

# HOW ENVIRONMENTAL LITIGATION HAS TURNED PIPELINES INTO PIPE DREAMS

by Madison Hinkle and Jesse Richardson

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## SUMMARY

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Proposed oil and gas pipelines have faced a myriad of legal challenges in the past several years. Even where pipeline proponents have prevailed, the cost and delay of protracted litigation has often caused cancellation of pipeline projects. In addition, presidential transitions have led to abrupt reversals of pipeline policies, which courts have often reviewed skeptically. This Article explores the regulatory framework for pipeline construction and analyzes recent lawsuits, describing the legal requirements that agencies must follow to change policies and discussing policies of the Obama and Trump Administrations in context of the legal challenges. It concludes by analyzing the approaches taken by pipeline opponents and discussing implications for future projects.

Energy has always been a hot topic in the United States, but energy development continues to become more contentious as society progresses. One hundred years ago, the United States cared only about producing and importing enough energy to satisfy the demands of the American people. In the 1960s, however, Americans became more concerned with the impacts that human activities were having on the planet.<sup>1</sup> While early environmentalists were primarily concerned with pollution of the air, waters, and lands of the United States, the movement continued to expand to encompass more issues, including that of climate change.<sup>2</sup>

Environmentalists began partnering with social justice groups and indigenous rights movements to fight pipelines in the 2000s. Pipelines can have a number of environmental impacts, both direct and indirect. Direct environmen-

tal impacts associated with pipelines include underground leaks, ruptures, and explosions, polluting the surrounding lands and leaching into waterways.<sup>3</sup> Indirect environmental impacts associated with pipelines stem from the burning of the oil and gas that the pipelines transport, causing an increase in harmful pollutants such as carbon dioxide and methane that exacerbate the impacts of climate change.<sup>4</sup>

Many of these pipelines are permitted to be constructed in areas affecting minority populations, including Native American tribes, Black communities, and poor rural communities.<sup>5</sup> Environmental organizations have begun partnering with these communities to fight the development of pipeline infrastructure, and have been taking action in the U.S. courts system. Because most pipelines require approval from some type of federal agency—such as the U.S. Fish and Wildlife Service (FWS), the U.S. Army Corps of Engineers (the Corps), and the Federal Energy Regulatory Commission (FERC)—many groups chal-

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1. Karin Otsuka, *The Evolution of Environmental Movements: Responding to Impending Threats*, UNIV. WASH. SCH. MARINE & ENV'T AFFS. (Apr. 11, 2019), <https://smea.uw.edu/currents/the-evolution-of-environmental-movements-responding-to-impending-threats/>.
2. *Id.*

3. Andrew Krososky, *Here's How Pipelines Directly Affect the Environment, Wildlife, and Human Beings*, GREEN MATTERS (Feb. 8, 2021), <https://www.greenmatters.com/p/why-are-pipelines-bad>.
4. *How Pipelines Fuel Climate Injustice*, CLIMATE REALITY PROJECT (Oct. 1, 2019, 8:00 AM), <https://www.climateRealityProject.org/blog/how-pipelines-fuel-climate-injustice>.
5. See generally Elizabeth Jones & Queen Shabazz, *Mountain Valley Pipeline Follows Familiar Playbook: Push Pollution Into Poor and Minority Communities*, VA. MERCURY (July 2, 2021, 12:01 AM), <https://www.virginiamercury.com/2021/07/02/mountain-valley-pipeline-follows-familiar-playbook-push-pollution-into-poor-and-minority-communities/>.

lenging pipeline construction and operation have chosen to pursue claims under the Administrative Procedure Act (APA), challenging agency actions and decisions.<sup>6</sup>

This Article explores how the modern administrative state regulates pipeline construction, analyzing a variety of lawsuits filed on the East Coast during the 21st century to determine ways in which environmental organizations have been successful or unsuccessful in halting pipeline development. Part I outlines requirements that administrative agencies must meet when making or changing decisions, as well as how the executive branch and presidential policy influence agencies. Part II discusses the energy policies of Barack Obama and Donald Trump during their terms in office, providing background for the pipeline cases filed during that time frame. Part III provides a comprehensive discussion of lawsuits filed concerning five major pipeline projects, and Part IV analyzes how environmental organizations found success within those lawsuits, summarizes the potential mechanisms for opposing harmful pipeline construction, and discusses thoughts for the future. Finally, Part V concludes.

## I. The Administrative State and Executive Branch Policy

Executive responsibilities and administrative law principles collide when agency action essentially flips following a presidential election, particularly when the outgoing and incoming presidents belong to opposing political parties. To gain a firm grasp on the current chaotic state of interstate pipelines, we must acknowledge the level of influence that the modern administrative state has over pipeline policies and regulations. Section A of this part briefly recaps how administrative agencies' actions are reviewed in court. Sections B and C then outline the ways in which the policies of administrative agencies and presidents came to be aligned, and what happens when those policies are reversed.

### A. Agency Requirements Under the APA

The powers of most administrative agencies are outlined in the statutes that create them, their enabling statutes.<sup>7</sup> If agencies do not adhere to these organic statutes and the APA, parties may challenge the agency action in court, potentially invalidating an agency conclusion or rule. Formal rulemakings and adjudications are reviewed under the “substantial evidence” standard.<sup>8</sup> A decision is said to be supported by substantial evidence when a reasonable mind would find the decision to be sufficient to support the conclusion.<sup>9</sup>

While the APA fails to outline a standard of review for informal rulemakings and adjudication, the U.S. Supreme

Court held that in the absence of an express standard of review, agency actions should be reviewed under an “arbitrary and capricious” standard.<sup>10</sup> Under this standard, reviewing courts are required to determine whether the agency action was the result of a clear error of judgment.<sup>11</sup> This review is also known as the “hard look” doctrine.<sup>12</sup>

When courts undertake their review of an agency action under the arbitrary and capricious standard, courts have held that a select few factors may support a finding that an action was arbitrary and capricious.<sup>13</sup> First, whether an agency relied on factors that the U.S. Congress did not intend for the agency to consider; second, whether the agency failed to consider an important aspect of the problem at issue; third, whether the agency offers an explanation for its action that conflicted with the available evidence; or fourth, whether the agency offers an explanation for its action that is so implausible it could not be attributed to a difference in view or the product of agency expertise.<sup>14</sup>

### B. Presidential Directives and Administrative Agencies

While agency rulemakings have always reflected presidential priorities, President Ronald Reagan initiated the ultimate agency oversight mechanism between the White House and federal agencies.<sup>15</sup> By Executive Order, President Reagan created an exhaustive regulatory process through which agencies were required to submit all rulemakings and actions to the Office of Management and Budget (OMB), an office within the Executive Office of the President (EOP).<sup>16</sup> This process requires agency experts to submit a comprehensive cost-benefit analysis of the proposed rulemaking, and OMB makes suggestions for changes before any publication of agency action.<sup>17</sup> While most regulatory statutes formally dictate that the head of an agency is to make final regulatory decisions, every president in the past four decades has required predecisional review to be conducted by the OMB.<sup>18</sup>

With each presidential administration after President Reagan, the relationship between administrative agencies and the EOP has only intensified, covering many more aspects of agency functions. Today, most agency actions consist of an organized endeavor of effectuating presiden-

6. See *infra* Part IV.

7. Justia, *Legislative Agencies*, <https://www.justia.com/administrative-law/legislative-agencies/> (last reviewed May 2022).

8. Ruth Maurice, *Legal Standards of Proof*, Nolo, <https://www.nolo.com/legal-encyclopedia/legal-standards-proof.html> (last visited May 6, 2022).

9. *Id.*

10. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 414, 1 ELR 20110 (1971).

11. *Id.* at 416.

12. Patrick M. Garry, *Judicial Review and the “Hard Look” Doctrine*, 7 NEV. L.J. 151, 152-53 (2006).

13. *George v. Bay Area Rapid Transit*, 577 F.3d 1005, 1010 (9th Cir. 2009).

14. *Id.*

15. While President Reagan is most known for his deregulatory agency, it is important to note that his successful deregulation of government was accomplished by more bureaucratic regulations and requirements.

16. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2247 (2001).

17. *Id.* at 2277-78.

18. Robert V. Percival, *Who's in Charge? Does the President Have Directive Authority Over Agency Regulatory Decisions?*, 79 FORDHAM L. REV. 2487, 2487 (2011).

tial policy through the subject area expertise of agencies.<sup>19</sup> The EOP has evolved into a hub for the development of agency action, and presidential policy is pursued through the appointment power, executive orders, and the scientific analysis of experts within the various agencies.<sup>20</sup>

### C. What Happens After a Shift in Administration?

Often, when a new presidential administration takes office, agencies' political considerations change. For an administrative agency, an outgoing president's policies and ideologies may be completely exchanged for converse policies and ideologies when a president of the opposite party is elected.<sup>21</sup> Models, scientific methods, and concepts are reassessed and often replaced by other frameworks that support the new president's goals. However, an administrative agency is not legally authorized to change course as quickly and without reason as the president might.

An incoming president often starts their term by signing a number of executive orders,<sup>22</sup> which often reverse and even eliminate a previous president's executive orders and other presidential policymaking tools.<sup>23</sup> Such executive orders may direct administrators and department heads to carry out specific actions based on the new president's desired policies.<sup>24</sup> The executive can request either a new or updated agency decisionmaking process, which may entail the agency reaching a conclusion different from its prior findings. While the president's work ends once their signature is placed on the order, the agency's work is just beginning.

Agencies are permitted to alter, and even reverse, prior actions and rules.<sup>25</sup> When an agency desires to make a change from its prior course, the standard of review remains the same (arbitrary and capricious) and the agency must justify its new position with a reasoned analysis.<sup>26</sup> The agency need not prove that the new position is "better" than the old position, but must reasonably explain the shift. Agencies are required to provide orderly reasoning, consider public input, and formulate decisions based on expert findings.<sup>27</sup> Thus, whenever a change in policy is directed by the president, administrative agencies are required to

construct a comprehensive and detailed rationale as to why the agency took action beyond the simple signature of an executive order directing them to do so.<sup>28</sup>

Presidential positions on energy and pipeline development tend to be heavily influenced by the administration's associated political party. While concern over climate change and environmental issues exists in both political parties, such concern is more commonly associated with the Democratic party.<sup>29</sup> Additionally, the Democratic party tends to favor promotion of renewable energy, while the Republican party tends to support the continued use of fossil fuels.<sup>30</sup> Following these trends, administrative agencies under the Obama Administration strengthened environmental reviews of pipeline construction.<sup>31</sup> Administrative agencies under the Trump Administration, on the other hand, eased the permitting processes for rapid development of energy infrastructure such as pipelines.<sup>32</sup>

## II. The Flip-Flopping of Pipeline Policies

With the decline of the coal mining industry in the 2010s, oil and gas production in the United States soared. Production and exports of natural gas and oil increased in both President Obama's and President Trump's terms in office. Renewables, such as wind and solar power, also jumped in production during the same time frame.

While President Obama did not expressly fight the natural gas and oil industries, he supported regulations that undermined their progress and fought the expansion of a few notable pipelines. President Obama also spent considerable effort aiding in the success of renewables. President Trump, on the other hand, supported fossil fuels and enacted executive orders and regulations aimed at helping the oil and natural gas industries succeed, particularly with respect to pipeline construction. The next two sections delve into these two presidents' approaches with respect to pipelines on a deeper level.

### A. Obama Administration Pipeline Policies

Oil and gas production took a significant leap during President Obama's eight years in office, with U.S. oil production climbing 75% over his two terms.<sup>33</sup> Additionally, the shale gas revolution began around the beginning of President Obama's first term. President Obama did not ban hydraulic fracturing, or fracking, as environmentalists pressured

19. See generally Wendy E. Wagner, *A Place for Agency Expertise: Reconciling Agency Expertise With Presidential Power*, 115 COLUM. L. REV. 2019 (2015).

20. Lumen, *The Powers of the Presidency*, <https://courses.lumenlearning.com/boundless-politicalscience/chapter/the-powers-of-the-presidency/> (last visited May 6, 2022).

21. Vivian S. Chu & Todd Garvey, *Separating Power Series: Presidential Influence v. Control Over Independent Agencies*, FED'N AM. SCIENTISTS (Mar. 23, 2015), <https://sgp.fas.org/crs/misc/presinf.pdf>.

22. See Roncevert Almond et al., *Regulatory Reform in the Trump Era—The First 100 Days*, 35 YALE J. ON REGUL. BULL. 29 (2017); see also Ronald C. Lee Jr., *Governance in an Age of Polarization: Biden's Use of Executive Orders in His First 100 Days*, 2021 U. ILL. L. REV. ONLINE 163 (2021).

23. Chu & Garvey, *supra* note 21.

24. *Id.*

25. See generally Evan Koslof, *VERIFY: Can a New President Reverse Executive Orders From Past Administrations?*, WUSA9 (Nov. 10, 2020, 7:33 PM), <https://www.wusa9.com/article/news/verify/what-can-joe-biden-reverse-on-day-one-of-the-presidency-executive-orders-factcheck/65-739c32ec-0931-45c7-b75f-d45f21cf43bc>.

26. *Id.*

27. *Id.*

28. *Id.*

29. See BO MACINNIS & JON A. KROSINICK, RESOURCES FOR THE FUTURE, CLIMATE INSIGHTS 2020: SURVEYING AMERICAN PUBLIC OPINION ON CLIMATE CHANGE AND THE ENVIRONMENT 4-6 (2020), [https://media.rff.org/documents/Climate\\_Insights\\_2020\\_Partisan\\_Divide.pdf](https://media.rff.org/documents/Climate_Insights_2020_Partisan_Divide.pdf).

30. See *id.* at 26. It should be noted, however, that these are not hard-and-fast positions of the political parties, but are instead trends that have developed in recent years.

31. See *infra* Section III.A.

32. See *infra* Section III.B.

33. Julien Mathonniere et al., *US Energy Policy Changes: Trump vs Obama*, INDEP. COMMODITY INTEL. SERVS. (Aug. 24, 2017), <https://www.icis.com/explore/resources/news/2017/08/24/10136872/us-energy-policy-changes-trump-vs-obama>.

him to do. However, the president cannot be given much credit for the large influx in gas exports during his time in office. The private sector and a strong balance of international trade spurred that influx.<sup>34</sup>

Rather than banning fracking, President Obama's energy goals during his two terms focused on renewable energy. In 2009, the Obama Administration passed the Recovery Act to encourage renewable development, providing more than \$70 billion in tax credits and funding for projects related to clean energy.<sup>35</sup> In 2015, President Obama announced the Clean Power Plan, which was meant to reduce greenhouse gas emissions from coal- and gas-fired power plants.<sup>36</sup> While President Obama failed to ban fracking during his presidency, the president blocked two large pipeline projects—the Dakota Access Pipeline and the Keystone XL Pipeline.

The Dakota Access Pipeline was proposed to run 1,100 miles from North Dakota to Illinois, passing through Standing Rock Sioux tribal land near the Missouri River in North Dakota.<sup>37</sup> Tribal members and other concerned citizens spent weeks protesting the pipeline, and filed for an injunction in federal court to halt its construction.<sup>38</sup> Only minutes after a federal judge declined to issue the injunction, the Obama Administration announced that the construction of the pipeline would not be permitted to continue.<sup>39</sup> The U.S. Department of Justice, the U.S. Department of the Interior (DOI), and the Corps announced their request that all construction be voluntarily halted within 20 miles of Lake Oahe.<sup>40</sup> Earlier in 2016, President Obama declared that the National Environmental Policy Act (NEPA)<sup>41</sup> review process should take into consideration the impacts of greenhouse gas emissions, and the Corps noted that, with construction halted on the Dakota Access Pipeline, the agency would reconsider how the pipeline complied with NEPA.<sup>42</sup>

The Keystone XL Pipeline was proposed to run 1,179 miles from Canada to the Gulf Coast, and spent seven years under review at the time of its cancellation in 2015.<sup>43</sup> President Obama announced the rejection of the request for the construction of the Keystone XL Pipeline, noting that “America is now a global leader when it comes to taking serious action to fight climate change.”<sup>44</sup> This announcement came approximately one month before the

United Nations summit meeting on climate change, at which the Paris Climate Agreement was adopted.<sup>45</sup> Many saw this move as President Obama's way of solidifying his stance on fighting climate change, whether the impacts were that strong or not. The president of the Institute for Governance and Sustainable Development, Durwood Zaelke, noted, “The rejection of the Keystone permit was key for the president to keep his climate chops at home and with the rest of the world.”<sup>46</sup>

In 2016, the Obama Administration issued a new regulation requiring drilling operations to reduce gas flaring, arguing that large volumes of gases such as methane were being lost during venting and flaring practices.<sup>47</sup> The regulation was the first step in a three-part methane regulation plan geared toward achieving President Obama's goal of reducing methane emissions from the oil and gas sector 40% to 45% below 2012 levels by 2025.<sup>48</sup> In addition to placing more regulations on the oil and gas industries, making operations more difficult than normal, President Obama also worked toward making it easier to develop renewable resources. Overall, during the first seven years of President Obama's presidency, wind power increased 245% and solar power production 2,300%.<sup>49</sup> This increase made President Obama one of the most aggressive presidents with respect to renewables and highlighted his goals with respect to U.S. energy expansion.

