No. 23A35

IN THE

Supreme Court of the United States

MOUNTAIN VALLEY PIPELINE, LLC,

Applicant,

v.

THE WILDERNESS SOCIETY, et al.,

Respondents.

On Emergency Application to Vacate the Stays Entered by the U.S. Court of Appeals for the Fourth Circuit in Nos. 23-1384, 23-1592, & 23-1594

RESPONSE BY APPALACHIAN VOICES, WILD VIRGINIA, WEST VIRGINIA RIVERS COALITION, PRESERVE GILES COUNTY, PRESERVE BENT MOUNTAIN, WEST VIRGINIA HIGHLANDS CONSERVANCY, INDIAN CREEK WATERSHED ASSOCIATION, SIERRA CLUB, CHESAPEAKE CLIMATE ACTION NETWORK, AND CENTER FOR BIOLOGICAL DIVERSITY TO EMERGENCY APPLICATION

Elizabeth F. Benson
SIERRA CLUB
2101 Webster Street, Suite 1300
Oakland, CA 94612

Derek O. Teaney
Claire Horan
APPALACHIAN MOUNTAIN ADVOCATES, INC.
P.O. Box 507
Lewisburg, WV 24901

Jason C. Rylander
Counsel of Record
CENTER FOR BIOLOGICAL DIVERSITY
1411 K Street NW, Suite 1300
Washington, D.C. 20005
(202) 744-2244
jrylander@biologicaldiversity.org

Jared Margolis
CENTER FOR BIOLOGICAL DIVERSITY
2852 Willamette Street, #171
Eugene, OR 87405

Counsel for Respondents Appalachian Voices, Wild Virginia, West Virginia Rivers Coalition, Preserve Giles County, Preserve Bent Mountain, West Virginia Highlands Conservancy, Indian Creek Watershed Association, Sierra Club, Chesapeake Climate Action Network, and Center for Biological Diversity

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, Respondents Appalachian Voices, Wild Virginia, West Virginia Rivers Coalition, Preserve Giles County, Preserve Bent Mountain (a chapter of the Blue Ridge Environmental Defense League), West Virginia Highlands Conservancy, Indian Creek Watershed Association, Sierra Club, Chesapeake Climate Action Network, and Center for Biological Diversity state that each of them is a non-profit organization with no parent corporation and no outstanding stock shares or other securities in the hands of the public. No publicly held corporation owns stock in any of the organizations.

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INTRODUCTION

On July 12, 2023, the U.S. Court of Appeals for the Fourth Circuit directed the parties to these consolidated petitions to appear for oral argument on July 27, 2023[1]—just two days from now—on the very questions presented by Mountain Valley Pipeline, LLC's ("MVP") pending emergency application. Nonetheless, the company rushed to this Court on July 14, 2023, asking this Court to take the extraordinary step of vacating a court of appeals's stay even as that court proceeds expeditiously to adjudication on the merits.

In this case involving endangered species that are indisputably harmed by pipeline construction, the stay appropriately maintains the status quo while the court of appeals moves swiftly to resolve the merits—including the pending motions to dismiss. MVP fails to show that it will suffer any harm beyond temporary financial loss as a result of the stay, and the equities weigh heavily in favor of avoiding harm to protected species. MVP has failed to show that extraordinary circumstances warrant this Court's intervention.

MVP's emergency application also fails on the merits. MVP relies on a Mountain Valley Pipeline–specific provision tacked on to the unrelated, must-pass Fiscal Responsibility Act of 2023, Pub. L. No. 118-5, 137 Stat. 10 (2023). That provision purports to approve and ratify MVP's existing federal authorizations—including the Endangered Species Act approvals challenged here—and to strip courts of jurisdiction over any challenges to those authorizations. But by attempting to pick the Government and MVP as the winners in pending litigation without creating new substantive law for courts to apply, Congress unconstitutionally invaded the judicial power. The emergency application should be denied.

[1] Order, *Appalachian Voices v. U.S. Dep't of the Interior*, No. 23-1384, ECF No. 56 (4th Cir. July 12, 2023).

BACKGROUND

MVP is attempting to construct a 304-mile-long natural gas pipeline across the Appalachian Mountains and their headwater streams. The pipeline requires razing a corridor through diverse forestlands, steep, landslide-prone terrain, and hundreds of sensitive rivers and streams. Over four hundred waterway crossings have yet to be constructed. App'x 57.[2]

As soon as construction began in 2018, serious erosion and sedimentation problems arose. The Virginia Department of Environmental Quality sued MVP in state court in 2018 due to "repeated violations of state water-quality regulations," and the West Virginia Department of Environmental Protection cited MVP for forty-six violations of water quality standards. *Sierra Club v. FERC*, 68 F.4th 630, 638–39 (D.C. Cir. 2023). Sedimentation from the project harms waterways that are important habitat for remaining populations of imperiled fish species protected under the Endangered Species Act.

