

No. 18-1144

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

COWPASTURE RIVER PRESERVATION ASSOCIATION, ET AL.,
Petitioners,

v.

UNITED STATES FOREST SERVICE, ET AL.,
Respondents,

and

ATLANTIC COAST PIPELINE, LLC,
Intervenor-Respondent.

On Petition for Review of Actions of the United States Forest Service

**AMICI CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF
MANUFACTURERS, THE AMERICAN FUEL & PETROCHEMICAL
MANUFACTURERS, THE AMERICAN PETROLEUM INSTITUTE,
THE INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA, THE
ASSOCIATION OF OIL PIPE LINES, THE NATURAL GAS SUPPLY
ASSOCIATION, THE NATIONAL MINING ASSOCIATION, THE
CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA,
THE EDISON ELECTRIC INSTITUTE, THE LABORERS'
INTERNATIONAL UNION OF NORTH AMERICA, THE WEST
VIRGINIA MANUFACTURERS ASSOCIATION, THE WEST VIRGINIA
CHAMBER OF COMMERCE, THE WEST VIRGINIA OIL AND
NATURAL GAS ASSOCIATION, AND THE INDEPENDENT OIL AND
GAS ASSOCIATION OF WEST VIRGINIA
IN SUPPORT OF PETITIONS FOR *EN BANC* REHEARING**

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FED. R. APP P. 29(A)(4)(E) STATEMENT

Amici state that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person—other than the Amici, their members, or their counsel—contributed money that was intended to fund preparing or submitting this brief.

Dated: February 19, 2019

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INTRODUCTION AND SUMMARY

Amici curiae trade associations and their thousands of members (collectively, “Amici”) representing American energy production and transportation, electric power generation, manufacturing, businesses, and workers, support rehearing *en banc*. As the rehearing petitions and other *amicus* explain, the panel wrongly vacated decisions of the United States Forest Service (“USFS”) related to critical energy pipeline infrastructure. Amici here focus on two questions of exceptional importance warranting full Court review under Fed. R. App. P. 35(a)(2), to avoid negatively impacting existing and future critical infrastructure projects and the well-being of U.S. citizens depending on reliable energy. In a first-of-its-kind ruling, the panel wrongly held that the Mineral Leasing Act (“MLA”) and National Trails System Act (“NTSA”) do not authorize USFS to issue an agency-granted right-of-way for an energy pipeline crossing beneath a national scenic trail. Separately, the panel misapplied the National Environmental Policy Act (“NEPA”) to undermine bipartisan efforts at coordinating federal reviews and permitting for pipelines.

ARGUMENT

I. THE DECISION THREATENS U.S. ENERGY SECURITY.

Amici share a significant interest in development of critical infrastructure and the reliable supply of natural gas, oil, and refined products provided by U.S. pipelines to the economy. Amici represent the interests of manufacturers,

businesses (large and small, local and national), fuel producers, pipeline owners and operators, natural gas suppliers, electric utilities, and mining companies.

Amici support upholding the federal permits issued for the Atlantic Coast Pipeline (“ACP”) and reversing the panel decision hindering domestic economic development and energy independence. Attachment 1 lists the individual interests of Amici.

U.S. energy supply requires a fully-functioning pipeline system. Pipeline transportation of domestic natural gas and oil products remains essential to manufacturing, other economic development, and job growth. The ACP alone is estimated to generate \$2.7 billion in economic activity and support over 17,000 construction jobs.¹ Ongoing ACP operations are expected to result in \$377 million in average energy cost savings and support over 2,000 long-term jobs. Even temporary delays, like the panel occasioned here, compromise these significant benefits.

The federal government has long promoted energy pipelines. For example, per the U.S. Department of Transportation’s Pipeline and Hazardous Materials Safety Administration (“PHMSA”): “Pipelines enable the safe movement of

¹ ACP, Powering the Future, Driving Change Through Clean Energy, <https://atlanticcoastpipeline.com/Resources/Docs/Resources/acp-factbookversion2.pdf>.

extraordinary quantities of energy products to industry and consumers, literally fueling our economy and way of life. The arteries of the Nation's energy infrastructure, as well as one of the safest and least costly ways to transport energy products, our oil and gas pipelines provide the resources needed for national defense, heat and cool our homes, generate power for business and fuel an unparalleled transportation system.”² The volumes carried by the more than 2.6 million miles of pipelines “are well beyond the capacity of other forms of transportation.” *Id.* A modest-sized oil pipeline moves the daily equivalent of 750 tank trucks, loading up every two minutes, 24 hours a day. *Id.*

