

# SOUTHERN ENVIRONMENTAL LAW CENTER

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*Via Electronic Mail, Certified U.S. Mail and Submittal to FERC Docket CP15-554-000*

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Re: Atlantic Coast Pipeline, FERC Docket # CP15-554-000

Dear Ms. Atkinson and Mr. Arney:

On December 13, 2018, the United States Court of Appeals for the Fourth Circuit vacated Forest Service approvals for the Atlantic Coast Pipeline (ACP) on multiple grounds. *Cowpasture River Pres. Ass'n v. Forest Serv.*, 911 F.3d 150 (4th Cir. 2018).

We previously wrote you on March 19, 2019, commenting on our view as to the scope of the Forest Service's consideration of alternatives in light of the Fourth Circuit's decision. We write today to address a related issue: the Forest Service's lack of authority under the Mineral Leasing Act to grant a right-of-way across the Appalachian National Scenic Trail (ANST) for a gas pipeline, which we understand the Forest Service is challenging as the specific holding of the *Cowpasture* decision as it relates to the ANST. In particular, we seek to clarify the following: (1) the *Cowpasture* decision does not affect the Forest Service's other management authorities for the ANST; (2) reasonable off-forest alternatives exist for the ACP to cross the ANST; and (3) while the Forest Service has never before and cannot now issue a new gas pipeline right-of-way across the ANST, options exist for new pipelines to be built in the eastern United States, and existing pipelines are unaffected by the *Cowpasture* decision.

## **The Cooperative Management of the ANST Is Unaffected by *Cowpasture***

In *Cowpasture*, the Fourth Circuit concluded that the Forest Service lacks statutory authority to grant a new gas pipeline right-of-way across the ANST where it traverses a national forest under the authority of the Mineral Leasing Act. The Court addressed a specific question related to the ANST – whether “the [Mineral Leasing Act] authorizes the Forest Service to grant

pipeline rights of way on Forest Service land traversed by the ANST.” *Cowpasture*, 911 F.3d at 179–80.

The ruling is specific to oil and natural gas pipelines; it has no impact on the Forest Service’s authority to otherwise manage the Appalachian Trail where it crosses the national forest. The Forest Service retains its long established authority to maintain the trail and regulate segments of the Appalachian Trail that traverse national forests. As Petitioners in that case argued to the Court, the National Trails Act “does not transfer ‘among Federal agencies any management responsibilities’ for trail segments....” See Petitioners’ Reply Brief at 20, *Cowpasture*, 911 F.3d 150 (No. 18-1114), ECF No. 79 (citing 16 U.S.C. § 1246(a)(1)(A)). The management authorities available to the Forest Service for national forests remain available to the agency in its day-to-day management responsibilities for forests traversed by the ANST. The Mineral Leasing Act is an exception, because Congress chose to exclude all “lands in the National Park System” from the scope of its authority. As a result, other statutory authority without such an exclusion, including right-of-way authorities other than the Mineral Leasing Act, remain available to the Forest Service to support its day-to-day management responsibilities for segments of the ANST, including segments entrusted to its management pursuant to 16 U.S.C. § 1246.

#### **Reasonable Off-Forest Crossings of the ANST Are Available for the ACP**

The Mineral Leasing Act only prohibits new oil or gas pipeline rights-of-way across the ANST on federal land, not state or private lands.<sup>1</sup> The Fourth Circuit’s ruling in *Cowpasture* has no effect on state and private lands crossed by the ANST. Atlantic Coast Pipeline, LLC (“Atlantic”) has options to reroute this project without crossing the ANST on federal land—the trail also crosses 67 units of state lands, lands owned by localities, and private lands.<sup>2</sup> Atlantic previously identified two locations in Virginia where it could cross the ANST on areas other than federal lands, an analysis that overlooked additional options. See Atlantic Coast Pipeline, Abbreviated Application, Resource Report 10 at 10-62 to 10-64, FERC Dkt. CP15-554-000, Accession Number 20150918-5212 (Sept. 18, 2015).<sup>3</sup> One route to the west would cross the ANST on a private industrial property. See *id.* At least two more options exist to the east to cross the ANST on state lands. See *id.* More alternative routes may be available. As of now, neither Atlantic nor FERC has fully evaluated any of those possible reroutes.

