Cowpasture River Preservation Association v. Forest Service: The Fourth Circuit Vacates and Rebukes Forest Service's Mysterious Change of Heart

I. OVERVIEW

The completed Atlantic Coast Pipeline (ACP) would carry natural gas over 604.5 miles through a forty-two-inch diameter pipe from West Virginia to North Carolina.[1] The United States Forest Service authorized Atlantic Coast Pipeline, L.L.C. (Atlantic) to build the ACP through sections of the George Washington (GWNF) and Monongahela National Forests (MNF) in Virginia and West Virginia respectively.[2] The Forest Service additionally granted a right of way across the Appalachian National Scenic Trail (ANST) as part of the ACP project.[3] These federally protected lands cover the ancient Appalachian Mountain range, a land of immense natural beauty and timeless rugged tranquility. The pipeline would cross twenty-one miles of national forest land and cross the ANST within the boundaries of the GWNF.[4] Construction in the national forest requires clearing trees and vegetation from a 125-foot right of way (seventy-five feet in wetlands), digging a trench to bury the pipeline, and blasting and flattening ridgelines in mountainous terrain.[5] Upon completion of construction, the project requires "maintaining a 50-foot right of way (reduced to 30 feet in wetlands) through the GWNF and MNF for the life of the pipeline."[6]

Atlantic filed a formal application with the Federal Energy Regulatory Commission (FERC) on September 18, 2015, and applied for

1. Cowpasture River Pres. Ass'n v. Forest Serv., 911 F.3d 150, 155 (4th Cir. 2018), *cert. granted*, No.18-1584, WL 4889926 (Oct. 4, 2019), *cert. granted*, Atl. Coast Pipeline, L.L.C. v. Cowpasture River Pres. Ass'n, No.18-1587, WL 4889930 (Oct. 4, 2019).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*

a Special Use Permit (SUP) for construction and use in the national forests on November 12, 2015.[7] The National Environmental Policy Act (NEPA) requires that when a federal agency proposes to take action "significantly affecting the quality of the human environment," that agency "must prepare a detailed environmental impact statement (EIS) describing the likely environmental effects, 'adverse environmental effects which cannot be avoided,' and potential alternatives to the proposal."[8] Specifically, the Forest Service commented that the EIS must "analyze alternative routes that do not cross national forest land, and that the EIS must address the Forest Service's policy that restricts special uses on national forest lands to those that 'cannot reasonably be accommodated on non-National Forest System lands.'"[9] The Forest Service's noted concerns "about landslides, slope failures, sedimentation, and impacts to groundwater, soils, and threatened and endangered species that it believed would result from the ACP project."[10]

In reviewing draft material, the Forest Service additionally requested "ten site-specific stabilization designs for selected areas of challenging terrain to demonstrate the effectiveness of Atlantic's proposed steep slope stability program."[11] The Agency noted that it intended for these selected sites to be "merely representative," and that "should the ACP Project be permitted, multiple additional high hazard areas will need to be addressed on a site-specific basis."[12] Atlantic communicated to the Forest Service that eight of the site stabilization designs requested had not commenced. In response, the Forest Service noted great discomfort in moving forward without information from these additional sites. With regards to the pipeline's impacts to forest resources and the effectiveness of the proposed mitigation techniques, the Forest Service held such reservations "because those conclusions ha[d] been reached prior to acquiring the necessary information to substantiate what must otherwise be presumed to represent judgments based on incomplete information."[13]

The Forest Service's comments were also pessimistic of the ACP project's potential effect on threatened and endangered species. Atlantic's drafts noted that construction "may displace certain sensitive species from

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7. *Id.*
8. *Id.* (quoting 42 U.S.C. § 4332(C) (1975)).
9. *Id.* (quoting Corrected Deferred Joint Appendix at 3593, United States Forest Serv. v. Cowpasture River Preservation Ass'n, 911 F.3d 150 (4th Cir. 2018).
10. *Id.*
11. *Id.* at 156.
12. *Id.*
13. *Id.* at 157.

within and areas adjacent to the right of way."[14] The draft claimed that these effects would only last during the period of construction and that they would restore conditions "as near as practicable to preconstruction contours and conditions."[15] Atlantic further claimed that a loss of potential roosting habitats would be offset by gains in foraging habitat.[16] The Agency found little merit in this unproven claim and commented that bats using areas opened up by the project and the right of way would be more susceptible to predators.[17]