Appalachian Voices's[3] petition for review challenges the Biological Opinion for the pipeline, issued by the U.S. Fish and Wildlife Service in February 2023 pursuant to the Endangered Species Act, 16 U.S.C. § 1536. In two prior cases, the Fourth Circuit set aside actions by the U.S. Fish and Wildlife Service that violated the Endangered Species Act's mandate to ensure against jeopardy, concluding that the agency appeared to ignore that constructing the pipeline would "press on the gas" for species that were already "speeding toward the extinction cliff." *Appalachian Voices v. U.S. Dep't of the Interior*, 25 F.4th 259, 266, 279 (4th Cir. 2022). Each time the Fourth Circuit invalidated the project's Endangered Species Act approvals, it took approximately a year for

[2] To avoid confusion, Appalachian Voices employs herein the conventions "App'x" for MVP's appendix and "AV App'x" for its own appendix.

[3] Respondents in the case challenging the Biological Opinion (No. 23-1384) are herein collectively referred to as "Appalachian Voices."

the agency to attempt to address the identified violations, evidencing the extent of the repeated failures to comply with the statute's vital protections. Nonetheless, the current iteration of the Biological Opinion repeats several of the prior violations identified by the Fourth Circuit (and commits some new ones that raise significant concerns over the pipeline's impacts to imperiled wildlife).

The Fourth Circuit's decision to issue a stay pending review of the Biological Opinion thus comes against a backdrop of persistent sedimentation problems and the recurring failure of regulators or MVP to show that the pipeline can be constructed in accordance with legal requirements—in part reflecting a pattern of agencies bending the law to accommodate MVP's preferred pipeline route and construction schedule.[4] In total, at least eight times, federal courts found that federal and state agencies failed to comply with the law in permitting the pipeline.[5]

MVP bristled at being held accountable for the consequences of its poorly designed project. But rather than grappling with the project's inability to comply with the law due to its location,

[4] For example, record evidence established that MVP pressured the U.S. Forest Service to accept its wildly optimistic sedimentation analysis—about which the Forest Service had previously expressed "grave concerns"—because changing it "'*would have ramifications for the entire project analysis*.'" *Sierra Club v. U.S. Forest Serv.*, 897 F.3d 582, 592, 594 (4th Cir. 2018) (quoting applicant commentary at meeting with agency; emphasis in *Sierra Club*). For its part, the U.S. Army Corps of Engineers twice tried to allow MVP to use a Clean Water Act permit for which it was not eligible. *See generally Sierra Club v. U.S. Army Corps of Eng'rs*, 981 F.3d 251 (4th Cir. 2020); *Sierra Club v. U.S. Army Corps of Eng'rs*, 909 F.3d 635 (4th Cir. 2018). And, most recently, the D.C. Circuit concluded that the Federal Energy Regulatory Commission ("FERC") failed to explain its decision not to conduct supplemental environmental review "addressing unexpectedly severe erosion and sedimentation along the pipeline's right-of-way." *FERC*, 68 F.4th at 636.

[5] *See FERC*, 68 F.4th at 651; *Sierra Club v. W. Va. Dep't of Env't Prot.*, 64 F.4th 487, 494 (4th Cir. 2023); *Appalachian Voices*, 25 F.4th at 271–79; *Wild Va. v. U.S. Forest Serv.*, 24 F.4th 915, 932 (4th Cir. 2022); *U.S. Army Corps of Eng'rs*, 981 F.3d at 263–64; Order, *Wild Va. v. U.S. Dep't of Interior*, No. 19-1866, ECF No. 41 (4th Cir. Oct. 11, 2019) ; *U.S. Army Corps of Eng'rs*, 909 F.3d at 651–54; *U.S. Forest Serv.*, 897 F.3d at 606.

design, and significant environmental effects, MVP instead directed its ire at the Fourth Circuit.[6] Although it never appealed any of its losses to this Court, MVP complained that the Fourth Circuit had "taken actions that go beyond the mandate of the judiciary" in refusing to rubber-stamp fatally flawed agency decisions. Pet'rs' Opp'n to Fed. Resp'ts' Mot. to Dismiss & Intervenor's Mot. to Dismiss or, in the Alternative, for Summ. Denial, Ex. A at 3, *Appalachian Voices v. U.S. Dep't of the Interior*, No. 23-1384, ECF No. 43-2 (4th Cir. June 26, 2023). MVP then appealed to its powerful allies in Congress, who worked behind closed doors with oil and gas lobbyists to attach a Mountain Valley Pipeline–specific provision to the entirely unrelated, must-pass debt-ceiling legislation—the Fiscal Responsibility Act of 2023 (the "Act").[7]

In short, faced with the reality that its ill-conceived pipeline cannot comply with this nation's foundational environmental laws, MVP sought special legislation in which Congress attempted to seize the judicial power by essentially declaring that, in pending litigation challenging authorizations for MVP, the Government and MVP win. Congress offered no substantive replacement legal standards and left no substantive questions of law or fact for the court to adjudicate. With this bespoke statute in hand, MVP and the Government moved to dismiss

