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Can the Appalachian Trail Block a Natural Gas Pipeline?

The question of the trail's ownership looms large in a case that may be headed to the Supreme Court. The answer could determine the fate of natural gas megaprojects on the East Coast.

BY NOAH SACHS AUGUST 14, 2019



DANIEL LIN/DAILY NEWS-RECORD/AP

Protesters gather at the Virginia Department of Environmental Quality Harrisonburg office to speak out against the Atlantic Coast and Mountain Valley Pipelines.

Hiking north on the Appalachian Trail from Reeds Gap in Virginia, my teenage daughter and I come to a clearing. We're at the Three Ridges Overlook, taking in the view of the Rockfish River Valley undulating to the east. Piney Mountain, blanketed in a green canopy of oaks and poplars, stares back at us from across the divide. This tranquil section of the iconic trail is the subject of a four-year legal battle that landed in June at the Supreme Court. It's the spot where Dominion Energy wants to route the controversial Atlantic Coast Pipeline (ACP), a \$7.5 billion, 600-mile, 42-inch-diameter pipe that will carry fracked natural gas from the depths of the Marcellus Shale in West Virginia. The pipeline would run up and over several mountain ranges to the Virginia coast and to eastern North Carolina.

The stakes are high. The lawsuit over this section of the Appalachian Trail could determine the fate of some of the largest natural gas deposits in North America. In a

landmark decision last December, the Fourth Circuit Court of Appeals in Richmond axed the project—for now. That court found that the entire Appalachian Trail from Georgia to Maine is part of the National Park System, blocking federal agencies from authorizing a pipeline crossing. The astonishing decision upended the U.S. natural gas industry and also jeopardizes other pipeline projects with proposed routes across the trail.

Whether the pipeline construction ever goes forward ultimately hinges on the question of who has authority over the Appalachian Trail. If the Supreme Court declines to hear *Cowpasture River Preservation Association v. U.S. Forest Service* (an announcement is expected this fall), then the Fourth Circuit decision will stand, and the ACP will likely be doomed unless it gets a congressional exemption or Dominion chooses a costly new route.

Both Dominion and the Trump administration petitioned the high court to hear the case, with Dominion charging that the Fourth Circuit turned the trail into “an impregnable barrier” that locks up abundant natural gas in the Midwest. (Full disclosure: I’m on the board of an environmental group, Virginia Conservation Network, that has opposed the Atlantic Coast Pipeline, but VCN is not a party to any of the pipeline litigation.)

Yet an even more fundamental problem posed by this latest generation of pipeline projects is not the exact point where they cross the Appalachian Trail, but whether they should be built at all. Once these investments in fossil fuel infrastructure are made, developers have every incentive to use the pipelines for their whole useful life (about 80 years), which would throw greenhouse gases into the atmosphere and exacerbate the climate crisis.

The Appalachian Trail, the longest continuous hiking-only route in the world, occupies a strange legal

landscape. No one had an incentive to determine conclusively who controlled sections of the trail—until now. But who controls the trail affects everything from jobs and energy resources to water quality and climate change. The Appalachian Trail has long been a story of power, property, jurisdiction, and land rights, and the quandaries surrounding those issues now fuel this case. Is the Appalachian Trail part of the National Park System even when it runs through property that the Park Service doesn't own? If so, what does that mean for users of the trail? And how can U.S. energy policy support pipeline construction through public lands and at the same time allow a narrow strip of footpath to block the projects?



CLAUDIA SACHS

View from the Three Ridges Overlook on the Appalachian Trail, in Central Virginia

Federal law allows pipeline rights-of-way in national forests, and 55 other oil and natural gas pipelines already cross under the Appalachian Trail at 34 separate locations (sometimes several pipelines cross at a single location). The Forest Service assumed it had authority over the pipeline and the tunneling under the Appalachian Trail since the proposed crossing is within the boundaries of the George Washington National Forest, land that the Forest Service purchased in 1918.

But Congress put the Park Service in charge of administering the entire Appalachian Trail, and agencies can't approve pipelines on Park Service lands. For decades, the Park Service has claimed the whole trail as one of the 419 official units of the National Park System, an authority that the Forest Service has acknowledged. The *Cowpasture* suit was filed in 2017 by the nonprofit Southern Environmental Law Center (SELC) to challenge the ACP's Forest Service approvals.

