Court rejects another pipeline permit

| January 09, 2020

MONTEREY — Yet another permit has been yanked away from Dominion Energy for its proposed Atlantic Coast Pipeline.

The U.S. Fourth Circuit Court of Appeals on Tuesday, Jan. 7 vacated the proposed ACP's Buckingham compressor station air permit that was granted last January by the Virginia Air Pollution Control Board.

The station was proposed for Union Hill, a historically African American community in Buckingham County, where disagreement has churned for years over whether the station would disproportionately affect a minority, low-income population.

The suit challenging the permit was brought by Friends of Buckingham, represented by the Southern Environmental Law Center, and the Chesapeake Bay Foundation.

In the 3-0 opinion, written by Judge Stephanie Thacker, the court remanded the permit to the Air Board for further deliberation on two grounds, as noted in these excerpts, as noted by the Allegheny- Blue Ridge Alliance:

• "The board's decision was arbitrary and capricious and unsupported by substantial evidence. As petitioners point out, ACP's and respondents' arguments on appeal read as 'convenient litigation positions.' Nothing more. We vacate and remand for further explanation of reliance on the redefining the source doctrine, and/or why electric turbines are not required to be considered in Virginia's BACT analysis of the compressor station."

• "We conclude that the board failed in its statutory duty to determine the character and degree of injury to the health of the Union Hill residents, and the suitability of the activity to the area. We vacate and remand for the board to make findings with regard to conflicting evidence in the record, the particular studies it relied on, and the corresponding local character and degree of injury from particulate matter and toxic substances threatened by construction and operation of the compressor station."

• "To be clear, if true, it is admirable that the compressor station 'has more stringent requirements than any similar compressor station anywhere in the United States,' and that residents of Union Hill 'will be breathing cleaner air than the vast majority of Virginia residents even after the compressor station goes into operation,' but these mantras do not carry the day. What matters is whether the board has performed its statutory duty to determine whether this facility is suitable for this site, in light of EJ and potential health risks for the people of Union Hill. It has not."

Feds again urged to halt pipeline work

| January 23, 2020

MONTEREY — The Southern Environmental Law Center has asked the Federal Energy Regulatory Commission to order work stoppage of the proposed Atlantic Coast Pipeline after the U.S. Fourth Circuit Court of Appeals rejected an air permit foe the Buckingham Compressor Station. The project now lacks eight key permits.

"In light of the Fourth Circuit's (Jan. 7) opinion, we again urge the commission to issue an order halting all construction of the ACP," SELC attorney Greg Buppert said in a letter to FERC. "Allowing continued construction would violate the condition of the Commission's certificate of public convenience and necessity requiring that Atlantic

Coast Pipeline LLC obtain all applicable authorizations required under federal law before commencing construction. The Commission cannot merely rely on Atlantic's temporary work stoppage to address this issue. It should issue a stop-work order.
"Environmental Condition 10 of the Certificate Order," he continued, "requires that Atlantic receive all applicable authorizations required under federal law before it can receive written authorization to commence construction … At this time, the ACP is a largely unpermitted pipeline — it is missing eight required authorizations." He outlined those as follows:
• Nationwide Permit 12 Verification, Pittsburgh District, U.S. Army Corps of Engineers: suspended by Pittsburgh District, Nov. 20, 2018. Letter from Angela M. Woodard, Dominion Energy Transmission, Inc., to Kimberly D. Bose, FERC;
• Nationwide Permit 12 Verification, Norfolk District, U.S. Army Corps of Engineers: suspended by Norfolk District, Nov. 20, 2018;
• Nationwide Permit 12 Verification, Wilmington District, U.S. Army Corps of Engineers: suspended by Wilmington District, Nov. 20, 2018;
• Special Use Permit and Record of Decision, U.S. Forest Service: vacated by Fourth Circuit, Dec. 13, 2018. Cowpasture River Pres. Ass'n v. Forest Service;
• Right-of-Way and Construction Permits, National Park Service: remanded by Fourth Circuit, Jan. 23, 2019, to be vacated by Park Service Order;
• Nationwide Permit 12 Verification, Huntington District, U.S. Army Corps of Engineers: vacated by Fourth Circuit, Jan. 25, 2019;
• Biological Opinion and Incidental Take Statement, U.S. Fish and Wildlife Service, vacated by Fourth Circuit, July 26, 2019;
• Article 6 Permit, Virginia State Air Pollution Control Board (implementing federal Clean Air Act requirements): vacated by Fourth Circuit, Jan. 7, 2020.
"As the Fourth Circuit has recognized, proceeding with construction in the absence of required agency authorizations would violate the Certificate Order: FERC's authorization for ACP to begin construction is conditioned on the existence of valid authorizations (required under federal law)," he wrote. "Absent such authorizations, ACP, should it continue to proceed with construction, would violate FERC's certificate of public convenience and necessity. As we have advised the commission in prior correspondence, consistent with the Fourth Circuit's direction and the Commission's own Certificate Order, the commission cannot permit construction in the absence of these required authorizations.
"Although Atlantic temporarily halted construction on the ACP, we are concerned that unless the commission takes further action, Atlantic could resume construction at its discretion. Moreover, Atlantic's temporary work stoppage does not relieve the commission of its obligation, set forth in the Certificate Order, to approve construction of the ACP only when Atlantic has all applicable authorizations required under federal law. Accordingly, we urge the commission to issue a stop-work order halting all construction activities on the ACP," Buppert said.

Appalachian trail, pipeline court arguments proceed

| January 23, 2020

BY JOHN BRUCE • STAFF WRITER

MONTEREY — The Cowpasture River Preservation Association responded Jan. 15 to petitioners U.S. Forest Service and Atlantic Coast Pipeline in papers filed with the U.S. Supreme Court.

At issue is whether the United States Forest Service has statutory authority under the Mineral Leasing Act to grant a gas pipeline right-of-way across the Appalachian National Scenic Trail.

"Both petitioners rest their case on the premise that the trail is a footpath that 'traverses' land, but is itself not land," the response contends.

Southern Environmental Law Center and others represent CRPC.

"Accordingly, they contend that, where the trail traverses national forest, the Forest Service can grant a pipeline right-of-way because no lands in the National Park System are implicated," the introduction says.

Trail is land

"Petitioners' argument is incorrect for three reasons," they argued. "First, as the Park Service explained in the administrative record under review, the Appalachian Trail is a 'protected corridor, a swath of land averaging about 1,000 feet in width' … The Park Service's Land Resources Division has done the math, confirming that the Trail corridor occupies nearly 240,000 acres. The Forest Service's own Management Plan states that the 'Trail is administered by the Secretary of the Interior' and that 'about 9,000 acres' of the 'Trail Corridor' are in the George Washington National Forest. Acres of what? Obviously, acres of land.

"Second, if the Appalachian Trail does not count as land, it cannot be a unit of the National Park System, because Congress has defined a park 'system unit' as 'any area of land and water administered by' the Park Service. Yet the trail clearly is such a unit. Every official source has listed the trail as a unit of the park system for nearly 50 years, and the Forest Service acknowledged as much in the record under review.

Third, they continued, "petitioners mistakenly suggest that, because the Trails Act states that the Appalachian Trail 'shall be administered primarily as a footpath,' the act draws a 'distinction' between the footpath and the land it traverses. That is a non sequitur. The 'footpath' qualification, as the Forest Service concedes, means that the trail is intended primarily for use by pedestrians, as opposed to mountain bikers or ATV drivers. A 'footpath' is just land with a particular purpose. Neither the Trails Act nor the Organic Act distinguishes between 'land' and 'foot-paths' any more than they distinguish between 'land' and the various monuments, historic buildings, park-ways, and recreational areas that are also units of the National Park System.

"Land is what you walk on. The Appalachian Trail cannot be separated from the land that constitutes it. Petitioners' argument that it can is inconsistent with ordinary English usage, the language of three statutes, longstanding agency practice, and the solid reality of the trail's existence as land upon which generations of hikers have walked, and their children and grandchildren will walk. 'The land was ours before we were the land's,' wrote Robert Frost. This land, this trail, belongs to the American people. Their representatives in Congress have directed that it shall be administered by the Park Service 'in such manner and by such means as will leave (it) unimpaired for the enjoyment of future generations.' Only Congress has the power to change that mandate," they argued.

"The Trails Act does not provide specific rules for easements and rightsof way. Instead, it authorizes the designated administrator of a trail, the Secretary of the Interior or the Secretary of Agriculture as the case may be, (to) grant easements and rights-of-way upon, over, under, across, or along any component of the national trails system in accordance with the laws applicable to the national park system and the national forest system, respectively … For oil-and-gas pipelines, the applicable law is the Mineral Leasing Act of 1920 … That Act authorizes the Secretary of the Interior or appropriate agency head to grant 'rights-of-way through any Federal lands' for 'pipeline(s)' that 'transport oil, natural gas, synthetic liquid or gaseous fuels.' The pipeline authorization … uses a special definition of 'Federal lands' that carves out 'lands in the National Park System' and certain other protected categories. Using separate authority under the Organic Act, the Secretary may grant rights-of-way 'through a (Park) System unit' for power lines, telephone lines, and certain 'canals, ditches, pipes and pipe lines, flumes, tunnels, or other water conduits,' — but not for pipelines that carry oil or gas. Because of the carve-out in the Leasing Act and the absence of Organic Act authority, oil-and-gas pipelines can obtain new rights-of-way across federal lands in the Park System only through case-by-case legislation. Congress has authorized pipeline rights-of-way crossing System units 'at Denali National Park, Glacier National Park, Great Smoky Mountains and Gateway National Recreation Area.'

"Since the 1968 designation of the Appalachian Trail, Congress has never authorized any oil or gas pipeline to cross the trail on federally owned land. To be clear, some pipelines do cross the trail. Those pipelines were not authorized under the Leasing Act, but instead cross on state or private land (to which the Leasing Act does not apply) or on federal land using an easement that predates federal ownership. Several new pipeline projects have crossed the trail using that approach in recent years. Today, respondents know of 55 pipeline crossings at 34 locations: 15 on non-federal land, and 19 on federal land in easements that predate either federal ownership or federal designation of the trail as a Park System unit. There are no crossings on any other federally owned lands. And no pipeline has been built across the trail on a new right-of-way over federally owned land since its inclusion in the Park System."

Horizontal drill uncertain

The argument continues, "Where the pipeline crosses the Appalachian Trail, Atlantic plans to use horizontal drilling to make a borehole one mile long and three-and-a-half feet wide. Drilling will require Atlantic to run heavy machinery, like drilling rigs, mud pumps, cranes, backhoes, and engine-driven light plants, around the clock for more than a year, on either side of the trail. Construction noise will affect trail use, and 24-hour lighting of Atlantic's machinery will dim the stars visible from the trail. The success of the mile-long horizontal drill is not at all certain. Atlantic's contingency plan is to use the 'direct pipe' method further up the mountainside, 'which is expected to intensify the disruptive effects of the pipe-line,'" the response says.

"The result in this case is governed by the plain text of three interconnecting statutes … The Mineral Leasing Act allows pipeline rights-of-way across federally owned lands "except lands in the National Park System.' The National Park Service Organic Act defines that system to include 'any area of land … administered by the Secretary of the Interior, acting through the Park Service.' The National Trails System Act states that 'the

Appalachian Trail shall be administered … by the Secretary of the Interior,' who delegated that duty to the Park Service. Accordingly, the Appalachian Trail is among the 'lands in the National Park System' administered by the Park Service, and the Forest Service lacks authority under the Leasing Act to grant a pipeline right-of-way across the trail on federally owned lands. All of petitioners' arguments to the contrary rely on a fiction that attempts to divorce the Appalachian Trail from the land it encompasses. The Park Service administers the former, they argue, but not the latter. That elusively metaphysical distinction is inconsistent with the relevant statutes and multiple federal regulations, and contradicts the government's own longstanding approach to administering the Trail," the summary states.

Serving as counsels for the respondents are Southern Environmental Law Center; Kellogg, Hansen, Todd, Figel and Frederick, P.L.L.C.; and Sierra Club Environmental Law Program.

Respondents include Cowpasture River Preservation Association, Highlanders for Responsible Development, Shenandoah Valley Battlefields Foundation, Shenandoah Valley Network, and Virginia Wilderness Committee, Sierra Club and Wild Virginia Inc.

Access full case documentation by going to www.supremecourt.gov/, clicking on search, then docket search and entering 18-1584 or 18-1587.

Va. attorney general seeks pipeline case dismissal

| January 30, 2020

BY JOHN BRUCE • STAFF WRITER

MONTEREY — State attorney general Mark Herring filed a brief on Jan. 22 with the U.S. Supreme Court stating the proposed Atlantic Coast Pipeline threatens Virginia's natural resources without clear corresponding benefits.

Petitioners U.S. Forest Service and Atlantic Coast Pipeline challenge the appellate court decision finding the Forest Service is unauthorized to issue Atlantic a right of way to cross the Appalachian Trail. They seek reversal of the Fourth Circuit Court of Appeals ruling in favor of groups including Highlanders for Responsible Development, Cowpasture River Preservation Association, Shenandoah Valley Battlefields Foundation, Shenandoah Valley Network, and Virginia Wilderness Committee, Sierra Club and Wild Virginia Inc.

Herring cut to the heart of whether the pipeline is needed. It is not, he said, for a variety of reasons. He argued whatever the justices' decision, it would not influence the case's outcome. He requested dismissal. Plus, the underlying need for a project widely characterized as a debacle was unfounded and unbacked, he said.

"In their effort to garner public and political support for the pipeline project, Atlantic and its allies have insisted that it will address a growing and unmet demand for natural gas from customers in Virginia and North Carolina," Herring said in the brief. "But there is reason to doubt those claims.

"In its application for a certificate of public convenience and necessity from the Federal Energy Regulatory Commission, Atlantic cited studies forecasting that 'demand for natural gas for power generation in Virginia and North Carolina will grow 6.3 percent annually between 2014 and 2035.'"

‘Faulty premise’

“Its pipeline, Atlantic argues, is needed to meet the growing energy demands of these customers,” Herring continued. “Atlantic’s argument, however, rests on a faulty premise. In 2017, for example, a federal agency charged with collecting information to promote sound energy policy-making projected that demand for natural gas for electricity would actually decrease between 2015 and 2020 — and not return to 2015 levels until 2034.

“The numbers for Atlantic have not improved since then,” he continued. “In its most recent long-term Integrated Resource Plan, the electric utility affiliate of Dominion Energy — the majority stakeholder in the pipeline joint venture — modeled five scenarios for meeting electricity demand through 2033. All but one of the models showed no significant increase in natural gas consumption, and the only model that included annual consumption numbers actually showed a decrease at the end of that time frame.

