

Nos. 18-1584 & 18-1587

IN THE
Supreme Court of the United States

ATLANTIC COAST PIPELINE, LLC, *Petitioner*,

v.

COWPASTURE RIVER PRESERVATION ASSOCIATION, ET AL.,
Respondents.

U.S. FOREST SERVICE, ET AL., *Petitioners*,

v.

COWPASTURE RIVER PRESERVATION ASSOCIATION, ET AL.,
Respondents.

**On Petitions for Writs of Certiorari to the
United States Court of Appeals
for the Fourth Circuit**

**BRIEF OF THE UNITED ASSOCIATION OF
JOURNEYMEN AND APPRENTICES OF THE
PLUMBING AND PIPE FITTING INDUSTRY OF
THE UNITED STATES AND CANADA, AFL-CIO;
INTERNATIONAL UNION OF OPERATING
ENGINEERS; LABORERS' INTERNATIONAL
UNION OF NORTH AMERICA; INTERNATIONAL
BROTHERHOOD OF TEAMSTERS; AND PIPE
LINE CONTRACTORS ASSOCIATION AS *AMICI
CURIAE* IN SUPPORT OF PETITIONERS**

ELLEN O. BOARDMAN*

JENNIFER R. SIMON

ANNA FRIEDLANDER

O'DONOGHUE & O'DONOGHUE LLP

5301 Wisconsin Ave, NW, Suite 800

Washington, DC 20015

*Counsel of Record

Counsel for Amici Curiae

TABLE OF CONTENTS

	Page
STATEMENT OF INTEREST	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. THE DECISION BELOW DIRECTLY OP- POSES THE BIPARTISAN GOAL OF RE- LIABLE AND EFFICIENT PIPELINE AU- THORIZATION PROCESSES.....	4
II. THE DECISION BELOW WOULD HAVE IMMEDIATE DETRIMENTAL EFFECTS ON SOCIETY.....	13
A. The Decision Below Threatens Tens of Thousands of Jobs and Associated Eco- nomic Benefits.....	13
B. The Decision Below Imperils Socioeco- nomic Benefits for Local Communities Along the Pipeline.....	16
III. THE DECISION BELOW THREATENS U.S. ENERGY INFRASTRUCTURE DE- VELOPMENT AND SAFETY GOING FOR- WARD.....	19
CONCLUSION.....	24

TABLE OF AUTHORITIES

	Page
Cases	
<i>Cowpasture River Preservation Ass’n v. Forest Service</i> , 911 F.3d 150, 180-181 (4th Cir. 2018)	5, 6
Statutes & Regulations	
Denali Nat’l Park Improvement Act, Pub. L. No. 113-33, 127 Stat. 514 (2013)	12
FAST Act, Pub. L. No. 114-94, 129 Stat. 1312 Pub. L. No. 114-94, tit. XLI, § 41002(c)(2)(B), 129 Stat. 1312, 1745-46 (2015).....	11 11
Mineral Leasing Act, 30 U.S.C. § 181 <i>et seq.</i>	4
30 U.S.C. § 185(a)	5
30 U.S.C. § 185(b)(1)	5
National Trails System Act, 16 U.S.C. § 1241, <i>et seq.</i>	5
16 U.S.C. § 1244(a)	20
16 U.S.C. § 1244(a)(1)	5, 6
16 U.S.C. § 1246(a)(1)(A)	6, 8
16 U.S.C. § 1246(a)(2)	6, 8, 9
Pub. L. 107-223, 116 Stat. 1338 (2002)	7
36 C.F.R. §200.3(b)(2)(i).....	8
Other Authorities	
Barack Obama, <i>Presidential Memorandum— Expediting Review of Pipeline Projects from</i>	

TABLE OF AUTHORITIES—Continued

	Page
<i>Cushing, Oklahoma, to Port Arthur, Texas, and Other Domestic Pipeline Infrastructure Projects</i> (Mar. 22, 2012), https://obamawhitehouse.archives.gov/the-pressoffice/2012/03/22/presidential-memorandum-expediting-review-pipeline-projects-cushing-okla	10
Charles Hughes, <i>Why America Needs More Pipelines</i> , Manhattan Institute (July 20, 2017), https://www.manhattan-institute.org/html/america-needs-more-pipelines-10478.html	22
Exec. Order No. 13766, 82 Fed. Reg. 8657 (Jan. 24, 2017)	11
Exec. Order No. 13807, 82 Fed. Reg. 40463 (Aug. 15, 2017)	11
Federal Energy Regulatory Commission, Office of Energy Projects, <i>Atlantic Coast Pipeline and Supply Header Project Final Environmental Impact Statement</i> (July 2017), https://www.ferc.gov/industries/gas/enviro/eis/2017/07-21-17-FEIS/volume-I.pdf	8-9
H.R. 2295, 115th Congress (2015-2016)	9
H.R. Rep. No. 114-285 (2015)	9
Hearing on PIPES Act of 2016 Implementation Before the Subcomm. on Railroads, Pipelines and Hazardous Materials of the H. Comm. on Transp. and Infrastructure (June 21, 2018) (Statement of Robin Rorick), https://www.api.org/news-policy-and-	