## B. Trump Administration Pipeline Policies

Bolstered by the shale gas revolution, President Trump sought to promote an agenda to transform the United States into a “global energy superpower.”<sup>50</sup> Since 2016, the United States has drastically increased its exports of liquefied natural gas to Asian and European markets.<sup>51</sup> Soon after his election, President Trump withdrew the United States from several binding international environmental agreements, most notably the Paris Climate Agreement in 2017.<sup>52</sup> Additionally, President Trump almost immediately began rolling back the Obama Administration's environmental policies, changing more than 100 policies during his time in office.<sup>53</sup>

34. *Id.*

35. *Id.*

36. Environmental Defense Fund, *The Clean Power Plan*, <https://www.edf.org/clean-power-plan-resources> (last visited May 6, 2022).

37. Robinson Meyer, *The Obama Administration Temporarily Blocks the Dakota Access Pipeline*, ATLANTIC (Sept. 9, 2016), <https://www.theatlantic.com/science/archive/2016/09/the-obama-administration-temporarily-blocks-the-dakota-access-pipeline/499454/>.

38. *Id.*

39. *Id.*

40. *Id.*

41. 42 U.S.C. §§4321-4370h, ELR STAT. NEPA §§2-209.

42. Meyer, *supra* note 37.

43. Coral Davenport, *Citing Climate Change, Obama Rejects Construction of Keystone XL Oil Pipeline*, N.Y. TIMES (Nov. 6, 2015), <https://www.nytimes.com/2015/11/07/us/obama-expected-to-reject-construction-of-keystone-xl-oil-pipeline.html>.

44. *Id.*

45. *Id.*

46. *Id.*

47. Chris Mooney, *Obama's Government Just Released a New Oil and Gas Rule—And Trump's May Not Like It Much*, WASH. POST (Nov. 15, 2016), <https://www.washingtonpost.com/news/energy-environment/wp/2016/11/15/obama-administration-releases-new-oil-and-gas-rule-in-the-face-of-an-incoming-trump-administration/>.

48. *Id.*

49. Robert Rapier, *President Obama's Energy Report Card*, FORBES (Dec. 12, 2016, 7:30 AM), <https://www.forbes.com/sites/rapier/2016/12/12/president-obamas-energy-report-card/?sh=7d145940554e>.

50. Farid Guliyev, *Trump's "America First" Energy Policy, Contingency and the Reconfiguration of the Global Energy Order*, 140 ENERGY POL'Y 11435 (2020).

51. *Id.*

52. *Id.*

53. Nadja Popovich et al., *The Trump Administration Rolled Back More Than 100 Environmental Rules. Here's the Full List*, N.Y. TIMES, <https://www.nytimes.com/interactive/2020/climate/trump-environment-rollbacks-list.html> (last visited May 6, 2022).

The Trump Administration's stance on foreign economic relations shifted toward a more protectionist stance, with a new energy policy known as "America First."<sup>54</sup> The major goals of this policy were to turn the United States into a major oil and gas producer and exporter, in addition to promoting the commercial interests of American energy firms internationally.<sup>55</sup> These initiatives are commonly associated with establishing "energy independence" or "energy dominance," allowing the United States to reduce its dependency on foreign suppliers.<sup>56</sup> President Trump announced his intent to shift from addressing climate change to energy dominance for economic and foreign policy concerns.<sup>57</sup>

In 2019, President Trump signed two Executive Orders aimed at making it easier for companies to construct and operate oil and gas pipelines and harder for states and their agencies to interfere.<sup>58</sup> Discussing the Executive Orders, President Trump noted that "badly needed energy infrastructure is being held back by special-interest groups, entrenched bureaucracies and radical activists," and "[t]he two executive orders that I'll be signing . . . will fix this, dramatically accelerating energy infrastructure approvals."<sup>59</sup> One of the two orders required the U.S. Department of Transportation to alter its rules and allow the shipment of liquefied natural gas by rail and tanker truck, and sought to restrict shareholder ballot initiatives used to alter policies on environmental issues.<sup>60</sup> The other order purported to grant the president the sole authority for approving and denying pipelines and other international infrastructure projects, rather than the Secretary of State, which previously held such authority.<sup>61</sup>

President Trump received a number of donations from individuals from within the natural gas industry,<sup>62</sup> and called out states that were not supportive of energy initiatives. For example, he specifically noted that "New York is hurting the country because they are not allowing us to get these pipelines through."<sup>63</sup> By 2019, the United States achieved energy independence for a time, producing more energy than American citizens were consuming, and also producing more natural gas and oil than Russia or Saudi Arabia.<sup>64</sup>

### III. Agency Actions Challenged in Recent Pipeline Court Decisions

Between 2016 and 2021, the U.S. court system saw an incredible number of lawsuits challenging the construction and operation of pipelines. A number of these cases stemmed from the reversal of environmental policies by the Trump Administration. While cases challenging pipelines were filed all across the United States during this time frame, a large portion of these cases were concentrated on the East Coast. This concentration partially resulted from an increase in projects within the region due to the desire to diversify and expand its natural gas market.<sup>65</sup> Much of the gas supplied to the East Coast is provided by a limited number of pipelines.

The Colonial Pipeline, which runs from Texas to New Jersey, supplies the East Coast with 45% of its gasoline.<sup>66</sup> In May 2021, a cyberattack required the Colonial Pipeline to shut down, causing a dramatic fuel shortage.<sup>67</sup> The push to build new pipelines on the East Coast likely seeks to prevent future shortages. This part details a number of cases surrounding five pipeline projects on the East Coast.

#### A. The Atlantic Coast Pipeline

The Atlantic Coast Pipeline (ACP) is a 600-mile interstate natural gas pipeline proposed by Atlantic Coast Pipeline, LLC (Atlantic) that would run from West Virginia to Virginia and North Carolina.<sup>68</sup> The proposed route would cross a total of 890 water body locations in Virginia, including 74 migratory fish spawning waters or their tributaries, and the access roads associated with the pipeline would intersect 89 Virginia rivers and streams.<sup>69</sup>

The Natural Gas Act (NGA) required Atlantic to obtain a certificate of public convenience and necessity to build and operate the ACP.<sup>70</sup> Atlantic applied for the certificate and a Clean Water Act (CWA)<sup>71</sup> §404 authorization from FERC and the Corps, respectively, in September 2015.<sup>72</sup> The Corps' authorization was provided through issuance of Nationwide Permit (NWP) 12.<sup>73</sup> In October 2017, FERC issued Atlantic a certificate of public

54. See generally Guliyev, *supra* note 50.

55. *Id.*

56. *Id.*

57. *Id.*

58. Toluse Olorunnipa & Steven Mufson, *Trump Signs Executive Orders Seeking to Speed Up Oil and Gas Projects*, WASH. POST (Apr. 10, 2019), [https://www.washingtonpost.com/national/health-science/trump-to-issue-executive-orders-seeking-to-speed-up-oil-and-gas-projects/2019/04/09/4949e74e-5ae2-11e9-9625-01d48d50ef75\\_story.html](https://www.washingtonpost.com/national/health-science/trump-to-issue-executive-orders-seeking-to-speed-up-oil-and-gas-projects/2019/04/09/4949e74e-5ae2-11e9-9625-01d48d50ef75_story.html).

59. *Id.*

60. *Id.*

61. *Id.*

62. Energy Transfer's chief executive, Kelcy Warren, gave \$100,000 to President Trump's campaign and \$250,000 to his inaugural committee. *Id.*

63. *Id.*

64. *President Trump Has Kept His Energy Promises; Biden Wants to Undo Them*, AM. ENERGY ALL. (Sept. 8, 2020), <https://www.americanenergyalliance.org/2020/09/president-trump-has-kept-his-energy-promises-biden-wants-to-undo-them/>.

65. See generally Alastair Nojek et al., *The End of the Atlantic Coast Pipeline: What Does It Mean for the North American Natural Gas Industry?*, MCKINSEY & CO. (Sept. 2, 2020), <https://www.mckinsey.com/industries/oil-and-gas/our-insights/petroleum-blog/the-end-of-the-atlantic-coast-pipeline-what-does-it-mean-for-the-north-american-natural-gas-industry>.

66. Andy Nguyen, *No, the East Coast Gas Shortage Isn't Related to the Keystone Pipeline or Biden's Order*, POLITIFACT (May 17, 2021), <https://www.politifact.com/factchecks/2021/may/17/facebook-posts/no-east-coast-gas-shortage-isnt-related-keystone-pl/>.

67. *Id.*

68. *Sierra Club v. U.S. Dep't of the Interior*, 899 F.3d 260, 267, 48 ELR 20140 (4th Cir. 2018).

69. *Appalachian Voices v. State Water Control Bd.*, 912 F.3d 746, 750 (4th Cir. 2019).

70. *Id.*

71. 33 U.S.C. §§1251-1387, ELR STAT. FWPCA §§101-607.

72. *Appalachian Voices*, 912 F.3d at 751.

73. *Id.* at 750.

convenience and necessity for the construction and operation of the pipeline.<sup>74</sup>

### 1. *Sierra Club v. U.S. Department of the Interior*<sup>75</sup>

This proceeding concerns two petitions brought by the Defenders of Wildlife, the Sierra Club, and the Virginia Wilderness Committee (collectively, the petitioners) against FWS and the National Park Service (NPS) for decisions made by the agencies with respect to the ACP.<sup>76</sup> The approval of the pipeline was conditioned on Atlantic obtaining certain federal authorizations necessary for the project.<sup>77</sup> The required authorizations included those from FWS and the NPS.<sup>78</sup>

□ *Issues associated with FWS.* A few days after FERC issued the certificate to Atlantic, FWS issued a biological opinion (BiOp) and an incidental take permit authorizing the ACP to take six threatened and endangered species.<sup>79</sup> Under §9 of the Endangered Species Act (ESA),<sup>80</sup> it is unlawful to take (harass, harm, wound, kill, etc.)<sup>81</sup> endangered and threatened species. An exception allows a take where “such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.”<sup>82</sup> The ACP would impact six species: the Roanoke logperch, the clubshell, the rusty patched bumble bee, the Madison Cave isopod, the Indiana bat, and the northern long-eared bat.<sup>83</sup> Petitioners sought review of the incidental take permits.

The court found that FWS failed to establish proper habitat surrogates in its determination of what would be an acceptable number of takes for each species for which an incidental take permit was authorized.<sup>84</sup> Additionally, FWS failed to explain why setting numeric limits was not practical and failed to establish enforceable take limits.<sup>85</sup> Accordingly, the court found that FWS’ take limits established for the six species were arbitrary and capricious, and vacated the incidental take permits.<sup>86</sup> FWS was directed to reevaluate these issues with respect to the six species.<sup>87</sup> In the *Defenders of Wildlife v. U.S. Department of the Interior* case,<sup>88</sup> FWS’ subsequent determination with respect to the endangered and threatened species was reevaluated. Despite the reevaluation, the take limits were still deemed inadequate.<sup>89</sup>

□ *Issues associated with the NPS.* In December 2017, the NPS issued a right-of-way authorizing the ACP to cross the Blue Ridge Parkway.<sup>90</sup> The Blue Ridge Parkway is a component of the National Park System, which exists between the Shenandoah National Park in Virginia and the Great Smoky Mountains National Park in North Carolina.<sup>91</sup> Because the proposed route for the ACP crosses the Blue Ridge Parkway, the final approval for the pipeline depended upon obtaining a right-of-way to cross the parkway.<sup>92</sup> The NPS’ right-of-way permit issued in December 2017 referenced only 16 U.S.C.A. §460a-8 for its statutory authority to grant a permit for a right-of-way across parkway lands.<sup>93</sup> Notably, however, the permit did not mention any harm to the parkway’s scenic value, nor any mitigation strategies. Petitioners sought review of the permit.<sup>94</sup>

Petitioners argued that NPS’ permit for the right-of-way violated the Blue Ridge Parkway Organic Act.<sup>95</sup> While the NPS relied on 16 U.S.C.A. §460a-8 for its authority to grant the right-of-way permit, petitioners correctly pointed out that that provision was applicable only to an extension of the parkway running from North Carolina to Georgia, which was inapplicable in this case.<sup>96</sup> Rather, 16 U.S.C.A. §460a-3 applied, which authorizes permits for rights-of-way over and across parkway lands and permits for the use of parkway lands by owners of adjacent lands.<sup>97</sup> Both types of permits, however, must be consistent with parkway purposes.<sup>98</sup>

Accordingly, before the NPS can issue a permit for a right-of-way pursuant to the Blue Ridge Parkway Organic Act, the agency must make a determination that the right-of-way will not be inconsistent with parkway purposes.<sup>99</sup> In this case, however, the NPS did not provide any type of explanation as to how the ACP would be consistent with parkway purposes.<sup>100</sup> The court thus concluded that the agency failed to make a rational connection between its prior review and its decision to grant the permit.<sup>101</sup> The court held that the NPS’ decision to issue a right-of-way permit for the ACP was arbitrary and capricious.<sup>102</sup> Not only did the NPS invoke a section of the law that was inapplicable to this project, but the NPS also failed to fulfill its statutory mandate pursuant to applicable sections of the Blue Ridge Parkway Organic Act.<sup>103</sup> The right-of-way permit was vacated.<sup>104</sup>

74. *Id.* at 751.

75. 899 F.3d 260, 48 ELR 20140 (4th Cir. 2018).

76. *See generally id.*

77. *Id.* at 267.

78. *Id.*

79. *Id.*

80. *See* 16 U.S.C. §1533, ELR STAT. ESA §4.

81. *See* 16 C.F.R. §1532(19) (2021).

82. *See* 16 U.S.C.A. §1539(a)(1)(B) (West 2021).

83. *Sierra Club*, 899 F.3d at 269.

84. *Id.* at 281.

85. *Id.*

86. *Id.*

87. *Id.*

88. 931 F.3d 339, 49 ELR 20124 (4th Cir. 2019).

89. This case is detailed further in another portion of this Article. *See infra* Section IV.A.3.

90. *Sierra Club*, 899 F.3d at 267.

91. *Id.* at 282.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 290.

96. *Id.* at 291.

97. *See* 16 U.S.C.A. §460a-3 (West 2021).

98. *Id.*

99. *Sierra Club*, 899 F.3d at 292.

100. *Id.* at 293.

101. *Id.* at 294.

102. *Id.*

103. *Id.*

104. *Id.* at 295. For an analogous case with similar arguments, see *Cowpasture River Preservation Ass’n v. U.S. Forest Service*, 911 F.3d 150, 49 ELR 20204 (4th Cir. 2019).

## 2. *Appalachian Voices v. State Water Control Board*<sup>105</sup>

□ *Background.* Because construction of the pipeline would involve the discharge of fill and dredged material into waterways, Atlantic was required to obtain a CWA §404 authorization from the Corps.<sup>106</sup> Additionally, because of the pipeline's proximity to and interactions with many of Virginia's water bodies, Atlantic was required to obtain a CWA §401 water quality certification from Virginia.<sup>107</sup>

In April 2017, Atlantic received §401 certification from the Virginia Department of Environmental Quality (DEQ) for the water crossings as covered in NWP 12 from the Corps.<sup>108</sup> In May 2017, the Virginia DEQ explained that its §401 certification for the ACP would entail two parts: the certification for the Corps' NWP 12, which was issued and approved in April, and an additional §401 review process to evaluate the upland impacts of the pipeline.<sup>109</sup> In November 2017, the Virginia DEQ recommended approval of a §401 upland certification for the ACP.<sup>110</sup> Petitioners then brought this action to challenge the issuance of the §401 upland certification, claiming that such issuance was arbitrary and capricious.<sup>111</sup>

□ *Analysis and reasoning.* Petitioners argued that the Virginia DEQ's decision not to conduct a combined effects analysis rendered its issuance of a §401 upland certification arbitrary and capricious.<sup>112</sup> The upland certification in question concerned ACP activities taking place in upland areas, and was used to supplement FERC's certificate and the Corps' NWP 12.<sup>113</sup> The §401 upland certification was "not designed to function as a stand-alone document, comprehensively covering all pieces of relevant data and potentialities."<sup>114</sup> The court found that Virginia DEQ was not required to analyze combined effects because other portions of the regulatory process had already examined and analyzed those issues.<sup>115</sup> The Virginia DEQ thus "properly made a unique contribution instead of duplicating the efforts of other regulatory bodies."<sup>116</sup> Moreover, certifying authorities, Virginia DEQ here, have broad discretion when determining applicable criteria for a §401 water quality certification, and nothing in the CWA requires states to issue a single certification that cumulatively assesses all potential impacts of a project.<sup>117</sup>

Petitioners next argued that the Virginia DEQ's failure to conduct an antidegradation review before issuing

its §401 certification was arbitrary and capricious.<sup>118</sup> The court rejected this argument for two reasons. First, Virginia's Annual Standards and Specifications Program required Atlantic to submit annual standards and specifications for approval to the DEQ.<sup>119</sup> The standards for the ACP project were developed over 18 months and were refined to ensure that the project met the technical and legal requirements for the state of Virginia.<sup>120</sup> Second, the Virginia DEQ did not have to conduct an antidegradation review because the sediment impacts within the water bodies would be temporary.<sup>121</sup> Under Virginia's antidegradation policy, temporary sources of pollution do not constitute a violation even in the waters afforded the highest level of protection within the state.<sup>122</sup>

Finally, petitioners argued that the Virginia DEQ's treatment of karst terrain was arbitrary and capricious in failing to make sure there were adequate protections related to water quality.<sup>123</sup> The court again rejected this argument. Petitioners had previously raised concerns with respect to the protection of karst terrain, but the Virginia DEQ took these concerns into account when issuing the §401 upland certification.<sup>124</sup> Specifically, the Virginia DEQ required Atlantic to conduct contingency planning in case of accidental spills on karst terrain; conduct water surveys regarding drinking water with respect to karst regions; and have a liability of \$5 million to cover the cost of any impacts to private water supplies, including those in karst regions.<sup>125</sup>

□ *Holding.* Because the Virginia DEQ reviewed upland activities and stream and wetland crossings, the court determined that it had satisfied its obligations under §401 of the CWA and its actions were not arbitrary and capricious.<sup>126</sup> Additionally, because the Virginia DEQ was not required to perform an antidegradation review for the ACP under Virginia state laws, the decision not to conduct the review was not arbitrary and capricious.<sup>127</sup> Finally, because the court found that the Virginia DEQ had reasonable assurance that karst regions would be protected under the §401 upland certification, the DEQ did not act arbitrarily or capriciously in issuing the certification.<sup>128</sup>

## 3. *Defenders of Wildlife v. U.S. Department of the Interior*<sup>129</sup>

□ *Background.* In 2017, FWS issued a BiOp in connection with the proposed ACP.<sup>130</sup> The BiOp concluded that

105. 912 F.3d 746 (4th Cir. 2019).

