



POWER OF THE LAW QUARTERLY

Fall 2020

Atlantic Coast Pipeline Cancelled, SELC Strategy Validated

After six years of comprehensive, dogged resistance led by SELC and our partners, Dominion Energy and Duke Energy announced on July 5 the cancellation of the Atlantic Coast Pipeline. The utilities cited “increasing legal uncertainty” in their decision to walk away from this \$8 billion project, which would have cut through the heart of the Southern Appalachian Mountains and locked our region into decades of reliance on fossil fuel power generation.

The abandonment of the Atlantic Coast Pipeline delivers significant relief for communities and natural resources all along the projected path. It also marks a major victory for the South’s clean-energy future and accelerates the closure of the fossil-fuel era across the nation. And we hope it bolsters allies and other legal teams still fighting the destructive Mountain Valley Pipeline in Virginia and West Virginia.

This virtually unprecedented result—stopping an interstate natural gas pipeline before it is in the ground—also validates SELC’s multifaceted model. We won this victory in large part due to our success in court. But we also won through years of persistent advocacy before state energy regulators. We won through a successful effort to broadly communicate the truth about this unnecessary project and to secure groundbreaking legislation committing Virginia to an electricity grid without fossil fuels. We won by blocking repeated attempts in the halls of Congress to greenlight the pipeline by rewriting the law. And we won through our strong local partnerships along the pipeline’s proposed route—partnerships that helped us understand and communicate with a clear, united voice the unacceptable risk the project posed to communities, national forests, remote streams, endangered species, and the South’s clean-energy transition.

Victory in the Courtroom

At the core of our opposition was a strategic litigation plan that shut down pipeline construction. Dominion Energy and Duke Energy took only one week to lay out the Atlantic Coast Pipeline’s 600-mile route. In doing so, the developers saw nothing but a blank map ready for digging holes and laying pipe—and thought their plan was a done deal.

But we saw big problems with their hastily chosen path. The route would require developers to bisect two national forests, tunnel under the Blue Ridge Parkway and Appalachian Trail, traverse steep landslide-prone mountains, blast through hundreds of remote streams, cut through habitat for endangered species, and build polluting facilities in historic African-American and Native American communities.

With so much at stake for the communities and natural resources along the pipeline’s path, SELC filed eight coordinated federal lawsuits on behalf of local and national organizations challenging permits issued for construction of the pipeline. We won six of these cases and lost only one. The eighth—our challenge to the Federal Energy Regulatory Commission’s overall approval of the pipeline—was headed to oral argument when the utilities announced the cancellation. We also took on the tall order of stopping work on the pipeline to fairly maintain the status quo while courts heard our cases.

Remarkably, we succeeded. In December 2018, one of our cases produced a stay from the U.S. Court of Appeals for the Fourth Circuit that halted construction, and work on the pipeline would never resume. On the eve of the cancellation announcement, the Atlantic Coast Pipeline was only 6 percent complete nearly three years after the project’s initial approval.

This is the first time that pipeline developers have



been unable to outrun the facts and the law.

Two of these victories stand out from the rest. First, the Fourth Circuit invalidated the U.S. Forest Service approval for developers to build across the Monongahela and George Washington National Forests. This win required specialized know-how that SELC has sharpened over several decades. Our accumulated knowledge of the national forest landscape, legal frame, and agency workings previously helped us protect over 700,000 acres of roadless national forest lands in the Southern Appalachians, shape a dozen long-range plans for Southern forests, stop misguided roads and logging, and enforce forest laws. This expertise again proved essential to winning this critical case against the Atlantic Coast Pipeline.

Second, the Fourth Circuit delivered a significant victory for environmental justice in Virginia when

the court ruled in favor of Friends of Buckingham, represented by SELC, and threw out the permit for Dominion to build a polluting compressor station in the middle of the historic African-American community of Union Hill, founded by Freedmen and Freedwomen in the years after the Civil War. The court's written opinion insisted that "environmental justice is not merely a box to be checked," and this powerful precedent is already helping SELC and other advocates demand that officials and developers fully consider the impacts of energy facilities on low-income communities and communities of color elsewhere in Virginia.

