**APPENDIX**

Exhibit A

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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**No. 20-5203** **September Term, 2023**

**1:20-cv-00006-JEB**

**Filed On:** October 24, 2023

Cletus Woodrow Bohon, et al.,

Appellants

v.

Federal Energy Regulatory Commission, et al.,

Appellees

**BEFORE:** Pillard, Wilkins, and Walker, Circuit Judges

**O R D E R**

Upon consideration of appellants' emergency motion for injunctive relief, the oppositions thereto, and the reply, it is

**ORDERED** that the motion be denied.

**Per Curiam**

**FOR THE COURT:**
Mark J. Langer, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk

Exhibit B

**IN THE UNITED STATES DISTRICT COURT**

**FOR THE DISTRICT OF COLUMBIA**

CLETUS WOODROW AND BEVERLY ANN BOHON,
6210 Yellow Finch Lane
Elliston, Virginia 24087

WENDELL WRAY AND MARY MCNEIL FLORA,
150 Floradale Farms Lane
Boones Mill, Virginia 24065

and

ROBERT MATTHEW AND AIMEE CHASE HAMM,
10420 Mill Creek Road
Bent Mountain, Virginia 24059

*Plaintiffs*,

v.

FEDERAL ENERGY REGULATORY COMMISSION
**Serve:**
888 First Street, NE
Washington, DC 20426
and
NEIL CHATTERJEE
in his official capacity as Chairman of
the Federal Energy Regulatory Commission,
**Serve:**
888 First Street, NE
Washington, DC 20426

and
MOUNTAIN VALLEY PIPELINE, LLC
**Serve:**
Registered Agent:
CT CORPORATION SYSTEM
4701 Cox Rd Ste 285
Glen Allen, VA, 23060 – 6808

*Defendants*.

Case No. _____

## COMPLAINT

**COME NOW** the Plaintiffs, Cletus Woodrow and Beverly Ann Bohon (the "Bohons"), Wendell Wray and Mary McNeil Flora (the "Floras"), and Robert Matthew and Aimee Chase Hamm (the "Hamms"), by counsel, and file this Complaint against the Defendants, the Federal Energy Regulatory Commission ("FERC") and Mountain Valley Pipeline, LLC ("MVP"). In support thereof, the Plaintiffs allege as follows:

## PARTIES

1. The Bohons are residents of Montgomery County, Virginia, and own two tracts of land sought by MVP (Montgomery County Tax Map Parcel No. 030271 and MVP Parcel No. VA-MN-5233, and Montgomery County Tax Map Parcel No. 017761 and MVP Parcel No. VA-MO-022). MVP seeks to take approximately 0.19 and 2.74 acres of land in Elliston, VA, owned by the Bohons for the MVP pipeline project. The property is at the base of Poor Mountain. Cletus, a bluegrass musician, lives on Yellow Finch Lane with his wife, Beverly. The property contains springs that water vegetable gardens and a weeping cherry tree, affectionately known as "Miss Magnificent," a memorial to Cletus' late father. The MVP project will bisect the Bohons' property and cause damage. Because the Bohons have refused to willingly sell their property interests by contract, MVP seeks to exercise its power of eminent domain under the NGA.

2. The Floras are residents of Franklin County, Virginia (Tax Map Parcel No. 0380002000 and MVP Parcel No. VA-FR-017.21). Wendell Wray, a retired Franklin County Sheriff's Deputy, and Mary McNeil, a retired Roanoke County schoolteacher, live on a fourth generation family farm. Wendell has lived on this land his entire life, and Wendell and Mary have lived there together as a married couple for over 40 years. The old family farmhouse and outbuildings, as well as the Floras' ranch home are situated downstream from the pipeline. The

farm is approximately 53 acres. MVP seeks to take 5.88 acres of land for its pipeline project. MVP's taking has caused and will continue to cause damage to the Floras' land. Because the Floras have refused to sell their property interests to MVP, MVP seeks to take the land by exercising its power of eminent domain under the NGA.

3. The Hamms are residents of Roanoke County, Virginia, and own 7.852 acres of land on Bent Mountain (Tax Map No. 110.00-1-56.1 and described in deed recorded as Instrument No. 200405721). The Hamms maintain their custom-built family home on the secluded land, which they share with seven horses, six dogs, and several children. MVP seeks to take an access easement of 0.15 acres via eminent domain proceedings in federal court. This easement will cause damage to the Hamms' land and involve transformation of the property, including excavation and widening of the road. The Hamms have refused to willingly sell their property interests by contract to MVP and MVP therefore seeks to take the land by exercising its power of eminent domain under the NGA.

4. Defendant FERC is a federal agency that regulates the interstate transmission of electricity, natural gas, and oil. FERC also reviews proposals to build liquefied natural gas terminals and interstate natural gas pipelines and grants certificates of convenience and public necessity to applicants it deems qualified to develop such projects. FERC is headquartered at 888 First Street, N.E., Washington, D.C. 20426. FERC's Chairman, Neil Chatterjee, performs his official duties at FERC's headquarters in Washington, D.C.

5. Defendant MVP is a limited liability company duly organized and existing under the laws of the State of Delaware. MVP is a joint venture between affiliates of EQT Midstream Partners, LP; NextEra Energy US Gas Assets, LLC; WGL Midstream, Inc.; Vega Midstream MVP LLC; and RGC Midstream, LLC. MVP is authorized to conduct business in the Commonwealth

of Virginia. MVP's principal office is located at 625 Liberty Avenue, Suite 1700, Pittsburgh, Pennsylvania 15222-3111.

## JURISDICTION AND VENUE

6. Under 28 U.S.C. §1331, this Court has subject matter jurisdiction over this action because it arises under federal law—namely, Articles I, II, and III of the Constitution of the United States, the non-delegation doctrine, the separation of powers doctrine, and 15 U.S.C. § 717 *et seq*., the Natural Gas Act of 1938 ("NGA").

7. Under 28 U.S.C. § 1391, venue is proper because a substantial part of the events or omissions giving rise to the claim occurred in this district, Director Chatterjee of FERC performs his official duties in this district, and both defendants are subject to the court's personal jurisdiction with respect to the actions raised herein.

8. In addition, while actions challenging ***agency*** decisions must be appealed within the agency until all available remedies therein are exhausted, actions centering wholly on the constitutionality of ***Congress's*** actions and Congressional legislation may only be brought in federal district court. *Delaware Riverkeepers Network v. FERC*, 895 F.3d 102, 107 (D.C. Cir. 2018); *NO Gas Pipeline v. FERC*, 756 F.3d 764 (D.C. Cir. 2014).

## STATEMENT OF FACTS

9. Congress, a ***legislative*** body of the federal government sitting in Washington, D.C., passed the NGA in 1938.

10. In 1947, Congress amended the NGA to enable "the Commission"[1] to issue a

[1] The "Commission" refers to the Federal Energy Regulatory Commission ("FERC"), which is the successor to the Federal Power Commission.

"certificate of public convenience and necessity to a natural-gas company for the transportation in interstate commerce of natural gas." 15 U.S.C. § 717f.

11. Under the NGA, the recipient of a certificate of public convenience and necessity ("holder") also acquires the right of eminent domain. 15 U.S.C. § 717f(h).

**FERC's Creation as An Arm of the Executive Branch**

12. FERC, a federal agency, is an arm of the ***executive*** branch of the federal government composed of "up to five commissioners who are appointed by the President of the United States with the advice and consent of the Senate."

13. As FERC's commissioners are unelected, FERC is an unelected regulatory body.

14. Article I of the United States Constitution vests all legislative powers in Congress. Thus, only the legislative branch of government can create laws. Because FERC is not part of the legislative branch, FERC has no authority to create law.

