

UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION

In the Matter of the Applications of:

Atlantic Coast Pipeline, LLC  
Dominion Transmission, Inc.

Docket Nos. CP15-554-000  
CP15-554-001  
CP15-555-000

**COMMENTS CONCERNING CONSERVATION EASEMENTS IN  
VIRGINIA**

**BY**

**SHENANDOAH VALLEY NETWORK,**  
**HIGHLANDERS FOR RESPONSIBLE DEVELOPMENT,**  
**SHENANDOAH VALLEY BATTLEFIELDS FOUNDATION,**  
**NATURAL RESOURCES DEFENSE COUNCIL,**  
**AUGUSTA COUNTY ALLIANCE,**  
**COWPASTURE RIVER PRESERVATION ASSOCIATION,**  
**DOMINION PIPELINE MONITORING COALITION,**  
**FRIENDS OF NELSON,**  
**PIEDMONT ENVIRONMENTAL COUNCIL,**  
**ROCKFISH VALLEY FOUNDATION,**  
**VALLEY CONSERVATION COUNCIL,**  
**VOICES FROM BATH, AND**  
**WEST VIRGINIA HIGHLANDS CONSERVANCY**

Under Virginia law, Atlantic Coast Pipeline, LLC (Atlantic) is precluded from constructing an interstate natural gas pipeline across lands protected by conservation easements held by the Virginia Outdoors Foundation. Atlantic's proposal would destroy portions of eleven properties protected by conservation easements and effect the largest intrusion on these protected lands in the fifty-year history of Virginia's conservation easement program. Like the forests on Shenandoah and Cheat Mountains, Atlantic's unwarranted threat to these

ecologically significant private lands is another symptom of its carelessly planned effort to force the Atlantic Coast Pipeline through the steep forested mountains of the central Appalachians.

In apparent recognition of the threat to these important private lands, on October 26, 2016, the Commission rightly requested that Atlantic “[f]ile documentation that Atlantic is not precluded from establishing an easement for the [Atlantic Coast Pipeline] on each Virginia Outdoors Foundation (VOF) easement crossed.”<sup>1</sup> The Commission also requested that Atlantic “identify any specific construction, restoration, and/or operation mitigation measures identified by the VOF that would be implemented to promote compatibility with the purpose and values of the easements.”<sup>2</sup>

On November 9, 2016, Atlantic submitted its response to the Commission’s information request.<sup>3</sup> But because the Virginia Outdoors Foundation will not even consider Atlantic’s unprecedented request to convert eleven conservation easements until February 2017, Atlantic cannot provide the documentation the Commission requested. Instead, it offers only an unconvincing argument that it

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<sup>1</sup> Federal Energy Regulatory Commission, Environmental Information Request, FERC Docket Nos. CP15-554-000, CP15-554-001, and CP-15-555-000, Accession No. 20161026-3009, at 26 [hereinafter Commission Information Request].

<sup>2</sup> *Id.*

<sup>3</sup> Atlantic Coast Pipeline, LLC and Dominion Transmission, Inc., Response to Data Request, FERC Docket Nos. CP15-554-000, CP15-554-001, and CP-15-555-000, Access No. 20161109-5138, at 114-18 [hereinafter Atlantic Response to Data Request].

“believes that it will have met all relevant state statutory criteria for VOF approval of the crossings if they are deemed to be conversions.”<sup>4</sup>

A recent letter from the Virginia Outdoors Foundation and these comments establish that Atlantic’s optimism is wholly unfounded. Atlantic’s expectation that it will satisfy the relevant statutory criteria for conversion of these conservation easements is premature, ignores the unwavering position of the Virginia Outdoors Foundation, and is based on unsupported statutory interpretation. Despite its claims, Atlantic fails to demonstrate that it is not precluded from crossing the eleven properties currently protected by conservation easements held by the Foundation. Neither the conservation easement deeds nor state law provide an avenue for approval of construction of the Atlantic Coast Pipeline through the proposed route.