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[6] For example, MVP sought (unsuccessfully) to change the panel composition for its cases—lobbing the charge that it "perceive[s] that the process ha[s] been rigged." Mountain Valley Pipeline, LLC's Mot. for Random Panel Assignment at 10, *Sierra Club v. State Water Control Bd.*, No. 21-2425, ECF No. 76 (4th Cir. May 16, 2022) (internal quotation marks omitted; first alteration added; second alteration in motion). Contrary to MVP's accusations of bias, MVP later prevailed on the merits in that case. In fact, the Fourth Circuit has ruled in MVP's favor in many cases. *See, e.g.*, *Sierra Club v. State Water Control Bd.*, 898 F.3d 383 (4th Cir. 2018); *Berkley v. Mountain Valley Pipeline, LLC*, 896 F.3d 624 (4th Cir. 2018); *Mountain Valley Pipeline, LLC v. W. Pocahontas Props. Ltd. P'ship*, 918 F.3d 353 (4th Cir. 2019); *Mountain Valley Pipeline, LLC v. 6.56 Acres of Land*, 915 F.3d 197 (4th Cir. 2019); *Mountain Valley Pipeline, LLC v. 0.15 Acres of Land*, 827 F. App'x 346 (4th Cir. 2020) (unpublished); *Mountain Valley Pipeline, LLC v. 0.47 Acres of Land*, 853 F. App'x 812 (4th Cir. 2021) (unpublished); *Sierra Club v. State Water Control Bd.*, 64 F.4th 187 (4th Cir. 2023).

[7] Maxine Joselow, *How a Fossil Fuel Pipeline Helped Grease the Debt Ceiling Deal*, WASH. POST (May 31, 2023), https://wapo.st/3NiL8KU.

Appalachian Voices's challenge to the Biological Opinion. After the Fourth Circuit entered a stay and promptly scheduled oral argument on the motions to dismiss for July 27, 2023, MVP rushed to this Court seeking vacatur of the stay despite the imminent resolution of the motions to dismiss in the court of appeals.

STANDARD OF REVIEW

MVP asks this Court for the extraordinary relief of vacatur of stays entered by the Fourth Circuit. Such relief is rarely granted because the issuance of a stay pending review by a court of appeals "is entitled to great deference from this Court." *Garcia-Mir v. Smith*, 469 U.S. 1311, 1313 (1985) (Rehnquist, J., in chambers). This Court, therefore, wields its authority to vacate a lower court's stay only "with the greatest of caution." *Holtzman v. Schlesinger*, 414 U.S. 1304, 1308 (1973) (Marshall, J., in chambers); *see also N.Y. Nat. Res. Def. Council v. Kleppe*, 429 U.S. 1307, 1310 (1976) (Marshall, J., in chambers) (noting that the Court has declined to "disturb, 'except upon the weightiest considerations, interim determinations of the Court of Appeals in matters pending before it'" (quoting *O'Rourke v. Levine*, 80 S. Ct. 623, 624 (1960) (Harlan, J., in chambers))).

Additionally, this Court has long applied the rule that disturbing an interim order is appropriate only when three requirements have been met: (1) the case "very likely would be reviewed [by this Court] upon final disposition in the court of appeals"; (2) "the court of appeals is demonstrably wrong in its application of accepted standards in deciding to issue the stay"; and (3) the applicant's rights "may be seriously and irreparably injured by the stay." *W. Airlines, Inc. v. Teamsters*, 480 U.S. 1301, 1305 (1987) (O'Connor, J., in chambers) (quoting *Coleman v. Paccar, Inc.*, 424 U.S. 1301, 1304 (1976) (Rehnquist, J., in chambers)) (internal quotation marks omitted); *see also Valentine v. Collier*, 140 S. Ct. 1598, 1598 (2020) (Sotomayor, J., respecting

the denial of application to vacate stay) (quoting *Western Airlines* standard and emphasizing that "where the Court is asked to undo a stay issued below, the bar is high").

Under the second *Western Airlines* factor, this Court "may not vacate a stay entered by a court of appeals unless that court clearly and 'demonstrably' erred in its application of 'accepted standards.'" *Planned Parenthood v. Abbott*, 571 U.S. 1061, 1061 (2013) (Scalia, J., concurring in denial of application to vacate stay) (quoting *W. Airlines*, 480 U.S. at 1305). Those "accepted standards" are the traditional stay factors set forth in *Nken v. Holder*, 556 U.S. 418 (2009): "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies[.]" *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2487 (2021) (quoting *Nken*, 556 U.S. at 434); *see also id.* at 2490 (Breyer, J., dissenting).