**Congress's Delegation of Power to FERC Via The NGA**

15. In passing the NGA, Congress delegated to FERC massive authority to exercise legislative power to determine when the right of eminent domain should be conveyed to an applicant without drafting legislation to guide FERC in carrying out Congress's will.

16. Instead, Congress deferred entirely to FERC, allowing the agency to unilaterally create and impose its own standards, tests, and rules for determining who can sell or transport natural gas, how much they can charge for their products and services, and to whom they can sell them.

17. For example,

a. Under 15 U.S.C. § 717b(a), no entity may import or export natural gas without first obtaining FERC's permission. FERC is unilaterally empowered to determine

whether doing so would be "consistent with the public interest" and to impose conditions for approval that FERC "find[s] necessary or appropriate."

b. Under 15 U.S.C. § 717c(a), FERC is empowered to declare unlawful any rate or regulation affecting rates that FERC determines are not "just and reasonable." Congress provides no criteria in the NGA to guide FERC in determining what rates are "just and reasonable."

c. Under 15 U.S.C. § 717d(a), FERC may order a natural-gas company to change the rate it charges for transporting or selling natural gas if FERC determines that the rate is "unjust, unreasonable, unduly discriminatory, or preferential …."

d. Under 15 U.S.C. § 717f(a), FERC may order a natural-gas company to "extend or improve its transportation facilities," connect those facilities with those of other natural-gas distributors, and sell natural gas to those natural-gas distributors if FERC unilaterally determines that "no undue burden will be placed upon such natural-gas company thereby" and that complying with FERC's orders would not "impair [the natural-gas company's] ability to render adequate service to its customers." Again, Congress provided no criteria by which FERC should evaluate what constitutes an "undue burden" or "adequate service."

18. Most significantly here, 15 U.S.C. § 717f(e) delegates to FERC Congress's legislative powers by empowering FERC to issue "certificates of public convenience and necessity" to entities wishing to construct or extend natural-gas facilities. As discussed, *infra*, these certificates are used by natural-gas companies to exercise eminent domain authority under 15 U.S.C. § 717f(h).

19. Congress did not provide FERC with any fixed standard or even an "intelligible

principle" to guide FERC in determining whether or under what conditions to grant a certificate to an applicant. Instead, Congress directed FERC to issue certificates to those applicants whom ***FERC*** determines are "qualified" and "able and willing … to perform the service proposed" and to obey FERC's rules so long as ***FERC*** determines that the proposed service "is or will be required by the present or future public convenience and necessity."

20. Instead of defining what a "qualified" applicant looks like (i.e., "A qualified applicant shall meet hypothetical requirements *A, B*, and *C* . . . "), Congress stated that an applicant is "qualified" based on its willingness and ability to comply with "the requirements, rules, and regulations **of the Commission**" (as opposed to requirements or standards set forth by Congress). 15 U.S.C. § 717f(e) (emphasis added).

21. ***FERC's*** test that it created to determine which applicant is "qualified" to receive a certificate is outlined in FERC's "Statement of Policy." *See* **Exhibit A**.

22. FERC created this test without any guidance from Congress. Congress, in other words, provided FERC with no test or fixed standards to guide FERC in developing its criteria for deciding which applicants are qualified to exercise the inherently coercive power of eminent domain.

**The Delegation of Eminent Domain Power to Private Entities Such As MVP**

23. An applicant who meets FERC's internally designed tests for public convenience and necessity obtains from FERC a Certificate, which conveys the power of eminent domain to the applicant as follows:

> **When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct**, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary

> to the proper operation of such pipe line or pipe lines, **it may acquire the same by the exercise of the right of eminent domain** in the district court of the United States for the district in which such property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: Provided, That the United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000.

15 U.S.C. § 717f(h) (emphasis added).

24. Thus, in situations where landowners refuse to sell their property interests to certificate holders, the NGA empowers such holders to forcibly "take" the landowners' property against their will through eminent domain proceedings in federal court, even in circumstances where, as here, the taking is for private gain.

25. Eminent domain power is traditionally an inherently coercive governmental power by which the sovereign forcibly seizes or "takes" private property without the landowner's consent for the sake of the "public good" (i.e., "public use").

26. Eminent domain power is a legislative power.

27. MVP applied for and obtained a Certificate of Public Convenience and Necessity from FERC. FERC issued the Order on October 13, 2017, permitting MVP to construct, maintain, and operate a natural gas pipeline along a route selected by MVP.

28. The Plaintiffs own property along that route and are unwilling to convey their property interests to MVP.

29. Because MVP has not been able to convince the Plaintiffs to convey their property interests willingly by contract, MVP has filed actions seeking to exercise its unlawfully delegated "right" of eminent domain to forcibly take the Plaintiffs' property against their wishes.

30. On October 24, 2017, MVP filed an action to condemn an easement along the approved route under section 7 of the NGA. While the route has gone through several changes since the initial proposal and certification, the pipeline's planned construction, operation, and maintenance impacts the property interests of all the Plaintiffs.

**Revival of the Federal Non-Delegation Doctrine.**

31. The federal non-delegation doctrine has been dormant (but not dead) for 84 years.

32. However, as recently as June 2019, the United States Supreme Court recognized that despite the rarity of its invocation to invalidate legislation, the non-delegation doctrine remains a valid principle of constitutional law on the federal level. *See Gundy v. United States*, 139 S. Ct. 2116, 2121 (2019) (where the plurality noted that "The nondelegation doctrine bars Congress from transferring its legislative power to another branch of Government.") (Kagan, J., joined by Ginsberg, J., Breyer, J., and Justice Sotomayor).

33. The three-member dissent in *Gundy* also recognized the existence, validity, and importance of the non-delegation doctrine as follows:

> While it's been some time since the Court last held that a statute improperly delegated the legislative power to another branch—thanks in no small measure to the intelligible principle misadventure—the Court has hardly abandoned the business of policing improper legislative delegations. When one legal doctrine becomes unavailable to do its intended work, the hydraulic pressures of our constitutional system sometimes shift the responsibility to different doctrines. And that's exactly what's happened here. We still regularly rein in Congress's efforts to delegate legislative power; we just call what we're doing by different names.

*Id.* at 2141 (Gorsuch, J., dissenting, joined by Thomas, J. and Chief Justice Roberts).

34. The non-delegation doctrine is derived from Articles I, II, and III of the United States Constitution, which establish and define the separation of powers between the three branches of government. *Id.* at 2123 ("Article I of the Constitution provides that '[a]ll legislative Powers herein granted shall be vested in a Congress of the United States.' §1. Accompanying that

assignment of power to Congress is a bar on its further delegation. Congress, this Court explained early on, may not transfer to another branch 'powers which are strictly and exclusively legislative.' *Wayman v. Southard,* 23 U.S. 1, 10 Wheat. 1, 42-43, 6 L. Ed. 253 (1825)").

35. The non-delegation doctrine prohibits Congress from delegating power to an executive agency without constitutionally adequate limitations or standards restricting the delegation.

36. The test currently used to determine whether the delegation is overly broad and unconstitutional is the "intelligible principle" test. *Gundy,* 139 S. Ct. at 2123 ("The constitutional question is whether Congress has supplied an intelligible principle to guide the delegee's use of discretion. So the answer requires construing the challenged statute to figure out what task it delegates and what instructions it provides.") (Kagan, J.).

37. Three other Justices in *Gundy* also recognized the validity of the non-delegation doctrine, but held that the intelligible principle standard was far too lenient.[2] That group of Justices would instead impose stricter standards on Congressional delegations of power. *See Gundy*, 139 S. Ct. at 2135.