“Even these estimates may be overstated. In 2018, Virginia’s State Corporation Commission rejected Dominion’s annual IRP, expressing considerable doubt regarding the accuracy and reasonableness of the company’s load forecast. For one thing, the Commission pointed out that Dominion’s forecasted load growth exceeded the forecast of the regional transmission organization by more than 50 percent. The Commission also criticized Dominion for consistently failing to meet expectations, observing that the record … reflects that the load forecasts contained in the Company’s past IRPs have been consistently overstated, particularly in years since 2012, with high growth expectations despite generally flat actual results each year,” Herring explained.

“Complicating matters further, natural gas is increasingly at a competitive disadvantage due to technical advances and cost reductions in renewable energy. Unfortunately for Virginians, regardless of the need for the pipeline and whether it is ultimately completed, the ever-rising costs of building it will be passed on to consumers by the companies that have contracted with Atlantic to carry gas through the pipeline — all of which are affiliates of the pipeline’s sponsors, Dominion, Duke Energy, and Southern Company.

“Although demand for the pipeline may be questioned, there is no debate about the value of the natural resources it will invariably impact. In Virginia alone, the proposed route crosses three celebrated natural features: the George Washington National Forest, the Blue Ridge Parkway, and the Appalachian Trail,” Herring stated.

“Combined with the adjacent Jefferson National Forest, the George Washington National Forest spans more than 1.6 million acres, extending along the Appalachians and following Virginia’s northwest border with Kentucky and West Virginia. Together, the two forests afford virtually every type of outdoor recreation activity … imaginable,” including hiking, mountain biking, camping, fishing, bird watching, horseback riding, photography, orienteering, and cross-country skiing, he said. “Given their natural beauty and varied offerings, it is not surprising the forests attract three million visitors per year.

“The Blue Ridge Parkway runs for nearly 500 miles through Virginia and North Carolina, following the Blue Ridge Mountains and linking the Shenandoah National Park to the Great Smoky Mountains National Park. It was the product of numerous public works projects undertaken in the 1930s, which helped the Appalachian region climb out of the Great Depression. Labeled America’s favorite drive, the Parkway boasts stunning long-range vistas and close-up views of the rugged mountains and pastoral landscapes of the Appalachian Highlands. According to the National Park Service, the Parkway protects a

diversity of plants and animals, and provides opportunities for enjoying all that makes this region of the country so special," Herring said.

"The Appalachian Trail stretches from Maine to Georgia, with more than a quarter of its 2,000 miles traversing Virginia. The trail has a rich history, both in its creation nearly 100 years ago and in the public-private partnerships that have stewarded its preservation through the years. Virginia is home to several of the Trail's most visited sites, including Grayson Highlands and Mount Rogers. These and other highlights draw countless visitors each year to enjoy the solitude and natural beauty of the Trail — the same attributes that led Congress to designate the Trail as one of the first two scenic trails under the National Trails System Act more than 50 years ago.

"The challenged permitting decision violated numerous federal statutes and regulations," Herring continued. "Because it planned to cross National Forest land, Atlantic needed a permit from the United States Forest Service — an agency that describes its own mission as caring for the land and serving people. Unfortunately, the service's evaluation of the permit fell far short of that promise."

Erratic tactics

Herring went on to explain that initially, the Forest Service appeared skeptical of the pipeline project and prepared to conduct the type of rigorous review envisioned by its governing statutes and regulations.

"In October 2016, the service expressed concern about Atlantic's plan to construct the pipeline on the steep slopes of the George Washington and Monongahela National Forests. Because the project would need to be consistent with Forest Plan standards that limit activities in areas that are at high risk for slope and soil instability, the Service explained that it needed further evidence before it could continue processing Atlantic's permit application," Herring said. "Specifically, the Forest Service requested plans for 10 sites that could demonstrate that Atlantic's technology would meet stabilization requirements."

He said the USFS said those plans would be "merely representative," and the forest service had cautioned, "Should the ACP project be permitted, multiple additional high hazard areas would need to be addressed on a site-specific basis."

Months later, Herring noted, in February 2017, the USFS confirmed all 10 site-specific stabilization designs would be required, and told Atlantic it was "not comfortable" with proceeding with the permit without seeing the plans.

Then, in December 2016, Herring explained, Atlantic circulated a timeline for FERC and USFS review, looking to complete the administrative process by October 2017.

Consistent with that timeline, FERC completed its draft Environmental Impact Statement in late 2016. In April 2017, the USFS commented on the draft, noting repeatedly that FERC lacked adequate information to draw the conclusions it reached, particularly about sensitive soils and steep slopes, he said. "Most significantly, the Forest Service commented that no analysis of a National Forest Avoidance Alternative has been conducted, and environmental impacts of this alternative have not been considered or compared to the proposed action. The Service explained that it could not support the recommendation that the National Forest Avoidance Alternative be dropped from consideration and reiterated its request for evaluation of such an alternative."

Herring said that around the same time, the USFS provided critical comments on the company's draft biological evaluation. USFS had cautioned the pipeline plans would likely create long-term negative impacts to the ecosystem, including on potentially sensitive species.

"Just a month later, however, the Forest Service abruptly changed course," Herring explained. "Without acknowledging its change of position, the Service now told Atlantic that the eight additional site-specific exemplars it had requested would not be required and the two previously provided designs would be adequate to proceed with the permit review."

Herring noted the USFS released its draft Record of Decision, which proposed granting the permit and exempting the pipeline from a number of forest plan standards. "Directly contradicting its prior position, the Forest Service agreed to drop its request for an analysis of alternatives that did not cross National Forest land, stating that such alternatives — never analyzed — would not offer a significant environmental advantage when compared to the pro-posed route or would not be economically practical," Herring said.

"In response to comments, the Service stated that FERC had adequately considered alternatives and concluded these alternatives would not provide a significant environmental advantage over a shorter route that passes through National Forests. In a similar about-face, the Service responded to Atlantic's updated biological evaluation by amending its previous conclusion to find that the pipeline would not result in a loss of sensitive species.

"Given the Forest Service's whiplash-inducing approach to Atlantic's permit, it is hardly surprising that the Fourth Circuit invalidated its decision on a number of separate grounds," Herring said.

"Observing that the National Environmental Policy Act requires particular care when a proposed project would cross a National Forest, the court of appeals found that the Service had failed to offer a detailed discussion of steps Atlantic could take to mitigate landslide risks, erosion impacts, and water-quality degradation. The court recognized that the Forest Service had expressed numerous concerns in its comments on FERC's draft EIS and had insisted that the permit should not be issued unless Atlantic provided 10 site-specific designs to demonstrate that its technology would be effective at mitigating the risks posed by steep slopes," Herring explained.

"Given statements made in the final EIS — including that slope instability/ landslide risk reduction measures have not been completed or have not been adopted — the court determined that the final EIS could not have addressed the Service's concerns.

"In other words, to support its decision to approve the project and grant the (permit), the Forest Service relied on the very mitigation measures it previously found unreliable. In the Fourth Circuit's view, that was insufficient to satisfy NEPA, and did not constitute the necessary hard look at the environmental con-sequences of the ACP project."

'Striking and inexplicable'

Herring went on to note the Fourth Circuit also found the USFS had not complied with its "Planning Rule" when it applied project-specific amendments to 13 standards, including nine related to the plan for the George Washington National Forest. Those amendments

relaxed forest plan standards for soil, water, riparian, threatened and endangered species, and recreational and visual resources.

"Despite acknowledging that the purpose of the amendments was to allow Atlantic to meet the requirements of the National Forest Management Act and accompanying regulations because it could not meet those standards without amendments, the Service failed to analyze whether the substantive requirements of the 2012 Planning Rule were directly related to the purpose of the amendments."

As the Fourth Circuit explained, he noted, "The lengths to which the Forest Service apparently went to avoid applying the substantive protections of the 2012 Planning Rule — its own regulation intended to protect national forests — in order to accommodate the ACP project through national forest land on Atlantic's timeline are striking, and inexplicable."

And, Herring pointed out, the court of appeals found the USFS had violated NEPA and other laws by failing to consider alternatives that did not cross National Forest land. In the court's view, it was improper for the USFS to rely on FERC's final EIS for several reasons.

• First, the standard FERC applied to determine whether an alternative route should be used was different from the standard imposed on the USFS, Herring said.

• Second, despite expressing concerns about the lack of study of off-forest alternatives in the draft EIS, the final EIS the USFS adopted included a discussion of National Forest Avoidance Route Alternatives that was identical to the draft. "The court simply could not conclude that the Forest Service undertook an independent review and determined that its comments and concerns were satisfied when it seemingly dropped its demand that off-forest alternative routes be studied before the ACP was authorized without any further analysis," Herring said. "The court thus determined that the Service had acted arbitrarily and capriciously."

"The writ of certiorari should be dismissed," Herring argued. "It is undisputed that this court's decision will not change the outcome of this case. As just described, the Fourth Circuit determined that the Forest Service violated its statutory and regulatory obligations in three different ways that are separate and apart from its authority under the Mineral Leasing Act to issue a pipeline right-of-way crossing the Appalachian Trail. Atlantic and the Service challenge none of those holdings and each is independently sufficient to invalidate the permit. Because this court reviews … judgments, not statements in opinions, that fact alone provides a sufficient basis to dismiss the writ of certiorari."

Herring said the reasons Atlantic and the USFS offer for deciding the question presented now are both "unpersuasive" and "betray a fundamentally misguided and troubling understanding of the Service's task on remand."

Focusing on the Fourth Circuit's holding that the Service was required to consider non-forest alternatives, Herring said, "the government doubles down on the very reasoning the court rejected — that FERC's final EIS properly analyzed all non-forest alternatives and there is nothing left for the Forest Service to do. But as the Fourth Circuit explained, that argument fails on multiple levels, including that the Service was required to undertake an independent review to determine whether FERC had addressed its concern that no analysis of a National Forest Avoidance Alternative had been conducted, and environmental impacts of that alternative had not been considered or compared to the proposed action. By promising to repeat its blind adherence to FERC's analysis on

remand, the government endorses nothing less than an abdication of the Forest Service's responsibilities," he said.
"Atlantic's arguments are even more dismissive of the Forest Service's important statutory and regulatory mandate," Herring continued. "Atlantic insists that even if it were somehow possible to divert the pipeline to permissibly cross the Trail on state or private land, that diversion would involve additional unnecessary cost, cause needless delay, and make no sense. But diverting the pipeline away from National Forest land where appropriate is precisely what the statutes and regulations were intended to accomplish, and what they require of the Forest Service. Atlantic's suggestion that doing what existing law demands would impose costs and make no sense is an argument for changing the law, not ignoring it as the Service did here."

'All-out push'
"Even more striking," Herring added, "Atlantic characterizes respondents' effort to defer review of the question presented until after remand, if necessary, as particularly disingenuous given the Fourth Circuit's apparent discomfort with pipelines."
According to Atlantic, he noted, "this court should ignore a United States court of appeals' unanimous analysis and the multiple independent reasons it found for remand because a private petitioner asserts that court cannot fairly decide an entire category of cases."
Instead, he noted, Atlantic is asking the court to join it and the federal government in their "all-out push to see that a particular pipeline is constructed when, where, and how the pipeline company wants it to be. But as the Fourth Circuit appropriately recognized, the Service's statutory and regulatory obligations are not optional, nor are they speed bumps to be hurried over and driven around if necessary."
Herring argued the requirements the USFS ignored when it granted the pipeline permit were crafted by Congress with an eye toward protecting the National Forests for generations to come.
"Virginians rightly should be able to count on the Forest Service to fulfill its congressionally mandated obligations — not to mention its self-professed mission of caring for the land and serving people," Herring said. "This court should not endorse the dismissive attitude the Service and Atlantic demonstrate toward the Forest Service's critical responsibilities by prematurely deciding a question whose resolution will not impact the outcome of this case."

Feds seek to resume Atlantic Coast Pipeline construction

| February 13, 2020

BY JOHN BRUCE • STAFF WRITER

MONTEREY – Sneaky stuff.
The Federal Energy Regulatory Commission staff on Monday asked the U.S. Fish and Wildlife Service to reinitiate formal consultation so the proposed Atlantic Coast Pipeline project can resume construction.
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.

The "request for reinitiation of consultation, and discussion at the October 22, 2019, meeting as documented in the meeting minutes, suggest FWS is once again preparing to commit legal errors in an effort to approve this pipeline along Atlantic's preferred route," said Patrick Hunter of the Southern Environmental Law Center, in a letter to FERC Tuesday. "FWS cannot complete consultation on the ACP until it knows the final route of the pipeline." Hunter cited FWS comments to reauthorize impacts on threatened and endangered species, including the candy darter and clubshell.

Additionally, SELC on Tuesday wrote to the Army Corps of Engineers advising that the pipeline company expressly plans to violate at least one of a permit's general conditions and has taken steps to do so.

Instead of any environmental concerns, getting the pipeline built seemed to be the major force driving FERC to ask FWS to get the job done.

"On July 21, 2017, FERC initiated formal consultation with the FWS," said David Swearingen, chief, FERC Gas Branch 4 Division of Gas, Environment and Engineering, recounted in a letter to Spencer Simon, FWS deputy assistant regional director.

New assessment needed

Swearingen noted that on Oct. 16, 2017, the USFWS transmitted its biological opinion and incidental take statement for the project, which was vacated by the U.S. Court of Appeals for the Fourth Circuit on May 15, 2018.

The USFWS issued a revised opinion and statement on Sept. 11, 2018. That, too, was vacated by the Fourth Circuit on July 26, 2019. As a result, formal consultation, including a new biological assessment and opinion, is required for the project to proceed.

He noted that informal consultation with the FWS has been ongoing, with the ultimate goal of updating the documents. FERC staff attended a meeting with Atlantic, Dominion, and the USFWS on Oct. 22, 2019, to discuss survey and technical needs. On Oct. 25, 2019, Atlantic and Dominion requested specific information from the Fish and Wildlife Service about species that will be covered.

Swearingen noted the USFWS said new information such as occurrence records and locations of specific populations relative to construction areas about some of the species is available. "Accordingly," he said, "we are requesting re-initiation of formal consultation so that impacts related to the species covered in the biological opinion can be properly assessed."

As of Tuesday, Southern Co. was no longer a partner in the project, after majority owner Dominion Energy agreed to buy its stake for $175 million. Dominion will own 53 percent and Duke Energy will own 47 percent.

The 600-mile pipeline is now expected to cost $8 billion, twice the original estimate in 2014.

The Allegheny-Blue Ridge Alliance reported last week that concerns over federal regulators' shortsighted approach to pipeline review were discussed on Capitol Hill.

The Natural Gas Act, which has not been amended in decades, was the subject of a broad hearing calling for reform on Feb. 5 before the Energy Subcommittee of the U.S. House Committee on Energy and Commerce.