106. *Id.* at 750.

107. *Id.* at 751.

108. *Id.*

109. *Id.*

110. *Id.* at 752.

111. *Id.*

112. *Id.*

113. *See id.*

114. *Id.* at 754.

115. *Id.*

116. *Id.*

117. *Id.*

118. *See id.* at 756.

119. *Id.* at 757.

120. *Id.*

121. *Id.* at 758.

122. *Id.*

123. *See id.*

124. *Id.*

125. *Id.*

126. *Id.* at 755.

127. *Id.* at 758.

128. *Id.* at 759.

129. 931 F.3d 339, 49 ELR 20124 (4th Cir. 2019).

130. *Id.* at 342.

the ACP would not jeopardize the continued existence of a number of endangered and threatened species: the rusty patched bumble bee (RPBB), the clubshell, the Indiana bat, and the Madison Cave isopod (MCI).<sup>131</sup> FWS did, however, anticipate the incidental taking (harassing, harming, or killing) of those species and issued an incidental take statement with the BiOp, creating restrictions on the number of each species that the ACP could legally take.<sup>132</sup> The petitioners initiated this suit to challenge FWS' determination that the ACP construction would not jeopardize the RPBB or the clubshell, and to challenge the validity of the take limits issued for the Indiana bat and the MCI.<sup>133</sup>

□ *The RPBB.* Since the late 1990s, RPBB populations have severely declined by almost 90%, and the species was first listed as endangered in 2017.<sup>134</sup> While noting that the loss of a single colony or queen “could reduce the health of a metapopulation” of the bee species, FWS explained that the ACP project would not likely negatively impact the fitness or survival of the population, despite finding that the project would likely cause the death of eight queen bees and impact one colony capable of producing 30 more queens.<sup>135</sup> FWS made its predictions based on other species of bumble bees' nest densities.<sup>136</sup>

In reviewing FWS' determination, the court looked at whether the evidence of other species' nest densities provided an adequate basis for the determination.<sup>137</sup> The two other species of bumble bees used for the comparison were “common” and “abundant,” whereas the RPBB is endangered and in significant decline.<sup>138</sup> Despite this, FWS chose values for nest densities and average number of queens per colony that were on the higher end of the average spectrum for the two abundant species.<sup>139</sup> FWS also relied on the “guess” of an expert witness, but failed to explain why that evidence was the best available when the remaining evidence showed that the RPBB should not be compared to common and abundant species, let alone the higher production rates of those species.<sup>140</sup>

Petitioners also argued that the determination was in conflict with FWS' own evidence of the importance of the bees likely to be killed by the pipeline's construction for the species' overall survival.<sup>141</sup> FWS previously recognized that the RPBB is imperiled to a level that every population remaining is important if the species is to continue to survive.<sup>142</sup> And while a loss in queens causes even further losses in RPBB reproduction, FWS offered no explanation as to why the loss of 38 queens would not endanger

the survival of the RPBB population at issue.<sup>143</sup> Nor did the BiOp mention or address the fact that FWS had previously determined that every remaining population of the RPBB is critical to its continued existence and that the species is susceptible to extinction without additional external stressors.<sup>144</sup>

Accordingly, the court found that FWS' no-jeopardy finding with respect to the RPBB was “arbitrary and capricious because it runs counter to available evidence, relies on data without providing a meaningful basis for that reliance, fails to consider the species' status as a whole, and fails to consider the pipeline's impacts on RPBB recovery.”<sup>145</sup>

□ *The clubshell.* The clubshell was first listed as an endangered species in 1993, and there are only 13 known populations existing today, occupying just 21 streams.<sup>146</sup> The West Virginia Division of Natural Resources monitors a population of clubshell in Hackers Creek, which had a total of 56 clubshell in 2004, but only 19 clubshell in 2014.<sup>147</sup> More than six miles of pipeline construction right-of-way and almost 12 miles of access roads for the ACP were planned for upstream of Hackers Creek, and the pipeline would cross six tributaries of the creek.<sup>148</sup> As such, ACP construction was projected to impact Hackers Creek in its entirety.<sup>149</sup> Because of the likely impacts on the clubshell, FWS' BiOp required Atlantic to attempt to salvage and relocate clubshell prior to beginning construction.<sup>150</sup>

During the recovery efforts, Atlantic found a much higher number of clubshell present in the waterways than was reported previously.<sup>151</sup> The BiOp was issued two months after the salvage efforts began, and FWS concluded that the ACP construction would not jeopardize the clubshell species.<sup>152</sup> Specifically, FWS determined that the impacts of the pipeline construction on Hackers Creek would not prevent recovery of the species as a whole because the Hackers Creek population did not show reproductive success.<sup>153</sup>

The court identified a number of flaws within FWS' no-jeopardy conclusion. First, no legal authority supported the assertion that only reproductive members of an endangered species deserve protection.<sup>154</sup> Survival and recovery are distinct concepts and must be evaluated as such.<sup>155</sup> In FWS regulations, the agency recognizes that a project may jeopardize an endangered species if it is likely to negatively impact the “reproduction, numbers, or distribution” of the species.<sup>156</sup> Additionally, in making its determination, FWS relied upon 25-year-old data and

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* at 346.

135. *Id.* at 348.

136. *Id.* at 349.

137. *Id.*

138. *Id.* at 349-50.

139. *Id.*

140. *Id.* at 351.

141. *Id.* at 352.

142. *Id.*

143. *Id.*

144. *Id.* at 354.

145. *Id.* at 355.

146. *Id.* at 356.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *See id.* at 357.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.* at 357-58.

156. 50 C.F.R. §402.02 (2012).



recovery criteria without explaining why such data and criteria were still reliable.<sup>157</sup> Overall, FWS never addressed why it chose to rely on older data on a number of occasions as the best available information.<sup>158</sup>

Accordingly, the court found that FWS' determination that the clubshell's survival would not be jeopardized by ACP construction was "not in accordance with the law" and failed "to consider important aspects of the issue before the agency."<sup>159</sup>

□ *The Indiana bat.* The Indiana bat is an endangered, migratory bat that frequently travels to regions of Virginia and West Virginia during its life-span.<sup>160</sup> Between 2015 and 2017, the population of Indiana bats in Virginia declined by 8.4% and in West Virginia by 54.7%.<sup>161</sup> In both states, the proposed ACP construction was set to cross through the Indiana Bat Appalachian Mountain Recovery Unit.<sup>162</sup> Under FWS regulations, for a habitat surrogate to be proper, FWS must describe the causal link between the surrogate and take of the species, must explain why it was impractical to determine the take limit in terms of individuals of the species, and must set a clear standard to determine when a take level is exceeded.<sup>163</sup>

In a 2017 BiOp previously issued by FWS that had been vacated, FWS determined that 3,275 acres of "suitable unoccupied summer habitat" would be indirectly impacted by the construction of the ACP.<sup>164</sup> In the 2018 BiOp, however, FWS completely eliminated the 3,275 acres from the habitat surrogate because current surveys indicated no bats were occupying the area.<sup>165</sup> The 2018 BiOp offered no explanation for this about-face in approach to unoccupied summer habitat, failing to even mention the 2017 BiOp conclusions.<sup>166</sup> Thus, FWS' 2018 BiOp failed to articulate a causal link between the surrogate and the take.<sup>167</sup>

Because FWS previously recognized that habitat loss and forest fragmentation are two of the primary factors influencing Indiana bat survival and recovery, the court determined that FWS' conclusion that clearing thousands of acres of unoccupied, yet suitable forest habitat would have no impact on the species was arbitrary and capricious.<sup>168</sup>

□ *The MCI.* The MCI is a freshwater crustacean found in karst<sup>169</sup> waters in Virginia that was first listed as threatened

in November 1982.<sup>170</sup> Because of the small size of the MCI and its subterranean habitat, it is difficult for FWS to practically estimate the number of MCI that may be taken by the ACP construction, and therefore the agency relied on a habitat surrogate to establish the species' take limits.<sup>171</sup> Petitioners challenged the soundness of the habitat surrogate established by FWS.<sup>172</sup>

In the 2017 BiOp, FWS concluded that a total of 1,974 acres of potential MCI habitat would be affected by the ACP construction.<sup>173</sup> In the 2018 BiOp, however, FWS chose a habitat surrogate of only 11.2 acres that would be directly impacted by construction activities because it was an area that the agency could actually measure and monitor.<sup>174</sup> The BiOp noted that 885.5 acres impacted by ground-disturbing activities performed within the 11.2-acre zone would be accounted for by monitoring the ground-disturbing activities within the 11.2-acre zone.<sup>175</sup> FWS, however, provided no explanation as to why it failed to account for the remainder of the 1,974 acres of MCI habitat impacted by the pipeline construction.<sup>176</sup>

Because of the connected nature of karst terrain, the court noted that it was implausible to expect that ground-disturbing activities would impact some specified acres, but not other terrain that is simply 12 feet vertically below what had been included in the take calculations.<sup>177</sup> Thus, the ACP construction would likely result in the take of more MCI than that which was provided for in the habitat surrogate.<sup>178</sup> The court determined that the agency had again failed to establish a causal link between the habitat surrogate and the take of the MCI and, as such, the habitat surrogate was unenforceable.<sup>179</sup>

□ *Final holding.* The court noted that in "fast-tracking its decisions," FWS lost sight of its obligation to "protect and conserve endangered and threatened species and their habitats."<sup>180</sup> The court held that FWS' 2018 BiOp arbitrarily and capriciously concluded that ACP construction would not jeopardize the RPBB and the clubshell, and failed to set enforceable and permissible take limits for the Indiana bat and the MCI.<sup>181</sup> Therefore, the court vacated the 2018 BiOp.<sup>182</sup>

157. See *Defenders of Wildlife*, 931 F.3d at 359.

158. *Id.* at 359-60.

159. *Id.* at 360.

160. *Id.*

161. *Id.*

162. *Id.*

163. 50 C.F.R. §402.14(i)(1)(i) (2003).

164. *Defenders of Wildlife*, 931 F.3d at 360.

165. *Id.* at 361.

166. *Id.* at 362.

167. *Id.* at 363.

168. *Id.* at 362.

169. "Karst terrain is created from the dissolution of soluble rocks, principally limestone and dolomite. Karst areas are characterized by distinctive landforms (like springs, caves, sinkholes) and a unique hydrogeology that results in aquifers that are highly productive but extremely vulnerable to contamination." Water Resources, *Karst Aquifers*, U.S. GEOLOGICAL SERV. (July

20, 2021), <https://www.usgs.gov/mission-areas/water-resources/science/karst-aquifers>.

170. *Defenders of Wildlife*, 931 F.3d at 363.

171. *Id.*

172. *Id.* at 364.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.* at 365.

178. *Id.*

179. *Id.*

180. *National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 651, 37 ELR 20153 (2007).

181. *Defenders of Wildlife*, 931 F.3d at 366.

182. *Id.*

#### 4. *Cowpasture River Preservation Association v. U.S. Forest Service*<sup>183</sup>

□ *Background.* The route of the pipeline, approved by FERC, crosses approximately 16 miles in the George Washington National Forest (GWNF) and five miles in the Monongahela National Forest (MNF).<sup>184</sup> On April 27, 2015, the Forest Service provided its comments on FERC's notice of intent to prepare an environmental impact statement (EIS) pursuant to NEPA.<sup>185</sup> The comments provided that the EIS must analyze alternative routes that would not cross national forestland and must include site-specific stabilization designs.<sup>186</sup>

A draft EIS was released by FERC in December 2016, noting that the ACP was routed to go through national forestland so that it could avoid the necessary congressional approval to cross the Appalachian National Scenic Trail (ANST).<sup>187</sup> When the Forest Service reviewed the draft EIS in April 2017, it noted that no "national forest avoidance alternative" had been considered, and again requested that such an alternative be included.<sup>188</sup> Approximately one month later, in May 2017, the Forest Service sent a letter to FERC and Atlantic stating that it no longer viewed the site-stabilization designs as necessary for authorization of the project.<sup>189</sup> The letter did not acknowledge the agency's change in position, and did not provide an explanation as to why it had changed its position.<sup>190</sup>

In July 2017, FERC released its final EIS and the Forest Service released its draft record of decision (ROD), in which it proposed to adopt the final EIS.<sup>191</sup> The final EIS' section on national forest avoidance alternatives was identical to that which the Forest Service had previously commented on in the draft EIS.<sup>192</sup> In November 2017, the Forest Service released its final ROD and special use permit (SUP), in addition to granting a right-of-way across the ANST in January 2018.<sup>193</sup> The petitioners filed suit less than one month later, arguing that the Forest Service violated the National Forest Management Act (NFMA),<sup>194</sup> NEPA, and the Mineral Leasing Act (MLA).<sup>195</sup>

□ *NFMA.* The NFMA requires the Forest Service to "develop, maintain, and as appropriate, revise" forest plans and ensure that all activities on national forestland are consistent with such forest plans.<sup>196</sup> Substantive requirements for forest plans are set out in the Forest Service's Forest Planning Rule, which was most recently updated in

2012.<sup>197</sup> The 2012 Planning Rule provided that its substantive requirements apply to a forest plan amendment if the requirement is "directly related to the plan direction being added, modified, or removed by the amendment."<sup>198</sup> Petitioners asserted the Forest Service violated the NFMA by determining that amendments to the GWNF and MNF Forest Plans' standards to accommodate the ACP were not "directly related" to the 2012 Planning Rule, and by failing to adequately determine whether the ACP project could be feasibly constructed and operated on lands other than national forestland.<sup>199</sup>

The court agreed with both of petitioners' arguments.<sup>200</sup> First, the court noted that the ROD made clear that the purpose of the amendments to the GWNF and MNF Forest Plans was to reduce the environmental requirements because the ACP project would not be able to meet the plans' original requirements.<sup>201</sup> Because the Forest Service failed to analyze whether the substantive requirements of the Planning Rule were directly related to the purpose of the amendments, it "entirely failed to consider an important aspect of the problem."<sup>202</sup> That failure was particularly important in this instance, because it was evident the amendments were directly related to the Planning Rule's substantive requirements for the relevant categories.<sup>203</sup>

The court noted that it was "striking and inexplicable" how far the Forest Service went to avoid applying its own protections from the Planning Rule in order to assist the ACP project through national forestland.<sup>204</sup> Therefore, the court concluded that the Planning Rule requirements for soil, riparian resources, and threatened and endangered species were directly related to the purpose of the forest plan amendments, which were intended to lessen protections for soils, riparian areas, and threatened and endangered species and, as such, the Forest Service acted arbitrarily and capriciously in arguing otherwise.<sup>205</sup>

In addition to the issues associated with the Planning Rule and the forest plan amendments, petitioners asserted that the Forest Service failed to consider alternatives that would have avoided national forestland, and therefore violated NEPA and the NFMA.<sup>206</sup> Forest Service regulations state that proposals shall be rejected "if, upon further consideration, the officer determines that: . . . the proposed use would not be in the public interest."<sup>207</sup> The Forest Service Manual further directs that a proposed use should be authorized as "in the public interest" under the regulations

183. 911 F.3d 150, 49 ELR 20204 (4th Cir. 2018).

184. *Id.* at 155.