38. Because the ninth Justice, Justice Kavanaugh, did not take part in the decision, Justice Alito also applied the intelligible principle standard, but indicated a willingness to revisit

[2] *Id*. at 2139 (Gorsuch, J., dissenting)

> Still, it's undeniable that the "intelligible principle" remark eventually began to take on a life of its own. We sometimes chide people for treating judicial opinions as if they were statutes, divorcing a passing comment from its context, ignoring all that came before and after, and treating an isolated phrase as if it were controlling. But that seems to be exactly what happened here. For two decades, no one thought to invoke the "intelligible principle" comment as a basis to uphold a statute that would have failed more traditional separation-of-powers tests. In fact, the phrase sat more or less silently entombed until the late 1940s. Only then did lawyers begin digging it up in earnest and arguing to this Court that it had somehow displaced (*sub silentio* of course) all prior teachings in this area.

the issue in a future case with a full Court. *Id*. at 2131 ("If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would **support** that effort.") (Alito, J., concurring) (emphasis added).

39. Justice Kavanaugh has since indicated that he would join Justice Alito and the *Gundy* dissent to form a majority to revisit the proper test to apply in non-delegation challenges. *Paul v. United States*, 589 U.S. __ (2019) (cert denied).

**COUNT I: FACIAL CONSTITUTIONAL CHALLENGE TO *CONGRESS'S* OVERLY BROAD DELEGATION OF LEGISLATIVE POWER TO FERC**

40. Plaintiffs repeat and re-allege paragraphs 1-39 of this Complaint as if fully set forth herein.

41. The delegation of legislative power by Congress to FERC via 15 U.S.C. § 717f of the NGA was and is overly broad under Articles I, II, and III of the Constitution of the United States of America, the non-delegation doctrine, and the separation of powers doctrine derived therefrom.

42. This delegation of power by Congress to FERC is facially unconstitutional because Congress did not provide sufficiently definite guidance to FERC to enable FERC to determine whether and how to grant certificates of public convenience and necessity to applicants.

43. By delegating to FERC unchecked and unfettered discretion to determine whether to grant certificates of public convenience and necessity, Congress has unlawfully delegated to FERC the legislative power to create law without sufficient guidance, limitations, or criteria from Congress to ensure that FERC is doing Congress's will and not its own.

44. The delegation of legislative power by Congress to FERC does not meet the intelligible principle test currently used to determine whether delegations of power to executive agencies are constitutional.

45. Even if the delegation of power by Congress to FERC meets the intelligible principle test, that test is itself unconstitutional under Articles I, II, and III of the Constitution (separation of powers doctrine), which impose stricter standards on the scope of delegations to executive agencies.

46. Instead of imposing its own criteria and congressional standards for determining which applicants are worthy of wielding such an inherently coercive power, Congress broadly delegated that legislative authority to FERC—an unaccountable, unelected executive agency—thus allowing Congress to distance itself from potential political uproar resulting from unpopular takings of private property.

47. Because the delegation of legislative power by Congress to FERC via 15 U.S.C. § 717f of the NGA was and is overly broad and unconstitutional, FERC has no authority to create policies or tests to determine how and when to issue certificates to applicants seeking to invoke the power of eminent domain. All such certificates already issued are void *ab initio*.

**COUNT II: FACIAL CONSTITUTIONAL CHALLENGE TO *FERC'S* SUB-DELEGATION OF EMINENT DOMAIN POWER TO PRIVATE ENTITIES, INCLUDING MVP**

48. Plaintiffs repeat and re-allege paragraphs 1-47 of this Complaint as if fully set forth herein.

49. Counts II and III are pleaded in the alternative.

50. 15 U.S.C. § 717f(h) empowers FERC to delegate to private entities, such as MVP, Congress's power of eminent domain.

51. This delegation of delegated powers to private entities violates the separation of powers and non-delegation doctrines and is therefore facially unconstitutional. *J.W. Hampton, Jr.*

*& Co. v. United States*, 276 U.S. 394, 405-06 (1928) ("*Delegata potestas non potest delegari,*" meaning "one to whom power is delegated cannot himself further delegate that power.").

52. *Even if* the power of eminent domain were not legislative power, it would still be an inherently public power that cannot be sub-delegated to a private actor.

53. Because all sub-delegations of eminent domain power by FERC via 15 U.S.C. § 717f(h) of the NGA are facially unconstitutional, FERC has no authority to issue certificates to applicants seeking to invoke the power of eminent domain and all such certificates already issued are void *ab initio*.

**COUNT III: FACIAL CONSTITUTIONAL CHALLENGE TO *CONGRESS'S* DELEGATION OF EMINENT DOMAIN POWER TO PRIVATE ENTITIES, INCLUDING MVP**

54. Plaintiffs repeat and re-allege paragraphs 1-47 of this Complaint as if fully set forth herein.

55. Counts II and III are pleaded in the alternative.

56. Pleading, in the alternative, that 15 U.S.C. § 717f delegates the public power of eminent domain ***directly*** from Congress to the applicant (i.e., from Congress directly to a private actor, such as MVP, as opposed to delegating it first to FERC and then to a private entity), such a direct delegation of eminent domain power by Congress to any private entity is facially unconstitutional.

57. Eminent domain power is legislative power. *See, e.g.*, I William Blackstone, *Commentaries on the Laws of England,* *135.

58. The delegation of legislative power by Congress to a private entity is facially unconstitutional. *See, e.g., DOT v. Ass'n of Am. R.R.*, 575 U.S. 43, 62 (2015) ("When it comes to private entities, however, there is not even a fig leaf of constitutional justification. Private entities

are not vested with 'legislative Powers.' Art. I, §1. Nor are they vested with the 'executive Power,' Art. II, §1, cl. 1, which belongs to the President.") (Alito, J., concurring) (discussing the non-delegation doctrine's prohibition on delegations of governmental powers to private entities).

59. The exercise of eminent domain power is particularly obnoxious when a private entity seeks to exercise that power for private gain.

60. Eminent domain, by its very nature, is the forcible taking of private property by the sovereign—a process in which the individual's sacred right to property is sacrificed for the public good.

61. The power of eminent domain is thus an inherently coercive, governmental power, much like the power to tax. It is a public power inherent to the sovereign and enforced by the power to seize land by force in the absence of the landowner's consent.

62. Due to the very public nature of the power of eminent domain, it is inherently incompatible for it to be exercised by a private entity.

63. Thus*, even if* the power of eminent domain were not legislative power, it would still be an inherently public, coercive governmental power that could not be delegated to a private actor.

64. Congress's delegation of this inherently coercive and public power of eminent domain to any private actor violates the non-delegation doctrine and is therefore facially unconstitutional. All such certificates already issued to private actors are void *ab initio.*

**WHEREFORE**, the Plaintiffs respectfully pray that this Court enter a declaratory judgment in their favor against the Defendants declaring that Congress's overly broad delegation of legislative powers to FERC was and is facially unconstitutional; that any delegation of eminent domain power (whether via a sub-delegation from FERC or a direct delegation from Congress) to any and all private actors, including MVP, is facially unconstitutional; that FERC has no authority

to issue certificates to applicants seeking to invoke the power of eminent domain to take property; and that all such certificates already issued are void *ab initio;* further, that this Court enter an injunction preventing FERC from acting upon its delegated powers and issuing certificates and preventing certificate-holders from exercising the power of eminent domain using void certificates; as well as any other relief that this Court deems just and proper.

Respectfully submitted this 2nd day of January, 2020

CLETUS WOODROW AND BEVERLY ANN BOHON, WENDELL WRAY AND MARY MCNEIL FLORA, AND ROBERT MATTHEW AND AIMEE CHASE HAMM,

By: /s/ John R. Thomas, Jr.
*Of Counsel*

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Exhibit C

No. 21-2425

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SIERRA CLUB, ET AL.,
Petitioners,

v.