For two decades, facilitating energy pipelines has been a bipartisan priority. In 2015 Congress enacted the “FAST Act,” Pub. L. No. 114-94, 129 Stat. 1312 (2015), which includes pipelines among the covered projects to benefit from more coordinated and efficient permitting timetables. The ACP is a “covered project” under Title 41 of the FAST Act and was permitted under that program. Three years earlier, President Obama called for “expedited review” of pipelines, and for agencies to “utilize and incorporate information from prior environmental reviews and studies conducted in connection with previous applications for similar or overlapping infrastructure projects so as to avoid duplicating effort.” Presidential

² PHMSA, General Pipeline FAQs, <https://www.phmsa.dot.gov/faqs/general-pipeline-faqs>.

Memorandum, Expediting Review of Pipeline Projects from Cushing, Oklahoma, to Port Arthur, Texas, and Other Domestic Pipeline Infrastructure Projects (Mar. 22, 2012), <https://obamawhitehouse.archives.gov/the-press-office/2012/03/22/presidential-memorandum-expediting-review-pipeline-projects-cushing-okla>. President Obama recognized that “we must make pipeline infrastructure a priority, ensuring the health, safety, and security of communities and the environment while supporting projects that can contribute to economic growth and a secure energy future.” *Id.* Similarly, President Trump and federal agencies adopted a “one federal decision” framework to facilitate pipeline and other infrastructure project decisions. Executive Order 13,807 (Aug. 15, 2017).

Amici also support a meaningful and efficient environmental review process, and Congress has implemented robust legal regimes to ensure safe and environmentally sound infrastructure development. The panel’s decision upsets settled rules, and creates substantial uncertainties and disruptions for the affected regional and national energy markets and the businesses and consumers who depend on them. The novel holdings also threaten negative implications for existing and future infrastructure projects that could have lasting economic effects. The panel’s decision therefore needlessly threatens U.S. energy security.

II. THE PANEL'S NEWLY-INVENTED BARRIER TO VITAL ENERGY PIPELINES IS INCONSISTENT WITH LAW.

Amici concur with Respondents, Intervenor, and *amicus* Mountain Valley Pipeline LLC that USFS lawfully granted ACP a right-of-way beneath the Appalachian Trail. 30 U.S.C. § 185(a), (b). As those parties explained, the panel erred in overturning USFS's long-recognized jurisdiction to administer USFS lands traversed by the Trail, a position advanced by the entire U.S. government.

No other court has adopted the panel's novel reading of the MLA and NTSA. If upheld, it could have substantial national ramifications. MLA § 185 applies broadly to natural gas pipelines like the ACP, and to oil, natural gas liquids, and refined products pipelines. These products literally and figuratively fuel our economy.

The decision also potentially impacts existing pipelines. The Appalachian Trail covers over 2,000 miles across multiple judicial Circuits from Maine to Georgia. *E.g.*, ECF No. 114 at App. B (map). Existing federal rights-of-way will require renewals which could be challenged based on the panel decision. *See id.*; 30 U.S.C. § 185(n).

Nor are the decision's potential impacts limited to Appalachian Trail crossings. The National Trails System spans the country, as does the vast network of existing energy pipelines. *See* Attachment 2 (National Park Service ("NPS") National Trails System Map,

<https://www.nps.gov/gis/storymaps/mapjournal/v2/index.html?appid=0fd54cead1a4d418e140e6e2021bb5b>); Attachment 3 (INGAA, 2018 Interstate Natural Gas Pipeline System Map); Attachment 4 (AOPL/API, Oil/Liquids Pipeline Map, <https://pipeline101.org/Where-Are-Pipelines-Located>); *see also* U.S. Dept. of Energy, Electricity Transmission, Pipelines, and National Trails (March 25, 2014), <https://publications.anl.gov/anlpubs/2016/11/131478.pdf>. The NTSA designates other trails as “administered by” the Department of the Interior, the language that the panel held did not authorize USFS to grant a right-of-way where Interior in turn delegated trail administration to NPS. 16 U.S.C. § 1244(a); slip op. at 52, 55. An example is the North Country National Scenic Trail, stretching 4,600 miles from New York to North Dakota, including nine national forests. Existing and future pipeline crossings of other trails therefore could be implicated by the panel’s rationale.

