

UNITED STATES DISTRICT COURT

for the

Western District of Virginia

ATLANTIC COAST PIPELINE, LLC

Plaintiff

v.

NELSON COUNTY BOARD OF SUPERVISORS, et al.

Defendant

Civil Action No. 3:18CV00115

SUMMONS IN A CIVIL ACTION

To: (Defendant's name and address) NELSON COUNTY, VIRGINIA
SERVE: Phillip D. Payne
County Attorney
402 Court Street, 2nd Floor
P.O. Box 299
Lovingsston, VA 22949

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — or 120 days for Social Security Cases filed pursuant to 42 USC 405(g) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Richard D. Holzheimer, Jr.
McGuireWoods LLP
Court Square Building
310 Fourth Street, N.E., Suite 300
Charlottesville, VA 22902-1288

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

JULIA C. DUDLEY, CLERK OF COURT

Date: 12/07/2018



s/ Heidi Wheeler
Deputy Clerk

Civil Action No. 3:18CV00115

**PROOF OF SERVICE**

*(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))*

This summons for *(name of individual and title, if any)* \_\_\_\_\_  
was received by me on *(date)* \_\_\_\_\_.

I personally served the summons on the individual at *(place)* \_\_\_\_\_  
\_\_\_\_\_ on *(date)* \_\_\_\_\_ ; or

I left the summons at the individual's residence or usual place of abode with *(name)* \_\_\_\_\_  
\_\_\_\_\_, a person of suitable age and discretion who resides there,  
on *(date)* \_\_\_\_\_, and mailed a copy to the individual's last known address; or

I served the summons on *(name of individual)* \_\_\_\_\_, who is  
designated by law to accept service of process on behalf of *(name of organization)* \_\_\_\_\_  
\_\_\_\_\_ on *(date)* \_\_\_\_\_ ; or

I returned the summons unexecuted because \_\_\_\_\_ ; or

Other *(specify)*: \_\_\_\_\_

My fees are \$ \_\_\_\_\_ for travel and \$ \_\_\_\_\_ for services, for a total of \$ \_\_\_\_\_ 0.00.

I declare under penalty of perjury that this information is true.

Date: \_\_\_\_\_

\_\_\_\_\_  
*Server's signature*

\_\_\_\_\_  
*Printed name and title*

\_\_\_\_\_  
*Server's address*

Additional information regarding attempted service, etc:

12/06/2018

JULIA C. DUDLEY, CLERK  
BY: *H. Whittle*  
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
Charlottesville Division

ATLANTIC COAST PIPELINE, LLC,

*Plaintiff,*

v.

Case No. 3:18CV00115

NELSON COUNTY BOARD OF SUPERVISORS

**SERVE:** Thomas H. Bruguiera, Jr.

Chairman

Nelson County Board of Supervisors

84 Courthouse Square

Lovingston, VA 22949

and

NELSON COUNTY, VIRGINIA

**SERVE:** Phillip D. Payne

County Attorney

402 Court Street, 2<sup>nd</sup> Floor

P.O. Box 299

Lovingston, VA 22949

*Defendants.*

**COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF**

Plaintiff Atlantic Coast Pipeline, LLC (“Atlantic”), by counsel and pursuant to Fed. R. Civ. P. 3 and 28 U.S.C. §§ 2201 and 2202, respectfully files this complaint against the Nelson County Board of Supervisors (the “Board of Supervisors”), and Nelson County, Virginia (the “County”) (collectively, “Defendants”), and in support thereof, states as follows:

## PARTIES

1. Atlantic is a limited liability company organized and existing under the laws of Delaware. Atlantic is a partnership consisting of subsidiaries of Dominion Energy, Inc., Duke Energy Corporation, and The Southern Company. Atlantic's principal place of business is 120 Tredegar Street, Richmond, Virginia 23219.

2. Atlantic is an interstate natural gas company as defined by Section 2 of the Natural Gas Act ("NGA"), codified at 15 U.S.C. § 717, *et. seq.* Atlantic is engaged in the business of transporting natural gas in interstate commerce for customers principally located in the Northeast and Mid-Atlantic markets, including Virginia, and as such is authorized to construct, own, operate, and maintain pipelines in Virginia the for the transportation of natural gas in interstate commerce. Atlantic is registered to do business in the Commonwealth of Virginia.