STATE WATER CONTROL BOARD, ET AL.,
Respondents,

and

MOUNTAIN VALLEY PIPELINE, LLC,
Intervenor.

**MOUNTAIN VALLEY PIPELINE, LLC'S**
**MOTION FOR RANDOM PANEL ASSIGNMENT**

This Court almost always assigns judges to cases randomly. There are exceptions, but the Court's rules certainly do not contemplate the assignment of the same judges to every case involving one specific private party, even if those cases cover one large, multi-state project. Yet that is precisely the practice the Court has adopted for Mountain Valley Pipeline, LLC ("Mountain Valley")—for the last four years, the Court has consistently assigned the same three judges to numerous, diverse cases involving different state and federal authorizations for Mountain Valley in all but two instances.[1] This Court has thereby created "both the appearance and the fact

[1] In 2018, Judge Traxler presided over two cases involving Mountain Valley in place of Judge Wynn.

of presentation of particular types of cases to particular judges" in violation of Internal Operating Procedure 34.1. What's worse, it has done so in circumstances where Internal Operating Procedure 34.1 would not dictate nonrandom assignment. Mountain Valley therefore respectfully asks the Court to correct this departure from its own procedures and randomly assign judges to the merits panel for this case. For all of the reasons outlined below, Mountain Valley further requests that this motion be referred to a randomly assigned three-judge panel for disposition pursuant to Local Rule 27(e) or referred to the Court en banc.

Pursuant to Local Rule 27(a), counsel for Mountain Valley informed counsel for Petitioners and counsel for the State Respondents of its intent to file this motion. The State Respondents take no position on the motion. Petitioners advised that they intend to file a response to the motion.

## BACKGROUND

1. Over the last four years, only four of the Court's 18 sitting judges have heard any of the myriad petitions challenging different federal and state authorizations for Mountain Valley and the former Atlantic Coast Pipeline ("ACP").[2] In May 2018, Chief Judge Gregory and Judges Wynn and Thacker first

[2] This accounting excludes the many condemnation-related pipeline cases involving Mountain Valley that the Court has decided. While Chief Judge Gregory and judges Wynn and Thacker have heard many of those cases, Judge Harris has also participated on occasion. *See, e.g.*, *Mountain Valley Pipeline, LLC v. 6.56 Acres of Land, Owned by Sandra Townes Powell*, 915 F.3d 197 (4th Cir. 2019);

heard a challenge to federal authorizations for ACP. *See Sierra Club v. U.S. Dep't of the Interior*, 899 F.3d 260 (4th Cir. 2018). That same week, Chief Judge Gregory and Judge Thacker—this time sitting with Judge Traxler—heard two challenges to authorizations issued to Mountain Valley. *See Sierra Club v. State Water Control Bd.*, 898 F.3d 383 (4th Cir. 2018); *Sierra Club, Inc. v. U.S. Forest Serv.*, 897 F.3d 582 (4th Cir. 2018).

Since that first court week, only Chief Judge Gregory and Judges Wynn and Thacker have heard "pipeline cases." *See Sierra Club v. U.S. Army Corps of Eng'rs*, 909 F.3d 635 (4th Cir. 2018); *Cowpasture River Pres. Ass'n v. Forest Serv.*, 911 F.3d 150, 154 (4th Cir. 2018), *rev'd and remanded sub nom. United States Forest Serv. v. Cowpasture River Pres. Ass'n*, 140 S. Ct. 1837 (2020); *Appalachian Voices v. State Water Control Bd.*, 912 F.3d 746 (4th Cir. 2019); *Defs. of Wildlife v. U.S. Dep't of the Interior*, 931 F.3d 339 (4th Cir. 2019); *Friends of Buckingham v. State Air Pollution Control Bd.*, 947 F.3d 68 (4th Cir. 2020); *Wild Va. v. U.S. Dep't of the Interior*, No. 19-1866 (4th Cir. Oct. 11, 2019).

2. Since the summer of 2020, when ACP folded in the face of rising delays and cost in part due to decisions of this Court, the Court has largely assigned this special panel to cases involving Mountain Valley. *See Sierra Club v. U.S. Army*

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*Mountain Valley Pipeline, LLC v. W. Pocahontas Props. Ltd. P'ship,* 918 F.3d 353 (4th Cir. 2019); *Mountain Valley Pipeline, LLC v. 0.15 Acres of Land by Hale*, 827 F. App'x 346 (4th Cir. 2020).

*Corps of Eng'rs*, 981 F.3d 251 (4th Cir. 2020); *Wild Virginia v. United States Forest Serv.*, 24 F.4th 915 (4th Cir. 2022); *Appalachian Voices v. United States Dep't of Interior*, 25 F.4th 259 (4th Cir. 2022). The Court automatically assigned the same panel to hear the challenge to North Carolina's denial of a permit for the separate Mountain Valley Southgate project. *See Mountain Valley Pipeline, LLC v. N. Carolina Dep't of Env't Quality*, 990 F.3d 818 (4th Cir. 2021).

3. In the twelve consolidated petitions challenging different authorizations for Mountain Valley and ACP, this special panel has vacated or stayed all but two.[3] It has done so despite purporting to apply the Administrative Procedure Act's deferential standard of review in each case, which constrains courts to set aside only arbitrary and capricious agency action. *See, e.g.*, *Appalachian Voices*, 912 F.3d at 753.[4]

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[3] *See* Nos. 21-1039, 20-2159, 20-2039(L), 19-1866, 19-1152, 18-2090, 18-1173(L), 18-1144, 18-1082(L) (ECF Nos. 82 & 94), 18-1077(L), 17-2406(L), 17-2399(L). The Court has uniformly affirmed district court decisions related to condemnations for the Mountain Valley project.

[4] The panel's record translates to a 17% success rate for pipeline approvals since 2018. By contrast, one study calculated a 92% agency win rate in arbitrary-and-capricious challenges before the Supreme Court between 1983 and 2014. *See* Jacob Gersen & Adrian Vermeule, *Thin Rationality Review*, 114 MICH. L. REV. 1355, 1358, 1407 (2016). Another study found that appeals court judges "voted to validate EPA decisions 72 percent of the time" under arbitrary-and-capricious review between 1996 and 2006. Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761, 778–79 (2008); *see also* Richard J. Pierce & Joshua Weiss, *An Empirical Study of Judicial Review of Agency Interpretations of Agency Rules*, 63 ADMIN. L. REV. 515, 515 (2011)

4. The public has certainly noticed these exceptional results and has zeroed in on the peculiarity that each case involving an authorization for Mountain Valley draws the same three-judge panel.

After the panel vacated the latest round of authorizations, the Roanoke Times observed that "[a] federal appellate court based in Richmond — *and in particular, three judges on the 15-member court* — has been perhaps the sharpest thorn in the side of a joint venture of five energy companies that make up Mountain Valley Pipeline LLC." Laurence Hammack, *With Construction at a standstill, Mountain Valley Pipeline looks for solutions*, ROANOKE TIMES, Mar. 20, 2022, https://tinyurl.com/55jujvxx (emphasis added). "Chief Judge Roger Gregory and judges Stephanie Thacker and James Wynn have presided over 12 cases in which environmental groups challenged permits issued to Mountain Valley and the Atlantic Coast Pipeline." *Id.* The same publication reported this year that the panel's "overall record has evoked a saying among pipeline opponents: 'May the Fourth be with you.'" Laurence Hammack, *Another Mountain Valley Pipeline permit struck down by federal court*, ROANOKE TIMES, Feb. 3, 2022, https://tinyurl.com/5n6macfe.[5]

("Courts at all levels of the federal judiciary uphold agency actions in about 70% of cases" regardless of the standard of review).

