

Federal court throws out permit for Atlantic Coast Pipeline to cross Appalachian Trail

By MICHAEL MARTZ Richmond Times-Dispatch 20 hrs ago

The Atlantic Coast Pipeline faces an escalating legal battle for its existence after a three judge panel of the 4th U.S. Circuit Court of Appeals on Thursday blocked a critical crossing of the Appalachian Trail through the Blue Ridge Mountains near Wintergreen Resort.

Dominion Energy, lead developer of the \$7 billion project, vowed to immediately appeal the panel's ruling to the full 4th Circuit, based in Richmond, while opponents asked federal regulators to revoke the certificate they issued 14 months ago to build the 604-mile natural gas pipeline through three states.

The Southern Environmental Law Center, based in Charlottesville, asked the Federal Energy Regulatory Commission to revoke the project's certificate of public convenience and necessity. The move came after the 4th Circuit vacated a permit that the U.S. Forest Service issued to allow construction of the pipeline beneath the Appalachian National Scenic Trail between Augusta and Nelson counties.

Without the permit, Dominion Energy and its partners would have to seek the explicit congressional approval they tried to avoid by rerouting the pipeline in 2015 to cross the trail and the adjacent Blue Ridge Parkway on land controlled by the Forest Service in the George Washington National Forest. Originally, it would have crossed the national trail and scenic parkway about 8 miles north near Afton.

"Under existing law, they don't have an option," said Greg Buppert, senior attorney at the law center. "No federal agency has authority to allow Dominion to cross the Appalachian Trail on federal lands."

"They have bet their whole project on that crossing point and now that's off the table," Buppert said.

Amendment in Congress

Dominion's allies in Congress reportedly are considering an amendment to a pending appropriations bill for the Department of Interior that would permit the crossing of the

Appalachian Trail and Blue Ridge Parkway near Reed's Gap, but they would have to move quickly with Democrats preparing to take control of the House of Representatives in January.

Dominion strongly disagreed with the 4th Circuit panel's decision, which it said "is at odds with the consensus" of four federal agencies — the Forest Service and National Park Service, as well as the Departments of Interior and Agriculture — that the Forest Service has "full legal authority" to approve the crossing.

"With this decision, the Fourth Circuit has now undermined the judgment of the dedicated, career professionals at nearly every federal agency that has reviewed this project," said Aaron Ruby, spokesman for the Richmond-based energy company, which is a partner in the project with Duke Energy, Southern Company Gas and Piedmont Natural Gas.

"If allowed to stand, this decision will severely harm consumers and do great damage to our economy and energy security," said Ruby, who noted that 56 other oil and gas pipelines cross the Appalachian Trail. "Public utilities are depending on this infrastructure to meet the basic energy needs of millions of people and businesses in our region."

The three-judge panel found that the Forest Service had "abdicated its responsibility to preserve national forest resources" and sent the permit back to the federal agency to correct under the guidance of the 60-page ruling, written by Judge Stephanie D. Thacker of West Virginia.

On the critical issue of crossing the Appalachian Trail, the panel concluded that the Forest Service does not have the power to administer the scenic trail, even though it manages portions of it passing through national forest lands. Rather, the trail is administered by the National Park Service, under the Department of Interior, which cannot permit natural gas pipelines across it under the Minerals Leasing Act.

The National Trail Management System Act "does not transfer administration responsibilities of the (Appalachian Trail) to the Forest Service simply because the Forest Service manages land underlying components" of the trail, Thacker concluded in vacating the permit.

The ruling also found that the Forest Service had acted arbitrarily and capriciously by

changing its forest management plans to accommodate the project, not fully considering alternative routes that would reduce the pipeline's damage to national forest land, and "failing to take a hard look at the environmental consequences" to the national forests it would cross.

Judge quotes Dr. Seuss

"We trust the United States Forest Service to 'speak for the trees, for the trees have no tongues,' " Thacker wrote, quoting from "The Lorax" by Dr. Seuss in a conclusion that cited the agency's own "serious environmental concerns that were suddenly, and mysteriously, assuaged in time to meet a private pipeline company's deadlines."

The ruling comes more than two months after a hearing before the same panel in Richmond in which Chief Judge Roger L. Gregory sharply questioned a lawyer for the Forest Service over the agency's apparent change of positions on the risks of landslides on steep slopes that the pipeline would cross, as well as other potential "adverse impacts" posed by the project.

The 4th Circuit already had vacated a permit issued by the Park Service to allow the pipeline to cross the Blue Ridge Parkway, a national scenic byway under its management. The agency subsequently issued a revised permit, which environmental groups also have challenged in the federal appeals court.

In August, the court also vacated a permit issued by the U.S. Fish & Wildlife Service that would have allowed the project to cause incidental harm to endangered or threatened animal species. The agency subsequently issued a new permit, but the 4th Circuit ordered a stay last week while it considered a pending appeal by environmental groups.

Given that stay, the pipeline company last week voluntarily suspended work on the project in three states, while asking the court for immediate clarification or reconsideration. Environmental groups asked FERC on Thursday to issue a stop-work order to the project because of the court's decision to vacate the Forest Service permit.

The 4th Circuit ruling on the Forest Service permit raises some of the concerns the same panel cited in a July 27 decision that vacated a permit the federal agency issued for the Mountain Valley Pipeline to cross the Jefferson National Forest in Southwest Virginia. In that decision, the same appeals panel faulted the Forest Service for its "silent acquiescence to a pipeline company's justification for upending large swaths of national forest lands" by changing its position on the potential threat of landslides, erosion and

sediment runoff into national forest streams.

On Thursday, the State Water Control Board began a process to potentially revoke the state water permit for the Mountain Valley Pipeline. Attorney General Mark Herring announced last Friday that his office had filed suit against the 300-mile project, citing 300 violations of water quality standards during its construction.

"From the start, it was clear that this destructive project cannot be built in a way that is protective of Virginia's waters," David Sligh, conservation director of Wild Virginia, said of the Mountain Valley Pipeline.

In its ruling on the Atlantic Coast Pipeline, the 4th circuit panel noted that the Forest Service had issued its draft "record of decision" for the permit on the same day that the Federal Energy Regulatory Commission released a final environmental impact statement supporting the project's proposed route over alternatives that could reduce harm to the national forests.

Those decisions followed a schedule that Dominion had recommended to the Forest Service the previous fall in meetings soon after Donald Trump was elected president. The panel said the "chain of events surrounding the Forest Service's sudden acquiescence to the alternatives analysis" by FERC was similar to the Mountain Valley case, in which the court ruled that the agency had acted arbitrarily and capriciously in adopting the findings in the environmental impact statement.

The ruling in the Atlantic Coast Pipeline case also found that the Forest Service had violated the National Environmental Policy Act by "failing to take a hard look at the environmental consequences of the project," even though the agency had expressed numerous concerns about the draft environmental impact statement that FERC never resolved.

"Nevertheless, as Atlantic's deadlines drew near, the Forest Service disregarded those concerns and adopted the (final environmental impact statement) — including its conclusions that landslide risks, erosion impacts, and degradation of water quality remained unknown — on the very same day FERC issued it," Thacker wrote.

The panel said the Forest Service's "insufficient analysis of landslide risks" also became clear when the Columbia Gas Transmission Pipeline, cited by FERC as an example of an existing pipeline built across sensitive terrain in the Appalachian Mountains, ruptured and exploded in early July after a landslide in West Virginia.

"Clearly, the Forest Service's (earlier) concerns about landslide risks and pipeline safety ... deserve serious consideration, for the protection of both the environment and the public," Thacker wrote.

mmartz@timesdispatch.com
(804) 649-6964