185. *Id.*

186. *Id.*

187. *Id.* at 156.

188. *Id.* at 158.

189. *Id.*

190. *Id.* at 159.

191. *Id.*

192. *Id.*

193. *Id.* at 160.

194. 16 U.S.C. §§1600-1687, ELR STAT. NFMA §§2-16.

195. *Cowpasture*, 911 F.3d at 160.

196. 16 U.S.C.A. §1604(a) (West 2021).

197. National Forest System Land Management Planning, 77 Fed. Reg. 21162 (Apr. 9, 2012) (to be codified at 36 C.F.R. pt. 219).

198. 36 C.F.R. §219.13(b)(5) (2016).

199. *Cowpasture*, 911 F.3d at 161.

200. *Id.* at 162.

201. *Id.*

202. *Id.* (citing *Defenders of Wildlife v. North Carolina Dep't of Transp.*, 762 F.3d 374, 396, 44 ELR 20181 (4th Cir. 2014) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 13 ELR 20672 (1983))).

203. *Id.* at 163.

204. *Id.* at 166.

205. *Id.* at 164.

206. *Id.* at 167-68.

207. 36 C.F.R. §251.54(e)(5)(ii) (2011).

“only if . . . the proposed use *cannot reasonably be accommodated* off of National Forest System lands” and projects should not be authorized on National Forest System lands “solely because it affords the applicant a lower cost or less restrictive location.”<sup>208</sup>

In the EIS, FERC only analyzed whether an alternative route would produce a significant environmental advantage over the proposed route, which is significantly different than the “*cannot reasonably be accommodated* off of National Forest System lands” standard.<sup>209</sup> Because the Forest Service neglected to demonstrate that the ACP project could not reasonably be constructed and operated on non-national forestland, the court found that it violated its obligations under both the NFMA and its own forest plans.<sup>210</sup>

□ *NEPA*. NEPA was enacted “to reduce or eliminate environmental damage”<sup>211</sup> and imposes procedural requirements on federal agencies, including necessitating an analysis of the environmental impacts of all agency proposals and actions. NEPA also requires agencies to “take a hard look at environmental consequences,”<sup>212</sup> and consider alternatives to the proposed action.<sup>213</sup> When a federal agency proposes an action that will significantly affect the quality of the human environment, the agency is required to prepare an EIS outlining the likely environmental impacts of the action, any unavoidable impacts, and potential alternatives.<sup>214</sup> In the issue at hand, the Forest Service is a cooperating agency and may only adopt the EIS prepared by FERC if it undertakes “an independent review of the [EIS]” and determines that all prior comments and suggestions have been adequately considered.<sup>215</sup> The court’s role in reviewing the adequacy of an EIS is determining whether or not there is a rational connection between the facts found and the choices made.<sup>216</sup>

The petitioners asserted that the Forest Service violated NEPA by failing to adequately consider alternative routes off of national forestland and by adopting FERC’s final EIS that failed to take a “hard look” at prior concerns that the Forest Service had raised with respect to landslide risks, erosion, and impairment of water quality.<sup>217</sup>

According to the court, the record reflects that the Forest Service failed to conduct its own required independent review of FERC’s EIS.<sup>218</sup> When reviewing the draft EIS, the Forest Service initially objected to the lack of non-national forest route alternatives provided.<sup>219</sup> The Forest Service

then reversed course, however, and adopted the final EIS despite the fact that it was unchanged from the draft EIS with respect to non-national forest alternatives.<sup>220</sup> And the Forest Service never explained in the ROD or elsewhere how its concerns about alternative routes were assuaged.<sup>221</sup> The court held that the Forest Service acted arbitrarily and capriciously in adopting the unchanged alternatives analysis in the final EIS, because it could not conclude that the Forest Service had independently reviewed it and “determined that its comment and concerns were satisfied.”<sup>222</sup>

The court also found that the Forest Service violated NEPA by neglecting to take a hard look at the environmental consequences of the project.<sup>223</sup> Initially, the Forest Service voiced concerns about site-specific stabilization designs, erosion-control devices, the use of water bars as a mitigation technique, and the calculations used to analyze water resource impacts from increases in sedimentation.<sup>224</sup> The final EIS, however, did not address any of these concerns, and even conceded that the Forest Service’s concerns remained unresolved.<sup>225</sup> In supporting its approval of the ACP, the Forest Service relied on the mitigation measures it previously found unreliable, which is insufficient to satisfy NEPA and the hard look required under the Act.<sup>226</sup>

□ *MLA*. The MLA authorizes the “appropriate agency head” to grant gas pipelines rights-of-way across federal lands.<sup>227</sup> “Federal lands,” under the Act, means “all lands owned by the United States *except lands in the National Park System*.”<sup>228</sup> Land in the National Park System includes “any area of land and water administered by the Secretary [of the Interior]” through the NPS.<sup>229</sup> The ANST is administered by the Secretary of the Interior, but that duty was delegated to the NPS.<sup>230</sup> While both parties agreed that the NPS “does not have authority under the MLA to grant pipeline rights of way across the ANST,” the parties disagreed about whether the Forest Service held that authority.<sup>231</sup>

The Forest Service argued that the National Trails System Act (NTSA) distinguishes between the “overall administration” of the ANST and administration of the lands underlying the ANST.<sup>232</sup> While the NPS has authority for the overall administration component, the Forest Service has jurisdiction over many of the lands underlying the trail.<sup>233</sup> Thus, according to the Forest Service’s interpretation of the NTSA, the MLA authorized it to grant

208. Forest Service Manual, Addendum to Pet’rs’ Br. 65-66.

209. *Id.*

210. *Cowpasture*, 911 F.3d at 168.

211. *Department of Transp. v. Public Citizen*, 541 U.S. 752, 756, 34 ELR 20033 (2004).

212. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350, 19 ELR 20743 (1989).

213. 40 C.F.R. §1502.14 (2012).

214. *Cowpasture*, 911 F.3d at 170.

215. 40 C.F.R. §1506.3(a) (2012).

216. *See Sierra Club, Inc. v. U.S. Forest Serv.*, 897 F.3d 582, 594 (4th Cir. 2018).

217. *Cowpasture*, 911 F.3d at 170.

218. *Id.* at 171.

219. *Id.*

220. *Id.*

221. *Id.* at 172.

222. *Id.* at 173.

223. *Id.* at 173-74.

224. *Id.* at 174.

225. *Id.*

226. *Id.*

227. 30 U.S.C.A. §185(a) (West 2021).

228. *Id.* §185(b).

229. 54 U.S.C.A. §100501 (West 2021).

230. *Cowpasture*, 911 F.3d at 179.

231. *Id.*

232. *Id.* at 180.

233. *Id.*

pipeline rights-of-way on portions of the ANST crossing lands administered by the Forest Service.<sup>234</sup>

The court noted that “[i]nterpreting the MLA as the Forest Service argues would give the Forest Service more authority than NPS on National Park System land,” which “defies logic.”<sup>235</sup> The court also noted that the NTSA does not distinguish between “levels” of administration and does not transfer administration responsibility from the NPS to the Forest Service just because the Forest Service manages lands underlying portions of the trail.<sup>236</sup> Finally, not only did the Forest Service never notify the public of its intent to grant the right-of-way, but the SUP did not provide the legal authority that the Forest Service was relying upon in granting it.<sup>237</sup> Accordingly, the court found that the Forest Service’s argument with respect to its authority under the MLA was unpersuasive.<sup>238</sup>

## 5. *U.S. Forest Service v. Cowpasture River Preservation Association*<sup>239</sup>

□ *Procedural and statutory background.* After the U.S. Court of Appeals for the Fourth Circuit found that the Forest Service had acted arbitrarily and capriciously and violated the NFMA, NEPA, and the MLA, the Supreme Court granted certiorari to decide whether the Forest Service has authority under the MLA to grant rights-of-way through national forestland traversed by the ANST.<sup>240</sup>

In 1920, Congress passed the Leasing Act, giving the Secretary of the Interior the authority to grant pipeline rights-of-way through public lands.<sup>241</sup> In 1973, the Leasing Act was amended so that any “appropriate agency head” may also grant pipeline rights-of-way through federal lands.<sup>242</sup> These amendments also defined “federal lands” as “all lands owned by the United States, except lands in the National Park System.”<sup>243</sup> Under the Leasing Act, the Forest Service is an “appropriate agency head” for “federal lands” over “which [it] has jurisdiction.”<sup>244</sup> According to the Supreme Court, it is clear that the lands within the GWNF are federal lands over which the Forest Service has jurisdiction and, as such, the question in this case was whether the lands in the forest have been placed under the NPS’ control because the ANST, a unit of the National Park System, crosses them, rather than under the Forest Service’s jurisdiction.<sup>245</sup>

□ *Analysis and reasoning.* The NTSA gave DOI “an easement for the specified and limited purpose of establish-

ing and administering” the ANST, and that easement was then delegated to the NPS.<sup>246</sup> But within national forestland, the land itself remained under the Forest Service’s jurisdiction.<sup>247</sup> While the federal government argued that the ANST is an “area” or a “unit” of the National Park System, the Court found it is in fact just a trail, and just an easement.<sup>248</sup> The NTSA did not strip the Forest Service of jurisdiction over the national forestland that the trail crosses.<sup>249</sup> The lands that the ANST crosses are still “federal lands” and, as such, because the Forest Service has jurisdiction over those lands within the GWNF, the Forest Service had the authority to grant a pipeline right-of-way through them, just as it granted the right-of-way for the establishment of the ANST.<sup>250</sup>

The Court noted that it is the Forest Service that performs necessary physical work with respect to the maintenance of the trail; “[i]f a tree falls on forest lands over the trail, it’s the Forest Service that’s responsible for it.”<sup>251</sup> While the NPS administers the ANST, it does not administer the land crossed by the trail.<sup>252</sup> The NPS administers the ANST as an easement, an easement that is distinct from the underlying land.<sup>253</sup> As the Court noted, “A trail is a trail, and land is land.”<sup>254</sup> Congress chose to establish the ANST as a right-of-way in the NTSA, rather than in terms of land transfers, supporting the determination that the NPS’ role extends only to the trail itself, not the lands it crosses.<sup>255</sup>

□ *Holding.* The Court held that the NTSA did not transfer jurisdiction of the lands crossed by the ANST from the Forest Service to DOI; rather, it created a trail easement giving DOI authority to administer the trail itself.<sup>256</sup> Because DOI thus has no jurisdiction over the lands crossed by the ANST, the Forest Service had the authority to grant Atlantic a right-of-way for the ACP.<sup>257</sup> Accordingly, the Supreme Court reversed the judgment of the Fourth Circuit with respect to the issue of the Forest Service’s authority to grant a pipeline right-of-way pursuant to the MLA, and remanded the case for further proceedings consistent with its opinion.<sup>258</sup>

## 6. Update to the Pipeline Project

On July 5, 2020, Dominion Energy and Duke Energy, partners of Atlantic, announced the cancellation of the

234. *Id.*

235. *Id.*

236. *Id.* at 181.

237. *Id.* at 182-83.

238. *Id.* at 183.

239. 140 S. Ct. 1837, 50 ELR 20148 (2020).

240. *Id.* at 1841.

241. 30 U.S.C.A. §185 (West 1920).

242. *Id.* §185(a) (West 1973).

243. *Id.* §185(b) (West 2021).

244. *Id.* §185(b)(3).

245. *Forest Serv.*, 140 S. Ct. at 1844.

246. *Id.* at 1846.

247. *Id.*

248. *Id.* at 1845.

249. *Id.* at 1846.

250. *Id.*

251. Oral Argument at 5, *U.S. Forest Serv. v. Cowpasture River Pres. Ass’n*, 140 S. Ct. 1837, 50 ELR 20148 (2020) (No. 18-1584), 2020 WL 883393.

252. *Forest Serv.*, 140 S. Ct. at 1847.

253. *Id.* at 1846.

254. *Id.*

255. *Id.* at 1847.

256. *Id.*

257. *Id.* at 1848.

258. *Id.* at 1850.

ACP due to delays in construction and cost uncertainties.<sup>259</sup> While Atlantic was successful in its Supreme Court case regarding the MLA, uncertainties still existed with respect to the NFMA and NEPA. Additionally, the U.S. District Court for the District of Montana overturned NWP 12, and a U.S. Court of Appeals for the Ninth Circuit ruling suggested an appeal would not be likely.<sup>260</sup> As Atlantic was reliant on NWP 12, these cases indicated that obtaining federal authority for water body crossings would be more difficult than originally anticipated.<sup>261</sup> After almost six years of litigation, the total projected cost of the pipeline increased from an originally estimated \$5 billion to a total of \$8 billion.<sup>262</sup>

## B. The Mountain Valley Pipeline

Mountain Valley Pipeline, LLC (Mountain Valley) proposed to construct and operate a 300-mile, 42-inch diameter, natural gas pipeline—the Mountain Valley Pipeline (MVP)—from West Virginia to Virginia.<sup>263</sup> The MVP was proposed to transport natural gas from West Virginia to Mid-Atlantic markets, and nearly all of the gas to be transported would be produced in West Virginia.<sup>264</sup> While Mountain Valley itself would not own the gas to be transported, 95% of it would be owned by affiliates of the company.<sup>265</sup> The MVP would cross 591 federal water bodies, including four major rivers, in the Corps' Huntington District.<sup>266</sup> The four rivers to be crossed are the Elk, Gauley, Greenbrier, and Meadow.<sup>267</sup>

In October 2017, FERC granted a certificate of public convenience and necessity to Mountain Valley. Specifically, FERC found that the MVP was in the public interest, would meet a market demand, and would be “environmentally acceptable,” but FERC required the MVP to be complete and operational by October 2020.<sup>268</sup>

### 1. Mountain Valley Pipeline, LLC v. McCurdy<sup>269</sup>

□ *Background.* Bryan and Doris McCurdy owned around 185 acres of land, consisting of three tracts, along the proposed route for the MVP in Monroe County, West Virginia.<sup>270</sup> The MVP proposed to cross all three tracts of the McCurdys' land.<sup>271</sup> In February 2015, a Mountain Valley

employee requested access to the McCurdys' land for the purpose of surveying it, so as to complete Mountain Valley's application for a certificate of public convenience and necessity from FERC.<sup>272</sup>

The McCurdys, however, refused to allow the employee access to their property so that surveys might be conducted.<sup>273</sup> Soon thereafter, Mountain Valley sent the McCurdys a letter indicating its intent to take legal action to obtain access to the property, claiming such authority under West Virginia law.<sup>274</sup> In March 2015, the McCurdys filed suit against Mountain Valley, seeking a declaratory judgment that the company had no right to enter their property and both a preliminary and a permanent injunction prohibiting Mountain Valley from entering their property.<sup>275</sup>

□ *Statutory and regulatory background.* Under West Virginia law, a company that is “invested with the power of eminent domain . . . may enter upon lands for the purpose of examining the same, surveying and laying out the land.”<sup>276</sup> A company in West Virginia is vested with the power of eminent domain “for any purpose of internal improvement for which private property may be taken or damaged for public use.”<sup>277</sup> The “public uses”<sup>278</sup> that land may be taken for include “[f]or construction, maintaining and operating pipelines . . . for transporting natural gas . . . by means of pipes . . . when for public use.”<sup>279</sup>

The determination as to what constitutes a public use is generally associated with the “fixed and definite use” test, first laid out in *Varner v. Martin*.<sup>280</sup> For a taking of private property to be allowed, the intended use must be fixed and definite, the public must have a right to the use, the use must be substantially beneficial and obviously needful, and the necessity for the condemnation must be obvious.<sup>281</sup> It is not enough to argue that the “general prosperity of the community is promoted by the taking of private property from the owner.”<sup>282</sup>

□ *Analysis and reasoning.* The West Virginia Supreme Court held that the MVP is not being constructed and operated for a public use for West Virginians. Mountain Valley was unable to recognize a single West Virginia consumer or natural gas consumer not affiliated with Mountain Valley that would benefit from the MVP.<sup>283</sup> The only benefit that could be identified by Mountain Valley is the benefit to producers and shippers of the natural gas, but

259. News Release, Dominion Energy, Dominion Energy and Duke Energy Cancel the Atlantic Coast Pipeline (July 5, 2020), <https://news.dominionenergy.com/2020-07-05-Dominion-Energy-and-Duke-Energy-Cancel-the-Atlantic-Coast-Pipeline>.

260. *Id.*

261. *Id.*

262. *Id.*

263. Mountain Valley Pipeline, LLC v. McCurdy, 238 W. Va. 200, 203 (2016).

264. *Id.*

265. *Id.* at 202.

266. Sierra Club v. U.S. Army Corps of Eng'rs, 909 F.3d 635, 639, 49 ELR 20198 (4th Cir. 2018).

267. *Id.*

268. Mountain Valley Pipeline, LLC v. 6.56 Acres of Land, 915 F.3d 197, 209, 49 ELR 20019 (4th Cir. 2019).

269. 238 W. Va. 200 (2016).

270. *Id.* at 203.

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.* See also W. VA. CODE ANN. §54-1-3 (West 2021).