[5] *See also* Valerie Banschbach & Jessica L. Rich, PIPELINE PEDAGOGY: TEACHING ABOUT ENERGY AND ENVIRONMENTAL JUSTICE CONTESTATIONS 117 (2021) (after the panel "pulled MVP's permits from the FS, BLM, and COE" and "took similar actions against ACP, even ruling that natural gas pipelines cannot cross the Appalachian Trail in national forests without an Act of Congress,"

And, "[o]ddly, [pipeline opponents'] repeated challenges keep landing before the same Fourth Circuit three-judge panel of Roger Gregory, James Wynn and Stephanie Thacker even though cases are supposed to be assigned to judges at random." The Editorial Board, *Green Judges vs. American Gas*, WALL STREET JOURNAL, May 6, 2022, https://tinyurl.com/2p97a4zs.

**ARGUMENT**

5. This Court's internal operating procedures, which aim to "achieve total random selection" in assigning mature cases to three-judge panels, dictate random assignment in this case. Fourth Circuit I.O.P. 34.1. The Court makes an exception to random assignment only when judges "have had previous involvement with the case . . . through random assignment" to either (1) a "prior appeal in the matter" or (2) a "preargument motion." *Id.* Neither exception applies here.

*First*, this case is a new matter. The petitioners here challenge Virginia's certification of Mountain Valley's waterbody crossings under Clean Water Act section 401. *See generally* Pet'rs' Opening Br., ECF No. 69. This certification represents an entirely new agency action. The special pipeline panel has not heard a challenge to any previous individual Virginia section 401 certification for

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"[o]pponents began signing emails, 'May the Fourth be with you'"); Sarah Vogelsong, *Federal court again yanks two Mountain Valley Pipeline approvals*, VIRGINIA MERCURY, Jan. 25, 2022, https://tinyurl.com/245w6xkp ("This is the second time the Fourth Circuit has rejected permits from the Forest Service and BLM for the national forest crossing.").

waterbody crossings, and this case does not return to the Court following remand of any prior decision. Indeed, the only common element between this case and previous challenges is the involvement of the same private party, Mountain Valley. That connection falls outside of the Court's narrow exception to random assignment for returning cases. *See* Marin K. Levy, *Panel Assignment in the Federal Courts of Appeals*, 103 CORNELL L. REV. 65, 86 (2017) ("[O]ne [Fourth Circuit] judge stated that the panels were all randomly created in his circuit except if cases were coming back following a remand either to the district court or from the Supreme Court.").

*Second*, the Court has not randomly assigned the special pipeline panel to a preargument motion in this case. If the panel has already participated, its involvement could not have been random.

Because neither exception applies here, the Court's operating procedures compel random assignment. Any nonrandom assignment that has already occurred in this new matter violates the Court's own procedures and should be disregarded.

6. Beyond contradicting specific provisions of this Court's operating procedures, assignment to the same panel would create "both the appearance and the fact of presentation of particular types of cases to particular judges." Fourth Circuit I.O.P. 34.1.

As detailed above, two judges have heard every single one of the 13 consolidated Fourth Circuit cases considering permitting decisions for interstate

natural gas projects over the past four years. *See supra* ¶¶ 1–2. A third judge has heard 11 of those cases. *Id.* These three judges have sat on pipeline cases regardless of the specific project—whether Mountain Valley, ACP, or Mountain Valley Southgate—and regardless of the procedural history—whether an entirely new challenge or one returning to the Court following remand to a federal or state agency. The participation of the same three-judge panel in all of these cases has already created the appearance of a special "pipeline panel" within the broader Court. Future assignment of pipeline cases to this same panel—without regard to procedural posture—would only solidify that impression.

Perhaps more troubling, for the last two years, the "pipeline panel" has become the "Mountain Valley panel." The same three judges have heard all four of the consolidated petitions implicating the project during that time period. *See supra* ¶ 2.[6]

7. Nonrandom assignment of this case would also violate the second rationale the Court provides for varied panel assignment: "to assure the opportunity for each judge to sit with all other judges an equal number of times." Fourth Circuit I.O.P. 34.1; *see also* Levy, 103 CORNELL L. REV. at 89 (quoting a Fourth Circuit

[6] And the panel has stayed or vacated all three authorizations it reviewed during that period. *See also* Petition for Rehearing En Banc, Case No. 21-1039(L), ECF No. 94 (outlining the panel's track record and specific errors in the panel's most recent decisions); Petition for Rehearing En Banc, Case No. 20-2159, ECF No. 95 (same).

judge as stating "that . . . the court's practice of equalizing co-sits [is] consistent with the court's general ethos of civility"). Even excluding condemnation cases, Chief Judge Gregory and judges Wynn and Thacker have sat together six separate times over the last four years to hear challenges to pipeline authorizations alone. Given simple time restraints, the continual reconstitution of this panel for complex administrative cases necessarily reduces the opportunities for these judges to sit with other members of the Court, while ensuring that they spend a disproportionate amount of time sitting and deciding cases together.

8. Continued nonrandom assignment to the same panel will undermine public trust in the judicial process. If the assignment process appears "deliberate in some fashion," the Court risks the impression "that the process ha[s] been rigged." Levy, 103 CORNELL L. REV. at 101 (describing the comments of a Fourth Circuit judge); *id.* (noting that random assignment helps safeguard "the public's perception of the judiciary's legitimacy").

The public has already taken note of the anomalous results that pipeline opponents have achieved before the "pipeline panel." *See supra* ¶ 4. And for good reason. The statistics on the panel's arbitrary-and-capricious review rate raise a large red flag. So too does the Supreme Court's near-unanimous reversal of one of the panel's 2018 decisions. *See Cowpasture*, 140 S. Ct. 1837. And the opinions the panel has issued so far this year only advance the perception of a deck stacked

against large infrastructure projects generally and one private party specifically.[7] This consistent track record leads Mountain Valley and the public more broadly to perceive that "the process ha[s] been rigged."

9. The perception created by this Court's deliberate formation of a special "pipeline panel"—actually, a "Mountain Valley panel"—threatens public confidence in the Court's legitimacy. Contrary to the Court's own rules, Mountain Valley and members of the public, currently expect the same panel on any pipeline case before this Court. That threat far outweighs any efficiencies the panel's familiarity with the project offers in this challenge to a new, un-remanded administrative decision.

## CONCLUSION

For the foregoing reasons, Mountain Valley respectfully requests that the Court randomly assign this case to a three-judge panel.

Dated: May 16, 2022

Respectfully submitted,

/s/ George P. Sibley, III

[7] *See* Petition for Rehearing En Banc, Case No. 21-1039(L), ECF No. 94; Petition for Rehearing En Banc, Case No. 20-2159, ECF No. 95.

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**CERTIFICATE OF COMPLIANCE**

I hereby certify that this motion complies with the type-face requirements of Fed. R. App. P. 32(a)(5) and the type-volume limitations of Fed. R. App. P. 27(d)(2)(A). This motion contains 2,316 words, excluding the parts of the motion excluded by Fed. R. App. P. 27(d)(2) and 32(f).

/s/ George P. Sibley, III
*Counsel for Mountain Valley Pipeline, LLC*

**CERTIFICATE OF SERVICE**

I hereby certify that on May 16, 2022, I electronically filed the foregoing **Motion for Random Panel Assignment** with the Clerk of Court using the CM/ECF System which will automatically send e-mail notification of such filing to all counsel of record.

/s/ George P. Sibley, III
*Counsel for Mountain Valley Pipeline, LLC*

Environment

# Joe Manchin's Price for Supporting the Climate Change Bill: A Natural Gas Pipeline in His Home State

To accommodate the West Virginia senator, Democratic leadership agreed to legislation streamlining permits for the often-stalled Mountain Valley Pipeline and removing jurisdiction from a court that keeps ruling against the project.



