

Atlantic Coast Pipeline - Risk Upon Risk

Threats to ACP go well beyond Forest Service permit



Friends of the Earth U.S., Oil Change International
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Introduction

The Atlantic Coast Pipeline faces some of the stiffest community and environmental opposition in the country today, comparable to that faced by TransCanada's ill-fated Keystone XL project. Seventeen months since certification by the Federal Energy Regulatory Commission, construction has barely progressed.

The ACP, if completed, would be a 600-mile, 42-inch-diameter pipeline carrying fracked gas from the Appalachian Basin in West Virginia through Virginia to North Carolina. It is owned by Dominion Energy, Duke Energy and Southern Company, which have together formed a private company, Atlantic Coast Pipeline LLC, specifically to build and operate the pipeline.

First announced in 2014, the project is two years behind schedule and substantially over budget. The latest update from Duke Energy estimates the project cost at \$7 to \$7.8 billion — 37 percent to 53 percent higher than the original \$5.1 billion — with full operation pushed back to 2021.¹

The ACP is facing a triple threat:

- extensive legal and regulatory challenges that are delaying construction and raising costs, which may lead to cancellation;
- fundamental challenges to its financial viability in the face of lack of growth in domestic demand for methane gas and increased affordability of renewable energy options; and
- an unprecedented citizen initiative positioned to ensure strict compliance with environmental laws and regulations, even in remote locations, if construction proceeds.

ACP: Putting human rights and the environment in peril

The ACP is a climate, environmental and human rights boondoggle. With a capacity of 1.5 billion cubic feet per day, the ACP will carry enough fracked gas to generate over 67 million metric tons of climate pollution per year, the equivalent of 20 average US coal plants.² It would cut from west to east through the entire Allegheny mountain range, requiring 38 miles of mountain top removal.³ It would cross the Appalachian Trail and Blue Ridge Parkway, hundreds of rivers and wetlands and national forests, including the Monongahela and George Washington national forests. And, it would disturb hundreds of farms and communities along its route, threatening livelihoods and health.

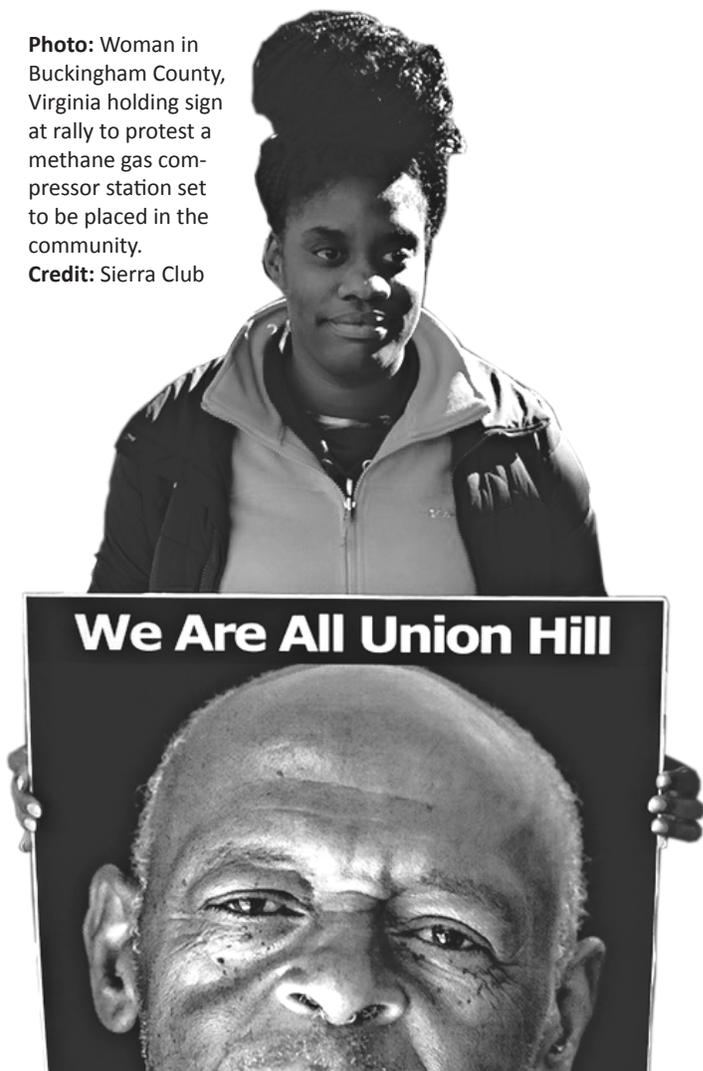
The ACP could become a poster child for environmental racism. It will disproportionately harm African-American,

