

ECONOMY

U.S. Supreme Court gives Mountain Valley Pipeline the OK to resume construction as 4th Circuit hears arguments

The Supreme Court's decision Thursday to vacate stays of activity, which were issued earlier this month, came on the same day that attorneys appeared before appellate judges to debate whether environmental cases against the pipeline should be dismissed.



by **Matt Busse**
July 27, 2023



The Mountain Valley Pipeline near Elliston in Montgomery County. Photo by Kevin Myatt.

The U.S. Supreme Court on Thursday gave Mountain Valley Pipeline the OK to resume construction activity following a lower court's orders earlier this month to halt such activity.

On the same day, a little more than a hundred miles away, attorneys appeared in Richmond before three judges of the U.S. Circuit Court of Appeals to argue over whether pending court cases against the pipeline should be dismissed.

Mountain Valley Pipeline on July 14 filed an emergency appeal with the Supreme Court, saying the 4th Circuit's [July 10 and 11 decisions](#) to stay construction activity along the pipeline's 303-mile route from West Virginia into Virginia jeopardized the goal of completing the project by the end of the year.

The Supreme Court's [brief decision posted online](#) did not include any explanation for the ruling.

"We are grateful for the quick action of the United States Supreme Court in vacating the previously issued stay orders regarding the Mountain Valley Pipeline (MVP) project," Natalie Cox, a spokesperson for the energy company Equitrans Midstream, which holds the largest interest in the Mountain Valley Pipeline project, said in a statement.

[Environmental groups had argued](#) that Mountain Valley would suffer no more than temporary financial loss and that the stays were necessary while pending cases involving the pipeline's crossing through the Jefferson National Forest and its impact on federally protected endangered species remain unresolved.

Kym Meyer, an attorney for the Southern Environmental Law Center, said in an interview after the 4th Circuit court hearing that pipeline opponents were "disappointed" with the Supreme Court's decision.

While that decision was a victory for Mountain Valley, attorneys for the pipeline project have sought to have those cases dismissed entirely, arguing that a provision in the recently passed Fiscal Responsibility Act removes the 4th Circuit's jurisdiction over them.

[Pipeline opponents, meanwhile, have argued](#) that Congress unconstitutionally overstepped its authority in passing the act and say the cases should not be dismissed.

The act, which was primarily intended to suspend and later raise the nation's debt ceiling, includes language that said completing the \$6.6 billion, 42-inch-diameter natural gas pipeline is in the national interest. It ordered the approval of all the pipeline's remaining necessary permits, removed judicial review of those permits, and said that only the D.C. Circuit Court of Appeals can hear any challenges to the pipeline provision's constitutionality.

Pipeline opponents have claimed that by removing the courts' ability to review the pending cases against the pipeline, Congress is effectively picking a winner — Mountain Valley — in those cases and therefore is infringing upon the courts' judicial power.

Attorney Kevin McArdle, representing federal agencies and arguing in support of Mountain Valley, said Thursday that Congress was not deciding the outcome of these particular cases but was rather changing the law to carve out an exemption covering a group of cases, and it followed that the 4th Circuit should dismiss the cases at hand based on that.

"Where's the limit on that?" asked Judge James Wynn Jr. "Congress can intervene on any type of case we have and take away jurisdiction and that's the end of it?"

Wynn's questions were among a number of queries posed to attorneys during a hearing that initially was scheduled for oral arguments of 30 minutes per side but which ran longer, as lawyers and judges discussed salient points of case law, the 4th Circuit's future role in the pending cases going forward and the wording of the Fiscal Responsibility Act.

Donald Verrilli Jr., representing Mountain Valley Pipeline, argued during Thursday's hearing that legal precedent allows Congress to remove a court's jurisdiction if legislators are "changing the substantive law."

Ratifying the pipeline's necessary permits and authorization, Verrilli said, counted as such a change of law.

