

Nos. 18-1584 & 18-1587

In the Supreme Court of the United States

UNITED STATES FOREST SERVICE, ET AL., PETITIONERS,

v.

COWPASTURE RIVER PRESERVATION ASSOCIATION, ET AL.

ATLANTIC COAST PIPELINE, LLC, PETITIONER,

v.

COWPASTURE RIVER PRESERVATION ASSOCIATION, ET AL.

ON WRIT OF CERTIORARI TO
THE FOURTH CIRCUIT COURT OF APPEALS

**BRIEF AMICUS CURIAE OF VIRGINIA
IN SUPPORT OF RESPONDENTS**

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INTEREST OF THE AMICUS CURIAE

This case impacts Virginia more than any other State. 301 miles of the proposed Atlantic Coast Pipeline—50% of the pipeline’s total length—would be located in Virginia and carve a path directly through some of the Commonwealth’s most valuable natural resources. One of those resources is the Appalachian Trail, which gently winds across Virginia for more than 500 of its 2,000 miles—a greater percentage than any other State.

Virginia thus has a strong interest in the Court’s consideration and resolution of this matter. Conserving natural resources and historical sites is critically important to Virginians and is enshrined in the state Constitution. See Va. Const. art. XI, § 1. But for Virginia’s natural resources to be adequately protected, federal agencies charged with administering federal lands within its borders must fulfill their statutory obligations. The Forest Service did not do so here, to the detriment of Virginians and others who enjoy the natural treasures in the pipeline’s path. The Commonwealth likewise has an interest in ensuring the Court is presented with an accurate picture of need for the pipeline, its (purported) benefits, and the burdens it would impose on Virginians and others.

SUMMARY OF ARGUMENT

The Atlantic Coast Pipeline is a proposed 600-mile-long natural gas pipeline that would begin in West Virginia and terminate in two different locations in North Carolina and Virginia. The pipeline would bisect Virginia from its northwestern corner to its southern border before splitting in two and turning northeast towards the Atlantic Ocean. Along its proposed route, the pipeline would run directly through several of Virginia's most cherished places—the George Washington National Forest, the Blue Ridge Parkway, and the Appalachian Trail.

The pipeline company (Atlantic) claims the project is necessary to address an unmet and growing demand for natural gas in Virginia and North Carolina. But that claim does not withstand scrutiny. Indeed, recent analyses indicate that the demand for natural gas will remain flat or decrease for the foreseeable future and can be met with existing infrastructure.

Beyond offering dubious benefits, the pipeline unquestionably threatens some of Virginia's most valued natural sites. The George Washington National Forest, the Blue Ridge Parkway, and the Appalachian Trail are woven into the fabric of Virginia's history, offering solitude and recreation to Virginians and visitors for generations, bringing tourism and its corresponding benefits to the neighboring communities.

Despite the undisputed (and indisputable) value of the natural resources in the pipeline's path, the United States Forest Service failed to conduct the meticulous review of Atlantic's permit application called

for by the Service's governing statutes and regulations. Instead, the permitting process was rushed and slipshod and driven by Atlantic's arbitrary deadlines. Given the chaotic nature of the agency proceedings, it is unsurprising that the Fourth Circuit invalidated the permit on three separate grounds that are entirely independent of the question whether the Forest Service has authority to grant Atlantic permission to cross the Appalachian Trail.

Atlantic and the Forest Service challenge none of those alternative holdings. As a result, the challenged permit will be invalid regardless of how the Court resolves the question on which it granted review. What is more, the Fourth Circuit's decision specifically requires the Service to consider alternative routes that do not cross National Forest land. For that reason, it is highly unclear if the issue before this Court—whether the Mineral Leasing Act would authorize the Forest Service to issue a pipeline right-of-way across the Appalachian Trail—will re-emerge. The Forest Service's arguments to the contrary betray its intent to repeat the shoddy review conducted the first time around, ignoring its statutory and regulatory mandate to give due consideration to alternative routes for the pipeline. This Court should not indulge the agency's abdication of its critical responsibilities.

