

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

ATLANTIC COAST PIPELINE, LLC,

Plaintiff,

v.

NELSON COUNTY BOARD OF
SUPERVISORS, *et al.*

Defendants.

Case No. 3:18-cv-00115-NKM-JCH

**PLAINTIFF’S REBUTTAL BRIEF IN SUPPORT OF
ITS MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS**

Plaintiff Atlantic Coast Pipeline, LLC (“Atlantic”), pursuant to L. Civ. R. 11(c)(1), submits this Rebuttal Brief in support of its Motion for Partial Judgment on the Pleadings (“Motion”).

ARGUMENT

The Opposition filed by Defendants Nelson County and Nelson County Board of Supervisors (collectively, “Defendants”) presents no new issues of fact or law. Rather, Defendants merely repackage the same argument that the Court already rejected in its Memorandum Opinion denying Defendants’ Motion to Dismiss. (ECF No. 23). Previously, in support of their Motion to Dismiss, Defendants argued that “the county’s floodplain management ordinance is imposed by the National Flood Insurance Act.” (ECF No. 10 at 6) (capitalization omitted). Now, in opposition to Atlantic’s Motion, Defendants similarly contend that “FEMA, through the NFIA and NFIP implementing regulations, has imposed that obligation [of floodplain management] on localities.”¹

¹ Defendants rely on dicta from *Till v. Unifirst Fed. Sav. & Loan Ass’n*, 653 F.2d 152, 156 (5th Cir. 1981) to support their argument that every locality nationwide *must* participate in the National Flood Insurance Program. However, the *Till* court did not hold that federal law *requires* communities to participate in the NFIP. Rather, it merely commented that, by deciding not to

(ECF No. 31 at 3). However, the Court has already held that Defendants’ position “is without merit.” (ECF No. 23 at 12). That ruling applies equally here.

Defendants’ other two arguments in opposition to Atlantic’s Motion both depend on the false equivalence between federal law and the Floodplain Regulations. First, Defendants contend that FERC cannot invade FEMA’s field of operations. (ECF No. 31 at 3). Although it is true that preemption does not apply in the context of two federal laws, that is not the context presented here. To the contrary, the Court previously determined that “the Floodplain Regulations are simply local ordinances.” (ECF No. 23 at 12). And because the Floodplain Regulations are local ordinances, they are subject to preemption under the Supremacy Clause.

Second, Defendants argue that no conflict exists between the NGA and the NFIA. (ECF No. 31 at 7). But this argument again depends on the erroneous premise that the Floodplain Regulations constitute federal law. Atlantic does not allege, nor does it need to prove, any conflict between the NGA and the NFIA. Rather, Atlantic has argued—and Plaintiff does not contest—that “[t]he Floodplain Regulations conflict with FERC’s authority and the FERC Certificate.” (ECF No. 27 at 6). This conclusion is supported by ample authority, *id.* at 8 (citing *Algonquin Gas Transmission, LLC v. Weymouth*, 919 F.3d 54, 65 (1st Cir. 2019); *Algonquin Gas Transmission, LLC v. Town of Weymouth*, 365 F. Supp. 3d 147, 157 (D. Mass. 2019); *Mountain Valley Pipeline,*

participate, a community may suffer sanctions and loss of federal financial assistance and financing. *Till*, 653 F.2d at 156-57. Moreover, a subsequent Fifth Circuit decision explicitly held that “the NFIP represents a *voluntary* federal program.” *Adolph v. FEMA*, 854 F.2d 732, 735 (5th Cir. 1988) (emphasis added); *see also City of Alexandria v. FEMA*, 781 F. Supp. 2d 340, 343 (W.D. La. 2011) (“Participation in the NFIP is voluntary.”); *Nat’l Wildlife Fed’n v. FEMA*, 345 F. Supp. 2d 1151, 1156 (W.D. Wash. 2004) (“Community participation in the NFIP is voluntary, and FEMA does not have any direct involvement in the administration of local floodplain management ordinances.”); *City of Biloxi v. Giuffrida*, 608 F. Supp. 927, 928 (S.D. Miss. 1985) (“The City of Biloxi voluntarily entered the [NFIP].”); *Texas Landowners Rights Ass’n v. Harris*, 453 F. Supp. 1025, 1028 (D.D.C. 1978) (rejecting argument that “the broadened sanctions of the Flood Disaster Protection Act of 1973 changed the [NFIP] into a mandatory enactment”).

LLC v. Wender, 337 F. Supp. 3d 656, 672 (S.D. W. Va. 2018)), and Defendants do not cite a single contrary decision. Thus, the Court should reject Defendants' arguments.

CONCLUSION

For the reasons discussed, the Court should grant Atlantic's Motion.

Dated: August 15, 2019

Respectfully submitted,
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CERTIFICATE OF SERVICE

I certify that, on August 15, 2019, I filed the foregoing on the Court's CM/ECF system,
which will send notification to the following:

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