No. 18-1144

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

COWPASTURE RIVER PRESERVATION ASSOCIATION, *et al.*

Petitioners,

v.

FOREST SERVICE, *et al.*,

Respondents,

and

ATLANTIC COAST PIPELINE, LLC,

Intervenor-Respondent.

MOUNTAIN VALLEY PIPELINE, LLC's AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR REHEARING *EN BANC*

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 18-1144 Caption: Cowpasture Preservation Ass'n v. Forest Service

Pursuant to FRAP 26.1 and Local Rule 26.1,

Mountain Valley Pipeline, LLC
(name of party/amicus)

who is amicus curiae, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☑ YES ☐ NO
If yes, identify all such owners:

(A) MVP Holdco, LLC: holds a 45.5% stake; parent = Equitrans Midstream Corporation
(B) US Marcellus Gas Infrastructure, LLC: holds a 31.0% stake; parent = NextEra Energy, Inc.
(C) Con Edison Gas Pipeline and Storage, LLC: holds a 12.5% stake; parent = Consolidated Edison, Inc.
(D) WGL Midstream, Inc.: holds a 10.0% stake; parent = AltaGas Ltd.

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? ☑ YES ☐ NO
If yes, identify entity and nature of interest:

RGC Midstream, LLC: holds a 1.0% stake; parent = RGC Resources, Inc.

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☐ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ George P. Sibley, III Date: February 4, 2019

Counsel for: Mountain Valley Pipeline, LLC

CERTIFICATE OF SERVICE

****

I certify that on February 4, 2019 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ George P. Sibley, III
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February 4, 2019
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Identity and Interest of Amicus Curiae

Mountain Valley Pipeline, LLC (MVP) is developing a 303.5-mile natural gas pipeline project from Wetzel County, West Virginia to Pittsylvania County, Virginia ("MVP Project"). The MVP Project route crosses the Appalachian National Scenic Trail ("Appalachian Trail" or "Trail") on lands within the Jefferson National Forest, which the U.S. Forest Service administers.

The Bureau of Land Management approved MVP's National Forest right-of-way and associated Trail crossing under the Mineral Leasing Act (MLA).[1] The Forest Service also relied on the MLA in authorizing the Atlantic Coast Pipeline (ACP) to cross the Trail and the George Washington National Forest. Because the two authorizations rely on the same MLA authority, the Court's decision here may influence the MVP Project on remand.

Rule 29(a)(4)(E) Statement

No person or entity other than MVP and its counsel authored this amicus curiae brief in whole or in part, and MVP has exclusively funded the brief's preparation.

[1] This Court vacated MVP's right-of-way in part and remanded it for other reasons. *Sierra Club v. U.S. Forest Service*, 897 F.3d 582, *as clarified on reh'g*, 739 F. App'x 185 (4th Cir. 2018).

Summary of Argument

The Court should rehear this case *en banc*. The panel decision presents questions of exceptional importance for public lands administration and Congress's exercise of its plenary powers to decide which federal agency administers certain areas of the nation's extensive federal lands and resources. *See Light v. United States*, 220 U.S. 523, 536-37 (1911) (upholding federal government's authority to establish forest reserves administered by Secretary of Agriculture). As the Supreme Court stated over a century ago, "it is not for the courts to say how" the nation's public lands "shall be administered. That is for Congress to determine." *Id*.

By holding that the Appalachian Trail segment crossed by ACP consists of "lands in the National Park System,"[2] the panel erroneously conflated the National Park Service's overall administration of the Trail for planning, coordination, signage, and related purposes with the actual administration and jurisdiction of the National Forest lands underlying the crossing. That decision directly contradicts Congress's recognition in the National Trails System Act ("Trails Act") that the federal agency administering the lands over which a particular national trail passes may be different than the agency charged to administer that trail. It also contradicts Congress's express statutory mandate that George Washington

[2] *Cowpasture Preservation Ass'n v. Forest Service*, No. 18-1144 (4th Cir. Dec. 13, 2018), slip op. at 52, 54.

National Forest lands be "permanently reserved, held and administered as national *forest*," and not national *park*, lands. 16 U.S.C. § 521 (emphasis added). The panel upended a century of public land law.