Because construction of the Atlantic Coast Pipeline through private lands protected by the Foundation’s conservation easements is contrary to state law, we respectfully request that the Commission reject the proposed route through these protected properties. Specifically, the Conservation Groups identified below make the following three arguments to the Commission:

- First, the Virginia Outdoors Foundation explicitly stated that approval for construction of the Atlantic Coast Pipeline cannot be granted under the terms of the conservation easements because the pipeline will permanently impair conservation values.

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<sup>4</sup> *Id.* at 114.

- Second, the Atlantic Coast Pipeline fails to meet the unambiguous statutory requirements for conversion of a conservation easement under Va. Code Ann. § 10.1-1704.
- And third, because there is no path for approval for the pipeline to cross these conservation easements under state law, Dominion’s discussion of mitigation is premature.

The Southern Environmental Law Center submits these comments on behalf of Shenandoah Valley Network, Highlanders for Responsible Development, Shenandoah Valley Battlefields Foundation, Natural Resources Defense Council, Augusta County Alliance, Cowpasture River Preservation Association, Dominion Pipeline Monitoring Coalition, Friends of Nelson, Piedmont Environmental Council, Rockfish Valley Foundation, Valley Conservation Council, Voices from Bath, and West Virginia Highlands Conservancy (collectively the Conservation Groups).

## **ARGUMENT**

### **I. Atlantic is Precluded from Constructing the Atlantic Coast Pipeline under the Terms of the Conservation Easement Deeds.**

Atlantic argues that language in some of the conservation easement deeds themselves allows for construction of the Atlantic Coast Pipeline. This argument rests on an erroneous interpretation of a provision regarding utilities contained in some of the easement deeds and on misapplication of the general principle that

easements can be modified by agreement of the Virginia Outdoors Foundation and a landowner.<sup>5</sup> Neither argument has merit.

**A. The Atlantic Coast Pipeline falls outside the scope of easement provisions addressing utilities.**

Atlantic's first argument blatantly ignores three prior filings by the Virginia Outdoors Foundation stating that the Atlantic Coast Pipeline would impair the conservation values of the relevant properties. On December 5, 2016, the Foundation filed yet another letter with the Commission expressly rejecting Atlantic's argument that construction of the pipeline could be permitted under the language of the easement deeds.

Atlantic notes that many Virginia Outdoors Foundation conservation easement deeds "contain language providing for existing and future utilities subject to review and approval of VOF"<sup>6</sup> and that several of the easement deeds at issue here contain the following provision: "Public or private utilities to be constructed in whole or in part to serve other properties shall not be constructed . . . unless Grantee [VOF] determines that the construction and maintenance of such utilities *will not impair the conservation values* of the Property."<sup>7</sup> Atlantic appears to argue that this language is sufficient to justify construction of the Atlantic Coast Pipeline across these properties. But that cannot be true because the Foundation has already

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<sup>5</sup> See Easement Deeds, **included as Exhibit 1, Attachments A-K.**

<sup>6</sup> Atlantic Response to Data Request, *supra* note 3 at 114.

<sup>7</sup> See Easement Deeds, **included as Exhibit 1, Attachments A-K.**

determined that construction of the pipeline *will* impair the conservation values protected by all eleven conservation easements.

In a September 2016 letter to the Commission, the Foundation expressly found that if the proposed route is approved, “a total of 11 open-space easements in Highland, Bath and Augusta and Nelson Counties would suffer permanent impairment of conservation values.”<sup>8</sup> The Foundation discussed the specific conservation values protected by these easements in detail, reiterating their “deep concern” that the pipeline would cross these easements and “assert[ing] their previous position, which was clearly stated in [two previous letters to the Commission] that the [Atlantic Coast Pipeline] should avoid crossing or intersecting VOF open space easements.”<sup>9</sup>

