

## Supreme Court to review important pipeline decision

October 7, 2019

On October 4, 2019, the Supreme Court granted review of a Fourth Circuit decision that rejected U.S. Forest Service authorization of a \$7 billion natural gas pipeline. See *Cowpasture River Pres. Assn v. Forest Service*, 911 F.3d 150, 155 (4th Cir. 2018), *cert. granted sub nom. U.S. Forest Service, Et al. v. Cowpasture River Assn., et al.*, No. 18-1584, 2019 WL 4889926 (U.S. Oct. 4, 2019), and *cert. granted sub nom. Atlantic Coast Pipeline, LLC v. Cowpasture River Assn., et al.*, No. 18-1587, 2019 WL 4889930 (U.S. Oct. 4, 2019).

The Fourth Circuit decision, issued last December, took aim at the Forest Service's authorization of the Atlantic Coast Pipeline (ACP) project – specifically, approval of the pipeline's passage through George Washington and Monongahela National Forests and crossing of the Appalachian National Scenic Trail.

The Fourth Circuit held that the Forest Service violated the National Environmental Policy Act (NEPA) and the National Forest Management Act when authorizing construction of the pipeline through national forest lands. In its findings, the Fourth Circuit leveled criticisms at the Forest Service, including that the Forest Service reverse-engineered its NEPA analysis, failed in its assessment of adverse impacts to the forest systems, and did not adequately examine alternatives.

But ACP and the Forest Service have focused their Supreme Court appeal on a separate finding by the Fourth Circuit: its ruling that the Mineral Leasing Act does not provide the Forest Service with authority to grant a right-of-way across the Appalachian Trail because the trail itself is managed by the National Park Service under the National Trails System Act, which does not authorize the Park Service to grant rights-of-way for a pipeline crossing along the trail. It is this portion of the Fourth Circuit's ruling that will be the focus of the Supreme Court's review.

In their separate petitions for review, ACP and the Forest Service contended that this Fourth Circuit holding effectively creates an impassable barrier along the 2,200 mile Appalachian Trail, and that the decision improperly transferred ownership and authority over the trail to the Park Service, which merely maintains it. Additionally, ACP has raised concerns about the fate of multiple, existing pipelines that cross the trail. Opponents of the pipeline have argued that these concerns are overstated, and highlight that alternative routes are available to ACP. The U.S. Solicitor General also weighed in to alert the Court that the Fourth Circuit's ruling is contrary to longstanding interpretation of the Forest Service's authority to grant such land uses within National Forests, which likely was instrumental in swaying the Court to consider the issue.

With a grant of certiorari, the Supreme Court has signaled that the issue in play is not limited to one pipeline, or one project; the appropriate distribution of authority between the Forest Service and Park Service is an issue that cuts across many government-owned and managed lands.

Upstream and midstream developers and investors should closely monitor the Supreme Court's review as it will likely impact other pipeline crossings that involve public lands of this nature. The decision has the potential to impact other projects that authorize federal land management agencies (such as the Forest Service *and* the Bureau of Land Management) to grant rights-of-way under the Mineral Leasing Act for years to come. Oral arguments will be during the 2019 term, with a ruling likely before the summer of 2020.

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