants."

C4GT: The 'big enchilada'

While Virginia Natural Gas emphasized the reliability benefits of the Header Improvement Projects, the trigger for the proposal was requests for service from C4GT, Dominion gas subsidiary Virginia Power Services Energy and Columbia Gas of Virginia.

But regulators and other case participants made it clear that in their eyes, the driving factor behind the application was C4GT — what Judge Christie characterized as "the big enchilada of this whole project."

The importance of C4GT to the overall expansion project matters, staff and opponents contended, because recent filings and public policy changes put the facility's future on shaky ground.

Particularly of concern, these parties said, was an April 14 letter from C4GT to Virginia Natural Gas requesting a six-month delay in the date by which the company would be required to close on its financing until debt markets "resume their normal functioning" after disruptions due to the COVID-19 pandemic.

Yagelski complained that this delay has been "mischaracterized over and over again" as a project delay rather than a financial deadline delay — a distinction hidden in docket filings by redactions made on confidentiality grounds. Original filings made on April 14 and 21 only noted a "slight delay" being sought by C4GT, with further detail blacked out. Only on May 8 was more information about the proposed delay provided in revised filings.

VNG redacted testimony filed April 21.

VNG revised testimony filed May 8.

Regardless, SCC utilities analyst Alison Samuel testified that it was this letter that caused SCC staff to change their position on May 11 from a more neutral stance focused on shielding utility customers from risk to the recommendation that either approval be suspended until C4GT's "financial close is imminent" or the entire application should be denied.

"Staff is concerned with the level of uncertainty regarding the need for the proposed project. C4GT is the customer driving the need for this project," she said. "The delay C4GT requests, 'until markets resume their normal functioning,' could be indefinite or one of many."

Yagelski, however, said C4GT, as well as Columbia Gas and Dominion's gas subsidiary, had assured Virginia Natural Gas that they continue to be committed to the project.

Columbia on May 12 filed comments in support of the project with the commission.

Environmental groups are opposing a pair of natural gas power plants planned for Charles City County. (Tom Burkett/ River Healers)

C4GT's "financial close has always been dependent upon receiving the (certificate of public convenience and need)," said Yagelski. "It's a large project. It requires a big financial commitment from their investors. They are not going to obligate themselves to the project without a certificate to provide fuel to the facility. And because of the … uncertainties related to COVID-19, they were simply asking for a change in the date of when they would have to have financial close."

Christie nevertheless appeared skeptical.

"We approved this three years ago. And you basically just said the reason they haven't secured financing is because of the market conditions," he said. "So it's not the fact that you haven't had a CPCN from us, it seems like. You didn't even ask for this until two and a half years after they got their CPCN, which we extended. And it's not COVID; I don't even know why they bothered to cite that."

Holding harmless?

The question of whether or not C4GT gets built might not at first blush seem to impact captive ratepayers who would be locked into paying for a project regardless of its success. Because C4GT is a merchant generator that will be privately funded and operated, its investors alone will bear the risks of any failure.

Such risks tend to be higher than those faced by utilities, which are guaranteed to recoup their costs and a rate of return from ratepayers. Consequently, merchant operators are more sensitive to the rise and fall of the marketplace.

"There are merchant plants all over this country — I could make you a list — that have not made money, and in merchant plants, if they don't make money, the owners are not in business for charity," Christie said during a cross-examination of Yagelski. "They will close them down."

C4GT, however, relies on a natural gas supply. And because its proposed location in Charles City County falls within Virginia Natural Gas' territory, any costs VNG incurs in building infrastructure to support the facility will have to be repaid by its customers.

In the current case, the utility has said that only 5 percent of the costs would be borne by its captive customers, with the remaining 95 percent the responsibility of C4GT, Columbia Gas and Virginia Power Services Energy.

Of the roughly $346 million in capital costs estimated for the Header Improvement Project, staff have calculated ratepayers will be responsible for almost $16 million — although SCC Division of Utility Accounting and Finance Deputy Director Scott Armstrong cautioned that the estimates are "very preliminary" and the capital costs could be as high as half a billion.

Furthermore, he noted, citing the Mountain Valley and Atlantic Coast pipelines that have seen costs rise from $3.5 to $5.5 billion and $5 to $8 billion, "recent and well-documented experience with other regional pipelines demonstrates that initial cost estimates are often significantly understated."

Even if the estimates are correct, staff expressed concerns that if C4GT were to close down early, captive ratepayers would be left "holding the bag" for the remaining costs.

