

No. 18-2095

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SIERRA CLUB; and VIRGINIA WILDERNESS COMMITTEE,

Petitioners,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR;
NATIONAL PARK SERVICE; DAN SMITH; and BOB VOGEL,

Respondents,

and

ATLANTIC COAST PIPELINE, LLC,

Intervenor-Respondent.

**FEDERAL RESPONDENTS' UNOPPOSED MOTION
FOR VOLUNTARY REMAND**

Federal Respondents hereby move for a voluntary remand of the construction and right-of-way permits challenged by this petition for review. On remand, the National Park Service will vacate the permits and reconsider Intervenor Atlantic Coast Pipeline's permit application. The reasons supporting such relief are explained below. Federal Respondents have confirmed through counsel that Petitioners and Intervenor consent to the motion.

I. BACKGROUND

1. In October 2017, the Federal Energy Regulatory Commission authorized construction of the Atlantic Coast Pipeline. 161 FERC ¶ 61042, 2017 WL 4925429

(2017). The authorized route includes an underground crossing where Atlantic proposes to horizontally bore below the surface for 4639 feet. That crossing includes adjacent, parallel segments of George Washington National Forest (approximately 680 feet) and the Blue Ridge Parkway (approximately 647 feet). In 2017, the Park Service issued a right-of-way permit for the 647-foot segment of the Parkway, and the Forest Service issued a right-of-way permit for the 680-foot segment of the George Washington National Forest. Petitioners sought judicial review of the permits issued by both agencies.

2. With respect to the Parkway right-of-way, Petitioners asserted that the Park Service lacked statutory authority to issue the permit. Without deciding that question, this Court vacated the permit on August 6, 2018, based on its finding that the Park Service provided an insufficient explanation regarding whether the right-of-way was “not inconsistent with the use of such lands for parkway purposes.” 16 U.S.C § 460a-3; *Sierra Club v. DOI*, 899 F.3d 260, 293 (4th Cir. 2018).

3. On September 14, 2018, the Park Service issued new construction and right-of-way permits for the Parkway crossing based in part on a memorandum evaluating, pursuant to *Sierra Club’s* instruction, whether the right-of-way was “not inconsistent with the use of such lands for parkway purposes.” In issuing that permit, the Park Service adopted reports regarding environmental and cultural impacts that it had prepared for the earlier vacated permit pursuant to the National Environmental Policy Act (NEPA) and the National Historic Preservation Act (NHPA). Like the

earlier 2017 permit, the new 2018 right-of-way and construction permits were predicated in part on the existence of a valid Forest Service permit authorizing the 680-foot crossing of adjacent George Washington National Forest land.

4. The present petition seeks judicial review of the 2018 permits under the Natural Gas Act, 15 U.S.C. § 717r(d). Petitioners filed their opening brief on December 7, 2018. In addition to reasserting that the Park Service lacks statutory authority to issue pipeline permits across the Parkway, Petitioners argued that the Park Service's analysis of environmental and cultural impacts was insufficient under NEPA and NHPA. Br. 15–34, 53–61. Petitioners seek vacatur of the 2018 permits. Br. 61.

5. On December 13, 2018, this Court vacated the Forest Service's 680-foot right-of-way permit. *Compasture River Pres. Ass'n v. USFS*, No. 18-1144, 2018 WL 6538240 (4th Cir. Dec. 13, 2018). *Compasture* held that the Forest Service lacks authority under the Mineral Leasing Act to issue a permit for the rights-of-way across the 680-foot segment of George Washington National Forest land. *Id.* at *24.

6. On December 17, 2018, in light of *Compasture*, the Park Service moved to defer further briefing in this matter so that it could “evaluat[e] next steps to propose for this case and at the administrative level.” Dkt. 32 at 2. On January 2, 2019, the Park Service renewed its motion. Dkt 39. That motion remains pending before the Court. Due to the lapse in appropriations to the Department of Justice and the

Department of the Interior, briefing in this petition has been suspended pending further order of the Court. Dkt. 47.

