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National Scenic Trails, Pipelines, & FERC: Examining Pipeline Certification After United States Forest Service v. Cowpasture River Forest Preservation Association

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NATIONAL SCENIC TRAILS, PIPELINES, & FERC: EXAMINING
PIPELINE CERTIFICATION AFTER *UNITED STATES FOREST
SERVICE V. COWPASTURE RIVER FOREST
PRESERVATION ASSOCIATION*

CAITLIN M. DOAK*

ABSTRACT

After the United States Supreme Court held the Atlantic Coast Pipeline (ACP) could cross the Appalachian Trail in United States Forest Service v. Cowpasture River Preservation Association, lawmakers introduced two bills in Congress purporting to protect national scenic trails from pipelines. H.R. 7878 and S. 4502 target the agency responsible for certifying natural gas pipelines: The Federal Energy Regulatory Commission (FERC). FERC is the right target, but these bills miss the mark. Using the ACP as a case study, this Article examines how H.R. 7878 and S. 4502 would work in practice under current FERC policy. H.R. 7878 and S. 4502 are ineffective and inefficient solutions to protect national scenic trails from pipelines. Both bills fail to account for FERC's heavy reliance on precedent agreements — including agreements with corporate affiliates — in determining pipeline need. This Article joins the growing calls for FERC reform. Unless FERC changes its reliance on precedent agreements, trail-specific legislation will not protect trails from pipelines.

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TABLE OF CONTENTS

I. INTRODUCTION	2
II. THE TRAIL & THE PIPELINE: A BACKGROUND OF THE SUPREME COURT’S DECISION IN <i>COWPASTURE</i> & THE RESULTING BILLS	6
A. The Appalachian Trail	7
B. The Atlantic Coast Pipeline	9
C. The <i>Cowpasture</i> Decision	13
D. Proposed Bills: H.R. 7878 & S. 4502	14
III. THE FERC PIPELINE CERTIFICATION PROCESS	17
A. Precedent Agreements: How FERC Determines Need	18
B. Atlantic Coast Pipeline Permitting	21
1. The Environmental Impact Statement Process	21
2. Atlantic Coast Pipeline: The FERC Order	24
IV. ANALYZING SOLUTIONS FOR IMPROVED PIPELINE NEED DETERMINATION	27
A. H.R. 7878 & S. 4502 Would Be Ineffective	28
B. H.R. 7878 & S. 4502 Would Be Inefficient	30
C. FERC Reform Is a Better Solution	31
D. Beyond Trails: Environmental & Social Justice Considerations	33
V. CONCLUSION	36

I. INTRODUCTION

“There is something woven into our national identity that relates to undisturbed mountains meeting the horizon. When you cut through that with a pipeline, you limit our ability to explore our thoughts, our land and our potential.”¹ The undisturbed mountains referenced here are the Appalachian Mountains, home of the Appalachian Trail. Jennifer Pharr Davis — who once held the speed record for hiking the entire two thousand, one hundred ninety-two-mile trail in under forty-seven days — wrote these words in response to the announcement of the Atlantic Coast Pipeline

1. Will Harlan, *Will the Appalachian Trail Stop an \$8 Billion Pipeline?*, N.Y. TIMES (Feb. 23, 2020), <https://www.nytimes.com/2020/02/23/opinion/appalachian-trail-pipeline.html> (quoting Jennifer Pharr Davis, former Appalachian Trail speed record holder).

(ACP), a natural gas pipeline that threatened to tear through the Appalachian Trail in Virginia.²

In 2016, I, too, hiked the Appalachian Trail from Maine to Georgia, albeit at a much slower pace than Davis. The hiker in me is moved by Davis's words; the realist in me remembers the many highways and power lines that crossed my path. The Appalachian Trail is no stranger to development. Though I was unaware at the time, I hiked across fifty-five pipelines cutting through the Appalachian Trail.³

The prospect of a fifty-sixth pipeline intersecting the Appalachian Trail dominated the debate over the ACP.⁴ Awareness of the ACP on a national scale and its connection to the Appalachian Trail is due in large part to the United States Supreme Court's decision in *United States Forest Service v. Cowpasture River Preservation Association*.⁵ Even though the ACP faced an onslaught of litigation attacking the project from every angle, the only issue the Supreme Court heard was whether the pipeline could cross the Appalachian Trail on national forest land.⁶ In a seven-to-two decision, the Supreme Court held that the ACP could cross the Appalachian Trail in the George Washington National Forest.⁷ Less than three weeks after

2. *Id.* (presenting opinions against ACP, which would cut through famous Appalachian Trail).

3. Noah Sachs, *Can the Appalachian Trail Block a Natural Gas Pipeline?*, THE AM. PROSPECT (Aug. 14, 2019), <https://prospect.org/power/can-appalachian-trail-block-natural-gas-pipeline/> (noting fifty-five pipelines already crossed Appalachian Trail).

4. Elizabeth McGowan, '*Less-Than-Ideal Bedfellows*': Mountain Valley Pipeline Payout Prompts Criticism, ENERGY NEWS NETWORK (Oct. 5, 2020), <https://energynews.us/2020/10/05/southeast/less-than-ideal-bedfellows-mountain-valley-pipeline-payout-prompts-criticism/> (discussing Mountain Valley Pipeline (MVP), approximately half of ACP's length, which was also set to cross Appalachian Trail). Although pipeline opponents brought many challenges against the MVP as well, the MVP did not receive nearly as much media attention as the ACP. *Id.* (providing reasons why MVP garnered less attention). As of late 2021, the MVP is expected to move forward as planned. Laurence Hammack, *Franklin County Landowners Settle Lawsuit Against Mountain Valley Pipeline*, THE ROANOKE TIMES (Oct. 25, 2021), https://roanoke.com/news/local/franklin-county-landowners-settle-lawsuit-against-mountain-valley-pipeline/article_0f146b26-35d2-11ec-b4c7-9339a30a1061.html (indicating pipeline is close to completion).

5. 140 S. Ct. 1837, 1841 (2020) (holding Forest Service has authority to grant pipeline rights-of-way through land within national forest traversed by national scenic trails).

6. *Id.* (noting Court granted certiorari to address narrow issue).

7. *Id.* (concluding Forest Service had authority to grant right-of-way).

the ACP's resounding Supreme Court win, however, the pipeline's owners cancelled the project.⁸

Dominion Energy and Duke Energy designed the ACP to carry natural gas six hundred miles from West Virginia to North Carolina.⁹ Soon after the energy consortium announced its plans to construct the ACP, activists criticized the pipeline for its potential disproportionate environmental impacts on Black and Indigenous communities as well as endangered species.¹⁰ Moreover, energy analysts questioned whether there was sufficient demand for natural gas to warrant the pipeline.¹¹ Yet, of all the inequitable effects the ACP would have wrought, the one-tenth-of-a-mile segment that would have crossed under the Appalachian Trail continues to be its most identifying feature.¹²

The Appalachian Trail was safe from the ACP after the pipeline companies cancelled the project, yet the *Cowpasture* decision signaled a threat of future pipelines to national scenic trails.¹³ The result: two bills introduced in Congress demanding that the Federal Energy Regulatory Commission (FERC), the body responsible for certifying natural gas pipelines, consider potential impacts on national scenic trails when deciding whether to issue pipeline applicants a Certificate of Public Convenience and Necessity (CPCN).¹⁴ FERC requires pipeline companies to obtain a CPCN certifying

8. *Dominion Energy and Duke Energy Cancel the Atlantic Coast Pipeline*, ATL. COAST PIPELINE [hereinafter *Dominion and Duke Cancel the ACP*], <https://atlanticcoastpipeline.com/> (last visited Sept. 10, 2021) (announcing cancellation of ACP).

9. ATL. COAST PIPELINE, PROJECT OVERVIEW 1 (2016) [hereinafter PROJECT OVERVIEW], <https://atlanticcoastpipeline.com/resources/docs/resources/acp-pfl-project-overview.pdf> (explaining details of ACP).

10. For a discussion of the opposition to the ACP, see *infra* notes 66-74 and accompanying text.

11. See CATHY KUNKEL & LORNE STOCKMAN, INST. FOR ENERGY ECON. AND FIN. ANALYSIS, THE VANISHING NEED FOR THE ATLANTIC COAST PIPELINE 4-10 (2019), https://ieefa.org/wp-content/uploads/2019/01/Atlantic-Coast-Pipeline_January-2019.pdf (investigating demand for natural gas).

12. See Lisa Friedman, *Michael Regan, Biden's E.P.A. Pick, Faces 'Massive Reconstruction and Rebuilding'*, N.Y. TIMES (Dec. 17, 2020), <https://www.nytimes.com/2020/12/17/climate/michael-regan-epa.html> (indicating Appalachian Trail crossing was ACP's most noteworthy impact).

13. *U.S. Forest Serv. v. Cowpasture River Pres. Ass'n*, 140 S. Ct. 1837, 1841 (2020) (allowing Forest Service to grant pipeline right-of-way through national forest land).

14. See Scenic Trail Viewshed Protection Act, H.R. 7878, 116th Cong. (2020) (requiring stricter evaluation of natural gas pipelines seeking to cross national scenic trails); Pipeline Fairness, Transparency, and Responsible Development Act of 2020, S. 4502, 116th Cong. (2020) (amending Natural Gas Act (NGA) to provide increased opportunities for public input and evaluation of FERC's permitting process for natural gas pipelines).

“need” for the proposed pipeline before any land acquisition or construction may begin.¹⁵

This Article argues that H.R. 7878, the Scenic Trail Viewshed Protection Act, and S. 4502, the Pipeline Fairness, Transparency, and Responsible Development Act of 2020, are ineffective and inefficient solutions to protect national scenic trails from pipelines under current FERC policy.¹⁶ Presently, FERC relies heavily on “precedent agreements,” agreements pipeline companies enter into for the purchase of gas from the proposed pipeline, to indicate “need” for a CPCN.¹⁷ Unless FERC changes its “need evaluation,” requiring the Commission to evaluate a pipeline’s impact on trails in its decision-making process — a process that already considers trails but skews disproportionately in favor of precedent agreements — will not change outcomes.¹⁸ Under current practices, the existence of precedent agreements will outweigh environmental impacts virtually every time FERC determines whether to issue a CPCN.¹⁹ FERC already undergoes a lengthy evaluation of potential environmental impacts, including impacts on national scenic trails, yet it has never denied certification of a pipeline based on environmental harm under its current policy.²⁰

Further, H.R. 7878 and S. 4502 risk contributing to the inefficient strategy of litigating a project to death by creating project delays and increasing costs.²¹ A better solution is FERC reform that can provide for a more robust need analysis.²² Specifically, FERC should stop relying solely on precedent agreements to demonstrate

15. For an overview of FERC’s pipeline certification process, see *infra* notes 146-95 and accompanying text.

16. For a discussion of H.R. 7878 and S. 4502, see *infra* notes 99-115 and accompanying text.

17. For a discussion of FERC’s use of precedent agreements, see *infra* notes 127-45 and accompanying text.

18. For example, FERC would likely still have certified the ACP even if Congress had enacted these bills before FERC deliberated on the ACP. For a discussion of FERC’s current need evaluation, see *infra* notes 127-45 and accompanying text.

19. For an analysis of FERC’s current practices, see *infra* notes 196-267 and accompanying text.

20. See Sue Tierney, *Time to Move Away from Old Precedents in FERC Pipeline Reviews*, UTIL. DIVE (Nov. 19, 2019) [hereinafter *Time to Move Away*], <https://www.utilitydive.com/news/time-to-move-away-from-old-precedents-in-ferc-pipeline-reviews/567512/> (advocating for FERC reform).

21. For a discussion of H.R. 7878 and S. 4502’s inefficiency, see *infra* notes 221-29 and accompanying text.

22. For a discussion of proposed FERC reform, see *infra* notes 230-45 and accompanying text.

need for a pipeline.²³ The existence of precedent agreements should only be one factor in FERC's determination.²⁴

This Article proceeds in five parts. Part II provides background on the Appalachian Trail, the ACP, and their intersection, as well as a summary of the *Cowpasture* decision and the resulting congressional bills.²⁵ Part III explains FERC's role in pipeline certification and uses the ACP to illustrate how the FERC process works in practice.²⁶ Part IV analyzes the proposed bills and argues that a better solution is FERC reform requiring the Commission to look beyond precedent agreements to determine need.²⁷ Part V concludes that the addition of trails to the litany of factors FERC must consider when deciding whether to grant a CPCN will likely not protect national scenic trails.²⁸

II. THE TRAIL & THE PIPELINE: A BACKGROUND OF THE SUPREME COURT'S DECISION IN *COWPASTURE* & THE RESULTING BILLS

Professor Richard Epstein distinguishes property types based on their shape: "long and skinny" resources, such as rivers, pipelines, and trails, and "short and squat" resources, such as National Parks, dump sites, and farms.²⁹ According to Professor Epstein, trails and pipelines face governance challenges unique to their long and skinny shapes.³⁰ When two long and skinny resources intersect, the intersection becomes a flashpoint in the practical, legal, and political disputes concerning the resources.³¹ The potential intersection of the Appalachian Trail and the ACP was not only a focal point of the legal battle against the ACP, but also a catalyst for

23. For a discussion of proposed FERC reform, see *infra* notes 230-45 and accompanying text.

24. For a discussion of environmental and social justice factors FERC should consider when evaluating need, see *infra* notes 246-67 and accompanying text.