TABLE OF AUTHORITIES—Continued

	Page
issues/testimony-and-speeches/2018/06/21/june-21-2018-rorick-pipeline-safety-testimony	20, 21
Kevin Petak et al., <i>U.S. Oil and Gas Infrastructure Investment through 2035</i> , ICF (Apr. 2017), https://www.api.org/~media/Files/Policy/Infrastructure/API-Infrastructure-Study-2017.pdf	21
National Park Service, <i>North Country National Scenic Trail</i> (Sept. 19, 2018) https://www.nps.gov/noco/planyourvisit/maps.htm	20
Office of the Assistant Sec’y for Fish & Wildlife & Parks, U.S. Dep’t. of the Interior, <i>Departmental Manual</i> (Aug. 16, 1977), www.doi.gov/sites/doi.gov/files/elips/documents/Chapter%20%201_%20PURPOSE%2C%20POLICY%2C%20RESPONSIBILITY.doc	5
Minnesota Public Utilities Commission, <i>Order Granting Certificate of Need as Modified and Required Filings</i> (Sept. 5, 2018), https://www.edockets.state.mn.us/EFiling/edockets/searchDocuments.do?method=showPoup&documentId={8077AB65-0000-C610-98DE-18780AEB54E9}&documentTitle=20189-146227-01	23
Permitting Dashboard, Federal Infrastructure Projects, <i>Atlantic Coast Pipeline</i> , https://www.permits.performance.gov/projects/atlantic-coast-pipeline-atlantic-	

TABLE OF AUTHORITIES—Continued

	Page
coast-pipeline-amendment-supply-header-and-acp-piedmont	11
Roy Bell et al., <i>Eastern North Carolina Mayors Rally in Support of the Atlantic Coast Pipeline and Urge Project’s Completion</i> (June 26, 2019), https://www.publicradioeast.org/sites/pre/files/201907/nc_mayor_open_letter_-_june_2019_1315_.pdf	17-18
S. Rep. No. 114-125 (2015)	20
U.S. Dep’t of Energy, Energy Info. Admin.: <i>Petroleum & Other Liquids</i> (June 28, 2019), https://www.eia.gov/dnav/pet/hist/LeafHandler.ashx?n=PET&s=MCRFPUS2&f=M	21
<i>Short-Term Energy Outlook</i> (July 2019), https://www.eia.gov/outlooks/steo/pdf/steo_full.pdf	21
U.S. Dep’t of Transp., Pipeline & Hazardous Materials Safety Admin.: <i>Call to Action</i> (last updated June 28, 2017), https://www.phmsa.dot.gov/safe-transportation-energy-products/call-action	22
<i>Pipeline Replacement Updates</i> , https://opswb.phmsa.dot.gov/pipeline_replacement/	22
<i>Pipeline Replacement Updates, By-Decade Inventory</i> , https://opswb.phmsa.dot.gov/pipeline_replacement/by_decade_installation.asp	22-23

TABLE OF AUTHORITIES—Continued

	Page
U.S. Forest Serv., U.S. Dep't of Agric.:	
<i>Forest Service Manual</i> (effective June 1, 1990), www.fs.fed.us/im/directives/fsm/1500/1531.2-1531.32e.rtf	7
<i>Record of Decision, Atlantic Coast Pipeline Project Special Use Permits/Land and Resource Management Plan Amendments</i> (Nov. 2017), https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd564397.pdf	7-8, 14, 17
<i>Special Use Permit, Atlantic Coast Pipeline</i> (Jan. 2018), https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd571995.pdf	9

STATEMENT OF INTEREST

The following parties respectfully submit this brief as *amici curiae*.¹

The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO (“UA”), is an international labor organization representing over 350,000 plumbers, pipefitters, sprinkler fitters, service technicians, and welders. The UA’s membership includes 10,000—11,000 workers who perform welding, pipefitting, and hydrostatic testing on pipelines. UA pipeliners have worked on every major pipeline project in the United States.

The International Union of Operating Engineers (“IUOE”) is a diversified trade union that primarily represents operating engineers, who work as heavy equipment operators, mechanics and surveyors in the construction and pipeline industries; as well as stationary engineers, who work in operations and maintenance in building and industrial complexes, and in the service and petrochemical industries. The IUOE has approximately 400,000 members and 110 local unions in the U.S. and Canada. Operating engineers operate, maintain, and repair all manner of heavy equipment on pipeline projects.

The Laborers’ International Union of North America (“LIUNA”) began as a union of construction workers, founded in 1903 by a group of hod carriers and related

¹ No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than *amici curiae*, their members, or counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

construction tradesmen who came together to secure better livelihoods for themselves and their families. Today, LIUNA represents roughly 500,000 members throughout the U.S. and Canada across multiple industries in the private sector, from construction to energy to manufacturing, and in the public sector.

Founded in 1903, the International Brotherhood of Teamsters (“Teamsters”) represents more than 1.4 million hardworking men and women across the U.S., Canada, and Puerto Rico. Teamster members work in a wide variety of industries, including the construction industry. Approximately 3,000 Teamster members nationwide regularly work on pipeline projects.

The Pipe Line Contractors Association (“PLCA”) is a trade association founded in 1948 representing employers engaged in the construction and maintenance of mainline oil and gas pipelines throughout the U.S. as well as service providers and suppliers that support such work. On behalf of its members, PLCA negotiates and administers national labor agreements with the UA, IUOE, LIUNA, and Teamsters. These collective bargaining agreements are considered industry-wide agreements covering all mainline pipeline construction work. The PLCA currently has approximately 200 member companies, including numerous companies that are expected to perform significant work on the Atlantic Coast Pipeline (“ACP”).