An Expensive, Unnecessary Pipeline

We fully expected—even with four necessary permits thrown out because of our litigation, revised versions of two of those permits thrown out a second time, and construction halted—

that two of the nation's most powerful corporations would double down on a gas pipeline that featured prominently in their business plans over the next 50 years.

To defeat this project once and for all, our approach had to work on multiple fronts at the same time. As we prepared for the courtroom, we were also uncovering and communicating key facts to counter Dominion's public narrative that the Atlantic Coast Pipeline was needed to keep the lights on in Virginia. Two avenues of SELC's advocacy came together here in the State Corporation Commission.

Over the previous ten years, our energy attorneys persistently showed up at little-publicized rate cases, integrated resource plan hearings, and other dockets to make the economic case for Virginia's clean-energy future, advocate for fair treatment of customers, and build a track record before state regulators. In December 2018, this dedication paid off when the commission for the first time rejected Dominion's long-term energy plan and rebuked the company's use of inflated projections of future energy demand—projections we had long refuted.

Now it was clear that neither the Atlantic Coast Pipeline nor the suite of fossil fuel plants Dominion wanted to build to burn the gas the pipeline would deliver was really needed to supply the energy needs of Virginians. In fact, we provided evidence, reinforced by the commission staff's own outside expert, that Dominion's gas-dependent fleet wasn't growing and that the existing fleet didn't need new pipelines. Based on that evidence, we secured rulings from the commission stating that Dominion already had access to adequate capacity on those existing pipelines.

SELC's attorneys worked hard to dig up this evidence, and our professional communicators worked hard to get it in front of the public. We used this data to educate partners, reporters,

and decision-makers and help spread the truth that this \$8 billion pipeline was little more than a money-making scheme for Dominion and Duke. The resulting shift in the views held by state officials and the public was dramatic. Standing with utility executives at a 2014 press conference, then-Virginia Governor Terry McAuliffe announced the new project, which he said was “desperately needed” and would become “a game-changer for the Commonwealth of Virginia.”

Six years later, the state’s Attorney General Mark Herring, in a brief submitted in the U.S. Supreme Court in support of SELC’s arguments, questioned the pipeline’s necessity, citing declining demand for natural gas and warning that “the ever-rising costs of building [the pipeline] will be passed on to consumers by the companies that have contracted with Atlantic to carry gas through the pipeline.”

Virginia’s Clean-Energy Future

With resistance to the Atlantic Coast Pipeline strengthening, SELC set out to secure Virginia’s clean-energy future and slam the door on fossil-fuel boondoggles like this one.

As regulators held Dominion accountable, lawmakers began to challenge the utility as well. Long accustomed to shaping energy legislation that would reward shareholders more than customers, Dominion suddenly faced a widespread demand for change as Virginia’s 2020 General Assembly session unfolded.

Taking hold of this opportunity, SELC developed concepts for clean-energy legislation that would set meaningful clean-energy targets and ensure fairness for low-income customers. We found lawmakers eager to learn from our expertise, and we helped fashion a series of historic laws that will transform the arc of Virginia’s energy future.

One of these laws, the Virginia Clean Economy Act, commits the state to eliminating carbon emissions from the electricity grid over the next 30 years and mandates the sequenced retirement of coal and natural gas

“Dominion and Duke aren’t going to mess with public lands or underserved communities in our region again without stopping, thinking, and worrying about SELC.”

—D.J. Gerken, Program Director

plants in Virginia, with all closing by 2050. These laws also pave the way for a massive expansion of solar and wind power, reduce the energy burden on low-income customers, and require state officials to address critical environmental justice concerns as the state transforms its energy system.

In a direct shot at the Atlantic Coast Pipeline, Virginia also enacted legislation protecting utility customers from paying for new pipelines unless utilities can prove the capacity is needed for reliability and is the cheapest way to address those needs. This law complicated Dominion’s plan to recover new pipeline costs from its captive customers.

North Carolina charted a similar path to renewable energy when it released a Clean Energy Plan calling for an electricity grid that produces zero carbon by 2050. SELC’s attorneys are helping the state develop an action plan to achieve this goal, which will make massive new natural gas pipelines obsolete in that state, too.

All Hands on Deck

With construction halted for well over a year, with multiple critical permits still lacking,

with communities and local organizations along the path refusing to stay silent, with public sentiment rising in opposition, and with Virginia and North Carolina embracing a carbon-free energy future—Dominion Energy and Duke Energy finally saw the writing on the wall and gave up on the Atlantic Coast Pipeline.