25. For a discussion introducing the intersection of the Appalachian Trail and ACP, the *Cowpasture* decision, and the proposed bills, see *infra* notes 29-115 and accompanying text.

26. For a discussion of FERC's pipeline certification process, see *infra* notes 116-95 and accompanying text.

27. For an analysis of H.R. 7878 and S. 4502 and a discussion of proposed FERC reform, see *infra* notes 196-267 and accompanying text.

28. For a conclusion, see *infra* notes 268-72 and accompanying text.

29. Richard A. Epstein, *Property Rights: Long and Skinny*, 14 INT'L J. OF THE COMMONS 567, 567 (2020) [hereinafter *Property Rights*] (categorizing property types).

30. *Id.* (describing issues unique to trails and pipelines).

31. The ACP-Appalachian Trail crossing is an example of such a flashpoint. For an overview of the tension caused by the ACP-Appalachian Trail crossing, see *supra* notes 4-12 and accompanying text.

proposed change in the regulation of natural gas pipelines, at least to the extent that pipelines implicate trails.³²

A. The Appalachian Trail

The Appalachian Trail is a public footpath in the Appalachian Mountains stretching over two thousand miles from Mount Katahdin, Maine, to Springer Mountain, Georgia.³³ Regional planner and forester Benton MacKaye proposed the idea for the Appalachian Trail in 1921 and organized the Appalachian Trail Conference, now the Appalachian Trail Conservancy (ATC), in 1925.³⁴ By 1937, MacKaye's dream became a reality.³⁵ The Appalachian Trail, however, did not secure legal protection until the passage of the National Trails System Act of 1968 (Trails Act).³⁶ Under the Trails Act, the Appalachian Trail became one of the first national scenic trails in the U.S.³⁷

Although the Trails Act authorized the federal government to acquire land for national scenic trails, it delegated significant authority to the states.³⁸ Spurred by Congress's desire to protect the Appalachian Trail from further development, the 1978 amendments to the Trails Act increased federal authority over national scenic trails.³⁹ Authority over the Appalachian Trail is messy.⁴⁰ Multiple statutes, private agreements, and voluntary cooperation govern the management of the Appalachian Trail.⁴¹ In general, the U.S. Secretary of the Interior administers the Trail as a unit of the National Park Service (NPS).⁴² As illustrated by the *Cowpasture* deci-

32. For a discussion of H.R. 7878 and S. 4502, see *infra* notes 99-115 and accompanying text.

33. *Appalachian National Scenic Trail*, NAT'L PARK SERV. (May 10, 2019), <https://www.nps.gov/appa/index.htm> (describing Appalachian Trail).

34. *ATC History*, APPALACHIAN TRAIL CONSERVANCY, <https://appalachian-trail.org/our-work/about-us/atc-history/> (last visited Sept. 9, 2021) (explaining origin of Appalachian Trail).

35. *Id.* (marking opening year of Trail).

36. *Id.* (signaling federal protection for Trail under Trails Act).

37. 16 U.S.C. § 1241 (designating Appalachian Trail and Pacific Crest Trail as initial components of National Trails System). See generally James J. Vinch, *The Telecommunications Act of 1996 and Viewshed Protection for the National Scenic Trails*, 15 J. LAND USE & ENVT'L. L. 93, 99-103 (1999) (providing detailed history of Appalachian Trail and Trails Act).

38. Vinch, *supra* note 37, at 102 (explaining delegation of trail authority in early years of Trails Act).

39. *Id.* at 103 (noting shift of trail authority to federal government).

40. *Id.* at 104 (describing "patchwork" of Appalachian Trail management).

41. *Id.* (detailing entities involved in Trail management).

42. *Id.* (explaining Appalachian Trail management).

sion, however, statutory authority over the Trail is not always straightforward.⁴³

In addition to the statutory maze surrounding trail authority, national scenic trails suffer from jurisdictional difficulties because of their long and skinny shape.⁴⁴ Long and skinny resources and projects face unique challenges because they extend into numerous jurisdictions.⁴⁵ The Appalachian Trail, for example, crosses into fourteen states, six national parks, eight national forests, two national wildlife refuges, sixty-seven state-owned land areas, over one dozen local municipal watershed properties, and even some privately-owned land.⁴⁶

The Appalachian Trail's Cooperative Management System seeks to remedy this jurisdictional mess.⁴⁷ In 1981, the NPS created the Appalachian Trail Comprehensive Plan, which established the Cooperative Management System to manage the Trail.⁴⁸ Under the Cooperative Management System, local trail clubs coordinate with relevant government agencies to develop local management plans, whereas the NPS retains authority for overall administration of the Appalachian Trail.⁴⁹

Due to the Appalachian Trail's considerable length, the scenery along the Trail is just as diverse as the entities that manage it.⁵⁰ The Trail traverses through rugged mountains, pastoral farms, wooded forests, and city streets.⁵¹ Though portions of the Trail feel

43. For a discussion of how the *Cowpasture* decision hinged on whether the Forest Service or the NPS had the authority to grant a right-of-way, see *infra* notes 84-98 and accompanying text.

44. *Property Rights*, *supra* note 29, at 575-76 (categorizing property types by shape).

45. *Id.* at 576 (noting long and skinny properties commonly cross local, state, and national borders).

46. NAT'L PARKS CONSERVATION ASS'N, APPALACHIAN NATIONAL SCENIC TRAIL: A SPECIAL REPORT 5 (2010), <https://www.nps.gov/appa/learn/management/upload/AT-report-web.pdf> (providing overview of Appalachian Trail).

47. NAT'L PARK SERV., COMPREHENSIVE PLAN FOR THE PROTECTION, MANAGEMENT, DEVELOPMENT AND USE OF THE APPALACHIAN NATIONAL SCENIC TRAIL 9 (1981), https://www.nps.gov/appa/learn/management/upload/comp-plan_web.pdf (noting cooperative relationships at national, state, and local levels).

48. *Id.* at 5 (detailing Appalachian Trail management plan).

49. *Id.* (exploring different trail management structures); see also *Cooperative Management*, APPALACHIAN TRAIL CONSERVANCY, <https://appalachiantrail.org/get-involved/volunteer/trail-management-resources/cooperative-management/> (last visited Sept. 9, 2021) (overviewing Cooperative Management System).

50. *Appalachian Trail Map*, NAT'L PARK SERV., <https://nps.maps.arcgis.com/apps/webappviewer/index.html?id=6298c848ba2a490588b7f6d25453e4e0> (last visited Oct. 13, 2021) (showing length of Appalachian Trail).

51. *Id.* (providing images of various points along Trail).

remote and wild, a hiker is never too far from a town.⁵² By necessity, the Trail crosses many highways and other developed areas.⁵³ Clear-cut paths for power lines are a common sight.⁵⁴ Additionally, a thru-hiker, someone who hikes the entire trail from end to end, will inadvertently hike across more than fifty pipelines that have intersected the Trail for decades.⁵⁵

B. The Atlantic Coast Pipeline

The ACP was a proposed six-hundred-mile natural gas pipeline that, if completed, would have stretched from West Virginia to North Carolina.⁵⁶ The ACP would have included two mainlines, three lateral extension pipelines, and three compressor stations.⁵⁷ The ACP would have provided Marcellus-Utica Shale gas to utilities in Virginia and North Carolina.⁵⁸ Four U.S. energy companies — Dominion Energy, Duke Energy, Piedmont Natural Gas, and Southern Company Gas — joined to form Atlantic Coast Pipeline, LLC (Atlantic), the joint venture responsible for building and operating the ACP.⁵⁹ In 2016, the joint venture partners estimated the pipe-

52. *Id.* (illustrating Trail's proximity to population hubs, including New York City and Washington, D.C.).

53. *Id.* (demonstrating length of Trail, which necessarily crosses developed areas).

54. *Id.* (noting presence of pipelines along duration of Trail).

55. Zach Davis, *What Is the Definition of a Thru-Hike?*, THE TREK (June 23, 2014), <https://thetrek.co/definition-thru-hike/> (discussing various opinions of what constitutes thru-hikers); Becky Sullivan & Laurel Wamsley, *Supreme Court Says Pipeline May Cross Underneath Appalachian Trail*, NPR (June 15, 2020, 6:09 PM), <https://www.npr.org/2020/06/15/877643195/supreme-court-says-pipeline-may-cross-underneath-appalachian-trail#:~:text=dominion%20Energy%20said%20the%20court's,without%20disturbing%20its%20public%20use> (noting more than fifty other pipelines have safely crossed Appalachian Trail for decades).

56. PROJECT OVERVIEW, *supra* note 9 (describing ACP).

57. *Id.* (emphasizing ACP specs).

58. *Atlantic Coast Pipeline Hires Main Construction Contractor*, OIL & GAS J. (Sept. 22, 2016) [hereinafter *ACP Hires Main Construction Contractor*], <https://www.ogj.com/pipelines-transportation/article/17250126/atlantic-coast-pipeline-hires-main-construction-contractor> (identifying construction contract between pipeline company and joint venture of construction companies). Marcellus Shale and Utica Shale are neighboring natural gas wells located in the eastern U.S. John Krohn & Grant Nülle, *Marcellus, Utica Provide 85% of U.S. Shale Gas Production Growth Since Start of 2012*, U.S. ENERGY INFO. ADMIN. (July 28, 2015), <https://www.eia.gov/todayinenergy/detail.php?id=22252> [<https://web.archive.org/web/20210323073237/https://www.eia.gov/todayinenergy/detail.php?id=22252>] (explaining steady increase in productivity of natural gas wells in Marcellus Shale and Utica Shale). Marcellus-Utica Shale gas is accessible through horizontal drilling and hydraulic fracturing. *Id.* (relaying how to access resource).

59. Wayne Barber, *Joint Venture Awarded Contract to Build 600-Mile Atlantic Coast Pipeline*, TRANSMISSIONHUB (Sept. 21, 2016), <https://www.transmissionhub.com/>

line would cost between 4.5 billion and five billion dollars.⁶⁰ By the time the companies cancelled the ACP, the estimated cost had risen to eight billion dollars.⁶¹

In addition to the ACP's increased costs, questions arose regarding the project's profitability.⁶² Demand for natural gas is stagnating as renewable energy resources become more competitive.⁶³ Further, the ACP did not have a "single independent committed customer," providing "reasons for skepticism around the future of [the ACP]."⁶⁴

An onslaught of litigation exacerbated the economic woes of the ACP.⁶⁵ From the very beginning, the ACP faced intense opposition from a diverse alliance of landowners, communities, tribes, and environmental groups.⁶⁶ Individual landowners and communities were wary of a potentially dangerous pipeline running through their backyards.⁶⁷ Climate activists were opposed to tapping another fossil fuel source, which would release greenhouse gas emissions and further contribute to climate change.⁶⁸ Wildlife activists aimed to protect endangered species from the pipeline's path.⁶⁹

articles/2016/09/joint-venture-awarded-contract-to-build-600-mile-atlantic-coast-pipeline.html (reporting on ACP construction contract).

60. *ACP Hires Main Construction Contractor*, *supra* note 58 (discussing ACP's projected costs).

61. *Dominion and Duke Cancel the ACP*, *supra* note 8 (outlining ACP's costs).

62. Kunkel & Stockman, *supra* note 11, at 1 (noting increased costs of ACP).

63. *Id.* at 4-10 (summarizing ACP's demand forecasts).

64. *Id.* at 12 (comparing profitability of natural gas with wind and solar plus storage). For a discussion of the distinction between affiliate and independent customers, see *infra* notes 138-42 and accompanying text.