3. The Nelson County Board of Supervisors is the elected governing body of Nelson County.

4. The County is a political subdivision of the Commonwealth of Virginia.

## JURISDICTION AND VENUE

5. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331, because the causes of action arise under the Constitution and laws of the United States, including, but not limited to, to the Supremacy Clause, U.S. Const. Art VI, cl. 2.

6. This Court is empowered to provide declaratory and injunctive relief in this action pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, and Fed. R. Civ. P. 57 and 65.

7. Venue is proper in this Court pursuant to 28 U.S.C. § 1391. The events giving rise to this action occurred in this district, and Defendants reside in this district.

## STATEMENT OF FACTS

### The ACP Project

8. Atlantic was formed to own, develop, construct, operate and maintain an approximately 600-mile underground interstate natural gas transmission pipeline, known as the Atlantic Coast Pipeline (“ACP” or the “Project”). The Project will transport natural gas from West Virginia to Virginia and North Carolina. The natural gas transported by the ACP will be used to generate electricity, heat homes, run local businesses and increase the reliability and security of natural gas supplies in Virginia, West Virginia and North Carolina. The pipeline will pass through approximately 27.2 miles of the County.

9. As an interstate natural gas company, Atlantic is regulated by and subject to the jurisdiction of the Federal Energy Regulatory Commission (“FERC”).

10. Pursuant to Section 7 of the Natural Gas Act, 15 U.S.C. § 717 *et seq.* (“NGA”), FERC’s jurisdiction includes determining whether interstate natural gas transportation facilities are in the public convenience and necessity and granting a Certificate of Public Convenience and Necessity (Certificate) to construct and operate such facilities when and where it deems appropriate.

11. In reviewing Certificate applications, FERC is required by federal law to conduct a complete independent review of project proposals, including but not limited to an environmental review of the proposed facilities under the National Environmental Policy Act of 1969 (NEPA). FERC bases its decision on, *inter alia*, technical competence, environmental impact, long-term feasibility, and other issues concerning a proposed project.

12. On September 18, 2015, Atlantic filed an application with FERC for a Certificate authorizing the construction and operation of the Project and attendant facilities, FERC Docket

No. CP15-554-000. Pursuant to 81 Fed. Reg. 28,060 (May 9, 2016), the County was provided notice of the Application and an opportunity to comment on the same.

13. On October 13, 2017, FERC issued a certificate of public convenience and necessity (the “FERC Certificate”) authorizing Atlantic to construct and operate the Project. A copy of the FERC Certificate is attached as **Exhibit 1**.

14. Consistent with typical FERC orders issuing Certificates, the FERC Certificate contains the following statement: “Any state or local permits issued with respect to the jurisdictional facilities authorized herein must be consistent with the conditions of this certificate. The Commission encourages cooperation between interstate pipelines and local authorities. However, this does not mean that state and local agencies, through application of state or local laws, may prohibit or unreasonably delay the construction or operation of facilities approved by this Commission.” Ex. 1 ¶ 324.

#### Nelson County Floodplain Regulations

15. On September 12, 2017, after the County received notice that Atlantic had filed its application for a Certificate to construct and operate the ACP (including in the County), but before the Certificate was granted, the Board of Supervisors amended its local floodplain regulations (the “Floodplain Regulations”). The Floodplain Regulations comprise Article 10 of the County’s Zoning Ordinance (the “Zoning Ordinance”), and were adopted by the Board of Supervisors “pursuant to the authority granted to localities by Va. Code § 15.2-2280.” *See* Art. 10-1.

16. Article 10-13(A) of the Zoning Ordinance requires that “[a]ll uses, activities, and development occurring within any floodplain district. . . shall be undertaken only upon the issuance of a zoning permit.” Zoning permits are subject to administrative review by the designated

Floodplain Administrator and a zoning permit application must include the information set forth in Article 10-13 of the Zoning Ordinance.

17. The Board of Supervisors' amendments to the Floodplain Regulations prohibit "critical facilities" from being located within any area classified as a "Special Flood Hazard Area" unless a variance is granted by the BZA. *See* Zoning Ordinance Article 10-14(L).

18. "Critical facilities" are defined to include "hazardous materials or fuel storage, and other similar improvements and uses." Zoning Ordinance Article 10-7.

19. Variances may only be approved where the BZA finds that stringent criteria set forth in Article 10-21 of the Zoning Ordinance are satisfied.

20. Approximately 4.5 miles of the Project located in the County will cross areas designated as Special Flood Hazard Areas as determined by Article 10-8(A)(1) of the Zoning Ordinance, including approximately 3.5 miles of pipeline and 1 mile of access roads.