West Virginia Sen. Joe Manchin in the U.S. Capitol in July. J. Scott Applewhite/AP Photo

by Ken Ward Jr. and Alexa Beyer, Mountain State Spotlight

Aug. 5, 2022, 5 a.m. EDT

REPUBLISH

Co-published with Mountain State Spotlight

**The New Power Brokers:** West Virginia's Natural Gas Industry

Coal, long West Virginia's most dominant industry, is ailing. Natural gas is taking over, as a powerful economic and political force. Is the state making the same mistakes again with a different fossil fuel?

*This article was produced for ProPublica's Local Reporting Network in partnership with Mountain State Spotlight. Sign up for Dispatches to get stories like this one as soon as they are published.*

From his Summers County, West Virginia, farmhouse, Mark Jarrell can see the Greenbrier River and, beyond it, the ridge that marks the Virginia border. Jarrell moved here nearly 20 years ago for peace and quiet. But the last few years have been anything but serene, as he and his neighbors have fought against the construction of a huge natural gas pipeline.

Jarrell and many others along the path of the partially finished Mountain Valley Pipeline through West Virginia and Virginia fear that it may contaminate rural streams and cause erosion or even landslides. By filing lawsuits over the potential

impacts on water, endangered species and public forests, they have exposed flaws in the project's permit applications and pushed its completion well beyond the original target of 2018. The delays have helped balloon the pipeline's cost from the original estimate of $3.5 billion to $6.6 billion.

But now, in the name of combating climate change, the administration of President Joe Biden and the Democratic leadership in Congress are poised to vanquish Jarrell and other pipeline opponents. For months, the nation has wondered what price Democratic West Virginia Sen. Joe Manchin would extract to allow a major climate change bill. Part of that price turns out to be clearing the way for the Mountain Valley Pipeline.



"It's a hard pill to swallow," said Jarrell, a former golf course manager who has devoted much of his retirement to writing protest letters, filing complaints with regulatory agencies and attending public hearings about the pipeline. "We're once again a sacrifice zone."



The White House and congressional leaders have agreed to step in and ensure final approval of all permits that the Mountain Valley Pipeline needs, according to a summary released by Manchin's office Monday evening. The agreement, which would require separate legislation, would also strip jurisdiction over any further legal challenges to those permits from a federal appeals court that has repeatedly ruled that the project violated the law.

The provisions, according to the summary, will "require the relevant agencies to take all necessary actions to permit the construction and operation of the Mountain Valley Pipeline" and would shift jurisdiction "over any further litigation" to a different court, the D.C. Circuit Court of Appeals.

In essence, the Democratic leadership accepted a 303-mile, two-state pipeline fostering continued use of fossil fuels in exchange for cleaner energy and reduced greenhouse emissions nationwide. Manchin has been pushing publicly for the pipeline to be completed, arguing it would move much needed energy supplies to market, promote the growth of West Virginia's natural gas industry and create well-paid construction jobs.

"This is something the United States should be able to do without getting bogged down in litigation after litigation after litigation," Manchin told reporters last week.

He did not respond to questions from Mountain State Spotlight and ProPublica, including about the reaction of residents along the pipeline route.

ProPublica and Mountain State Spotlight have been reporting for years on how a federal appeals court has repeatedly halted the pipeline's construction because of permitting flaws and how government agencies have responded by easing rules to aid the developer.

The climate change legislation, for which Manchin's vote is considered vital, includes hundreds of millions of dollars for everything from ramping up wind and solar power to encouraging consumers to buy clean vehicles or cleaner heat pumps. Leading climate scientists call it transformative. The Sierra Club called on Congress to pass it immediately. Even the West Virginia Environmental Council urged its members to contact Manchin to thank him.

"Senator Manchin needs to know his constituents support his vote!" the council said in an email blast. "Call today to let him know what climate investments for West Virginia means to you!"



But even some residents along the pipeline route who are avidly in favor of action against climate change say they feel like poker chips in a negotiation they weren't at the table for. And they are anything but happy with Manchin. "He could do so much more for Appalachia, a lot more than he is, but he's chosen to only listen to industries," farmer Maury Johnson said.

It's not clear exactly when the Mountain Valley Pipeline became a focal point of the efforts to win Manchin's vote on the climate change legislation. Reports circulated in mid-July that the White House was considering giving in to some Manchin demands focused on fossil fuel industries. That prompted some environmental groups to urge Biden to take the opposite route, blocking the pipeline and other pro-industry measures.

Pipeline spokesperson Natalie Cox said in an email that it "is being recognized as a critical infrastructure project" and that developers remain "committed to working diligently with federal and state regulators to secure the necessary permits to finish construction." Mountain Valley Pipeline LLC, the developer, is a joint venture of Equitrans Midstream Corp. and several other energy companies.

The company "has been, and remains, committed to full adherence" with state and

federal regulations," Cox added. "We take our responsibilities very seriously and have agreed to unprecedented levels of scrutiny and oversight."

The White House and Senate Democratic Leader Chuck Schumer's office did not respond to requests for comment.

Mountain Valley Pipeline is one of numerous pipelines proposed across the region, reflecting an effort to exploit advances in natural gas drilling technologies. Many West Virginia business and political leaders, including Manchin, hope that natural gas will create jobs and revenue, offsetting the decline of the coal industry.

To protect the environment, massive pipeline projects must obtain a variety of permits before being built. Developers and regulators are supposed to study alternatives, articulate a clear need for the project and outline steps to minimize damage to the environment.

In Mountain Valley Pipeline's case, citizen groups have successfully challenged several of these approvals before the 4th U.S. Circuit Court of Appeals. In one widely publicized ruling involving a different pipeline, the panel alluded to Dr. Seuss' "The Lorax," saying that the U.S. Forest Service had failed to "speak for the trees" in approving the project. The decision was overturned by the U.S. Supreme Court, but not before the project was canceled.

The 4th Circuit has ruled against the Mountain Valley Pipeline time and again, saying developers and permitting agencies skirted regulations aimed at protecting water quality, public lands and endangered species. In the past four years, the court has found that three federal agencies — the U.S. Forest Service, the U.S. Army Corps of Engineers and the Interior Department's Bureau of Land Management — illegally approved various aspects of the project.

While those agencies tweaked the rules, what Manchin's new deal would do is change the referee. In March, Manchin told the Bluefield Daily Telegraph that the 4th Circuit "has been unmerciful on allowing any progress" by Mountain Valley Pipeline.

Then, in May, lawyers for the pipeline petitioned the 4th Circuit to assign a lawsuit by environmental advocates to a new three-judge panel, instead of having it heard by judges who had previously considered related pipeline cases. Among other things, the attorneys cited a Wall Street Journal editorial, published a week earlier, declaring that the pipeline had "come under a relentless siege by green groups and activists in judicial robes."



Lawyers for the environmental groups responded in a court filing that Mountain Valley Pipeline LLC was just "dissatisfied that it has not prevailed" more often and was unfairly lobbing a charge that the legal process was rigged. The 4th Circuit rejected the company's request.

It is unclear whether this pending case, which challenges a water pollution permit issued by West Virginia regulators, would be transferred if the Manchin legislation

issued by West Virginia regulators, would be transferred if the Manchin legislation becomes law.

Congress has intervened in jurisdiction over pipeline cases before. In 2005, it diverted legal challenges to decisions on pipeline permits from federal district courts to the appeals court circuit where the projects are located. The move was part of a plan encouraged by then-Vice President Dick Cheney's secretive energy task force to speed up project approvals. (Under the Constitution, Congress can determine the jurisdiction of all federal courts except the U.S. Supreme Court.)

Besides the pipeline, Manchin has cited other reasons for his change of heart on the climate change bill. He has emphasized that the bill would reduce inflation and pay down the national debt.

