

Gas Infrastructure Faces Legal Battles Despite High Court Pipeline Ruling

1,506 words

15 June 2020

18:07

InsideEPA.com's Daily Briefing

EPAWDB

English

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In a win for the natural gas industry, the Supreme Court is rejecting a key challenge to the **Atlantic Coast Pipeline** (ACP), though the pipeline and other large gas infrastructure projects are still facing growing legal and permitting hurdles before they can be built and put into operation.

The high court in a June 15 decision in *U.S. Forest Service v. Cowpasture River Preservation Association, et al.* held that the Forest Service can issue a special-use permit allowing the 604-mile pipeline planned between West Virginia and North Carolina to traverse 16 feet through a national forest, including a tenth of a mile segment 600 feet below a portion of the Appalachian Trail (AT).

The court reversed an appellate ruling that would have required developers to re-route the major pipeline project and delay its construction.

Opponents alleged the special-use permit violated the Mineral Leasing Act and the U.S. Court of Appeals for the 4th Circuit agreed, vacating the permit after finding the Forest Service lacked such authority because the AT is part of the National Park Service (NPS).

However, the Supreme Court held that the Department of the Interior's decision to assign AT responsibility to the NPS did not transform the land the trail passes through into NPS land. As such, it found the Forest Service did have authority to issue the permit. Justice Clarence Thomas authored the 7-2 opinion, with Justices Sonia Sotomayor and Elena Kagan dissenting.

The decision is a "constructive ruling" for the ACP as well as the pending Mountain Valley Pipeline in the region, which also faces litigation over its route, say analysts at ClearView Energy Partners. But they note other federal permits for both projects are still pending, with those outcomes unclear.

In another example of expanded legal attacks on gas infrastructure, a broad coalition of environmental groups is joining with landowners and renewable energy organizations to challenge the Federal Energy Regulatory Commission's (FERC) approval of the Jordan Cove liquefied natural gas (LNG) terminal in Oregon, in what would be the first U.S. facility to export gas to Asia.

'Copious' Litigation

Like the ACP challenge, the Jordan Cove suit is not a direct challenge to the greenhouse gas or climate change aspects of the LNG project, but is part of a growing effort by environmentalists to challenge all aspects of gas infrastructure approvals in order to block expanded natural gas drilling and electric supply reliance on the fuel as they seek to transition to zero-carbon renewable energy.

The Jordan Cove suit, *Rogue Riverkeeper, et al. v. FERC*, filed May 22 in the D.C. Circuit, will allege that FERC failed to comply with the National Environmental Policy Act (NEPA) when considering effects to wildlife habitat, aquatics and public safety. It will also raise Natural Gas Act (NGA) issues, including climate impacts and analysis, a source familiar with the filing says.

The plaintiff coalition has not yet outlined substantive arguments over the FERC approval, but the source familiar with the case says to also expect suits over the Forest Service's plan for amendments to rights-of-way for the related Pacific Connector Pipeline that will cross Oregon to connect to the terminal in Coos Bay, as well as two biological opinions issued by the Fish & Wildlife Service and National Marine Fisheries Service.

Additionally, environmentalists will be “involved in any Secretarial override of the State of Oregon’s denial” of the project’s Coastal Zone Management Act (CZMA) permit, as well as the state’s Clean Water Act (CWA) section 401 permit objection. “Those two issues aren’t ripe yet, and we’re not sure how they’ll turn out. But if they don’t go our way, we will be involved in challenging those adverse decisions too. There will be copious amounts of litigation,” the source says.

Environmentalists say the pipeline and export terminal would be the largest construction project in Oregon’s history and would become the state’s largest source of climate pollution.

FERC in 2016 denied the project in part because of weak demand for LNG exports. Oregon also denied all of the permits over which it has authority, including the CZMA, though pipeline developer Pembina has asked Commerce Secretary Wilbur Ross to overturn that decision. Additionally, EPA is seeking to roll back state authority over CWA section 401 reviews.