21. Failure to comply with any of the requirements or provisions of the Zoning Ordinance or directions of the Floodplain Administrator is a misdemeanor. *See* Zoning Ordinance Article 15-2.

#### Atlantic's Floodplain Application

22. In October 2017, Atlantic filed a "Floodplain Development Package" supporting its request for the necessary zoning permits to cross eleven floodplains, including two areas designated as a "Floodway District" (the "Zoning Application"). The Zoning Application included the criteria required by Article 10-13 of the Zoning Ordinance (site plans and permits applications), and described how the construction of the ACP would satisfy all applicable general and specific standards.

23. No-Rise Certificates prepared by a licensed engineer were included for each crossing, demonstrating, among other things, that the Project will not adversely affect the capacity of channels of the floodway or any watercourse, drainage ditch or any other drainage system, and will not increase flood elevations.

24. The Zoning Application also requested variances from the BZA for proposed work in the Floodway districts.

25. Public hearings on the requested variances were scheduled for February 12, 2018.

26. After filing the Zoning Application, Atlantic was advised that additional notice to property owners of the filing was required, thus necessitating the re-filing of the Zoning Application. Atlantic re-filed substantially the same Zoning Application on January 16, 2018, per the County's request.

27. Atlantic was then advised on January 24, 2018, that the County classified the ACP as a "critical facility" pursuant to Article 10-15(F) of the Zoning Ordinance, and that variances from the BZA would be required for all of the floodplain crossings.

28. Atlantic was also advised that the County intended to retain an engineering consultant to review the Zoning Application and provide a recommendation to the BZA on the variance requests. Thereafter, the County requested that Atlantic provide additional information that was not required by the Floodplain Regulations, including, among other things, construction methodologies, hydraulic and hydrologic ("H&H") analyses for all of the floodplain crossings and additional technical data that was used to create the engineering data provided, including the No-Rise Certificates.

29. During a meeting on February 5, 2018, the BZA unanimously voted to dismiss seven of Atlantic's eleven variance requests where Atlantic did not have a recorded easement or



an agreement from the underlying property owner to request a floodplain permit for the property. At Atlantic's request, the BZA deferred action on the remaining four variances to allow Atlantic additional time to provide the additional information requested by the County.

30. In the ensuing months, Atlantic attempted to work with the County and its consultant, KCI Technologies, Inc. ("KCI"), to provide the information requested by the County with respect to Atlantic's remaining four crossings.

31. From February through September 2018, Atlantic provided KCI with additional information, including but not limited to: (i) recorded easement plats for the pipeline and access roads within the floodplains, (ii) a link to the 404 Nationwide 12 and VADEQ Upland 401 Certification, (iii) construction alignment sheets for the access roads (iv) a Hydraulic Analysis Summary that discusses the conditions and resulting assumptions made in the No-Rise Certificates and within the supporting HEC-RAS modelling, and (v) HEC-RAS Modelling Results. None of the foregoing information is required by the Floodplain Regulations.

32. At KCI's request, and even though not required by the Floodplain Regulations, Atlantic revised its H&H modelling using StreamStats V4 to develop revised stream hydrology at each crossing. Atlantic also provided KCI with the digital HEC-RAS model data to expedite its review.

33. By letter dated September 21, 2018, Atlantic requested that the Zoning Application be placed on the BZA's next agenda (following the requisite legal notices being provided).

34. On October 1, 2018, Atlantic was advised that the variances could not be heard in October or November, and that a special meeting was not possible. Atlantic was requested to agree to a public hearing on December 3, 2018, which it did in a continued effort to cooperate with the County.

35. On October 24, 2108, Atlantic received two pages of additional “General Review Comments” and “Specific Review Comments” provided by KCI related to the four crossings, which requested that Atlantic provide additional information and data in support of its Zoning Application. While Atlantic disagreed with most of KCI’s comments, by letter dated October 29, 2018, Atlantic agreed to provide additional information to the County upon clarification.

36. On November 27, 2018, less than a week before the hearing and without time to address prior to the hearing, Atlantic received five (5) additional pages of comments from KCI related to the Zoning Application and the four crossings.