In particular, Armstrong took issue with Virginia Natural Gas' plan to recover its costs over a 70-year period, even though its precedent agreements committing the three major customers to gas service are only 20 years.

"If parties are contracted for 20 years but have 70-year payment plans, that leaves a 50-year period in which those parties are anticipated but not obligated to pay their share of capital recovery," he said.

As a result, Armstrong has recommended that the costs be required to be paid back over 20 years — a plan that would increase all customers' immediate costs but over the long term would bring down its lifetime costs from about $1.4 billion to $913 million.

Virginia Natural Gas has resisted the recommendation, which attorney Joseph Reid said could increase proposed rates for the three major customers by as much as 25 percent. (Any rate increases for distribution customers would need to be approved by the commission in a separate case before going into effect.)

The utility has previously argued that a requirement to pay off costs over 20 rather than 70 years could potentially make the Header Improvement Project "cost prohibitive" and has emphasized other protections in place to protect ratepayers.

Several of the protections alluded to Wednesday are written into the precedent agreements and not available to the public for review. In written and spoken testimony, however, Virginia Natural Gas has pledged "to hold its distribution customer(s) harmless … from any costs that do not benefit these customers."

Ultimately, said Yagelski, the risks will fall "on VNG's shareholders."

Noting that "to the extent that no one needs this capacity at some point in the future, we will have no one to assign those costs to," John Cogburn, a regulatory planning director with VNG parent company AGL Services, said that "the company is willing to take the risk that that is not the case, because we believe that natural gas plays a role in a low-carbon future for a very long time."

A legislative boon or bust

Exactly how strong the outlook for natural gas is given Virginia's new legislative commitments was a theme of both public comments in opposition to the project and the conversation throughout the Wednesday hearing.

A letter from 12 Democratic legislators to the State Corporation Commission argued that because of an oversupply of gas in the U.S. and decreased energy demand due to the pandemic, the project will "most likely face significant economic setbacks that will only burden municipalities and VNG ratepayers."

"With the project and its buyers facing funding and other economic uncertainties including COVID-19 that may last well into the foreseeable future, this project is too big a financial risk (and) therefore it cannot go forward," they wrote.

Christie voiced reservations about the effect Virginia's participation in RGGI, which will begin Jan. 1, will have on C4GT.

"It's a de facto carbon tax. And it's meant to drive up the cost of fossil fuels like C4GT's plant and increase the cost of both energy and capacity by effectively putting a price on carbon," he said. "I mean, that's how RGGI works. How will that not have an impact on the market conditions affecting C4GT's ability to raise capital to get this plant built?"

Yagelski, however, contended that RGGI participation could actually benefit C4GT because it will force older and less efficient coal and natural gas-fired plants to close down, leaving the power grid with greater need for energy.

"They may wind up being one of the last gas facilities that would be impacted," he said.

And while Virginia Natural Gas said it had not conducted any analysis on the impact of the 2020 changes in state energy policy on the financial viability of C4GT — "We wouldn't have the data to make such analysis," said Yagelski — its executives pointed to other legislation and utility findings as proof of natural gas' continued importance in Virginia.

While the Clean Economy Act aims to usher in a renewables-dominated energy future, it "also includes exceptions for allowing fossil fuel generation like natural gas fired generation to ensure the reliability of the electric system," said Yagelski. "The Virginia Energy Plan explicitly states that there's a need for natural gas infrastructure to make certain that reliability continues."

Dominion's most recent long-range plan filed May 1, he also noted, makes it clear "that natural gas-fired generation will continue to play a critical, low-emission role in their system for decades to come."

Legislators and the coalition that helped craft this session's sweeping energy legislation, however, have criticized the utility's plan as unnecessarily reliant on gas, with VCEA sponsors Sen. Jennifer McClellan (D-Richmond) and Del. Rip Sullivan (D-Fairfax) accusing Dominion of sidestepping its commitment to the renewables transition despite having assured lawmakers such an energy transformation was possible