ARGUMENT

MVP's application points to no "[e]xceptional circumstances" that would justify the extraordinary emergency relief that it seeks. *Kleppe*, 429 U.S. at 1313 (quoting *Holtzman*, 414 U.S. at 1308 (Marshall, J., in chambers)). Indeed, this Court's deference to the court of appeals's decision to grant a stay is "especially warranted" when, as here, the court is "proceeding to adjudication on the merits with due expedition[.]" *Planned Parenthood*, 571 U.S. at 1061 (Scalia, J., concurring) (quoting *Doe v. Gonzales*, 546 U.S. 1301, 1308 (2005) (Ginsburg, J., in chambers)). The Fourth Circuit will hear oral argument in just two days on pending motions to dismiss that have been fully briefed and address the same issues presented to this Court in MVP's emergency

application. Because oral argument on motions deviates from standard circuit court practice,[8] the scheduled argument establishes the care with which the Fourth Circuit is approaching these issues.

Moreover, MVP has failed to carry its burden to establish the *Western Airlines* factors. At the threshold, MVP fails entirely to address whether this Court would ultimately review these cases upon the Fourth Circuit's final disposition.[9] And, as established below, MVP also fails to show either that the Fourth Circuit clearly erred in applying the *Nken* stay factors to Appalachian Voices's stay motion, or that its rights would be irreparably harmed by continuation of the stay.

I. MVP FAILS TO CARRY ITS BURDEN UNDER *WESTERN AIRLINES*.

A. The Fourth Circuit Did Not Clearly and Demonstrably Err in Granting the Stay.

1. The Fourth Circuit did not err in its assessment of the merits.

MVP relies on Section 324 of the Act to support its contention that it is likely to prevail on the merits below and that the Fourth Circuit's stay of the deficient Biological Opinion should be vacated. But the provisions of Section 324 on which it relies are unconstitutional exercises of judicial power by Congress as applied to this pending case. Accordingly, those provisions are ineffective. *See Marbury v. Madison*, 5 U.S. 137, 176–78 (1803).

As this Court has observed, "[t]he Framers of our Constitution lived among the ruins of a system of intermingled legislative and judicial powers, which had been prevalent in the colonies long before the Revolution, and which after the Revolution had produced factional strife and partisan oppression." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219 (1995). To cure the illness

[8] Fed. R. App. P. 27(e) ("A motion will be decided without oral argument unless the court orders otherwise.").

[9] MVP (at 11–12) does not apply the *Western Airlines* factors and instead relies solely on the *Nken* factors, treating itself as a stay applicant in the first instance. Because it omits the relevant standards, MVP fails to make the required showings for the extraordinary relief it seeks.

caused by legislative exercise of judicial power, "[t]he Convention made the critical decision to establish a judicial department independent of the Legislative Branch[.]" *Id.* at 221.

Courts must jealously guard the line between legislative and judicial power. To that end, this Court has long recognized that, once Congress has established lower federal courts and provided jurisdiction over a given case, Congress may not interfere with such courts by dictating the result in a particular case. *See generally United States v. Klein*, 80 U.S. 128, 146–47 (1871).

Section 324 of the Act violates that constitutional restriction on Congress's power. Simply put, Section 324 "prescribe[s] a rule of decision in a case pending before the courts, and [does] so in a manner that require[s] the courts to decide a controversy in the Government's favor." *United States v. Sioux Nation of Indians*, 448 U.S. 371, 404 (1980). This Court should not "allow[] one party to the controversy to decide it in its own favor[.]" *Klein*, 80 U.S. at 146.

a. Section 324's jurisdiction-stripping provision violates the separation-of-powers doctrine.

i. The Fourth Circuit has jurisdiction to resolve all issues presented in the pending petition for review.

MVP relies (at 14–17) on Section 324(e)(2) of the Act to argue that the Fourth Circuit lacks authority to consider the constitutionality of Section 324. Not so.

"[I]t is familiar law that a federal court always has jurisdiction to determine its own jurisdiction." *United States v. Ruiz*, 536 U.S. 622, 628 (2002); *see also Brownback v. King*, 141 S. Ct. 740, 750 (2021) (same). That power includes the authority to decide all legal questions necessary to the determination of the jurisdiction question. *See Stoll v. Gottlieb*, 305 U.S. 165, 171 (1938) ("There must be admitted, however, a power to interpret the language of the jurisdictional instrument and its application to an issue before the court."); *see also Prack v. Weissinger*, 276 F.2d 446, 450 (4th Cir. 1960) (citing *Stoll*); *Jahed v. Acri*, 468 F.3d 230, 233 (4th Cir. 2006)

(holding federal courts retain jurisdiction to determine their own jurisdiction, even in the face of a statute stating that "no court shall have jurisdiction").

To avoid that fundamental principle, MVP cites (at 14) Section 324(e)(2) of the Act, which provides the D.C. Circuit "original and exclusive jurisdiction over any claim alleging the invalidity of this section or that an action is beyond the scope of authority conferred by this section." Properly construed, the most that Section 324(e)(2) does is place *original* jurisdiction in the D.C. Circuit over *new* litigation challenging Section 324 on its face or alleging that an action is beyond the scope of authority conferred by Section 324. It has no effect on the Fourth Circuit's authority to determine the Act's effect on *pending* petitions for review.