65. For a discussion of the numerous claims brought against the ACP, see *infra* note 79 and accompanying text.

66. Sarah Vogelsong, *What Sank the Atlantic Coast Pipeline? It Wasn't Just Environmentalism*, VA. MERCURY (July 8, 2020, 2:42 PM), <https://www.virginiamercury.com/2020/07/08/what-sank-the-atlantic-coast-pipeline-it-wasnt-just-environmentalism/> (noting diversity of interested parties). Opposition to the ACP grew from:

[A]n unusually large and persistent grassroots movement that drew from not only different parts of the state, but different causes: clean energy, social and racial justice and property rights . . . the groups that joined together to fight the Atlantic Coast Pipeline were unusually diverse: from mountainous areas, cities and rolling farmland, Black and White, affluent and poor and across the political spectrum.

Id. (commenting on ACP's abrupt cancellation).

67. See John Murawski, *Atlantic Coast Pipeline to Take Landowners to Court to Clear Way for 600-Mile Project*, THE NEWS & OBSERVER (Nov. 16, 2017, 9:36 AM), <https://www.newsobserver.com/news/business/article184993198.html> (describing litigation between landowners and ACP).

68. See *Stop the Pipelines*, SIERRA CLUB: VA. CHAPTER, <https://www.sierraclub.org/virginia/vapipelines> (last visited Nov. 13, 2021) (opposing ACP).

69. See Press Release, Ctr. For Biological Diversity, Forest Service Denies Atlantic Coast Pipeline Route (Jan. 21, 2016), <https://www.biologicaldiversity.org/>

Environmentalists were concerned about water and air pollution.⁷⁰ Recreationists hoped to protect national treasures such as the Blue Ridge Parkway and the Appalachian Trail.⁷¹ Tribes fought to protect the safety of their land and communities.⁷² Environmental justice advocates sought to prevent the pipeline's disproportionate impact on minority communities.⁷³ These stakeholders and grassroots activists voiced their opposition by organizing marches and sit-ins, attending public meetings, and monitoring the pipeline's construction.⁷⁴

The legal challenges to the construction and operation of the ACP largely tracked the concerns of various stakeholders.⁷⁵ The most concerted legal challenges came from a coalition of local and national environmental groups, including the Sierra Club, Defenders of Wildlife, Appalachian Voices, Cowpasture River Preservation Association, and Wild Virginia.⁷⁶ These organizations attacked

news/press_releases/2016/acp-01-21-2016.html (explaining ACP's potential impacts on wildlife).

70. See *Stop the Pipelines*, *supra* note 68 (exploring ACP's potential negative impacts).

71. See Kurt Repanshek, *Groups Support Efforts to Keep Pipeline from Crossing A.T., Blue Ridge Parkway*, NAT'L PARKS TRAVELER (Jan. 28, 2020), <https://www.nationalparkstraveler.org/2020/01/groups-support-efforts-keep-pipeline-crossing-blue-ridge-parkway> (describing legal questions relating to pipelines crossing protected trails and parkways).

72. See Elizabeth Ouzts, *North Carolina Tribes Fear Impact of Atlantic Coast Pipeline Construction*, ENERGY NEWS NETWORK (Mar. 21, 2018), <https://energynews.us/2018/03/21/southeast/north-carolina-tribes-fear-impact-of-atlantic-coast-pipeline-construction/> (detailing Lumbee Tribe's opposition to ACP).

73. Olivia Rosane, *'Important Victory' for Historic Black Community Over the Atlantic Coast Pipeline*, ECOWATCH (Jan. 8, 2020, 9:12 AM), <https://www.ecowatch.com/atlantic-coast-pipeline-black-community-2644561804.html> (noting ACP's potential impact on historically Black community).

74. See, e.g., David Boraks, *3 N.C. Protests Target Atlantic Coast Pipeline*, WFAE (Nov. 15, 2016, 1:44 PM), <https://www.wfae.org/energy-environment/2016-11-15/3-n-c-protests-target-atlantic-coast-pipeline> (describing marches); John Murawski, *Atlantic Coast Pipeline Protestors Arrested Outside NC Governor's Office After Sit-In*, THE NEWS & OBSERVER (Feb. 5, 2018, 7:01 AM), <https://amp.newsobserver.com/news/local/counties/wake-county/article198037914.html> (reporting on sit-in); Kevin Ridder, *The End of the Atlantic Coast Pipeline*, APPALACHIAN VOICES (July 21, 2020), <https://appvoices.org/2020/07/21/the-end-of-the-atlantic-coast-pipeline/> (detailing marches, public meetings, and monitoring of construction).

75. See, e.g., *Klemic v. Dominion Transmission, Inc.*, 138 F. Supp. 3d 673, 678 (W.D. Va. 2015) (noting landowners' concern over Atlantic entering properties and conducting pipeline surveying); *Sierra Club v. United States Dep't of the Interior*, 899 F.3d 260, 266 (4th Cir. 2018) (addressing wildlife concerns); *Friends of Buckingham v. State Air Pollution Control Bd.*, 947 F.3d 68, 71 (4th Cir. 2020) (discussing environmental justice concerns).

76. See *U.S. Forest Serv. v. Cowpasture River Pres. Ass'n*, 140 S. Ct. 1837, 1842 (2020) (listing numerous environmental groups as parties); *Sierra Club*, 899 F.3d at 260 (vacating NPS grant of right-of-way); *Def. of Wildlife v. United States Dep't of the Interior*, 931 F.3d 339, 342 (4th Cir. 2019) (addressing endangered wildlife);

every stage of the permitting process in a successful attempt to render the project costly and delayed.⁷⁷ This strategy is especially effective against long and skinny projects like pipelines because of the many permits required; one invalidated permit could mark the end of an entire project.⁷⁸

The coalition against the ACP used every litigation tool at its disposal, alleging that the various federal and state agencies involved in the ACP project violated the National Environmental Policy Act (NEPA) and other federal statutes, including the Endangered Species Act (ESA), the Clean Air Act (CAA), the Clean Water Act (CWA), the National Forest Management Act (NFMA), and the Administrative Procedure Act (APA).⁷⁹ FERC is the predominant agency involved in approving natural gas pipelines, but many other agencies must approve permits required for construction.⁸⁰ The numerous lawsuits against FERC's sister agencies' actions regarding the ACP resulted in vacated authorizations and delayed construction.⁸¹

In addition to alleging violations of various environmental statutes, the coalition against the ACP also attacked agency authority to

Appalachian Voices v. State Water Control Bd., 912 F.3d 746, 750 (4th Cir. 2019) (considering pipeline's effects on water resources).

77. Ivan Penn, *Atlantic Coast Pipeline Canceled as Delays and Costs Mount*, N.Y. TIMES (July 5, 2020), <https://www.nytimes.com/2020/07/05/business/atlantic-coast-pipeline-cancel-dominion-energy-berkshire-hathaway.html> (reporting on ACP's cancellation).

78. *Property Rights*, *supra* note 29, at 578-79 (explaining jurisdictional difficulties of long and skinny resources).

79. *See* *Cowpasture River Pres. Ass'n v. U.S. Forest Serv.*, 911 F.3d 150, 154-55 (4th Cir. 2018) (addressing NFMA, NEPA, and MLA claims); *Defs. of Wildlife*, 931 F.3d at 345-66 (analyzing ESA and APA claims); *Appalachian Voices*, 912 F.3d at 750 (exploring CWA claims); *Friends of Buckingham*, 947 F.3d at 72, 81 (considering CAA and APA claims).

80. *Natural Gas Pipelines*, FED. ENERGY REGUL. COMM'N (Feb. 10, 2021), <https://www.ferc.gov/industries-data/natural-gas/overview/natural-gas-pipelines> (explaining FERC and other agencies' roles in natural gas pipeline certification).

81. Christine Tezak, *A Policy Analyst's View on Litigation Risk Facing Natural Gas Pipelines*, 40 ENERGY L.J. 209, 223 (2019) (describing lawsuits by anti-ACP parties against various federal agencies). Pipeline opponents have increasingly challenged FERC's sister agencies, such as the U.S. Forest Service and the U.S. Fish & Wildlife Service, in court. *Id.* at 223-29 (providing case summaries). Numerous agencies grant permits for pipeline projects; each of these permits creates an opportunity for pipeline opponents to attack a project. *Id.* (noting opponents challenged permits under different agency statutory requirements). According to the American Law Institute (ALI), "Generally speaking, challenges to Forest Service, Park Service, and BLM permits fared better than challenges to grants of water quality certificates." Carolyn Elefant & Jennifer Flint, *Summary of New Challenges to FERC Interstate Pipelines*, THE AM. LAW INST. CONTINUING LEGAL EDUC. (Jan. 24-26, 2019) (summarizing legal challenges to pipelines).

act in the first place.⁸² *Cowpasture* — the most publicized ACP lawsuit, and the only one to reach the Supreme Court — was a challenge to the Forest Service’s statutory authority to grant a right-of-way for the ACP to cross the Appalachian Trail.⁸³

C. The *Cowpasture* Decision

On February 24, 2020, activists and affected community members protested outside the Supreme Court to draw attention to the environmental and social justice impacts of the ACP.⁸⁴ Inside the courthouse, the justices listened to rather dry oral arguments detached from the emotional chants echoing through the Capitol.⁸⁵ The sole issue before the Supreme Court was whether the Mineral Leasing Act (MLA) authorized the Forest Service to grant a right-of-way for the ACP to cross national forest land traversed by the Appalachian Trail.⁸⁶

The MLA enables the Secretary of the Interior or an appropriate agency head to grant rights-of-ways through federal lands for pipeline purposes.⁸⁷ A 1973 amendment to the MLA defines federal lands to include “all lands owned by the United States, *except lands in the National Park System*, lands held in trust for an Indian or Indian tribe, and lands on the Outer Continental Shelf.”⁸⁸

The United States Court of Appeals for the Fourth Circuit held that the Forest Service lacked statutory authority to grant a pipeline right-of-way crossing the Appalachian Trail.⁸⁹ The parties did not dispute that the right-of-way for the ACP to cross under the Appalachian Trail, a national scenic trail, would intersect the Appalachian Trail in the George Washington National Forest.⁹⁰ The

82. *Cowpasture*, 140 S. Ct. at 1841 (addressing challenge to Forest Service’s authority to act).

83. *Id.* (holding Forest Service had authority to grant pipeline right-of-way).

84. Erin Jensen, *Pipeline Fighters and Frontline Community Members Rally Against Atlantic Coast Pipeline at Supreme Court*, FRIENDS OF THE EARTH ACTION (Feb. 24, 2020), <https://foeaction.org/news/pipeline-fighters-frontline-community-members-rally-atlantic-coast-pipeline-supreme-court/> (describing protests outside Supreme Court).

85. *See generally* Transcript of Oral Argument, *U.S. Forest Serv. v. Cowpasture River Pres. Ass’n*, 140 S. Ct. 1837 (2020) (Nos. 18-1584, 18-1587) (demonstrating legal battle focused on statutory language).

86. *Cowpasture*, 140 S. Ct. at 1841 (identifying issue granted certiorari).

87. 30 U.S.C. § 185(a) (delegating power to Secretary of Interior).

88. *Cowpasture*, 140 S. Ct. at 1843 (emphasis added) (citing 30 U.S.C. §185(a)) (providing amended statutory language).

89. *Cowpasture River Pres. Ass’n v. U.S. Forest Serv.*, 911 F.3d 150, 181 (4th Cir. 2018) (holding Forest Service lacked statutory authority to grant right-of-way and acted arbitrarily and capriciously in violation of NFMA and NEPA).

90. *Cowpasture*, 140 S. Ct. at 1844 (explaining legal issue).

decision hinged on whether the land the Appalachian Trail traverses was under the jurisdiction of the Forest Service or the NPS.⁹¹ If the land traversed by the Appalachian Trail was part of the NPS, then not only did the Forest Service not have authority to grant a right-of-way, but no agency could grant a right-of-way for a pipeline without congressional approval because the MLA exempts lands in the National Park System.⁹²

In an opinion written by Justice Thomas, the Court reversed the Fourth Circuit's decision: the MLA authorized the Forest Service to grant a pipeline right-of-way crossing the Appalachian Trail because the Trail's establishment as a national scenic trail merely created an easement and thus did not change the ownership of the national forest land on which it traversed.⁹³ In doing so, the majority separated the Appalachian Trail from the land underneath, stating "[a] trail is a trail, and land is land."⁹⁴

As a result of the *Cowpasture* decision, national scenic trails do not present a statutory bar against pipeline development.⁹⁵ *Cowpasture*, however, was not a green light for the ACP; the Supreme Court case simply put the other ongoing legal challenges to the ACP on hold.⁹⁶ Though *Cowpasture* was a victory for the pipeline, the seven-to-two decision could not save the ACP.⁹⁷ Dominion Energy and Duke Energy publicly cancelled the ACP due to "legal uncertainties" on July 5, 2020, only three weeks after the Supreme Court announced its decision in *Cowpasture*.⁹⁸

D. Proposed Bills: H.R. 7878 & S. 4502

As environmental and social justice advocates celebrated the ACP's demise, publicity surrounding *Cowpasture* revealed the public's desire to protect trails from the impact of pipelines.⁹⁹ In the

91. *Id.* (distinguishing between land and Trail).