ABRA reported, "In opening remarks, Congressman Frank Pallone (DNJ), committee chair, said the Federal Energy Regulatory Commission 'must take a more holistic view of the pipeline infrastructure already serving particular regions in order to determine

whether new infrastructure is truly needed.' Continuing, he said, 'I am concerned FERC is simply approving duplicative pipelines, with 60-year lifespans, under the guise of market need even when those pipelines are not really necessary. The Atlantic Coast and Mountain Valley pipeline projects clearly illustrate the need for regional review. Both pipelines cross roughly the same areas in the Mid-Atlantic region and, in some instances, impact the same communities and landowners. Why do we need that duplication? And while work on both pipes has been halted, much of the land damage has already been done because FERC allowed these duplicative projects to begin construction.'"

'Broken system'

Among the witnesses testifying at the hearing were former FERC commissioner Cheryl LaFleur and representatives of the Environmental Defense Fund, Delaware Waterkeepers and the Niskanen Center, all of whom raised many of the concerns ABRA has voiced over the years about the shortcomings of the FERC process, ABRA reported. "A letter to the subcommittee, to become part of the hearing record, was submitted by Richard Averitt IV, a Nelson County, Va., landowner, and 17 fellow landowners in the county whose properties would be impacted by the Atlantic Coast Pipeline."

Their submission said, "We are outraged citizens who have spent nearly six years fighting for our most basic and fundamental rights to due process and property in a country founded on these sacrosanct principles. Moreover, while our specific experience relates to the Atlantic Coast Pipeline, our grievances are representative of injustices perpetrated against thousands of families across the country at this very moment along dozens of new pipelines routes. We are the victims of a broken system, a truly feckless FERC, an energy economy that is wildly incentivized to build infrastructure at any cost, and the outrageous lie that the public need for gas is driven by domestic demand while our nation races to be the largest global exporter."

They continued, "The Natural Gas Act is the framework for these abuses and it has not been updated to reflect the massive changes in the energy economy or the new realities of a diverse energy market since 1962. As a result, the language of the Natural Gas Act is being misused by FERC to deny people their legal and constitutional rights, to strip and undermine the legal authority of states, to undermine the authority of other federal agencies, to ignore the mandates of the Clean Water Act and the National Environmental Policy Act, to trample private property rights, to take from communities the protection of public parks, forests and conserved lands that they have invested heavily in protecting, to take jobs and destroy small businesses, to harm our communities' health, diminish our safety and damage our local environments, all for the benefit of a single industry seeking to advance its own corporate profits and business edge over its competitors."

Bills designed to tighten state regulation of pipelines cleared the Agriculture, Chesapeake and Natural Resources Committee of the Virginia House of Delegates on Feb. 5, ABRA reported. The measures headed to the House floor earlier this week.

Pumping up penalties

The bills, sponsored by Del. Chris Hurst (D-Blacksburg), include:

• HB 643, which would reduce from 36 to 24 inches the minimum diameter of natural gas transmission pipeline that is subject to certain regulatory actions, including a stop work order;

• HB 644, which would direct the State Water Control Board to adopt regulations to penalize the accrual of water quality violations by large natural gas transmission pipeline projects;
• HB 646, which would authorize the State Water Control Board to include civil penalties of up to $50,000 per violation, not to exceed $500,000 per order. Current law sets these limits at $32,500 and $100,000, respectively.
ABRA reported legislation was introduced in the West Virginia House of Delegates that would heighten the penalties for protesting near oil and gas pipelines and other infrastructures. “Under the provisions of H.R 4615, knowingly trespassing on property containing a critical infrastructure facility is punishable by a year in jail and a $500 fine. Criminal trespassing on critical infrastructure property with the intent to ‘vandalize, deface, tamper with equipment, or impede or inhibit operations’ of the facility is a felony punishable by up to three years in prison and a $1,000 fine. An organization or person found to have ‘conspired’ to commit any of the offenses, regardless of whether they were committed, is subject to a criminal fine.”
The bill newly defines “critical infrastructure facility” under West Virginia law to include a range of oil, gas, electric, water, telecommunications, and railroad facilities that are fenced off or posted with signs indicating that entry is prohibited, ABRA reported.

Argument preview: Supreme Court pipeline case nears

| February 20, 2020

BY JOHN BRUCE • STAFF WRITER

MONTEREY — Is a trail considered land, or not?
The question of whether a wilderness trail could actually be land lies at the heart of a legal appeal case going before the U.S. Supreme Court next week.
The court will hear an hour of arguments on the question Monday, Feb. 24, on whether the proposed Atlantic Coast Pipeline can cross under the Appalachian Trail.
Solicitor General Noel Francisco, the fourth highest official in the Department of Justice, represents the government’s side in favor of the crossing and the pipeline, along with pipeline company petitioner counsel Paul Clement of Kirkland and Ellis LLP.
On the opposing side is the Southern Environmental Law Center, representing private citizens who have mounted an offensive effectively blocking the project and leading to the high-court appeal.
According to a brief filed last week by petitioner U.S. Forest Service, at issue is whether the Forest Service has authority to grant rights of way, under the Mineral Leasing Act, through lands traversed by the Appalachian Trail within national forests.

Trail ‘fiction’
The Fourth Circuit decision favoring the respondents — citizen and environmental groups including Allegheny Blue Ridge Alliance members — “rests on the proposition that, in the National Trails System Act, a designated ‘trail’ is itself ‘land,’” the brief says. “The National Trails System Act states that ‘the Appalachian Trail shall be administered … by the Secretary of the Interior,’ who delegated that duty to the Park Service, the respondents argue. “Accordingly, the Appalachian Trail is among the ‘lands in the

National Park System' administered by the Park Service, and the Forest Service lacks authority under the Leasing Act to grant a pipeline right of way across the trail on federally owned lands. All of petitioners' arguments to the contrary rely on a fiction that attempts to divorce the Appalachian Trail from the land it encompasses. The Park Service administers the former, they argue, but not the latter. That elusively metaphysical distinction is inconsistent with the relevant statutes and multiple federal regulations, and contradicts the government's own longstanding approach to administering the trail," the respondents said.

The Forest Service, represented by Francisco, argues in a brief filed last week that a trail is not "land," but a human-made route across the surface of lands that is not inherently fixed and can be relocated to traverse different land. The brief further states the pipeline is in the public interest.

"Because Congress did not authorize the Secretary of the Interior to administer National Forest lands traversed by the Trail, that responsibility remains vested in the Forest Service. The Mineral Leasing Act accordingly provides the Forest Service with authority to grant a pipeline right of way through those lands," the brief states.

Additionally, "The Forest Service, as the land-managing agency charged with administering National Forest lands, thus retains its jurisdiction to administer such lands traversed by the trail."

Francisco continued, "Respondents do not even try to deny that their statutory position would be a death knell for the Atlantic Coast Pipeline and the countless jobs, tax revenues, and energy savings it promises … Never mind the thousands of hours that expert federal agencies have spent studying energy needs, pipeline routes, and environmental impact; in the view of respondents and their amici, the Federal Energy Regulatory Commission cannot be trusted to assess energy needs, and the federal government cannot be trusted to know whether a stretch of trail is on park land or forest land."

The brief continues, "Unfortunately, a panel of the Fourth Circuit has adopted the same view, second-guessing every decision of federal regulators and deciding that it must speak for the trees. The cost of that approach in terms of lost jobs, foregone tax revenues, and unmet energy needs is real."

Francisco's motion for divided argument — to allow the Forest Service 15 minutes and the pipeline company 15 minutes — was granted Feb. 14.

The Supreme Court is expected to rule in May or June.

Pipeline in a pickle

The case is one of several permitting barriers to the $8 billion pipeline project.

Managing partner Dominion Energy expects the pipeline to enter operation in 2022, CEO Thomas Farrell said in a recent earnings call.

The U.S. Fish and Wildlife Service's Biological Opinion and taking statement on threats to endangered species was vacated twice by the Fourth Circuit. The court cited the inadequacy of the agency's analysis of the ACP's impact on several species.

Construction was suspended in December 2018 in the wake of the first opinion being vacated. Dominion Energy has said it would resume construction whenever the third is issued. The agency is currently in the midst of writing the third opinion and taking statement.

Both SELC and ABRA have filed comments with the agency.
The Park Service asked the court to vacate the previously issued permit for the ACP to cross the Blue Ridge Parkway so the agency could "consider whether issuance of a right of way permit for the pipeline to cross an adjacent segment of the Parkway is appropriate."
The Fourth Circuit granted that motion on Jan. 23.
Accordingly, there is no permit for the ACP to cross under the Blue Ridge Parkway.
The U.S. Army Corps of Engineers filed a motion Jan. 18 in the Fourth Circuit for a remand and vacating of the permit the Huntington District of the Corps had issued for the ACP to cross rivers and streams in West Virginia.
The court previously issued a stay of the Nationwide 12 permit issued by the Huntington District, as well as other NWP12 permits issued for the project by Corps districts in Pittsburgh, Norfolk, and Wilmington, that have jurisdiction over other portions of the project.
Fourteen conservation groups, represented by SELC and Appalachian Mountain Advocates, contended FERC failed to look behind the affiliate agreements that Dominion Energy and Duke Energy use to say the pipeline is needed in Virginia and North Carolina markets in support of the project's licensing.
The D.C. Court of Appeals case arguments are pending the outcome of the U.S. Supreme Court case.
SELC, on behalf of Friends of Buckingham, also challenged the Virginia Air Pollution Control Board's decision to approve the pipeline Buckingham County compressor station.
Joining SELC in the lawsuit, filed with the Fourth Circuit, was the Chesapeake Bay Foundation.
The Court vacated the Air Board's permit for the ACP on the grounds that the board did not consider a cleaner and quieter alternative to the compressor station; and the board inadequately considered the impact the project would have on Union Hill.
The 600-mile pipeline would originate in West Virginia, travel through Highland and Bath counties in Virginia with a lateral extending to Chesapeake, then continue south into eastern North Carolina, ending in Robeson County.
Two additional, shorter laterals would connect to Dominion Energy power stations in Brunswick and Greensville counties.

Supreme Court considers pipeline appeal

| February 27, 2020

BY ANNE ADAMS • STAFF WRITER

WASHINGTON, D.C. — The senior most justice lobbed the first question.
"Isn't this case going back for consideration of the environmental consequences?" Justice Ruth Bader Ginsburg asked. "Since those reviews go on, will the Mineral Leasing Act question be moot?"
Monday morning, the U.S. Supreme Court heard an appeal in U.S. Forest Service v. Cowpasture River Preservation Association over a narrow legal question with regard to

which federal agency has the authority to grant a permit for the proposed Atlantic Coast Pipeline to cross the Appalachian Trial near Waynesboro.

It followed court challenges going back two years that made their way through the U.S. Fourth Circuit Court (see sidebar, page 4).

The attorney arguing for the USFS, Anthony Yang, agreed with Ginsburg that could be possible. “That issue could change to make this issue no longer necessary,” he said.

But he stressed the need for the court to make a determination on this point. “If the trail cannot be crossed,” he said, “then this whole enterprise is done. We’re done. They’d have to start over.”

The U.S. Supreme Court was in session Monday to hear oral arguments by attorneys for the U.S. Forest Service, Atlantic Coast Pipeline LLC, and environmental groups represented by Michael Kellogg. The USFS and ACP were provided 15 minutes each to make their legal points and answer questions from the justices; Kellogg was given 30 minutes to do the same on behalf of the Cowpasture River Preservation Association and other environmental groups that had challenged the USFS special permit for the ACP to cross the Appalachian Trail.

The U.S. Supreme Court was in session Monday to hear oral arguments by attorneys for the U.S. Forest Service, Atlantic Coast Pipeline LLC, and environmental groups represented by Michael Kellogg. The USFS and ACP were provided 15 minutes each to make their legal points and answer questions from the justices; Kellogg was given 30 minutes to do the same on behalf of the Cowpasture River Preservation Association and other environmental groups that had challenged the USFS special permit for the ACP to cross the Appalachian Trail.

Ginsburg pressed on. “Then, no one doubts the trail is in the National Park System?”

The trail is administered by the NPS, Yang said, but not the land.

This set in motion a series of questions and debate on what the trail is, and whether it’s considered “land.”

Yang, assistant to the Solicitor General in the Department of Justice, said in his opening statement that while the NPS administers the trail, the ultimate care of the land where the trail sits is managed by the USFS. If the court were to decide the trail is “land” under the NPS, then it would put “vast amounts” of land into the park system, including places where the trail crosses like towns, bridges, and some 600 roads.

Ginsburg pointed to a brief prepared by the ACP respondents, noting they agree the trail is in the National Park System. “So how is the trail not land?” she asked.

“Our view is that the trail is not land,” Yang said.

Justice Helena Kagan weighed in on the difficulties of separating the trail from the land, saying when one walks or bikes on the trail, they’re on land. “You’re saying the trail is distinct from the land that is the trail, but no one makes this distinction in real life,” she said.

Kagan told Yang she found the USFS and ACP briefs on the subject, while well written, “strange to read because you can’t say what you mean, which is that the trail is a piece of land … you are wrapped up in these strange locutions about the trail traversing land … imagining something that goes on top of (the land) somehow,” she said.

She pointed to Yang’s argument that if a tree fell on the trail, it would be USFS personnel called to remove it, not National Park Service staff. On the Appalachian Trail, Kagan said, it’s the park service that regulates the trail’s uses. “The land is the trail,” she said,

and the director of the park service is in charge of regulating that land, including how regulations are implemented.

Justice Sonia Sotomayor wanted to know why two federal agencies cannot have simultaneous management. Under the Mineral Leasing Act, she noted, there is a whole chapter devoted to when two agencies manage land.

"Wouldn't the Trails Act supersede the forest service's permission?" she asked.

"The answer is no," Yang said, wrapping up his allotted 15 minutes to make his oral arguments.

Attorney Paul Clement, arguing on behalf of Atlantic Coast Pipeline LLC, argued the National Trails Act draws a distinction between the trail and the land it crosses. "The trail can even be moved," he said. He pointed to the National Rivers Act, passed by Congress the same day as the Trails Act, and said there would be "untenable consequences" to finding in favor of the CRPA's challenge, moving thousands of acres of land under the National Park Service.

Justice Stephen Breyer was keen to debate whether the land under the trail was also considered to fall under the National Park Service. He asked about how the pipeline would be tunneled under the trail, and Clement explained it would start and end on either side on private land, and be situated about 600 feet under the surface of the trail and about 800 feet under the Blue Ridge Parkway.

Justice Samuel Alito took up this point. "So, the trail is on top of the earth, and the pipeline will be 600 feet below; why can't we just say the trail is only on the surface?" He said when he thinks of a trail, he thinks of something that lies on top of the earth, but a pipeline 600 feet below doesn't seem like a trail. Instead of having to figure out how to distinguish a trail from land it's on, "Why can't we just stay the trail is on the surface and something 600 feet below the surface is not the trail?"

He noted that would pretty much determine the case in favor of ACP.

"I'm sure my clients would be happy to win on that point," Yang said, but again insisted there were broader consequences involved for situations where it's important to determine which agency controls the federal land where the trail crosses. "It is pretty far underground, but as for practical matters, there are other issues," Yang said.