The Forest Service's trepidation over the ACP project and its potential adverse impacts disappeared as the deadlines set by Atlantic grew closer. On May 14, 2017, the Forest Service told FERC that it would no longer require the remaining eight site-specific stabilization designs. This change in tenor came with no explanation for its reasoning. On July 5, 2017, the Forest Service acknowledged that the two site-specific stabilization designs adequately disclosed the potential environmental effects. Again, the service provided no explanation as to its reasoning or "why the two plans were adequate."[18] On July 21, 2017, FERC released the final environmental impact study (FEIS). On the very same day, the Forest Service released its draft Record of Decision (ROD). The ROD proposed "to adopt the FEIS, grant the SUP, and exempt Atlantic from several forest plan standards."[19] According to the ROD, "FERC's evaluation concluded that the major pipeline route alternatives and variations do not offer a significant environmental advantage when compared to the proposed route or would not be economically practical."[20] On November 16, 2017, the Forest Service responded to Atlantic's updated biologic evaluation. The updated evaluation stated that "the ACP project was likely to result in a 'loss of viability' for three Regional Forester Sensitive Species (RFSS) in the MNF."[21] In another change of tenor, the Agency's response stated that "the project was *not* likely to result in a loss of viability to the three RFSS." According to the Forest Service Manual, the service "cannot authorize uses of national forests that are likely to result in a loss of viability for a species."[22] As the chronology

14. *Id.* at 158.
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.* at 159.
19. *Id.*
20. *Id.* (quoting Corrected Deferred Joint Appendix, *supra* note 9, at 1411).
21. *Id.*
22. *Id.* at 159-60.

indicates, the Forest Service had already granted the draft ROD approving the SUP before Atlantic issued its updated biologic evaluation. The agency made the decision to change course without any explanation or reasoning.

The Forest Service issued the final ROD on November 17, 2017. They issued the SUP and granted the right of way across the ANST on January 23, 2018. Cowpasture Rver Preservation Association and six other petitioners filed a challenge to the agency's action on February 5, 2018.[23] Petitioners asserted that the Forest Service violated the National Forest Management Act (NFMA), NEPA, and the Mineral Leasing Act (MLA) in granting Atlantic the ROD and SUP for the pipeline.[24] The United States Court of Appeals for the Fourth Circuit possesses jurisdiction pursuant to the Natural Gas Act.[25] The United States Court of Appeals for the Fourth Circuit *held* that the United States Forest Service violated the NFMA and NEPA, and that the Forest Service lacked statutory authority pursuant to the MLA to grant a pipeline right of way across the ANST. *Cowpasture River Preservation Ass'n v. Forest Serv.*, 911 F.3d 150, 155 (4th Cir. 2018).

II. BACKGROUND

A court may set aside a federal agency's action "whenever the challenged act is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.'"[26] An agency's decision is arbitrary and capricious when it:

> relied on factors which Congress has not intended it to consider, entirely failed to consider an important an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference of view or the product of agency expertise.[27]

The Natural Gas Act grants the right that petitioners "may obtain a review of such order in the Court of Appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business."[28] Under the Natural Gas

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23. *Id.* at 160.
24. *Id.*
25. *Id.* (first citing generally Administrative Procedure Act, 5 U.S.C.A. §§ 701-706 (West 2011); and then citing Natural Gas Act, 15 U.S.C.A. § 717r(d)(1) (West 2005)).
26. *Id.* (quoting Sierra Club, Inc. v. Forest Serv., 897 F.3d 582, 589-90 (4th Cir. 2018)).
27. *Sierra Club*, 897 F.3d at 590 (quoting Defs. of Wildlife v. N.C. Dep't of Transp., 762 F.3d 374, 396 (4th Cir. 2018)).
28. 15 U.S.C.A. § 717r(b).