Indigenous and poor communities, many of whom have been excluded from important decision-making processes. Thirty thousand Native peoples live in census tracts considered by the Federal Energy Regulatory Commission to be part of the project area in North Carolina. Compared to their statewide numbers, Native Americans are overrepresented by a factor of 10 along the North Carolina section of the pipeline route.⁴ Further, there is grave concern about maintaining the integrity of historic artifacts given the failure to include the four impacted North Carolina state-recognized tribes in the programmatic agreement for historic preservation activities associated with ACP construction and operation.

Additionally, a methane gas compressor station, one of the largest ever if built, is set to be located in Union Hill, an African-American community of great historical and cultural significance in Buckingham County, Virginia. It would emit nearly 300,000 tons of carbon-equivalent pollution per year. At a recent visit to Union Hill, former vice president Al Gore called the ACP “a reckless racist rip-off” and referred to the compressor station as a “vivid example of environmental racism.” Living near pipelines and infrastructure like compressor stations has been documented to cause multiple health complications, including skin, gastrointestinal, respiratory, neurological and psychological problems.⁵

Photo: Woman in Buckingham County, Virginia holding sign at rally to protest a methane gas compressor station set to be placed in the community.

Credit: Sierra Club



ACP's Triple Threat

Threat #1: Legal and regulatory challenges

The ACP is facing an onslaught of legal challenges and losses. Seven federal permits have been stayed, suspended or vacated; in fact, all construction on the pipeline is currently stopped. When — or if — construction will start up again is unknown. Environmental groups, Indigenous Peoples and others have brought at least nine court challenges to ACP permits and certifications, most of which are ongoing.⁶ These include:

- *Forest Service Permit* — In November 2017, the U.S. Forest Service amended the forest plans for the George Washington and Monongahela national forests to accommodate the ACP. Then in January 2018, the Forest Service granted the ACP a special use permit to cross forest lands and a right-of-way to cross the Appalachian National Scenic Trail. A suit was filed in February 2018 challenging the Forest Service's approval of the project, with the case argued before a three-judge panel in September. Arguments included that approval of the project violated the National Forest Management Act and the National Environmental Policy Act. In December, the Fourth Circuit ruled to vacate the Forest Service permit, agreeing with the petitioners on the improper evaluation of environmental threats and ruling that the Forest Service lacked the authority to grant the project permission to cross the ANST. On Jan. 28, 2019, ACP, LLC filed with the Fourth Circuit, requesting a rehearing en banc, meaning a hearing on the case before all 15 judges of the Fourth Circuit. On Feb. 25, the court declined to reconsider its ruling. Dominion Energy stated that it plans to appeal the decision to the U.S. Supreme Court within 90 days, but it is less than likely that the court will grant this petition. Without this permit, ACP will struggle to find a viable route.
- *FERC certificate* — A challenge to FERC's issuance of a Certificate of Purpose and Need for the ACP in October 2017 was filed with the Fourth Circuit Court of Appeals in August 2018. Fourteen conservation groups, represented by Southern Environmental Law Center and Appalachian Mountain Advocates, contend that FERC failed to adequately examine the demand for methane gas in the project's destination markets and took at face value inflated demand projections submitted by Dominion Energy and Duke Energy. A briefing before the D.C. Circuit Court for the case has not yet been scheduled, but oral arguments are likely to occur in the fall of 2019. If successful, this case could leave



Photo: Sign protesting ACP in Augusta County, 2014. **Credit:** Steven Johnson Flickr