275. Mountain Valley Pipeline, 238 W. Va. at 203.

276. W. VA. CODE ANN. §54-1-3 (West 2021).

277. *Id.* §54-1-1.

278. For additional “public use” cases, see *Equitrans, L.P. v. 0.56 Acres More or Less of Permanent Easement Located in Marion County, West Virginia*, 145 F. Supp. 3d 622 (N.D.W. Va. 2015), and *Boggs v. Public Service Commission*, 174 S.E.2d 331, 333 (W. Va. 1970).

279. W. VA. CODE ANN. §54-1-2 (West 2021).

280. 21 W. Va. 534 (1883).

281. *Id.*

282. *Id.*

283. Mountain Valley Pipeline, LLC v. McCurdy, 238 W. Va. 200, 210 (2016).

the owners of the gas are all affiliates of Mountain Valley.<sup>284</sup> In fact, approximately 95% of the gas to be transported by the MVP would be owned and produced by affiliates of Mountain Valley.<sup>285</sup>

While Mountain Valley argued that there was a “possibility” and “potential” that some of the gas from the MVP would reach West Virginia consumers, the court noted that this was purely speculative, since Mountain Valley had not entered into any agreements that would ensure such a result.<sup>286</sup> Additionally, while consumers outside of West Virginia will surely benefit from the MVP, West Virginia may only authorize a company to exercise the right of eminent domain if the company’s proposed activities will result in a benefit for the people of West Virginia.<sup>287</sup>

□  *Holding.* Because Mountain Valley only had the authority to enter the McCurdys’ property if it was vested with the power of eminent domain, because eminent domain authority may only exist where the company’s activities will result in a beneficial public use for West Virginians, and because the MVP will not benefit any consumers in West Virginia, Mountain Valley had no right to enter the McCurdys’ land for the purpose of surveying it.<sup>288</sup>

## 2. *Sierra Club v. U.S. Army Corps of Engineers*<sup>289</sup>

□  *Background.* Because construction of the proposed MVP would involve the discharge of fill material into federal waters, Mountain Valley is required under the CWA to obtain a permit from the Corps before construction activities may commence.<sup>290</sup> NWP 12 authorizes the discharge of fill material into federal waters from the construction of utility lines and associated facilities, and was most recently reissued in 2017.<sup>291</sup> NWP 12 requires compliance with a number of federally imposed general conditions.<sup>292</sup> Additionally, a state’s certification of NWP 12 may impose special conditions that project proponents must comply with, and the Corps must make these special conditions regional conditions.<sup>293</sup>

After providing public notice and receiving comments from the public, West Virginia imposed a number of special conditions as part of its certification for NWP 12, with special conditions A and C being relevant here.<sup>294</sup> Special condition A provides that for pipelines equal to or greater than 36 inches in diameter, or pipelines crossing a river regulated by §10 of the Rivers and Harbors Act, an individual state water quality certification must be obtained.<sup>295</sup> Special condition C provides that stream crossings must be

carried out in a continuous manner and must be completed within 72 hours.<sup>296</sup>

The West Virginia Department of Environmental Protection (DEP) issued a conditional grant of the state water quality certification in March 2017, but after Sierra Club petitioned for review of the certification, the DEP sought remand with vacatur, and on remand, the DEP waived its requirement that Mountain Valley obtain an individual state water quality certification.<sup>297</sup> The Corps issued its verification in December 2017, noting that the MVP’s construction time frame for stream crossings would take four to six weeks to complete, as Mountain Valley would be using a “dry open cut” method, which takes longer than “wet” open-cut construction.<sup>298</sup> The Corps noted that the dry method was more protective of water quality than the wet method, even if it took longer to complete, and, as such, the Corps was using its discretionary authority under 33 C.F.R. §330.5(d)(1) to modify a particular case’s specific activity authorization under NWP 12.<sup>299</sup> Specifically, the Corps included special condition 6 in its verification, which provided that the dry method was to be used, and that condition 6 would “apply in lieu of” special condition C.<sup>300</sup>

Petitioners filed a timely petition challenging the verification, arguing that the Corps did not have the authority to impose special condition 6 in lieu of special condition C, that the verification was inconsistent with special condition A, and that complete vacatur or vacatur without remand was an appropriate remedy.<sup>301</sup>

□  *Analysis and reasoning.* With respect to the Corps imposing special condition 6 in lieu of special condition C, the Corps had relied on statutory authority under the CWA, arguing that it had the authority to substitute on a case-by-case basis its own conditions for those imposed by states.<sup>302</sup> The Fourth Circuit found, however, that the Corps never explained how the statutory text afforded the agency this authority.<sup>303</sup> The plain language of §401 of the CWA provides that conditions imposed by a state in its certification process “shall become a condition on any Federal license or permit.”<sup>304</sup>

Accordingly, state-imposed conditions are required to be included as conditions of NWP 12; the Corps does not have the authority to reject or alter any conditions imposed by states.<sup>305</sup> Because the language used by the Corps noted that it was providing special condition 6 “in lieu of” special condition C, this indicated that the state-imposed condition was to be replaced or, in other words, rejected.<sup>306</sup> The court noted that the CWA does not give the Corps author-

284. *Id.* at 211.

285. *Id.*

286. *Id.* at 211-12.

287. *Id.* at 212.

288. *Id.* at 213.

289. 909 F.3d 635, 49 ELR 20198 (4th Cir. 2018).

290. *Id.* at 639.

291. *Id.* at 640.

292. *Id.*

293. *Id.*

294. *Id.*

295. *Id.*

296. *Id.* at 641.

297. *Id.*

298. *Id.* at 641-42.

299. *Id.* at 642.

300. *Id.*

301. *Id.* at 642-43.

302. *Id.* at 644.

303. *Id.*

304. *Id.* at 645 (quoting 33 U.S.C.A. §1341(d) (West 2021) (emphasis added)).

305. *Id.*

306. *Id.* at 646.

ity to replace a state condition with an alternative condition, “even if the Corps reasonably determines that the alternative condition is more protective of water quality.”<sup>307</sup>

The Corps attempted to argue that special condition 6 was simply a further condition on NWP 12, but the relevant regulation provides that “[a]n activity is authorized under an NWP *only if* that activity and the permittees satisfy *all of the NWP’s terms and conditions*.”<sup>308</sup> As such, for the MVP project to be authorized, it must satisfy every included term and condition, including state-imposed conditions such as special condition C.<sup>309</sup> Because the MVP project cannot satisfy special condition C because it cannot satisfy the 72-hour time limit it sets forth, the project never satisfied all of the conditions of NWP 12 and never obtained authorization.<sup>310</sup> If there is no authorization, the Corps cannot modify it through revision, such as adding conditions.<sup>311</sup>

Petitioners next argued that the verification was inconsistent with special condition A because individual state water quality certifications are required for pipelines that have a diameter of 36 inches or more.<sup>312</sup> The MVP is a 42-inch diameter pipeline, and the West Virginia DEP waived its authority to issue an individual certification.<sup>313</sup> In the Corps’ verification, the organization provided no explanation as to why the waiver was valid, despite the fact that no notice-and-comment procedures were initiated as required under federal law.<sup>314</sup>

When West Virginia originally certified NWP 12 and imposed its special conditions, it followed the required notice-and-comment procedures, but did not do the same for the decision to waive the conditions.<sup>315</sup> The court noted that if West Virginia were allowed to make case-specific modifications to conditions without notice and comment, it would create a “back-door mechanism” for a state to issue certification conditions via the required notice-and-comment process, but then refuse to apply those conditions in every case.<sup>316</sup>

□  *Holding.* The court held that the Corps exceeded its statutory authority by replacing special condition C with special condition 6, rather than simply supplementing the conditions already provided in NWP 12.<sup>317</sup> Additionally, the court held that because the CWA requires West Virginia to conduct notice-and-comment procedures for case-specific modifications to conditions, which was not done with respect to the state choosing to waive its authority to implement special condition A, the Corps’ verification should be vacated.<sup>318</sup> Because the Corps’ actions with re-

spect to the verification were legally deficient and not in accordance with the law, the court decided to vacate the verification in its entirety.<sup>319</sup>

### 3. *Mountain Valley Pipeline, LLC v. 6.56 Acres of Land*<sup>320</sup>

□  *Background.* Mountain Valley obtained the necessary rights-of-way to construct the pipeline for approximately 85% of the properties along the route, but was unable to come to an agreement with hundreds of other landowners, who are the plaintiffs in this litigation.<sup>321</sup> To obtain rights-of-way for the remaining 15% of the properties along the proposed MVP route, Mountain Valley moved on its right to take the easement by eminent domain, and sought preliminary injunctions giving Mountain Valley immediate access to and possession of the lands while the proceedings were pending, so as to stay on track for the October 2020 operational deadline.<sup>322</sup>

A number of district courts granted Mountain Valley the preliminary injunctions for immediate possession of the easements.<sup>323</sup> The landowners challenged the preliminary injunctions, and argued that federal courts did not have the authority to grant immediate possession of their lands for the purposes of eminent domain.<sup>324</sup> Alternatively, the landowners argued that the *Winter* factors were applied incorrectly and, as such, the district courts abused their discretion in awarding preliminary relief in this case.<sup>325</sup>

□  *Analysis and reasoning.* The Fourth Circuit previously had held that a federal court has the authority to grant a company immediate possession of private property when exercising eminent domain along a pipeline route, so long as landowners are paid just compensation at a later point in time.<sup>326</sup> In reaching that conclusion, the court determined that if a company already established its substantive right to eminent domain under the NGA, it was entitled to apply for a preliminary injunction.<sup>327</sup> Additionally, here, “[w]hen immediate possession is granted though a preliminary injunction, title itself does not pass until compensation is ascertained and paid.”<sup>328</sup> Accordingly, if just compensation were not paid to the landowners, they would be entitled to commence a trespass action.<sup>329</sup>

The court next turned to the issue of whether or not the district courts applied the *Winter* factors incorrectly and abused their discretion in awarding preliminary relief in this case.<sup>330</sup> The four *Winter* factors that must be satisfied

307. *Id.* at 648.

308. *Id.* at 649 (quoting 33 C.F.R. §330.1(c) (2012) (emphasis added)).

309. *Id.* at 650.

310. *Id.* at 651.

311. *Id.*

312. *Id.*

313. *Id.* at 652.

314. *Id.* See also 33 U.S.C.A. §1341(a)(1) (West 2021).

315. *Sierra Club*, 909 F.3d at 653.

316. *Id.* at 654.

317. *Id.* at 647.

318. *Id.* at 654.

319. *Id.* at 655.

320. 915 F.3d 197, 49 ELR 20019 (4th Cir. 2019).

321. *Id.* at 210.

322. *Id.*

323. *Id.* at 211.

324. *Id.* at 213.

325. *Id.*

326. See *East Tenn. Natural Gas Co. v. Sage*, 361 F.3d 808 (4th Cir. 2004).

327. *Id.* at 824.

328. *Mountain Valley*, 915 F.3d at 214 (citing *East Tenn. Natural Gas Co.*, 361 F.3d at 825-26).

329. *Id.*

330. *Id.* at 215.

to obtain a preliminary injunction are (1) the likelihood of success on the merits, (2) suffering of irreparable harm, (3) a balancing of equities and hardships, and (4) whether the preliminary injunction is in the public interest.<sup>331</sup>

The court determined that the first factor weighed in favor of granting Mountain Valley a preliminary injunction because Mountain Valley had not only proved likelihood of success on the merits, it had already succeeded because it was entitled to exercise the power of eminent domain (the district courts granted partial summary judgment for Mountain Valley as to the eminent domain issue in this case).<sup>332</sup> With respect to the second factor, the court also determined that there was no error or abuse in the district courts' finding that Mountain Valley would suffer irreparable harm absent a preliminary injunction.<sup>333</sup> Without the ability to take immediate possession of the necessary lands, Mountain Valley would be unable to meet its October 2020 operational deadline.<sup>334</sup> Thus, Mountain Valley would lose the right to construct the pipeline altogether, and none of the company's economic losses would be recoverable.<sup>335</sup>

With respect to the third factor, the court once again found that the balance weighed in favor of granting the preliminary injunction.<sup>336</sup> The court noted that the harms suffered by Mountain Valley without the preliminary injunction would be severe, given that the pipeline construction would have to be halted altogether without the ability to meet the October 2020 operational deadline.<sup>337</sup> The landowners, however, would eventually suffer the same harms whether access to their land was granted prior to or just after compensation was paid to them.<sup>338</sup> While a few landowners would suffer injury arising from immediate possession, the court determined that the district court properly found that the potential harm to Mountain Valley outweighed the potential harm to those few landowners.<sup>339</sup> Finally, with respect to the fourth factor, the court found that a preliminary injunction would be in the public interest, because delaying construction would delay the public benefits that were recognized by FERC in granting the certificate of public convenience and necessity for the MVP.<sup>340</sup>

□ **Holding.** The court found that the district courts did not abuse their discretion in determining that Mountain Valley should be granted a preliminary injunction allowing it to take immediate possession of lands obtained through eminent domain prior to just compensation being paid to the landowners.<sup>341</sup> Federal courts have the authority to grant

such immediate possession, and application of the *Winter* factors for the appropriateness of a preliminary injunction was proper.<sup>342</sup>

#### 4. Update to the Pipeline Project

As of June 2022, the MVP is still under construction, and still facing legal and administrative hurdles. After the *Sierra Club v. U.S. Army Corps of Engineers*<sup>343</sup> case in 2018 vacated the Corps' verification for water quality certification for the project pursuant to NWP 12, Mountain Valley sought a new verification from the Corps and individual state water quality certifications.<sup>344</sup> In July 2021, however, the U.S. Environmental Protection Agency evaluated the draft version of the new course Mountain Valley proposed to proceed with for water crossing concerns, and recommended that the Corps not issue its approval due to "substantial concerns."<sup>345</sup>

In August 2021, FERC released an environmental assessment (EA) finding that a trenchless method of construction would be less environmentally damaging than the originally proposed open-cut dry crossing method.<sup>346</sup> A number of groups filed comments in response to FERC's EA, arguing that the review did not sufficiently analyze the potential impacts of the new construction method, but there is no time frame for which FERC must make a final decision on the EA.<sup>347</sup> The project was originally scheduled to be complete in 2018 at a cost of \$3.5 billion.<sup>348</sup> In August 2021, Mountain Valley projected the pipeline would be completed in the summer of 2022, with an updated total cost of \$6.2 billion.<sup>349</sup> This, however, was impacted by the results of new lawsuits filed against the MVP's construction in early 2022.<sup>350</sup>

In January 2022, the Fourth Circuit revoked Mountain Valley's permit to pass through the Jefferson National Forest.<sup>351</sup> The first permit issued for this passing was revoked in

331. *Id.* at 211-12.

332. *Id.* at 216.

333. *Id.*

334. *Id.*

335. *Id.* at 217.

336. *Id.* at 219.

337. *Id.* at 219-20.

338. *Id.* at 219.

339. *Id.* at 220.

340. *Id.* at 221-22.

341. *Id.* at 223.

342. *Id.*

343. 909 F.3d 635, 49 ELR 20198 (4th Cir. 2018).

344. Sarah Vogelsong, *Mountain Valley Pipeline Water Permit Arguments Tread Familiar Ground*, VA. MERCURY (Sept. 29, 2021, 12:02 AM), <https://www.virginiamercury.com/2021/09/29/mountain-valley-pipeline-water-permit-arguments-retread-familiar-ground/>.

345. *Id.*

346. Mike Tony, *Federal Environmental Assessment Green-Lights Change in Mountain Valley Pipeline Construction Method*, CHARLESTON GAZETTE-MAIL (Aug. 17, 2021), [https://www.wvgazette.com/news/energy\\_and\\_environment/federal-environmental-assessment-green-lights-change-in-mountain-valley-pipeline-construction-method/article\\_ebe3d6e8-0f88-5824-bee8-4741c383415f.html](https://www.wvgazette.com/news/energy_and_environment/federal-environmental-assessment-green-lights-change-in-mountain-valley-pipeline-construction-method/article_ebe3d6e8-0f88-5824-bee8-4741c383415f.html).

347. *Id.*

348. *Id.*

349. *Id.*

350. See Charles Young, *Mountain Valley Pipeline's W. Va. Permit Challenged*, REG.-HERALD (Jan. 11, 2022), [https://www.register-herald.com/mountain-valley-pipelines-w-va-permit-challenged/article\\_bfd42b24-20ac-5947-b6c4-b7a270cbdbd.html](https://www.register-herald.com/mountain-valley-pipelines-w-va-permit-challenged/article_bfd42b24-20ac-5947-b6c4-b7a270cbdbd.html); Laurence Hammack, *Legal Fights Continue Over the Mountain Valley Pipeline*, ROANOKE TIMES (Jan. 8, 2022), [https://roanoke.com/news/local/legal-fights-continue-over-the-mountain-valley-pipeline/article\\_fdc651e0-700f-11ec-871b-0f6553a197ef.html](https://roanoke.com/news/local/legal-fights-continue-over-the-mountain-valley-pipeline/article_fdc651e0-700f-11ec-871b-0f6553a197ef.html).