"Ratification does not mean these permits are lawful under existing law," he said. "It means they are decided by Congress to be lawful regardless of whether they were lawful under previous law."

But, asked Judge Roger Gregory, does that mean Mountain Valley now can violate any environmental protection laws?

"What would stop them?" he asked.

Coming back to that query later in the hearing, Verrilli said that while the Fiscal Responsibility Act approved Mountain Valley's permits, the project still has to comply with the conditions of those permits.

"It's not a free pass by any means," he said.

Attorneys for the environmental groups argued that with the Fiscal Responsibility Act's pipeline provision, Congress crossed the line separating the legislative and judicial branches.

"Good fences make good neighbors," said Derek Teaney, an attorney representing a coalition of environmental groups including Appalachian Voices, Preserve Bent Mountain and Wild Virginia.

Congress showed its intent to declare a victor in the pending cases through its language in the Fiscal Responsibility Act that removes judicial review of the pipeline's permits, Teaney argued.

Meyer, arguing on behalf of The Wilderness Society, said despite Mountain Valley's arguments to the contrary, there is no legal standard to justify Congress' actions.

"There has to be a line, and respectfully, here that line has been crossed," Meyer said.



The Mountain Valley Pipeline has been delayed for years by legal challenges, a number of which have come before the 4th Circuit, whose geographic region covers the pipeline's entire route. Photo by Matt Busse.

She said the argument that Congress ratifying Mountain Valley's permits qualified as a substantive change of law is a "red herring" if ratification is used in a "super targeted way" to decide a case.

"That's what it has done here by ratifying the approvals which are at issue before this court," Meyer said.

Another point of discussion centered on the Fiscal Responsibility Act's wording that it approved all permits "necessary for the construction and initial operation at full capacity of the Mountain Valley Pipeline."

"Who, if anyone, determines when Mountain Valley Pipeline is operating at, quote, full capacity?" asked Judge Stephanie Thacker, a question that was later echoed by Gregory.

If the Fiscal Responsibility Act removes the 4th Circuit's judicial review in cases challenging the permits necessary to complete the pipeline, Gregory asked, when does the court's jurisdiction resume?

Verrilli, representing Mountain Valley, replied that the act authorized all permits necessary for the pipeline's original plan, but if Mountain Valley wanted to add new parts beyond the original scope, it would need new permits not covered by the act.

The Mountain Valley Pipeline project was first announced in 2014 and initially was expected to be complete in 2018. Pipeline officials now say the work is more than 90% done, although opponents dispute that figure.

For years, the pipeline — which begins in northwestern West Virginia, then in Virginia passes through Giles, Craig, Montgomery, Roanoke and Franklin counties before connecting to a compressor station in Pittsylvania County — has been delayed by legal challenges, a number of which have come before the 4th Circuit, whose geographic region covers the pipeline's entire route.

The three-judge panel now is tasked with deciding whether to dismiss the cases against Mountain Valley. At the adjournment of Thursday's hearing, Wynn praised the professionalism of attorneys on both sides of the ongoing battle.

"My hat's off to both of you," he said.

ECONOMY

4th Circuit dismisses environmental cases against Mountain Valley Pipeline

While the decision was unanimous, two of the three judges raised questions about the precedent that was being set, with one wondering whether recent congressional action to eliminate the 4th Circuit’s jurisdiction over the cases is “a harbinger of erosion not just to the environment, but to our republic.”



by **Matt Busse**

August 11, 2023



The 4th U.S. Circuit Court of Appeals in Richmond. Photo by Matt Busse.

Privacy - Terms

A three-judge panel of the Richmond-based 4th U.S. Circuit Court of Appeals on Friday unanimously **dismissed environmental groups' legal challenges** against the Mountain Valley Pipeline, saying Congress has eliminated the court's jurisdiction over the cases.