The UA, IUOE, LIUNA, and Teamsters (“Pipeline Crafts”) collectively represent the approximately 7,000 workers who would perform all aspects of pipeline construction on ACP while the PLCA represents the pipeline contractors who would employ them. Individuals represented by the Pipeline Crafts would perform this work pursuant to Project Labor Agreements that have already been executed. These Agree-

ments provide for wages that allow union workers to have a high standard of living, health benefits for themselves and their families, and pension contributions for all hours worked. Employers also make hourly contributions to training funds jointly run by the Pipeline Crafts and signatory contractors, which ensure that experienced workers are trained on the skills necessary to build the safest pipelines and allow new workers to enter the trade and develop these skills. In return, *Amici* and the workers they represent ensure that the U.S. pipeline infrastructure is built and maintained according to the most up-to-date, safe, and efficient standards—at a significant benefit to the public at large.

The lower court’s erroneous interpretation and application of the Mineral Leasing Act in this case presents a significant barrier to permitting of ACP and potentially many other pipeline projects. *Amici* submit this brief to provide the Court with information about the damaging impact that this outcome would have on the immediate and long-term future of U.S. energy infrastructure and the socioeconomic welfare of thousands of pipeline workers, as well as State and local communities. We urge the Court to grant certiorari on the petitions in order to resolve the important legal question presented and ensure that federal agency approval of pipelines remains accessible and efficient to the benefit of all involved.

SUMMARY OF ARGUMENT

Gas and liquid pipelines are an essential part of U.S. energy infrastructure. In recent years, pipeline permitting processes have been targeted by opponents of traditional energy sources like oil and natural gas. The fact remains, however, that there is a need for pipelines like ACP and a bipartisan federal policy that

favors efficient authorization procedures for them, in recognition of their important role in the nation’s energy infrastructure. Not only do pipelines ensure that energy is delivered efficiently, reliably, and safely, but they also create and support large numbers of construction jobs as well as direct and indirect economic benefits to local communities.

The decision below vitiates these compelling benefits. It renders the process to obtain pipeline authorizations across the Appalachian National Scenic Trail (“ANST” or the “Trail”)—and potentially other lands the National Park Service (“NPS”) is involved with administering—more burdensome at best and inaccessible at worst. This result would have serious and long-lasting negative effects on American workers, consumers, and energy infrastructure, and would deprive local communities of significant economic benefits that flow from pipeline construction and operation.

ARGUMENT

I. THE DECISION BELOW DIRECTLY OPPOSES THE BIPARTISAN GOAL OF RELIABLE AND EFFICIENT PIPELINE AUTHORIZATION PROCESSES.

The Fourth Circuit’s ruling presents an overly restrictive interpretation of the Mineral Leasing Act (“MLA”), 30 U.S.C. § 181 et seq. In effect, the Fourth Circuit’s decision means that an act of Congress may be necessary before any pipeline right-of-way underneath the ANST—and potentially other lands administered to any extent by NPS—could be issued. This result goes against federal law, decades of consistent interagency agreement and practice, and bipartisan policy favoring accessible and reliable permitting of

infrastructure generally, and pipeline projects specifically.

The MLA authorizes the “Secretary of the Interior or appropriate agency head” to grant pipeline rights-of-way across “Federal lands,” 30 U.S.C. § 185(a), and defines “Federal lands” to exclude “lands in the National Park System,” *id.* 185(b)(1). Since the Fourth Circuit concluded that the ANST qualifies as “lands in the National Park System,” it found that the MLA bars the U.S. Forest Service (“Forest Service”) from granting a pipeline right-of-way underneath it, even though the 0.1-mile portion of the ANST at issue lies within a National Forest. *Cowpasture River Preservation Ass’n v. Forest Service*, 911 F.3d 150, 180-181 (4th Cir. 2018).

This ruling incorrectly applies the National Trails System Act (“NTSA”), 16 U.S.C. § 1241 et. seq. NTSA, which designates the ANST as a National Scenic Trail, delegates administration of the ANST “primarily as a footpath” to the “Secretary of the Interior, in consultation with the Secretary of Agriculture.” 16 U.S.C. § 1244(a)(1). The Secretary of the Interior, in turn, has delegated “management responsibility” for the ANST to NPS. Office of the Assistant Sec’y for Fish & Wildlife & Parks, U.S. Dep’t. of the Interior, *Departmental Manual* Pt. 710, at § 1.4(C)(1) (Aug. 16, 1977).² Due to this delegation of administration to NPS, the Fourth Circuit found that the Trail is “lands in the National Park System,” and, thus, that the MLA forecloses agency permitting of a pipeline right-of-way underneath it. *Cowpasture*, 911 F.3d at 180. The Fourth Circuit further found that NTSA’s delegation of administration of the Trail to the Secretary of the Inte-

² www.doi.gov/sites/doi.gov/files/elips/documents/Chapter%20%201_%20PURPOSE%2C%20POLICY%2C%20RESPONSIBILITY.doc

rior/NPS means that the Forest Service lacks any authority over the land underlying it. *Id.* at 180-181.

The error in the Fourth Circuit’s analysis is that, in defining the ANST as “lands within the National Park System” and finding that NPS has exclusive jurisdiction over it and the land underlying it, the lower court overstates NPS’s authority over the ANST and disregards authority reserved for the Forest Service under NTSA. NTSA expressly states that the Secretary of the Interior is to administer the Trail “primarily as a footpath.” 16 U.S.C. § 1244(a)(1). The statute also makes clear that this delegation is limited, and does not “transfer among Federal agencies any management responsibilities established under any other law for federally administered lands which are components of the National Trails System.” 16 U.S.C. § 1246(a)(1)(A). In fact, NTSA itself characterizes the Trail as a “right-of-way,” which may cross “Federal *lands under the jurisdiction of another Federal agency*,” State land, and/or private land. 16 U.S.C. § 1246(a)(2) (emphasis added).