Because Atlantic’s recent response evinces a failure to recognize that position, on December 5, 2016, the Virginia Outdoors Foundation filed yet another letter with the Commission in direct opposition to Atlantic’s response.<sup>10</sup> In the letter, the Foundation plainly rejects Atlantic’s erroneous contention that these utility provisions apply to construction of the Atlantic Coast Pipeline:

[C]onstruction of the Atlantic Coast Pipeline would not fall within the scope of activities permitted by this language in the easements. VOF has stated since the very first consultation with Atlantic that

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<sup>8</sup> Letter from Martha Little, Deputy Dir., Va. Outdoors Found., to Kimberly D. Bose, Sec’y, FERC (Sept. 6, 2016), **included as Exhibit 1, Attachment N.**

<sup>9</sup> *Id.*

<sup>10</sup> Letter from Martha Little, Deputy Dir., Va. Outdoors Found., to Kimberly D. Bose, Sec’y, FERC (Dec. 5, 2016), **included as Exhibit 2.**

this project could not be completed on VOF open space land without impairing conservation values of the affected properties.<sup>11</sup>

Because these conservation easements cannot be altered under the terms of the easement deeds to allow construction of the Atlantic Coast Pipeline, Atlantic cannot rely on the utilities provision to support its position to the contrary.

**B. Construction of the Atlantic Coast Pipeline is not an easement “modification.”**

Although Atlantic does not develop this argument in any depth, it also suggests that the conservation easements at issue could be “modified with the agreement of both the landowner and VOF” to allow for construction of the Atlantic Coast Pipeline.<sup>12</sup> While amendments to conservation easements may be made, construction of the pipeline falls outside the scope of the amendment provisions contained in the easement deeds.

First, the amendment provision contained in the relevant easement deeds permits amendments to an easement “to enhance the Property’s conservation values or to add to the restricted property”—neither of which the Atlantic Coast Pipeline would accomplish.<sup>13</sup> To the contrary, the Virginia Outdoors Foundation has determined that the pipeline would *impair*, not enhance, conservation values. Second, the amendment provision specifically prohibits amendments that “conflict with or [are] contrary to or inconsistent with the conservation purpose of [the]

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<sup>11</sup> *Id.*

<sup>12</sup> Atlantic Response to Data Request, *supra* note 3 at 114.

<sup>13</sup> See Easement Deeds, **included as Exhibit 1, Attachments A-K.**

Easement” or “reduce the protection of the conservation values” protected by the easement.<sup>14</sup> Here, the Foundation has explicitly and repeatedly “taken the position that construction, maintenance and operation of the [Atlantic Coast Pipeline] is inconsistent with the open space protections afforded by the subject easements” and that the pipeline “could not be completed on VOF open space land without impairing conservation values of the affected properties.”<sup>15</sup>

Because the Virginia Outdoors Foundation has already determined that construction of the Atlantic Coast Pipeline will permanently impair conservation values on the conservation easements at issue, Atlantic’s suggestion that the Foundation and landowners could simply agree to “modify” the easements to allow for construction is untenable and must be rejected.

## **II. The Atlantic Coast Pipeline Fails to Meet the Statutory Requirements for Conversion under the Virginia Open-Space Land Act.**

Atlantic next argues that the Atlantic Coast Pipeline would satisfy the requirements for conversion of open-space land under Va. Code Ann. § 10.1-1704.<sup>16</sup> In order to arrive at that conclusion, Atlantic so distorts the relevant statutory language that the result bears no relation to the plain meaning expressed by the General Assembly. While the Virginia Outdoors Foundation will not consider the merits of Atlantic’s § 1704 application to permanently convert conservation easement lands until February 2017, a plain reading of the statute

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<sup>14</sup> *Id.*

<sup>15</sup> Dec. 5, 2016 VOF letter, *supra* note 10.

<sup>16</sup> Atlantic Response to Data Request, *supra* note 3 at 115-16.

readily demonstrates that the pipeline fails to meet the statutory requirements of this law and cannot be approved.