Act, "the United States Court of Appeals for the circuit in which a facility subject to section 717(b) of this title . . . shall have original and exclusive jurisdiction over any civil action for the review of an order or action of a federal agency."[29]

The NFMA governs the substantive and procedural standards by which the Forest Service must manage national forests.[30] Under the NFMA, the Forest Service must develop, maintain, and revise Forest Plans that "provide a framework for where and how certain activities can occur in national forests."[31] Additionally, the NFMA directs that the Forest Service ensure that all activities, "specifically, all 'resource plans and permits, contracts, and other instruments for the use and occupancy of National Forest System lands'—are consistent with the Forest Plans."[32] The Department of Agriculture through the Forest Service, in promulgating Forest Plans, should "'insure consideration of the economic and environmental aspects of various systems of renewable resource management' and 'provide for diversity of plant and animal communities based on the suitability and capability of the specific land area.'"[33]

Congress enacted NEPA "to reduce or eliminate environmental damage."[34] NEPA imposes procedural requirements to ensure that federal agencies "undertake analyses of the environmental impact of their proposals and actions."[35] Agencies must consider alternatives to proposed actions and "take a hard look at environmental consequences."[36] Under this requirement, a federal agency taking a major action affecting the environment "must prepare a detailed EIS describing the likely environmental effects of the proposal, any unavoidable adverse environmental effects, and potential alternatives."[37]

The MLA grants authority to the Secretary of the Interior "to grant gas pipeline rights of way across 'Federal Lands.'"[38] Federal Lands include "all lands owned by the United States, except lands in the National Park System."[39] Lands in the National Park System are administered by

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29. *Id.* § 717r(d)(1).
30. *See* 16 U.S.C.A. § 1604 (West 2018).
31. *Sierra Club*, 897 F.3d at 600 (first quoting Am. Wild Horse Pres. Campaign v. Perdue, 873 F.3d 914, 919 (D.C. Cir. 2017); and then quoting 16 U.S.C.A. § 1604(a)).
32. *Id.* (first quoting *Perdue*, 873 F.3d at 919; and then quoting 16 U.S.C.A. § 1604(i)).
33. *Id.* (quoting 16 U.S.C.A. § 1604(g)(3)(A)-(B).
34. *Id.* at 590 (quoting Dep't of Transp. v. Pub. Citizen, 541 U.S. 752, 756 (2004)).
35. *Id.* (quoting *Dep't of Transp.*, 541 U.S. at 756-57).
36. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989).
37. 42 U.S.C.A. § 4332(2)(C) (West 1975).
38. 30 U.S.C.A. § 185(a) (West 1995).
39. *Id.* § 185(b)(1).

the Secretary of the Interior and the National Park Service.[40] According to Congress, the ANST is administered by the Secretary of the Interior and the National Park Service.[41]

On October 4, 2019, the United States Supreme Court granted *certiorari* to the United States Forest Service regarding petitioner's MLA claim.[42] Atlantic Coast Pipeline omitted the NFMA and NEPA claims from their petition because the Forest Service will resolve them on remand. The Supreme Court must determine whether the Forest Service has authority to grant a right of way across the ANST or if the Secretary of the Interior must grant such permission.

III. COURT'S DECISION

The NFMA requires the implementation of Forest Plans to guide the management of U.S. national forest lands.[43] Petitioners deny the Forest Service's determination "that amendments to the GWNF and MNF Plans' standards to accommodate the ACP were not directly related to the 2012 Forest Planning Rule's (2012 Planning Rule's) substantive requirement."[44] They claim that "the amendments are directly related to the substantive requirements both in their purpose and their effects" and thus the Forest Service violated the NFMA.[45] Under the 2016 Amendment of the Planning Rule, "a substantive requirement from the 2012 Planning Rule applies to a Forest Plan amendment if that requirement is 'directly related to the plan direction being added, modified, or removed by the amendment.'"[46] The Forest Service official is required to "apply such requirement(s) within the scope and scale of the amendment" if there is a direct relationship between the substantive requirement *and* the amendment.[47] Direct relation is determined when the requirement 'is associated with either the "purpose for the amendment or the effects (beneficial or adverse) of the amendment."[48] The Forest Service's ROD exempts the ACP Project from "four MNF Plan standards and nine GWNF Plan standards that relate to soil, water, riparian, threatened and endangered species, and recreational

