

Appalachian Trail Ruling May Speed Other Pipeline Cases

By **Monique Watson, Cynthia Taub and Daniel Mullen**

On June 15, the U.S. Supreme Court reversed and remanded a decision of the U.S. Court of Appeals for the Fourth Circuit that vacated a special use permit issued by the U.S. Forest Service to Atlantic Coast Pipeline LLC.[1] The Fourth Circuit had determined that the Forest Service's issuance of the special use permit to Atlantic Coast for the right-of-way below a portion of the Appalachian National Scenic Trail violated the Mineral Leasing Act.

This ruling removes a major legal obstacle for two multibillion-dollar pipelines. And it has implications for several cases pending before the U.S. Court of Appeals for the District of Columbia Circuit.

The Atlantic Coast Pipeline is a 600-mile project proposed to carry natural gas from West Virginia to North Carolina that has been tied up in litigation for several years. While the Supreme Court's decision removed a major obstacle for the pipeline, the project now returns to the Fourth Circuit, where additional arguments challenging the project have yet to be addressed.

Similarly, the PennEast Pipeline Company's pipeline will benefit from the court's decision, as it also crosses the Appalachian Trail. But that project also still faces significant legal issues.

Background

On Sept. 18, 2015, Atlantic Coast filed an application pursuant to Section 7(c) of the Natural Gas Act[2] with the Federal Energy Regulatory Commission for authorization to construct and operate the pipeline. The application was amended on March 11, 2016.

The proposed pipeline route crosses the George Washington National Forest,[3] including crossing under the Appalachian National Scenic Trail. Consequently, Atlantic Coast needed to obtain a special use permit from the Forest Service, to cross lands under the service's jurisdiction.

In 2018, the Forest Service issued the permits and right-of-way to allow Atlantic Coast to place a 0.1-mile segment of pipeline approximately 600 feet below the Appalachian Trail in the George Washington National Forest. The Cowpasture River Preservation Association and others appealed the Forest Service's permit issuance to the Fourth Circuit, arguing that the issuance of the special use permit for the right-of-way under the Appalachian Trail violated the Mineral Leasing Act and



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other statutes.

The Fourth Circuit reviewed the Forest Service's issuance of the special use permit, vacated it and remanded it to that agency for further proceedings. In doing so, the Fourth Circuit held that the Forest Service lacked statutory authority to grant a right-of-way for pipeline construction in portions of national forest land traversed by the Appalachian Trail.

Specifically, the Fourth Circuit determined that the land underlying the Appalachian Trail falls within the National Park System, and thus is ineligible for the grant of a pipeline right-of-way under the Mineral Leasing Act.[4] Atlantic Coast and the Forest Service filed petitions for certiorari in June 2019.

Supreme Court Decision

In a 7-2 decision, the U.S. Supreme Court ruled that the Forest Service was authorized under the Mineral Leasing Act to grant rights-of-way through lands within national forests traversed by the Appalachian Trail, and reversed the Fourth Circuit's decision. The court looked at the plain language of the National Trails System Act[5] and the Mineral Leasing Act to reach its ruling.

The court began by reviewing the Trails System Act, which created the Appalachian Trail.[6] The Trails System Act "empowers the Secretary of the Interior to establish the location and width of the Appalachian Trail by entering into 'rights-of-way' agreements with other federal agencies as well as States, local governments, and private landowners." [7]

The court pointed out that the Trails System Act contains a proviso stating that "[n]othing contained in this chapter shall be deemed to transfer among Federal agencies any management responsibilities established under any other law for federally administered lands which are components of the National Trails System." [8] The secretary of the interior delegated his authority over the Appalachian Trail to the National Park Service in 1969. [9]

The court also examined the Leasing Act, which enabled the secretary of the interior to grant pipeline rights-of-way through "public lands, including forest reserves." [10] As relevant here, Congress amended the Leasing Act in 1973 to define federal lands to include "all lands owned by the United States, except lands in the National Park System." [11]

The court posited that a key question was whether federal lands within the George Washington National Forest had been removed from the Forest Service's jurisdiction and placed under the National Park Service's control because the Appalachian Trail crosses them. [12] The court concluded that the lands that the Appalachian Trail crosses "remain under the Forest Service's jurisdiction and, thus, continue to be 'Federal lands' under the Leasing Act." [13]

The court further concluded that the plain language of the Trails System Act and the agreement between the secretary of the interior and the Park Service: did not divest the Forest Service of jurisdiction over the lands the [Appalachian] Trail crosses. It gave the Department of Interior (and by delegation the National Park Service) an easement for the specified and limited purpose of establishing and administering the Trail, but the land itself remained under the jurisdiction of the Forest Service. [14]

The court found that the duties described in the Trails System Act reinforced that the land remained within the jurisdiction of the Forest Service. [15] The Trails System Act charges the secretary of the interior with designating the Appalachian Trail uses, and with regulating

the "protection, management, development, and administration" of the Trail.[16] The court determined that these statutory duties refer to the Appalachian Trail easement, not the lands over which the easement passes.