Atlantic contends that Va. Code Ann. § 10.1-1704 provides an “additional means of allowing projects such as the [Atlantic Coast Pipeline] to co-exist with Open Space Easements.”<sup>17</sup> As discussed above, the first means Atlantic relies on—language in the easement deeds themselves—fails because the Virginia Outdoors Foundation has already determined that the Atlantic Coast Pipeline would impair conservation values on these properties. Therefore, approval under § 1704 would provide the *only* means for approval outside of a certificate of public convenience and necessity by the Commission and the subsequent exercise of eminent domain. The Foundation emphasizes this in its most recent letter to FERC: “[C]onstruction, maintenance and operation of the interstate gas transmission line is inconsistent with the open space protections afforded by the subject easements. Therefore, the [Atlantic Coast Pipeline] will constitute a conversion/diversion of the easement property as outlined in Va. Code Ann. § 10.1-1704.”<sup>18</sup> The Foundation correctly recognizes that the only relevant question is “whether Atlantic will have met the statutory requirements”<sup>19</sup>—and the answer must be no.

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<sup>17</sup> *Id.* at 115.

<sup>18</sup> Dec. 5, 2016 VOF letter, *supra* note 10.

<sup>19</sup> *Id.*

Conversion under § 1704 is more than modification of an existing conservation easement: conversion means that the land will no longer be designated as open-space land for conservation purposes. Because conversion authorizes such a drastic change in land use, the General Assembly has required any proposed conversion to meet very strict statutory requirements. The Atlantic Coast Pipeline fails to meet those requirements.

Va. Code Ann. § 10.1-1704 requires any conversion to be “essential to the orderly growth and development of *the locality*” and “in accordance with the official comprehensive plan for *the locality* in effect at the time of conversion.”<sup>20</sup> As discussed at length in the motion filed by some of the Conservation Groups in October 2016, the Atlantic Coast Pipeline fails to meet either requirement.<sup>21</sup> First, the pipeline is not “essential” to the orderly growth and development of any of the four localities—Highland, Bath, Augusta, and Nelson Counties—which it would run through.<sup>22</sup> Under Virginia law, a “locality” is “a county, city, or town as the context may require.”<sup>23</sup> Far from being “essential” to those localities’ growth, the pipeline is likely to harm each of these localities, all of which are characterized by and benefit from their rural features.

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<sup>20</sup> Va. Code Ann. § 10.1-1704(A)(i)(a)-(b) (emphasis added).

<sup>21</sup> Shenandoah Valley Network, et al., Motion to Reject Proposed Route through Conservation Easements in Virginia, FERC Docket Nos. CP15-554-000, CP15-554-001, CP15-555-000, Accession No. 20161013-5029, at 5, 11-17 [hereinafter Motion to Reject Route through Easements].

<sup>22</sup> Va. Code Ann. § 10.1-1704(A)(i)(a); *see* Motion to Reject Route through Easements, *supra* note 21 at 11-13.

<sup>23</sup> Va. Code Ann. at § 15.2-102.

Second, the Atlantic Coast Pipeline is wholly inconsistent with the comprehensive plans of Highland, Bath, Augusta, and Nelson Counties.<sup>24</sup> Atlantic attempts to sidestep this prong of the analysis by contending that “the ACP is not specifically included in many local comprehensive plans because, pursuant to the Natural Gas Act, localities do not have jurisdiction over the siting of interstate natural gas pipelines.”<sup>25</sup> But the relevant question is not whether the Atlantic Coast Pipeline is specifically contemplated by a locality’s comprehensive plan. The question is whether construction of the interstate natural gas pipeline is “in accordance with” that plan.<sup>26</sup> As the Conservation Groups discussed at length in the October 2016 motion, the pipeline is simply not in accordance with any of the four localities’ comprehensive plans.<sup>27</sup> As such, it must fail that prong of the analysis. Further, the fact that ultimately the siting of a pipeline falls within the Commission’s jurisdiction is irrelevant to the question whether Atlantic is precluded from constructing the pipeline through these easements under state law.