For example, he pointed to multiple uses for national forest land, such as when maple tree producers tap sugar trees in New Hampshire, and they do so with forest service permission.

"That's not quite the question," Breyer said. "The question is, what harm would it do to separate the trail from the land beneath it?" Why, he wondered, should the court decide this case when it would have all kinds of consequences? Sotomayor agreed there were problems with definitions involved. "Does the Act give the park service the right to grant easements on top and below the trail?"

Clement noted when a right of way is granted across land, that does not affect subsurface rights.

Kagan came back to the statute. "Here's the argument that you can't separate the two," she said. "The Mineral Leasing Act gives the authority for rights of way to the Secretary of the Interior (which oversees the National Park Service). That has the authority over the surface, and the subsurface is given to the person in charge of the surface."

Clement disagreed, saying the forest service isn't necessarily in a subsidiary position when the two federal agencies have jurisdiction. "It asks which agency has the authority,"

he said, adding, “Congress isn’t crazy. It had no delusions of including the lands of the National Park Service (that way) … there’s a difference in the implications of the theories.”
He said there are several provisions of the National Trails System Act that make a distinction between the trail and the land without which there could be “untenable consequences” that would end up creating a barrier to all pipeline development in the East.
But Ginsburg reiterated her previous point. “You said the trail is in the National Park Service. How do you respond to that line?”
“I say you keep reading,” Clement responded. “It is in the National Park Service … but that doesn’t make all lands traversed by the trail, all the other lands, subjected to the service’s authority.”
Alito interjected. “The trail is administered in full by the National Park Service,” he said.
“In full, but really meaning in land,” Clement said. “I don’t think it’s as metaphysical as you think,” he said, again noting the trail is maintained day to day by the forest service, “The park service and the forest service haven’t had any problem with this for 50 years.”
“Does the National Park Service have an office here in Washington?” Alito said. “And isn’t that administered by the park service?”
“Yes, but not everything is administered by the park service,” Clement said.

Environmental groups respond
Following oral arguments from the forest service and ACP, attorney Michael Kellogg, arguing on behalf of the CRPA and other environmental groups, had 30 minutes to provide his arguments.
The Appalachian Trail, he said, falls under the Secretary of Interior, National Park Service, as granted by statute. The NPS has authority upon the trail for rights of way that go over, under, across, or along any components of it. “Under counts,” he said. “The MLA talks about jurisdiction, the one who administers the surface, and Congress made it clear with the Trails Act that the Appalachian Trail shall be under the Secretary of the Interior.” Congress also made it clear under the General Authorities Act, he said, that all NPS land is part of the park system, whether it’s land, water, buildings, or monuments.
“The MLA makes it absolutely clear,” he said, “that it referred to all federal lands, except those in the National Park System.”
Chief Justice John Roberts asked about the nature of easements and property rights.
Kellogg said rights of way are passages across land, and the Trails Act repeatedly mentions this.
Alito asked, “What property rights does the National Park Service have … Any property rights over private land?”
Kellogg note the regulations specifically exclude private property arrangements, and only refer to federal lands. The land for the Appalachian Trail, he said, considers its acreage and its length.
“Who regulates its use?” Kagan asked.
Kellogg explained the National Park Service has authority over its use, but can delegate maintenance to other federal agencies.
“Suppose there was a regulation that said no snowmobiles were allowed?” Kagan continued.

“The National Park Service has the authority over those regulations,” Kellogg responded.
Sotomayor said, “The trail runs through towns (like Selma). Can the National Park Service regulate use in that area, downtown Selma?”
“No,” Kellogg said, pointing out again that regulatory authority in question is about federal land, not private or state-owned property.
Justice Neil Gorsuch pressed, and Kellogg reiterated, “The park service has no regulatory power on the national historic trail for private or state lands.”
Breyer provided an example of a state park where Native American remains might be buried, and asked whether a private group could get permission to access them.
“They can do it,” Kellogg said, again noting the NPS has control only over federal where the trail crosses.
“So it’s more like an easement,” Breyer said, “and private individuals or states have the right to use the land as they wish. But if you go down 1,000 feet, then maybe they can do it too, but only if the National Park Service agrees?”
Gorsuch made the point than in the East, the National Park Service administers trails, but in the West, it’s the national forest service. “While you might thwart this pipeline here, you’d open it up for pipelines in the west,” he said.
“I don’t think that’s going to happen,” Kellogg said.
“That’s what I thought you’d say,” Breyer replied.
Justice Brett Kavanaugh pointed out the confusion about which agency has authority, and the enormous consequences of upholding the environmentalists’ position. “You’d expect to see clearer language from Congress,” he said, “if we’re getting all those consequences.”
But, Kellogg noted, the word “administered” is used in every Act from Congress, as applied to regulatory authority, and in this case, he said, the federal government owns the land.
“Couldn’t congress reassign authority?” Gorsuch asked.
Kellogg pointed out that when Congress established authority, it specifically kept the Appalachian Trail and a couple of others separate.
Breyer came back to the subsurface point. “If the land belongs to the federal government, does that mean to the center of the earth? Is that your position with the trails, too?”
Kellogg affirmed that point.
Roberts expressed concern about future development. “It really creates an impermeable barrier,” he said, for bringing natural gas pipelines to the East where they are needed more.
“That’s absolutely incorrect, your honor,” Kellogg replied, noting some 55 pipelines already cross the trail over private or state property, and 19 pipelines cross on federal land by permanent easement before the trail was designated. This question, he said, only applies to where pipelines are proposed to cross on federal land, and no such pipelines have been authorized to cross the trail under the Mineral Leasing Act since the trail was established.
Kagan wanted to know the effect of joint jurisdiction of the two federal entities. “If it’s joint, isn’t it true that the Secretary of the Interior has control over the right of way?”
“Yes,” Kellogg said. “The secretary administers the land.”
“If it’s everything the park service administers, that means it can stop the pipelines across the country,” Sotomayor added. “You haven’t articulated this.”

“Any reason why Congress would single out the Appalachian Trail?” Alito asked.
“Because insofar as it is on federal land, where the most beautiful parts of the trail are found through national forest,” Kellogg said, “Congress drew a bright line.”
“There may be good environmental reasons not to authorize this pipeline,” Alito said, “but do you have anything more than just ‘gotcha’ arguments? Is this what Congress intended?”
Yang came back to the podium and wrapped up his conclusions making the point that Congress gave administrative authority to the park service, but did not intend for all park lands to be governed by the Secretary of the Interior.
Sotomayor interrupted, pointing out that “management” and “administration” have different meanings.
“Management includes management of the land,” Yang said. “If (the USFS) has no authority of the land, then management is transferred.”
Following the hour’s arguments, environmental groups held a press conference on the steps of the Supreme Court building, explaining there are numerous other challenges to the pipeline proposal (see sidebar, above).
The court is not expected to render its decision until late spring or early summer.

From 4th Circuit to Supreme Court: A case history

| February 27, 2020

BY ANNE ADAMS • STAFF WRITER

WASHINGTON, D.C. — It’s taken two years.
The case of U.S. Forest Service v. Cowpasture River Preservation Association was first filed in the Fourth Circuit Court of Appeals, and had two reviews before it was appealed to the U.S. Supreme Court in Washington, D.C.
Here’s a look at the history and significance of the case.

What’s the project?
Atlantic Coast Pipeline LLC (consisting now of principal owners Dominion Energy and Duke Energy) proposes to build a 600-mile natural gas pipeline to carry gas from Marcellus shale in West Virginia, through Virginia to North Carolina.
It would cross 21 miles of federal property in parts of two national forests — the George Washington and the Monongahela.
And, it is proposed to cross the Appalachian Trail at Reed’s Gap, near Waynesboro. How did the forest service handle the proposal?
In 2015, the Federal Energy Regulatory Commission sought input from the USFS about the project. At the time, the forest service told FERC that alternative routes should be found because pipelines didn’t fit the mission of forest plans or policies. The USFS also had myriad environmental concerns. Later that year, Dominion applied for a special use permit to cross the forests anyway, and the USFS requested much more information about the plans. Then Dominion not only sought permission to cross the forest, but also fast-tracked approval to do that. The USFS kept insisting on more information.

What brought the legal challenge?

By mid-2017, the USFS seemed to change its mind, and supported a special use permit that would make way for the pipeline; it issued one in January 2018 despite its admission there would be a negative impact to sensitive species and habitat, in direct conflict with its own rules that say activities on USFS lands may not result in a loss of species. At this point, the Cowpasture River Preservation Association and other environmental groups sued in the Fourth Circuit Court of Appeals to challenge that permit.

How did the court respond?
The Fourth Circuit Court twice agreed with the environmental groups, saying the USFS had abdicated its responsibility to preserve forest resources. It said in its ruling at the time that the USFS had "serious environmental concerns that were suddenly, and mysteriously, assuaged in time to meet a private pipeline company's deadlines." It concluded that in issuing the special use permit, the USFS violated the National Forest Management Act and the National Environmental Policy Act. It also said the USFS did not have the authority to issue the permit under the Mineral Leasing Act and the National Scenic Trails Act to allow the pipeline to cross the Appalachian Trail.

What did ACP do next?
The pipeline owners had one recourse at this point — an appeal to the U.S. Supreme Court. There was no guarantee the court would hear their appeal, but the court agreed to do that just before the end of 2019, and oral arguments were scheduled for this month.

What did the Supreme Court agree to hear?
The Supreme Court limited the question before the justices to only whether the USFS had authority to permit the pipeline to cross the Appalachian Trail under the Mineral Leasing and National Scenic Trails acts. It did not take up issues related to environmental concerns.

What's the heart of the matter?
As outlined in a court summary by Robert Abrams, professor of law at Florida A&M University College, determining the extent of the USFS authority in this case involves nuanced statutory interpretation. While parties on both sides agree the Mineral Leasing Act allows the federal government to permit pipeline rights of way on federal land, but does not permit them on national park service land. While the land involved is national forest property, the plan calls for the pipeline to cross the Appalachian Trail, which is administered by the National Park Service.

Why is it complicated?
The statutory language involved doesn't make this easy, which is why the court's interpretation is important.
The legislation authorizing the Appalachian Trail makes the Secretary of the Interior responsible for it, not the Department of Agriculture, which oversees the USFS. It says, "The Appalachian Trail shall be administered primarily as a footpath by the Secretary of the Interior, in consultation with the Secretary of Agriculture."
But then, under the National Trails System Act, it says, "The Secretary of the Interior or the Secretary of Agriculture, as the case may be, may grant easements and rights of way

upon, over, under, across, or along any component of the national trails system in accordance with the laws applicable to the national park system and the national forest system, respectively, provided that any conditions contained in such easements and rights of way shall be related to the policy and purposes of this chapter."
So, as Professor Abrams noted, the language in the Trails Act "is susceptible to competing interpretations."
On the one hand, emphasizing the explicit mention of the Secretary of Agriculture (USFS) and laws that apply to the national forests, only rules that apply to the national forests are considered, and in one of its briefs, the USFS "concedes that it is not the lead agency" for the Trails Act, and doesn't have jurisdiction over the trail.
On the other hand, the Mineral Leasing Act excludes national park service land from the definition of "federal lands" where pipeline permits can be granted.

What did the lower court rule?
Because it was clear the MLA does not apply to park service land, the Fourth Circuit concluded that Congress clearly distinguished the Appalachian Trail's administration — as assigned to the park service — from the "management" of the land where it traverses. So, the court said that under the MLA, the "appropriate agency head" is the park service, not the forest service. Separately, as Abrams pointed out, it can also be argued that statutory language requires action "in accordance with the laws applicable to the national park system and the national forest system. "That reading would require the forest service to follow both its own statutory requirements and those of the National Park Service."

Why does it matter?
Abrams noted, "The issue before the Supreme Court involves a discrete and somewhat narrow matter of statutory interpretation that arises at the intersection of several statutes governing the administration of federal lands."
Also, resolving the matter will have "very little doctrinal significance" because it applies only when national park system lands that are administered by federal agencies other than the park service, and a pipeline right of way through those lands are sought under the Mineral Leasing Act.
He said, "If the Fourth Circuit decision is affirmed, those pipelines cannot be permitted; if the Fourth Circuit is reversed on that point" such pipelines can be permitted by the federal agency managing the property; in this case that would be the forest service.
He emphasized that if the court upholds the Fourth Circuit ruling, Congress can amend the statutes, and that's not without precedent. "Congress granted an exemption from a different MLA limitation for the Trans-Alaska Pipeline several decades ago," he noted.

What happens if the Supreme Court upholds the Fourth Circuit ruling in favor of environmentalist groups?
If the justices agree with the lower court that the USFS cannot issue a permit for the pipeline to cross the trail, Dominion would have to re-route the pipeline to cross the trail elsewhere, on private or state-owned land. Proponents of the project say this would be expensive to fix, perhaps cost-prohibitive for its shareholders.

What if the Supreme Court overrules the Fourth Circuit?

If the justices overturn the lower court's decision in favor of the ACP, the USFS can re-issue a permit to cross.
However, the USFS must still address the Fourth Circuit's other concerns about environmental issues and harm to sensitive species; otherwise, a new permit would likely again be challenged in court.

Environmental groups respond to court arguments

| February 27, 2020

BY ANNE ADAMS • STAFF WRITER

WASHINGTON, D.C. — The fight is far from over.
According to environmental groups and concerned citizens, opposition to the proposed Atlantic Coast Pipeline is strong, and will remain as such.
Following oral arguments given at the U.S. Supreme Court Monday morning, a press conference was held by the Southern Environmental Law Center, the Sierra Club, and Wild Virginia — all of which have joined forces with other groups to challenge the ACP.
D.J. Gerken, an attorney with SELC, said the question before the court that day was whether the U.S. Forest Service exceeded its authority by "giving over to private pipeline developers our protected public lands, national forests, and allowing them to cross the Appalachian Trail on protected federal land."
And, he noted, "This pipeline has other routes available to it, but the pipeline developers refuse to consider them, insisting, demanding, that they be allowed to cross on our public lands instead.
"The Appalachian Trail is a national treasure and it has rightfully been recognized as an iconic part of our national park system for more 50 years," Gerken continued. "Like other lands in our national park system, Congress gave it special protection from pipeline development on federal land.
"The question before the justices today is narrow, but the problems facing this pipeline are very broad. The permit at the center of this dispute was one of eight that have now been either been revoked by federal courts or withdrawn by federal agencies in response to challenges from community groups."
While the ACP was supposed to be in service by 2018, "it is now less than 6 percent complete, without an inch of pipeline laid in the state of Virginia, and the budget has now ballooned to over $8 billion," Gerken continued. "There's a good reason for that. Dominion and Duke Energy (co-owners of the ACP) insisted on plowing this pipeline through public land, through private land, without any concern for the communities or the special places that were in the way," he said.
"The story of this project is one of slapdash agency decision making; they tossed out the rule books; they ignored the facts; and they gave the pipeline developers what they were demanding under intense political pressure. But every time, our clients, our partners, stood up for their communities, for the places they love, and for the rule of law. These permits were tossed out again and again."
Gerken said these groups were confident in the arguments presented to the court Monday, "but have no doubt – this pipeline is unreasonable. It's risky. And it has a long road ahead no matter what happens today. There's a good reason for that as well. The pipeline

companies should really get off of this road and move onto a different path because studies show this pipeline is unneeded; it's unnecessary. Virginia and North Carolina are served by adequate pipeline capacity and the only purpose this pipeline ultimately will serve is to boost the profits of its developers at the expense of electricity customers and private landowners whose land is being taken for this pipeline."