351. Laurence Hammack, *Mountain Valley Pipeline Loses Permit to Cross Through Jefferson National Forest*, ROANOKE TIMES (Jan. 25, 2022), [https://roanoke.com/news/local/mountain-valley-pipeline-loses-permit-to-cross-through-jefferson-national-forest/article\\_be1c56c8-7e03-11ec-9b97-371e2dc8c6c1.html](https://roanoke.com/news/local/mountain-valley-pipeline-loses-permit-to-cross-through-jefferson-national-forest/article_be1c56c8-7e03-11ec-9b97-371e2dc8c6c1.html).



2018, and it took approximately two years for this second permit to be issued.<sup>352</sup> With the second permit now revoked and sent back to the Forest Service and Bureau of Land Management for reconsideration, it is uncertain whether and when a new permit will be issued.<sup>353</sup> Weeks after the Fourth Circuit struck down the Jefferson National Forest crossing permit, the court invalidated yet another of Mountain Valley's necessary authorizations.<sup>354</sup>

In February 2022, the Fourth Circuit revoked FWS' BiOp for the MVP.<sup>355</sup> The court based its decision on two endangered fish—the candy darter and the Roanoke logperch—that are protected under the ESA, finding that FWS had not adequately assessed the potential impacts that the project would have on the species.<sup>356</sup> Around the same time, Mountain Valley noted that it no longer expected to complete the project by summer 2022.<sup>357</sup> Additionally, one of the company's largest partners noted that it was reevaluating its role in the project, providing that “[t]he continued legal and regulatory challenges have resulted in a very low probability of pipeline completion.”<sup>358</sup>

### C. The PennEast Pipeline

In 2015, PennEast Pipeline Co. (PennEast) applied to FERC for a certificate of public convenience and necessity for a 116-mile pipeline that would run from Pennsylvania to New Jersey, and the certificate was granted in January 2018.<sup>359</sup> Weeks after receiving its certificate, PennEast filed complaints in federal district court in New Jersey.<sup>360</sup> PennEast wanted to “exercise the federal eminent domain power under §717f(h)” of the NGA “to obtain rights-of-way along the pipeline route approved by FERC.”<sup>361</sup>

#### 1. PennEast Pipeline Co., LLC v. New Jersey<sup>362</sup>

□ *Background.* Congress passed the NGA for regulation of “the transportation and sale of natural gas in interstate commerce.”<sup>363</sup> As originally passed, the NGA did not provide a means by which certificate holders could obtain the property rights needed to construct the pipelines, and certificate holders were often left to use state eminent domain

procedures.<sup>364</sup> In 1947, Congress “amended the NGA to authorize certificate holders to exercise the *federal* eminent domain power.”<sup>365</sup> Relevant to this case, “PennEast sought to condemn two parcels in which New Jersey asserts a possessory interest, and 40 parcels in which the State claims nonpossessory interests, such as conservation easements.”<sup>366</sup> New Jersey challenged PennEast's complaints, arguing that a motion to dismiss should be granted on sovereign immunity grounds.<sup>367</sup>

□ *Procedural history.* The district court denied New Jersey's motion to dismiss, concluding that “New Jersey was not immune from PennEast's exercise of the federal government's eminent domain power.”<sup>368</sup> Therefore, the district court granted PennEast's requests for a condemnation order and preliminary injunctive relief, allowing PennEast to take immediate possession of each property in advance of any award of just compensation (otherwise known as “quick take”).<sup>369</sup> The U.S. Court of Appeals for the Third Circuit vacated the district court's order and remanded the case for dismissal of any claims against New Jersey.<sup>370</sup>

The Third Circuit reasoned that “[w]hile the Federal Government can delegate its eminent domain power to private parties,” it “found ‘reason to doubt’ that it can do the same with respect to its exemption from state sovereign immunity.”<sup>371</sup> The court did not definitively address that issue, however, relying instead upon Supreme Court precedents providing that Congress cannot revoke state sovereign immunity unless there is an “unmistakably clear” statement.<sup>372</sup> Because §717f(h) of the NGA does not assign to certificate holders the federal government's authority to sue nonconsenting states, the Third Circuit held that PennEast was not empowered to condemn New Jersey's property.<sup>373</sup> The U.S. Supreme Court “granted certiorari to determine whether the NGA authorizes certificate holders to condemn land in which a State claims an interest.”<sup>374</sup>

□ *Analysis and reasoning.* In the Supreme Court's account, “[t]he fact that land is owned by a state is no barrier to its condemnation by the United States.”<sup>375</sup> Since the founding of the United States, the federal eminent domain power has been permissibly delegated to private parties.<sup>376</sup> Supreme Court decisions have confirmed that private parties may also exercise such power within the states.<sup>377</sup> Whether utilized by the government or delegees, the federal eminent

352. *Id.*

353. *Id.*

354. Laurence Hammack, *Another Mountain Valley Pipeline Permit Struck Down by Federal Court*, ROANOKE TIMES (Feb. 3, 2022), [https://roanoke.com/news/local/another-mountain-valley-pipeline-permit-struck-down-by-federal-court/article\\_2e5a2d46-84fa-11ec-95be-eb35bd964ed7.html](https://roanoke.com/news/local/another-mountain-valley-pipeline-permit-struck-down-by-federal-court/article_2e5a2d46-84fa-11ec-95be-eb35bd964ed7.html).

355. *Id.*

356. *Id.*

357. Laurence Hammack, *Mountain Valley Facing “Greater Uncertainty,” Lead Partner in Pipeline Project Says*, ROANOKE TIMES (Feb. 22, 2022), [https://roanoke.com/news/local/mountain-valley-facing-greater-uncertainty-lead-partner-in-pipeline-project-says/article\\_2b3fbf44-93ec-11ec-ab47-1f007a93d4e2.html](https://roanoke.com/news/local/mountain-valley-facing-greater-uncertainty-lead-partner-in-pipeline-project-says/article_2b3fbf44-93ec-11ec-ab47-1f007a93d4e2.html).

358. *Id.*

359. *PennEast Pipeline Co., LLC v. New Jersey*, 141 S. Ct. 2244, 2253, 51 ELR 20128 (2021).

360. *Id.*

361. *Id.*

362. 141 S. Ct. 2244, 51 ELR 20128 (2021).

363. *Id.* at 2252.

364. *Id.*

365. *Id.*

366. *Id.*

367. *Id.*

368. *Id.*

369. *Id.*

370. *Id.*

371. *Id.*

372. *Id.* at 2253-54.

373. *Id.* at 2254.

374. *Id.*

375. *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 534 (1941).

376. *PennEast*, 141 S. Ct. at 2255.

377. *Id.* See *Luxton v. North River Bridge Co.*, 153 U.S. 525 (1894).

domain power may be exercised “within state boundaries, including against state property.”<sup>378</sup> The respondents argued that “sovereign immunity bars condemnation actions against nonconsenting States,” and that §717f(h) does not speak with enough clarity to authorize such actions even if they are determined to be constitutionally permissible.<sup>379</sup> The Supreme Court addressed both arguments.

A state may only be subject to suit in a limited number of situations. One of these situations arises where the state consented to suit under the plan-of-the-convention doctrine.<sup>380</sup> Under this doctrine, the states consented to the exercise of the federal eminent domain power, including condemnation proceedings.<sup>381</sup> Because Congress delegated the federal eminent domain power to private parties, and the federal eminent domain power is tied to the ability to bring condemnation proceedings, it follows that these private-party delegates have the authority to bring condemnation proceedings against states in exercising the federal eminent domain power.<sup>382</sup>

Regarding the second argument, the Court noted that while respondents were “correct that a clear statement is required to subject States to suit in the waiver and abrogation contexts,” no such requirement exists when the federal government empowers a private party to exercise the federal eminent domain power.<sup>383</sup> The federal eminent domain power is “complete in itself”<sup>384</sup> and the states “consented to the exercise of that power—in its entirety—in the plan of the Convention.”<sup>385</sup>

□ *Holding.* Section 717f(h) of the NGA empowers certificate holders to condemn all necessary rights-of-way, regardless of whether the property is owned by private parties or by states.<sup>386</sup> Condemnation actions against states do not upset state sovereignty because all states consented to the exercise of federal eminent domain power, whether by public officials or private delegates, at the founding of the nation.<sup>387</sup> The Supreme Court reversed the judgment of the Third Circuit and remanded the case for further proceedings.<sup>388</sup>

## 2. Update to the Pipeline Project

In September 2021, just three months after receiving approval from the Supreme Court to condemn all necessary rights-of-way in New Jersey, PennEast cancelled the

development of the PennEast Pipeline.<sup>389</sup> PennEast was unable to obtain a CWA §401 water quality certification from the state of New Jersey, which was necessary for the project to proceed.<sup>390</sup> Due to the regulatory uncertainties and the time that further legal battles might take, the pipeline developers determined it was no longer economically feasible to continue with the project.<sup>391</sup>

## D. The Leidy Southeast Project

In September 2013, the Transcontinental Gas Pipe Line Company, LLC (Transco) filed an application to construct and operate the Leidy Southeast Project (Leidy Project) with FERC.<sup>392</sup> The project was proposed to add around 30 miles of looping to the existing pipeline in Pennsylvania and New Jersey to meet increasing energy demands.<sup>393</sup> In December 2014, FERC issued Transco a certificate of public convenience and necessity, or certificate order, for the Leidy Project, but noted that it required Transco to obtain “all applicable authorizations required under federal law” prior to FERC authorizing construction.<sup>394</sup>

### 1. Delaware Riverkeeper Network v. Federal Energy Regulatory Commission<sup>395</sup>

□ *Factual and statutory background.* Pursuant to NEPA, FERC conducted an environmental review of the Leidy Project and issued an EA in August 2014, finding that the project would have no significant impact on the environment.<sup>396</sup> Under NEPA, when an agency issues a finding of no significant impact, it is not required to then issue an EIS.<sup>397</sup> So long as the agency takes a hard look at the environmental consequences of the proposed activity, NEPA is satisfied.<sup>398</sup>

Under §401 of the CWA, Transco was required to obtain a state water quality certification from Pennsylvania, the state in which any potential discharges would originate, before FERC could authorize activities that may result in such a discharge.<sup>399</sup> Transco applied for the water quality certification in June 2014.<sup>400</sup> At the time the conditional certificate order was issued by FERC, Pennsylvania had not yet acted on Transco’s water quality certification request.<sup>401</sup>

In early 2015, FERC authorized Transco to begin conducting preconstruction activities and by March 2015,

378. *PennEast*, 141 S. Ct. at 2257.

379. *Id.* at 2257-58.

380. *Id.* at 2258. The “plan of the convention” doctrine refers to the idea that every state consented to the possibility of being sued, without immunity under the Eleventh Amendment, by ratifying the U.S. Constitution. See USLegal, *Plan-of-the-Convention Doctrine Law and Legal Definition*, <https://definitions.uslegal.com/p/plan-of-the-convention-doctrine/> (last visited May 6, 2022).

381. *PennEast*, 141 S. Ct. at 2259.

382. *Id.* at 2261.

383. *Id.* at 2262-63.

384. *Id.* at 2263 (quoting *Kohl v. United States*, 91 U.S. 367, 374 (1876)).

385. *Id.*

386. *Id.*

387. *Id.*

388. *Id.*

389. Niina H. Farah, *PennEast Cancels Pipeline Despite Supreme Court Win*, E&E NEWS: GREENWIRE (Sept. 27, 2021, 10:03 AM), <https://www.eenews.net/articles/penneast-cancels-pipeline-despite-supreme-court-win/>.

390. *Id.*

391. *Id.*

392. *Delaware Riverkeeper Network v. Federal Energy Regul. Comm’n*, 857 F.3d 388, 392 (D.C. Cir. 2017).

393. *Id.* at 394.

394. *Id.* at 395.

395. 857 F.3d 388 (D.C. Cir. 2017).

396. *Id.* at 394.

397. *See id.*

398. *Id.*

399. *Id.* at 392 (citing 33 U.S.C.A. §1341(a)(1) (West 2021)).

400. *Id.*

401. *Id.* at 395.

Transco had begun felling trees along a right-of-way for the pipeline.<sup>402</sup> In April 2015, Pennsylvania’s Department of Environmental Protection issued a §401 water quality certification for the pipeline project.<sup>403</sup> Delaware Riverkeeper Network (Riverkeeper) then petitioned for review of FERC’s EA and certificate order.<sup>404</sup>

□ *Analysis and reasoning.* Riverkeeper first argued that FERC violated §401 of the CWA by issuing approval of the Leidy Project prior to Pennsylvania issuing a final determination on the water quality certification request.<sup>405</sup> In analyzing this argument, the court noted that §401 only prohibits issuance of licenses and permits without state water quality certification if the project proponent’s activities may result in a discharge to the navigable waters of the United States.<sup>406</sup> Here, the conditional certificate order did not authorize any activities that could result in such a discharge; FERC still required Transco to obtain §401 water quality certification prior to allowing it to proceed with construction activities that could result in a discharge.<sup>407</sup> The court determined that the only activity actually authorized prior to Pennsylvania’s issuance of the §401 certification—felling trees—would not have the potential to result in any discharges to navigable waters.<sup>408</sup>

Riverkeeper next argued that FERC violated NEPA by misclassifying wetlands in the issuance of its EA.<sup>409</sup> Specifically, Riverkeeper argued that FERC misidentified 3.8 acres of wetlands that would be impacted by the operation and construction of the Leidy Project pursuant to the Cowardin classification system.<sup>410</sup> According to the court, Riverkeeper did not, however, explain how the misclassification led to the conclusion that FERC failed to appropriately account for the environmental impacts of the project.<sup>411</sup> Assuming FERC did in fact misclassify some of the wetlands, the misclassification would simply mean that some wetlands will have longer, and others shorter, revegetation processes.<sup>412</sup> Thus, Riverkeeper failed to show any prejudice by virtue of FERC failing to comply with NEPA procedures, because it failed to explain how the plan was significantly deficient; FERC still took the requisite hard look at the impacts, even if they were slightly misclassified.<sup>413</sup>

□ *Holding.* The court rejected both of Riverkeeper’s two main arguments, finding that issuance of the certificate order prior to approval of the water quality certification did not violate §401 of the CWA because no activities that could result in discharges were authorized, and that FERC took a hard look at the environmental consequences of the

Leidy Project with respect to wetlands under NEPA because misclassification of the wetlands did not result in any prejudicial error.<sup>414</sup>

## 2. Update to the Pipeline Project

Prior to its win in the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit, Transco completed the Leidy Project in December 2015, and the pipeline is in full service, operating in both Pennsylvania and New Jersey.<sup>415</sup> The project added 30 miles of pipe to Transco’s pipeline network.<sup>416</sup> As a much shorter pipeline project, the total costs of the construction were originally projected at \$738 million,<sup>417</sup> but a final total cost could not be located. By December 2021, Transco completed another expansion to its pipeline network with the Leidy South Expansion Project, which increased interstate natural gas pipeline capacity from the Appalachian Basin to the East Coast.<sup>418</sup>

### E. The Spire STL Pipeline

In 2016, Spire STL Pipeline, LLC (Spire STL) announced its plans to construct and operate a pipeline in the St. Louis metropolitan region.<sup>419</sup> On January 26, 2017, Spire STL applied to FERC for a certificate of public convenience and necessity under §7(c) of the NGA.<sup>420</sup> In September 2017, the Commission published an EA, pursuant to NEPA, for the proposed pipeline, finding that the construction and operation of the pipeline would have no significant impact.<sup>421</sup> In August 2018, the Commission granted Spire STL a certificate of public convenience and necessity by a 3-2 vote.<sup>422</sup>

#### 1. *Environmental Defense Fund v. Federal Energy Regulatory Commission*<sup>423</sup>

□ *Background.* In August 2016, Spire STL held an “open season,” inviting natural gas shippers to enter into precedent agreements for the natural gas that the proposed pipeline would transport.<sup>424</sup> At the conclusion of the open season, no shippers had entered into an agreement with Spire STL and, instead, Spire STL created a precedent agreement

414. *Id.* at 400-01.

415. Williams, *Before & After: N.J. Pipeline Easement Successfully Restored*, <https://www.williams.com/2016/12/02/before-after-n-j-pipeline-easement-successfully-restored/> (last visited May 6, 2022).

416. *Id.*

417. Candy Woodall, *7 Major Pipeline Projects in Pennsylvania*, PENNLIVE (May 22, 2019, 9:16 PM), [https://www.pennlive.com/midstate/2015/10/7-major-pipeline-projects\\_in\\_p.html](https://www.pennlive.com/midstate/2015/10/7-major-pipeline-projects_in_p.html).

418. Sara Simper, *Natural Gas Interstate Pipeline Capacity Additions Decrease in 2021*, WORLD PIPELINES (Feb. 24, 2022), <https://www.worldpipelines.com/project-news/24022022/natural-gas-interstate-pipeline-capacity-additions-decrease-in-2021/>.

419. *Environmental Def. Fund v. Federal Energy Regul. Comm’n*, No. 20-1016, 2021 WL 2546672, at \*1, 51 ELR 20120 (D.C. Cir. June 22, 2021).