Instead of arguing that the Atlantic Coast Pipeline meets the two statutory criteria of Va. Code Ann. § 10.1-1704 as they are written, Atlantic fashions an expansive interpretation of § 1704 that bears no resemblance to the statute’s plain language.<sup>28</sup> Atlantic first argues that when considering

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<sup>24</sup> See Va. Code Ann. § 10.1-1704(A)(i)(b).

<sup>25</sup> Atlantic Response to Data Request, *supra* note 3 at 115.

<sup>26</sup> Va. Code Ann. § 10.1-1704.

<sup>27</sup> Motion to Reject Route through Easements, *supra* note 21 at 13-16.

<sup>28</sup> Atlantic Response to Data Request, *supra* note 3 at 115-16.

major infrastructure projects like ACP . . . a proper evaluation of whether the project is ‘essential to the orderly development and growth of the locality’ cannot be limited to any one locality in isolation but instead must be evaluated more broadly to accurately reflect the economic benefits to the Commonwealth of Virginia overall.<sup>29</sup>

Citing the purported economic benefits of the pipeline, Atlantic argues that the pipeline “is essential for the orderly development and growth of a comprehensive energy system.”<sup>30</sup> Va. Code Ann. § 10.1-1704 plainly and specifically requires any proposed conversion to be essential to the locality in which the property is located and to be in accordance with that same locality’s comprehensive plan. Atlantic’s interpretation carelessly replaces “the locality” with “the Commonwealth of Virginia” and—even more egregiously—with “a comprehensive energy system.”<sup>31</sup>

The language of the statute cannot be stretched to justify conversion of conservation easements for uses not contemplated by the legislature. Approval of Atlantic’s § 1704 application would violate the plain language of the statute. “Under basic rules of statutory construction, [Virginia courts] consider the language of these statutes to determine the General Assembly’s intent from the words contained therein, unless a literal construction would yield an absurd result.”<sup>32</sup> Where the legislature “has used words of a plain and definite import, courts cannot assign to them a construction that would be tantamount to holding

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<sup>29</sup> *Id.* at 115.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Mozley v. Prestwould Bd. of Dirs.*, 570 S.E.2d 817, 820 (Va. 2002) (citing *Vaughn, Inc. v. Beck*, 554 S.E.2d 88, 90 (2002); *Cummings v. Fulghum*, 540 S.E.2d 494, 496 (2001)).

that the General Assembly intended something other than that which it actually expressed.”<sup>33</sup> Here, the language of § 1704 could not be more “plain and definite.”<sup>34</sup> Atlantic’s interpretation is wholly unrelated to the expressed intent of the General Assembly. The Commission therefore cannot rely on Atlantic’s expansive and unwarranted interpretation of § 1704 to support its “belief” that the Atlantic Coast Pipeline meets statutory requirements.

On a related point, Atlantic cites to language from the Virginia Energy Plan’s Commonwealth Energy Policy in support of its argument that the Virginia Outdoors Foundation should approve the § 1704 applications.<sup>35</sup> Atlantic’s reliance on this language does not further their arguments. By its own terms, the Commonwealth Energy Policy is merely “intended to provide guidance” and “shall not be construed to amend, repeal, or override any contrary provision of applicable law.”<sup>36</sup> The Policy provides that state agencies should, where appropriate, act in a manner consistent with the broad objectives stated in the Policy.<sup>37</sup> Such general policy guidance cannot be interpreted to override the plain statutory instructions of Va. Code Ann. § 10.1-1704.

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<sup>33</sup> *Id.* (citing *Vaughn*, 554 S.E.2d at 90).

<sup>34</sup> *See id.*

<sup>35</sup> Atlantic Response to Data Request, *supra* note 3 at 115.

<sup>36</sup> Va. Code Ann. § 67-102(D).