40. 54 U.S.C.A. § 100501 (West 2014).
41. Cowpasture River Pres. Ass'n v. Forest Serv., 911 F.3d 150, 180 (4th Cir. 2018).
42. Atl. Coast Pipeline, L.L.C. v. Cowpasture River Pres. Ass'n, No. 18-1587, WL 4889930, at *1 (Oct. 4, 2019).
43. *Cowpasture*, 911 F.3d at 160.
44. *Id.* at 161.
45. *Id.*
46. *Id.* (quoting Sierra Club, Inc. v. Forest Serv., 897 F.3d 582, 602 (4th Cir. 2018)).
47. *Id.*
48. *Sierra Club*, 897 F.3d at 602 (quoting 36 C.F.R. § 219.13(b)(5)(ii) (2017)).

and visual resources."[49] The Agency "violated the NFMA and the 2012 Planning Rule because it skipped the purpose prong of the directly related analysis."[50] Despite specifying the need for project specific amendments in order to meet the requirements of the NFMA, the Forest Service failed to analyze their purposes as required by the Planning Rule Amendment.[51] The project specific amendments are directly related because they "clearly intended to lessen protections for soils, riparian areas, and threatened and endangered species in the GWNF and MNF Plans."[52] The 2012 Planning Rule specifically states substantive requirements for the exact same areas of environmental concern.

The Forest Service claimed "that the true purpose of the amendments was just to authorize the ACP project—not to lessen environmental protections for certain resources."[53] This completely contradicts the Agency's own description of the amendments, which clearly states their intent to "weaken existing environmental standards in order to accommodate the ACP, which cannot meet the current standards."[54] The court dryly states that for the Forest Service "to say that a 2012 Planning Rule Requirement protecting water resources (as one example) is not 'directly related' to a Forest Plan amendment specifically relaxing protection for water resources is nonsense."[55] The decision that the "Planning Rule requirements for soil, riparian resources, and threatened and endangered species" did not directly relate to the purpose of the Forest Plan amendment constituted arbitrary and capricious conduct by the Forest Service.[56]

While unnecessary due to the Forest Service's failure to analyze the "purpose prong" of the 2012 Planning Rule, the court analyzed the effects prong as well. The Forest Service asserted that the Forest Plan amendments had no substantial adverse effects.[57] The Forest Service claimed that according to the preamble to the 2012 Planning Rule, "rarely, if ever, will a project specific amendment rise to the level of having a substantial adverse effect on these resources."[58] The "rarely, if ever

49. *Cowpasture*, 911 F.3d at 162.
50. *Id.*
51. *See id.* at 161.
52. *Id.* at 163.
53. *Id.*
54. *Id.*
55. *Id.* at 164.
56. *Id.*
57. *See id.*
58. *Id.* at 165.

language used by counsel is nowhere to be found in the preamble to the 2012 Planning Rule."[59] The court noted the pure absurdity of the claim that "the Forest Service—the federal agency tasked with maintaining and preserving the nation's forest land—takes the position that as a bright line rule, a project specific amendment, no matter how large, will rarely, if ever, cause a substantial adverse effect on a national forest."[60] The court rejected the petitioner's assertion that the Forest Service further violated the NFMA by failing to allow for public comment on the amendment to the Forest Plan standards. Their argument failed because the "petitioners do not attempt to demonstrate that the outcome of the process would have differed in the slightest had notice been at its meticulous best."[61]

The petitioners claimed that the Forest Service's failure "to study alternative off-forest routes, and adopt[ion of] a FEIS that failed to take a hard look at landslide risks, erosion, and degradation of water quality" violated NEPA.[62] The FEIS prepared by FERC "did not satisfy the Forest Service's earlier comments and suggestions on the DEIS."[63] The Forest Service "adopted FERC's inadequate EIS without undertaking the required independent review."[64] An agency may not adopt an inadequate EIS. According to the applicable regulations, "if a [DEIS] is so inadequate as to preclude meaningful analysis . . . the agency shall make every effort to disclose and discuss at appropriate points in the draft statement all major points of view on the environmental impacts of the alternative including the proposed action."[65] Nothing in the record shows that the Forest Service or Atlantic "undertook the required independent review."[66] The Forest Service commented on the lack of route alternatives and still adopted the FEIS unchanged from the draft. Despite previously held fears, "the National Forest Avoidance Route Alternatives section in the FEIS is identical to the DEIS."[67] The Forest Service granted the ROD on the same day that FERC issued the FEIS.[68] Without explaining the disappearance of their concerns over the alternative route analysis, the Agency stated that "FERC's evaluation concluded that the major pipeline route alternatives