Who is really in charge of this stretch of the Appalachian Trail near the Three Ridges Overlook? No single entity owns the whole footpath. It meanders continuously for 2,100 miles through 14 states. It crosses 717 miles of national parks, 423 miles of state and private lands, and 1,006 miles of Forest Service lands. At the midpoint of the trail in Harpers Ferry, West Virginia, the trail runs right down city streets. At Bear Mountain, New York, it travels across the Hudson River on a bridge owned by the state of New York.

Born in the Progressive Era, the Appalachian Trail was assembled from dozens of smaller trails that had been operated by various hiking clubs. By 1937, the full route was complete, but there was no overarching federal protection until Congress passed the National Trails System Act in 1968, which designated the Appalachian Trail as a “national scenic trail” and tasked the National Park Service with administering the path. With funding from Congress, the Park Service purchased 825 trail miles from private landowners in the early 1980s. But authority was still dispersed. Today, nearly half the trail runs through Forest Service lands.

First proposed in 2014, the ACP once appeared to be unstoppable, with powerful allies at every level of government. In Virginia, the pipeline has been backed by two Democratic governors and most of the political establishment. Dominion Energy, the lead developer of the ACP, is a Fortune 500 company headquartered in Richmond. A political titan, Dominion has for decades used campaign cash to lubricate legislative and gubernatorial races. Duke Energy, Dominion’s 47



APPALACHIAN VOICES, IN C.

Proposed routes of the Atlantic Coast and Mountain Valley Pipelines

percent partner on the pipeline, plays a similar kingmaking role in North Carolina. Pat McCrory, a Republican who worked for Duke Energy for 28 years, was governor of North Carolina when the ACP was proposed.

Meanwhile, the Trump administration, which has never met a fossil fuel deposit it didn't want to exploit, quickly got behind the ACP. Reversing Obama administration policy in 2017, the Forest Service blessed a route through the Monongahela and George Washington National Forests that included tunneling 700 feet beneath the trail (the pipeline will be buried a few feet belowground along the rest of the route).

Environmentalists quickly lawyered up—and they are winning. Courts have tossed out seven separate permits for the ACP, including an Endangered Species Act permit vacated by the Fourth Circuit on July 26.

With all the litigation, costs for the project have risen dramatically (Moody's recently slapped a “credit negative” rating on the project). Environmentalists have disputed the need for new gas, cite water quality and climate change risks, and decry the pipeline's scar across the Blue Ridge Mountains.

If the pipeline is ever built, 1.5 billion cubic feet of gas per day would course through the network. Dominion will maintain a 50-foot clear-cut for repair purposes over the entire 600-mile route. The proposed project would snake over Piney Mountain and ruin hikers' view from the Three Ridges Overlook. Dominion also plans to clear-cut ten nearby acres in the George Washington National Forest to assemble the pipeline before yanking it through the tunnel under the trail.

Even with tunneling, the ACP would wreck the wilderness experience of being on the trail. And it's not

just one pipeline. Another project owned by a different developer, Mountain Valley Pipeline (MVP), is further along in construction, on a more southerly route than the ACP, and it also needs an Appalachian Trail crossing. Environmentalists have locked themselves to bulldozers and are slamming the MVP with lawsuits. The developers are fighting back, citing construction jobs and billions in economic activity. They also argue that cleaner-burning natural gas is needed to replace aging coal-fired power plants.

But the other lawsuits don't have the same national impact as the Appalachian Trail case. The Fourth Circuit was the first court to conclude that the entire Appalachian Trail is part of the National Park System, giving the trail a talismanic power to block energy projects. The Forest Service's ACP approval was bogus, the court said, because it lacked authority to give it, even within the George Washington National Forest. Judge Stephanie Thacker, writing for the court, concluded that the Forest Service had “abdicated its responsibility to preserve national forest resources.” She invoked Dr. Seuss and quoted *The Lorax*: “We trust the United States Forest Service to ‘speak for the trees, for the trees have no tongues.’”

This wasn't a case where two federal agencies were at loggerheads over jurisdiction. In fact, the National Park Service under President Trump acquiesced in the Forest Service permitting process for the pipeline. Instead, the court found that federal law doesn't allow *either* agency to approve a pipeline crossing under a trail in the National Park System. The ruling could set a



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Mountain Valley Pipeline under construction near Rainelle, West Virginia

precedent for other trails administered by the secretary of the interior, such as the Natchez Trace Scenic Trail from Mississippi to Tennessee, or the North Country Scenic Trail from New York to North Dakota.