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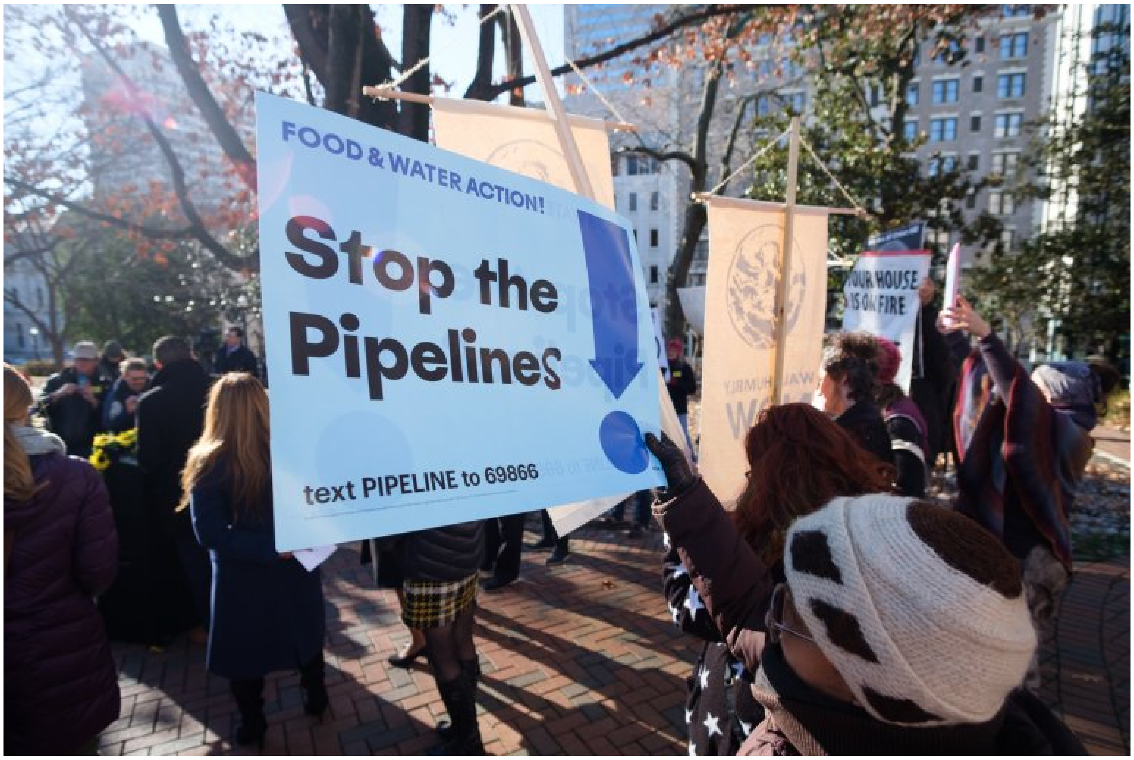
What sank the Atlantic Coast Pipeline? It wasn't just environmentalism.

By **Sarah Vogelsong** - July 8, 2020



Protesters wave signs opposing pipeline construction at a rally earlier this year in support of a Green New Deal for Virginia. (Photo by Ned Oliver/Virginia Mercury)

The news seemed to come out of nowhere.

On a hot Sunday afternoon, Union Hill pastor Paul M. Wilson was sitting on his porch eating seafood when he got a call that the Atlantic Coast Pipeline, the 600-mile natural gas conduit that he and thousands of others in Virginia, West Virginia and North Carolina had been fighting for six years, was dead.

At first he couldn't believe it. And he wasn't alone in his skepticism — when Dave Sligh, a pipeline opponent in Charlottesville and conservation director of Wild Virginia, saw a Facebook post with the announcement, his first thought was, "That's not fair, he shouldn't be making jokes like this."

But the calls kept coming.

"Within 15 minutes I got four or five other calls. Some people out of state called me," said Wilson. "Then I knew it was real."

It was, he said, "the best news I've heard in 47 years" — since his wife had agreed to marry him.

In a year of turmoil, the news that Dominion Energy and Duke Energy had decided to pull the plug on the pipeline still managed to be a bombshell. The companies had poured billions into the effort, which was only about 6 percent complete. They had just won a victory at the U.S. Supreme Court, which had declared the pipeline could pass beneath the Appalachian Trail. And Dominion CEO, president and chairman Tom Farrell had been adamant over the prior months that the project not only was still viable, but would be done by 2022.

So what happened?

Dominion attributed the pipeline's demise to "ongoing delays and increasing cost uncertainty which threaten the economic viability of the project." In particular, the utility pointed a finger at a string of legal challenges to federal and state permits the pipeline had received and then subsequently saw yanked. The delays had been extremely costly: since the initial \$4.5 to \$5 billion estimate, the price tag had risen to \$8 billion.

"To state the obvious, permitting for investment in gas transmission and storage has become increasingly litigious, uncertain and costly," Farrell told investors on a Monday call. "This trend, though deeply concerning for our country's economic growth and energy security, is a new reality."