92. *Id.* at 1843 (explaining NPS carve-out in MLA).

93. *Id.* at 1841, 1845 (holding Forest Service had statutory authority to grant pipeline right-of-way crossing Trail).

94. *Id.* at 1846 (distinguishing Trail from land it traverses).

95. *Cowpasture*, 140 S. Ct. at 1846 (stating consequence of Supreme Court's holding).

96. *See Cowpasture River Pres. Ass'n v. U.S. Forest Serv.*, 911 F.3d 150, 155 (4th Cir. 2018) (remanding violations of NFMA and NEPA to Forest Service).

97. *Dominion and Duke Cancel the ACP*, *supra* note 8 (noting ACP's peril despite favorable outcome at Supreme Court).

98. *Id.* (announcing cancellation of ACP).

99. *See* Julia Widmann & Malaika Elias, *Atlantic Coast Pipeline Cancelled After Years of Activism, Waterkeepers React to the Win*, WATERKEEPER ALL. (July 16, 2020), <https://waterkeeper.org/news/atlantic-coast-pipeline-cancelled-after-years-of-activism-waterkeepers-react-to-the-win/> (sharing activists' reactions). Not everyone

wake of *Cowpasture*, the House and Senate each proposed bills addressing the certification procedures for natural gas pipelines that could interfere with the aesthetic views of national scenic trails.¹⁰⁰ Rather than addressing agency authority to grant a pipeline right-of-way to cross a national scenic trail, H.R. 7878 and S. 4502 both focus on the very beginning of the pipeline certification process: FERC's issuance of a CPCN.¹⁰¹ Pipeline companies are required to obtain a CPCN certifying "need" for the proposed pipeline before any land acquisition and construction may begin.¹⁰²

Democratic Representative Ann McLane Kuster of New Hampshire introduced H.R. 7878, the Scenic Trail Viewshed Protection Act, in the House.¹⁰³ This bill purports to protect national scenic trails from pipelines that would mar the views of hikers.¹⁰⁴ H.R. 7878 directs FERC to "specifically consider the conservation and recreation value of the land impacted" and issue a CPCN under section 7 of the Natural Gas Act (NGA) only if FERC makes certain findings to minimize the impact on trails, including: (1) "[T]he pipeline is the only prudent and feasible alternative to meet an overriding public need;" (2) if the pipeline crosses a trail, it intersects the trail only once "at a point that is already subject to significant impact;" and (3) the pipeline will be built using special construction techniques to minimize disturbance to any trail.¹⁰⁵ Additionally, under H.R. 7878, if FERC grants a CPCN and the

viewed the ACP's cancellation as an environmental win; some ACP advocates argued the pipeline would have replaced coal, which produces nearly double the carbon dioxide (CO₂) emissions of natural gas. Ed Hirs, *Coal Wins! Atlantic Coast Pipeline Canceled*, FORBES (July 6, 2020, 3:06 PM), <https://www.forbes.com/sites/edhirs/2020/07/06/coal-wins-atlantic-coast-pipeline-canceled/?sh=7ba05d17487f> (arguing ACP would have benefitted environment). See generally Richard A. Epstein, *The Many Sins of NEPA*, 6 TEX. A&M L. REV. 1 (2018) [hereinafter *The Many Sins of NEPA*] (providing analysis on how environmentalist litigation strategies that block new developments may prevent cleaner technology from replacing more environmentally damaging infrastructure).

100. Scenic Trail Viewshed Protection Act, H.R. 7878, 116th Cong. (2020) (establishing procedure for evaluating pipelines); Pipeline Fairness, Transparency, and Responsible Development Act of 2020, S. 4502, 116th Cong. (2020) (stating purpose to increase transparency and public involvement in pipeline approvals).

101. H.R. 7878 (detailing pipeline certification process); S. 4502 (addressing when need is sufficient for pipeline creation).

102. SUSAN TIERNEY, ANALYSIS GRP., NATURAL GAS PIPELINE CERTIFICATION: POLICY CONSIDERATIONS FOR A CHANGING INDUSTRY 1 (2017), https://www.analysisgroup.com/uploadedfiles/content/insights/publishing/ag_ferc_natural_gas_pipeline_certification.pdf (describing natural gas pipeline certification process).

103. H.R. 7878 (providing bill's sponsor).

104. *Id.* § 3 (specifying bill applies to natural gas pipelines that will impact national scenic trails).

105. *Id.* §§ 2(1), 3(b) (governing CPCN issuance).

CPCN — or an action taken pursuant to it — is challenged in court, “The court should consider the loss of any natural, cultural, scenic, and recreational values in determining whether an overriding public need for such pipeline exists.”¹⁰⁶

Subsequently, Democratic Senator Tim Kaine of Virginia introduced S. 4502, the Pipeline Fairness, Transparency, and Responsible Development Act of 2020, in the Senate.¹⁰⁷ As its name suggests, this bill is significantly broader than H.R. 7878.¹⁰⁸ S. 4502’s purpose is “[t]o amend the [NGA] to bolster fairness and transparency in the consideration of interstate natural gas pipeline permits, to provide for greater public input opportunities in the natural gas pipeline permitting process, and for other purposes.”¹⁰⁹ One such “other purpose” is to require federal agencies to include a project’s visual impacts on national scenic trails in an environmental impact statement (EIS) prepared for federal authorization of a natural gas pipeline.¹¹⁰ FERC relies on the EIS when deciding whether to issue a CPCN.¹¹¹ S. 4502 includes some guidance on what to include in the EIS — such as “visual impact simulations depicting leaf-on and leaf-off views” to show a pipeline’s potential impact on a trail viewshed during different seasons — but unlike H.R. 7878, S. 4502 does not provide specific guidance on how FERC should make its determination to certify a pipeline after the EIS is completed.¹¹²

Neither bill legislatively overturns *Cowpasture*, under both bills, pipelines could still cross trails under certain circumstances.¹¹³ Rather, H.R. 7878 and S. 4502 protect national scenic trails by directing FERC to consider visual impacts on trails in its pipeline certification process.¹¹⁴ Though protecting national scenic trails from

106. *Id.* § 2(2) (identifying factors courts should consider).

107. Pipeline Fairness, Transparency, and Responsible Development Act of 2020, S. 4502, 116th Cong. (2020) (introducing Senate’s companion bill).

108. *Compare id.* (including considerations beyond trails) *with* H.R. 7878 (focusing on trails).

109. S. 4502 (providing bill’s purpose).

110. *See id.* § 7(5)(a) (instructing FERC to consider discernible aesthetic changes to natural landscape when issuing EIS).

111. *See, e.g.*, Atl. Coast Pipeline, LLC, 161 FERC ¶ 61,042, para. 4 (2017) (relying on EIS to authorize construction and operation of ACP in West Virginia, Virginia, and North Carolina).

112. S. 4502 § 7(5)(A)(ii) (leaving evaluation of considerations to FERC’s discretion).

113. H.R. 7878 (allowing pipeline certification if pipeline is only prudent and feasible alternative to meet overriding need and minimizes impact on trails); S. 4502 (permitting FERC authorization of pipeline if FERC considers trails).

114. H.R. 7878 (instructing FERC to consider impact on trails); S. 4502 (calling for consideration of impact on trails).

pipelines is a laudable goal, requiring FERC to consider impact on trails when certifying natural gas pipelines is an ineffective and inefficient method of protecting trails under current FERC policy and practice.¹¹⁵

III. THE FERC PIPELINE CERTIFICATION PROCESS

FERC is an independent agency charged with “regulat[ing] the interstate transmission of electricity, natural gas, and oil.”¹¹⁶ Under the NGA, FERC’s regulatory authority includes approving the siting of interstate natural gas pipelines such as the ACP.¹¹⁷ Before a company may begin construction or operation of an interstate natural gas pipeline, FERC must issue a CPCN pursuant to the NGA.¹¹⁸ The NGA, however, does not define “public convenience and necessity,” leaving FERC to construe the language as it sees fit to identify need.¹¹⁹

FERC’s evaluation of CPCN applications has shifted with industry changes.¹²⁰ FERC set forth its current analytical framework for

115. For a further discussion of H.R. 7878 and S. 4502’s shortcomings, see *infra* notes 206-29 and accompanying text.

116. *What FERC Does*, FED. ENERGY REGUL. COMM’N (Nov. 19, 2020), <https://www.ferc.gov/about/what-ferc/what-ferc-does> (explaining FERC’s role). FERC is comprised of up to five commissioners appointed by the President with advice and consent of the Senate. *Meet the Commissioners*, FED. ENERGY REGUL. COMM’N (Dec. 30, 2021), <https://ferc.gov/about/commission-members> (providing FERC leadership).

117. *What FERC Does*, *supra* note 116 (explaining FERC’s regulatory authority). Congress passed the NGA in 1938 to fill the regulatory gap produced as technological advancements led to interstate pipelines. Elefant & Flint, *supra* note 81 (noting congressional intent behind NGA). Because “the [NGA] preempts state and local agencies from regulating the construction and operation of interstate pipeline facilities or [their siting] . . . FERC regulation serves as the primary mechanism for ensuring that pipelines will be built in the public interest.” Avi Zevin, *Regulating the Energy Transition: FERC and Cost-Benefit Analysis*, 45 COLUM. J. ENVTL. L. 419, 487 (2020) (discussing FERC’s role under NGA).

118. *Industry Activities*, FED. ENERGY REGUL. COMM’N (May 4, 2021), <https://www.ferc.gov/industries-data/hydropower/industry-activities> (providing overview of FERC’s application review process). See generally *The Process*, FED. ENERGY REGUL. COMM’N (Aug. 31, 2020), <https://www.ferc.gov/industries-data/resources/process> (supplying detailed information on planning, filing, application, and construction processes).

119. Robert Christin et al., *Considering the Public Convenience and Necessity in Pipeline Certificate Cases Under the Natural Gas Act*, 38 ENERGY L.J. 115, 116 (2017) (describing 1999 Certificate Policy Statement). The NGA originally gave the Federal Power Commission, FERC’s predecessor agency, regulatory jurisdiction over interstate natural gas pipelines. Frank R. Lindh, *Federal Preemption of State Regulation in the Field of Electricity and Natural Gas: A Supreme Court Chronicle*, 10 ENERGY L.J. 277, 277 (1989) (explaining division of authority between states and federal agency).

120. Zevin, *supra* note 117, at 488 (explaining evolution of FERC policy).

reviewing pipeline certificate applications in its 1999 Certificate Policy Statement (Policy Statement), which “adopted an economic balancing test that weighs the public benefits of a project against its adverse impacts.”¹²¹ FERC measures public benefits through market demand for a pipeline, the sole indicator of which is the existence of precedent agreements.¹²²

Under current FERC policy, the existence of precedent agreements will overwhelmingly outweigh adverse impacts of a proposed pipeline.¹²³ Yet, H.R. 7878 and S. 4502 seek to change the overall criteria against which FERC weighs precedent agreements.¹²⁴ Simply adding impact on trails to the factors FERC considers would likely not tip the scales when the determinative factor of need is the existence of precedent agreements.¹²⁵ Moreover, FERC already considers a proposed pipeline’s adverse impacts on national scenic trails. H.R. 7878 and S. 4502, therefore, would not change FERC’s decision-making in practice.¹²⁶

A. Precedent Agreements: How FERC Determines Need

Precedent agreements are made between a pipeline company and potential companies for the purchase of gas before construc-

121. Christin et al., *supra* note 119 (summarizing Policy Statement). According to the Policy Statement, FERC must first conclude that the proposed project can proceed without subsidies from existing customers; FERC then “determine[s] whether the applicant has made efforts to eliminate or minimize any adverse effects the project might have on the existing customers of the pipeline proposing the project, existing pipelines in the market and their captive customers, or landowners and communities affected by the route of the new pipeline.” Certification of New Interstate Nat. Gas Pipeline Facilities, 88 FERC ¶ 61,227, 61,745 (1999) (clarifying “[t]his is not intended to be a decisional step in the process” but rather to review applicant’s mitigation measures). If, however, adverse effects are likely to occur after efforts have been made to minimize them, then FERC must balance the public benefits against any adverse effects. *Id.* ¶ 61,745-46 (explaining factors FERC considers).