The panel’s Congressional pipeline approval option offers little comfort. Amici are aware of only a handful of projects receiving such approval across National Park System units, and the process added many months of delay and uncertainty. *See* H. Rpt. 114-285, at 3, 5 (2015) (“Since 1990, five natural gas pipelines have received such authorizations—which took eight to 16 months to authorize.”). Moreover, prior statutory approvals largely pre-dated concerted efforts by various groups throughout the country seeking to stop construction and

utilization of energy pipelines. Members of Congress also previously deemed unnecessary and rejected a bill, H.R. 2295 (2015), to amend 30 U.S.C. § 185(b) to allow agencies to grant natural gas pipeline rights-of-way over NPS lands:

[C]ontrary to claims at the markup that the Appalachian Trail acts as a “Great Wall” that blocks pipeline development, there are 63 current pipeline crossings of the Appalachian Trail. According to data from the Congressional Research Service, in only three locations was specific Congressional authorization required, *as much of the Appalachian Trail is on land not owned by the National Park Service and therefore does not need that authorization.*

H. Rpt. 114-285, at 24 (2015) (emphasis added).

Congress should not have to routinely repeat on a pipeline-by-pipeline basis a decision it already delegated to the Executive Branch. Requiring an act of Congress and the attendant delay and uncertainty for each pipeline crossing of a national trail on federal lands not managed by NPS risks compromising U.S. energy security and economic growth.

III. THE OPINION UPENDS BIPARTISAN EFFORTS TOWARD EFFICIENT AND COORDINATED NEPA REVIEW AND ENVIRONMENTAL PERMITTING OF CRITICAL INFRASTRUCTURE PROJECTS.

The panel opinion returns to a duplicative and counterproductive approach to NEPA and project permitting that Congress and administrations of both parties have refuted. Here, USFS properly participated as a cooperating agency on a project requiring over 30 approvals and where the Federal Energy Regulatory

Commission (“FERC”) was the lead agency. USFS offered input early and often on FERC’s Environmental Impact Statement (“EIS”) until USFS was satisfied with the analysis. Once the EIS was published, USFS adopted that analysis, issued its own draft decision, considered public comments, and finalized its decision. Its actions were transparent and well-founded.

The panel effectively treated USFS’s early and open input as a bar to USFS’s subsequent adoption of the EIS. Slip op. 34, 39. Such a reading turns NEPA on its head. NEPA regulations specifically encourage scoping and early interagency vetting of issues as part of the NEPA process. *E.g.*, 40 C.F.R. §§ 1500.5(b), (d), (f), 1501.2, 1501.5, 1501.7. The panel decision, however, would chill the scoping process, lest an early-voiced opinion preclude later concurrence.

The panel likewise promotes needless duplication under the guise of “independent review,” citing only the general regulation on “adoption.” 40 C.F.R. § 1506.3(c). But the opinion cites *no* authority requiring greater review to adopt an EIS than USFS dedicated here, particularly where USFS served as a cooperating agency and subsequently was able to “reduce excessive paperwork.” *See* 40 C.F.R. §§ 1500.4, 1500.4(n), 1508.5. By adopting the EIS, USFS “conclude[d] that its comments and suggestions ha[d] been satisfied.” 40 C.F.R. § 1506.3(c). It was not for the panel to presume otherwise. Nor should the panel have relied on

40 C.F.R. §§ 1506.3(a) and 1502.9, as the adequacy of FERC's EIS was not at issue in this case, nor is FERC a party. *See slip op.* at 33-35.

The panel's insistence on more time and paperwork also countermands the essence of NEPA, which is to refine federal proposals through environmental considerations in a timely fashion. As described above, at least two decades of bipartisan initiatives have focused on development of key infrastructure projects, particularly energy pipelines. The FAST Act stresses early interagency consultation and the flagging of issues by cooperating agencies, and greater adoption of other agency documents. Pub. L. No. 114-94, § 41,005. The panel decision is inconsistent with NEPA's goals and objectives, provides no additional environmental safeguards, and undermines the value of NEPA as recently implemented by both Congress and the Executive Branch.

CONCLUSION

The Court should grant rehearing *en banc*.

Dated: February 19, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE OF BRIEF

I certify, pursuant to Fed. R. App. P. Rule 32(g)(1), that the foregoing *amici curiae* brief complies with the type-volume limitation of Fed. R. App. P. Rule 29(b)(4) because this document, including the text of Attachment 1 setting forth the individual interests of Amici, and excluding the parts of the document exempted by Fed. R. App. P. 32(f), contains 2,595 words, as computed by Microsoft Word. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface of Times New Roman, 14 point font.

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CERTIFICATE OF SERVICE

I hereby certify that, on this 19th day of February, 2019, the foregoing *amici curiae* brief was served electronically through the Court's CM/ECF system with the Court and all registered counsel.

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