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<sup>1</sup> *Cowpasture River Pres. Ass’n*, 911 F.3d at 150, (4th Cir. 2018) (“The [Mineral Leasing Act] authorizes the ‘Secretary of the Interior or appropriate agency head’ to grant gas pipeline rights of way across ‘Federal lands.’ 30 U.S.C. § 185(a). As relevant here, ‘Federal lands’ means ‘all lands owned by the United States *except lands in the National Park System.*’ 30 U.S.C. § 185(b)(1).” (emphasis in original)). State or private lands crossed by the Appalachian Trail are not “Federal lands” under the Act, as they are not “owned by the United States.”

<sup>2</sup> Appalachian Nat. Scenic Trail Res. Mgmt. Plan at I-23 (Sept. 2008), [https://www.nps.gov/appa/learn/nature/upload/AT\\_Resource\\_Management\\_Plan\\_Ch\\_1.pdf](https://www.nps.gov/appa/learn/nature/upload/AT_Resource_Management_Plan_Ch_1.pdf).

<sup>3</sup> Available at [http://elibrary.ferc.gov:0/idmws/file\\_list.asp?document\\_id=14378326](http://elibrary.ferc.gov:0/idmws/file_list.asp?document_id=14378326).



## **The Forest Service Has Never Before Authorized a New Gas Pipeline to Cross the ANST and Existing Pipelines Are Unaffected by *Cowpasture***

We have examined every existing crossing of the ANST by an oil or gas pipeline and confirmed that the Forest Service has never before granted a new right-of-way for an oil or gas pipeline to cross the ANST where it traverses a national forest, until it did so for the Atlantic Coast and Mountain Valley pipelines.

We created a geographical information system overlay of the S&P Global Platts database, the industry standard resource for identifying pipeline locations, with the centerline of the Appalachian Trail, which was obtained directly from the National Park Service Appalachian Trail Park Office. We checked property ownership against the U.S. Geological Survey's PAD-US database,<sup>4</sup> the United States government's official inventory of public parks and other protected open space, and tax parcel data obtained from individual counties. We consulted individual deed records, FERC environmental study documents, historical pipeline map records obtained from the Library of Congress, and other resources as available to confirm property ownership, date of property acquisition, and date of pipeline construction. I have attached a map and table summarizing our findings.

Our map analysis confirms that 55 existing oil and natural gas pipelines currently cross the ANST at 34 separate locations (pipelines are often co-located in the same right-of-way). Of these 34 crossing locations, 15 are on parcels owned by state or private landowners. Another 19 are on parcels owned by the National Park Service pursuant to property rights that predate federal ownership or the creation of the Appalachian Trail.<sup>5</sup> No existing pipeline crosses the Appalachian Trail on a parcel owned by the Forest Service, and the Forest Service has never before approved a new gas pipeline right-of-way across the ANST where it traverses a national forest. Such an approval has never been necessary because other options, like state and private lands and existing rights-of-way, provide sufficient opportunities to route pipelines in the East.

The *Cowpasture* decision has no impact on existing rights-of-way for pipelines that cross the Appalachian Trail. Nearly half of existing pipelines cross the Appalachian Trail on state or private land. As discussed above, because the Mineral Leasing Act applies only to rights-of-way across federal land, those crossings are unaffected by the *Cowpasture* decision.

Of the pipelines that do cross the Appalachian Trail on federally-owned land, nearly all existed before the creation of the Appalachian Trail or before the land was acquired by the federal government. The Mineral Leasing Act applies only to the initial grant of a right-of-way or the renewal of temporary rights-of-way for oil and gas pipelines. *See* 30 U.S.C. § 185(a), (q). Permanent rights-of-way granted before the creation of the ANST as land in the National Park

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<sup>4</sup> *See* <https://www.usgs.gov/core-science-systems/science-analytics-and-synthesis/gap/science/protected-areas>.