122. Sam Kalen, *A Bridge to Nowhere? Our Energy Transition and the Natural Gas Pipeline Wars*, 9 MICH. J. ENVTL. & ADMIN. L. 319, 358 (2020) (noting reliance on precedent agreements).

123. See *Time to Move Away*, *supra* note 20 (illustrating determinative weight given to precedent agreements).

124. Scenic Trail Viewshed Protection Act, H.R. 7878, 116th Cong. (2020) (including trails in FERC’s balancing of need); Pipeline Fairness, Transparency, and Responsible Development Act of 2020, S. 4502, 116th Cong. (2020) (requiring evaluation of visual impacts on national scenic trails).

125. See *Time to Move Away*, *supra* note 20 (illustrating determinative weight given to precedent agreements).

126. Atl. Coast Pipeline, LLC, 161 FERC ¶ 61,042, para. 246 (2017) (addressing ACP’s potential impact on Appalachian Trail).

tion of the proposed pipeline.¹²⁷ Sue Tierney, Senior Advisor at Analysis Group and former Assistant Secretary for Policy at the U.S. Department of Energy, succinctly explains how FERC presently determines need:

When FERC reviews a pipeline project, it looks to see if the developer has an agreement with someone who wishes to purchase capacity on the pipeline (called a “shipper”). FERC treats such agreements as decisive in determining if a project is needed. The theory is that, if a shipper wants to purchase capacity along a new pipeline (instead of an existing pipeline), then there must be a market demand for the new project.¹²⁸

Under the Policy Statement, FERC only rejected two of the 476 projects proposed between 1999 and 2019.¹²⁹ Notably, the two rejected projects had no precedent agreements, but “since 1999 FERC has approved every proposed gas pipeline project that has had at least one precedent agreement.”¹³⁰ In practice, FERC relies on precedent agreements to make CPCN determinations.¹³¹

FERC’s use of precedent agreements to determine need for a pipeline project is controversial.¹³² According to Tierney, because

127. Kalen, *supra* note 122, at 328 (explaining FERC’s use of precedent agreements as demonstration of market need).

128. *Time to Move Away*, *supra* note 20 (emphasizing use of precedent agreements in proposed pipeline decision-making).

129. SUSAN F. TIERNEY, ANALYSIS GRP., FERC’S CERTIFICATION OF NEW INTERSTATE NATURAL GAS FACILITIES: REVISITING THE 1999 POLICY STATEMENT FOR 21ST CENTURY CONDITIONS 8 (2019), https://www.analysisgroup.com/globalassets/content/insights/publishing/revising_ferc_1999_pipeline_certification.pdf (noting substantial increase in pipeline capacity as result of FERC’s approval process). Although the Policy Statement eliminated a specific contract requirement, it affirmed that precedent agreements “would constitute significant evidence of demand for the project.” Certification of New Interstate Nat. Gas Pipeline Facilities, 88 FERC ¶ 61,227, 61,748 (1999) (clarifying FERC policy). Other scholars have noted that FERC “continues to rely on the existence of contracts for use of the pipeline as the best evidence of market demand.” Christin et al., *supra* note 119, at 115 (defending FERC’s policy on precedent agreements).

130. *Time to Move Away*, *supra* note 20 (providing statistics on precedent agreements in securing approval of pipeline proposals).

131. *Id.* (demonstrating importance of precedent agreements in securing gas pipeline approval).

132. The debate surrounding precedent agreements prompted FERC to investigate whether it should change its policy. Certification of New Interstate Natural Gas Facilities, 83 Fed. Reg. 18,020, 18,020 (Apr. 25, 2018) (publishing notice of inquiry). In April of 2018, six months after issuing a CPCN for the construction of the ACP, FERC issued a Notice of Inquiry to seek comments on, among other things, whether FERC should revise its reliance on precedent agreements to demonstrate need for a proposed project. *Id.* (outlining contents of notice of inquiry).

precedent agreements reflect the private interests of two parties, “[A] precedent agreement alone cannot universally demonstrate that a pipeline project is needed to meet the ‘public convenience and necessity’ — the standard under the [NGA].”¹³³ Tierney acknowledges that “the existence of a precedent agreement is a relevant factor, but it is not the *only* relevant factor.”¹³⁴ Under the current practice, FERC undervalues other relevant factors — including FERC environmental staff’s own findings in an EIS — in determining a proposed project’s need.¹³⁵ Furthermore, Tierney argues that FERC can and should change its policy on precedent agreements to engage in more robust need determinations.¹³⁶ In fact, “Doing so would return FERC’s reviews to the letter of the current Policy Statement which states that the agency will consider ‘all relevant factors’ to determine pipeline need.”¹³⁷

Another contentious aspect of FERC’s use of precedent agreements is its failure to distinguish between affiliate and non-affiliate agreements.¹³⁸ An affiliate agreement is a precedent agreement in which both parties fall under the same corporate umbrella.¹³⁹ Some argue that affiliate contracts do not adequately reflect need because they are not the product of arms-length negotiations.¹⁴⁰ More critical viewpoints perceive the use of affiliate agreements as “corporate self-dealing.”¹⁴¹ In response, those individuals in favor of upholding current FERC policy argue that affiliate agreements are an adequate measure of market need because “[i]nvestors are highly unlikely to put capital at risk for projects that lack a genuine market”¹⁴²

133. *Time to Move Away*, *supra* note 20 (explaining precedent agreements are not only factor in demonstrating project need).

134. *Id.* (listing additional factors FERC considers).

135. *Id.* (identifying factors FERC’s policy undervalues).

136. *Id.* (advocating for more holistic decision-making process).

137. *Id.* (arguing FERC is “well situated” to consider environmental externalities because it already considers economic externalities affecting existing customers).

138. *See* Certification of New Interstate Natural Gas Facilities, 83 Fed. Reg. 18,020, 18,030 (Apr. 25, 2018) (seeking comments on how FERC should assess precedent agreements with affiliates).

139. *Time to Move Away*, *supra* note 20 (noting increasing reliance on affiliate precedent agreements).

140. Elefant & Flint, *supra* note 81 (summarizing FERC policy).

141. LORNE STOCKMAN & KELLY TROUT, OIL CHANGE INT’L, ART OF THE SELF-DEAL: HOW REGULATORY FAILURE LETS GAS PIPELINE COMPANIES FABRICATE NEED AND FLEECE RATEPAYERS 5 (2017), https://www.eenews.net/assets/2017/09/19/document_ew_03.pdf (criticizing reliance on affiliate agreements).

142. Christin et al., *supra* note 119, at 128 (discussing market demand as determinative factor).

Under current FERC policy, the balancing scales are heavily weighted towards granting a CPCN to any pipeline applicant with a precedent agreement.¹⁴³ Adding potential negative impacts on national scenic trails to FERC's pipeline certification process is not an effective means of overcoming the controlling weight of precedent agreements.¹⁴⁴ Moreover, as the ACP permitting process illustrates, H.R. 7878 and S. 4502 do not require FERC to consider any novel factors in its decision-making process.¹⁴⁵

B. Atlantic Coast Pipeline Permitting

H.R. 7878 and S. 4502 purport to protect national scenic trails by forcing FERC to consider a proposed pipeline's potential impacts on trails, but FERC did just that in its evaluation of the ACP.¹⁴⁶ The Appalachian Trail was a focal point in both the EIS and FERC's order granting a CPCN for the ACP.¹⁴⁷

1. *The Environmental Impact Statement Process*

Under NEPA, FERC must publish a detailed EIS before it may issue a CPCN for a proposed pipeline.¹⁴⁸ Although FERC is the "lead agency" responsible for ensuring NEPA compliance and granting natural gas pipeline certificates, the Commission often cooperates with sister agencies involved in the certification process.¹⁴⁹ In developing the ACP EIS, FERC environmental staff received input from the Forest Service, U.S. Army Corps of Engineers, U.S. Environmental Protection Agency, U.S. Fish and Wildlife Ser-

143. *Time to Move Away*, *supra* note 20 (noting FERC's treatment of precedent agreements as decisive in need determination).

144. *Id.* (explaining how other factors are undervalued under current FERC policy).

145. Atl. Coast Pipeline, LLC, 161 FERC ¶ 61,042, para. 246 (2017) (considering national scenic trails in pipeline certification process).

146. *Id.* (addressing ACP's potential impact on Appalachian Trail).

147. *Id.* (noting EIS's discussion of Appalachian Trail).

148. Aaron Flyer, *FERC Compliance Under NEPA: FERC's Obligation to Fully Evaluate Upstream and Downstream Environmental Impacts Associated with Siting Natural Gas Pipelines and Liquefied Natural Gas Terminals*, 27 GEO. INT'L ENVTL. L. REV. 301, 303 (2015) (explaining necessity, scope, and requirements of EIS); *see also* 18 C.F.R. § 380.6 (2021) (requiring preparation of EIS under NEPA for authorization of natural gas pipelines pursuant to NGA). NEPA applies to all "major Federal actions significantly affecting the quality of the human environment[.]" 42 U.S.C. § 4332(C) (describing NEPA requirements). *See generally*, *EIS Pre-Filing Environmental Review Process*, FED. ENERGY REGUL. COMM'N (June 25, 2020), <https://www.ferc.gov/resources/processes/flow/process-eis> (outlining project review process for both applicants and FERC).

149. PAUL W. PARFOMAK, CONG. RSCH. SERV., R45239, INTERSTATE NATURAL GAS PIPELINE SITING: FERC POLICY AND ISSUES FOR CONGRESS 12 (May 27, 2021) (explaining interagency cooperation in pipeline certificate process).

vice, West Virginia Department of Environmental Protection, and West Virginia Division of Natural Resources as cooperating agencies.¹⁵⁰

On September 18, 2015, Atlantic filed an application with FERC for authorization to build and operate the ACP.¹⁵¹ FERC environmental staff issued a draft EIS in December 2016.¹⁵² FERC received comments during a ninety-day open comment period and produced its final EIS in July 2017.¹⁵³

The 866 pages of Volume I of the ACP EIS contain a description of the proposed action, alternatives, environmental analysis, conclusions, and recommendations.¹⁵⁴ The EIS considered the ACP's potential impacts on geology; soils; water resources; vegetation; wildlife; fisheries and aquatic resources; special status species; land use, special interest areas, and visual resources, including socioeconomic and environmental justice concerns; cultural resources; air quality and noise; and public safety.¹⁵⁵

The EIS specifically addressed the ACP-Appalachian Trail crossing.¹⁵⁶ It provided background information on the Trail and Trail management, noting that the NPS is the lead federal agency for the Trail's overall administration.¹⁵⁷ Anticipating the claim in *Cowpasture*, the EIS asserted that because the ACP would cross the Trail in national forest land, the crossing was not subject to NPS

150. *Final Environmental Impact Statement – Atlantic Coast Pipeline and Supply Header Project*, FED. ENERGY REGUL. COMM'N (June 16, 2020), <https://www.ferc.gov/final-environmental-impact-statement-atlantic-coast-pipeline-and-supply-header-project> (listing agencies providing feedback on ACP).

151. Atl. Coast Pipeline, LLC, 161 FERC ¶ 61,042, para. 1 (2017) (authorizing ACP). Atlantic amended its application on March 11, 2016, to reflect several proposed route changes and additional compression. *Id.* (providing background on ACP application process). Atlantic is a “natural gas company” subject to FERC's jurisdiction under 15 U.S.C. § 717. 15 U.S.C. § 717(a)(6) (defining natural gas company).

152. FED. ENERGY REGUL. COMM'N, ATLANTIC COAST PIPELINE AND SUPPLY HEADER PROJECT: DRAFT ENVIRONMENTAL IMPACT STATEMENT 1-2 (2016), https://www.ferc.gov/sites/default/files/2020-05/volume-I_0.pdf (outlining draft EIS).

153. 161 FERC ¶ 61,042, paras. 193-98 (explaining application review process). FERC received 1,675 written or electronically filed letters, in addition to 620 oral comments at ten public sessions held during the ninety-day comment period. *Id.* para. 197 (describing feedback received during public comment period).

154. FED. ENERGY REGUL. COMM'N, ATLANTIC COAST PIPELINE AND SUPPLY HEADER PROJECT: FINAL ENVIRONMENTAL IMPACT STATEMENT i-v (2017) [hereinafter ACP EIS], https://www.ferc.gov/sites/default/files/2020-05/volume-I_9.pdf (providing table of contents).

