

# Pipeline developer urges replacement of 4th Circuit panel

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Mountain Valley developers are calling for a federal appeals court to randomly assign judges to a legal fight over a water permit for the natural gas project following a panel's repeated rejection of other key pipeline approvals.

A string of rulings against pipelines from the same three judges of the 4th U.S. Circuit Court of Appeals has created the "perception of a deck stacked against large infrastructure projects generally and one private party specifically," Mountain Valley wrote in a [motion](#) yesterday.

"This consistent track record," the company continued, "leads Mountain Valley and the public more broadly to perceive that 'the process ha[s] been rigged.'"

Chief Judge Roger Gregory, a Clinton pick, along with Judges James Wynn and Stephanie Thacker, both Obama appointees, have been assigned to hear 12 cases over the past four years involving Mountain Valley and the now-canceled Atlantic Coast pipeline, according to the company. The 4th Circuit has not yet announced which judges will hear the latest challenge to Mountain Valley, but the company has requested that the court reassign the case if Gregory, Wynn and Thacker have already been selected.

The court only deviated from that particular panel when in 2018 it assigned Judge William Traxler, a Clinton pick, to two Mountain Valley cases in place of Wynn, the company said.

"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," the company said. "Future assignment of pipeline cases to this same panel — without regard to procedural posture — would only solidify that impression."

Rulings from the 4th Circuit panel have had serious consequences for Mountain Valley, a 304-mile pipeline designed to carry natural gas from West Virginia to Virginia. The project is not expected to be completed until next year, and its costs have surged \$3 billion over its original estimate to \$6.6 billion ([Energywire](#), May 4).

Delays and rising costs followed the 4th Circuit's rejection this year of the project's Fish and Wildlife Service-revised biological opinion and incidental take statement. The court has also tossed out approvals from the Forest Service and the Bureau of Land Management for the pipeline to cross the Jefferson National Forest ([Energywire](#), Feb. 4).

In response to speculation that the company planned to shutter the project, Mountain Valley has said it plans to seek replacement permits from the agencies.

While the court is allowed to specifically assign the same judges to a dispute in which they have had previous involvement, the company said, that is not the case with the Sierra Club's lawsuit against the Virginia State Water Control Board and Mountain Valley.

"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," Mountain Valley said.

The Sierra Club lawsuit challenges Virginia's certification that the pipeline's water crossings comply with state standards as required under Clean Water Act Section 401.

Gregory, Wynn and Thacker have not previously heard any cases involving Virginia's 401 certification of the pipeline, and the 4th Circuit therefore should have no reason for assigning the same panel in this case, Mountain Valley said.

But the company said it still expects the 4th Circuit to assign the same panel again, posing a threat to the public's confidence in the court's legitimacy.

"That threat far outweighs any efficiencies the panel's familiarity with the project offers in this challenge to a new, unremanded administrative decision," Mountain Valley said.

The Sierra Club declined to comment on Mountain Valley's request. The group will have an opportunity to file its own response with the court.