The real-world consequences are serious. As ACP explains, with one exception, all of the pipelines that currently transport natural gas to Virginia, Maryland, and the District of Columbia cross the Trail—several on Forest Service lands with rights-of-way subject to periodic renewal. Pet. for Reh'g En Banc (Doc. 114), Exh. B. Millions of people depend on these pipelines to deliver gas for heating, cooking, cooling, electricity, and industrial uses.

Argument

The panel decision does not attempt to harmonize the Trails Act or the National Park Service Organic Act with the various statutes that created the National Forests. By failing to do so, the panel reached a decision that creates dissonance between these enactments and upsets a half-century of federal administrative practice. The consequences are profound. The panel decision not only imperils existing federal lands rights-of-way for pipelines crossing the Trail, but also redefines the legal framework for crossings of other national trails should other circuits follow the panel's approach.

I. The Appalachian Trail Segment Crossed By The ACP Project Is Not "Lands in the National Park System" Under The Mineral Leasing Act.

While the Park Service has at times considered the Appalachian Trail to be a unit of the National Park System for its internal labeling purposes,[3] being a "unit" is not the same as being "lands in the National Park System" under the MLA. *See* 30 U.S.C. § 185(b)(1). Park System units often include areas of non-federal ownership or areas under other agencies' jurisdictions. The Trail corridor too contains a variety of areas administered by state and federal agencies and local entities. *See infra* at 8-10. The Trail area ACP would cross is National Forest System land. The Trail is a surface use (or overlay), but the Trails Act did not transfer the "lands" themselves to the National Park Service or deprive the Forest Service of its administrative jurisdiction.

Under the National Park Service Organic Act, the National Park System "include[s] any area of land and water administered by the Secretary [of the Interior], acting through the Director [of the National Park Service], for park, monument, historic, parkway, recreational, or other purposes." 54 U.S.C. § 100501. But the public lands statutory framework, federal agency practice, and the Trails Act demonstrate that National Forest System lands the Trail traverses remain lands *administered* by the Forest Service.

[3] *See*, *e.g.*, slip op. at 52.

A. Statutory Background.

1. National Forest Versus National Park Service Administration.

In 1891, Congress authorized the President to "set apart and reserve . . . public land bearing forests . . . as public reservations." 26 Stat. 1103, § 24 (Mar. 3, 1891) (codified at 16 U.S.C. § 471 (repealed 1976)). In the 1897 Organic Administration Act, Congress provided that "[n]o national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber." 30 Stat. 35, codified at 16 U.S.C. § 475. In 1905, Congress transferred the administrative jurisdiction of the National Forests from the Department of the Interior to the Department of Agriculture. 33 Stat. 628. These acts created the current National Forest System. *See* 36 C.F.R. § 200.3(b)(2).

Congress developed the National Park System for very different purposes. In 1916, Congress provided that the "fundamental purposes of the said parks, monuments, and reservations . . . is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same . . . unimpaired for the enjoyment of future generations." National Park Service Organic Act of 1916, 39 Stat. 535, § 1, as amended, 54 U.S.C. § 100101. Congress has long emphasized that for "the national forests there must always be

. . . as primary objects and purposes the utilitarian use of land, of water, and of timber, as contributing to the wealth of all the people." H.R. Rep. No. 64-700, at 3 (1916); *see also United States v. New Mexico*, 438 U.S. 696, 706-09 & n.18 (1978).

2. The Weeks Act.

The Weeks Act authorized the Secretary of Agriculture to acquire land to establish the eastern states National Forests from previously logged, privately owned lands. 36 Stat. 962, § 6 (Mar. 1, 1911, codified at 16 U.S.C. § 515). Congress directed that those lands be "permanently reserved, held, and administered as national forest lands under the provisions of" the 1891 Act as supplemented. 16 U.S.C. § 521; *see also id*. § 521a. Both the George Washington and Jefferson National Forests were established pursuant to these authorities. *See* Presidential Proclamation 1448, 40 Stat. 1779 (1918) (George Washington National Forest establishment); Proclamation 1792, 44 Stat. 2633, 2633-34 (1927) (same); Executive Order No. 5867 (1932) (same); 1 Fed. Reg. 227, 227-29 (Apr. 24, 1936) (Jefferson National Forest establishment).