Virginia agrees with the arguments made by respondents and their other State amici and urges this Court to affirm if it reaches the question presented. In the alternative, Virginia asks the Court to dismiss the writ of certiorari given the Fourth Circuit's (entirely

correct) conclusion that the challenged permit fails for numerous other reasons. Because respondents and their other State amici aptly present the arguments for affirming on the specific question on which this Court granted review, this brief focuses on the Fourth Circuit’s alternative grounds for invalidating the challenged permit.

ARGUMENT

I. The Pipeline Threatens Virginia’s Natural Resources Without Clear Corresponding Benefits

1. In their effort to garner public and political support for the pipeline project, Atlantic and its allies have insisted that it will address a growing and unmet demand for natural gas from customers in Virginia and North Carolina. See, *e.g.*, West Virginia Amicus Br. 23 (invoking the interests of “[r]esidents of North Carolina and Virginia”). But there is reason to doubt those claims.

In its application for a certificate of public convenience and necessity from the Federal Energy Regulatory Commission (FERC), Atlantic cited studies forecasting that “demand for natural gas for power generation in Virginia and North Carolina [will] grow 6.3 percent annually between 2014 and 2035.”¹

¹ Atlantic Coast Pipeline, *Abbreviated Application for a Certificate of Public Convenience and Necessity and Blanket Certificates, Resource Report 1: General Project Description*, Federal Energy Regulatory Commission Case No. CP15-554, September 18, 2015, p. 1–6.

Its pipeline, Atlantic argues, is needed to meet the growing energy demands of these customers. See Atlantic Br. 1 (referencing “consumers in Virginia and North Carolina”).²

Atlantic’s argument, however, rests on a faulty premise. In 2017, for example, a federal agency charged with collecting information to promote sound energy policymaking projected that demand for natural gas for electricity would actually *decrease* between 2015 and 2020—and not return to 2015 levels until 2034.³

The numbers for Atlantic have not improved since then. In its most recent long-term Integrated Resource Plan (IRP), the electric utility affiliate of Dominion Energy—the majority stakeholder in the pipeline joint venture—modeled five scenarios for meeting electricity demand through 2033. All but one of the models

² As Atlantic’s filing indicates, FERC has responsibility for determining whether there is a market need for the pipeline. Although FERC answered that question affirmatively, it focused narrowly on Atlantic’s gas-transportation contracts with affiliated utilities without addressing the likelihood that demand for natural gas would remain flat or decrease in coming years. Cf. Dissent on Order Issuing Certificates and Granting Abandonment Authority (Mountain Valley Pipeline and Atlantic Coast Pipeline), Commissioner Cheryl A. LaFleur (Oct. 13, 2017) (“I believe that evidence of the specific end use of the delivered gas within the context of regional needs is relevant evidence that should be considered as part of our overall needs determination.”).

³ See U.S. Energy Information Administration, Annual Energy Outlook 2017, at 70, *available at*, [https://www.eia.gov/outlooks/aeo/pdf/0383\(2017\).pdf](https://www.eia.gov/outlooks/aeo/pdf/0383(2017).pdf). This estimate assumes that the Clean Power Plan, which the Trump administration has rescinded, is not implemented.

showed no significant increase in natural gas consumption, and the only model that included annual consumption numbers actually showed a decrease at the end of that time frame.⁴

Even these estimates may be overstated. In 2018, Virginia’s State Corporation Commission rejected Dominion’s annual IRP, expressing “considerable doubt regarding the accuracy and reasonableness of the Company’s load forecast.”⁵ For one thing, the Commission pointed out that Dominion’s forecasted load growth exceeded the forecast of the regional transmission organization by more than 50%. *Id.* The Commission also criticized Dominion for consistently failing to meet expectations, observing that “[t]he record . . . reflects that the load forecasts contained in the Company’s past IRPs have been consistently overstated, particularly in years since 2012, with high growth expectations despite generally flat actual results each year.” *Id.*

Complicating matters further, natural gas is increasingly at a competitive disadvantage due to technical advances and cost reductions in renewable

⁴ See Institute for Energy Economic and Financial Analysis (IEEFA), *The Vanishing Need for the Atlantic Coast Pipeline: Growing Risk That the Pipeline Will Not Be Able to Recover Costs From Ratepayers*, at 5 (Jan. 2019) (IEEFA Analysis), available at, https://ieefa.org/wp-content/uploads/2019/01/Atlantic-Coast-Pipeline_January-2019.pdf (estimating consumption for four models based on information provided in IRP).