Stated differently, the law establishing the ANST does not designate the thousands of miles of land through which it runs as “lands within the National Park System” and does not grant exclusive authority over it and all of the land underneath it to the Secretary of the Interior. Rather, NTSA describes the Trail as a “right-of-way” through lands under the jurisdiction of other entities, directs the Secretary of the Interior to administer the ANST as a “footpath,” and expressly provides that other Federal agencies retain jurisdiction over components of the Trail under their management. 16 U.S.C. § 1244(a)(1); 16 U.S.C. §§ 1246(a)(1)(A), (a)(2). The Fourth Circuit’s decision fails to explain or rebut the limited authority granted

to the Secretary of the Interior in these provisions of NTSA, leading it to incorrectly interpret NTSA to give undue authority to NPS and to dismiss the Forest Service's established, efficient procedures administering National Forest lands underneath the Trail.

Since the ANST was established by NTSA, NPS and the Forest Service have cooperated without conflict in administering it. Pursuant to NTSA's mandate that NPS administer the Trail as a footpath and the Forest Service retain jurisdiction over National Forest lands, NPS and the Forest Service executed a Memorandum of Agreement in 1970, shortly after the passage of the NTSA, in recognition of the fact that "significant portions of the [ANST] traverse lands under the separate administrative jurisdictions of [NPS] and the Forest Service." See U.S. Dep't of Agric., *Forest Service Manual* § 1531.32a, at 9 (effective June 1, 1990).³ This Agreement goes on to provide for cooperation between NPS and the Forest Service in administering the segments of the Trail under their separate jurisdictions, "enforcement of which will be carried out by the agency administering the lands through which the Trail passes." *Id.* at 11.⁴

Critically, this case involves pipeline construction on land that is under the jurisdiction of the Forest Service. See U.S. Dep't of Agric., Record of Decision, *Atlantic Coast Pipeline Project Special Use Permits/Land and Resource Management Plan Amendments*

³ www.fs.fed.us/im/directives/fsm/1500/1531.2-1531.32e.rtf.

⁴ Of course, any time a pipeline right-of-way is sought underneath a National Park, the MLA would operate to prohibit agency permitting absent Congressional approval. See Pub. L. 107-223, 116 Stat. 1338 (2002) (authorizing the Secretary of the Interior to issue certain right-of-way permits for natural gas pipelines within the Great Smoky Mountains National Park).

(“Forest Serv. ROD”), at 3 (Nov. 2017) (noting that ACP’s route would cross the ANST within the George Washington National Forest); 36 C.F.R. § 200.3(b)(2) (i) (“The Forest Service administers and manages the National Forest System lands”). Although the ANST crosses the George Washington National Forest as part of its 2,000 continuous miles of footpath, NTSA makes clear that the Forest Service retains jurisdictional and administrative authority over the land underlying this footpath because it is part of a National Forest. 16 U.S.C. § 1246(a)(1)(A), (a)(2).⁵ In its Final Environmental Impact Statement (“FEIS”) concerning ACP, the Federal Energy Regulatory Commission recognized that the Memorandum of Agreement between NPS and the Forest Service means that the decision of whether to grant a right-of-way for

⁵ Even a basic understanding of the plan for constructing ACP reinforces why the Fourth Circuit’s interpretation of NTSA to grant NPS exclusive authority to regulate the Trail and all the land underneath it is inconsistent with the language of NTSA, which speaks to administration of the Trail as a “footpath”—on the surface of the land. The ACP would be approximately 600 miles long in total. A 0.1-mile segment of ACP would be installed under the ANST at a depth of approximately 700 feet using Horizontal Directional Drilling (“HDD”). While pipelines are traditionally constructed using trenches dug into the ground from the surface, the HDD technique would install the pipeline into the soil horizontally from an entry point 1400 feet away from the Trail to an exit point 3400 feet away from the Trail on the other side. FEIS at 4-462. In this way, ACP would have no perceptible effect on the Trail’s surface during construction or thereafter. The Forest Service went so far as to make it a condition of the permit it issued to ACP that “[n]o surface-disturbing activity. . . occur on [National Forests] lands as part of the crossing under the [ANST].” Forest Serv. ROD at 14. Therefore, neither construction nor operation of ACP would have an effect on the Trail as a footpath, leaving nothing for NPS to administer with relation to the pipeline under NTSA.

ACP across the Trail is subject exclusively to the Forest Service's jurisdiction. See Federal Energy Regulatory Commission, Office of Energy Projects, *Atlantic Coast Pipeline and Supply Header Project Final Environmental Impact Statement*, I-9 (July 2017).⁶

In the decision below, the Fourth Circuit ignores these decades of cooperation, grounded in NTSA, between NPS and the Forest Service. The Fourth Circuit's view of the ANST "right-of-way," see 16 U.S.C. § 1246(a)(2), as granting exclusive control to NPS is also inconsistent with the way rights-of-way are typically granted. For example, the Forest Service's special use permit granting a right-of-way to ACP underneath the ANST is clear that it did not give the pipeline "exclusive" use or occupancy of the land. U.S. Dep't. of Agric., *Special Use Permit for Atlantic Coast Pipeline*, at 3 (Jan. 2018).⁷ It further reserved the right of the Forest Service to access, inspect, and monitor the land for any legal purpose and to allow others to use the land in any way not inconsistent with ACP's permit. *Id.* Read according to these principles, the best inter-

⁶ Congress, too, has recognized the NPS and Forest Service's respective authority vis-à-vis the ANST. Recently, an amendment to the MLA to allow agencies to grant natural gas pipeline rights-of-way on federal lands failed to go to a vote. H.R. 2295, 115th Congress (2015-2016). Part of the rationale against the amendment was that it was unnecessary because only a small portion of the ANST is on land owned exclusively by NPS. See H.R. Rep. No. 114-285, at 24 (2015) (observing that 63 pipelines already cross the ANST, for which Congressional authorization had only been required in three locations because "much of the . . . Trail is on land not owned by [NPS]"). Thus, Congress has recognized that the MLA's exclusion of "lands within the National Park System" does not apply to ANST land subject to another agency's jurisdiction.