The defeat of this behemoth was an all-hands-on-deck accomplishment. It required every tool SELC has developed over decades of experience in litigation, communications, legislative advocacy, and partnership building. In many ways, this is the moment we have been preparing for over our 34-year history. But it is also just a beginning. We move forward with a new sense of the national-level impact we can have as an environmental leader with deep roots in the South.

L-R: Greg Buppert, Senior Attorney • Laura LaFleur, Legal Administrative Assistant
Katie Storer, Legal Administrative Assistant • Amelia Burnette, Senior Attorney
Danielle Fontaine, Legal Administrative Assistant • D.J. Gerken, Program Director
Nat Mund, Director of the Washington, D.C. Office and Federal Affairs
Patrick Hunter, Senior Attorney • Jonathan Gendzler, Staff Attorney
Sarah Francisco, Director of Virginia Office



Defending Our Nation's Environmental Laws

From the beginning, the Trump administration made clear its intention to gut many of the essential laws that have protected our nation's environment for decades. Because SELC has unmatched experience and success using these federal protections on the ground to stand up for clean air, clean water, and natural treasures in the South, it was imperative that we show regional and national leadership in anticipating and countering a barrage of rollbacks that would most affect our six states. For over three years, we have been doing just that—responding to dangerous Trump administration proposals as they have developed. Now the pace of these bad policy changes is accelerating, and SELC is using our expertise, capacity, and partnerships to sustain this fight on multiple fronts.

Defending 50 Years of Environmental Protection

Public participation has always been at the heart of our nation's environmental laws. The National Environmental Policy Act ensures communities have a clear avenue to challenge plans to build an interstate through their town, cut down trees on a beloved national forest, or pave over wetlands. The Trump administration is trying to eviscerate this cornerstone law, which has provided environmental protections for over half a century. We must stop those who currently hold power from cutting the American people out of their own government's decisions.

Through various presidential administrations, NEPA has been used to make big projects better, save taxpayers money, and expose damaging and wasteful political pork. The changes the administration is now trying to push through would remove basic democratic protections that give communities their best defense against irresponsible agency actions and reckless companies.

In 2019, the U.S. Forest Service



NEPA has given a voice to communities of lesser means that often bear the brunt of polluting projects. It is a tool of democracy, a tool for the people. We're not going to stand idly by while the Trump administration eviscerates it."

—Kym Hunter, SELC Senior Attorney

proposed to dramatically reduce environmental and public review for most projects on national forests. Throwing science-based decision-making under the bus, the proposal was designed to help the agency meet inflated timber quotas. With unique expertise in national forest protection, SELC led regional and national allies in providing legal and technical analysis of the harm this proposal would bring to southern forests. We also helped coordinate defensive efforts among leaders on Capitol Hill and galvanized the public to respond. We expect a final rule this fall and are prepared to continue our challenge if the problems are not corrected.

This July, the White House Council on Environmental Quality finalized an even more sweeping and destructive gutting of NEPA protections. The CEQ rule changes would restrict the ability of federal agencies to consider climate change impacts, mask the true extent of harm from major federal actions, and severely limit public participation, making it far more difficult for impacted communities to propose alternatives to major infrastructure projects like highways, bridges, and pipelines.

At the end of July, representing 17 conservation organizations, we filed a federal lawsuit asserting that the Trump administration's rule changes violate NEPA and laws designed to ensure government transparency and accountability. Our case has garnered the support of the former CEQ leader under President Obama and the former

agency general counsel under four previous administrations, including under President Carter when the original regulations were promulgated in 1978.

SELC Sues to Protect Clean Water

This summer and early fall, many Southerners found refuge and recharged at our region's many iconic rivers and lakes. We watched as our kids hurtled through the air on rope swings before plunging into the smooth waters of a local lake. Couples paddled together and fished from kayaks. Sometimes we simply took a moment to sit quietly by a placid lake, to watch the sun rise or set. But as we were finding solace in these natural treasures, the Trump administration continued with its plan to remove Clean Water Act protections for millions of stream miles, tens of millions of wetland acres, and important recreational lakes and drinking water reservoirs across the country.