⁵ *In re: Va. Elec. & Power Co.’s Integrated Resource Plan filing*, No. PUR-2018-00065, 2018 WL 6524202, at *5 (Va. SCC Dec. 7, 2018).

energy. IEEFA Analysis at 10. Unfortunately for Virginians, regardless of the need for the pipeline (and whether it is ultimately completed), the ever-rising costs of building it will be passed on to consumers by the companies that have contracted with Atlantic to carry gas through the pipeline—all of which are affiliates of the pipeline’s sponsors, Dominion, Duke Energy, and Southern Company. See Robert Zullo, *Atlantic Coast Pipeline’s Projected Price Tag Swells By Up To \$1.5 Billion*, Richmond.com (Feb. 22, 2018).⁶

2. Although demand for the pipeline may be questioned, there is no debate about the value of the natural resources it will invariably impact. In Virginia alone, the proposed route crosses three celebrated natural features: the George Washington National Forest, the Blue Ridge Parkway, and the Appalachian Trail.

a. *The George Washington National Forest*. Combined with the adjacent Jefferson National Forest, the George Washington National Forest spans more than 1.6 million acres, extending along the Appalachians and following Virginia’s northwest border with Kentucky and West Virginia.⁷ Together, the two forests “afford virtually every type of outdoor recreation activity . . . imagin[able],” including “[h]iking, mountain biking,

⁶ Available at, https://www.richmond.com/business/atlantic-coast-pipeline-s-projected-price-tag-swells-by-up/article_bd8f073d-f563-511e-8988-b93cb1874a05.html; see also IEEFA at 2 (explaining that “all of the[] transportation contracts are with regulated utility companies affiliated with the three ACP-LLC partners”).

⁷ *George Washington and Jefferson National Forests*, Virginia.org, available at, <https://www.virginia.org/gwjnf>.

camping, . . . fishing . . . bird watching, horseback riding, photography, orienteering, and cross-country skiing.”⁸ Given their natural beauty and varied offerings, it is not surprising the forests attract three million visitors per year.⁹

b. *The Blue Ridge Parkway*. The Blue Ridge Parkway runs for nearly 500 miles through Virginia and North Carolina, following the Blue Ridge Mountains and linking the Shenandoah National Park to the Great Smoky Mountains National Park. It was the product of numerous public works projects undertaken in the 1930s, which helped the Appalachian region climb out of the Great Depression. Labeled “America’s [f]avorite [d]rive,” the Parkway boasts “stunning long-range vistas and close-up views of the rugged mountains and pastoral landscapes of the Appalachian Highlands.”¹⁰ According to the National Park Service, the Parkway “protect[s] a diversity of plants and animals, and provid[es] opportunities for enjoying all that makes this region of the country so special.” *Id.*

c. *The Appalachian Trail*. The Appalachian Trail stretches from Maine to Georgia, with more than a

⁸ *George Washington and Jefferson National Forests*, U.S. Forest Service, available at, <https://www.fs.usda.gov/recmain/gwj/recreation>.

⁹ *George Washington and Jefferson National Forests: A Weeks Act Profile*, Nationalforest.org, available at, <https://www.nationalforests.org/blog/a-weeks-act-profile>.

¹⁰ *Blue Ridge Parkway*, National Park Service, available at, <https://www.nps.gov/blri/index.htm>.

quarter of its 2,000 miles traversing Virginia.¹¹ The trail has a rich history, both in its creation nearly 100 years ago and in the public-private partnerships that have stewarded its preservation through the years. See 16 U.S.C. § 1246(a)(1) (entrusting private landowners with the responsibility to manage the portions of the Trail on their lands); see also Appalachian Trail Conservancy Amicus Br. 27–29 (describing role of local governments and conservancy groups in managing the Trail). Virginia is home to several of the Trail’s most visited sites, including Grayson Highlands and Mount Rogers. These and other highlights draw countless visitors each year to enjoy the solitude and natural beauty of the Trail—the same attributes that led Congress to designate the Trail as one of the first two scenic trails under the National Trails System Act more than fifty years ago.