Kelly Martin of the Sierra Club said she first heard about the proposed pipeline four years ago when she got a call from a Sierra Club member living in the pipeline's route.

"He was concerned that Dominion and Duke energy were trying to build a pipeline that would cut through his family farm to brining fracked gas from West Virginia, threatening to seize his land without any real argument about how this project would benefit his community," Martin said. "He was worried about his safety; he was worried about the risk of explosion on his property; and he didn't want his neighbors or him to have to pay for it through higher utility bills. He wanted to know more about the oversight that he could expect from our government in the permitting process. And here we are, after many years, after many hurried, rushed permit applications have been filed, and after thousands of people have spoken up at public hearings and community meetings, and after tens of thousands of people have written letters and raised their voice against this project. A pipeline, a risky project that was once though inevitable, now is seriously in doubt."

Martin noted the project has met resistance "all along the proposed 600 miles of this pipeline because it threatens to harm our water, our public lands, and because it would lock us in to decades of dependence on dirty, dangerous fracked gas, a fossil fuel that is exacerbating the climate crisis.

"The case against the ACP didn't start here today; it will not end here today," she said. "It lacks seven other needed permits besides this one we discussed in court. It is years behind schedule; it's billions of dollars over budget, and every day, it looks more and more likely that the ACP will never be built."

David Sligh of Wild Virginia added, "Dominion's proposal to cut and blast up and down our steep mountain slopes through many miles of precious forest is reckless and it's irresponsible. It's a most direct assault on our most sacred places — places that we as Americans have promised we would preserve and protect – the national forests, the Blue Ridge parkway, the Appalachian Trail.

"The pipeline threatens many rare and sensitive species," he continued. "It would degrade some of our best streams, pollute our drinking water. No one has safely and successfully built a pipeline of this size and this nature through this terrain and there's a good reason for that. There are insurmountable problems that they will face if they go forward and we can see the evidence just farther south in Virginia where the Mountain Valley Pipeline is trying to build through the same kind of terrain and causing disastrous problems to the environment and to the people who live there.

"Simply put, Dominion could not have chosen a worse place to try to put a pipeline. The people who live in these areas treasure the land, and millions of people come there every year because they are inspired and enriched by these places. These places are our heritage and our legacy," he said.

"My family has lived in the mountains of Virginia since the early 1700s. Just south from where this pipeline would go through the Blue Ridge lies the grave of my five times great-grandfather. He left those mountains to fight in the Revolution and returned to a place he loved. And he passed that love down these generations.

“Wild Virginia, the other parties to this lawsuit, and the thousands of our allies, will continue to defend against this dangerous and destructive plan of Dominion’s. This pipeline should never be completed — a fact that is understood by more and more people each day as the true costs are counted up.”

Bill intends to question Dominion Energy pipeline need

| February 27, 2020

BY JOHN BRUCE • STAFF WRITER

MONTEREY — Republican Del. Lee Ware of Powhatan once again has introduced legislation to keep Dominion Energy’s electric utility from saddling ratepayers to pay for the proposed Atlantic Coast Pipeline.

Ware said his bill, H.B. 167, aims to answer the question of whether retail customers actually need the pipeline or is it instead an entrepreneurial venture meant to earn high profits for Dominion Energy.

Winners, losers

The legislation joins a growing contention asking if the pipeline amounts to a strategy to enrich the investor-owned utility at the sacrifice of captive ratepayers.

These include electric cooperatives in Bath and Highland counties that buy wholesale power from Dominion.

As proposed this year, Ware’s bill summary states it “requires an electric utility, as a condition of approval of any request by an electric utility for recovery through its fuel factor of costs incurred under a natural gas capacity contract not previously subject to review in a fuel factor case, to prove by a preponderance of the evidence that the utility has:

• (i) determined that the utility cannot meet its service obligations, giving due regard, in the (Virginia State Corporation) Commission’s sole discretion, to reliability of service and the need to maintain reliable sources of supply, without an additional fuel resource;

• (ii) reasonably identified and determined the date and amount of the new fuel resource it needs;

• (iii) objectively studied available alternative fuel resource options, as verified by the commission, including options other than a new natural gas capacity contract or contracts to meet the identified and determined need; and

• (iv) determined that the natural gas capacity contract or contracts are the lowest-cost available option, taking into consideration fixed and variable costs and a reasonable projection of utilization.”

In 2019, the then-Dominion friendly Senate Commerce and Labor Committee rejected Ware’s similar proposal when Republicans made up the majority.

The committee has a Democratic majority in 2020.

To view the full bill text, access lis.virginia.gov/ and enter hb167 in the search field.

The same lack of analysis and oversight of a pipeline’s necessity exists not only on the state level but on the federal level as well, according to one expert.

The $8 billion proposed Atlantic Coast Pipeline is not needed, electric and gas utility expert Thomas Hadwin contends. He noted in his latest report that the Federal Energy

Regulatory Commission allows utilities to collect 15 percent rate of return yearly on their gas pipeline investments.
The Recorder first reported the estimated cost in 2014 was $4 billion.
“This extremely high rate of return, in an era of very low interest rates, has lured utility holding companies into the pipeline building business,” Hadwin said, “especially since growth in demand for electricity is relatively flat. Utilities are typically awarded rates of return in the 9-10 percent range for building power plants and transmission lines. Owning a pipeline provides a long-term stream of windfall profits. It works as long as there are customers that pay to use the pipeline.”

Deficient regulation
Dominion cited need for the pipeline project when it told FERC back in 2015 about plans to build two more gas power plants — projects it since has canceled.
But FERC in all likelihood would have approved the project anyway.
“FERC assumes that if an organization is willing to sign a long-term contract to pay for capacity on a pipeline, it must have a need for it,” Hadwin said. “This might have been true at one time. Developers have since learned to have their subsidiaries or affiliates sign contracts for reserving the capacity of the new pipeline.
“It is easy for the holding-company owners of the ACP to propose a new pipeline when FERC gives the go-ahead without further analysis of the actual need for the project and they expect that state regulators will pass through the costs and risks of the project to the ratepayers of their utility subsidiaries. Over 400 applications have been submitted to FERC in the past 20 years. Only one failed to pass muster.
“At the time of the FERC application, Dominion planned to build two large gas-fired plants, beyond what was already in development. Duke planned to add six more of these combined cycle gas turbine facilities to its system in North Carolina,” Hadwin explained.
“Since that time, Dominion has canceled plans to build more large gas-fired units and says it plans to build no more. The company has also just announced that it will discontinue plans to build 1,500 MW of new gas-fired peaking units.
“Testimony to the state regulator shows that Dominion has sufficient long-term contracts for pipeline capacity to serve all of its existing gas-fired units,” Hadwin said. “With plans to build no more, Dominion has no need for the ACP.”
A surplus of gas power plants coupled with overbuilt pipeline infrastructure could burden retail customers of the regulated monopoly with debt, Hadwin suggests, adding expansions to the existing Transco east coast pipeline system more than satisfies gas demand at a far lower price than the ACP for the foreseeable future.
“S&P Global Market Intelligence has recently published a series of articles that reveal we have a glut of natural gas-fired power plants. Policymakers and regulators will be forced to confront what others have been saying for some time — we have greatly overbuilt our gas infrastructure,” Hadwin noted.

Big decision
“Assuming the ACP can overcome its permitting hurdles, after the pipeline is expected to begin commercial operation in 2022, state regulators must decide whether to pass-through all, some, or none of the cost of the pipeline contracts to ratepayers,” Hadwin

continued. “By then, it should be obvious that no new gas-fired plants are needed. Or if they were, that they could be supplied by existing pipelines at a much lower price.
“There is no reason to burden families and businesses in Virginia and North Carolina with more than $30 billion in added energy costs for an unnecessary pipeline,” Hadwin concluded.
To read Hadwin’s report, access www.abralliance.org/ and click on “Why Support for the Atlantic Coast Pipeline Adds Risks to Shareholders and Ratepayers.”

Outdated pipeline surveys need updates from Dominion

| April 09, 2020

BY JOHN BRUCE • STAFF WRITER

MONTEREY — If Dominion Energy wants to proceed with construction of the proposed Atlantic Coast Pipeline, then it must update expired surveys applying to endangered bats and mussels, an environmental lawyer suggests.
On March 20, Atlantic Coast Pipeline LLC requested a variance to conduct slip remediation activities in the Hackers Creek watershed in West Virginia.
In an April 2 letter to Liz Stout of the U.S. Fish and Wildlife Service, Southern Environmental Law Center staff attorney Patrick Hunter challenged the pipeline company’s assertion it was replying on current surveys from 2015.
“That is not correct,” Hunter said. “To the contrary, surveys performed under the 2015 Indiana bat survey guidance are generally valid for two years; consequently, the 2015 surveys expired approximately three years ago under the relevant guidance. Even if Atlantic argues that its surveys should be considered valid for five years because surveys completed using the current, 2020 survey guidance can be valid for five years, the 2015 surveys also will soon be more than five years out of date and therefore expired even by that metric. Similarly, surveys for protected mussels are also generally valid for two years and many that underpin the analysis supporting the Atlantic Coast Pipeline have apparently expired. The Fish and Wildlife Service must require all species surveys to be brought up to date to ensure Section 7 consultation is based on best available science under the agency’s own guidance,” Hunter said.
Similarly, the company’s Indiana bat surveys are no longer valid, Hunter argued. “Even if surveys under the 2015 guidance could be used for longer than two years in some circumstances, they do not remain valid for as much as five years – as Atlantic recently indicated to FWS – when not completed with the same level of analysis FWS has determined is necessary for surveys to last five years. Atlantic’s surveys completed under the 2015, 2016, and 2017 guidance have expired,” he said.
“We previously made FWS aware that Atlantic’s surveys had expired, and we hope that this language was not added in another attempt by a federal agency to accommodate the developers of the Atlantic Coast Pipeline.
“Regardless, FWS’s obligation is not to discuss the pros and cons of requiring project developers to use current data to ensure endangered and threatened species are appropriately protected. FWS’s job is to protect and conserve endangered and threatened species and their habitats.

“FWS’s obligation to protect endangered and threatened species does not turn on whether a protective act would be subjectively considered a pro or a con. Congress has already decided it is a pro. And to give endangered and threatened species any protections at all, FWS must know where they are – that requires current surveys,” he said.

“FWS should not retroactively apply this new language to surveys completed under the less rigorous 2015-2017 survey guidance. At most the new language should only apply to surveys that meet the criteria FWS determined were necessary to extend validity to five years (instituted in 2018). But even that approach is dubious. FWS cannot meet its obligations under the Endangered Species Act by assuming species are absent, and therefore will not be harmed, without requiring project applicants to look for them in the first place. It similarly would be arbitrary for FWS to assume species are absent by relying on surveys the agency’s guidance documents recognize as out of date,” he said.

“More to the point, we are aware of no cons in requiring Atlantic to update its bat surveys. Atlantic may argue that surveying will further delay the project, but the project’s delays to date have been self-inflicted. Instead of designing a project that minimized impacts on endangered species and protected lands, Atlantic insisted on its preferred route and exerted pressure on agencies to quickly issue permits on its preferred timeline. That strategy was just as flawed as the resulting permits, and now the project is years behind schedule, billions of dollars over budget, and less than 6 percent complete. Atlantic chose to barrel through endangered species habitat regardless of the ecological cost. As a consequence of that choice, it must go through the process of complying with Endangered Species Act requirements, including updating surveys once they have expired,” Hunter argued.

“On the other hand, there are numerous pros associated with making sure surveys are current … The conclusion here is unmistakable — surveys are critical to conserving this species. FWS cannot meet its Endangered Species Act obligations by allowing Atlantic to rely on outdated surveys … Updated surveys are also necessary to accurately assess impacts to northern long-eared bats. As FWS is aware, the U.S. District Court for the District of Columbia recently remanded FWS’s rule listing the northern long-eared bat as a threatened species. Northern long-eared bat is likely in a more precarious position than FWS determined in its rule listing the species as threatened, which it relied on in its first two biological opinions for the Atlantic Coast Pipeline. Having current survey information will be critical to accurately assessing the impact of this project on this species.

“The problem of outdated surveys is not unique to bats. Both the Virginia and North Carolina wildlife agencies have cautioned Atlantic that mussel surveys are valid for only two years. As explained by the North Carolina Wildlife Resources Commission, a mussel survey is valid for up to two years; therefore, if the project is not completed within two years, an additional mussel survey is needed if federal-listed species are found during the initial survey.

“FWS originally requested, and Atlantic originally compiled, species survey data because it was necessary to accurately assess the impact of the Atlantic Coast Pipeline on protected species. That information is no less necessary now. If Atlantic plans to move forward with this project, it must submit up-to-date survey information,” Hunter concluded.

Troubled 600-mile pipeline's need under scrutiny again

| April 16, 2020

BY JOHN BRUCE • STAFF WRITER

MONTEREY — If it's not for power stations, then what?

A motion the Virginia State Corporation Commission approved last week again suggested a lack of need for – and unsound rationale behind — the proposed Atlantic Coast Pipeline.

An Associated Press article spotlighted the issue, focusing on the pipeline need controversy and quoting a source describing it as an albatross.

According to the SCC filing, construction of more gas power plants, the reason Dominion Energy cited for the pipeline in the first place, is no longer feasible in light of passage of renewable energy legislation.

Dominion is required to file an integrated resource plan by May 1. The SCC directed the company to include information about the legislation.

In a motion filed March 24, Dominion identified requirements as no longer relevant to resource planning. The first was not to take into account the Clean Power Plan passed under the Obama administration and was repealed in 2017.

In support of being relieved of other requirements, Dominion stated it has suspended development of North Anna 3, and coal without carbon sequestration technology is no longer a generating option.

Thirdly, and most telling, the company stated "significant build-out of natural gas generating facilities is currently not viable, with the passage by the General Assembly of the Virginia Clean Economy Act of 2020."

The filing did not mention the pipeline or say what the gas from the 600-mile, $8.5 billion project would be used for.

Dominion went on to say that removing a requirement related to comprehensive risk analysis would relieve the company of a time and resource intensive analysis that is no longer relevant. The investor owned utility stated it would conform with the VCEA with respect to solar power purchase agreements.

Dominion suspended construction after 6 percent completion in December 2018 because the U.S. Fourth District Court of Appeals vacated the U.S. Fish and Wildlife Service biological opinion and taking statement for the project.