SELC has led the national response to defend Clean Water Act protections. In 2018, we won when the administration tried to suspend clean water protections for the nation's waters and wetlands. Last October, we filed another lawsuit when the administration attempted to repeal regulations defining the scope of waters protected by the act. Then this April, the Trump EPA finalized its "replacement rule" to permanently remove Clean Water Act protections for up to 70 percent of the nation's streams and over half of the nation's wetlands. In the process, the

rule would jeopardize drinking water sources for more than 200 million Americans, including seven out of ten Southerners.

If this rule stands, developers, industry, or anyone else can pollute, fill, or pave over these waters without federal protections provided by the Clean Water Act. So we again filed a lawsuit in federal court in Charleston, South Carolina, to ensure essential safeguards for drinking water supplies, water quality, recreational waters, and habitat for animals and plants that depend on clean water.

While the administration has attacked the 2015 Clean Water Rule under the banner of “federal overreach,” it is attempting at the same time to undermine the ability of states to protect their own waters. Section 401 of the Clean Water Act gives states the authority to ensure that federal projects proposing to fill wetlands, cross rivers, or affect water quality will comply with state standards to protect local waters. This allows states to apply state law and local knowledge and expertise to ensure federally licensed projects protect water quality. The administration has instead finalized a rule weakening states’ ability

to condition approvals, giving federal agencies broad power to reject states’ requirements and drastically shortening the timeline for review and public participation.

SELC’s three decades of place-based Clean Water Act advocacy has made us the national leader on this issue, and we objected to the proposed changes on behalf of 80 national and regional organizations last October. The comments we submitted describe in detail the damage this change will bring to our region and provide a roadmap for further challenges as necessary. We are now preparing to go to court.

Air Mercury Standards Under Threat

We have known for decades that mercury and other air toxins are dangerous, particularly for mothers and young children. For more than a dozen years, SELC has represented several national medical and health groups, including the American Lung Association, and has been in the vanguard of litigation and advocacy work to overturn industry-led efforts to exempt coal-fired power plants from protections against hazardous air pollution. Safeguards we helped to secure more than a decade

ago have slashed mercury emissions in our region by nearly 90 percent, providing important health benefits for some of the most vulnerable people in our communities.

Despite the demonstrated and highly cost-effective success of these safeguards, the Trump EPA has decided to sweep them aside, claiming that it is no longer “appropriate and necessary” to keep mercury and other toxic air pollutants emitted from coal plants out of the air.

Not only does the administration’s unlawful action threaten protections against mercury and other toxic pollutants, it also is particularly dumbfounding because utilities have already complied with the standards. Many of the coal plants in our region are located near large population centers, and the closest communities, often comprising people of color and people with limited financial means, are most threatened by mercury and other toxic air pollution. The administration’s disregard for these communities and healthy air is dangerous, unsupportable, and unlawful, and we’re in court to make sure EPA’s baseless conclusion is reversed and the standards remain in place.

Confronting Plans to Burn Southern Forests

The Trump administration has proposed to define burning trees for energy as carbon neutral. Such a move would not only exacerbate climate change, but would open up Southern U.S. forests to more clear-cutting and result in an increase of carbon emissions. Because of misguided European subsidies for woody biomass fuel, the industry has exploded in the South as forests have been harvested for export overseas. In our multifront response, we have successfully challenged permits for biomass facilities in the U.S., worked with partner groups to expose the truth that Southern forests are being stripped to export biomass pellets, and launched direct advocacy and public outreach campaigns in the U.S.

and Europe to reform these policies.

Our most recent SELC-commissioned scientific analysis shows that burning carbon-storing trees actually increases carbon pollution for decades, and we are using these clear facts to inform the British public and decision makers about the need to end the subsidies propping up this industry. The Trump administration’s plans could open up a new front for domestic woody biomass use, resulting in a massive boost for this dirty, expensive, unsustainable energy source. SELC will be involved, joining with partners to submit comments while also educating and encouraging the public to oppose this discredited practice.