Appalachian Voices's petition, brought under Natural Gas Act § 717r(d)(1), seeks judicial review of the February 28, 2023 Biological Opinion issued for the Mountain Valley Pipeline under the Endangered Species Act. Joint Pet. for Review, *Appalachian Voices v. U.S. Dep't of the Interior*, No. 23-1384, ECF No. 3 (4th Cir. Apr. 10, 2023). The petition does not allege a claim that Section 324 is invalid. Indeed, it is the federal agencies and MVP who put Section 324 at issue in the pending cases through their motions to dismiss. In opposing those motions, Appalachian Voices and its co-petitioners raised the *argument* that Section 324 is unconstitutional because it violates separation-of-powers principles. The Fourth Circuit has jurisdiction both to entertain and resolve that argument, *Brownback*, 141 S. Ct. at 750, notwithstanding Section 324(e)(2)'s assignment of original jurisdiction over certain *claims* to the D.C. Circuit.

That Section 324(e)(2) addresses new litigation, not pending litigation, is clear from its use of the terms "claim" and "original . . . jurisdiction." Indeed, this Court regularly recognizes the distinction between a *claim* and an *argument* or *issue*. *See, e.g.*, *New Hampshire v. Maine*, 532 U.S. 742, 748–49 (2001) (recognizing distinctions between *claim* and *issue* preclusion); *Yee v.*

Escondido, 503 U.S. 519, 534–35 (1992) (recognizing that *arguments* and *claims* are distinct). Like other statutes, Section 324(e)(2) uses the term "claim" to refer to a new cause of action. *Cf. Sanders v. Allison Engine Co.*, 703 F.3d 930, 938–39 (6th Cir. 2012); *United States v. John C. Grimberg Co.*, 702 F.2d 1362, 1367–68 (Fed. Cir. 1983); *see also Lucky Brand Dungarees, Inc. v. Marcel Fashions Grp.*, 140 S. Ct. 1589, 1595 (2020) ("Suits involve the same claim (or cause of action) when they arise from the same transaction or involve a common nucleus of operative facts." (cleaned up)); *Steiner v. 20th Century-Fox Film Corp.*, 232 F.2d 190, 193 n.3 (9th Cir. 1956) ("'[C]laim' means a cause of action.").

That conclusion is underscored by Congress's assignment of "original . . . jurisdiction" to the D.C. Circuit. "Original jurisdiction" means the "court of first instance" where a proceeding is initiated through a *claim*. *See United States v. El-Edwy*, 272 F.3d 149, 152 (2d Cir. 2001).

When Congress uses legal terms of art, it is presumed to use them consistently with their established legal usage. *Morissette v. United States*, 342 U.S. 246, 263 (1952). Congress's use of the terms "claim" and "original . . . jurisdiction" in Section 324(e)(2) makes clear that, at most, that section establishes the D.C. Circuit as the court of first instance for new litigation challenging Section 324's validity or alleging that an agency action is beyond its scope. The statute's language certainly does not indicate that Congress intended to transfer venue of one issue of this proceeding to another federal circuit court. Indeed, that would be inconsistent with Congress's investiture of the Fourth Circuit with "original and exclusive" jurisdiction over petitions for review of permits related to natural gas facilities located within that circuit. 15 U.S.C. § 717r(d)(1). The D.C. Circuit does not have jurisdiction to review the challenged Biological Opinion under either the Natural Gas Act or the Fiscal Responsibility Act.

MVP and the Solicitor General resist the plain meanings of "claim" and "original jurisdiction" and insist that Section 324(e)(2)'s language is broad enough to encompass the constitutional arguments about Section 324 raised below. But their proffered construction would entirely forbid the Fourth Circuit from applying or construing *any* law by precluding the Fourth Circuit from even considering its own jurisdiction, thereby contravening the separation-of-powers doctrine by dictating the outcome in a pending case. *See Bank Markazi v. Peterson*, 578 U.S. 212, 225 (2016) (explaining that Congress cannot "usurp a court's power to interpret and apply the law to the circumstances before it" (cleaned up)); *id.* at 230 n.20 (recognizing construction of statutory terms as exercise of judicial power).

A construction of Section 324(e)(2) requiring the Fourth Circuit to dismiss the pending petition to review the Biological Opinion without consideration of the validity of Section 324 under separation-of-powers principles "raise[s] serious questions" about its constitutionality. *Johnson v. Robison*, 415 U.S. 361, 366–67 (1974). Appalachian Voices filed its petition for review in the Fourth Circuit to challenge the validity of the Biological Opinion—not to raise a constitutional question about the yet-to-be enacted Section 324. The D.C. Circuit has never had jurisdiction over the former question. Accordingly, accepting the position of MVP and the Solicitor General that Section 324(e)(2) requires the Fourth Circuit to dismiss without engaging in any analysis would "end [Appalachian Voices's challenge to the Biological Opinion] for good," and leave it "no alternative means of review [of the Biological Opinion] anywhere else." *Patchak v. Zinke*, 138 S. Ct. 897, 921 (2018) (Roberts, C.J., dissenting). "'[I]t is a cardinal principle that this Court will first ascertain whether a construction of [a] statute is fairly possible by which [a constitutional] question may be avoided.'" *United States v. Thirty-Seven (37) Photographs*, 402 U.S. 363, 369 (1971) (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)). Consequently, the

canon of constitutional avoidance requires that MVP's proffered construction be rejected in favor of construing Section 324(e)(2) to apply only to *new* cases facially challenging the validity of Section 324 or its scope.

ii. Section 324's jurisdiction-stripping provision unconstitutionally exercises the judicial power because it does not preserve an adjudicative role for the court.