The biological opinion has been vacated twice.

Other permits for the pipeline have either been invalidated by court decisions or are being challenged.

The U.S. Supreme Court is expected to rule on an appeal this summer to decide if the pipeline can cross under the Appalachian Trail on public land.

Dominion sells wholesale electricity through purchased-power agreements to Old Dominion Electric Cooperative, which is owned by BARC and Shenandoah Valley Electric Cooperatives, plus nine other member-owned electric coops in Virginia, Maryland and Delaware.

Highland County, served by both BARC and SVEC, would be the gateway for the pipeline from West Virginia to Virginia. Northern Bath County, served by BARC, would

bridge the route into western Augusta County and then through Virginia to North Carolina's border with South Carolina.
Concerns over skyrocketing costs, overseas gas sales, water quality degradation, karst and species protection, mountaintop razing and eminent domain have driven a massive organized resistance filing lawsuits since the project was proposed in May 2014.
The company has unwaveringly glamorized the proposal, saying it is essential to the economy. While not on the current federal licensing, Dominion also conceded South Carolina and points south are among targeted gas service territories for connection to the pipeline.
Spokesman Aaron Ruby said the company has long had a presence in the Palmetto State. Dominion has acquired the state's largest gas transmission system and now provides electric and gas distribution service to homes and businesses across a 22,000-square-mile service territory in central, southern and western South Carolina.

Conservation groups ask to supplement pipeline report

| June 04, 2020

BY JOHN BRUCE • STAFF WRITER

MONTEREY — Conservation groups including Highlanders for Responsible Development filed a request Monday to the Federal Energy Regulatory Commission to supplement the environmental impact statement for the proposed Atlantic Coast Pipeline with new information.

'Different picture'

"New information arising since the commission issued its EIS for the ACP in July 2017 presents a seriously different picture of the project's available alternatives and environmental impacts than the one considered by the commission," the more than 4,000-page procedural motion states. They include:

• Alternatives — "The region's energy future has undergone a dramatic shift away from gas-fired power generation while the ACP's projected cost has ballooned and its timeline has been pushed back, compelling the commission to revisit its consideration of alternatives."

• Vulnerable species — "Surveys have documented multiple new occurrences of the endangered rusty-patched bumble bee along the ACP route, and the U.S. Fish and Wildlife Service has proposed critical habitat for the newly listed candy darter (endangered) and yellow lance (threatened) in streams the pipeline would cross."

• Water quality — "Well-documented landslides and sedimentation problems along the ACP's steep terrain, combined with the rollback of federal water protections relied on by the commission, indicate the project's impacts to water quality would be more substantial than previously analyzed."

• Environmental justice — "The Commonwealth of Virginia and Atlantic Coast Pipeline LLC have now recognized the existence of a minority environmental justice population in Union Hill, Va., neighboring the ACP's proposed Buckingham Compressor Station."

• Climate change — “Scientific understanding about the anticipated impacts of climate change, both globally and in the area of the ACP, has expanded dramatically since the publication of the EIS.”
• Cumulative impacts — “The majority of the ACP’s construction is now anticipated to occur between 2020 and 2021 alongside newly proposed area projects whose cumulative impacts the commission never considered.”
The groups said that in light of substantial new information, FERC’s prior environmental review of the ACP is “stale and fails to address significant effects of the project.”
The ACP is far from complete, they pointed out — less than 6 percent of the 604-mile pipeline has been installed — “and cannot be completed without further action by the commission, including a decision whether to extend the ACP’s construction and in-service deadline of October 2020.”
As such, they said, the National Environmental Policy Act requires FERC to analyze new information and disclose its analysis for public review. The conservation groups requested that FERC supplement the EIS to address the new information, circulate the supplemental EIS for public comment, and stay its certificate of public convenience and necessity for the ACP pending finalization of the supplemental EIS.
“The commission’s NEPA obligations do not end with issuance of an EIS, preventing the commission from putting on blinders to adverse environmental effects,” they said. “So long as there is ‘remaining government action (that) would be environmentally significant’ and the commission still has ‘a meaningful opportunity to weigh the benefits of the project versus the detrimental effects on the environment,’ the commission has a continuing duty to supplement its environmental analysis. Unmistakably there is remaining action by the commission that would be environmentally significant.”
Pipeline construction has been halted since December 2018 and multiple agency approvals remain outstanding, they pointed out. “Even if Atlantic secures these missing permits, the commission must issue orders authorizing construction before Atlantic can resume building the pipeline.”
Because the ACP’s developers have indicated construction will last until at least the end of 2021, FERC must also decide whether to extend the Oct. 13, 2020 deadline it imposed on the ACP to complete construction and place the pipeline into service, the groups noted. “And even after issuing such orders, the commission would retain stop-work authority over the project for the duration of construction.”
Authorizing construction along nearly 570 miles of the proposed route, extending the duration of construction, and retaining stop-work authority, all constitute “government action that would be environmentally significant,” they argued.
“Further, with only 35 miles of the pipeline in the ground, almost 570 miles of the project must still be constructed, requiring tree-felling, trenching, blasting through mountaintops, and installing pipe,” they continued. “Over 365 miles of the proposed route are still in approximately the same condition as the day the commission issued the EIS nearly three years ago. The commission’s opportunity to weigh the purported benefits of the project against the adverse environmental impacts is as meaningful now as it was when the commission issued the EIS three years ago.”
The groups also argue that for an environmental impact statement to serve its two main functions — informing agency decision-making and disclosing environmental impacts to the public — its analysis “must be based on accurate, up-to-date information.” As a

result, they said, “an agency must supplement its environmental impact statement where there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.”

Ballooning costs

“Since the July 2017 issuance of the EIS, the energy landscape of the region the ACP would serve has transformed dramatically, while the costs of the project have ballooned and its timeline has been pushed back,” they continued. “Meanwhile, significant new information has arisen regarding the project’s impacts on endangered and threatened species, water quality, environmental justice communities, and climate change, presenting ‘a seriously different picture of the environmental impact of the proposed project from what was previously envisioned,’” the filing states.

Southern Environmental Law Center filed the motion on behalf of Counsel for Alliance for the Shenandoah Valley, Cowpasture River Preservation Association, Friends of Buckingham, Friends of Nelson, Highlanders for Responsible Development, Piedmont Environmental Council, Shenandoah Valley Battlefields Foundation, Sound Rivers Inc., Virginia Wilderness Committee, and Winyah Rivers Foundation.

Counsel for Appalachian Voices filed on behalf of Chesapeake Climate Action Network, Sierra Club, and Wild Virginia Inc.

U.S. Supreme Court reverses pipeline ruling

| June 18, 2020

BY ANNE ADAMS • STAFF WRITER

WASHINGTON, D.C. — The Appalachian Trail is governed more like a right of way, according to a U.S. Supreme Court majority.

The case, U.S. Forest Service, et al, vs. the Cowpasture River Preservation Association, et al, was heard Feb. 24.

Monday, the high court issued a 7-2 decision that overturned the U.S. Fourth Circuit Court of Appeals’ ruling that determined the U.S. Forest Service did not have the authority to give a permit for the proposed Atlantic Coast Pipeline to cross under the trail.

ACP owners including Dominion Energy had appealed that Fourth Circuit decision, and the Supreme Court heard arguments Feb. 24. The majority decision, penned by Justice Clarence Thomas, interpreted several laws governing federal land. Essentially, they determined the AT, while under management of the National Park System, exists in a fashion similar to a right of way or easement.

Therefore, the U.S. Forest Service owns the land, and has the authority to allow a pipeline crossing under the trail, the court decided.

The dissenting opinion issued by Justice Sonia Sotomayor, joined by Justice Elena Kagan, stated, “Today’s outcome is inconsistent with the language of three statutes, longstanding agency practice, and common sense. The Park Service administers acres of land constituting the Appalachian Trail for scenic, historic, cultural, and recreational purposes … ‘Any area of land’ so ‘administered’ by the Park Service is a unit of and thus land in the National Park System … The Mineral Leasing Act does not permit natural-gas

pipelines across such federally owned lands … Only Congress, not this Court, should change that mandate."

The prevailing decision, however, stated, "A right-of-way is a type of easement. And easements grant only non-possessory rights of use limited to the purposes specified in the easement agreement: They are not land; they merely burden land that continues to be owned by another. The same principles that apply to right-of-way agreements between private parties apply here, even though the Federal Government owns all lands involved. A right-of-way between two agencies grants only an easement across the land, not jurisdiction over the land itself. Read in light of basic property law principles, then, the plain language of the Trails Act and the agreement between the two agencies did not divest the Forest Service of jurisdiction over the lands crossed by the Trail."

The Fourth Circuit had also vacated the USFS permit on other grounds not addressed by the Supreme Court's decision, which was issued Monday. The ACP still lacks that permit, in addition to several other approvals required for construction, as noted by the Southern Environmental Law Center.

"While today's decision was not what we hoped for, it addresses only one of the many problems faced by the Atlantic Coast Pipeline," said SELC program director D.J. Gerken. "This is not a viable project. It is still missing many required authorizations, including the Forest Service permit at issue in today's case, and the D.C. Circuit Court of Appeals will soon consider the mounting evidence that we never needed this pipeline to supply power. It's time for these developers to move on and reinvest the billions of dollars planned for this boondoggle into the renewable energy that Virginia and North Carolina customers want and deserve."

"It's been six years since this pipeline was proposed; we didn't need it then, and we certainly don't need it now," said Dick Brooks of the Cowpasture River Preservation Association. "Today's decision doesn't change the fact that Dominion chose a risky route through protected federal lands, steep mountains, and vulnerable communities." Among the permits in question for the ACP are:

• Endangered Species Act permit (Biological Opinion) from the U.S. Fish and Wildlife Service;
• Special use permit and right-of-way grant from the U.S. Forest Service;
• Right of way permit from the National Park Service;
• Virginia air pollution permit for the Union Hill compressor station; and
• Four Clean Water Act authorizations from the Corps of Engineers for Pennsylvania, West Virginia, Virginia, and North Carolina

The ACP's central permit from the Federal Energy Regulatory Commission is under review in the D.C. Circuit Court of Appeals, and arguments are expected later this year. The case will determine if FERC correctly determined the ACP was needed to fuel gas-fired power plants when it approved the project in 2017, SELC explained.

A supplemental environmental impact statement is planned by the Forest Service (see related story, this issue).

In a statement, ACP spokesperson Ann Nallo said, "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. We look forward to resolving the remaining project permits.

“In its decision today, the Supreme Court upheld the longstanding precedent allowing infrastructure crossings of the Appalachian Trail,” Nallo continued. “For decades, more than 50 other pipelines have safely crossed the Trail without disturbing its public use. The Atlantic Coast Pipeline will be no different. To avoid impacts to the Trail, the pipeline will be installed hundreds of feet below the surface and emerge more than a half-mile from each side of the Trail. There will be no construction activity on or near the Trail itself, and the public will be able to continue enjoying the Trail as they always have. We appreciate the many stakeholders who supported our position in this case, including the U.S. Solicitor General, 18 state attorneys general, more than 60 members of Congress and dozens of labor and industry groups.”

Friends of Nelson, a citizens group formed to challenge the proposed ACP, said it will fight on, despite the U.S. Supreme Court’s decision, citing numerous other legal challenges and rapidly changing public attitudes that stand in the way of the 600-mile project that would also cross Nelson County.

Doug Wellman, president of Friends of Nelson, said, “While we are disappointed by the Forest Service v. Cowpasture decision, the great majority of the legal challenges to the pipeline have been successful. As a result, the Pipeline lacks at least seven permits that it needs to move forward. We will continue to fight the Pipeline with every ounce of our energy to stop its destructive path through Nelson County and many other communities.”

Ernie Reed, formerly president of Friends of Nelson and currently a member of the Nelson County Board of Supervisors, reflected on the series of events. “We are focused on last Thursday’s announcement that the Forest Service has been forced to draft a Supplemental Environmental Impact Statement for the ACP project,” Reed said. “The George Washington National Forest, dozens of citizen groups and an amazing legal team still stand in the way of the ACP.”

Wellman added, “We view the ACP as a misguided investment in the past, just when a clean energy economy is finally in sight. The ACP is based on 20th century thinking. Building it would retard the shift to the clean energy economy we must have. The path forward has been laid out in recent state legislation anchored by the landmark Clean Economy Act that calls for 100 percent clean energy by 2045. It is time for Dominion to abandon its profit-seeking pipeline plan and put its many resources to work for a brighter future for all.”

To view the high court decision, access www.supremecourt.gov, click on opinions, then on United States Forest Service v. Cowpasture River Preservation Assn.

Jon Mueller filed on behalf of the Chesapeake Bay Foundation.

Forest service plans supplemental pipeline report

| June 18, 2020

BY JOHN BRUCE • STAFF WRITER

MONTEREY — The U.S. Forest Service has published a notice of intent to prepare a supplemental environmental impact statement, according to Joby Timm, forest supervisor.

The statement will analyze the use and occupancy of National Forest System lands for the proposed Atlantic Coast Pipeline, and project-specific amendments for the Monongahela

National Forest and George Washington National Forest plans. The USFS is preparing this supplemental analysis to address the Fourth Circuit Court's ruling, new information, and changed circumstances such as new federally listed threatened and endangered species and critical habitat designations.
Conservation groups requested the supplement recently.
The notice explains that on Nov. 17, 2017, the USFS adopted the environmental analysis prepared by the Federal Energy Regulatory Commission, and foresters signed a final record of decision. The decision authorized Dominion Energy to build the ACP across the MNF and GWNF, and amended the forest service plans to allow the project.
Then, on Jan. 23, 2018, the USFS issued a special use permit and granted a right of way for the ACP.
But the Fourth Circuit court vacated that decision and permit on Dec. 13, 2018. The court cited deficiencies in the plans related to the National Forest Management Act, the National Environmental Policy Act, and the Mineral Leasing Act.
The USFS notice explains that to resolve the court's forest management act issues, "there is a need to apply Forest Service Planning Rule requirements for soil, water, and threatened and endangered species to the Forest Plan amendments."
Further, it said, "The court also identified NEPA deficiencies including the need for the Forest Service to analyze off-forest routes, and to evaluate erosion, sedimentation, and water quality effects in relation to anticipated mitigation effectiveness. There is a related need to amend the MNF's and GWNF's Forest Plans for the project to be consistent with the two forest plans."
The draft supplemental EIS is expected to be available in July, and the final version is anticipated later this year.

Dominion asks FERC for more time to build pipeline

| June 25, 2020

BY JOHN BRUCE • STAFF WRITER

MONTEREY — Dominion Energy is asking the Federal Energy Regulatory Commission for a minimum two-year extension to build its proposed Atlantic Coast Pipeline.
On Oct. 13, 2017, FERC authorized Atlantic Coast Pipeline LLC and Dominion Energy Transmission Inc. to construct and operate certain facilities that comprise the Atlantic Coast Pipeline and Supply Header projects.
Dominion was required to construct all facilities and make them available for service by Oct. 13 this year.