But two of the judges used their concurring opinions to raise questions about the precedent that is being set, with one wondering if the recent congressional action is “a harbinger of erosion not just to the environment, but to our republic,” and another saying that the 4th Circuit has “no clear guidance from the Supreme Court on where the line between legislative and judicial power lies.”

Mountain Valley Pipeline **had argued for the cases to be dismissed**, citing the recently passed Fiscal Responsibility Act, which primarily suspended the nation's debt ceiling so the federal government wouldn't default on its obligations. The act also included language in its Section 324 that said timely completion of the \$6.6 billion, 42-inch-diameter natural gas pipeline from West Virginia into southern Virginia is in the national interest.

The act ordered the approval of all the pipeline's remaining necessary permits, removed judicial review of those permits and said that only the D.C. Circuit Court of Appeals can hear any challenges to the pipeline provision's constitutionality.

Environmental groups including Appalachian Voices, the Sierra Club and the Wilderness Society were challenging the 303-mile pipeline's right to cross through the federally protected Jefferson National Forest as well as a federal opinion that said the pipeline wouldn't harm endangered species along its route.

Pipeline opponents claimed that by removing the courts' ability to review the pending cases against the pipeline, Congress effectively picked a winner — Mountain Valley — in those cases and therefore infringed upon the courts' judicial power.

In writing the opinion for the court, published Friday, Judge James Wynn Jr. said that Congress has the power to ratify federal agency approval, and while “Congress may not impermissibly tell this Court how to apply existing law,” it is constitutional for Congress to provide a new legal standard — in this case, Section 324 — and instruct the court to follow that standard.

“Accordingly, because Congress has ratified the challenged agency actions, there is no longer a live controversy and the underlying petitions are moot. We therefore lack jurisdiction over them,” Wynn wrote.

Wynn also noted that the Constitution grants Congress the power to create federal courts in the first place.

“Provided it does not violate other constitutional provisions, Congress is widely seen to enjoy broad control over the jurisdiction of the federal courts,” Wynn wrote.

Wynn noted that “the exact confines of Congress's power over jurisdiction are still being debated, especially when it comes to jurisdiction-stripping efforts that appear to dictate the outcome of pending litigation.”

But, he wrote, regardless of the merits of the environmental groups' arguments, the 4th Circuit is not the court to consider them because Section 324 vests the D.C. Circuit, not the 4th Circuit, with jurisdiction over any claims of the act's unconstitutionality.

Wynn noted that the 4th Circuit could potentially hear future challenges to the pipeline, such as if Mountain Valley Pipeline were to propose a new spur outside the scope of the original project — a hypothetical scenario that also came up as a point of discussion July 27 when attorneys on both sides of the cases presented oral arguments before Wynn and fellow judges Roger Gregory and Stephanie Thacker.

“We save such challenges for another day,” Wynn wrote.

Gregory, while concurring in a separate opinion that the cases must be dismissed, wrote that the pipeline provision of the Fiscal Responsibility Act is nonetheless “a blueprint for the construction of a natural gas pipeline by legislative fiat.”

“If that provision is likewise constitutionally sanctioned, then Congress will have found the way to adjudicate by legislating for particular cases and for particular litigants, no different than the governmental excesses our Framers sought to avoid,” Gregory wrote.

“For that reason, I fear Congress has employed this Court’s constitutionally directed deference to legislative prerogatives to undermine the Constitution and, in the process, it has made the Court an accessory to its deeds. If that is so, I wonder if Section 324 is a harbinger of erosion not just to the environment, but to our republic. That, only our Supreme Court can decide.”

In her separate concurring opinion, Thacker said that because Congress legislated that only the D.C. Circuit could decide if Section 324 is constitutional, the only question before the 4th Circuit was whether that D.C. Circuit provision itself is constitutional.

“We limit our inquiry to that question because we have determined we are bound to do so, but the judicial branch should proceed with caution in scenarios like this one,” Thacker wrote, reiterating points of discussion raised during the July 27 oral arguments regarding how far Congress’ jurisdiction-stripping power could go.