155. *Id.* at iii-v (outlining factors FERC considered in comprehensive environmental analysis).

156. *Id.* at ES-6 (discussing public land and recreational impacts).

157. *Id.* at 1-9 (identifying role of NPS).

approval.¹⁵⁸ The EIS further explained how the NPS and Forest Service's differing roles in administering the Appalachian Trail was one of the reasons the proposed route crossed the Trail in a national forest.¹⁵⁹

Additionally, the EIS provided a detailed analysis of the ACP's impact on the Appalachian Trail.¹⁶⁰ The cooperating agencies conducted full visual simulations at nine key observation points along the Trail and concluded that, at most points, "The right-of-way would be visible in the background; however, there would be little visual contrast in form, line, and color compared to the surrounding landscape."¹⁶¹ At other points, the right-of-way would be clearly visible but not prominent, and "visual impacts would not be noticeable as vegetation becomes reestablished."¹⁶² At two key observation points, the right-of-way would "creat[e] strong visual contrast across the landscape."¹⁶³ According to the EIS, Atlantic would mitigate this contrast by planting additional shrubs and vegetation.¹⁶⁴

The EIS also explained the Appalachian Trail's Cooperative Management System and the ATC's policy to oppose any pipeline crossing the Trail or adjacent land that could adversely impact the Trail, unless a pipeline meets certain criteria.¹⁶⁵ The criteria set forth in the ATC's policy and restated in the EIS resemble the criteria in H.R. 7878: in order for the ATC to approve a pipeline, the proposed pipeline must be "the only prudent and feasible alternative to meet an overriding public need" and cross the Appalachian Trail "at a point already subject to significant impact"¹⁶⁶ Additionally, the ATC requires pipeline proposals to include best practices — such as use of the horizontal directional drill (HDD) method — to minimize disturbance to the landscape.¹⁶⁷

158. *Id.* (concluding Appalachian Trail was under Forest Service management authority).

159. *See* ACP EIS, *supra* note 154, at 1-9 (explaining Appalachian Trail management authority).

160. *Id.* at 4-478 to -80 (surveying visual impact of ACP).

161. *Id.* at 4-479 (summarizing visual simulations results).

162. *Id.* at 4-480 (noting role of vegetation in mitigating visibility of ACP).

163. *Id.* (describing projected appearance of right-of-way from Trail overlook).

164. *See* ACP EIS, *supra* note 154, at 4-480 (indicating mitigation measures to reduce visual impact on Trail).

165. *Id.* at 4-461 (summarizing ATC policy).

166. *Id.* (outlining ATC policy); *cf.* Scenic Trail Viewshed Protection Act, H.R. 7878, 116th Cong. (2020) (proposing similar requirements).

167. *Id.* (reviewing ATC policy). Notably, the ATC accepted \$19.5 million from the pipeline companies behind the MVP. McGowan, *supra* note 4 (noting financial contributions from supporters of proposed pipeline).

Though the EIS did not expressly apply the ATC's criteria, its language suggests that FERC environmental staff considered this criteria.¹⁶⁸ For example, the EIS explained how the ACP would use the HDD method to cross the Appalachian Trail in order to avoid directly impacting its recreational use.¹⁶⁹ Furthermore, the EIS addressed alternative pipeline specifications and routes and their potential impacts on the Trail, noting that the proposed route was the most prudent and feasible.¹⁷⁰

The EIS ultimately determined that although construction and operation of the ACP “would result in temporary and permanent impacts on the environment,” negative impacts would be adequately “avoid[ed], minimize[d], and mitigate[d]”¹⁷¹ Relating to the Appalachian Trail, the EIS concluded that the overall impacts on recreation and visual resources would be adequately minimized.¹⁷²

2. *Atlantic Coast Pipeline: The FERC Order*

Relying on the EIS, FERC issued an order granting the ACP a CPCN on October 13, 2017.¹⁷³ In its order, FERC applied the analytical structure set forth in the Policy Statement and noted, “[A]lthough precedent agreements are no longer required to be submitted, they are still significant evidence of project need or demand.”¹⁷⁴ Because the ACP had six long-term, firm precedent agreements for about ninety-six percent of the pipeline's capacity, demonstrating market demand, FERC found need for the ACP.¹⁷⁵

168. *See generally id.* (addressing similar criteria).

169. ACP EIS, *supra* note 154, at ES-6 (providing plans for ACP). The ACP would cross the Appalachian Trail and the Blue Ridge Parkway “using the [HDD] method, which would not require ground disturbance or vegetation clearing between the HDD entry and exit points” *Id.* (noting Atlantic developed contingency plan to use direct pipe method to cross Appalachian Trail and Blue Ridge Parkway if HDD method failed).

170. *Id.* at 3-10 to -50 (considering alternative routes).

171. *Id.* at ES-16 (explaining EIS's major conclusions).

172. *Id.* at 5-28 (noting negative impacts to be mitigated by Atlantic and Dominion's proposed impact avoidance and minimization proposals).

173. Atl. Coast Pipeline, LLC, 161 FERC ¶ 61,042, para. 2 (2017) (issuing order); *see also* Mountain Valley Pipeline, LLC, 161 FERC ¶ 61,043, para. 3 (2017) (issuing order granting CPCN to MVP, which would also cross Appalachian Trail and provide natural gas to same region, on same day).

174. 161 FERC ¶ 61,042, paras. 28, 54 (concluding ACP met threshold requirement because there was “no potential for subsidization . . . or degradation of services to existing customers”).

175. *Id.* para. 63 (finding market demand).

Five of the six shippers with precedent agreements for ACP capacity were affiliated with the project's sponsors.¹⁷⁶ Adhering to its policy, FERC did not examine the relationship between Atlantic and the shippers because there were no allegations of anticompetitive behavior.¹⁷⁷ FERC argued, “[A]ny attempt . . . to look behind the precedent agreements in this proceeding might infringe upon the role of state regulators in determining the prudence of expenditures by the utilities that they regulate.”¹⁷⁸

FERC again reiterated its reliance on precedent agreements to determine need, rather than considering uncertain projections of future demand: “Where, as here, it is demonstrated that specific shippers have entered into precedent agreements for project service, [FERC] places substantial reliance on those agreements to find that the project is needed.”¹⁷⁹ FERC’s finding of need for the ACP rested solely on the existence of precedent agreements.¹⁸⁰ Even when weighing the adverse impacts against public benefits, FERC offered only precedent agreements as evidence demonstrating public benefits.¹⁸¹

FERC also analyzed the potential environmental impacts of the ACP and specifically addressed each aspect of the EIS, including the Appalachian Trail crossing.¹⁸² FERC agreed with the EIS’s con-

176. *Id.* (noting overwhelming presence of affiliate precedent agreements).

177. *Id.* para. 56 (outlining typical FERC practices with precedent agreements).

178. *Id.* para. 60 (explaining purpose for minimal search beyond precedent agreements).

179. Atl. Coast Pipeline, LLC, 161 FERC ¶ 61,042, para. 60 (2017) (specifying reasoning for reliance on precedent agreements when determining need).

180. *Id.* (refusing to look beyond precedent agreements in current proceeding). FERC dismissed other arguments that there was no need for the ACP, such as claims that an existing pipeline already served the generating facilities the ACP would supply and claims that gas from the ACP may be exported. *Id.* paras. 61-62 (ignoring other arguments in finding need). FERC also declined to examine pipeline need on a region-wide basis, noting that “Commission policy is to examine the merits of individual projects . . .” *Id.* para. 56 (emphasizing current FERC policy).

181. *Id.* paras. 64-65 (looking past adverse impacts when determining need). FERC weighed the need for the ACP against any adverse impacts on existing pipelines and their customers as well as landowners and communities. *Id.* (describing method for weighing adverse impact). FERC found that the ACP would have no adverse impact on existing pipelines or their captive customers because, as stated in the EIS, other pipelines were not practical alternatives to the ACP. *Id.* paras. 57, 64 (finding lack of practical alternatives to project). As for landowners and communities, FERC found that Atlantic mitigated impact by locating the ACP “within or parallel to existing utility corridors where feasible.” *Id.* para. 65 (providing explanation for ACP’s mitigated adverse impact).

182. *Id.* paras. 199-325 (outlining specific environmental impacts but ultimately finding majority would be temporary or short-term).

clusion that the ACP is environmentally acceptable “if constructed and operated as described in the final EIS”¹⁸³

Commissioner Cheryl LaFleur dissented from FERC’s decision to grant the CPCN for the ACP and stated, “Deciding whether a project is in the public interest requires a careful balancing of the need for the project and its environmental impacts.”¹⁸⁴ Commissioner LaFleur noted that FERC was also issuing an order authorizing the Mountain Valley Pipeline (MVP) that same day, implying that the majority did not give the balancing the proper attention it required.¹⁸⁵ Commissioner LaFleur’s dissent rested on her “concerns regarding the aggregate environmental impacts of the [ACP and MVP]”¹⁸⁶ She implored FERC to consider the projects’ collective environmental impacts against their economic need given their similar “routes, impact, and timing.”¹⁸⁷ Additionally, Commissioner LaFleur noted “the records demonstrate that there may be alternative approaches that could provide significant environmental advantages over [the ACP and MVP’s] construction as proposed.”¹⁸⁸

Though her dissent rested on the ACP and MVP’s cumulative impacts and the existence of alternative approaches, Commissioner LaFleur also addressed the need determination.¹⁸⁹ Commissioner LaFleur seemingly agreed with the majority’s conclusion that market need for the ACP exists.¹⁹⁰ Her dissent, however, took the need analysis further, also considering the ACP’s “specific evidence regarding the end use of the gas to be delivered on its pipeline.”¹⁹¹ Noting both projects produced evidence of precedent agreements, Commissioner LaFleur compared evidence of the ACP and MVP’s market need:

ACP estimates that 79.2 percent of the gas will be transported to supply natural gas electric generation facilities, 9.1 percent will serve residential purposes, 8.9 percent will serve industrial purposes, and 2.8 percent will serve other

183. *Id.* para. 325 (agreeing with EIS’s conclusion regarding acceptability of environmental impact).

184. *Atl. Coast Pipeline, LLC*, 161 FERC ¶ 61,042 (2017) (LaFleur, Comm’r, dissenting) (disagreeing with majority’s conclusion that ACP is in public interest).

185. *Id.* (pointing out FERC’s lack of careful consideration).

186. *Id.* (noting concern over aggregate impacts fueled dissent).

187. *Id.* (reminding of similarities between ACP and MVP).

188. *Id.* (recognizing potential for alternative approaches to ACP and MVP).

189. *Atl. Coast Pipeline, LLC*, 161 FERC ¶ 61,042 (2017) (LaFleur, Comm’r, dissenting) (exploring need determination issue).

190. *Id.* (agreeing with majority’s conclusion regarding market need).

191. *Id.* (examining considerations beyond what FERC found necessary).

purposes such as vehicle fuel. In contrast, “[w]hile Mountain Valley has entered into precedent agreements with two end users . . . for approximately 13% of the MVP project capacity, the ultimate destination for the remaining gas will be determined by price differentials in the Northeast, Mid-Atlantic, and Southeast markets, and thus, is unknown.”¹⁹²

If Commissioner LaFleur’s concerns regarding aggregate impacts and alternative approaches were not at issue, she may have joined the majority in granting the CPCN for the ACP.¹⁹³ Her finding of market need, however, would have been founded on more than precedent agreements alone, breaking from FERC’s current practice.¹⁹⁴ Commissioner LaFleur noted that although current FERC implementation of the Policy Statement “has focused more narrowly on the existence of precedent agreements[,]” the Policy Statement supports a broader need determination that allows applicants to “demonstrate need relying on a variety of factors”¹⁹⁵

IV. ANALYZING SOLUTIONS FOR IMPROVED PIPELINE NEED DETERMINATION

The timing of H.R. 7878 and S. 4502 suggests these bills are direct responses to *Cowpasture* that aim to protect trails from the detrimental effects of pipelines.¹⁹⁶ Although local activists had been fighting the ACP for years, the pipeline did not capture national attention until the Supreme Court granted certiorari in *Cowpasture*.¹⁹⁷ The Appalachian Trail quickly became the centerpiece of the ACP debate and its resulting legislation due to the narrow legal issue raised in the Supreme Court and the Trail’s popularity in the U.S.¹⁹⁸ The nation became so fixated on one-tenth-of-a-mile of pipeline that the other six hundred miles’ egregious environmental damages faded into the background.¹⁹⁹

192. *Id.* (alterations and omission in original) (quoting Mountain Valley Pipeline, LLC, 161 FERC ¶ 61,043, para. 292 n.286 (2017)) (comparing market needs).