3. Trails Act.

The 1968 Trails Act designated the Appalachian Trail as a National Scenic Trail. 16 U.S.C. § 1244(a)(1). But it did not change the underlying administration, management, or status of the lands over which the Trail passes. Here is where the

panel went astray—it mistakenly treated the Trails Act as transferring administration of all non-Park Service Trail corridor *lands* to the Park Service, regardless of their prior administration, classification, or ownership. *See* slip op. at 52-56.

The Trails Act recognizes that a federal agency other than the agency charged with the overall administration of a *trail* may have authority and responsibility for the administration of the *lands* over which the trail traverses; the latter retains its authority to administer those lands despite the trail's presence. *See* 16 U.S.C. § 1246(a)(1)(A) ("Nothing . . . shall be deemed to transfer among Federal agencies any management responsibilities established under any other law for federally administered lands which are components of the National Trails System.").

The Trails Act also provides that the "Secretary charged with the administration of a national scenic . . . trail may relocate segments of a national scenic . . . trail right-of-way," but only "*with the concurrence of the head of the Federal agency having jurisdiction over the lands involved*." 16 U.S.C. § 1246(b) (emphasis added). It further provides that the appropriate Secretary "may issue regulations," but only "*with the concurrence of the heads of any other Federal agencies administering lands through which a . . . national scenic . . . trail passes*." 16 U.S.C. § 1246(i) (emphasis added).

These provisions show that Congress did not transfer the Trail corridor lands away from the Forest Service where the Trail traverses National Forest System lands. Congress elsewhere has been explicit when it intends to transfer jurisdiction from one federal agency to another. For example, in creating Great Basin National Park, Congress specified that "[l]ands and waters . . . within the boundaries of the park which were administered by the Forest Service . . . prior to the date of enactment of this Act are hereby transferred to the administrative jurisdiction of the Secretary [of the Interior]." Pub. L. No. 99-565, § 4(b) (1986), codified at 16 U.S.C. § 410mm-2. *See also, e.g.*, 16 U.S.C. § 192b-9 (boundary adjustments for Rocky Mountain National Park). Had Congress intended to convert the Trail corridor lands into lands of the National Park System where the Trail passes over National Forest System lands, it would have said so.

B. Both Federal Agencies Have Administered Their Respective Trail Segments Consistent With This Statutory Framework.

The Park Service explains that two types of lands comprise the Appalachian Trail. *First*, Appalachian Trail Park Office Lands are lands specifically acquired and managed by the Park Service Appalachian Trail Park Office. *See*, *e.g.*, NPS, Appalachian National Scenic Trail Resource Management Plan, I-24 (Sept. 2008).[4] This includes "some 2,300 tracts and 82,700 acres acquired by the National Park

[4] Available at https://www.nps.gov/appa/learn/management/upload/appalachian_trail_resource_management_plan.pdf.

Service to protect the trail." *Id*. *Second*, "Appalachian Trail lands" are *all* lands traversed by the trail, including those that are under the jurisdiction and management of other agencies. *Id.* The lands at the ACP Trail crossing are in this second category—they are not Park Service administered lands and therefore are not lands in the National Park System.

As the Park Service recognizes:

> One of the most confusing and challenging realities of managing the [Trail] is created by the complex patchwork of land ownership along much of the length of the trail. The trail crosses *lands administered by eight national forests*, six national parks, one national wildlife refuge, 67 state game lands, forest, or park areas, and more than a dozen local municipal watershed properties.

Id. at I-23 (emphasis added). Thus, the Park Service acknowledges that the Trail "crosses an extensive land base *administered* by many other federal and state agencies. Each of these land-managing entities manages its section of the Appalachian National Scenic Trail . . . in accordance with its own *administrative* jurisdictional responsibilities." *Id*. at III-1 (emphases added); *see id.* at I-8.