The appellate court, she wrote, has “no clear guidance from the Supreme Court on where the line between legislative and judicial power lies, especially when Congress acts for the purpose of influencing pending litigation or even going so far as to pick a winner in that pending litigation.”

After the 4th Circuit panel published its opinion, Natalie Cox, spokesperson for Equitrans Midstream, which holds the largest interest in the Mountain Valley Pipeline, said in a statement that the company agreed with the court’s conclusion.

“Mountain Valley is committed to finalizing work on this critical energy infrastructure project by the end of 2023 in compliance with all approved federal and state authorizations so it can enter service and help satisfy public demand for cleaner, affordable and reliable domestic energy,” Cox said.

Meanwhile, a variety of environmentalists condemned the ruling.

“It has been clear from the outset that the proposal to construct this pipeline across the steep slopes and sensitive streams of Appalachia will threaten communities and harm imperiled species and their habitats,” Ben Jealous, executive director for the Sierra Club, said in a statement. “Congress’s action apparently gives the Mountain Valley Pipeline a free pass to edge out vulnerable species and steamroll communities in its path.”

Jessica Sims, Virginia field coordinator for Appalachian Voices, called the pipeline “a dangerous, destructive project that repeatedly failed in attempts to obtain federal authorizations that could withstand legal scrutiny until it convinced its friends in Congress to intervene.”

“We will not give up our efforts to protect the communities suffering the consequences of this unnecessary project,” Sims said in a statement.

The Mountain Valley Pipeline project was first announced in 2014 and initially was expected to be complete in 2018. Pipeline officials now say the work is more than 90% done, although opponents dispute that figure.

The pipeline begins in northwestern West Virginia, and then in Virginia passes through Giles, Craig, Montgomery, Roanoke and Franklin counties before connecting to a compressor station in Pittsylvania County.

Over the years it has been delayed by a number of legal and permitting challenges, many of which have come before the 4th Circuit, whose geographic region covers the pipeline’s entire route.

After the Fiscal Responsibility Act was signed into law June 3, pipeline opponents secured a temporary victory when the 4th Circuit ordered stays of construction activity along the pipeline route.

But Mountain Valley Pipeline filed an emergency appeal to the U.S. Supreme Court, and the stays were vacated July 27 as attorneys and appellate judges met in Richmond for oral arguments.

ECONOMY

Judges deny landowners' emergency request to halt Mountain Valley Pipeline work

Property owners in Franklin, Montgomery and Roanoke counties had sought to stop construction activity on their land as their eminent domain challenge against the natural gas pipeline remains unresolved.

by **Matt Busse**

October 25, 2023



The Mountain Valley Pipeline near Elliston in Montgomery County. Photo by Kevin Myatt.

A three-judge panel of a federal appeals court has denied an emergency injunction request from six Southwest Virginia landowners to halt Mountain Valley Pipeline construction activity on their properties.

The court order, filed late Tuesday afternoon by Judges Cornelia Pillard, Robert Wilkins and Justin Walker of the U.S. Circuit Court of Appeals for the District of Columbia, did not offer details behind the decision.

The landowners' attorney, Mia Yugo of Roanoke law firm Yugo Collins, noted in an email to Cardinal News on Wednesday that an injunction request can be appealed immediately.

"We're evaluating all options," Yugo said.

Mountain Valley Pipeline spokesperson Natalie Cox declined to comment Wednesday on the decision, citing the fact that the landowners' larger federal lawsuit is still pending.

That lawsuit centers on properties owned by Cletus and Beverly Bohon in Montgomery County, Wendell and Mary Flora in Franklin County, and Aimee and Matt Hamm in Roanoke County.

The three couples are suing the Federal Energy Regulatory Commission and Mountain Valley Pipeline and have argued for nearly four years that Congress improperly delegated the legislative power of eminent domain to the commission, a federal agency.