'Unforeseen delays'

"Due to unforeseen delays in permitting, additional time is required in order to complete construction, said Matthew Bley, director of gas transmission, in a letter to FERC.
"Atlantic and DETI are diligently pursuing completion of the projects, and initial construction has already occurred in West Virginia and North Carolina, and significant tree felling has already occurred in Virginia. Completion of the projects is expected in 2022," Bley wrote.

“Consistent with commission’s extensions of the time allowed for construction of other projects, DETI requests a two-year extension of time to construct the projects,” he said.
Bley argued the need for the projects is undiminished.
“Precedent agreements and transportation service contracts demonstrating the need for the projects remain in place, and Atlantic has agreed with its customers on terms to address the impact of delay and cost increases,” he said.
“Furthermore, no changes in the projects have been made that would alter the results of the commission’s environmental review to any significant extent … FERC generally considers delays in construction that result from permitting issues good cause for granting an extension of time to commence and complete construction. Where good cause can be demonstrated, FERC frequently grants an extension of time if the extension request is filed within a timeframe during which the public interest findings underlying the commission’s authorization can be expected to remain valid,” Bley asserted. “When considering extensions, the commission considers whether the total period allowed for constructing a project is reasonable.”

4-6 years ‘reasonable’
“Allowing at least four years to complete construction of a major new pipeline like ACP is very reasonable,” Bley argued. “The commission has frequently authorized infrastructure projects with initial deadlines of four, five, or six years without expressing concerns about the certificate order’s economic or environmental findings becoming stale. And the commission frequently grants extensions allowing even more than four years to complete construction.”
Dominion, he said, encountered “unforeseeable circumstances” that delayed construction as the result of decisions by the United States Court of Appeals for the Fourth Circuit. Those decisions were related to U.S. Forest Service Record of Decision and Special Use Permit, including the crossing of the Appalachian National Scenic Trail, its U.S. Fish and Wildlife Service Biological Opinion and Incidental Take Statement, and the air permit for the compressor station in Buckingham.
Bley said Dominion has been working diligently and in good faith to re-obtain all approvals as soon as possible, anticipated by year’s end.

Dominion Energy not playing by rules, SELC says
| June 25, 2020

BY JOHN BRUCE • STAFF WRITER

WASHINGTON, D.C. — On June 22, Dominion Energy Transmission Inc. filed a Biological Assessment in the Federal Energy Regulatory Commission dockets for the proposed Atlantic Coast Pipeline without fully following the rules for such a filing, Southern Environmental Law Center attorney Patrick Hunter said in a letter to FERC.
“According to the rule cited by Dominion, when a “person request(s) that material be treated as privileged information” the person “also must submit to the Commission a public version with the information that is claimed to be privileged material redacted, to the extent practicable,” Hunter wrote.

“It is certainly practicable to redact this information and release a public version of the Biological Assessment. Dominion has done as much before. For instance, on March 10, 2017, Dominion filed a 664-page draft Biological Evaluation in these same dockets. Dominion filed both a public and privileged version with minimal redactions in the public version. The commission’s rules require Dominion to do the same now,” Hunter said. “We request that a public version of the Biological Assessment be posted to the commission’s Atlantic Coast Pipeline dockets within five business days.”

Angela M. Woolard, gas transmission certificate consultant, said in the Dominion letter to FERC that the National Park Service provided Atlantic with the Acoustic Bat Survey at Blue Ridge Parkway, dated Dec. 31, 2019, on June 8, 2020.

“Acoustic bat surveys were conducted on the Blue Ridge Parkway in the vicinity of the Atlantic Coast Pipeline project crossing from July 30 through Aug. 2, 2019, at five locations … A supplement detailing an assessment of project effects resulting from these survey results is currently under way and will be provided upon completion,” Woolard said.

“Dominion Energy requests that … the information filed be treated as controlled unclassified information and privileged and confidential, and that this information not be released to the public. As such, this information is labeled as ‘Contains Controlled Unclassified Information and Contains Privileged Information – Do Not Release’ and contains the locations of sensitive species, which are customarily treated as privileged and confidential,” Woolard explained.

Dominion has also submitted additional data and analysis to Virginia regulators providing ample justification for re-issuing the air permit for the Buckingham station, Bley said.

He said Dominion remains committed to constructing the projects as soon as possible.

Out of gas

Pipeline project’s demise a relief to area residents

| July 09, 2020

BY JOHN BRUCE • STAFF WRITER

MONTEREY — Dominion Energy and Duke Energy picked Sunday afternoon, July 5, to announce the end of the proposed Atlantic Coast Pipeline after years of delay and doubt. The ill-fated $8 billion project would have carried gas 600 miles from West Virginia to North Carolina, crossing Highland and Bath counties on the way.

Landowners Jeannette and Gary Robinson of Little Valley smiled because the pipeline that would have crossed their Bath County farm was now a thing of the past.

“My reaction was: I can’t believe it,” Ms. Robinson said. “For four years we have been hoping and praying we would beat them. We were the underdogs. They had the money and the power, but we had power, too.

“I can’t speak words about Southern Environmental Law Center and Appalachian Advocates. They’re amazing. And the experts we have, like Rick Webb, Lew Freeman and Rick Lambert.

“This is the first time in four years we’ve felt this kind of peace,” Ms. Robinson said.

The pipeline route was moved to northern Bath about four years ago from central Highland after the protected Cheat Mountain salamander won a partial victory for the opposition.

'New beginning'

"My reaction on Sunday was initially disbelief," Mr. Robinson said. "It will take time for this to sink in. This is a new beginning. Our side won out over the corporate propaganda. The gas was not needed.

"For us, it's the vindication of everyone opposing the project over the last several years. It's too good to believe, but that's the reality. It's hard to believe it really happened.

"The good thing is we know so much more about how to protect our land. We have an endangered species on our farm — the rusty patched bumble bee. We have so much knowledge to protect this area from here on out," he said.

Landowner Anne Bryan said she and her husband felt a broad sense of gratitude on the pipeline project's end.

"Joe and I notice our shoulders drop as we confirm the cancellation of the proposed ACP; we release years of tension; the land we steward seems to heave a sigh of relief. We feel a palpable shift in ourselves and our environment.

"We are grateful for the multitude of friends, acquaintances, and sense of community birthed through our adventures with the proposed ACP and our interactions with associated individuals. I am grateful for the opportunities the project provided to us — opportunities to increase awareness, empathy, compassion, and devotion to cause; to exercise resilience; and to participate in caring for the planet through voice and action.

"Part of the challenge of fighting the pipeline was organizing individuals who do not have internet access and keeping them informed," Bryan said. "The Recorder did a phenomenal job of that. For the work (the newspaper) did in educating so many, we are forever grateful. We appreciate the newspaper for its role in providing an outlet for native residents and newcomers to find and speak their voice about this important topic."

"We are in a state of euphoria," said longtime pipeline opponent Bill Limpert, formerly a part-time resident of Little Valley and now living with his wife, Lynn, in Maryland. "I can imagine all of the good vibes in Highland, Bath, and all along the line — hey, no more line!"

"Dominion has yanked along Highland County folks for six years, and I'm just sorry for the turmoil it has caused," supervisors chair David Blanchard said. "I know there are a lot of landowners who are breathing a sigh of relief, but there are also folks who looked toward the ACP for work and had made personal investments; that's a hard loss.

"From this supervisor's perspective, the revenue generated from ACP may have been a boost to Highland. However, Dominion should have done better a job of building relations with our community and instilling confidence toward the project. Public sentiment in Highland was never fully there," Blanchard said.

'Good riddance'

"Highlanders for Responsible Development is very pleased that Dominion Energy and Duke Energy have decided to abandon their plans to build the Atlantic Coast Pipeline," said HRD president Rick Lambert. "As one of the founding members of the coalition that led the fight against the ACP, the Allegheny- Blue Ridge Alliance, HRD has been at the

forefront of the effort to defeat the project, including being a plaintiff in several of the successful legal challenges that led to the decision to shut down the project. The ACP would have brought no benefit to the greater Allegheny Highlands area, and instead would have created long-term environmental damage to our region. Good riddance to the ACP!"

C. Nelson Hoy of Williamsville added, "The battle to discourage Dominion from building what eventually became known as the Atlantic Coast Pipeline began six years ago in July of 2014 with (a) letter to the board of directors of Dominion Resources. The board of directors condescended by not replying to this letter from Berriedale Farms, Lizzie and I.

"The second shot across their bow was the convening of round table discussions that resulted in the formation of the Allegheny-Blue Ridge Alliance in August of 2014, and the third shot was to make the pipeline a multi-year issue for the Cowpasture River Preservation Association. Dominion has now thrown in the towel and sold its assets to Berkshire Hathaway."

"It is now apparent to all that Dominion never established a case for the need for the pipeline," said Fort Lewis Lodge owner John Cowden, whose property fell in the proposed route. "The good news for the environment is that, in the end, the ACP was just not an economically viable project. My hope is that this may serve as a tipping point in our journey of transitioning to renewable energy sources. My sincere gratitude goes out to ABRA and the entire community under their umbrella."

In a news release, Dominion and Duke cited ongoing delays and increasing cost uncertainty that "threaten the economic viability of the project" as the reason for cancelation. "Despite last month's overwhelming 7-2 victory at the United States Supreme Court, which vindicated the project and decisions made by permitting agencies, recent developments have created an unacceptable layer of uncertainty and anticipated delays for ACP," the company said. "Specifically, the decision of the United States District Court for the District of Montana overturning long-standing federal permit authority for waterbody and wetland crossings (Nationwide Permit 12), followed by a Ninth Circuit ruling on May 28 indicating an appeal is not likely to be successful, are new and serious challenges. The potential for a Supreme Court stay of the district court's injunction would not ultimately change the judicial venue for appeal nor decrease the uncertainty associated with an eventual ruling.

'Too uncertain'

"The Montana district court decision is also likely to prompt similar challenges in other circuits related to permits issued under the nationwide program including for ACP," the companies explained.

"This new information and litigation risk, among other continuing execution risks, make the project too uncertain to justify investing more shareholder capital. For example, a productive tree-felling season this winter is a key milestone to maintaining the project's cost and schedule. Unfortunately, the inability to predict with confidence the outcome of the project's permits and the potential for additional incremental delays associated with continued legal challenges, means that committing millions of dollars of additional investment for tree-felling and subsequent ramp up for full construction is no longer a prudent use of shareholder capital.

"A series of legal challenges to the project's federal and state permits has caused significant project cost increases and timing delays. These lawsuits and decisions have sought to dramatically rewrite decades of permitting and legal precedent including as implemented by presidential administrations of both political parties. As a result, recent public guidance of project cost has increased to $8 billion from the original estimate of $4.5 to $5.0 billion. In addition, the most recent public estimate of commercial in-service in early 2022 represents a nearly three-and-a-half-year delay with uncertainty remaining."
Thomas Farrell, Dominion Energy chairman, president, and chief executive officer, and Lynn Good, Duke Energy chair, president, and chief executive officer, said in a statement, "We regret that we will be unable to complete the Atlantic Coast Pipeline. For almost six years we have worked diligently and invested billions of dollars to complete the project and deliver the much-needed infrastructure to our customers and communities. Throughout we have engaged extensively with and incorporated feedback from local communities, labor and industrial leaders, government and permitting agencies, environmental interests and social justice organizations. We express sincere appreciation for the tireless efforts and important contributions made by all who were involved in this essential project. This announcement reflects the increasing legal uncertainty that overhangs large-scale energy and industrial infrastructure development in the United States. Until these issues are resolved, the ability to satisfy the country's energy needs will be significantly challenged."
The news release continued, "The Atlantic Coast Pipeline was initially announced in 2014 in response to a lack of energy supply and delivery diversification for millions of families, businesses, schools, and national defense installations across North Carolina and Virginia. Robust demand for the project is driven by the regional retirement of coal-fired electric generation in favor of environmentally superior, lower cost natural gas-fired generation combined with widespread growing demand for residential, commercial, defense, and industrial applications of low-cost and low-emitting natural gas. Those needs are as real today as they were at project inception as evidenced by the recently renewed customer subscription of approximately 90 percent of the project's capacity. The project was also expected to create thousands of construction jobs and millions of dollars in tax revenue for local communities across West Virginia, Virginia and North Carolina.
"The companies remain steadfast in the belief that fuel diversity, including renewables, nuclear, and natural gas, is critical for reliably and sustainably serving our customers and communities. Both will continue aggressively pursuing the development of renewables, storage, nuclear license renewals, electric vehicle infrastructure, energy delivery infrastructure, as well as energy efficiency and demand side management programs to meet their customers' needs while creating jobs and spurring new business growth in the aforementioned regions. "Dominion Energy and Duke Energy will separately provide additional information for their respective stakeholders and shareholders as relates to the company specific financial, environmental, operational, and other impacts of this announcement."

'Win for all'
Wild Virginia, which had opposed the project from its inception, applauded the decision. David Sligh, Wild Virginia's conservation director, said, "Citizens told Dominion and all of the government agencies who were tasked with protecting us that this was a horrible

idea; finally, after causing so much pain and worry for so many, these companies have made a decision that is actually in the interest of their customers and the people their actions affect.

“This is a win for all of the thousands of people who have banded together in the most amazing uprising for environmental protection and environmental justice in Virginia’s history,” he added.

“Now, we will be pushing to make sure our state officials never let this kind of travesty happen again. Our water and air protection laws were more than strong enough to have empowered the Department of Environmental Quality and the air and water boards to stop this project and the Mountain Valley Pipeline years ago. This time they failed but we don’t intend to allow that to happen again.”

Lew Freeman, executive director of the Allegheny-Blue Ridge Alliance — a coalition of more than 50 organizations in Virginia and West Virginia formed in 2014 to oppose the project — said ABRA is elated.

“ABRA has contended for six years that the ACP was not needed to meet the future energy needs of their customers,” Freeman said. “Furthermore, the ACP has been wrongheaded from the start, presenting threats to the environment and the safety and prosperity of the communities through which it would have been built that did not justify the project. We are glad to see that Dominion and Duke have come to their senses and arrived at the same conclusion.”

Southern Environmental Law Center Senior attorney Greg Buppert said, “This is a victory for all the communities that were in the path of this risky and unnecessary project. The Atlantic Coast Pipeline was wrong from the start. After years of opposition, legal defeats and threats to the environment, SELC is relieved to see Duke and Dominion make the right decision to walk away from it. This is a great day for the people of Union Hill, for public lands, for landowners in the path, and for all North Carolinians and Virginians who deserve a clean energy future and are no longer on the hook to pay for this $8 billion pipeline.