“FERC got it right the first time when it rejected this harmful project, and it hasn’t adequately explained its about face,” the Natural Resources Defense Council (NRDC) said in a statement on the suit. “Jordan Cove still hasn’t identified any outside buyers for this gas.”

Another example of expanded legal efforts is a late January suit by Environmental Defense Fund targeting FERC’s approval of a Midwestern pipeline, questioning its decision under the NGA that the Spire STL Pipeline running from southern Illinois to the St. Louis area is needed. In issuing its approval, FERC relied on an agreement to purchase the gas from an affiliate of the pipeline developer.

An EDF official testified at an earlier House hearing that FERC must conduct a more thorough assessment of “need” to prevent unnecessary costs to consumers as well as locking in long-term GHG pollution.

Permit Challenges

In the ACP case, ClearView analysts say they expect the Forest Service to next issue a draft supplemental environmental impact statement (SEIS) in July as planned, with a final SEIS expected later this year. That timeline would allow a speedy reinstatement of ACP’s permits in line with President Donald Trump’s June 4 executive order to waive environmental reviews and expedite infrastructure projects as a response to the COVID-19 pandemic.

But ACP still lacks key Endangered Species Act (ESA) permits from the Fish & Wildlife Service, including a biological opinion and an incidental take statement. Construction can resume once those are re-issued, if they survive appeals or injunction requests, ClearView says.

However, the project is also stymied by a nationwide injunction affecting all new gas pipeline construction that was issued in May by a federal district judge in Montana. That prevents ACP from relying on Nationwide Permit (NWP) 12 to address CWA dredge-and-fill requirements. The 9th Circuit recently declined to stay the injunction amid the appeal, and a decision is not expected for about a year.

Environmental groups are also noting persistent problems facing the ACP, despite the high court’s favorable ruling, including that it still needs eight more permits.

“While today’s decision was not what we hoped for, it addresses only one of the many problems faced by the [ACP]. 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 . . . will soon consider the mounting evidence that we never needed this pipeline to supply power,” the Southern Environmental Law Center (SELC) said in a statement, referencing a separate challenge over FERC’s approval of the project. That case has been on hold pending the high court’s ruling but is now likely to restart.

SELC also cites a March statement from Dominion Energy in Virginia that the buildout of new gas-fired power plants is no longer “viable” because the state enacted a clean energy law in April requiring Dominion to shut down all of its gas plants by 2045. Similarly, a North Carolina plan calls for that state to reduce GHGs from power plants by 70 percent from 2005 levels in 2030, and to achieve total carbon neutrality by 2050.

The group says it is “unreasonable” to expect customers to pay \$8 billion for the unneeded pipeline, characterizing the high court ruling as only plugging one hole in a sinking ship.

In addition to the ESA and special use permits, other outstanding ACP permits include a right-of-way from the NPS, a Virginia air permit and four CWA authorizations from the Army Corps of Engineers for Pennsylvania, West Virginia, Virginia and North Carolina.

NRDC says in a statement that the decision “doesn’t greenlight” the ACP, citing the other outstanding permits. “That’s why we’ll continue fighting through all legal and federal and state avenues to ensure this proposed fracked gas pipeline . . . is never built.” NRDC also cited Sotomayor’s “notable dissent” for getting “what should be obvious, that the [AT] is land in the National Park system. And under federal law, a pipeline plainly cannot cross land in the National Park system.”

However, the American Gas Association hailed the decision for bringing the “hope of clean, affordable energy” to Atlantic Coast consumers.

“This decision paves the way to supply natural gas to parts of Virginia and eastern North Carolina, allowing access to more affordable energy for those who need it and delivering the economic and environmental gains that natural gas brings,” the group said.

The Supreme Court heard arguments in the case Feb. 24. -- Dawn Reeves (dreeves@iwpnews.com)

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