⁷ https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd571995.pdf.

pretation of NTSA is that it grants the Trail a non-exclusive right-of-way through Forest Service land, where applicable, limited to the operation of a foot-path and does not prohibit the Forest Service from authorizing other, compatible uses of the land—exactly as it has been interpreted and administered by NPS and the Forest Service for decades.

By casting aside the statutory directives and long-standing practices of the federal agencies involved, and effectively requiring an act of Congress to allow permitting of any pipeline right-of-way under the ANST—and potentially other land that is in any way administered by NPS—the Fourth Circuit’s decision stands in direct opposition to the bipartisan policy goal of timely and reliable permitting of energy pipelines. In 2012, the Obama Administration’s Executive Order 13604 recognized the need to “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.” Barack Obama, *Presidential Memorandum—Expediting Review of Pipeline Projects from Cushing, Oklahoma, to Port Arthur, Texas, and Other Domestic Pipeline Infrastructure Projects* (Mar. 22, 2012).⁸ Executive Order 13604 encouraged federal agencies to “work collaboratively and concurrently to advance reviews and permitting decisions” and to “execute Federal permitting and review processes with maximum efficiency and effectiveness . . . [to] provide a transparent, consistent, and predictable path for both project sponsors and affected communities.” *Id.*

⁸ <https://obamawhitehouse.archives.gov/the-pressoffice/2012/03/22/presidential-memorandum-expediting-review-pipeline-projects-cushing-okla>.

Fixing America’s Surface Transportation Act (“FAST Act”), enacted in 2015, introduced reforms aimed at streamlining approval mechanisms for major infrastructure projects, including pipelines. Pub. L. No. 114-94, 129 Stat. 1312. Among the priorities established in the FAST Act are stakeholder engagement; timely decision-making regarding environmental reviews and authorizations; improved agency coordination; and transparency. Pub. L. No. 114-94, tit. XLI, § 41002(c)(2)(B), 129 Stat. 1312, 1745-46 (2015). ACP is a “covered project” under the FAST Act and is thus considered a national priority. *See Atlantic Coast Pipeline*, Permitting Dashboard, Federal Infrastructure Projects.⁹

In 2017, President Trump issued Executive Order 13766, which reinforces the federal policy of “expedit[ing], in a manner consistent with law, environmental reviews and approvals for all infrastructure projects, especially projects that are a high priority for the Nation, such as . . . pipelines.” Exec. Order 13766, 82 Fed. Reg. 8657 (Jan. 24, 2017). Later in 2017, President Trump issued Executive Order 13807 aimed at facilitating informed decision-making among federal agencies, and transparency and accountability to the public regarding infrastructure authorization, including pipelines. Exec. Order No. 13807, 82 Fed. Reg. 40463 (Aug. 15, 2017). Executive Order 13807 calls for “coordinated, consistent, predictable, and timely” authorization processes “in order to give public and private investors the confidence necessary to make funding decisions for new infrastructure projects.” *Id.*

⁹ <https://www.permits.performance.gov/projects/atlantic-coast-pipeline-atlantic-coast-pipeline-amendment-supply-header-and-acp-piedmont>.

The decision below represents a sharp turn away from these policy goals and the established, orderly permitting process that the Forest Service has utilized since the ANST was established, creating, instead, a largely inaccessible and entirely inefficient authorization process. Specifically, the Fourth Circuit's interpretation appears to require individual Congressional authorization for the Secretary of the Interior to issue any pipeline right-of-way underneath the ANST, regardless of the underlying land ownership. This Congressional authorization would not be subject to set standards or procedures, making it inaccessible and unreliable. Congressional authorization is also an inherently political process, frequently mired with interruption and disruption.

And Congressional authorization would only be a first step towards issuance of a pipeline permit under the Trail. Assuming Congressional authorization, the Secretary of the Interior would then have to undertake a full analysis of the right-of-way sought, including any required environmental impact analyses. *See* Denali Nat'l Park Improvement Act, Pub. L. No. 113-33, 127 Stat. 514 (2013) (authorizing the Secretary of the Interior to issue a right-of-way permit for a natural gas pipeline within the Denali National Park consistent with normal procedures applicable to utilities rights-of-way and after an analysis under the National Environmental Policy Act of 1969).

In the case of ACP, in place of one review and decision by the Forest Service—which already considers effects of the pipeline and construction on the Trail—the project's sponsors would need: (1) Congressional approval for the Secretary of the Interior to issue a permit for the pipeline to cross underneath the ANST; (2) a favorable review by NPS and permit for the 0.1-

mile portion of the pipeline crossing under the Trail; and (3) a permit from the Forest Service for ACP to cross National Forest lands leading up to and away from the Trail crossing. These added steps and, more importantly, the uncertainty surrounding if and when Congress might act at all presents the exact opposite of efficient infrastructure authorization. It transforms an efficient process into one that is inaccessible, unpredictable, fragmented, and inefficient, and unnecessarily adds an entire branch of government—the legislative branch—into the equation.