II. The Challenged Permitting Decision Violated Numerous Federal Statutes and Regulations

Because it planned to cross National Forest land, Atlantic needed a permit from the United States Forest Service—an agency that describes its own mission as “Caring for the Land and Serving People.”¹²

¹¹ *Virginia’s Appalachian Trail*, Virginia.org, available at, <https://www.virginia.org/appalachiantrail/>.

¹² *What We Believe*, U.S. Forest Service, available at, <https://www.fs.usda.gov/about-agency/what-we-believe>.

Unfortunately, the Service’s evaluation of the permit fell far short of that promise.¹³

1. a. Initially, the Forest Service appeared skeptical of the pipeline project and prepared to conduct the type of rigorous review envisioned by its governing statutes and regulations.

In October 2016, the Service expressed concern about Atlantic’s plan to construct the pipeline on the steep slopes of the George Washington and Monongahela National Forests. Because the project would need to be consistent with “Forest Plan standards that limit activities in areas that are at high risk for slope and soil instability,” the Service explained that it needed further evidence before it could continue processing Atlantic’s permit application. Pet. App. 4a. Specifically, the Forest Service requested plans for ten sites that could demonstrate that Atlantic’s technology would meet stabilization requirements. *Id.* Those plans would be “merely representative,” the Service cautioned: “Should the ACP project be permitted, multiple additional high hazard areas [would] need to be addressed on a site-specific basis.” *Id.* at 5a. Months later, in February 2017, the Forest Service confirmed that all ten site-specific stabilization designs would be required, informing Atlantic that it was “not

¹³ The Forest Service was not alone in failing to meet its statutory and regulatory obligations when it reviewed the pipeline project. The permit review the U.S. Park Service conducted before allowing Atlantic to cross the Blue Ridge Parkway was similarly flawed. See *Sierra Club v. U.S. Dep’t of the Interior, et al.*, 899 F.3d 260, 290–94 (4th Cir. 2018).

comfortable” with proceeding with the permit without seeing the plans. *Id.* at 7a.

In December 2016, Atlantic circulated a timeline for FERC and the Forest Service’s review, looking to complete the administrative process by October 2017. Consistent with that timeline, FERC completed its draft Environmental Impact Statement (EIS) in late 2016. In April 2017, the Forest Service commented on the draft, noting repeatedly that FERC lacked adequate information to draw the conclusions it reached, particularly about sensitive soils and steep slopes. Pet. App. 9a. Most significantly, the Forest Service commented that “[n]o analysis of a National Forest Avoidance Alternative has been conducted, and environmental impacts of this alternative have not been considered or compared to the proposed action.” *Id.* at 38a. The Service explained that it “[could not] support the recommendation that the National Forest Avoidance Alternative be dropped from consideration” and “reiterate[d]” its request for evaluation of such an alternative. *Id.* at 39a.

Around the same time, the Forest Service provided critical comments on Atlantic’s draft biological evaluation. In particular, the Service cautioned that Atlantic’s plans would “likely . . . create long-term negative impacts to the ecosystem,” including detrimental impacts on “potentially sensitive species.” Pet. App. 9a–10a.

b. Just a month later, however, the Forest Service abruptly changed course. Without acknowledging its change of position, the Service now told Atlantic that the eight additional site-specific exemplars it had

requested *would not* be required and the two previously provided designs *would* be adequate to proceed with the permit review. Pet. App. 11a.

In line with Atlantic’s timeline, the Forest Service released its draft Record of Decision, which proposed granting the permit and exempting the pipeline from a number of forest plan standards. Directly contradicting its prior position, the Forest Service agreed to drop its request for an analysis of alternatives that did not cross National Forest land, stating that such alternatives—never analyzed—“[would] not offer a significant environmental advantage when compared to the proposed route or would not be economically practical.” Pet. App. 11a–12a. In response to comments, the Service stated that FERC had “adequate[ly] consider[ed]” alternatives and “concluded these alternatives would not provide a significant environmental advantage over a shorter route that passes through National Forests.” *Id.* at 12a. In a similar about-face, the Service responded to Atlantic’s updated biological evaluation by amending its previous conclusion to find that the pipeline would *not* result in a loss of sensitive species. *Id.* at 13a.