<sup>37</sup> *Id.*

### **III. Any Discussion of Mitigation is Premature and Irrelevant to the Question of whether Atlantic is Precluded from Crossing Properties Protected by Virginia Outdoors Foundation Conservation Easements.**

Finally, Atlantic’s discussion of mitigation again ignores the statements of the Virginia Outdoors Foundation. The Commission requested that Atlantic identify mitigation measures “that would be implemented to promote compatibility with the purpose and values of the easements.”<sup>38</sup> The Foundation determined that the Atlantic Coast Pipeline “could not be completed on VOF open space land without impairing conservation values of the affected properties.”<sup>39</sup> In other words, construction, operation, and maintenance of the pipeline are fundamentally incompatible with the purpose and values of the easements. While Atlantic vaguely notes—without providing any details—that it is “working with VOF to develop plans that minimize and mitigate both permanent and temporary impacts,”<sup>40</sup> such mitigation will not make the Atlantic Coast Pipeline compatible with the conservation values protected by these easements.

Further, Atlantic’s discussion of “compensatory mitigation”—namely Hayfields Farm and the Rockfish River parcel—is premature.<sup>41</sup> Va. Code Ann. §10.1-1704 allows conversion of open space easements only when the requirements discussed above—essentiality and compliance with comprehensive

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<sup>38</sup> Commission Information Request, *supra* note 1.

<sup>39</sup> Dec. 5, 2016 VOF letter, *supra* note 10.

<sup>40</sup> Atlantic Response to Data Request, *supra* note 3 at 115.

<sup>41</sup> *Id.* at 116-17.

plans—are met.<sup>42</sup> When, and only when, those requirements are met, there must be “substituted other real property” of equal or greater value for conversion to be approved.<sup>43</sup> But as discussed above, the Atlantic Coast Pipeline fails to meet those requirements because it is neither essential to the localities which it would pass through nor in accordance with their current comprehensive plans.

Mitigation should only be discussed in the event that the Commission grants a certificate of public convenience and necessity—not before. The fact that Atlantic has offered substitute properties in an effort to force the Foundation to negotiate now does not alter the fact that conversion of these conservation easements is not permitted under the easements themselves or Virginia law. Any discussion of mitigation should only occur in the event that the Commission approves the proposed route and grants a certificate of public convenience and necessity. Because there is no path to approval of this route under state law, any discussion of mitigation at this point is premature.

### **CONCLUSION**

Atlantic has failed to demonstrate that it is not precluded from establishing a pipeline easement across these eleven conservation easement lands under the terms of the easement deeds and under Virginia law. Atlantic’s recent response to the Commission’s information request ignores the Foundation’s unequivocal statement that the pipeline cannot be built under the terms of the easements

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<sup>42</sup> Va. Code Ann. § 10.1-1704.

<sup>43</sup> *Id.* § 1704(A)(ii).

because it would permanently impair conservation values, and it grossly manipulates the plain text of Va. Code Ann. § 10.1-1704. The Commission should give no weight to Atlantic's deficient response.

As discussed at length in our October 2016 motion before the Commission, construction of the Atlantic Coast Pipeline through eleven properties meant to be protected in perpetuity would deeply undermine the conservation easement program in Virginia and do untold harm to the conservation values of this unique region. Because Atlantic is precluded under state law from building the pipeline across these eleven properties, we respectfully reiterate our request that the Commission reject Atlantic's proposed route.

Respectfully submitted,

/s/ Gregory Buppert

Gregory Buppert  
Southern Environmental Law Center  
201 West Main Street, Suite 14  
Charlottesville, VA 22902  
434.977.4090  
gbuppert@selcva.org

*On behalf of the Conservation Groups*

December 13, 2016

**CERTIFICATE OF SERVICE**

I hereby certify that I have on December 13, 2016, caused the foregoing document to be served upon each person designated on the official service list compiled by the Secretary in this proceeding.

/s/ Gregory Buppert \_\_\_\_\_  
Gregory Buppert

*On behalf of the Conservation Groups*