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Approval for the pipeline may not be a done deal. Both senators from Virginia, where the pipeline is also a hot political issue, are signaling that they don't feel bound by Manchin's agreement with the leadership. Manchin's own announcement said that Democratic leaders have "committed to advancing" the pipeline legislation — not that the bill would pass. Regional and national environmental groups are walking a fine line. They support the climate change legislation while opposing weakening the permit process.

The pipeline's neighbors say they'll keep fighting, but they recognize that the odds are against them. "You just feel like you're not an equal citizen when you're dealing with Mountain Valley Pipeline," Jarrell said.



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**Investigative Journalism in the Public Interest**

# Mountain Valley loses another permit needed to complete pipeline

Exhibit E

Laurence Hammack Apr 3, 2023 5


Less than a week after the Mountain Valley Pipeline moved one step closer to completion, it suffered another step backward Monday.

A federal appeals court threw out a water quality certification from the West Virginia Department of Environmental Protection, an authorization needed by the natural gas pipeline to cross streams and wetlands in the state where it starts.

Mountain Valley's past violations of erosion and sedimentation control regulations figured prominently in a decision by a three-judge panel of the 4th U.S. Circuit Court of Appeals.

"Although the Department acknowledged MVP's violation history, it failed to dispel the tension between MVP's checkered past and its confidence in MVP's future compliance," Chief Judge Roger Gregory wrote in the unanimous decision.

Last Wednesday, the same panel upheld a similar decision by the Virginia Department of Environmental Quality and the State Water Control Board that allowed the company to move forward with its plans to cross streams and wetlands in Southwest Virginia.


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Certification from both states — through which the 303-mile pipeline runs — is required before the U.S. Army Corps of Engineers can issue a final approval for water body crossings.

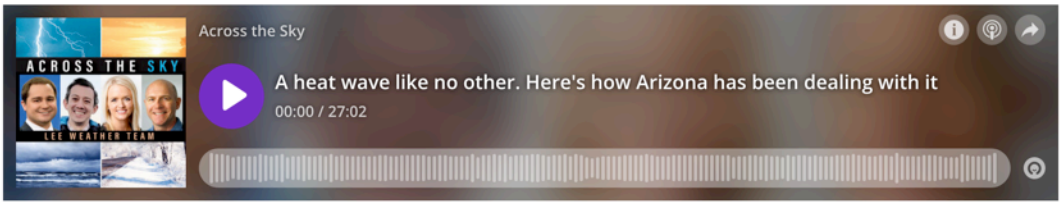
“This should be a huge blow to the project,” said David Sligh, conservation director for Wild Virginia, one of the environmental groups that have filed repeated legal challenges against permits issued for the pipeline.

Mountain Valley, however, indicated that it will seek a renewed certification from West Virginia.

The company “will continue to work with the agency on a path forward to completing this critical infrastructure project safely and responsibly,” Mountain Valley spokeswoman Natalie Cox wrote in an email Monday.

Construction of the $6.6 billion project is nearly 94% done, she said, and Mountain Valley still expects to finish the job by year’s end.

But the Fourth Circuit’s decision Monday was just the latest in a series of rejections of government permits that have already delayed the project’s completion by more than four years.

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Fall of 2021 marked the last time there was active construction of the pipeline, although erosion and sedimentation control efforts have continued since then on the otherwise dormant right of way.

In early 2022, during a winter break from construction, the Fourth Circuit rejected two other approvals — one for the pipeline to cross through a section of the Jefferson National Forest and the other an opinion by the U.S. Fish and Wildlife Service that endangered species of fish and bats would not be jeopardized by the work.

Mountain Valley says it expects to have a new permit from the U.S. Forest Service by summer. The Fish and Wildlife Service issued a revised biological opinion last month that again found no significant threat to endangered species.

Yet environmental groups are threatening more litigation against the latest permits.

Monday’s decision involving the West Virginia water quality certification also complicates the Army Corps’ pending consideration of water crossing permits in both states. Mountain Valley plans to either dig through or burrow under the remaining streams and wetlands. More than half of nearly 1,000 water body crossings have been completed, the company says.

Opponents hope the latest court defeat will seal the project's fate.

"After countless violations of environmental safeguards and clean water protections, we know that MVP can't be trusted to comply with the most basic standards of reasonable conduct," said Patrick Grenter, director of the Sierra Club's Dirty Fuels Campaign.

"This project is already more than three years behind schedule, and billions over budget," Grenter said. "With continuous legal setbacks, it has never been more clear that investors should stop throwing money at this doomed project and walk away."

Since crews began to clear land and dig ditches for the buried pipeline in early 2018, there have been problems with muddy runoff from construction sites situated precariously on mountainsides and stream banks.

DEQ has cited Mountain Valley with more than 350 violations of erosion and sedimentation control regulations on a portion of the pipeline that crosses through Southwest Virginia, passing north of Blacksburg and south of Roanoke.



In West Virginia, environmental regulators fined Mountain Valley a combined $569,000 for failing to maintain storm water control measures in 2019 and 2021.

Considering the past record, Gregory wrote, the state did not do enough to prevent additional problems that may occur, should construction resume.

"Without substantive assurance that MVP will comply with those policies," he wrote in a 34-page opinion, "the department's sanguine outlook is troubling — especially given MVP's prior violations."

Exhibit F

APRIL 04, 2023

# MANCHIN STATEMENT ON 4TH CIRCUIT COURT DELAY OF MOUNTAIN VALLEY PIPELINE

Charleston, WV — Today, U.S. Senator Joe Manchin (D-WV), Chairman of the U.S. Senate Energy and Natural Resources Committee, released the below statement on the decision by the U.S. 4th Circuit Court of Appeals to further delay construction of the Mountain Valley pipeline.

"It is infuriating to see the same 4th Circuit Court panel deal yet another setback for the Mountain Valley Pipeline project and once again side with activists who seem hell-bent on killing any fossil energy that will make our country energy independent and secure. This pipeline is more than 90% constructed with 283 miles already laid, and once through the red tape can bring an additional 2 billion cubic feet per day of natural gas onto the market within months. This project has been through three rounds of water quality permitting but activist groups continue to litigate the last 20 miles, standing in the way of restoring land to its natural beauty, getting more product to market to bolster our energy security and bring down prices, and allowing West Virginians to benefit from the natural resources they own. As OPEC and Putin continue to manipulate energy to suit their agendas, the United States must step up to the plate to get more of our abundant natural resources – which are among the cleanest produced in the world – to market, both for our own energy security and that of our friends and allies around the world."



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Exhibit G

MAY 20, 2023

# PERMITTING REFORM NECESSARY FOR AMERICA'S FUTURE

America's permitting process is broken, consumed by bureaucratic delays and endless litigation at every turn. Our inability to permit projects in West Virginia and across the country on a timely basis is not only harming our energy security and ability to provide for ourselves, it's also hurting our national security and ability to reduce our reliance on foreign adversaries who do not share our values. We only have to look at Putin's ability to cripple much of Europe by cutting off Russia's energy exports to see what happens if we continue down this road of, or open up the door to, dependence on countries like China, Russia, Iran, and other bad actors for our energy.

For years, I have been working in a bipartisan way to address our country's broken permitting system. Over the past year, as West Virginia's senior senator and the chairman of the Senate Committee on Energy and Natural Resources, I have been proud to reignite and lead the effort on bipartisan, comprehensive permitting reform, and I continue to work with the president and congressional leaders to secure the enactment of commonsense permitting reforms. Because of the crippling impacts of a broken system, I continue to urge my colleagues to come together around a bipartisan solution as quickly as possible.