37. On December 3, 2018, Atlantic’s Zoning Application was considered by the BZA. During the meeting, the Planning Director reported, among other things, that Atlantic had provided all of the information required by the Zoning Ordinance, and had provided additional information as requested by the County. Thereafter, members of the public spoke in opposition to the Zoning Application. At the conclusion of the public hearing, KCI recommended that the BZA conditionally approve the Zoning Application and recommended a number of conditions of approval. Following all comments, and with little deliberation, the BZA voted to deny all four variance requests.

38. As Atlantic expects that it would provide substantially the same type of information in support of the remaining seven crossings, Atlantic believes that it is highly likely the BZA will deny those requests at such time as the BZA considers those requests (which will not be until a later date).

39. Compliance with the Zoning Ordinance and the Floodplain Regulations will delay and prevent Atlantic from constructing the ACP along its FERC approved route because Atlantic is unable to obtain any zoning permits for the necessary floodplain crossings from the County.

**COUNT I**  
**(Declaratory Judgment)**

40. Atlantic realleges and incorporates by reference the preceding allegations as though fully set forth herein.

41. Atlantic owns and operates interstate natural gas facilities, and is engaged in the transportation of natural gas in interstate commerce and is therefore subject to the jurisdiction of and regulation by FERC under the NGA.

42. Pursuant to § 717(b) of the NGA, FERC has plenary jurisdiction over the transportation of natural gas in interstate commerce, the sale of natural gas in interstate commerce for resale, and natural gas companies that are engaged in such transportation or resale.

43. Atlantic is subject to the exclusive jurisdiction of FERC as it pertains to the construction and operation of the Project.

44. Atlantic is not bound by the requirements set forth in the Zoning Ordinance, including but not limited to the Floodplain Regulations, which are intended to or have the effect of regulating the design, installation, construction, operation, and other aspects of natural gas transportation, including the Project.

45. The application of the Floodplain Regulations to the Project conflicts with federal law and regulation and will delay the construction and operation of the Project.

46. The Zoning Ordinance and the Floodplain Regulations are preempted by the NGA.

47. Atlantic seeks a declaration from this Court that the NGA preempts the requirements of the Zoning Ordinance, including but not limited to the Floodplain Regulations, and that Atlantic is not required to comply with the Zoning Ordinance, including obtaining any zoning permits for any of the floodplain crossings, as part of the construction and siting of the Project.

**COUNT II**  
**(Preliminary and Permanent Injunction)**

48. Atlantic realleges and incorporates by reference the preceding paragraphs as though fully set forth herein.

49. Defendants' actions in delaying and preventing Atlantic from constructing the ACP in accordance with the FERC Certificate interfere with Atlantic's ability to comply with applicable federal laws governing the transportation of natural gas in interstate commerce.

50. If Defendants are not enjoined, Atlantic will be irreparably harmed by its inability to construct the Project as approved in the FERC Certificate.

51. Atlantic is likely to succeed on the merits because the NGA preempts local laws and regulations, including zoning laws, where such laws and/or regulations prohibit or unreasonably delay the construction or operation of the ACP Project, a FERC-approved facility.

52. The degree of injury the Defendants will suffer if an injunction is granted is less than the injury that will result if the injunction is refused for reasons including FERC's having already conducted an independent environmental review of the proposed route (including, but not limited to, an analysis of floodplain impacts in the County) as part of its certification process. The County will not be harmed by not conducting a separate floodplain analysis, whereas Atlantic will be greatly harmed if it is unable to construct the ACP pursuant to its Certificate.

53. Atlantic has no adequate remedy at law.

54. An injunction will allow Atlantic to construct the Project and ensure safe and efficient distribution of natural gas to consumers. As a result, the general public will benefit from the granting of an injunction.

**WHEREFORE**, Atlantic prays that this Court:

(A) Enter a judgment pursuant to 28 U.S.C. §§ 2201 and 2202 declaring that the Nelson County Zoning Ordinance, the Floodplain Regulations, and any other local laws, regulations, and/or rules are preempted by federal law and are thus null and void as applied to the siting, construction and/or operation of the Project located in Nelson County;

(B) Award Atlantic preliminary and permanent injunctive relief enjoining the Defendants from administering or enforcing the Zoning Ordinance, the Floodplain Regulations, and any other local laws, regulations, or rules purporting to govern the siting, construction and/or operation of the Project; and

(C) Grant Atlantic such other relief as may be just and equitable, including, without limitation, costs and reasonable attorney's fees.

Respectfully submitted,  
**ATLANTIC COAST PIPELINE, LLC**  
By Counsel:

s/ Richard D. Holzheimer, Jr.  
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