193. *See generally id.* (noting ACP’s demonstrated market need).

194. *Id.* (noting LaFleur could have reached same conclusion in different manner).

195. *Id.* (explaining potential for broader reach of current FERC policy).

196. *See U.S. Forest Serv. v. Cowpasture River Pres. Ass’n*, 140 S. Ct. 1837, 1841 (2020) (permitting pipelines to cross national scenic trails).

197. For a discussion of the *Cowpasture* decision, see *supra* notes 84-98 and accompanying text.

198. *See, e.g.*, Friedman, *supra* note 12 (identifying Appalachian Trail crossing as distinguishing feature of ACP).

199. *See id.* (illustrating absence of other newsworthy features).

Regardless of whether the focus on the Appalachian Trail was misplaced, the EIS and FERC order granting a CPCN for the ACP demonstrate that FERC's analysis already includes consideration of a project's impact on national scenic trails.²⁰⁰ Congressional action that officially adds impact on trails to the factors FERC evaluates will not affect certification outcomes unless FERC modifies its need determination.²⁰¹ The current policy's focus on precedent agreements skews FERC's balancing of need against environmental and other impacts in favor of pipelines with precedent agreements, even those with affiliates.²⁰² H.R. 7878 and S. 4502 would give pipeline opponents another tool to chip away at a pipeline's authorization in court.²⁰³ Using litigation to render a project more costly and delayed, however, is an inefficient strategy to prevent hazardous pipelines, even if it was effective in halting the ACP.²⁰⁴ A better strategy is to reform FERC policy surrounding how the Commission determines need, specifically when precedent agreements are involved.²⁰⁵

A. H.R. 7878 and S. 4502 Would Be Ineffective

Without reforming FERC's mechanisms of weighing pipeline need, requiring the Commission to consider a project's impact on trails is unlikely to alter the outcome of pipeline certification proceedings.²⁰⁶ The ACP EIS illustrates that had Congress enacted either H.R. 7878 or S. 4502 before Atlantic applied for a CPCN, the bills would not likely have prevented FERC from certifying the project.²⁰⁷

NEPA already requires FERC to conduct an environmental review that includes analyzing a pipeline's potential impact on trails.²⁰⁸ H.R. 7878, therefore, fails to significantly change FERC's

200. Atl. Coast Pipeline, LLC, 161 FERC ¶ 61,042, para. 249 (2017) (addressing ACP's potential impact on Appalachian Trail).

201. *See id.* para. 4 (authorizing ACP after detailed analysis of impact on Trail).

202. *Time to Move Away*, *supra* note 20 (critiquing FERC policy).

203. For a further discussion of the content of H.R. 7878 and S. 4502, see *supra* notes 99-115 and accompanying text.

204. *See generally The Many Sins of NEPA*, *supra* note 99 (providing critical commentary on environmental litigation).

205. *Time to Move Away*, *supra* note 20 (suggesting FERC reforms).

206. *See, e.g.*, Atl. Coast Pipeline, LLC, 161 FERC ¶ 61,042, para. 4 (2017) (finding need for ACP despite considering impact on Appalachian Trail).

207. *See, e.g.*, ACP EIS, *supra* note 154, at 4-480 (assessing ACP's impact on Appalachian Trail).

208. For a further discussion of FERC's pipeline certification process, see *supra* notes 116-95 and accompanying text.

current evaluation process.²⁰⁹ To certify a pipeline under H.R. 7878, the project must be “the only prudent and feasible alternative to meet an overriding public need.”²¹⁰ But, as illustrated in the order issuing the CPCN for the ACP, current FERC policy presumes a strong public need for a pipeline based on the existence of precedent agreements.²¹¹ Moreover, the ACP EIS concluded that the proposed route was the most prudent and feasible alternative pursuant to NEPA.²¹²

The ACP EIS further incorporated the other requirements H.R. 7878 purports to impose on FERC.²¹³ For example, H.R. 7878 section 3(b)(7) requires the use of construction techniques that limit disturbance to protected trails or surrounding land.²¹⁴ The ACP EIS described at length how the HDD method would minimize recreational impacts to the Trail, which was further reiterated in the ACP FERC order.²¹⁵

S. 4502 is even weaker than H.R. 7878 in its attempt to protect national scenic trails from disturbance by pipelines.²¹⁶ S. 4502 merely requires a pipeline’s EIS to “include visual impact simulations depicting leaf-on and leaf-off views at each location where major visual impacts occur” and “consider the cumulative visual impacts of any similar proposed project . . . that impacts the same national scenic trail within 100 miles of the first project[.]”²¹⁷ The ACP EIS included visual impact simulations and considered the MVP, a similar proposed project routed to cross the Appalachian

209. Scenic Trail Viewshed Protection Act, H.R. 7878, 116th Cong. (2020) (recommending factors for consideration when pipelines cross national scenic trails).

210. *Id.* § 3(b)(1) (designating standard to approve new pipelines).

211. Atl. Coast Pipeline, LLC, 161 FERC ¶ 61,042, para. 55 (2017) (finding market need based on existence of precedent agreements).

212. Catherine E. Kanatas & Maxwell C. Smith, *The Heart of the Matter: Alternatives, Mitigation Measures, and the Clouded Heart of NEPA*, 31 J. LAND USE & ENVTL. L. 197, 198 (2016) (explaining how NEPA requires agencies to consider alternatives); ACP EIS, *supra* note 154, at ES-15 (noting alternatives considered).

213. For a further discussion of the similarities between the ACP EIS and H.R. 7878, see *supra* notes 166-67 and accompanying text.

214. Scenic Trail Viewshed Protection Act, H.R. 7878, 116th Cong. (2020) (requiring minimal disturbance to trails and land during construction).

215. ACP EIS, *supra* note 154, at 2-1 (noting use of HDD to cross Appalachian Trail); 161 FERC ¶ 61,042, para. 249 (noting HDD crossing method eliminates surface impact on Trail).

216. Compare H.R. 7878 (advancing strict requirements) with Pipeline Fairness, Transparency, and Responsible Development Act of 2020, S. 4502, 116th Cong. (2020) (requiring only consideration of trails).

217. S. 4502 § 7(5)(A) (describing visual impact analysis of proposed projects).

Trail in the same region as the ACP.²¹⁸ Unlike H.R. 7878, which uses strong language purportedly limiting FERC's authority to certify pipelines, S. 4502 does not direct FERC's action as long as the environmental staff includes trails in the EIS, as was done in the ACP EIS.²¹⁹ H.R. 7878 and S. 4502 would probably not have protected the Appalachian Trail from the ACP, and they are not sufficiently effective to protect trails from future pipelines under current FERC policy.²²⁰

B. H.R. 7878 and S. 4502 Would Be Inefficient

Perhaps the most effective aspect of these bills is their potential use in litigation to stall pipeline projects.²²¹ Pipeline opponents defeated the ACP by bringing numerous lawsuits that delayed the project and made it prohibitively expensive.²²² Whether these bills would impact the outcome of a case by providing additional fuel for litigation is undetermined; the ACP is nevertheless an example of how the litigation strategy of death by a thousand cuts — or lawsuits — works, even in the face of a Supreme Court win for the pipeline.²²³

H.R. 7878 anticipates its use in litigation by stating that if FERC grants a CPCN that is challenged in court, “[T]he court should consider the loss of any natural, cultural, scenic, and recreational values in determining whether an overriding public need for such pipeline exists.”²²⁴ Had Congress enacted these bills prior to the ACP saga, they certainly would have appeared in court briefings.²²⁵ Although this legislation might make post-certificate anti-pipeline

218. ACP EIS, *supra* note 154 (evaluating potential environmental impacts of ACP).

219. *Id.* (including Appalachian Trail impact).

220. *See, e.g.*, Atl. Coast Pipeline, LLC, 161 FERC ¶ 61,042, para. 4 (finding need for ACP despite considering Appalachian Trail impact).

221. *Cf. The Many Sins of NEPA*, *supra* note 99, at 10 (critiquing similar litigation tactic in NEPA context).

222. *Dominion and Duke Cancel the ACP*, *supra* note 8 (announcing cancellation of ACP).

223. *Id.* (describing cost increases and time delays leading to cancellation).

224. Scenic Trail Viewshed Protection Act, H.R. 7878, 116th Cong. § 2(2) (2020) (outlining bill's potential use in litigation and factors courts should consider).

225. *Cf. Carl Segerstrom, Feds Eye Changes to a Bedrock Environmental Law*, HIGH COUNTRY NEWS (July 6, 2018), <https://www.hcn.org/articles/public-lands-feds-eye-changes-to-bedrock-environmental-law> (noting some lawmakers view NEPA as “weapon for litigants to force delays and denials on all sorts of activities”).

litigation more successful by further delaying projects and increasing their costs, it perpetuates an inefficient litigation strategy.²²⁶

Scholars have critiqued the use of litigation tactics that delay projects and increase costs, particularly regarding NEPA, as a waste of resources.²²⁷ Before Dominion and Duke cancelled the ACP, some of the pipe was already in the ground and had to be “retire[d] in place”²²⁸ Given the waste of time, money, and resources resulting from drawn-out litigation and cancelled projects, stakeholders would benefit from an ex-ante strategy impacting FERC’s decisions before any ground is broken.²²⁹

C. FERC Reform is a Better Solution

Changing FERC’s policies on precedent agreements can effectively and efficiently protect trails, as well as communities, species, and landscapes, from unnecessary natural gas infrastructure.²³⁰ Precedent agreements should not predetermine FERC’s decisions.²³¹ FERC can and should employ a more rigorous need analysis to ensure only pipelines truly in the public benefit may obtain a CPCN.²³²

Allowing precedent agreements to determine public need puts the very companies FERC regulates in charge of making that determination.²³³ This is especially true when FERC relies on precedent

226. Julia S. Thrower, *Is the National Environmental Policy Act in Need of Change?*, 62 THE ADVOCATE 35, 35-36 (2019) (noting inefficiency of similar litigation strategy in NEPA context).

227. *Id.* (providing how litigation methods used may not be ideal). Although NEPA has been successful in some cases in leading to “better decision-making that prevented unnecessary adverse environmental impacts and saved taxpayers millions of dollars[,]” NEPA has been “criticized as a law that creates inefficiencies, causes project delays, and costs taxpayers money.” *Id.* (explaining why such litigation strategy faces criticism).

228. *Frequently Asked Questions*, ATL. COAST PIPELINE, <https://atlanticcoastpipeline.com/about/default.aspx> (last visited Nov. 11, 2021) (informing consumers about aftermath of abruptly ended projects).

229. *See, e.g.*, ATL. COAST PIPELINE, ATLANTIC COAST PIPELINE: DISPOSITION AND RESTORATION PLAN 1-2 (2020), https://atlanticcoastpipeline.com/resources/docs/public_acp%20disposition%20and%20restoration%20plan.pdf (detailing environmental and economic waste in need of restoration post-ACP cancellation).

230. *See* Gillian Giannetti, *Reform Is Long Overdue for FERC’s Gas Pipeline Reviews*, NRDC (Nov. 19, 2019), <https://www.nrdc.org/experts/gillian-giannetti/reform-long-overdue-how-ferc-approves-pipelines> (advocating for FERC reform).

231. *Time to Move Away*, *supra* note 20 (explaining problems with FERC’s reliance on precedent agreements).

232. *Id.* (noting “consideration of such other factors is entirely within FERC’s technical abilities and the confines of the law”).

233. Stockman & Trout, *supra* note 141 (explaining reliance on affiliate agreements and its impact on ratepayers).

agreements with affiliates, as was the case with the ACP.²³⁴ Under current FERC policy and practice, a pipeline project only needs one precedent agreement to obtain a CPCN.²³⁵ If a pipeline company can manufacture an agreement with an affiliate, the company can all but guarantee FERC will defer to the agreement and find need for the project.²³⁶ To maintain the integrity of the pipeline certification process, the entities FERC is charged with regulating should not be able to determine project need.²³⁷

Precedent agreements should, nonetheless, be a factor in the need analysis.²³⁸ FERC must ensure the energy produced will be bought on the market.²³⁹ FERC should therefore take a broader approach to ensure that pipelines will not become stranded assets.²⁴⁰ Commissioner LaFleur's dissent suggests that even under a broader approach, FERC would have found need for the ACP, despite analysts' findings to the contrary.²⁴¹

The ACP's cancellation, however, demonstrates that the economic need for the pipeline was not great enough to survive what have become routine anti-pipeline litigation attacks.²⁴² By relying solely on precedent agreements, the true test of economic need plays out in the courtroom.²⁴³ Pipeline companies anticipate lawsuits; if a pipeline is "necessary" or has economic backing, that need will overcome litigation setbacks.²⁴⁴ A more robust need analysis may abdicate the necessity of trail-specific FERC legislation because

234. For a discussion of ACP affiliate agreements, see *supra* notes 176-78 and accompanying text.

235. *Time to Move Away*, *supra* note 20 (explaining decisive weight of precedent agreements).