- the project without a permit to proceed.
- *National Park Service Permit* — The NPS's December 2017 approval for the ACP to cross underneath the Blue Ridge Parkway was challenged in the Fourth Circuit. The court vacated the permit on Aug. 6, 2018 and FERC issued a stop work order for the entire project on Aug. 10. The NPS issued a new permit that purported to remedy the deficiencies in the earlier permit, lifting the stop work order on Sept. 17. Then, plaintiffs re-challenged that permit in the Fourth Circuit. Before the case was argued, the NPS asked the court to vacate the previously issued permit for the ACP to cross the Blue Ridge Parkway so it 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, 2019. At present, there is no permit for the ACP to cross the Blue Ridge Parkway and therefore the project's route is not viable.
- *Fish and Wildlife Service* — The FWS's biological opinion and incident statement on threats to endangered species by the ACP was vacated by the Fourth Circuit Court of Appeals in May 2018. The court determined that the FWS had been too vague in their assessment of local wildlife that would be affected by the pipeline. The FWS issued a new biological opinion that sought to meet the court's objections, which was then challenged, with arguments expected to take place in May before the Fourth Circuit. Without this permit, the entire pipeline is in jeopardy.
- *Army Corps of Engineers* — The U.S. Army Corps of Engineers filed a motion on Jan. 18, 2019 with the Fourth Circuit Court of Appeals for a remand and vacating of the permit that the Huntington District of the Corps had issued for the ACP to cross more than 1,500 rivers and streams in West Virginia. The court had previously issued a stay of the Nationwide 12, or NWP12, permit issued for the ACP 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 ACP project. The motion was unopposed and subsequently granted

by the court. While the action only directly affects the portion of the ACP subject to the Huntington District's jurisdiction (West Virginia portions of the route), the stays on stream and river crossings for the ACP in the other Corps districts remain in effect.

- *Buckingham County Compressor Station* — A challenge was filed with the Fourth Circuit Court of Appeals on Feb. 8, 2019 against the Virginia Air Pollution Board and the Department of Environmental Quality's decision to approve the compressor station in Buckingham County, Virginia.
- *Proposed Metering and Regulating Station* — Members of the Lumbee and Tuscarora tribes in North Carolina have filed a lawsuit against the ACP and the Board of Commissioners of Robeson County, North Carolina. The dispute centers on the county's permitting of the siting of the ACP's proposed metering and regulating station in the heart of their Indigenous communities. The complaint claims that the Board of Commissioners did not follow the statutory procedures during the public hearing and that the proposed station does not meet the requirements of the Conditional Use Permit, or CUP. The complaint states that "the decision to grant the CUP was arbitrary and capricious, and that the proposed M&R Station and Tower would endanger public health and safety, cause injury to the value of adjoining property, and would not be harmonious with existing zoning and usage of the surrounding land." These three criteria are required to be met in approving local conditional and special use permits. The lawsuit will be heard in the second half of April 2019.
- *Winstead Farm* — The U.S. Court of the Eastern District of North Carolina issued a stay on ACP development on the property of Marvin Winstead, a farmer whose land stands in the path of the pipeline. The 90-day halt, originally issued in November 2018, was recently extended until May 31, 2019.

The ACP's cost inflation risks reducing returns on the project as state regulators are likely to balk at passing the project's full costs onto ratepayers. The high cost of the project is exacerbated by the lack of new demand for methane gas in the destination markets. Further, the project has no independent committed customers. Six companies, all of which are regulated utility affiliates of the pipeline's three owners, have contracted for 96 percent of the pipeline's capacity. Utility subsidiaries of Duke and Dominion in Virginia and North Carolina have contracted for 86 percent of the pipeline's capacity. Yet, the argument by these utilities that they need new methane gas pipeline capacity has been significantly weakened since the ACP was first proposed.

In Dominion's 2018 long-term Integrated Resource Plan (IRP), four out of five modeled scenarios showed no increase in methane gas consumption for power generation from 2019 through 2033.⁹ However, in December 2018, this IRP was rejected by Virginia state regulators, in part for overstating projections of future electricity demand.¹⁰ On March 8, Dominion submitted a revised plan using the grid operator PJM's more realistic power demand projections. This reduced the number of potential gas 'peaker' plants in the plan's scenarios from 8-13 to 4-7.¹¹ This reduces further the projected demand for gas in Virginia.

Since it first proposed the ACP, Dominion has canceled plans for power plants that it previously stated would be serviced by methane gas transported by the project. Further, all of its existing major methane gas-fired plants have long-term contracts with existing pipelines that can deliver methane gas at a much lower cost than via the ACP. Dominion's future peaking units, if built, would likely be supplied by existing pipelines. The bottom line is that Dominion's utility customers have no need for additional methane gas supply.