II. THE DECISION BELOW WOULD HAVE IMMEDIATE DETRIMENTAL EFFECTS ON SOCIETY.

Pipelines support a vital industry of workers and associated socioeconomic benefits in affected communities. *Amici* represent the union workers and companies who would construct the pipeline and reap significant economic and career benefits from doing so, including wages, benefits, and skills training. They are greatly affected by unreliability in permitting, beyond the effects caused by delay or cancellation of one project. Local communities would also be harmed in many ways, including by loss of local spending, tax revenue, business development, and savings on energy costs that reliable pipeline construction and operation provide.

A. The Decision Below Threatens Tens of Thousands of Jobs and Associated Economic Benefits.

Construction and operation of ACP would lead to significant job creation and associated benefits. ACP is anticipated to create approximately 17,240 construction jobs in total in the three-State/Common-

wealth area. Forest Serv. ROD at 23.¹⁰ Pursuant to collectively bargained Project Labor Agreements, these construction jobs would be filled by skilled pipeline craft workers.

Given the scope of the project in this case, and based on a schedule of work prepared by ACP, *Amici* estimate that up to approximately 725 pipeline workers would be employed on each of ACP's sixteen construction "spreads," or segments. Over the course of the two years that ACP construction is anticipated to take, *Amici* expect that these individuals would work more than 30 million hours, earning an average total wage and fringe benefit package of \$55.49 per hour across all crafts under the National Pipe Line Agreement.

Thus, *Amici* expect that construction of ACP would generate over \$1.8 billion in wages and fringe benefit contributions for pipeline workers. Included in this amount is approximately \$1 billion in wages, \$232 million in payments to provide medical and accident benefits for pipeline workers and their families, \$564 million in payments to provide retirement, survivor, and disability benefits, and \$3 million in payments to provide training, education, and safety programs, including joint union and employer-sponsored training for new entrants to the industry.

These are the exact type of jobs—blue collar jobs for skilled workers that provide good wages, health coverage, and retirement security, and fund their own training and training for new entrants to the indus-

¹⁰ After construction, the pipeline would continue to support approximately 271 direct, indirect, and induced jobs during the operation of the line, with a total annual payroll of \$41.3 million. Forest Serv. ROD at 23.

try—that are so badly needed in today’s economy. Although pipeline construction jobs are often described as “temporary,” the temporary nature of construction jobs is exactly what makes them so important. Every opportunity for construction work that is delayed or denied is devastating because construction workers rely on a steady supply of projects to provide complete incomes and retirement savings for themselves and their families over the course of their careers. Thus, pipeline workers in particular rely on efficient and predictable permitting of projects.

ACP itself is an example of this disruption and how it affects workers’ lives. After obtaining all applicable permits in March 2018, ACP began construction. When a separate decision of the Fourth Circuit placed a stay (pending review) on implementation of the Biological Opinion from U.S. Fish and Wildlife Service for ACP in December 2018, construction was halted, leaving thousands of workers, who had anticipated two years of employment for 60 hours per week on ACP, suddenly jobless and largely forced to go on out-of-work lists and wait to be dispatched to another job. The decision below, which was issued within one week after the stay of the Biological Opinion, further exacerbated the situation. With delays and obstruction of permitting becoming more and more common nationwide, there are no jobs available for many workers.

When a pipeline worker is unemployed, he or she loses not only significant income but also pension contributions and eligibility for individual and family health benefits, which are typically keyed to a required number of hours worked. Workers may try to get jobs outside of pipeline work, but these jobs—especially if they are not covered by a collective bargaining agreement—often do not compare in terms of wages

and benefits to the skilled pipeline construction jobs for which they have trained. Thus, to the extent an unemployed pipeline worker is able to find a replacement job, that job may well command inferior wages and benefits.

Unreliable permitting and a corresponding decline in available pipeline jobs also renders unions unable to take in new members and advance the ones they have. If there is a shortage of jobs or uncertainty as to how long it will take for permitting decisions to be made, unions cannot accept as many entry-level members as they would otherwise, preventing those workers from receiving the training and other benefits available in the unionized pipeline construction industry.

All of this is not to say that pipelines should be approved without any scrutiny or even with less scrutiny than the law currently requires. Rather, it is to say that the effects of unnecessary obstruction and inefficiency in permitting compromise an entire industry, including the many thousands of skilled careers it supports. These effects are real and tangible for the American workforce and worthy of consideration in deciding whether to review the Fourth Circuit's unprecedented and unsupported interpretation of the MLA and NTSA, and its disregard for the efficient permitting process that the Forest Service and NPS have developed over the last nearly half century.

B. The Decision Below Imperils Socioeconomic Benefits for Local Communities Along the Pipeline.

Construction and operation of ACP would promote economic benefits in the communities through which it runs. ACP itself would generate an estimated total of \$2.7 billion in economic activity and a total of \$25

million in tax revenue to State governments as a result of construction alone. Forest Serv. ROD at 23. Part of this economic activity and tax revenue would come from the workers on the pipeline, who would spend their earnings largely locally, including on lodging and all the necessities of everyday life.