59. *Id.*
60. *Id.*
61. *Id.* at 167 (quoting Friends of Iwo Jima v. Nat'l Capital Planning Comm'n, 176 F.3d 768, 774 (4th Cir. 1999)).
62. *Id.* at 170.
63. *Id.*
64. *Id.*
65. *Id.* (quoting 40 C.F.R. § 1502.9(a) (1977)).
66. *Id.* at 171.
67. *Id.* at 172.
68. *Id.*

and variations do not offer a significant environmental advantage when compared to the proposed route."[69] The very analysis that the Forest Service had previously requested in the EIS suddenly became a non-issue without any changes made between the draft EIS (DEIS) and the final EIS. The court found striking similarities between this "sudden acquiescence to the alternative analysis in the FEIS" and the *Sierra Club, Inc. v. Forest Service* decision in which it "determined that the Forest Service had acted arbitrarily and capriciously in adopting the sedimentation analysis for a different pipeline project."[70]

While NEPA does not require environmentally friendly outcomes, it does require a level of care beyond that taken by the Forest Service. An agency decision may still pass muster "even if there will be negative environmental impacts resulting from it, so long as the agency considered these costs and still decided that other benefits outweighed them."[71] When the proposal may impact national forest land "that Congress has specially designated for federal protection," the agency must take "particular care."[72] The court held that the Forest Service failed its duty to take particular care in granting the SUP without sufficiently analyzing the potential for "landslide risks, erosion impacts, and degradation of water quality."[73] Furthermore, the Forest Service made this decision without sufficient "information about the effectiveness of mitigation techniques to reduce those risks."[74] On yet another issue, the Forest Service accepted the FEIS without requiring FERC to address specific potential environmental issues raised in their previous responsive comments.

The proposed ACP route terrain with a potential for landslides. As noted by the Forest Service, "similar hazards on other smaller pipelines in the central Appalachians have led to slope failures, erosion, and sedimentation incidents, and damage to aquatic resources."[75] The Agency used a FEIS from the Columbia Gas Transmission pipeline as an example of the safe crossing of a similar pipeline over similar terrain. As both sides prepared arguments, "a landslide in Marshall County, West Virginia

69. *Id.*
70. *See* Sierra Club, Inc. v. Forest Serv., 897 F.3d 582, 589-90 (4th Cir. 2018).
71. Nat'l Audubon Soc'y v. Dep't of Navy, 422 F.3d 174, 184 (4th Cir. 2005) (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350-51 (1989)).
72. *Id.*
73. *Cowpasture*, 911 F.3d at 174.
74. *Id.*
75. *Id.* at 174-75.

caused the Columbia pipeline—highlighted by the Forest Service for its safety and stability—to rupture and explode."[76]

Regarding erosion risks, the Forest Service criticized Atlantic's proposal for the installation of erosion control devices and their success in controlling erosion damage in the mountainous landscape of West Virginia and Western Virginia.[77] Nothing in the record indicates that Atlantic took any action to resolve the Forest Service's concerns with the success rate of the proposed erosion control devices.[78] Without any evidence to the contrary, the Forest Service "relied on this figure to determine that Atlantic's proposed mitigation measures would effectively reduce erosion and sedimentation impacts from the ACP project."[79] While NEPA "does not require a fully formed mitigation plan to be in place," the Forest Service granted its draft ROD "in reliance on a mitigation plan that had not been established, and one that, as demonstrated by the Forest Service's own concerns, had not been proven effective."[80]

The Court held that the Agency misinterpreted the MLA in determining that they had authority to grant the right of way without the need for permission from the National Park Service (NPS).[81] According to the court, the MLA "is clear that the Secretary of the Interior administers the entire ANST, while 'other affected State and Federal agencies,' like the Forest Service manage trail components under their jurisdiction."[82] Specifically, the law clarifies that "nothing 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."[83] The court held that the Forest Service lacked "statutory authority to grant pipeline rights of way across the ANST pursuant to the MLA" and thus vacated the ROD and SUP granting such a right of way.[84]