Congress may not direct courts in pending cases to reach a particular outcome based on existing law. *Bank Markazi*, 578 U.S. at 231; *Klein*, 80 U.S. at 146. Although Congress can amend statutes and make the changes applicable to pending cases, *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429 (1992), such amendments must not "usurp a court's power to interpret and apply the law to the circumstances before it[.]" *Bank Markazi*, 578 U.S. at 225 (cleaned up); *see also Patchak*, 138 S. Ct. at 920 (Roberts, C.J., dissenting) ("[T]he concept of 'changing the law' must imply some measure of generality or preservation of an adjudicative role for the courts."). Here, Section 324(e)(1)'s jurisdiction-stripping provision is not a valid change in the law because it does not preserve any role for the courts.

Even assuming Sections 324(c) and (f) were changes to the substantive law in this case (they are not, *see* Section I.A.1.b, *infra*), for such changes to be constitutional, *courts* must retain the power to implement them. Sections 324(c) and (f) present questions ordinarily decided by courts, including, *inter alia*, whether Section 324 impermissibly directs an outcome under existing law. However, Section 324(e)(1) purports to strip federal courts of the power to address those questions. Stated otherwise, if Section 324 were effective to strip federal court jurisdiction, then federal courts would lack the power to address unresolved legal questions arising from Sections 324(c) or (f)—including the meaning and effect of those provisions—because Congress decided those issues on its own when it directed that "no court shall have jurisdiction to review" the Biological Opinion.

The effect of MVP's construction of Section 324(e)(1) is to compel a specific judicial result (dismissal) *without any opportunity* for legal or factual analysis of how any purportedly "new" law bears on the merits. Section 324(e)(1) would thus prevent federal courts from asking the critical separation-of-powers question that *Klein* and its progeny require, i.e., whether Sections 324(c) and (f) actually change the substantive law. Such a result violates separation-of-powers principles and is unconstitutional under *Bank Markazi* and *Klein*.

iii. Section 324 targeted this litigation and lacks sufficient generality.

Section 324 targeted this litigation. Congress is presumed to be fully aware of this lawsuit and its preceding cases, *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 85 (2006), and thus knew that in 2019 the Fourth Circuit stayed MVP's first Biological Opinion, Order, *Wild Va. v. U.S. Dep't of the Interior*, No. 19-1866, ECF No. 41 (4th Cir. Oct. 11, 2019), and that in 2022 the Fourth Circuit vacated the second, *Appalachian Voices*, 25 F.4th at 283. In the 2022 case, the Fourth Circuit held that the U.S. Fish and Wildlife Service "failed to adequately evaluate the 'environmental baseline' and 'cumulative effects' for two listed species[,]" "neglected to fully consider the impacts of climate change[,]" and "failed to incorporate its environmental-baseline and cumulative-effects findings into its jeopardy determinations[.]" *Id.* at 271, 278.

On February 28, 2023, the Fish and Wildlife Service issued a revised Biological Opinion for MVP's proposed project. Joint Pet. for Review, Ex. A, *Appalachian Voices v. U.S. Dep't of the Interior*, No. 23-1384, ECF No. 3 (4th Cir. Apr. 10, 2023). Appalachian Voices and its co-petitioners filed a petition for review of that action on April 10, 2023, in the Fourth Circuit, pursuant to 15 U.S.C. § 717r(d). Joint Pet. for Review, *Appalachian Voices v. U.S. Dep't of the Interior*, No. 23-1384, ECF No. 3 (4th Cir. Apr. 10, 2023). On April 27, 2023, those groups filed the stay motion that led to the challenged order at issue here, and established that the Fish and Wildlife Service repeated some of the same legal errors that led to vacatur of the previous

Biological Opinion. *See generally* Pet'rs' Mot. for Stay of Resp't U.S. Fish & Wildlife Serv.'s Biological Op. & Incidental Take Statement, *Appalachian Voices v. U.S. Dep't of the Interior*, No. 23-1384, ECF No. 17 (4th Cir. Apr. 27, 2023).[10] That stay motion became ripe for determination on May 16, 2023—well before the inclusion of Mountain Valley Pipeline–specific provisions in the Fiscal Responsibility Act was disclosed. Pet'rs' Reply in Support of Mot. for Stay of Resp't U.S. Fish & Wildlife Serv.'s Biological Op. & Incidental Take Statement, *Appalachian Voices v. U.S. Dep't of the Interior*, No. 23-1384, ECF No. 26 (4th Cir. May 16, 2023). Accordingly, when Congress took up the Fiscal Responsibility Act at the end of May 2023—and revealed its Mountain Valley Pipeline–specific provisions—it was against the backdrop of a ripe stay motion before the Fourth Circuit.