Lastly, the court concluded that when Congress wishes to transfer land from one agency to another it uses "unequivocal and direct language." [17] Congress, in the Trails System Act, spoke "in terms of rights-of-way ... rather than in terms of land transfers," which "reinforces the conclusion that the Park Service has a limited role over the [Appalachian] Trail, not the lands that the Trail crosses." [18]

Accordingly, the court ruled that the Forest Service retained authority to grant Atlantic Coast a pipeline right-of-way for crossing under the Appalachian Trail. [19]

Implications for Other Cases

While a win for pipeline proponents, the dissent challenged the majority's insistence that the Appalachian Trail was distinct from the land it occupied. The dissent concluded that the majority opinion was "inconsistent with the language of three statutes, longstanding agency practice, and common sense." The decision does not end litigation.

The court's decision has implications for at least two cases pending before the D.C. Circuit. In 2019, the D.C. Circuit requested supplemental briefing in Atlantic Coast Pipeline LLC v. FERC and Delaware Riverkeeping Network v. FERC, to address whether the Fourth Circuit's Cowpasture decision rendered the case "unfit for review at this time."

The commission's supplemental brief maintained that the Fourth Circuit's Cowpasture decision did not affect the validity of Atlantic Coast's or PennEast's certificates of public convenience and necessity. It also argued that invalidation of the Forest Service permits would not invalidate the commission's certificate issuances. [20]

The cases have been briefed and oral argument has been held, but the D.C. Circuit has not yet ruled on them. Therefore, it is likely that FERC or another party will file the Supreme Court's Cowpasture decision with the appellate court to dispose of this question, and ensure that the pending D.C. Circuit cases are heard and decided.

The decision did not impact other aspects of the Fourth Circuit's decision, which ruled the Forest Service had violated the National Forest Management Act and the National Environmental Policy Act in approving the pipeline's route through two national forests. Consequently, Atlantic Coast is continuing to resolve the other pending permits — and the end of the story still needs to be written.

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[1] U.S. Forest Serv. et al. v. Cowpasture River Pres. Ass'n et al., S.Ct. No. 18-1584, 590 U.S. (2020) ("Cowpasture"). Consolidated with Atlantic Coast Pipeline LLC v. Cowpasture

River Pres. Ass'n et al., S. Ct. No. 18-1587.

[2] 15 U.S.C. § 717f(c) (2012).

[3] Atlantic Coast Pipeline LLC et al., 161 FERC ¶ 61,042, at P 246 (2017), reh'g denied, 164 FERC ¶ 61,100 (2018).

[4] 30 U.S.C. §§ 185(a) and (b)(1).

[5] 16 U.S.C. § 1241 et seq.

[6] Slip op. at 4.

[7] Id.

[8] Id., citing 16 U.S.C. § 1246(a)(1)(A).

[9] Slip op. at 5, citing 34 Fed. Reg. 14337.

[10] Slip op. at 5, citing Section 28 of the Mineral Leasing Act, 30 U.S.C. § 181 et seq.

[11] Pub. L. 93-153, 87 Stat. 576, codified at 30 U.S.C. § 185(a).

[12] Slip op. at 6.

[13] Id.

[14] Slip op. at 9-10.

[15] Slip op. at 10-11.

[16] Slip op. at 11.

[17] Slip op. at 12.

[18] Slip op. at 12.

[19] Slip op. at 13.

[20] *Appalachian Voices v. FERC*, Nos. 17-1271, et al., 2019 WL 847199, at *1 (D.C. Cir. Feb. 19, 2019) (unpublished) (Commission's issuance of a certificate for the Mountain Valley Pipeline "did not hinge" on other federal agency permits vacated by the Fourth Circuit in *Sierra Club v. U.S. Forest Service*, 897 F.3d 582, 596 (4th Cir. 2018), reh'g granted in part, 739 F. App'x 185 (4th Cir. 2018)); see also *Moreau v. FERC*, 982 F.2d 556, 562 (D.C. Cir. 1993) (state agency's suspension of required permit meant that pipeline applicant "no longer satisfied one of the conditions on which FERC granted the certificate of public convenience and necessity, namely that [pipeline] obtain all necessary state and local permits").