Important SELC News

SELC Welcomes Brenda Mallory

We are very pleased to welcome Brenda Mallory to our team. She will serve as SELC's Director of Regulatory Policy and will be based in our Washington, D.C., office. Brenda has over 35 years of experience in environmental, energy, and natural resources law and policy in both the public and private sectors. Brenda served almost two decades in the federal government, as General Counsel of the White House Council on Environmental Quality during the Obama administration

and also in various senior roles at the EPA, including as Acting General Counsel. Most recently, Brenda was the executive director and senior counsel of the Conservation Litigation Project at the Resources Legacy Fund, advancing protective land-management policies on federal public lands. At SELC, Brenda will coordinate SELC's regulatory agenda and provide strategic advice and guidance across the organization to attorneys working to uphold and enhance federal environmental safeguards.

"I am excited to join SELC as it tackles the most significant environmental challenges of our time. Protecting the air, water, and climate of the South has broad implications for national policy, and I look forward to helping SELC ensure a healthy environment for all communities in our region."

—Brenda Mallory,
SELC Director of Regulatory Policy



New Season of *Broken Ground* Navigates Sea Level Rise in the South

SELC's podcast *Broken Ground* is digging up environmental stories around our region. Join us as we explore how Southerners living along the coast are navigating sea level rise as they face ever-changing conditions. What decisions are people in waterfront communities forced to make to deal with rising tides? How are homeowners, city officials, developers, and others mapping a path forward? Find out on this season of *Broken Ground*, available wherever you get podcasts and at BrokenGroundPodcast.org. Text BrokenGround to 52886 to subscribe.

A Planned Gift Can Provide SELC with Staying Power

The recent Atlantic Coast Pipeline victory demonstrates the effectiveness of the Southern Environmental Law Center's approach, but it equally underscores the importance of SELC's staying power. The same is true of our coal ash initiative, which since 2011 has compelled reluctant utilities to excavate or recycle 255 million tons of toxic ash. Or our 15-year-old Clean Air and Energy Program, which has caused a 36 percent drop in carbon levels across the Southeast. Or our decade-long campaign that won permanent protection for 750,000 acres of roadless area in the Southern Appalachian national forests.

We suspect that you agree with our board member Joel Adams, who says, "I want the future to inherit a world worth living in." For information on how to provide staying power to SELC while taking care of your family, contact Deb Donnelly at ddonnelly@selcva.org, (434) 218-7382.

BINGE SEASON THREE!

GARDENING TIDEWATERS

Norfolk, Virginia's waters are rising fast, and its land is sinking. The city's plans to meet this climate change challenge could be a blueprint for other coastal communities.

BREAKING POINT

With waters rising in Charleston, South Carolina, we explore what, if any, breaking point there is for people living and working in this city. And we talk to city officials about making the big decisions of what—and what not—to build when trying to keep a flooding city livable.

FLOOD CITY

In Norfolk, Virginia, homeowners like Karen Speights are struggling with the hard decision between staying put and finding a way to start over somewhere else. Meanwhile, the city is hoping it can buy people time.

PROGRESS FOR WHO?

In the city and suburbs of Charleston, South Carolina, questions of environmental justice and wetland protections arise as development encroaches.

UNCHARTED TERRITORY

Scientists battling sea level rise enlist residents of Norfolk, Virginia, to help collect data that could help the city better understand its rising tides and flooding problems.

A Message From SELC's Executive Director

Dear SELC Friends,

Welcome to the new normal. As my daily interactions with our staff now take place on the computer screen, I am filled with gratitude for my colleagues. Their strength, flexibility, resilience, and support for one another is remarkable, particularly as many are stretched to the limits of their capacities and beyond as they teach and care for their children, attend to family members, and deal with the stress created by the uncertainty of this pandemic, while making sure our mission-critical work moves forward. I have never been prouder to be part of the Southern Environmental Law Center.

Although 2020 will forever be known as the year of the coronavirus, it will also be known at SELC as a year of remarkable achievements. The year started with the January 2 announcement of our coal ash settlement with Duke Energy. The settlement, requiring Duke to clean up its remaining coal ash pits in North Carolina, represents the largest coal ash cleanup in U.S. history and the largest toxic waste cleanup in our region's history. All told, SELC's coal ash work has led to the cleanup of over 255 million tons of toxic coal ash sludge left behind by utilities to seep into our waterways and drinking water supplies for decades to come.