“Over the last six years, SELC has been honored to represent a dedicated and tireless group of conservation organizations opposed to the pipeline: Alliance for the Shenandoah Valley,

Cowpasture River Preservation Association, Defenders of Wildlife, Friends of Buckingham, Friends of Nelson, Jackson River Preservation Association, Highlanders for Responsible Development, Piedmont Environmental Council, Potomac Riverkeeper Inc., Shenandoah Riverkeeper, Shenandoah Valley Battlefields Foundation, Sierra Club, Sound Rivers, Inc., Virginia Wilderness Committee, and Winyah Rivers Foundation. Today’s outcome would not be possible without their energy and commitment,” Buppert said. “The Atlantic Coast Pipeline was an anvil that would have stymied investment in renewable energy for decades, harmed vulnerable communities, and crushed mountainsides,” he said. Mike Tidwell, executive director of the Chesapeake Climate Action Network, also weighed in on the decision. “Just one day after July 4th, America is stunningly closer to true energy independence with the cancellation of the Atlantic Coast Pipeline,” he said. “The fossil fuel era is rapidly drawing to a close in Virginia and nationwide thanks to the ferocious six-year opposition to this destructive pipeline.

‘Boondoggle’

“That opposition was waged by environmentalists, farmers, justice groups and common citizens across the region. This pipeline was a boondoggle from the moment it was announced by Dominion CEO Tom Farrell and then-Virginia Gov. Terry McAuliffe in September 2014. The Chesapeake
Climate Action Network is proud to have been one of the first statewide environment groups to take up this cause, to organize our supporters, to protest with everything from letters to the editor to civil disobedience,” Tidwell continued. “We want to thank all our partners in this long struggle,” he added “They include, but are not limited to, Friends of Buckingham, Friends of Nelson, Wild Virginia, Rick Webb, David Sligh, the Allegheny-Blue Ridge Alliance, Lewis Freeman, Bill and Lynn Limpert, Appalachian Voices, Appalachian Mountain Advocates, Southern Environmental Law Center, Pastor Paul Wilson, Virginia Chapter of the Sierra Club, Virginia League of Conservation Voters, Virginia Conservation Network, and so many more. Special thanks to current and past CCAN staff and board members who put everything they had – for years – into stopping this pipeline. We never gave up.”
The Berkshire Hathaway Energy deal is valued at $9.7 billion. Under terms of the agreement, Berkshire Hathaway Energy acquires 100 percent of Dominion Energy Transmission, Questar Pipeline and Carolina Gas Transmission, as well as 50 percent of Iroquois Gas Transmission System and 25 percent of Cove Point LNG, an export-import and storage facilities for liquefied natural gas developed by Dominion on the Chesapeake Bay in Maryland.
The company did not acquire assets related to the Atlantic Coast Pipeline.
Chair and CEO Warren Buffett said Berkshire is “proud to be adding such a great portfolio of natural gas assets to our already strong energy business.” Buffett is considered one of the most successful investors in the world and has a net worth of $88.9 billion as of December 2019, making him the fourth-wealthiest person in the world. Berkshire Hathaway contains securities worth more than $216 billion.
Up until Sunday, the Federal Energy Regulatory Commission was receiving hundreds of comments from individuals and organizations pleading for the regulators not to extend the pipeline construction deadline two years. One person recapped an Ohio regulatory probe into the explosion of a Dominion-built pipeline last year. He is William Porter of Roseland, a mechanical engineer with more than 35 years of design and construction contract administration experience. Porter told FERC, “My experience includes natural gas pipelines successfully built across the country in diverse environments from soils subject to earthquake liquefaction in California to karst and landslide-prone mountains in Virginia,” Porter said in his letter.

Unanswered questions

“This experience caused me to question how Atlantic could build a safe pipeline through certain vulnerable segments of the proposed ACP route. Most of my technical questions to Atlantic were met by silence. When Atlantic finally responded, their response was through outside attorneys hired by Dominion Energy rather than engineers. This gave me pause – especially when they seemed more intent on misdirection rather than answering my technical questions regarding public safety,” Porter said.
A Dominion-built pipeline in Ohio exploded last year after two weeks of operation, Porter pointed out to FERC.

“A Public Utility Commission of Ohio staff report relative to compliance with Natural Gas Pipeline safety standards documents PUCO related staff findings regarding the November 15, 2019 explosion of a 30-inch coated steel natural gas distribution main in Pepper Pike, Ohio. This explosion occurred in a 30-inch distribution main operating at 193 psig. This is in stark contrast to the ACP’s proposed 1,440 psig, 42-inch transmission main,” Porter said.

He selected these excerpts from the PUCO report:

“The failed pipeline segment was bored under the roadway at a depth of 15 to 25 feet and had been in service for approximately two weeks. Poor construction practices, failure to follow established procedures and a lack of oversight by Dominion all contributed to the pipeline failure.

“Staff believes Dominion showed a lack of institutional control at the construction project located at Shaker Blvd. in Pepper Pike. Poor construction practices, failure to follow established procedures, and a lack of oversight all contributed to the weld failure and pipeline rupture. Staff further believes that the number of bad welds found at the site, Dominion’s previous enforcement history related to not following or enforcing procedures in the field, and poor documentation practices show that failures similar to the pipeline rupture in Pepper Pike may recur in the future if the factors that contributed to the rupture are not addressed.

“When asked during the investigation, Dominion reported there were no issues or problems encountered during the boring operations. The construction report clearly shows that problems did exist.

‘Apparent discrepancy’

“Staff believes it is not possible to determine who performed which weld at the construction site or whether or not procedures were followed through a review of project documentation due to Dominion’s poor documentation practices and Dominion’s failure to maintain accurate or reliable records. Dominion does not generate or maintain reliable records and does not maintain document integrity. Staff submitted several data requests and questions to Dominion during its investigation, and there were a number of instances where the responses raised questions about the integrity of the documents being provided. While on site during the immediate incident response, Staff photographed a field form completed by Dominion employees to document an odorization test performed by Dominion after the explosion. Dominion provided a different version of the form when submitting a response to a data request. There was no place on the form for a signature and the handwritten information on the two forms was different. When asked about the apparent discrepancy, Dominion claimed the forms were completed by two different individuals, but both were documenting the same test.

“On Jan. 21, 2019, Dominion provided a document titled Engineering Notes, which identified which welders performed each weld along the pipeline. The document was completed by hand and had no date, signature, or any other information that could be used to attribute the document to a specific individual. On Jan. 31, 2020, Dominion provided a revised version of the same document where a number had been written over in multiple places throughout the form to make a correction with no notes, comments, or attributions for the changes on the forms. Dominion indicated via email the correction was made so the document would be accurate.

"Additionally, the welder related information in the document contradicts a statement provided by one of the welders who worked on the project. The individual is referred to as Welder #2 in the document and is recorded as having made 70 welds on the project. When interviewed by staff this individual stated he only performed 15-20 welds on this project. The same 70 welds are also attributed to Welder #2 on another document … These noted documentation issues show that Dominion does not generate and maintain reliable records and does not maintain document integrity.

Ignoring procedure

"During its investigation, commission staff also observed a number of instances at the construction site where Dominion employees and contractors did not follow Dominion procedures or were unaware of these procedures, further demonstrating that established Dominion procedures are routinely not followed or enforced in the field: A staff investigator asked Dominion welders if he could see the procedure they were using to weld and was told by the welders that they didn't need the procedures because they knew the requirements. The staff inspector then asked the welders a question about one of the parameters in the welding procedure (what preheat temperature they used) and received incorrect answers. As noted earlier, these welders did not have equipment necessary to determine the preheat temperature of the pipe despite the procedure requiring the use of a temperature indicating device.

"Visual inspection of welds was either not performed or welds that should have failed a visual inspection were not recognized. The individuals performing welding at the construction site did not have the necessary knowledge and skills to perform welding in a manner that ensured the safe operation of the pipeline," the excerpt said.

Dominion's requests need public input, SELC argues

| July 23, 2020

BY JOHN BRUCE • STAFF WRITER

MONTEREY — If the latest requests and comments to federal regulators are any indication, it's going to take quite a while for the smoke to clear after cancellation of the Atlantic Coast Pipeline.

Last week, the Southern Environmental Law Center said two requests Dominion Energy made to the Federal Energy Regulatory Commission need extra FERC attention.

Friday, FERC set a 15-day comment period on Dominion's requests for extending the timeline by one year for the ACP stand down, and two years for completing the supply header project.

That was half the time SELC asked FERC to provide for stakeholders to address the modified request to extend the ACP's construction deadline.

SELC attorneys Greg Buppert, Mark Sabath and Emily Wyche advised in comments to FERC to deny the request for a two-year extension to complete and place into service the proposed Supply Header Project because the request fails to meet FERC's standard for granting extensions.

FERC has never granted an extension to an applicant deciding on whether to use a proposed project.

To the extent Dominion decides to move forward with the SHP minus the pipeline, Dominion must seek additional authorization from FERC in a new proceeding. FERC cannot act on the modified extension request for the ACP without providing an opportunity for additional intervention and public comment to address important questions.

Dominion requested a one-year extension for construction activities, which it asserts may be necessary for abandoning and restoring ACP project areas. "There may be good reason for this extension, but Atlantic has provided little explanation for the commission's authority to grant this request and has left unaddressed details that will be important to the public," SELC said. "The public could not have anticipated the need to address restoration of the now abandoned right of way during the initial extension comment period, before Atlantic and DETI abandoned the ACP.

The attorneys argued FERC must, at minimum, provide another comment period of at least 30 days.

"For example, given the eminent domain authority that comes with a certificate order, and the hundreds of properties affected by the project, the public, and landowners in particular, will be interested in the status of Atlantic's easements and eminent domain authority during the restoration period and the landowners' associated rights to their property during this time," they argued.

"Any extension of the construction deadline must include conditions limiting Atlantic's authority under the certificate order, and public comment is necessary to identify what conditions would be appropriate. Specifically, if the commission grants the extension of time for construction activities, it must, at a minimum, address the following issues," they said. They listed those as:

• Limiting activities to only those necessary for restoring the right of way and abandoning the pipeline and vacating the remainder of the certificate order, in turn removing Dominion's eminent domain authority over the right of way.

• Identifying the mechanisms by which affected landowners will communicate specific restoration requirements to the company.

• Requiring Dominion to immediately commence consultation with all relevant state and federal agencies to promptly establish appropriate standards for completing restoration of the right of way.

• Identifying how FERC and other state and federal agencies will monitor restoration activities and associated environmental impacts. Monitoring could include a requirement that Dominion continue to submit regular status reports and environmental compliance monitoring reports during the restoration period.

• Requiring Dominion to promptly contact all landowners where a right of way easement exists and inform them Dominion will release the right of way easement within 90 days of a written request from an affected landowner; provide the landowner with the proposed written release; pay the reasonable attorneys' fees of the landowner in reviewing and negotiating changes to the easement; and file the final, executed written release of the easement in the land records of the appropriate jurisdiction. Dominion has already committed that landowners will keep the easement compensation they have received, they said.

"These are only a few of the important and complex issues that the commission must resolve and that the public must be permitted to address to help inform the commission's

decision," SELC said, noting that public comment, while necessary, should only be the first step in developing a restoration plan for the ACP project areas.
"The public comment period will serve to highlight the concerns of landowners, conservation groups, and other stakeholders," SELC added; but because Dominion did not include details in its extension request on what restoration may require or look like, citizens will be limited in their ability to weigh in.
SELC filed the comments on behalf of the Alliance for the Shenandoah Valley, Cowpasture River Preservation Association, Friends of Buckingham, Friends of Nelson, Highlanders for Responsible Development, Piedmont Environmental Council, Shenandoah Valley Battlefields Foundation, Virginia Wilderness Committee, Sound Rivers, Inc., and Winyah Rivers Foundation.
FERC strongly encourages electronic filings of comments in lieu of paper using the "eFiling" link at www.ferc.gov. In lieu of electronic filing, you may submit a paper copy. Submissions sent via the U.S. Postal Service must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, D.C. 20426.
Submissions sent via any other carrier must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Md. 20852.
The comment deadline is 5 p.m. on Aug. 3.

SELC asks Dominion Energy to end 'pipeline to nowhere'

| August 06, 2020

BY JOHN BRUCE • STAFF WRITER

MONTEREY — "A pipeline to nowhere."
That's the name many folks have given to the supply header project, a byproduct of the canceled Atlantic Coast Pipeline. The project was supposed to go away with the pipeline, but Dominion Energy Transmission Inc. wants to complete it under the same license.
Not so fast, said the Southern Environmental Law Center, which filed comments Monday asking the U.S. Federal Energy Regulatory Commission to limit the scope of any extension of the ACP's construction deadline to activities necessary for abandonment and restoration of ACP project areas; condition any such limited extension on the release of easements and proper restoration of ACP project areas under a new restoration plan subject to public comment; and deny the Dominion Energy Inc.'s request for a two-year extension to construct the Supply Header Project and place it into service.
SELC argued the timeframe for abandonment and restoration of the canceled Atlantic Coast Pipeline must be limited to the time required for necessary activities allowable only if easements are settled. The law center demanded FERC deny the pipeline company's proposal to complete the supply header project because its purpose is unknown and completion would rely on construction of the canceled ACP.
"As DETI's Modified Extension Request recognizes, the mid-construction cancellation of the ACP requires abandonment and restoration of the ACP right-of-way and other affected areas," SELC's filing states. "Several issues must be addressed on both public and private land to ensure adequate restoration of ACP project areas — including

corridors where trees have been felled (but not necessarily cleared), farm fields impacted by construction activities, waterbodies under which pipe has been installed, and areas serving as habitat to protected species such as the endangered candy darter … Atlantic must, in consultation with the Forest Service, determine whether restoration is needed beyond allowing cleared portions of the right-of-way to revegetate, for example on any access roads that might have been disturbed in connection with non-mechanized tree-felling. Any such restoration should be consistent with Atlantic's obligations upon termination of the Forest Service's Special Use Permit for the ACP, which required a performance bond for environmental restoration activities."

SELC said FERC should "require Atlantic to release its right-of-way easements upon request from private landowners or conservation easement holders. Atlantic must promptly contact the owners of all property, including conservation easement holders, where a right-of-way easement exists and inform them that (a) Atlantic will release the right-of-way easement within 90 days of a written request from an affected landowner or conservation easement holder; (b) Atlantic will provide the affected landowner or conservation easement holder with the proposed written release of the right-of-way easement; (c) Atlantic will pay the reasonable attorneys' fees of the affected landowner or conservation easement holder incurred in reviewing and negotiating changes to the proposed written release of the right-of-way easement; and (d) Atlantic will file the final, executed written release of the right-of-way easement in the land records of the appropriate jurisdiction."

The comments were filed on behalf of Alliance for the Shenandoah Valley, Appalachian Voices, Chesapeake Bay Foundation, Inc., Chesapeake Climate Action Network, Cowpasture River Preservation Association, Friends of Buckingham, Friends of Nelson, Highlanders for Responsible Development, Piedmont Environmental Council, Shenandoah Valley Battlefields Foundation, Sierra Club, Sound Rivers, Inc., Virginia Wilderness Committee, Wild Virginia, Inc. and Winyah Rivers Foundation.