FERC regulates the construction of interstate gas pipelines and in late 2017 authorized Mountain Valley, under the federal Natural Gas Act, to use eminent domain to seize land to build the pipeline.

In their Oct. 16 emergency request, the landowners accused FERC and Mountain Valley Pipeline of requesting delays so that the case won't be heard until after the land is "irreparably damaged." Most recently, the court granted FERC's request to have more time to file certain legal briefs, giving FERC and Mountain Valley until Nov. 13 to do so.

In a follow-up filing Monday, the landowners accused Mountain Valley Pipeline of escalating construction activity since Oct. 16 in retaliation against the landowners for their emergency request.

"The delays are nothing but shameless stall tactics by two extremely capable litigants — surrounded by armies of lawyers — who are trying to run out the clock by manipulating the judicial process," Monday's filing stated.

The landowners' emergency motion sought to keep work crews from "accessing or entering their private property, constructing, blasting, tree-clearing, building, or performing any other activities" related to the pipeline.

"Bulldozers are on the property. Smoke can be seen rising over the land. ... With each delay, Landowners suffer irreparable injury to private land being seized for private gain," the Oct. 16 filing stated, with both instances of the word "private" underlined.

FERC opposed the landowners' motion and argued, among other points, that its orders approving the pipeline have been finalized for years and it's too late to challenge them.

Mountain Valley also opposed the motion, calling it an "extraordinary, thirteenth-hour request." It argued that the Fiscal Responsibility Act — which Congress passed earlier this year to keep the government from defaulting on its financial

obligations but which also contained provisions fast-tracking the Mountain Valley Pipeline — removed the court's jurisdiction to hear challenges to the company's FERC authorization.

Mountain Valley also said most of the tree-cutting and other work related to clearing the pipeline's right of way is already complete and the remaining work on the landowners' properties "will be focused on assembling the pipeline, digging the trench, installing the pipeline, backfilling the trench, and re-contouring and restoring the soil."

"That work will be done in strict compliance with rigorous environmental and safety protocols," Mountain Valley Pipeline said in a filing Friday.

A federal judge in the D.C. Circuit had previously dismissed the landowners' case, citing a lack of jurisdiction, but the landowners appealed to the U.S. Supreme Court, which sent it back to the appellate court in April.

It's now the last court case remaining among multiple challenges over the years to the controversial, 303-mile natural gas pipeline that runs from West Virginia through part of Southwest Virginia.

Besides objecting to the pipeline's use of eminent domain, opponents have said the project is unnecessary, unsafe and harmful to the environment. Previous court cases have focused on the pipeline's impact on federally protected endangered species and national forests.

Supporters have hailed the pipeline as a critical piece of domestic energy infrastructure to help transport natural gas from Appalachian shale deposits to mid- and south Atlantic U.S. markets, meeting a market need and boosting the nation's energy security.

The Fiscal Responsibility Act that President Joe Biden signed into law June 3 ordered government agencies to approve any remaining permits necessary to complete the pipeline and shielded those permits from further legal challenges.

About two months later, a Richmond-based federal appeals court dismissed environmental groups' lawsuits against the pipeline, saying that law had removed the court's jurisdiction over the cases.

Last week, the company with the largest stake in the joint Mountain Valley Pipeline project, Pittsburgh-based Equitrans Midstream, [said in a filing with the U.S. Securities and Exchange Commission](#) that the pipeline will be more expensive and will come online later than previously estimated.

The pipeline now is expected to cost \$7.2 billion, up from a previous recent estimate of \$6.6 billion and more than twice the initial budget of \$3.5 billion. The pipeline was first announced in 2014 and initially was expected to be complete in 2018 but has been delayed by years of legal and permitting challenges.

Equitrans Midstream also said the pipeline will be up and running in the first quarter of next year, rather than by the end of this year as it has previously stated.

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