2. Given the Forest Service’s whiplash-inducing approach to Atlantic’s permit, it is hardly surprising that the Fourth Circuit invalidated its decision on a number of separate grounds.

a. Observing that the National Environmental Policy Act (NEPA) requires “particular care” when a proposed project would cross a National Forest, the court of appeals found that the Service had failed to

offer a “detailed discussion” of steps Atlantic could take to mitigate landslide risks, erosion impacts, and water-quality degradation. Pet. App. 43a. The court recognized that the Forest Service had expressed numerous concerns in its comments on FERC’s draft EIS and had insisted that the permit should not be issued unless Atlantic provided ten site-specific designs to demonstrate that its technology would be effective at mitigating the risks posed by steep slopes. *Id.* Given statements made in the final EIS—including that “slope instability/landslide risk reduction measures have not been completed or have not been adopted”—the court determined that the final EIS could not have addressed the Service’s concerns. Pet. App. 44a. In other words, “[t]o support its decision to approve the project and grant the [permit], the Forest Service relied on the very mitigation measures it previously found unreliable.” *Id.* In the Fourth Circuit’s view, that was “insufficient to satisfy NEPA, and did not constitute the necessary hard look at the environmental consequences of the ACP project.” *Id.* at 45a.

b. The Fourth Circuit also found that the Service had not complied with its Planning Rule when it applied project-specific amendments to 13 standards, including nine amendments related to the plan for the George Washington National Forest. Pet. App. 18a; see also Planning Rule, 77 Fed. Reg. 21,162 (U.S. Dep’t of Agric. April 9, 2012); 36 C.F.R. §§ 219.8–219.11. Those amendments relaxed forest plan standards for soil, water, riparian, threatened and endangered species, and recreational and visual resources. Despite

acknowledging that the purpose of the amendments was to allow Atlantic to meet the requirements of the National Forest Management Act (NFMA) and accompanying regulations (because it could not meet those standards *without* amendments), the Service “fail[ed] to analyze whether the substantive requirements of the 2012 Planning Rule [were] directly related to the purpose of the amendments.” Pet. App. 19a. As the Fourth Circuit explained: “The lengths to which the Forest Service apparently went to avoid applying the substantive protections of the 2012 Planning Rule—its own regulation intended to protect national forests—in order to accommodate the ACP project through national forest land on Atlantic’s timeline are striking, and inexplicable.” Pet. App. 27a.

c. Finally, the court of appeals found that the Forest Service had violated NEPA and other governing laws by failing to consider alternatives that did not cross National Forest land. See 42 U.S.C. § 4332(C)(iii) (requiring consideration of alternatives); see also 16 U.S.C. § 1604(i) (requiring compliance with forest plans, which require non-National Forest alternatives). In the court’s view, it was improper for the Service to rely on FERC’s final EIS for several reasons: First, the standard FERC applied to determine whether an alternative route should be used was different from the standard imposed on the Forest Service. Pet. App. 31a. Second, despite expressing concerns about the lack of study of off-forest alternatives in the draft EIS, the final EIS the Service adopted included a discussion of “National Forest Avoidance

Route Alternatives” that was *identical* to the draft. Pet App. 39a. The court “simply [could not] conclude that the Forest Service undertook an independent review and determined that its comments and concerns were satisfied when it seemingly dropped its demand that off-forest alternative routes be studied before the ACP was authorized without any further analysis.” *Id.* at 41a (internal quotation marks omitted). The court thus determined that the Service had acted “arbitrarily and capriciously.” *Id.* at 41a–42a.

III. The Writ of Certiorari Should Be Dismissed

It is undisputed that this Court’s decision will not change the outcome of this case. See Gov’t Cert. Reply 8; Atlantic Cert. Reply 9. As just described, the Fourth Circuit determined that the Forest Service violated its statutory and regulatory obligations in *three different ways* that are separate and apart from its authority under the Mineral Leasing Act to issue a pipeline right-of-way crossing the Appalachian Trail. Atlantic and the Service challenge none of those holdings and each is independently sufficient to invalidate the permit. Because “[t]his Court . . . reviews . . . judgments, not statements in opinions,” *Black v. Cutter Laboratories*, 351 U.S. 292, 297 (1956), that fact alone provides a sufficient basis to dismiss the writ of certiorari.