<sup>5</sup> *See* Attached spreadsheet of pipeline crossings (private and state crossings are highlighted in brown, while NPS crossings are highlighted in blue).

System are unaffected by the *Cowpasture* decision because they require no new authorization under the Mineral Leasing Act. Similarly, the federal government took ownership subject to any property rights for permanent rights-of-way that existed prior to federal acquisition; such property rights do not require renewal under the Mineral Leasing Act and are unaffected by the *Cowpasture* decision.

Moreover, federal lands are not a barrier for the development of new pipeline infrastructure. Some newer pipelines cross the Trail on state or private lands. For example, a 2016 expansion of the Transco pipeline network crossed the ANST on Pennsylvania State Game Lands.<sup>6</sup> Similarly, the Penn East Project was approved in 2017 to cross the ANST on state game lands in Carbon County, Pennsylvania, and recently revised its route to co-locate on a pre-existing right-of-way across the Trail.<sup>7</sup> In 2014, a reroute of the ANST allowed an extension of a Columbia gas pipeline to avoid crossing the Trail on federal property near Pearisburg, Virginia.<sup>8</sup>

Other newer pipelines are able to cross the Trail on federal lands by co-locating with existing rights-of-way. In 2002, for example, the National Park Service approved a special use permit for East Tennessee Natural Gas Company's Patriot Project to cross the Trail on land owned by the National Park Service within the proclamation boundary of a national forest and managed by the Forest Service. Because the new pipeline was sited in an existing easement for an existing pipeline, no new right-of-way under the Mineral Leasing Act was required.<sup>9</sup> The *Cowpasture* decision does not affect any of these existing crossings.

Sincerely,



Austin DJ Gerken  
Southern Environmental Law Center

enclosures

<sup>6</sup> Penn. State Game Comm'n, "Right-of-way Agreement Adds Acreage to Game Lands" (July 19, 2016), <https://www.media.pa.gov/Pages/Game-Commission-Details.aspx?newsid=48>.

<sup>7</sup> FERC, PennEast Pipeline Project, Docket No. CP15-558-000, Final Environmental Impact Statement, FERC/EIS: 0271F at 4-164 (April 2017), <https://www.ferc.gov/industries/gas/enviro/eis/2017/04-07-17-FEIS/Final-Environmental-Impact-Statement.pdf?csrt=7047953472926746552>; FERC, PennEast Pipeline Company, LLC; Notice of Application for Amendment, 84 FR 6000-02, 2019 WL 859077 (Feb. 25, 2019).

<sup>8</sup> U.S. Forest Serv., Environmental Assessment: Natural Gas Pipeline Construction Project, Proposed by Columbia Gas of Virginia for service to Celanese Plant in Giles County, Virginia at 3 (Sept. 2013), [https://www.fs.usda.gov/nfs/11558/www/nepa/93590\\_FSPLT3\\_1457228.pdf](https://www.fs.usda.gov/nfs/11558/www/nepa/93590_FSPLT3_1457228.pdf).