II. VOLUNTARY REMAND OF THE RIGHT-OF-WAY AND CONSTRUCTION PERMITS IS APPROPRIATE.

7. This Court has discretion to remand agency actions prior to full briefing on the merits, and the Court's exercise of that authority is warranted in the circumstances presented here. "When a court reviews an agency action, the agency is entitled to seek remand without confessing error, to reconsider its previous position. . . . An agency must be allowed to assess the wisdom of its policy on a continuing basis." *Ohio Valley Env'tl. Coalition v. Aracoma Coal Co.*, 556 F.3d 177, 215 (4th Cir. 2009) (internal quotation marks and alterations omitted). Courts commonly grant requests for voluntary remand of agency decisions in order to afford administrative agencies the opportunity to consider newly available information, including judicial decisions announced subsequent to an agency's decision. *See, e.g., Limnia, Inc. v. DOE*, 857 F.3d 379, 387 (D.C. Cir. 2017) (Remand is appropriate where the agency "profess[es] intention to reconsider, re-review, or modify the original agency decision that is the subject of the legal challenge."); *Citizens Against Pellissippi Parkway Extension, Inc. v. Mineta*, 375 F.3d 412, 416 (6th Cir. 2004) ("[W]hen an agency seeks a remand to take further action consistent with correct legal standards, courts should permit such a remand in the absence of apparent or clearly articulated countervailing reasons."); *SKF USA Inc. v. United States*, 254 F.3d 1022, 1028 (Fed. Cir. 2001) ("[T]he agency

may seek a remand because of intervening events outside of the agency's control, for example, a new legal decision."); *Ethyl Corp. v. Browner*, 989 F.2d 522, 524 (D.C. Cir. 1993). Even in the absence of "intervening events, the agency may request a remand (without confessing error) in order to reconsider its previous position." *Util. Solid Waste Activities Grp. v. EPA*, 901 F.3d 414, 436 (D.C. Cir. 2018).

8. As explained above, the Park Service's decision was based in part on the existence of a valid permit for the pipeline to cross the 680-foot segment of adjacent George Washington National Forest land. In light of *Compasture's* vacatur of the Forest Service's permit and ruling that the Forest Service lacks authority under the Mineral Leasing Act to issue that permit, the Park Service requests that the Court remand the permits challenged in the present petition. On remand, the Park Service will vacate the permits and further consider whether issuance of a right-of-way permit for the pipeline to cross an adjacent segment of the Parkway is appropriate. That reconsideration will include discussions with other land management agencies within the Department of the Interior and the Department of Agriculture regarding the government's authority to issue a pipeline permit across the adjacent George Washington National Forest land and, if such authority exists, the appropriate agency or agencies to evaluate Atlantic's application for a crossing of that land and the Parkway land. Remand is also appropriate because, in light of new arguments presented in Petitioners' opening brief regarding NEPA and NHPA, the Park Service

must reconsider its determinations regarding the impact of the right-of-way on the environmental and cultural resources of the Parkway.

9. As noted above, Petitioners and Intervenor do not oppose this motion.

III. CONCLUSION

For the foregoing reasons, the Court should grant this motion and remand the construction and right-of-way permits challenged by this petition.

Respectfully submitted,

s/ *Avi Kupfer*

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**CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 27**

I hereby certify that this filing complies with the requirements of Fed. R. App. P. 27(d)(1) because it has been prepared in 14-point Garamond, a proportionally spaced font. I further certify that this motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2) because it contains **1149 words**, excluding the parts of the motion exempted under Fed. R. App. P. 27(a)(2)(B), according to the count of Microsoft Word.

s/ Avi Kupfer

AVI KUPFER

CERTIFICATE OF SERVICE

I hereby certify that on January 16, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

s/ Avi Kupfer

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