In an effort to avoid losing yet another legal challenge to a deficient Biological Opinion, "Congress . . . attempt[ed] to decide the controversy at issue in the Government's own favor," *Sioux Nation*, 448 U.S. at 405—the type of effort held unconstitutional in *Klein*, 80 U.S. at 147. *See also Sioux Nation*, 448 U.S. at 404 (construing *Klein* to have held statute at issue unconstitutional because it prescribed a rule of decision in a pending case "that required the courts to decide a controversy in the Government's favor").

Once Congress has established lower federal courts and provided jurisdiction over a given case, Congress may not interfere with such courts by dictating the result in a particular case. At the time of Section 324's enactment, four pending cases sought judicial review of Mountain Valley Pipeline approvals: the instant case, two challenging authorizations to cross the Jefferson National

[10] MVP does not contend that the Fourth Circuit erred in concluding that Appalachian Voices is likely to succeed on the merits of its claims that the Fish and Wildlife Service failed to comply with the Endangered Species Act in its most recent Biological Opinion.

Forest,[11] and one challenging a 2022 FERC order extending the expiration date of MVP's FERC Certificate.[12] Section 324 is thus targeted at specific, pending litigation. It is not a law of general application—it applies to a single project, impacting a known, small universe of litigants, including the Government itself. By attempting to strip federal courts of jurisdiction in pending Mountain Valley Pipeline cases, Congress has attempted to direct the outcome in those cases and usurp judicial power. Without preserving an adjudicative role for the courts in these pending cases, Congress has pronounced the equivalent of "the Government and MVP win." That is not a legitimate use of legislative power—rather, it is an unconstitutional effort by Congress to exercise judicial power. *Bank Markazi*, 578 U.S. at 231; *Sioux Nation*, 448 U.S. at 404; *Klein*, 80 U.S. at 146–47.

Nonetheless, MVP insists that Section 324 is sufficiently general in its application because it applies to more than one case. But the Constitution does not permit Congress to direct the outcome in pending litigation so long as it does so in more than one case at a time. Indeed, the statute this Court struck down in *Klein* applied to pardoned confederates beyond V.F. Wilson.

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[11] *The Wilderness Soc'y v. U.S. Forest Serv.*, No. 23-1592 (4th Cir. filed June 1, 2023); *The Wilderness Soc'y v. Bureau of Land Mgmt.*, No. 23-1594 (4th Cir. filed June 1, 2023).

[12] *Appalachian Voices v. FERC*, No. 22-1330 (D.C. Cir. filed Dec. 23, 2022). The petitioners in that case are seeking voluntary dismissal.

The Solicitor General (at 24 n.5) and MVP (at 22) try to make the class appear larger by pointing to Mountain Valley Pipeline litigation that should be unaffected by Section 324. First, they cite a pair of consolidated petitions for review in which judgment was entered on May 26, 2023 (before Section 324's enactment). Judgment, *Sierra Club v. FERC*, No. 20-1512, ECF No. 2000936 (D.C. Cir. May 26, 2023); *see also Sierra Club v. FERC*, 68 F.4th 630, 636 (D.C. Cir. 2023) (concluding that FERC failed to adequately address whether supplemental environmental review was necessary in light of the project's severe sedimentation impacts). Second, they cite *Bohon v. FERC*, which this Court remanded to the D.C. Circuit for further consideration on April 24, 2023, *Bohon v. FERC*, 143 S. Ct. 1779 (Apr. 24, 2023), and which presents a constitutional claim independent from the statutory review scheme for MVP's federal approvals. Finally, they cite *Bold Alliance v. FERC*, No. 1:17-cv-1822, 2018 WL 4681004 (D.D.C. Sept. 28, 2018), *appeal docketed*, No. 18-5322 (D.C. Cir. Oct. 31, 2018), which is a programmatic challenge to statutory and constitutional infirmities in FERC's Natural Gas Act certificate program.

Klein, 80 U.S. at 133–34 (quoting 16 Stat. at Large 235). As a result, it is of no import that Section 324 attempts to direct the result in more than one pending case because it targets a small universe of cases challenging the same pipeline and directs that the Government wins.

iv. The plurality opinion in *Patchak* is not controlling.

Although Congress defines the jurisdiction of inferior federal courts, and may prospectively strip them of jurisdiction over classes of cases, *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986), there are limits on that authority when it comes to *pending* cases. Attempts by Congress to target particular litigation and strip jurisdiction over pending cases violate the separation-of-powers doctrine. In *Klein*, for instance, the Supreme Court held that Congress invaded the judicial power with a statute providing that the Court "shall have no further jurisdiction of the cause, and shall dismiss the same for want of jurisdiction." 80 U.S. at 143. As *Klein* makes clear, an intrusion on the judicial power disguised as an exercise of authority over federal court jurisdiction constitutes a separation-of-powers violation.