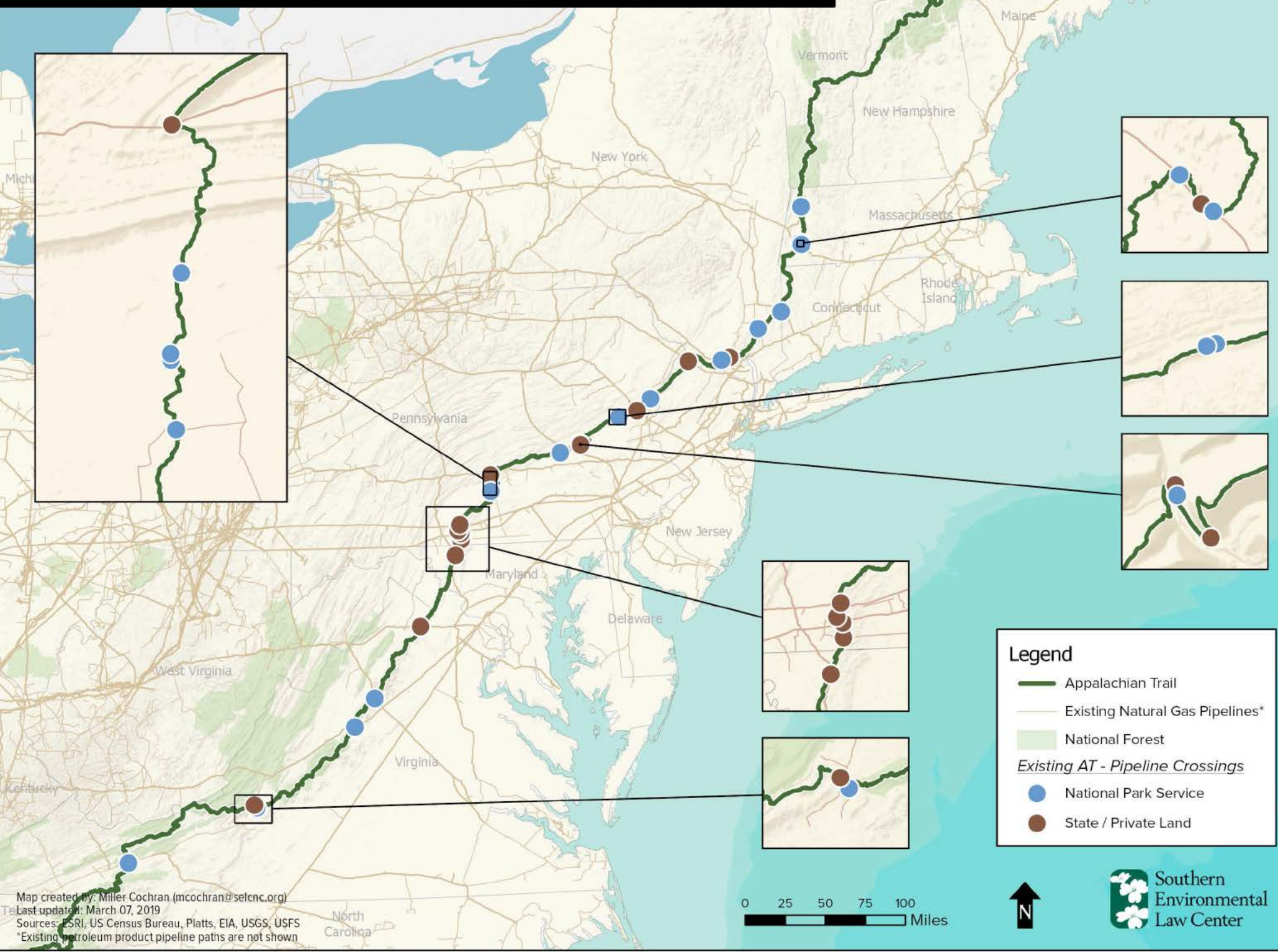
<sup>9</sup> FERC, Patriot Project Docket No. CP01-415-000, Final Environmental Impact Statement FERC/EIS 0148F, Appendix H-1 Environmental Analysis of the Proposed Crossing of the Appalachian National Scenic Trail at 1 (Sept. 1, 2002), [https://books.google.com/books?id=6\\_Q0AQOAMAAJ&pg=PR55&dq=%22currently,+East+Tennessee+has+easements%22&hl=en&sa=X&ved=0ahUKEwjv2MPZh-DgAhVmkeAKHd-5D\\_sQ6AEIKDAA#v=onepage&q=%22currently%2C%20East%20Tennessee%20has%20easements%22&f=false](https://books.google.com/books?id=6_Q0AQOAMAAJ&pg=PR55&dq=%22currently,+East+Tennessee+has+easements%22&hl=en&sa=X&ved=0ahUKEwjv2MPZh-DgAhVmkeAKHd-5D_sQ6AEIKDAA#v=onepage&q=%22currently%2C%20East%20Tennessee%20has%20easements%22&f=false).