Five days later, we won yet another case involving the unneeded and highly destructive Atlantic Coast Pipeline when the U.S. Court of Appeals for the Fourth Circuit invalidated the air permit for the compressor station Dominion Energy planned to build at Union Hill. In one of the most important environmental justice decisions of the past 30 years, the court chastised the Virginia Department of Environmental Quality and Dominion for their shoddy analysis and poor treatment of the Union Hill community, reminding them that "environmental justice is not merely a box to be checked." In February, we won an important decision in the South Carolina Supreme Court upholding the rights of citizens to challenge state air permits when their health and welfare are threatened. In early March, we helped secure passage of groundbreaking legislation in Virginia that commits the state to a zero-carbon electricity grid by 2050, the first such legislation in the South.

A week later, COVID-19 changed our world, but our work did not slow down. Through the spring, we focused on countering the steady stream of rollbacks of bedrock environmental protections by the Trump administration, and on developing legal strategies to counter Dominion Energy efforts to restart construction of the Atlantic Coast Pipeline—which, due to our successful legal work, had been on hold since December 2018. Then, on a long July 4th weekend as we paused to collectively catch our breath, a remarkable thing happened. Late in the afternoon of Sunday, July 5, Dominion and Duke Energy quietly issued a press release announcing that they were finally giving up on their pipeline and cancelling the project due to "increasing legal uncertainty." Six years of hard work—over 40,000 hours of attorney time and \$1.6 million in expenses—had suddenly come to a successful end.

Never before has an interstate gas pipeline of this magnitude been stopped because of citizen opposition. We were honored to work with 15 committed citizen groups to stop this project, all of whom put in countless hours writing letters, submitting comments, attending public hearings, and helping develop the evidence we needed to support our legal arguments. The Atlantic Coast Pipeline could not have been stopped without their extraordinary commitment. It also could not have been stopped without the extraordinary efforts of the Southern Environmental Law Center. This victory stands as a testament to the success of SELC's multifaceted model and the resources we brought to this herculean effort—legal expertise, a deep understanding of utilities gained through years of work in state utility commissions, a deep understanding of federal agencies, strategic communications, a strong presence in state legislatures and in Washington, D.C., and the staying power required for a sustained, multi-year effort.

We recently published on our website reflections on the Atlantic Coast Pipeline victory from the SELC team that worked on the project. My favorite came from Katie Storer, an administrative and legal assistant who spent a good part of her life over the past six years working to stop this pipeline. She summed up her feelings with this observation: "Personally, it really showed me that if you want to achieve something that seems impossible, just take the first step. Then the next."

So many of the uphill but ultimately successful efforts, we have launched over the years have come down to just taking the first step. Taking that first step would not have been possible without the generous support of SELC's loyal and committed friends. I hope that you are as proud as we are of the results you have helped make possible. We have a lot of work before us, and we look forward to our continued partnership in the years ahead.

—Jeff Gleason

"It really showed me that if you want to achieve something that seems impossible, just take the first step. Then the next."

—Katie Storer, Legal Administrative Assistant

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SELC Is Rising to the Challenge

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SELC Stays Strong in the Fight Against Trump Rollbacks

As the possibility of losing the White House (and possibly even the Senate) approaches, the Trump administration is accelerating its efforts to gut our nation's core environmental laws. This means that while the country's attention has been consumed with an unprecedented public health crisis, federal agencies have been picking up the pace—issuing bad policies under a veil of secrecy that ignores the facts, rejects science, and undermines America's traditions of public participation.

They're not letting up, and SELC is rising to the challenge.

Our attorneys are working from home—with every necessary tool at their command—and pushing back hard

against the Trump administration's attempt to rush its reckless policies across the finish line. SELC continues to coordinate with partners, file cases, attend hearings remotely, and craft innovative legal, policy, and communication strategies to get the job done.

These conditions are new to us, but our task is a familiar one. Since January 2017, SELC has worked nonstop to build a firewall between the Trump administration and our country's bedrock environmental safeguards. But the work we've taken on is not just a job for us because these are our neighbors, communities, coasts, forests, farms, and rivers that we are bound and determined to protect.

Our tactics are working: we have prevailed in every lawsuit we've launched against the Trump administration. Every single one. And we won't let up until this mess is cleaned up and strong protections for our air, water, and natural treasures are adopted and restored. (To learn more, see page 4).