236. *Id.* (noting FERC does not look behind precedent agreements).

237. See generally Stockman & Trout, *supra* note 141, at 7 (advocating for FERC reform).

238. *Time to Move Away*, *supra* note 20 (stating precedent agreements are relevant factor but not only one).

239. Christin et al., *supra* note 119, at 132 (explaining importance of market signals).

240. See Kalen, *supra* note 122 (providing detailed analysis of FERC's role in stranded asset problem).

241. See Kunkel & Stockman, *supra* note 11 (finding "vanishing need" for ACP).

242. *Dominion and Duke Cancel the ACP*, *supra* note 8 (announcing cancellation of ACP).

243. *Id.* (noting legal uncertainty).

244. See Christin et al., *supra* note 119, at 128 (explaining how market forces show evidence of need).

the FERC process on its own could weed out unnecessary pipelines that may impact trails.²⁴⁵

D. Beyond Trails: Environmental & Social Justice Considerations

In focusing on a pipeline's interference with national scenic trails, H.R. 7878 and S. 4502 fail to consider other important issues.²⁴⁶ Although the Appalachian Trail crossing received the most publicity, the ACP would have had more serious impacts on communities and the environment as a whole than disturbing a short segment of trail.²⁴⁷ Broader FERC reform could also address the environmental and social justice concerns absent from H.R. 7878 and S. 4502.²⁴⁸

Beyond the Appalachian Trail crossing and legal questions regarding statutory interpretation, the debate over the ACP can be simplified to two diverging viewpoints: promoting economic development and energy independence on the pro-ACP side, and preventing environmental and climate harm and social inequity on the anti-ACP side.²⁴⁹ The proposed pipeline route traveled heavily through minority and low-income communities; although the ACP project may have brought jobs and economic development to the region, the pipeline's route raised environmental justice concerns in the event of a leak or explosion.²⁵⁰

245. See generally *Time to Move Away*, *supra* note 20 (advocating for more rigorous review of pipeline proposals).

246. See *id.* (listing other important factors FERC undervalues).

247. See Sara Wraight et al., *Environmental Justice Concerns and the Proposed Atlantic Coast Pipeline Route in North Carolina*, RTI PRESS (2018), <https://www.rti.org/rti-press-publication/environmental-justice-ACP/fulltext.pdf> (providing empirical study of ACP's potential environmental justice impacts on communities and their land).

248. See Certification of New Interstate Nat. Gas Pipeline Facilities, 174 FERC ¶ 61,125, para. 6 (2021) (seeking comments on pipeline review policy, including environmental and social justice issues).

249. See generally Brief of Amici Curiae State of West Virginia and 15 Other States in Support of Petitioner, U.S. Forest Serv. v. Cowpasture River Pres. Ass'n, 140 S. Ct. 1837 (2020) (No. 18-1587) (arguing Fourth Circuit decision halting ACP construction harmed economic development); Brief of the City of Staunton, Virginia and Nelson County, Virginia, as Amici Curiae in Support of Respondents, U.S. Forest Serv. v. Cowpasture River Pres. Ass'n, 140 S. Ct. 1837 (2020) (Nos. 18-1584, 18-1587) (noting environmental risks of ACP).

250. Lynsey Gilpin, *A Pipeline Runs Through It*, GRIST (Dec. 3, 2019), <https://grist.org/Array/tracing-the-path-of-dominion-energys-atlantic-coast-natural-gas-pipeline/> (providing varying viewpoints from people residing near ACP's proposed route).

The potential harm of natural gas pipelines extends beyond the aesthetic scarring of land and possible leaks and spills.²⁵¹ Many commentators viewed the placement of a compressor station for the ACP in Union Hill, North Carolina, a predominantly and historically Black neighborhood, as an example of environmental racism.²⁵² Natural gas pipelines require compressor stations to maintain the pressure and flow of gas.²⁵³ Compressor stations can have several damaging impacts on communities, especially from air, noise, and light pollution.²⁵⁴ Operating a compressor station, even without incident, is a toxic industrial activity that damages the public health of nearby communities.²⁵⁵ When environmentally damaging activities disproportionately impact communities of color, environmental racism needs to be considered and addressed.²⁵⁶ Environmental justice concerns should play a role at the FERC certification stage before overburdened groups need to fight against disparate environmental harms resulting from pipelines.²⁵⁷

251. See, e.g., Robert Rapier, *Deadly Dangers Lurk in Natural Gas Distribution Lines*, FORBES (Sept. 17, 2018), <https://www.forbes.com/sites/rpapier/2018/09/17/deadly-dangers-lurk-in-natural-gas-distribution-lines/?sh=4b5f06e54890> (identifying risks of natural gas pipelines, including explosions).

252. Ben Paviour, *A Historically Black Town Stood in the Way of a Pipeline – So Developers Claimed It Was Mostly White*, THE GUARDIAN, (Sept. 16, 2021), <https://www.theguardian.com/us-news/2021/sep/16/virginia-atlantic-coast-pipeline-union-hill-historically-black-town> (reporting on pressing impacts of environmental racism).

253. *Understanding Natural Gas Compressor Stations*, PENNSTATE EXTENSION (Mar. 26, 2015), <https://extension.psu.edu/understanding-natural-gas-compressor-stations> (explaining how natural gas compressor stations work).

254. *Id.* (noting potential negative impacts of compressor stations).

255. See generally Kaitlin A. Vollet Martin et al., *Survey of Airborne Organic Compounds in Residential Communities Near a Natural Gas Compressor Station: Response to Community Concern*, 5 ENV'T ADVANCES 1 (June 13, 2021), <https://reader.elsevier.com/reader/sd/pii/S2666765721000478?token=CD4BAFFC6B4C952FD6021EBE0D7D860AAACE47684F0451AD2F6014C6959156B5EF1435738401B95DCE276625FDEA0DD84&originRegion=us-east-1&originCreation=20211121193632> (investigating impact of compressor station on public health). Compressor stations are short and squat properties, as opposed to the long and skinny shape of pipelines and trails. *Property Rights*, *supra* note 29, at 567 (categorizing property types by shape). According to Professor Epstein, short and squat properties are more prone to environmental justice issues than skinny properties. *Id.* at 580 (arguing environmental justice concerns play out differently for pipelines than waste dumps or other facilities).

256. Rachel D. Godsil, *Remedying Environmental Racism*, 90 MICH. L. REV. 394, 395 (1991) (recognizing need for potential environmental racism to be considered). Reverend Benjamin Chavis, Jr. coined the term “environmental racism” in response to a study finding that race is the most significant factor related to the presence of hazardous waste sites in residential communities in the U.S. *Id.* (recognizing importance of studying intersection of race and environment).

257. Miranda Willson, *Gas Projects Reveal FERC's Environmental Justice Conundrum*, E&E NEWS: ENERGYWIRE (Aug. 3, 2021, 6:17 AM), <https://www.eenews.net/>

The ACP also implicated tribal sovereignty questions.²⁵⁸ In North Carolina, the ACP's route would have cut through traditional and contemporary areas of the Lumbee, Coharie, and Haliwa-Saponi tribes.²⁵⁹ According to the Lumbee Tribe, the ACP "poses a serious risk to the environmental and cultural resources of the Lumbee Tribe and its ability to provide a safe, livable homeland for its members and residents[.]"²⁶⁰ Tribes are supposed to be included in the development planning of any project that could impact tribal lands, a process known as "consultation," but tribes have struggled to obtain "full and meaningful government-to-government consultation."²⁶¹

Moving away from precedent agreements as the sole indicator of pipeline need allows for these important environmental justice issues to hold more weight in the pipeline certification process.²⁶² Already, FERC is listening: in 2018, and again in 2021, FERC issued a Notice of Inquiry (NOI) seeking input on the pipeline certification process.²⁶³ Both NOIs asked for comments on how FERC determines need for a proposed pipeline.²⁶⁴ Questions proposed covered FERC's reliance on precedent agreements and use of affiliate agreements, and what, if any, other evidence beyond precedent

articles/how-fercs-environmental-justice-push-might-backfire/ (quoting Montana Cole, senior counsel for environmental justice and equity at FERC, about need to address environmental justice issues before making final decision on project).

258. See Naveena Sadasivam, *Federal Agencies Are Required to Consult with Tribes About Pipelines. They Often Don't*, GRIST (Jan. 2, 2020), <https://grist.org/energy/federal-agencies-are-required-to-consult-with-tribes-about-pipelines-they-often-dont/> (addressing tribal involvement and lack thereof in FERC process).

259. Laura Oleniacz, *N.C. Tribes Faced Obstacles to Atlantic Coast Pipeline Water Planning. Study Shows*, N.C. STATE UNIV.: NEWS (Aug. 11, 2020), <https://news.ncsu.edu/2020/08/n-c-tribes-faced-obstacles-to-pipeline-water-planning/> (interviewing author of case study evaluating potential impacts of ACP on water quality and Indigenous people).

260. LUMBEE TRIBE OF N.C., TRIBAL CONSULTATION AND THE ATLANTIC COAST PIPELINE 2 (2018), <https://s3.documentcloud.org/documents/4417276/Lumbee-Tribe-of-N-C-Resolution-on-Atlantic-Coast.pdf> (adopting tribal council resolution). During the battle against the ACP, the Lumbee Tribe was also engaged in an ongoing struggle to gain federal recognition. Ouzts, *supra* note 72 (noting Lumbee Tribe lacks federal recognition).

261. Ouzts, *supra* note 72 (describing ACP's impact on tribes).

262. See generally *Time to Move Away*, *supra* note 20 (advocating for more rigorous need analysis).

263. *FERC Revisits Review of Policy Statement on Interstate Natural Gas Pipeline Proposals*, FED. ENERGY REGUL. COMM'N (Feb. 18, 2021), <https://www.ferc.gov/news-events/news/ferc-revisits-review-policy-statement-interstate-natural-gas-pipeline-proposals> (reopening review of Policy Statement to build its record established in response to 2018 NOI).

264. *Id.* (outlining areas of interest in which FERC requested feedback).

agreements FERC should consider.²⁶⁵ The 2021 NOI added questions relating to impacts on environmental justice communities.²⁶⁶ FERC reform can help center the issues that are truly significant in the pipeline certification process — a proposed pipeline’s impact on nearby communities and the environment — rather than a narrow segment of trail.²⁶⁷

V. CONCLUSION

To protect national scenic trails, Congress must do more than add trails to the litany of factors FERC considers when deciding whether to grant a CPCN.²⁶⁸ Pipeline companies will continue to propose new natural gas pipelines, and even under FERC-reformed policies regarding precedent agreements, FERC will continue to certify new pipelines.²⁶⁹ As long as pipeline projects exist, so, too, will the onslaught of litigation trying to stop them.²⁷⁰ FERC reform may provide an ex-ante approach to prevent unnecessary pipelines from getting past the starting line.²⁷¹ Although the series of cases against the ACP illustrates that the litigation strategy of attacking a project at every angle works, a far more efficient outcome would have been for the ACP — a pipeline with questionable need — to never have received a CPCN in the first place.²⁷²

265. *Id.* (providing examples of FERC’s questions).

266. *Id.* (showing additional areas of concern FERC added to newest NOI).

267. *See, e.g.,* Willson, *supra* note 257 (identifying environmental justice implications of two natural gas projects in Texas).

268. For a discussion of the shortcomings of H.R. 7878 and S. 4502 in protecting trails, see *supra* notes 206-29 and accompanying text.

269. For a discussion of FERC policy reform proposals for change, see *supra* notes 230-45 and accompanying text.

270. *See, e.g., Pipelines*, SIERRA CLUB, <https://www.sierraclub.org/topics/pipelines> (last visited Oct. 31, 2021) (indicating environmental group’s general opposition to pipelines).

271. For a discussion of the inefficiencies of H.R. 7878 and S. 4502, see *supra* notes 221-29 and accompanying text.

272. For a discussion of possible FERC reforms, see *supra* notes 230-45 and accompanying text.