These economic benefits would extend beyond the construction period. Operation of ACP in the 3-State/Commonwealth region would result in a total economic impact of \$69.2 million in spending on labor, equipment maintenance, routine capital expenditure, supplies, and profits, and \$418,443 in income tax revenue to State governments per year. *Id.*

Perhaps even more importantly, the pipeline would bring with it new natural gas infrastructure. This infrastructure would be used primarily to supply electricity locally for industrial, commercial, and residential purposes, translating to approximately \$377 million in net annual savings to natural gas and electricity consumers in Virginia and North Carolina alone between 2019 and 2038. *Id.* By contrast, the Forest Service determined that not building the pipeline would prolong existing energy supply constraints and could lead to exacerbated volatility of natural gas prices in the area, causing higher gas and electric rates in the region and energy shortages during winter peak demand. *Id.* at 43.

These anticipated benefits for local communities from construction and operation of ACP are summarized in a recent open letter by six eastern North Carolina mayors. In that letter, the mayors describe their region's "desperate need" for "new infrastructure to attract the industries and jobs of the modern economy," and how their existing, aging infrastructure cannot support manufacturing or new industries needed

for growth, causing businesses to pass over their communities in favor of “other regions with more reliable infrastructure and access to natural gas.” Roy Bell et al., *Eastern North Carolina Mayors Rally in Support of the Atlantic Coast Pipeline and Urge Project’s Completion* (June 26, 2019).¹¹ The mayors’ letter goes on to describe how ACP would help to meet these needs:

Ever since the Atlantic Coast Pipeline was proposed, our communities have seen renewed hope in the future. The project promises living wage jobs for thousands of local construction workers and opportunities for many of our residents to learn a new vocation. It’s bringing millions of dollars in new business for local companies, from equipment dealers and construction suppliers to local hotels and restaurants. Local contractors that once traveled hundreds of miles for new business now have opportunity at their doorstep.

The ACP has also allowed us to start recruiting new industries to create local jobs and grow our economy . . . We’re seeing renewed interest in our region, with existing businesses thinking about expansion and new economic prospects knocking at our door. We also see the promise of millions in new tax revenue from the pipeline as a way to support our public schools, enhance our community services and lower the tax burden on our citizens.

Id.

The specific counties crossed by ACP’s route have an acute need for these benefits associated with ACP. Only two of the 27 counties through which ACP would

¹¹ https://www.publicradioeast.org/sites/pre/files/201907/nc_mayor_open_letter_-_june_2019_1315_.pdf.

run—Harrison County, West Virginia and Johnston County, North Carolina—had median household incomes (“MHI”) above their State-wide MHIs in 2017, the most recent year for which data is available. Likewise, only two of the counties crossed by ACP had MHIs higher than the U.S. MHI of \$61,372—Chesapeake and Suffolk Counties in Virginia—in 2017. The median MHI of the 27 counties crossed by ACP was \$43,759 in 2017—29% below the national MHI of \$61,372. *See* State, County, and national data available at <http://www.census.gov>.

Given all of these economic benefits of pipelines and the jobs and opportunities they create both directly and indirectly, it is not surprising that federal policy on both sides of the aisle aims to provide accessible and reliable authorization procedures. American workers and communities count on having such procedures in place. By interpreting applicable federal law to erect obstacles to fulfilling this clear policy goal, the Fourth Circuit has done a grave disservice to American workers and communities.

III. THE DECISION BELOW THREATENS U.S. ENERGY INFRASTRUCTURE DEVELOPMENT AND SAFETY GOING FORWARD.

By ruling that the Forest Service lacks the authority to grant a right-of-way across the Trail, the Fourth Circuit’s decision creates uncertainty about the status of the 50+ pipelines and other land use authorizations that already cross the ANST, many of which must be periodically renewed. It would be a strange and inefficient result, indeed, if the same agency that granted those initial permits and subsequent renewals suddenly could not do so without an intervening act of Congress.

This result is not confined to crossings of the ANST. NTSA identifies a total of 30 National Scenic and National Historic Trails, of which 24, crossing more than 39,000 miles in total, are “administered” solely or primarily by the Secretary of the Interior. 16 U.S.C. § 1244(a). Under the Fourth Circuit’s reasoning, current and future rights-of-way across these trails not issued by NPS appear to be in doubt. For example, the North Country National Scenic Trail (“North Country Trail”) spans seven States and 4,600 miles between New York and North Dakota and crosses nine National Forests. NPS, *North Country National Scenic Trail*.¹² Like the ANST, NTSA grants administration of the North Country Trail to the Secretary of the Interior, which has, in turn, delegated administration of it to NPS. See S. Rep. No. 114-125 (2015). Under the Fourth Circuit’s reasoning, this 4,600-mile east-to-west trail would now appear to be off-limits to any pipeline right-of-way absent a specific act of Congress. If agency authorization of pipeline and other infrastructure rights-of-way were to be suddenly foreclosed across the North Country Trail and any of the other 34,000 miles of National Trails administered by the Secretary of the Interior, and existing permits also thrown into limbo, the result would be devastating for American energy infrastructure.

Moreover, development of new pipeline infrastructure is an energy efficiency and safety issue that has serious implications in these times of increased U.S. energy production. U.S. natural gas production has increased by 50% since 2008. Hearing on PIPES Act of 2016 Implementation Before the Subcomm. on Railroads, Pipelines and Hazardous Materials of the H.

¹² <https://www.nps.gov/noco/planyourvisit/maps.htm> (last updated Sept. 19, 2018).

