

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); *Def. 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*

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

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

“[o]pponents began signing emails, ‘May the Fourth be with you’”); Sarah Vogel song, *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.

George P. Sibley, III
J. Pierce Lamberson
HUNTON ANDREWS KURTH LLP
951 E. Byrd St.
Richmond, VA 23219
Telephone: (804) 788-8716
Facsimile: (804) 343-4733
Email: gsibley@hunton.com

Justin W. Curtis
AQUALAW PLC
6 South 5th Street
Richmond, Virginia 23219
Telephone: (804) 716-9021
Email: justin@aqualaw.com

*Counsel for Mountain Valley Pipeline,
LLC*

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