Dominion Energy CEO Tom Farrell at Richmond City Hall in 2019 for an announcement about the city's plans to build a new coliseum, which he spearheaded. (Ned Oliver/Virginia Mercury)

President Donald Trump's administration, which had argued on behalf of Dominion before the Supreme Court in February, blamed what U.S. Secretary of Energy Dan Brouillette on Sunday called "the well-funded, obstructionist environmental lobby," an accusation picked up by industry groups like the U.S. Energy Association, which called out "environmental lobbyists with a myopic view and an ideology-driven agenda."

"Unfortunately, the economic promise of this project is no longer a reality for thousands of Americans in this region," said Brouillette in a statement posted to Twitter. "Instead, Duke and Dominion have had to make the difficult decision to end this project because it is no longer economically viable due to the costly legal battles they would continue to face."

Federal court rulings Monday that halted the Dakota Access pipeline's operations and upheld a freeze on a key permit for the Keystone XL pipeline seemed to reinforce the view that Atlantic Coast's demise was just one casualty of a nationwide assault on pipelines. In their wake, many analysts wondered whether natural gas pipelines can still be built in the U.S. at all.

But seeing the ACP's defeat merely as proof that natural gas pipeline projects are increasingly litigious and difficult to build "really ignores the fact that the problems with this project were self-inflicted," said Southern Environmental Law Center attorney Greg Buppert, who has represented project opponents in numerous cases, including the *Cowpasture* case that went to the Supreme Court.

"There were always different choices that the company could have made. … Those are decisions that have consequences," he said.

Greg Buppert of the Southern Environmental Law Center offers comments about a hearing on the Atlantic Coast Pipeline on the steps of the U.S. Supreme Court in Washington, D.C. Feb. 24, 2020. (Sarah Vogelsong/Virginia Mercury)

What undid the pipeline in the final accounting may take years to untangle. But interviews with a dozen Virginia opponents of the project pointed to three main drivers of their victory and the developers' defeat: a growing lack of faith in both Dominion and state government, an increasing recognition of environmental injustice and a legislative shift toward renewable energy that will allow Dominion to replace lucrative capital investments in natural gas with investments in wind, solar and storage.

Together, the first two factors led to the forging of an unusually large and persistent grassroots movement that drew from not only different parts of the state, but different causes: clean energy, social and racial justice and property rights. Challenges to the pipeline would come from all three areas, ensnaring the project in the courts as the costs mounted.

"Death by a thousand cuts — that's what I think about it," said Del. Sam Rasoul, D-Roanoke, a pipeline opponent who has been the state's strongest legislative advocate for a Virginia version of the Green New Deal. "There really wasn't one finger on the scale that was heavier than the rest."

Delaying the pipeline until it became uneconomic wasn't explicitly a strategy, said Lewis Freeman, a Highland County resident who became leader of an anti-ACP coalition called the Allegheny Blue-Ridge Alliance.

"I would have objected had anyone suggested" writing it down, he said. But "at the same time, we were aware that slowing the process down slows the projects down."

And the delays, said Wild Virginia's Sligh, allowed opponents to better present the facts of the case as they saw them to the public. Others saw the years ticking by without energy disruptions as evidence that undermined the Atlantic Coast Pipeline's contention that gas was urgently needed in the region.

"It wasn't just delay for delay's sake. It was delay because it allowed the story to be told over and over and over," Sligh said.

A loss of institutional faith

Love it or hate it, few would deny that the coalition of groups that fought the pipeline was a remarkable example of grassroots organizing. Over time, big-tent movements tend to splinter because of the differences among their members. And in many ways, the groups that joined together to fight the Atlantic Coast Pipeline were unusually diverse: from mountainous areas, cities and rolling farmland, Black and White, affluent and poor and across the political spectrum.

"You could ride through the countryside in some of these communities and see the 'No Pipeline' signs right next to Confederate flags sometimes, or sometimes next to a Trump sign, because the principles that were involved were across the map," said Sligh.

But the coalition didn't disintegrate over the years. And the reason why, as conversations with opposition members revealed, was that many saw grassroots action as the course of last resort when institutions had failed them.

The Atlantic Coast proposal "was a flawed plan that really highlighted the inequities in a flawed regulatory system," said Harrison Wallace, Virginia director of the Chesapeake Climate Action Network.