Did the court get it right? A plain reading of the applicable statutes shows that it did. At the heart of this case is the 1920 Mineral Leasing Act, which governs energy development on public lands. That law allows pipeline rights-of-way on “all lands owned by the United States,” except “lands in the National Park System.” Is the Appalachian Trail a land “in the National Park System”? According to the Fourth Circuit, the answer is yes because Congress defined the National Park System, in a 1916 law, to include “any area of land and water administered” by the Park Service.

“Administered” is the key word because 50 years later, in the 1968 National Trails System Act, Congress gave administrative authority over the Appalachian Trail to the secretary of the interior, who then delegated it to the Park Service. Congress gave the U.S. Forest Service administrative authority over *other* trails (like the Pacific Crest Trail in California), but not the Appalachian Trail. Piecing together multiple statutes enacted decades apart, the Fourth Circuit concluded that the Park Service’s administration of the Appalachian Trail makes the trail part of the National Park System. The court was saying Dominion should go to Capitol Hill, not the courts, if it wants an exemption.

In their respective Supreme Court petitions, the Trump administration and Dominion stressed the billions in economic gains from the pipeline. For the Trump administration, the *Cowpasture* decision throws a wrench into plans to fast-track pipelines and exploit natural gas resources to achieve U.S. energy “dominance.” Arguing for the administration, Solicitor General Noel Francisco labeled the trail a mere “ribbon

of land” in a national forest and asserted that the *Cowpasture* decision threatens “significant and immediate adverse consequences” for energy infrastructure in the eastern United States.

Dominion, represented by serial Supreme Court litigator Paul Clement, argued that the decision effected “a massive unauthorized land transfer” from the Forest Service to the Park Service. It also “imperiled the Eastern Seaboard's ability to access inland oil and gas sources.”

If the high court agrees to hear the case (a vote of only four justices is needed), then a final decision would likely come next spring. A lot depends on whether the conservatives on the court give as much weight to the National Trails System Act as the Fourth Circuit did. With a strong conception of property rights, the conservatives might say that the Park Service's authority to “administer” the trail does not give it the power to determine what happens on or underneath the trail on lands it doesn't own.

The justices might want clearer language from Congress. At least five justices may be open to the argument that Congress would not have made a dramatic change to laws governing pipeline rights-of-way through a seemingly unrelated law about scenic trails. As Dominion argued in a brief last year, quoting an opinion by the late Justice Antonin Scalia, Congress “does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.”

Did the Fourth Circuit really turn the Appalachian Trail into a “Great Wall” that blocks all energy transport from the Midwest to the East Coast, as many energy industry analysts have suggested? And what about those 55 pipelines that already cross under the trail? Maybe this is a case of environmentalists tolerating existing

blemishes on the landscape while targeting their legal firepower on what seems new and scary.

A document released in June by SELC attorney Austin D.J. Gerken helps to clarify the stakes. Gerken conducted a land parcel analysis on every one of the 55 pipelines (at 34 crossing points). It shows that in each case, the pipelines crossed under the Appalachian Trail on state or private land, or the pipelines existed before the National Park Service acquired the land.

This is apparently the first time that the Forest Service has authorized a pipeline to cross the Appalachian Trail on federal property. If so, the Fourth Circuit engaged in a reasonable slap-back of a federal agency that exceeded its authority under the Mineral Leasing Act. According to Gerken, the *Cowpasture* decision doesn't preclude *all* pipeline crossings of the Appalachian Trail—in fact, he suggested alternate ACP crossing points on state or private land. This could take some of the heat off this case and make the Fourth Circuit decision appear more reasonable to the Supreme Court.

The real significance of the *Cowpasture* case is that it uses the Appalachian Trail crossing as a legal hook to delay and block the pipeline and raise its costs. There's nothing wrong with delay-and-block tactics. It's a strategy that environmentalists have been using since the 1960s. And as the climate crisis heats up, it's a virtuous one. The impacts of the pipelines go way beyond clear-cutting of forests and sedimentation of streams. When the 1.5 billion cubic feet of natural gas per day is burned, the resulting carbon dioxide contributes to the climate crisis, staying in the atmosphere for centuries, heating the planet for my daughter's generation and beyond. At a time when scientists say the United States needs to cut greenhouse gas emissions in half by 2030, approving fossil fuel

pipelines like the ACP commits us to the opposite course.

This post has been updated.

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