The most recent IRPs of Duke Energy Progress and Duke Energy Carolinas also revealed that previously planned methane gas plants have been delayed by at

Threat #2: Financial viability

Moody's Investors Service stated in February 2019 that "Dominion's execution risk with its Atlantic Coast pipeline is credit negative."⁷ Bank of America Merrill Lynch also downgraded Duke Energy (from "buy" to "neutral"), citing the ACP as a primary reason; Bank of America is joint lead arranger and bookrunner for a loan to the ACP. The project's construction costs are now estimated to be more than \$2 billion above the original price tag, and that figure looks likely to grow larger still, should the project make it to completion. According to Dominion, the construction halt costs up to \$20 million per week.⁸



least five years beyond the original proposal, and none have been approved by the state regulator. Duke's first power plant that might need more methane gas supply is proposed to begin operation many years after the ACP is supposed to be in service. It is also possible that new methane gas-fired power plants might not be built at all in North Carolina.

Moreover, on March 7, 2019, North Carolina's attorney general submitted official comments to the North Carolina Utilities Commission regarding the IRPs of Duke Energy for 2018-2033.¹² The attorney general recommended that the IRP not be accepted as is and that Duke submit a revised plan. The revised plan should more robustly evaluate storage-plus-renewables and more thoroughly assess the cost to ratepayers of climate change from Duke's proposed power generation from methane gas. Additionally, Duke should include the potential costs of future price volatility and government-imposed limitations on greenhouse gas emissions. The attorney general also proposed that Duke more thoroughly evaluate the benefits of renewables, including energy security and diversification and demand-side management and energy efficiency measures. If Duke were to accurately compare the total methane gas vs. renewables costs and savings, it could spell the end to the entire pipeline project.

Over the next decade, it is likely that the demand for methane gas in Virginia and North Carolina will decrease further as renewable energy and storage technologies continue to rapidly decline in price and undercut the cost of running methane gas-fired power plants. State utility regulators in Virginia and North Carolina must approve the pass-through of ACP transportation costs to customers. If the capacity that these utilities have reserved has no value, as appears likely, investors in the ACP run the risk that state regulators will not agree to saddle customers with the full cost of paying for the pipeline, leaving ACP investors holding the bill.

For a more in-depth analysis, see the recent report by the Institute for Energy Economics and Financial Analysis and Oil Change International: "The Vanishing Need for the Atlantic Coast Pipeline, Growing Risk That the Pipeline Will Not Be Able to Recover Costs From Ratepayers."

Threat #3: Citizen compliance initiative

If construction proceeds, an unprecedented, highly coordinated science and technology-based Pipeline Compliance Surveillance Initiative (CSI) is positioned to make sure environmental laws and regulations are strictly applied and enforced during construction. It is spearheaded by the Allegheny-Blue Ridge Alliance and member organizations. The Pipeline CSI promises unparalleled public scrutiny, utilizing

innovative approaches. Concerned citizens will collect and submit "evidence-grade information concerning noncompliance with, or failure of, required environmental protection practices."¹³ There will be CSI incident response teams, a CSI mapping system, a Pipeline CSI reporting hotline and more. Criminal charges are being investigated against the Mountain Valley Pipeline as a result of evidence compiled by a similar compliance effort.¹⁴

The Pipeline CSI intends to hold ACP to account for construction violations in some of the most difficult terrain for pipeline construction. While violations have often gone undetected in remote regions on many similar projects, this citizen's initiative promises to expose a higher number of incidents leading to possible further delays and cost increases.

Conclusion

The ACP faces a drawn-out legal and regulatory quagmire, as well as an unprecedented level of public scrutiny through a citizen-led Compliance Surveillance Initiative. These challenges are likely to further delay construction and raise the project's price tag even higher. If completed, state utility regulators in North Carolina and Virginia are unlikely to justify passing the full cost of methane gas transportation contracts onto ratepayers.

It would be prudent for investors in Dominion, Duke and Southern to question whether pursuing the ACP further is a good use of capital. As the transition to clean energy gathers pace, the risks and growing costs of this major methane gas pipeline project look increasingly unwise to ratepayers, regulators and investors alike.



Photo (page 4): Residents hold signs calling out Dominion Energy for its ACP involvement.

Credit: Friends of Buckingham Facebook.

Photo (page 5): Woman raising #NoACP sign at community meeting.

Credit: Elizabeth Outz, Energy News

Endnotes

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