From the beginning, there was widespread distrust of both Dominion's plans and of the legitimacy of state and federal permitting reviews. The question of need was an early point of skepticism: the Federal Energy Regulatory Commission that certificates interstate pipelines requires only agreements with gas offtakers as proof of need — even if, as was the case with the Atlantic Coast Pipeline, those agreements are with affiliates of the same companies developing the project.

And even if opponents accepted the utilities' contention that the ACP was urgently needed infrastructure in a region of constrained supply, there were a range of other claims they didn't trust: That the pipeline could be safely built along steep karst terrain and disturbed mountain ridges could be restored. That air quality would not be significantly affected by the construction of a compressor station in the overwhelmingly African American community of Union Hill in Buckingham County. That erosion and sedimentation wouldn't damage water quality along the roughly 300 miles of Virginia and hundreds of waterways the pipeline would cross.

A sign on State Route 663 near Union Hill Baptist Church in Buckingham , one of several in the area opposed to Dominion Energy's Atlantic Coast Pipeline. (Robert Zullo/ Virginia Mercury).

State and federal agencies' assurances that impacts would be minimal did nothing to diminish the opposition. On the contrary, they fueled many opponents' belief that regulators were rubber-stamping a done deal, a view many traced back to the 2014 press conference announcing the project that saw then-Democratic Gov. Terry McAuliffe, appearing alongside Farrell, enthusiastically endorse the ACP.

"It was very hard for the public to see the state as a neutral arbiter," said Buppert. "Gov. McAuliffe made the decision that the state was in favor of this project. And I think the public was rightfully skeptical of what that meant for agency reviews."

So egregious did many opponents find agency action that public meetings themselves became a tool for winning Virginians to their cause. Wallace said that if his group wanted to increase people's commitment to the pipeline fight, they took them to state Air Pollution Control and Water Control Board meetings.

"Those are what agitated our campaign the most," he said.

The State Air Pollution Control Board approved a contentious permit for a Dominion Energy compressor station, part of the company's Atlantic Coast Pipeline in January 2019 over the objections of anti-pipeline demonstrators. (Mechelle Hankerson/ Virginia Mercury)

Sligh, a former Virginia environmental regulator, attributed some of the backlash to what he perceived as the Department of Environmental Quality's "timidity."

"Essentially their posture has been in so many circumstances, 'Unless you can force us by going to court and beating us, then we're not going to do it,'" he said. "They could have gone so much further in protecting water quality in these 401 (certification) cases than they did, and they just would not take the most protective stance that they have the power and the duty to do."

As protests became legal challenges, with the opposition largely represented by the Southern Environmental Law Center and the Sierra Club, a series of judicial rulings seemed to bolster the anti-ACP coalition's claims that the state and federal agencies had rushed to sign off on the project as judges repeatedly found that reviews had been inadequate and incomplete. At the time Dominion and Duke canceled the pipeline, eight necessary state and federal permits had been withdrawn.

"If those permits had actually been issued in a way that met the law, the courts never would have overturned them," said Tom Hadwin, a retired utility executive who fought the pipeline as part of ABRA.

Over time, said some opponents, cracks even began to appear among Dominion employees and contractors. In Buckingham, Wilson said some utility representatives privately told him they didn't think the project was solid — conversations Freeman said he'd also heard from others had occurred elsewhere.

"A lot of the people who were selling the project for Dominion, they weren't on board," said Wilson. "They knew."

Pastor Paul Wilson, of Union Hill and Union Grove Baptist churches in Buckingham County, was among the most outspoken opponents of the Atlantic Coast Pipeline, which was proposing to build a compressor station in the county. (2018 file photo by Robert Zullo / Virginia Mercury).

Union Hill: an increasing recognition of environmental injustice

Nowhere along the pipeline's proposed line became as big a flashpoint as Union Hill, the predominantly African American community in Buckingham County founded by freedpeople after the Civil War. There, Dominion proposed — and the state approved — the construction of a roughly 54,000-horsepower compressor station.

"I think Union Hill is really the linchpin that did it," said Karen Campblin, who as environmental and climate justice chair of the Virginia State Conference of the NAACP was extensively involved in Atlantic Coast opposition. "It was such a blatant environmental justice issue on every level: local, state and federal government, and it was alarming how we had all these government regulations and processes in place, and those even failed."

Union Hill, to many opponents, became the latest example in a long history of siting polluting infrastructure in minority and economically disadvantaged communities, a trend that has been extensively documented across the U.S.

If built, the Union Hill compressor station would have been one of three along the 600-mile line and the only one in the commonwealth. A demographic survey found the population living within 1.1 miles of the chosen site was 84 percent non-White, far above the roughly 31 percent of the statewide population minorities comprise.