Comm. on Transp. and Infrastructure (June 21, 2018) (Statement of Robin Rorick, Am. Petroleum Inst.) (“Rorick Statement”) (citing U.S. Department of Energy, Energy Information Administration (“U.S. EIA”) monthly statistics).¹³ Domestic production of crude oil has also skyrocketed, increasing from approximately 5 million to 11 million barrels per day between 2009 and 2018. *Petroleum & Other Liquids*, U.S. E.I.A. (June 28, 2019).¹⁴ The U.S. E.I.A. expects that American natural gas and oil production will continue to increase over the next several years. *See Short-Term Energy Outlook*, U.S. E.I.A. (July 2019).¹⁵ Domestic production creates energy savings for U.S. households, job opportunities for American workers, assists U.S. manufacturing efforts, and enhances national security. *See Rorick Statement.*

Inherent in this rise in production is an increased need for transportation of natural gas and oil. One recent study found that the U.S. will need up to \$1.3 trillion in energy infrastructure investment through 2035, of which 22-27% (\$12.3 to \$19 billion annually) will go towards oil and gas pipeline repairs, replacements, and new builds. Kevin Petak et al., *U.S. Oil and Gas Infrastructure Investment through 2035*, ICF, at 3 (Apr. 2017).¹⁶ The current pipeline infrastructure in the U.S. is simply insufficient.

¹³ <https://www.api.org/news-policy-and-issues/testimony-and-speeches/2018/06/21/june-21-2018-rorick-pipeline-safety-testimony>.

¹⁴ <https://www.eia.gov/dnav/pet/hist/LeafHandler.ashx?n=PET&s=MCRFPUS2&f=M>.

¹⁵ https://www.eia.gov/outlooks/steo/pdf/steo_full.pdf.

¹⁶ <https://www.api.org/~media/Files/Policy/Infrastructure/API-Infrastructure-Study-2017.pdf>.

Pipelines are inherently one of the safest and most cost-effective ways to transport natural gas and oil. Between 2007 and 2016, oil and natural gas pipelines had lower average annual accident rates—at 0.66 and 0.73 per billion ton-miles of oil and gas transported, respectively—than rail (2.20 accidents) and road (7.11 accidents). Charles Hughes, *Why America Needs More Pipelines*, Manhattan Institute, at 4 (July 20, 2017).¹⁷ Modern pipelines, in particular, offer valuable safety features, including improved pipe coating that protects against corrosion, welding techniques, and seam inspection, as well as testing of the pipe both before it leaves the mill and once it is in place, and machinery that is periodically deployed through the pipe during operation checking for defects like corrosion, cracking, gouges, dents, weaknesses in welds, and other safety risks. Older natural gas and oil pipelines, by contrast, are more prone to external corrosion and other weaknesses that threaten their integrity and make them susceptible to ruptures or leaks. *See Pipeline Replacement Updates*, U.S. Department of Transportation Pipeline & Hazardous Materials Safety Administration (“PHMSA”).¹⁸

Due to these features making them comparatively more prone to failure, in 2011, the PHMSA issued a “call to action” to accelerate the repair, rehabilitation, and replacement of older pipelines. *Call to Action*, PHMSA.¹⁹ Since that time, the number of pipelines installed before 1970 that remain in operation has declined, but still comprises approximately 33% and

¹⁷ <https://www.manhattan-institute.org/html/america-needs-more-pipelines-10478.html>.

¹⁸ https://opsweb.phmsa.dot.gov/pipeline_replacement/.

¹⁹ <https://www.phmsa.dot.gov/safe-transportation-energy-products/call-action> (last updated June 28, 2017).

45% of gas distribution mainline and hazardous liquid miles of pipeline, respectively. *See Pipeline Replacement Updates, By-Decade Inventory*, PHMSA.²⁰

To the extent that the Fourth Circuit’s decision inhibits the construction of new, comparatively safer pipelines, it undercuts this important federal policy aimed at developing a new pipeline infrastructure with the most up-to-date safety features. Faced with an inability to build new pipelines, pipeline operators will have little choice but to keep using aging pipelines with known integrity risks.

For example, for the last several years Enbridge Energy has been in the process of seeking approval to replace its existing Line 3, which was built in 1960s. Line 3 is currently operating at about half its intended capacity due to age-related integrity risks. Absent replacement, these risks will require approximately 6,250 “integrity digs” to check on the condition of the pipeline and make necessary repairs and replacements over the next 15 years if it remains in service, even at its current reduced operating capacity. *Order Granting Certificate of Need as Modified and Required Filings*, at 5, Minn. Pub. Utilities Comm’n (Sept. 5, 2018).²¹ Similarly, if new pipeline infrastructure cannot be built beneath the ANST or other places where NPS holds administrative authority, it is likely that pipeline operators will be forced to continue using aging, less reliable pipelines that lack modern safety features just to attempt to meet regional energy needs.

²⁰ https://opsweb.phmsa.dot.gov/pipeline_replacement/by_decade_installation.asp.

²¹ <https://www.edockets.state.mn.us/EFiling/edockets/searchDocuments.do?method=showPoup&documentId={8077AB65-0000-C610-98DE-18780AEB54E9}&documentTitle=20189-146227-01>.

CONCLUSION

For the foregoing reasons, the *Amici* respectfully urge the Court to grant the petitions and review the decision below.

Respectfully submitted,

ELLEN O. BOARDMAN*

JENNIFER R. SIMON

ANNA FRIEDLANDER

O'DONOGHUE & O'DONOGHUE LLP

5301 Wisconsin Ave, NW

Suite 800

Washington, DC 20015

(202) 362-0041

*Counsel of Record

Counsel for Amici Curiae

July 25, 2019