IV. ANALYSIS

As experts in their field and guardians of the realms they are entrusted to protect, federal and state agencies are given deference from

76. *Id.* at 175.
77. *Id.* at 176.
78. *Id*.
79. *Id.*
80. *Id.* at 178.
81. *Id.* at 181.
82. *Id.* at 180; *see* 16 U.S.C. § 1246(a) (West though P.L. 116-112).
83. 16 U.S.C. §§ 1246(a)(1)(A).
84. *Cowpasture*, 911 F.3d at 181.

the court system. There are, however, limits to this deference when the agency acts arbitrarily and capriciously in disregard of their designated mission. A natural gas pipeline brings desperately needed jobs to the citizens of Central Appalachia who have been so decimated by the demise of the coal industry, the Great Recession, and the Opioid Crisis. Last year in West Virginia, "4,000 equipment operators were working along with 4,500 laborers . . . [h]undreds more workers were truck drivers and pipeline welders. More than half of those workers were local."[85] While job opportunities may provide short-term benefit, the national forests are part of what makes Appalachia great. The GWNF and MNF not only add aesthetic benefits but also economic ones. The beauty of the region brings tourism revenue to a region that has long been trapped in the monoculture of mineral extraction. Potential disasters resulting from the hasty acceptance of a pipeline proposal can prove equally as devastating to a region as the harshness of unemployment and job loss.

The Forest Service's actions in pushing the Atlantic Coast Pipeline project forward with reduced procedural requirements and environmental standards puts the national forests at substantial risk for degradation. The Forest Service said so themselves when they voiced their concerns following the issuance of the draft environmental impact statement. Congress established these environmental standards to protect the region and others like it from destruction of the natural resource that is the forest. As the court aptly quotes from *The Lorax,* "[W]e trust the United States Forest Service to 'speak for the trees, for the trees have no tongues.'"[86] As protectors of our nation's forest resources, the Agency must not act as a rubber stamp to projects with serious potential environmental impacts. Here, the United States Forest Service completely failed to speak for the voiceless trees and "abdicated its responsibility to preserve national forest resources."[87] While the Agency had serious concerns about the ACP's potential environmental impacts, these concerns "were suddenly, and mysteriously, assuaged in time to meet a private pipeline company's deadlines."[88]

Repeatedly the court notes that the Forest Service made a complete about face regarding previously communicated environmental concerns.

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85. Brad McElhinny, *Expenses and Delays Continue for Mountain Valley Pipeline, Where Work was Halted Again*, METRONEWS (Oct. 27, 2019, 5:00 PM), http://wvmetronews.com/2019/10/27/expenses-and-delays-continue-for-mountain-valley-pipeline-where-work-has-halted-again/.

86. *Cowpasture*, 911 F.3d at 183 (quoting DR. SEUSS, THE LORAX (1971)).

87. *Id.*

88. *Id.*

Each time, this change of heart came with no explanation or reasoning from the agency. The question is not so much whether the pipeline should be built at all. The issue is that the regulatory process has been completely usurped in order to expedite construction. As stated in the previous section, NEPA does not require that all environmental impacts be absolutely prevented. However, the law requires that pipeline companies like Atlantic play by the rules and meet congressionally established procedural and substantive requirements. It is up to agencies like the Forest Service to uphold and enforce those rules. Had Atlantic done its due diligence and followed these procedures, the project might very well be on its way to completion. In allowing Atlantic to fail to meet its obligations, the Forest Service has failed to perform its duty. The court correctly ruled that the Forest Service acted arbitrarily and capriciously in violation of NFMA and NEPA. On remand, the Agency now must fulfill its obligation to the American people and ensure that the project only resumes construction in accordance with the law and following the proper environmental impact analysis.