420. *Id.* at \*4.

421. *Id.* at \*6.

422. *Id.*

423. 2021 WL 2546672, 51 ELR 20120 (D.C. Cir. June 22, 2021).

424. *Id.* at \*1.

402. *Id.*

403. *Id.*

404. *Id.*

405. *Id.* at 397.

406. *Id.* at 399.

407. *Id.* at 398-99.

408. *Id.* at 399.

409. *Id.* at 399-400.

410. *Id.* at 400.

411. *Id.*

412. *Id.* at 401.

413. *Id.*

with one of its affiliates, Laclede Gas Company—now known as Spire Missouri, Inc.<sup>425</sup> The precedent agreement, however, was only entered into for 87.5% of the pipeline’s projected transport capacity.<sup>426</sup> In determining that “market need” existed for the proposed pipeline, the Commission seemed to rely solely on the precedent agreement between Spire STL and Spire Missouri.<sup>427</sup>

□ *Statutory and regulatory background.* Under §7 of the NGA, any entity that wishes to construct an interstate pipeline for natural gas transportation must obtain a certificate of public convenience and necessity from FERC.<sup>428</sup> Such certificates may only be issued if the Commission finds that the proposed pipeline “is or will be required by the present or future public convenience and necessity,”<sup>429</sup> and the Commission is required to “evaluate all factors bearing on the public interest.”<sup>430</sup>

To help evaluate the public interest, the Commission outlined steps to follow in its Certificate Policy Statement.<sup>431</sup> First, the applicant is required to show that there is a market need for the new pipeline or the extension of an existing pipeline.<sup>432</sup> If market need exists, the Commission then evaluates whether the project would create adverse impacts on existing customers, existing pipelines, or landowners and communities impacted by the proposed route of the pipeline.<sup>433</sup> If adverse impacts are expected, “the Commission balances the adverse effects with the public benefits of the project, as measured by an ‘economic test.’”<sup>434</sup> “Rather than relying only on one test for need, the Commission will consider *all relevant factors* reflecting on the need for the project.”<sup>435</sup>

□ *Analysis and reasoning.* The court found that under the Certificate Policy Statement, “precedent agreements always will be important evidence of demand for a project.”<sup>436</sup> However, a precedent agreement being *always important* is not the same as a precedent agreement being *always sufficient* to show that there is a market need for the construction of a new pipeline.<sup>437</sup> Per the statement, “the evidence necessary to establish the need for [a] project will usually include a market study,” and “[a] project that has precedent agreements with multiple new customers may present a greater indication of need than a project with only a

precedent agreement with an affiliate.”<sup>438</sup> However, there is no guidance indicating that a precedent agreement is “conclusive proof” of market need when there is no new load demand and no determination by the Commission that the new project would aid in reducing costs.<sup>439</sup> Moreover, in this situation, there was only a single precedent agreement between corporate affiliates that was entered into “after no shipper subscribed during an open season, and the agreement is not for the full capacity of the pipeline.”<sup>440</sup>

Per the court, the Commission seemed to rely solely on the single precedent agreement between Spire STL and its affiliate as conclusive proof of market need, which the Certificate Policy Statement did not support.<sup>441</sup> Additionally, the Commission did not balance adverse effects and public benefits, as the Certificate Policy Statement called for.<sup>442</sup> The Commission merely noted that the benefits outweighed the adverse effects, failing to provide any concrete evidence to support the statement.<sup>443</sup> And while legitimate claims were raised by Environmental Defense Fund (EDF) and others, the Commission merely provided that it had “no reason to second guess the business decision” of Spire Missouri.<sup>444</sup>

□ *Holding.* The court found that the Commission’s approach did not reveal “reasoned and principled decision making.”<sup>445</sup> The Commission failed to adequately engage with EDF’s arguments and the evidence regarding self-dealing, and thus the Commission’s decisionmaking was arbitrary and capricious.<sup>446</sup> Additionally, the Commission’s “cursory balancing of public benefits and adverse impacts was arbitrary and capricious.”<sup>447</sup> In this situation, in which there was a sole precedent agreement for the pipeline with an affiliated shipper, all parties agreed that potential demand for natural gas would be stagnant for the foreseeable future, and the Commission failing to determine if the project would reduce costs, it was arbitrary and capricious for the Commission to rely solely on the precedent agreement to establish market demand.<sup>448</sup>

## 2. Update to the Pipeline Project

Gas began flowing in the Spire STL Pipeline in 2019.<sup>449</sup> In June 2021, however, three judges on the D.C. Circuit revoked the certificate of public convenience and necessity originally issued for the project by FERC.<sup>450</sup> Pursuant to

425. *Id.*

426. *Id.*

427. *Id.* at \*6.

428. *Id.* at \*2 (citing 15 U.S.C.A. §717f(c)(1)(A) (West 2021)).

429. *Id.* (quoting 15 U.S.C.A. §717f(e) (West 2021)).

430. *Id.* (quoting *Atlantic Refin. Co. v. Public Serv. Comm’n of N.Y.*, 360 U.S. 378, 391 (1959)).

431. *Id.* at \*3 (citing *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61745 (Sept. 15, 1999)).

432. *Id.*

433. *Id.*

434. *Id.* (quoting *Myersville Citizens for a Rural Cmty., Inc. v. Federal Energy Regul. Comm’n*, 783 F.3d 1301, 1309 (D.C. Cir. 2015)).

435. *Id.* (quoting 88 FERC at ¶¶ 61747-61748 (emphasis added)).

436. *Id.* at \*12 (quoting *Minisink Residents for Env’t Pres. & Safety v. Federal Energy Regul. Comm’n*, 762 F.3d 97, 111 n.10, 44 ELR 20190 (D.C. Cir. 2014)).

437. *Id.*

438. *Id.* at \*3 (quoting 88 FERC at ¶ 61748).

439. *Id.* at \*13.

440. *Id.*

441. *Id.*

442. *Id.*

443. *Id.*

444. *Id.* (quoting Rehearing Order, J.A. 1155).

445. *Id.*

446. *Id.* at \*14.

447. *Id.* at \*15.

448. *Id.*

449. *Spire Asks U.S. Supreme Court to Block Shutdown of STL Pipeline*, MARCELLUS DRILLING NEWS (Oct. 5, 2021), <https://marcellusdrilling.com/2021/10/spire-asks-u-s-supreme-court-to-block-shutdown-of-stl-pipeline/>.

450. *Id.*

that decision, the Spire STL Pipeline was ordered to cease operations while FERC completed additional assessments of the need for the project.<sup>451</sup> Spire obtained “temporary permission” from FERC to continue operating the pipeline until December 2021, while regulators continued making a final decision.<sup>452</sup>

By December 2021, however, FERC had not finished its review of the project, and extended the temporary certificate for operation of the pipeline “through the completion of the remand proceedings.”<sup>453</sup> The environmental impact study associated with the FERC review is not projected to be complete until October 2022 and a public comment period will follow its release.<sup>454</sup> In February 2022, Spire executives noted that they expect the FERC determination to extend for another year.<sup>455</sup>

## F. Summary of Pipeline Cases and Acts Utilized

In the cases discussed above, a variety of parties filed suit to attempt to halt construction or operation of a pipeline. The ACP was challenged by numerous environmental nonprofits; the MVP was challenged by landowners and environmental nonprofits; the PennEast Pipeline was challenged by a state; the Leidy Project was challenged by an environmental nonprofit; and the Spire STL Pipeline was challenged by an environmental nonprofit. Of the five pipelines analyzed in this Article, only two are still operational or under construction; three of the pipelines have either terminated construction or have been ordered to cease operations.

Atlantic first filed for its certificate of public convenience and necessity for the ACP in 2015. The cases discussed in this Article span from 2018-2020, and the environmental nonprofits involved in the litigation had varying successes. Arguments were made by the environmental organizations under the ESA, MLA, Blue Ridge Parkway Organic Act, CWA, NFMA, and NEPA. The plaintiffs had successes in their respective suits under the ESA, Blue Ridge Parkway Organic Act, NFMA, and NEPA, while they were unsuccessful in their arguments under the MLA and the CWA. After years of litigation, the construction of the pipeline was cancelled in 2020.

Mountain Valley first applied for its certificate of public convenience and necessity for the MVP in 2016, but

began surveying land to gather information for its filing in 2015. The cases discussed in this Article span from 2016-2019 and while the environmental organizations involved in the litigation found success, the landowners involved had varying successes. The environmental organizations’ successful arguments were made pursuant to the CWA, arguing that the Corps’ verification of the project was improper.

Landowners in the 2016 lawsuit argued that Mountain Valley’s use of eminent domain with respect to their land was improper and found success with that argument. But the landowners in the 2019 lawsuit were unsuccessful in arguing that the eminent domain power did not give Mountain Valley the right to immediate possession of their land, and construction of the MVP on those landowners’ land was allowed to proceed without providing compensation first. The MVP is still currently under construction.

PennEast first applied for its certificate of public convenience and necessity for the PennEast Pipeline in 2015. While multiple cases were filed after the certificate was granted, the only case discussed in this Article was that of the 2021 lawsuit argued in front of the Supreme Court, where the state of New Jersey was unable to find success with its arguments. New Jersey argued that it was protected from suit due to sovereign immunity, but the Court found that states were not immune from the federal eminent domain power. Despite PennEast’s win, the pipeline was cancelled in 2021.

Transco first applied for its certificate of public convenience and necessity for the Leidy Project in 2013. In 2017, an environmental nonprofit filed suit against FERC with no success, arguing that FERC improperly issued the certificate to Transco in violation of §401 of the CWA and violated NEPA through an improper EA. Both of these arguments were rejected. The Leidy Project is currently operational.

Spire STL first announced its plans to construct the Spire STL Pipeline in 2016 and first applied for its certificate of public convenience and necessity for the pipeline in 2017. The pipeline became operational in 2019, but in 2021, an environmental nonprofit filed a lawsuit challenging the adequacy of the certificate issued by FERC. The environmental organization was successful in making its arguments, and the court found that FERC did not adequately assess the necessity of the pipeline. In late 2021, the pipeline was ordered to shut down and cease operations.

As this summary illustrates, no consistent patterns can be drawn from this sample of cases. No causes of action result in the most successes for either party. The chart included in the Appendix, which outlines the various causes of action utilized and whether such causes of action were successful, makes that clear.

Rather, the overarching group of techniques used by environmentalists have resulted in the cancellation or shutdown of pipelines. By leveraging claims based on statutory and regulatory arguments, delaying construction through litigation, and strategically assessing the courts that pipeline

451. Allison Kite, *Spire STL Pipeline Can Keep Operating Through the Winter, Regulators Decide*, MO. INDEP. (Dec. 3, 2021), <https://missouriindependent.com/2021/12/03/spire-stl-pipeline-can-keep-operating-through-the-winter-regulators-decide/>.

452. Sebastien Malo, *Spire Asks SCOTUS to Hit Pause on Missouri STL Pipeline Shutdown*, REUTERS (Oct. 4, 2021, 7:58 PM), <https://www.reuters.com/legal/government/spire-asks-scotus-hit-pause-missouri-stl-pipeline-shutdown-2021-10-04/>.

453. Press Release, EDF, FERC Allows Spire STL Pipeline to Operate Through Winter as Anticipated (Dec. 4, 2021), <https://www.edf.org/media/ferc-allows-spire-stl-pipeline-operate-through-winter-anticipated>.

454. Bryce Gray, *Debate Over Spire’s STL Pipeline Will Drag Out for Another Year, Company Says*, ST. LOUIS POST-DISPATCH (Feb. 2, 2022), [https://www.stltoday.com/business/local/debate-over-spires-stl-pipeline-will-drag-out-for-another-year-company-says/article\\_491aae15-8f99-5bec-8e33-0d34f90b858.html](https://www.stltoday.com/business/local/debate-over-spires-stl-pipeline-will-drag-out-for-another-year-company-says/article_491aae15-8f99-5bec-8e33-0d34f90b858.html).

455. *Id.*

cases are litigated in, environmental organizations have had the greatest successes in achieving their desired outcomes. Instead of focusing on one particular cause of action, environmental organizations utilize a wide variety of provisions.

#### IV. Analysis of Environmentalist Efforts

In the cases described above, environmental organizations were able to delay or cancel construction of a number of pipelines. While in some cases the organizations were able to achieve their goals by leveraging merits claims under federal statutes, in others the success came from delaying the pipeline construction through injunctive relief or protracted litigation that eventually caused cancellation due to increasing costs and uncertainty.

This part analyzes these two mechanisms for success, and provides suggestions as to how environmental organizations, or other organizations seeking to fight pipeline construction, can fight the development of pipelines in the United States. Section A focuses on utilizing federal statutes to leverage claims, and Section B focuses on the delay of the permitting and construction processes. Section C analyzes the role the various courts have played in the development of pipeline projects. And Section D addresses the question of whether more pipelines can successfully be built in the United States, given the battles that pipeline companies have faced.

##### A. Leverage Administrative and Statutory Claims

Pipelines must meet a number of requirements before being allowed to pursue construction and operation. Pipeline companies must receive permits, certifications, and approvals, and must ensure that they are following all outlined procedures and conditions in an appropriate manner. Many of these approvals and permits are granted by administrative agencies, which are required to undertake factual inquiries, balancing tests, and legal determinations in making their final decisions.

One of the very first things that a pipeline company is required to do when seeking to construct a new pipeline is to apply for a certificate of public convenience and necessity from FERC. FERC may only grant the certificate if actual need exists or will exist, and the Commission is required to take into account all public interests. While the majority of the time FERC's assessment of public need is correct and its decision can be easily explained, other times the Commission has issued certificates in situations where there in fact is no public need.

For example, in *Environmental Defense Fund v. Federal Energy Regulatory Commission*, FERC improperly granted the certificate. The Spire STL Pipeline had been operational for around two years before this determination was made, and the pipeline was forced to shut down. If there is no need for a pipeline in the first place, then there should be no reason for it to be constructed, and certainly no reason for an agency to grant it a certificate.

Many environmental organizations also find success in arguing claims pursuant to the ESA and NEPA. Often,

certificates of public convenience and necessity are granted conditionally, requiring the pipeline to obtain any other federal authorizations that may be necessary, such as an authorization from FWS. To comply with the ESA, a federal agency is required to ensure that the construction of a pipeline will not jeopardize an endangered or threatened species or its habitat.<sup>456</sup> And FWS is required to engage in formal consultation when an action, such as construction of a pipeline, “may affect” an endangered or threatened species or its habitat.<sup>457</sup>

The consultation process is very detailed, and the BiOp issued by FWS must suggest or recommend actions that correspond with the factual findings of the consultation.<sup>458</sup> Often, however, agencies under conservative presidents are encouraged to simply push pipeline projects along, providing authorizations when they should have recommended mitigation measures. The ESA is a “roadblock statute,” meaning that if it is violated, there is a flat prohibition on the associated activity until the ESA can be adequately complied with. An example of the successes that can stem from utilizing the ESA is outlined in *Defenders of Wildlife v. U.S. Department of the Interior*.

NEPA requires federal agencies undertaking major actions that will impact the quality of the environment to conduct an EIS. Because pipeline construction almost always has a significant impact on the quality of the environment, EISs are generally required. FERC is generally the federal agency required to conduct an EIS, but in some cases, such as *Cowpasture River Perseveration Ass'n v. U.S. Forest Service*, cooperating agencies are responsible for EISs as well. While NEPA does not mandate particular results, it requires careful consideration of alternative actions that may be taken and a “hard look” at all environmental consequences. Failure to adequately perform these two requirements are common reasons for courts to find a NEPA violation, often requiring a remand and further agency consideration.

On the administrative side, one of the most successful arguments used by parties challenging pipeline construction is that the involved agency did not adequately explain its reasoning for making its decision on a specific issue, thus making the decision arbitrary and capricious. Out of the 11 cases discussed in this Article, six involved successful challenges by plaintiffs against the pipeline companies. Of those six, five cases involved a lack of adequate explanation for the decision made.

In *Sierra Club v. U.S. Department of the Interior*, *Defenders of Wildlife v. U.S. Department of the Interior*, and *Cowpasture River Preservation Ass'n v. U.S. Forest Service*, the issues were centered around the agencies' decisions to change direction from their prior course or failing to consider evidence or practices previously outlined by the relevant agencies. When an agency wishes to change course from its prior positions, it must have a well-reasoned explanation as to why it did so. With President Trump making

456. *Defenders of Wildlife v. U.S. Dep't of the Interior*, 931 F.3d 339, 343, 49 ELR 20124 (4th Cir. 2019).

457. *Id.*

458. *See generally id.*

a hard push to expand energy infrastructure in the United States upon his election, it made sense that the administrative agencies would be doing their best to push pipeline projects through.

However, as these cases illustrate, projects cannot be pushed forward and expedited if adequate review and reasoning do not go into the decisions made. With a drastic shift in viewpoint on pipelines between presidencies, this makes looking at decisions to determine whether adequate, methodical reasoning was provided essential for parties looking to bring cases against pipeline companies. If the proper explanation and reasoning was not supplied, the decision will be determined to be arbitrary and capricious.