Last summer, after securing a commitment to get permitting reform done, I introduced legislation that would enable the United States to build the infrastructure we need to ensure our energy and national security. Throughout the fall, I worked with a bipartisan group of senators to make adjustments that incorporated feedback from my Republican colleagues. As a result of these compromises, 40 Democrats and seven Republicans voted to include my comprehensive, and truly bipartisan, energy permitting reform legislation in the 2022 National Defense Authorization Act. Notably, that legislation was also supported by the chairman and ranking member of the Senate Environment and Public Works Committee.

While we need 60 votes in the U.S. Senate to enact a law, when you can get 47 bipartisan senators to agree on anything, it's a sure sign that Congress knows there's a problem we need to fix. That's why I have reintroduced that legislation, the Building American Energy Security Act of 2023, to restart conversations around permitting reform. As the only comprehensive Senate permitting bill to have received bipartisan support, it is a great starting point.

For generations, West Virginians have been proud to punch above our weight to mine the coal that forged the steel that built the tanks and ships that powered our nation to greatness. West Virginia coal miners and their families have sacrificed so that our country could industrialize and grow to become the superpower of the world. An improved permitting process will ensure West Virginia is able to continue reliably powering the rest of the nation like we have proudly done for hundreds of years.

As all four Federal Energy Regulatory Commission commissioners testified before the Senate Energy Committee, we cannot eliminate coal today or in the near future if we want to have a reliable electric grid. I also continue to work to ensure that newer energy industries like hydrogen and advanced nuclear see the tremendous benefits that investing in West Virginia will provide.

It's for that reason that I provided $8 billion for hydrogen hubs through my committee, ensuring that one must be in the Appalachian region, and have authored bipartisan laws to help bring advanced nuclear to re-power coal plants that have closed and provide jobs and economic opportunities to these communities. But this is all for nothing if we can't get our permitting processes to work for us, not against us.

Unfortunately, in West Virginia, we've seen up close the consequences of our broken permitting system through the drawn-out permitting process for the Mountain Valley Pipeline. With only 20 miles left until the pipeline is finally finished, the project has been undergoing litigation and permitting re-dos for more than eight years, including six Environmental Impact Studies and nine court cases in the Fourth Circuit.

This delay is preventing 2 billion cubic feet of natural gas per day from entering the market that would help keep global supply and demand balanced, bring in $40 million annually in new tax revenue for West Virginia and bring in more than $300 million more per year in royalties for West Virginia landowners. That's on top of the approximately 2,500 construction jobs that are on hold while the Mountain Valley Pipeline is litigated over and over again.

And MVP is just the tip of the iceberg. All across our great nation, all types of energy and mineral projects — including fossil fuels like natural gas,

oil, and coal, but also wind and solar and critical minerals projects that will be needed for new energy technologies of the future — are tied up in unnecessary litigation and a disjointed, lengthy and repetitive permitting process that subjects vital projects to rounds and rounds of red tape and reviews that only solidify our reliance on foreign supply chains.

As chairman of the Senate Energy and Natural Resources Committee, I held a hearing last week to look at opportunities for Congress to reform the permitting process and it became clear: just as we did with the Bipartisan Infrastructure Bill, we all need to sit down and negotiate in good faith to do what our country needs and craft a truly bipartisan permitting reform bill instead of focusing on whose name is on the bill.

To continue making the case to the administration and congressional leaders, I will hold more sector-specific energy permitting hearings in the weeks ahead to learn more about the issues these projects face and inform our work. Make no mistake, actually getting something done will require compromise and prioritization. Many ideas that are priorities for some senators are strongly opposed by others. But we cannot let the pursuit of the perfect bill mean we fail once again in getting a good, impactful bill signed into law.

Americans of all walks of life expect the lights to turn on when we flip the switch. We expect the gas station to be able to sell us fuel to get to work. And why shouldn't we? America is the superpower of the world, the richest nation in history, and yet, our electric grid and the reliable energy supply that all Americans count on is being threatened because it takes five, 10, or even 15 years to build the infrastructure we need to produce and transport energy across our great nation. Without comprehensive permitting reform we risk jeopardizing the energy security our country needs to be the superpower of the world.

Let me be clear: the road ahead to enact meaningful permitting reforms is not easy, but if we put partisan politics aside and truly work on behalf of all West Virginians and the American people, like they deserve, then we can find a solution that strengthens our energy security and ensures America remains a global energy leader.

**By: Senator Joe Manchin**
Source: **Wheeling Intelligencer**



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Exhibit H

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

CLETUS WOODROW AND BEVERLY ANN BOHON, *et al.*,

*Appellants*,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,

*Appellees*.

**No. 20-5203**
On appeal from
1:20-cv-00006-JEB (D.D.C.)

## DECLARATION OF CLETUS WOODROW BOHON

I, Cletus Woodrow Bohon, of Montgomery County, Virginia, hereby depose and state that I am over the age of 18 and am in all respects competent and qualified to make this Declaration. All facts stated are within my personal knowledge and are true and correct.

1. I am a proud Virginian landowner residing in Elliston, Virginia.

2. My land is located in Montgomery County, which is in rural Southwest Virginia.

3. I have lived in this house in Montgomery County for 30+ years. I live there with my wife, Beverly Ann Bohon.

4. I have personal knowledge of MVP's activities on our land.

5. In the past few weeks alone, MVP has significantly ramped up activity on my property and caused a lot of damage to my land while building their pipeline. This includes, but is not limited to, the following:

a. ***Blasting***. MVP has been drilling holes and blasting, with dynamite, to remove rocks from their path.

b. ***Tree clearing***. MVP has been clearing and removing old trees that were piled up on my land.

c. ***Pipe***. Numerous sections of large pipe have been delivered and stacked up in or around my property.

d. ***Trenches***. Trenches have not yet been dug, but MVP has brought large equipment in what appears to be preparation for trenching.

e. ***Bulldozers & machinery***. MVP has many large excavators and bulldozers in or around my property. MVP has been moving and using these bulldozers to clear trees from Poor Mountain.

f. ***MVP's agents & workers***. There have been a lot of strange people wandering on my land recently, including construction workers and security personnel. Some of MVP's agents have approached our home and gone outside their right of way. When I confronted them and asked why they were wandering outside their right of way and so

close to our home, they said they were "lost," did not know where the right of way was, were new on the job, or "accidentally" went outside the right of way.

g. ***Loud Noises***. My wife and I moved here for the peace and quiet. Now, when we sit on our porch, instead of hearing the birds singing, we hear the sound of loud machinery. Beeping, clattering, and pounding on rocks with jackhammers is what we endure all day.

6. My wife and I have been very disturbed and distressed by these unwelcome invasions of our privacy, and the destruction of our land.

7. I have taken many pictures of the above-described activity. This includes pictures of pipe, blast holes, bulldozers, and other large machinery & equipment, showing the magnitude of activity in recent weeks. The attached pictures were taken by me using my phone.

I hereby state, under penalty of perjury, under the laws of the United States of America, that the foregoing is true and correct.

Executed this 15th day of October 2023.

Cletus Woodrow Bohon

Cletus Woodrow Bohon


W
NW
N
270
300
30
0
30
328°NW (T)
37°12'42"N, 80°11'44"W ±32ft
1694ft
05 Oct 2023, 18:35:11


W
NW
N
NE
270
300
330
0
30
60
347°N (T)
37°12'41"N, 80°11'44"W ±26ft
1689ft
KOMATSU
16 Sep 2023, 11:00:58


NE
E
SE
60
90
120
150
108°E (T)
37°12'44"N, 80°11'47"W ±36ft
1671ft
16 Sep 2023, 10:58:24


S
SW
W
NW
180
210
240
270
300
330
246°SW (T)
37°12'43"N, 80°11'46"W ±16ft
1655ft
CAT
01 Sep 2023, 18:54:50