cc: via email only

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# Existing Oil and Gas Pipelines Crossing the Appalachian Trail



## Oil and Gas Pipelines Crossing Locations of the Appalachian National Scenic Trail

### Crossing Locations on State and Private Land

<b>Company Name(s)</b>	<b>State</b>	<b>County</b>	<b>Product</b>	<b>Land Owner at Crossing Location</b>
Central Hudson Gas & Electric Corp.	NY	Orange	Natural Gas	State road right-of-way
Columbia Gas Transmission Corp.	PA	Franklin	Natural Gas	PA Department of Natural Resources
Columbia Gas Transmission Corp.	PA	Franklin	Natural Gas	PA Department of Natural Resources
Columbia Gas Transmission Corp.	PA	Franklin	Natural Gas	PA Department of Natural Resources
Columbia Gas Transmission Corp.	VA	Clarke	Natural Gas	VA Department of Conservation
Dominion Transmission Inc.	MD	Frederick	Natural Gas	MD Department of Natural Resources
Portland Natural Gas Transmission System; Portland Pipe Line Corp.	NH	Coos	Natural Gas	NH Dept. of Nat Resources
Roanoke Gas Co.	VA	Betotourt	Natural Gas	Western VA Water Authority
Sunoco Pipeline LP	PA	Berks	Non-HVL Product	State road right-of-way
Sunoco Pipeline LP	PA	Berks	Non-HVL Product	State road right-of-way
Tennessee Gas Pipeline Co.	MA	Berkshire	Natural Gas	Private owner
Tennessee Gas Pipeline Co.	NJ	Sussex	Natural Gas	NJ Department of Natural Resources
Texas Eastern Transmission, LP	PA	Franklin	Natural Gas	PA Department of Natural Resources
Texas Eastern Transmission, LP	PA	Perry	Natural Gas	PA Game Commission
Transcontinental Gas Pipe Line Corp.	PA	Monroe	Natural Gas	PA Game Commission



## Oil and Gas Pipelines Crossing Locations of the Appalachian National Scenic Trail

### Crossing Locations on National Park Service Land

<b>Company Name(s)</b>	<b>State</b>	<b>County</b>	<b>Product</b>	<b>Land Owner at Crossing Location</b>
Buckeye Partners, LP	PA	Cumberland	Non-HVL Product	National Park Service
Buckeye Partners, LP	PA	Carbon	Non-HVL Product	National Park Service
Buckeye Partners, LP	PA	Carbon	Non-HVL Product	National Park Service
Central Hudson Gas & Electric Corp.	NY	Dutchess	Natural Gas	National Park Service
Columbia Gas Transmission Corp.; Millennium Pipeline Co., LLC	NY	Orange	Natural Gas	National Park Service
Columbia Gas Transmission Corp.	PA	Monroe	Natural Gas	National Park Service
Columbia Gas Transmission Corp.	VA	Abermarle	Natural Gas	National Park Service
Columbia Gas Transmission Corp.	VA	Rockingham	Natural Gas	National Park Service
East Tennessee Natural Gas Co.	VA	Smyth	Natural Gas	National Park Service
Iroquois Gas Transmission System, LP	CT	Litchfield	Natural Gas	National Park Service
Roanoke Gas Co.	VA	Betotourt	Natural Gas	National Park Service
Sunoco Pipeline LP	PA	Berks	Non-HVL Product	National Park Service
Sunoco Pipeline LP	PA	Cumberland	Non-HVL Product	National Park Service
Sunoco Pipeline LP	PA	Berks	Non-HVL Product	National Park Service
TE Products Pipeline Co., LP	PA	Cumberland	Liquefied Petroleum Gas	National Park Service
Tennessee Gas Pipeline Co.	MA	Berkshire	Natural Gas	National Park Service
Tennessee Gas Pipeline Co.	MA	Berkshire	Natural Gas	National Park Service
Tennessee Gas Pipeline Co.	MA	Berkshire	Natural Gas	National Park Service
UGI Utilities, Inc.	PA	Cumberland	Natural Gas	National Park Service