Additionally, the other two cases in which the plaintiffs were successful, *Sierra Club v. U.S. Army Corps of Engineers* and *Environmental Defense Fund v. Federal Energy Regulatory Commission*, involved arguing arbitrary and capricious decisionmaking by agencies. While it is true that various successful causes of action were brought forward in all of these cases with statutory claims, the administrative claim that decisions were arbitrary and capricious was usually what the courts relied upon in handing down their final decisions. By utilizing statutes that require extensive agency oversight and involvement, environmental organizations and other plaintiffs were able to tie together the statutory and administrative claims to put forth meritorious arguments for the court to rule on. In all of the cases analyzed here in which an agency flip-flopped its position and did not provide adequate reasoning for its decision, the plaintiffs found success.

While not all statutory and administrative claims will result in a full shutdown of the pipeline, as was the case for the Spire STL Pipeline, leveraging these claims helps to ensure that pipelines are being developed in a manner that is more considerate of the environment. Additionally, putting forth claims that have merit often result in decisions being sent back to agencies so that they can review them and make additional determinations. This can help slow down the construction processes, and will be discussed further in the next section.

## B. Prolong the Permitting and Construction Processes

The permitting process that takes place prior to approval for construction of a pipeline is lengthy. Prior to construction, a pipeline company must engage in a market assessment, participate in FERC's pre-filing process, submit a formal application to FERC for a certificate of public convenience and necessity, wait for FERC's issuance of the certificate, and obtain any other outstanding authorizations.<sup>459</sup> Once these steps have been completed, construction of the pipeline may begin.<sup>460</sup> But organizations, such as nonprofit

environmental groups, often disrupt this process through protests and lawsuits during any of the phases described above, including construction. There are a number of examples in which such lawsuits and protests may not have been the sole reason for the cancellation of a pipeline, but they certainly contributed to the decision.

The ACP first applied for its certificate from FERC in 2015, but developers spent nearly six years battling litigation. Lawsuits filed against construction of the ACP had mixed results; sometimes environmentalists found success, and other times their arguments were shot down. Some cases were extremely lengthy, such as the *Cowpasture* case, which eventually made its way up to the Supreme Court. Upon announcing the cancellation of the pipeline in 2020, delays in construction and uncertainties with respect to costs were cited as the primary reasons for the cancellation. The time spent in court, the money spent in court, and the money spent associated with the delays were successful in making the project impractical for the developers.

Similar to the ACP, the possibility of future lawsuits and the time and costs associated with them played into the cancellation of the PennEast Pipeline. PennEast also had to deal with a lawsuit that eventually ended up in the Supreme Court, taking considerable time. Despite the Supreme Court win for the pipeline company, the time spent in litigation, the potential future time in court, and the costs associated with both simply made it inappropriate to continue spending money. The PennEast Pipeline cancellation is a prime example of how prolonging the permitting and construction of a pipeline can kill it.

Mountain Valley first applied for its MVP certificate from FERC in 2016, and the project was scheduled to be completed in 2018. The first case discussed above detailed landowners' claims against the pipeline company, arguing that Mountain Valley did not have the right of eminent domain to access their property. This slowed down Mountain Valley even applying for its certificate, as it originally sought to do in 2015. In 2018, when the pipeline was supposed to be completed, the Sierra Club was successful in requiring Mountain Valley to obtain an entirely new verification and reinstatement from the Corps, delaying construction through West Virginia. In 2019, landowners once again brought a suit against the MVP and while unsuccessful with their claims, this also contributed to a delay in the progression of the pipeline. The MVP is under construction, but is still not complete as of June 2022, four years after its initial completion deadline. While Mountain Valley previously established a new deadline of summer 2022 for operation of the MVP, reports in February 2022 indicated that deadline was no longer feasible.

As detailed by these three pipelines and their associated litigation over the years, simply spending time in court can sometimes be enough to shut down the construction of a pipeline. Both Atlantic and PennEast found success at the Supreme Court level for their most recently litigated cases, but the time and money spent fighting the legal battles was enough to warrant cancellation. After pipeline companies go through a number of cases in court, even when they win on their arguments, there is always the potential for addi-

459. INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA, PIPELINE PERMITTING, <https://www.ingaa.org/File.aspx?id=34233&cv=46cd2a03>.

460. *Id.*

tional lawsuits to be brought to continue to try and halt construction. While the MVP is still under construction, its completion deadline received an extension of four years, costing Mountain Valley considerable resources.

It is evident that when organizations like nonprofit environmental groups bring lawsuits against pipeline companies, it is a powerful tool in prolonging the permitting and construction processes of the pipeline, potentially causing enough disruption to shut down a pipeline project. As one article noted, “[s]low it down with . . . lawsuits and protests and any kind of action you can, and eventually, you can kill it.”<sup>461</sup>

### C. *The Role of the Fourth Circuit, D.C. Circuit, and Supreme Court*

Part III of this Article analyzed a number of cases that were filed on the East Coast that involved pipeline construction and operation. Notably, many of these cases were filed and decided in the Fourth Circuit, D.C. Circuit, and Supreme Court. While the following cannot be said for every case, many of the cases dealing with the environment filed in the D.C. Circuit and the Fourth Circuit have resulted in environmental organizations finding success with their arguments. In recent years in the Supreme Court, however, environmental organizations have increasingly been unsuccessful in obtaining the result they desire. The trends seen from these courts, which hear many pipeline cases, may indicate that these courts currently tend to favor environmentalists substantially more than pipeline companies, but that pipeline companies may find more success with conservative courts.

The D.C. Circuit has handed down opinions supporting environmentalists in recent years, both pipeline-related and not, but its stance on environmentalism has been noted for decades. As early as the 1970s, the D.C. Circuit has been known for its “central role in the development of environmental law.”<sup>462</sup> Many federal environmental statutes, such as the Resource Conservation and Recovery Act (RCRA) and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),<sup>463</sup> may only be litigated in the D.C. Circuit.

In 2017, the D.C. Circuit ordered FERC to analyze and take into consideration the potential indirect and long-term impacts of greenhouse gas emissions associated with pipeline development.<sup>464</sup> And in 2021, a D.C. Circuit decision found that FERC was not adequately taking into

consideration the impacts of a pipeline project on climate change and environmental justice.<sup>465</sup> Only two of the cases discussed in Part III were litigated in the D.C. Circuit; in one,<sup>466</sup> environmentalists found success, but in the other,<sup>467</sup> the pipeline companies found success. Despite this even split in the two cases analyzed here, the D.C. Circuit has made its mark as a court that tends to lean more in favor of environmentalists than others.

Similarly, the Fourth Circuit has begun to be known as a court that often sides with environmental organizations when dealing with pipeline cases. Out of the six cases argued in the Fourth Circuit that were discussed in Part III, only two of them went in favor of the pipeline company. With the Fourth Circuit recently overturning two permits granted to the MVP in 2022, it is continuing to hand down opinions supporting environmentalist arguments. After one of the two cases in which MVP permits were overturned, it was noted that while it is true that the Fourth Circuit has sided with Mountain Valley in some cases, the court’s “overall record has evoked a saying among pipeline opponents: ‘May the Fourth be with you.’”<sup>468</sup>

The Supreme Court, on the other hand, has tended to side with pipeline companies over environmentalists. The Supreme Court handed down two monumental decisions related to pipeline construction in 2020 and 2021, the *Cowpasture River Preservation Ass’n* case (7-2 vote) and the *PennEast Pipeline Co., LLC* case (5-4 vote). These two decisions were the biggest pipeline-related cases the Supreme Court has heard in recent years, and both cases resulted in the pipeline companies finding success in the judicial branch. Significantly, both cases overturned opinions from lower courts that had supported the arguments of the environmentalists.

While it is true that jurisdictional rules play a role in determining which court a case is litigated in, the trends that these courts have established are still extremely important for both environmentalists and pipeline companies to consider when dealing with pipeline-related lawsuits. The Fourth Circuit and D.C. Circuit seem to be more willing to support environmentalists, but not every claim will be successful in those courts. Arguments based off of roadblock statutes like the ESA or a failure of an agency to adequately conduct its necessary reviews without providing explanation tend to be more successful. However, as is the case in most courts, arguments that require extremely lenient interpretation of statutes and that are more of a “stretch” tend to not be successful.<sup>469</sup>

The Supreme Court has bent over backwards to find arguments that support the position of the pipeline companies in its recent decisions. But even with pipeline companies finding success with the Supreme Court, the companies that did find

461. *Troubling: PennEast Pipeline Withdraws NJ Eminent Domain Lawsuits*, MARCELLUS DRILLING NEWS (Sept. 23, 2021), <https://marcellusdrilling.com/2021/09/troubling-penneast-pipeline-withdraws-nj-eminent-domain-lawsuits/>.

462. Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717, 1717 (1997).

463. *See id.*; 42 U.S.C. §§6901-6992k, ELR STAT. RCRA §§1001-11011; 42 U.S.C. §§9601-9675, ELR STAT. CERCLA §§101-405.

464. Catherine Morehouse, *DC Circuit Orders FERC to Analyze Climate, Environmental Justice More Thoroughly*, UTIL. DIVE (Aug. 4, 2021), <https://www.utilitydive.com/news/dc-circuit-calls-on-ferc-to-analyze-climate-environmental-justice-more-tho/604481/>.

465. *Id.*

466. *See supra* Section III.E.1.

467. *See supra* Section III.D.1.

468. Hammack, *supra* note 354.

469. *See generally* *Appalachian Voices v. State Water Control Bd.*, 912 F.3d 150 (4th Cir. 2019); *Delaware Riverkeeper Network v. Federal Energy Regul. Comm’n*, 857 F.3d 388 (D.C. Cir. 2017).



support still ended up cancelling their pipeline projects. These trends in these three courts that hear many pipeline cases teach important lessons for parties preparing for litigation. As one reporter noted, “If you can take the time and expense of fighting pipeline opponents all the way to the Supreme Court, win, yet still are forced to give up, why even try?”<sup>470</sup>

#### D. *The Future of Pipeline Construction in the United States*

Pipeline companies have faced many challenges from environmentalists and landowners while trying to construct new pipelines, resulting in many pipeline projects being cancelled, but pipeline construction in the United States is far from dead. In 2021, while there were 10 pipeline projects cancelled and five temporarily put on hold, there were also 14 pipeline projects that were completed in the United States.<sup>471</sup> Of those 14, six projects were new construction, five were expansions, two reversed the commodity’s direction, and one changed to a new commodity carried by the pipeline.<sup>472</sup> While the 10 cancellations and 14 completions may seem like close numbers, many of the pipelines that were cancelled in 2021 had been scheduled for completion many years prior, and had been fighting legal battles for years. The cancellations were not instantaneous.

In 2009, it took approximately 386 days for a pipeline to receive federal approval to begin construction of the project.<sup>473</sup> In 2018, however, that amount of time increased to a staggering 587 days.<sup>474</sup> One of the attorneys who led the fight against the Dakota Access Pipeline said, “The era of multibillion dollar investment in fossil fuel infrastructure is over. Again and again, we see these projects failing to pass muster legally and economically in light of local opposition.” While it is true that local opposition plays a large role in the success of these operations, it does not mean that investment in such projects will end.

Companies understand, now more than ever, that pipeline construction is not as smooth sailing as it once was in the United States. Almost every pipeline project in recent years has faced legal battles, delaying construction and increasing the costs associated with such construction. Additionally, protesters have succeeded in delaying projects even further. It is likely that many pipeline companies are working on strategies to address these concerns and prepare for the battles that they have recently been facing. Project budgets will likely increase, and preparation for project development will likely begin much earlier

than previously done. It is true that companies will not be able to foresee every hurdle they will have to overcome, but recent developments in the industry will better prepare them for when such problems do arise.

Over the coming years, with the strong push toward renewables and away from fossil fuels, it is inevitable that pipeline construction in the United States will slow down drastically from that which existed in the early years of the 21st century. But the future of such construction is not set in stone. While President Joe Biden will be in office until 2024, and his agenda with respect to energy relies quite heavily on the development of renewables, the United States has drastic shifts in energy policies when different presidents take office. If a president is elected after President Biden who is more focused on energy independence, like President Trump was, then the development of pipeline projects may have some support in the executive branch, and thus with agencies, once again.

Overall, it is likely that pipeline projects will continue to be developed in the United States and pipelines will continue to be built for quite some time. However, the number of pipelines built each year will likely decrease over time as the country, and eventually the world, strives toward cleaner energy and compliance with the Paris Climate Agreement.<sup>475</sup> If pipeline companies wish to have the best chances of success in their efforts, they will have to adapt to the changing environment of pipeline development.

Companies will have to recognize that they will face legal battles if they are not complying with federal environmental laws, increasing project costs and construction time. And no matter how well a project complies with such federal laws, opposition from local landowners, environmentalists, and Native Americans will surely persist. Pipeline construction may not be dead just yet, but these groups will continue to do everything they can to fight toward that end.

## V. Conclusion

Pipelines will undoubtedly continue to be proposed and built in the coming years, as there is a legitimate need for natural gas and oil in the energy market as it currently stands. These pipelines, however, will often cause serious environmental degradation, especially when legislative acts and regulatory processes are not followed as they should be. Additionally, the indirect effect of continuing to utilize fossil fuels for energy production will continue to put harmful pollutants into the atmosphere. Environmental organizations that support renewable energy development and decreased reliance on fossil fuels will

470. Ben Lieberman, *For Energy Infrastructure Projects, Even Supreme Court Victories Mean Nothing*, COMPETITIVE ENTER. INST. (Dec. 9, 2021), <https://cei.org/blog/for-energy-infrastructure-projects-even-supreme-court-victories-mean-nothing/>.

471. Jim O’Sullivan, *In 2021, 14 Petroleum Liquids Pipeline Projects Were Completed in the United States*, U.S. ENERGY INFO. ADMIN. (Jan. 19, 2022), <https://www.eia.gov/todayinenergy/detail.php?id=50938>.

472. *Id.*

473. Hiroko Tabuchi & Brad Plumer, *Is This the End of New Pipelines?*, N.Y. TIMES (July 8, 2020), <https://www.nytimes.com/2020/07/08/climate/dakota-access-keystone-atlantic-pipelines.html>.

474. *Id.*

475. The Paris Climate Agreement focuses on reducing the global temperature increase to two degrees Celsius and working toward an even lower number of 1.5 degrees Celsius in this century. This is to be done by reducing global greenhouse gas emissions, which are associated with fossil fuels. Today, there are 192 Parties to the Paris Climate Agreement, including 191 countries and the European Union. United Nations, *The Paris Agreement*, <https://www.un.org/en/climatechange/paris-agreement> (last visited May 6, 2022).

also likely continue to fight the construction and operation of these pipelines.

In fighting pipelines, environmental organizations and other groups wishing to battle pipeline construction have a number of tools at their disposal. Organizations can seek to bring lawsuit after lawsuit against a pipeline company in an attempt to slow down development and increase the costs associated with the continued construction of the pipeline, often making it impractical for the pipeline com-

pany to continue pursuing the project. Some of those lawsuit claims may not be successful in court, but they are all the more powerful when they are. When organizations can leverage administrative and statutory claims, showing that a pipeline company or the organizations authorizing the pipeline’s construction did so improperly, there is nowhere for the company to turn other than correcting their errors or ending up with a complete shutdown.

### Appendix

	General Overview					Causes of Action					
	Pipeline	Court	Year	NFMA	NEPA	ESA	Eminent Domain	CWA	MLA	BRPOA*	NGA
Sierra Club v. U.S. Department of the Interior	Atlantic Coast Pipeline	4th Circuit	2018								
Appalachian Voices v. State Water Control Board	Atlantic Coast Pipeline	4th Circuit	2019								
Defenders of Wildlife v. U.S. Department of the Interior	Atlantic Coast Pipeline	4th Circuit	2019								
Cowpasture River Preservation Association v. U.S. Forest Service	Atlantic Coast Pipeline	4th Circuit	2019								
Cowpasture River Preservation Association v. U.S. Forest Service	Atlantic Coast Pipeline	U.S. Supreme Court	2020								
Mountain Valley Pipeline, LLC v. McCurdy	Mountain Valley Pipeline	West Virginia Supreme Court	2016								
Sierra Club v. U.S. Army Corps of Engineers	Mountain Valley Pipeline	4th Circuit	2018								
Mountain Valley Pipeline, LLC v. 6.56 Acres of Land	Mountain Valley Pipeline	4th Circuit	2019								
PennEast Pipeline Co., LLC v. New Jersey	PennEast Pipeline	U.S. Supreme Court	2021								
Delaware Riverkeeper Network v. Federal Energy Regulatory Commission	Leidy Southeast Project	D.C. Circuit	2017								
Environmental Defense Fund v. Federal Energy Regulatory Commission	Spire STL Pipeline	D.C. Circuit	2021								

\* Blue Ridge Parkway Organic Act. Light gray: Court rules in favor of environmentalists and landowners. Dark gray: Court rules in favor of pipeline companies and agencies.