The 2010 Memorandum of Understanding (MOU) for the Trail in Virginia, signed by the Park Service, Forest Service, Virginia, and others, confirms this view. The MOU provides that "[t]he legislative authority of each individual land managing agency to manage, regulate, operate, develop, use, control, and protect

all lands under its jurisdiction shall continue to be the controlling authority."

2010 MOU § VI.J.1.[5]

In sum, the affected federal agencies have consistently treated the National Forest lands the Trail traverses as lands remaining under the Forest Service's jurisdiction and authority. These are not lands in the National Park System. The panel recognized that "the MLA concerns the *land*, not the agency." Slip op. at 54. But it did not acknowledge the status and classification that Congress mandated for these lands. The agencies' long-standing views are entitled to at least *Skidmore* deference,[6] but the panel gave them no consideration at all. Slip op. at 54.

II. The Panel's Holding Conflicts With This Court's And The Supreme Court's Decisions On Harmonizing Potentially Conflicting Statutes.

The panel was faced with reconciling the statutes for the administration of the George Washington National Forest and the Trails Act. But it overlooked the forest-administration statutes, so it could not "reconcile and harmonize the statutes, and carry out the legislative intent behind both [statutory] schemes." *In re Bulldog Trucking*, 66 F.3d 1390, 1395 (4th Cir. 1995).

When "confronted with two Acts of Congress allegedly touching on the same topic, this Court is not at '"liberty to pick and choose among congressional

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[5] Available at http://www.appalachiantrail.org/docs/appendix---g---table/2010-mou-for-the-anst-in-virginia.pdf (emphasis added).

[6] *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *see also United States v. Mead Corp.*, 533 U.S. 218 (2001).

enactments' and must instead strive 'to give effect to both.'"'" *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1619 (2018) (citations omitted). So Petitioners bore a "heavy burden" to show that Congress implicitly displaced forest-administration statutes through the Trails Act. *Id.*

Neither petitioners nor the panel harmonized the Trails Act or the National Park Service Organic Act with the National Forest statutes. Instead, the panel presumed that the entire almost 2,200-mile long Trail corridor comprised lands in the "National Park System" because it was generically referenced in the record as a "'unit' of the National Park System." Slip op. at 52. But those shorthand labeling references do not themselves transfer administration of *all* lands within the Trail corridor to the Park Service, change the language of the Trails Act, or even modify the Park Service's own understanding of the Trails Act as reflected in the agency's management documents and consistent practice. *See FCC v. Fox TV Stations*, 556 U.S. 502, 513-16 (2009).

The panel's approach results in an implausible reading of the Trails Act. Extending it to other national scenic trails, such as the Pacific Crest Trail, where the Trails Act assigns to the Secretary of Agriculture the trail-administration role, *see* 16 U.S.C. § 1244(a)(2), would lead to the absurd result of the Forest Service exercising the trail crossing permitting authority under its own authorities even

where that trail traverses national park lands.[7] This approach would convert those narrow strips of national park lands into National Forests without any congressional action. The panel erred in failing to consider this broader context. *See Sturgeon v. Frost*, 136 S. Ct. 1061, 1071 (2016) (rejecting as "implausible" the reading of a statute that failed to recognize that certain lands within the boundaries of conservation system units in Alaska may be treated differently from other "public" lands within the unit).

Conclusion

This Court should rehear this case *en banc*.

[7] The Pacific Crest Trail traverses at least *seven* national park system units: North Cascades, Mount Rainier, Crater Lake, Lassen Volcano, Yosemite, and Sequoia & Kings Canyon national parks, and Devils Postpile National Monument.

Respectfully submitted this 4th day of February, 2019.

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Certificate of Compliance

The undersigned counsel certifies under Fed. R. App. P. 32(g) that the foregoing brief meets the formatting and type-volume requirements set by Fed. R. App. P. 29(b)(4) and Fed. R. App. P. 32(a). This motion is printed in 14-point, proportionately spaced typeface utilizing Microsoft Word and contains 2,554 words, including headings, footnotes, and quotations, and excluding all items identified under Fed. R. App. P. 32(f).

Dated: February 4, 2019

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