Opponents of a proposed Atlantic Coast Pipeline compressor station in Buckingham County protested outside the General Assembly Building ahead of a State Air Pollution Control Board meeting. (Ned Oliver/Virginia Mercury – Dec. 19, 2018)

Yet Dominion, and Virginia DEQ, refused even to recognize Union Hill as an environmental justice community until January 2020, when during oral arguments before the U.S. 4th Circuit Court of Appeals in Richmond an attorney conceded the validity of the demographic survey's results.

The failure ultimately was one of the major factors that caused the 4th Circuit to yank the compressor station's permit, sternly admonishing DEQ and the Air Pollution Control Board that "environmental justice is not merely a box to be checked" and calling their analysis "flawed."

The conviction that, as Union Hill resident and pipeline opponent Ruby Laury put it, developers "were taking advantage of us as people of color," brought allies flocking to the movement, particularly after civil rights leader Rev. William Barber and former U.S. vice president Al Gore took up the cause in winter 2019.

Residents from the historically Black Union Hill community in Buckingham County were given front-row seats to see Rev. Dr. William Barber II and Al Gore speak at a rally against the Atlantic Coast Pipeline. (Mechelle Hankerson/ Virginia Mercury)

"You have like-minded folk who are willing to cross lines, so to speak, with other like-minded folk," said Rev. Wilson of Buckingham. "I'm a traditional missionary Baptist preacher, pastor. Under normal circumstances, I would not have reached out to form a bond with the fine folk of Yogaville. … And not only Yogaville, but there were other alliances that we made, and we followed through."

The Union Hill struggle also hit at a time when the public was becoming more attuned to and receptive of the idea that minority and poor communities have for years been disproportionately burdened by pollution. At the same time, high-profile police shootings of Black men across the U.S. were increasing racial tensions and heightening public awareness of systemic inequities — currents that have crested this summer following the killing of George Floyd by Minneapolis police.

"America as a whole is actually waking up and coming out of a state of denial to see that there is a huge inequity toward the Black and Brown communities," said Campblin. And Union Hill, she said, "was part of this whole systemic and discriminatory system that prevented the right education, the right information to be disseminated into these communities, but also to prevent representation at the table where these decisions are being made."

In looking at the failure of the Atlantic Coast Pipeline, Del. Rasoul warned against seeing the story merely as "a win for environmentalists or a win for the liberal left."

"There is a collective that is frustrated and it is manifesting itself in different ways — protests in the street, grassroots coalitions rising up against these projects," he said. “I think people are finding ways of voicing their frustration. And during this perfect storm of the Black Lives Matter movement and the failure of our response to the COVID crisis, people have had it with certain systems that are not being responsive to their needs.”

Renewables: A new pathway to profit

Even many opponents celebrating their victory in the wake of the pipeline cancellation were quick to note, however, that grassroots opposition was only part of the story. Corporate bottom lines were another.

“The reality is that Dominion made a calculation that, especially with the passage of the Clean Economy Act, they could replace many of their profits from natural gas now with $12.5 billion in profits from the Clean Economy Act,” said Rasoul.

The Democrat-driven Virginia Clean Economy Act that cleared the General Assembly this winter not only commits the state to transitioning its electric grid to 100 percent carbon free by 2050 but gives broad mandates to utilities, and particularly Dominion, to build out the enormous wind, solar and storage infrastructure that will be needed to meet that goal.

A map of Dominion Energy's Coastal Virginia Offshore Wind test project. (Dominion Energy)

That directive, said Hadwin, offered a way out for Dominion as it moved to divest itself of the Atlantic Coast Pipeline as well as most of its natural gas assets, which it announced it would sell to Berkshire Hathaway in a nearly $10 billion deal Sunday.

"Without that guaranteed income stream, it would have been really hard for them to let go of the Atlantic Coast Pipeline," said Hadwin.

Talking to analysts on an investor call Monday morning, Dominion head Farrell made clear the promise the utility sees for shareholder profits in renewables. In response to a question about how the company plans to offset its lost capital spending opportunities — which come with lucrative returns — with its move away from natural gas, Farrell described renewables and grid protections as "a very large opportunity" for the company's utilities in not only Virginia but North Carolina, South Carolina and other states.

"That's where we will be concentrating our capital investments over the next at least decade," he said. "It's tens and tens and tens and tens of billions of dollars over the next decade."

Sarah Vogelsong

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