As previously noted, the Supreme Court agreed to review this case. Before the Supreme Court, the Forest Service claimed that Fourth Circuit "'effectively erected a 2,200-mile barrier' along the Appalachian Trail to pipelines" seeking to traverse the mountain range.[89] The additional administrative steps do not completely bar pipeline approval. While requiring energy companies to seek approval from another agency, it is hyperbolic to claim that the court of appeals has erected a barrier to all projects proposed and future. The government's arguments "rely on a fiction that attempts to divorce the Appalachian Trail from the land it encompasses."[90]

The respondent environmental groups argue that the Forest Service's interpretation goes against the "ordinary English usage of three statutes, longstanding agency practice, and the solid reality of the Trail's existence as land upon which generations of hikers have walked, and their children and grandchildren as well."[91] Nothing in the statutes distinguishes the words "land" and "trail" in the way argued by the Forest Service. A trail is simply a specific use for the land it has been cut from.

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89. Keith Goldberg, *High Court to Review 4th Circuit's Atlantic Coast Pipeline Ruling*, LAW360 (Oct. 4, 2019, 9:58 AM), https://www.law360.com/articles/1206219.

90. Keith Goldberg, *Justices Told $7B Pipeline Can't Cross Appalachian Trail*, LAW360 (Jan. 16, 2020, 4:23 PM), https://www.law360.com/articles/1234999/justices-told-7b-pipeline-can-t-cross-appalachian-trail (quoting Brief of Respondents at *13, U.S. Forest Serv. v. Cowpasture River Pres. Ass'n, Nos. 18-1584, 18-1587 (Jan. 15, 2020)).

91. *Id.* (quoting Brief of Respondents, *supra* note 90, at *3).

The Appalachian Trail provides a narrow 2200-mile sanctuary for millions of hikers each year. Robert Frost wrote, "'[T]he land was ours before we were the land's,' and, 'This land, this [t]rail belongs to the American people.' Congress directed that it shall be administered by the Park Service 'in such a manner and by such means that will leave [it] unimpaired for the enjoyment of future generations.'"[92] While the Mineral Lease Act allow the Secretary to grant rights of way for oil and gas pipelines, it carves out protections for lands in the National Park System. While allowing for the grant of rights of way to build power lines, telephone lines, and certain canals, it makes no mention of oil and gas pipelines.[93] The Act creating the National Park Service "defines that system to include 'any area of land. . . administered by the Secretary [of the Interior], acting through' the Park Service."[94] Under that statute, "the Appalachian Trail shall be administered primarily as a footpath by the Secretary of the Interior."[95] The purpose of these statutes is to erect environmental protections for public land. Failure of government agencies to further this goal, or to "speak for the trees," places a great responsibility on the court system to protect the environment when the rest of the government has failed. If the government is to grant a right of way across the Appalachian Trail at all, the decision should not be made by the Forest Service alone without consultation and approval from the Secretary of the Interior and the National Park Service.

The noted case and the Supreme Court's forthcoming decision has implications as to the scope of power granted to agencies like the Forest Service. The differentiation of a trail as separate from the land it sits upon would alter the management structure currently in place. The Fourth Circuit has impeded the movement toward greater power held by the Forest Service in how it manages protected land. The government's interpretation of the MLA would allow the Forest Service the ability to open up additional federally protected lands to economic exploitation and to drift further away from its mission to protect our nation's forest resources.

V. CONCLUSION

The Fourth Circuit correctly vacated the United States Forest Service's decision to grant a SUP for the Atlantic Coast Pipeline for

92. Brief of Respondents, *supra* note 90, at *7.
93. *Id.*
94. *Id* at *13 (quoting 16 U.S.C. § 1244(a)(1) (2019)).
95. 16 U.S.C. § 1244(a)(1).

violation of the NFMA and NEPA. The Forest Service acted arbitrarily and capriciously in granting these authorizations to the project without properly analyzing the potential environmental impacts of the project, and without requiring Atlantic to sufficiently provide information regarding these potential impacts and mitigation strategies. The Agency further acted arbitrarily and capriciously by diminishing environmental standards without proper analysis and reasoning. Additionally, the Forest Service lacked authority under the MLA to grant a right of way to a pipeline through the Appalachian Trail as part of the National Park System. The Fourth Circuit correctly analogizes the noted case to its previous decision in *Sierra Club*. The Supreme Court should uphold the Fourth Circuit and environmental organization's interpretation of the MLA in deciding that the National Park Service, not the Forest Service, should determine whether to grant the pipeline right of way across the Appalachian Trail. It should demand the proper administrative procedure in the decision whether or not to grant the Atlantic Coast Pipeline a right of way across the Appalachian Trail.

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