The reasons Atlantic and the Forest Service offer for deciding the question presented now are both unpersuasive and betray a fundamentally misguided (and troubling) understanding of the Service’s task on remand. Focusing on the Fourth Circuit’s holding that

the Service was required to consider non-forest alternatives, the government doubles down on the very reasoning the court rejected—that FERC’s final EIS properly analyzed all non-forest alternatives and there is nothing left for the Forest Service to do. See Gov’t Cert. Reply 10–11. But as the Fourth Circuit explained, that argument fails on multiple levels, including that the Service was required to undertake an *independent* review to determine whether FERC had addressed its concern that “[n]o analysis of a National Forest Avoidance Alternative ha[d] been conducted, and environmental impacts of [that] alternative ha[d] not been considered or compared to the proposed action.” Pet. App. 41a. By promising to repeat its blind adherence to FERC’s analysis on remand, the government endorses nothing less than an abdication of the Forest Service’s responsibilities.

Atlantic’s arguments are even more dismissive of the Forest Service’s important statutory and regulatory mandate. Atlantic insists that “even if it were somehow possible to divert the pipeline to permissibly cross the Trail on State or private land, that diversion would involve additional unnecessary cost, cause needless delay, and make no sense.” Atlantic Cert. Reply 10. But diverting the pipeline away from National Forest land where appropriate is *precisely* what the statutes and regulations were intended to accomplish, and what they require of the Forest Service. See, e.g., 16 U.S.C. § 1604(i); 42 U.S.C. § 4332(C)(iii); 40 C.F.R. § 1500.2(b). Atlantic’s suggestion that doing what existing law demands would impose costs and “make no

sense” is an argument for changing the law, not ignoring it as the Service did here.¹⁴

Even more striking, Atlantic characterizes respondents’ effort to defer review of the question presented until after remand (if necessary) as “particularly disingenuous given the Fourth Circuit’s apparent discomfort with pipelines.” Atlantic Cert. Reply 12. According to Atlantic, this Court should ignore a United States court of appeals’ unanimous analysis and the multiple independent reasons it found for remand because a private petitioner asserts that court cannot fairly decide an entire category of cases. Instead, Atlantic asks this Court to join it and the federal government in their all-out push to see that a particular pipeline is constructed when, where, and how the pipeline company wants it to be. But as the Fourth Circuit appropriately recognized, the Service’s statutory and

¹⁴ Respondents and their other State amici demonstrate why this Court should reject the government and Atlantic’s alternative argument that immediate resolution is needed because the Fourth Circuit’s decision has sweeping implications. See *e.g.*, Resp. Br. 46–48; Vermont Amicus Br. 17–25 (explaining that few trails would be covered by the Fourth Circuit’s decision on the Mineral Leasing Act and the decision would not affect existing pipeline crossings and utility easements). It is telling that, in response to respondents’ argument that no federal agency had granted a right-of-way under the Mineral Leasing Act until 2017, the government could muster only a single permit authorized in 2013, where the Forest Service knew that the Appalachian Trail was scheduled to be re-routed away from the proposed construction. Gov’t Cert. Reply 7. That single example hardly suggests an urgent need to conclusively resolve whether the Fourth Circuit was correct about a single (non-outcome determinative) threshold holding.

regulatory obligations are not optional, nor are they speed bumps to be hurried over and driven around if necessary.

* * *

The requirements the Forest Service ignored when it granted Atlantic’s permit were crafted by Congress with an eye towards protecting the National Forests for generations to come. Virginians rightly should be able to count on the Forest Service to fulfil its congressionally mandated obligations—not to mention its self-professed mission of “Caring for the Land and Serving People.”¹⁵ This Court should not endorse the dismissive attitude the Service and Atlantic demonstrate towards the Forest Service’s critical responsibilities by prematurely deciding a question whose resolution will not impact the outcome of this case.

¹⁵ *What We Believe*, U.S. Forest Service, available at, <https://www.fs.usda.gov/about-agency/what-we-believe>.

CONCLUSION

The judgment of the Fourth Circuit should be affirmed. In the alternative, the writ of certiorari should be dismissed.

Respectfully submitted.

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