To defend Section 324(e)(1)'s jurisdiction-stripping provision, MVP (at 12–13, 18, 20–21, 23) and the Solicitor General (at 19, 23) cite a four-Justice plurality opinion in this Court's highly fractured decision in *Patchak v. Zinke*, 138 S. Ct. 897 (2018). However, *Patchak* was a 4-2-3 decision that, under *Marks v. United States*, 430 U.S. 188, 193 (1977), does not offer a binding holding.

Although six Justices concurred in the *result* in *Patchak*, there was not a majority to uphold the Gun Lake Act's provisions stripping the courts of jurisdiction over a pending case as a valid exercise of the legislative power. Only four Justices agreed with that reasoning, while two more

concurred in the result but only because, in their view, the statute reinstated sovereign immunity (which is not the case with the Fiscal Responsibility Act).[13]

Specifically, Justice Thomas (joined by Justices Breyer, Alito, and Kagan) reasoned that the Gun Lake Act, which stripped jurisdiction over cases related to a certain tract of land held in trust for a tribe, was constitutional because it did "nothing more than strip jurisdiction over a particular class of cases[.]" *Patchak*, 138 S. Ct. at 909 (plurality opinion) (cleaned up).

Justices Ginsburg and Sotomayor concurred in the judgment, but did so on a different ground, reasoning that the language of the Gun Lake Act mirrored the language of the Administrative Procedure Act's ("APA") sovereign immunity waiver by using the phrase "shall be promptly dismissed," thereby displacing the APA's waiver of immunity. *Id*. at 913 (Ginsburg, J., concurring). Justice Ginsburg reasoned that the Court need go no further than the sovereign immunity question to resolve the case. *Id.* at 912. Justice Sotomayor also wrote a separate concurrence, in which she stated that an Act that strips courts of jurisdiction over a pending proceeding is not enough to be considered a change in the law and that she joined the result *only* on sovereign immunity grounds. *Id*. at 913–14 (Sotomayor, J., concurring).

Chief Justice Roberts, joined by Justices Kennedy and Gorsuch, wrote a dissent explaining why the Gun Lake Act unconstitutionally violated separation-of-powers principles: "Congress cannot, under the guise of altering federal jurisdiction, dictate the result of a pending proceeding." *Id*. at 919 (Roberts, C.J., dissenting). "[T]he concept of 'changing the law' must imply some measure of generality or preservation of an adjudicative role for the courts. The weight of our

[13] Contrary to the assertions of the Solicitor General (at 23 n.4) and Amicus U.S. House of Representatives (at 6 n.4), Section 324 is distinguishable from the Gun Lake Act because it does not include language that could be construed to reinstate the government's sovereign immunity. To reinstate sovereign immunity after waiver, Congress must demonstrate "an unambiguous intention to withdraw" that waiver, which it did not do here. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1019 (1984).

jurisdiction stripping precedent bears this out. . . . The Court, to date, has never sustained a law that withdraws jurisdiction over a particular lawsuit." *Id*. at 920 (citations omitted).

When no five Justices agree on a single rationale, the holding of the Court may be viewed as the position taken by those Justices who concurred in the judgment on the narrowest grounds. *Marks*, 430 U.S. at 193–94. Because Justices Ginsburg and Sotomayor did not implicitly or otherwise approve the reasoning of Justice Thomas's plurality cited by MVP (Justice Ginsburg would not have reached the jurisdiction-stripping question, and Justice Sotomayor expressly joined the dissent's reasoning on that issue), there is no rationale common to five Justices and no holding to apply. Thus, *Patchak* does not control this case.

Appalachian Voices submits that Section 324(e)(1) should be ruled unconstitutional under the persuasive reasoning embraced by Chief Justice Roberts, Justice Kennedy, Justice Gorsuch, and Justice Sotomayor (who agreed with the dissent with the lone exception of the sovereign immunity issue) in *Patchak*. As that opinion explains:

> Congress exercises the judicial power when it manipulates jurisdictional rules to decide the outcome of a particular pending case. Because the Legislature has no authority to direct entry of judgment for a party, it cannot achieve the same result by stripping jurisdiction over a particular proceeding. Does the plurality really believe that there is a material difference between a law stating "The court lacks jurisdiction over Jones's pending suit against Smith" and one stating "In the case of *Smith v. Jones,* Smith wins"? In both instances, Congress has resolved the specific case in Smith's favor.

Patchak, 138 S. Ct. at 919–20 (Roberts, C.J., dissenting).

Chief Justice Roberts further explained why federal courts must guard against such congressional overreach, using reasoning equally applicable here:

> The Framers saw this case coming. They knew that if Congress exercised the judicial power, it would be impossible "to guard the Constitution and the rights of individuals from . . . serious oppressions." The Federalist No. 78, at 469 (A. Hamilton). Patchak thought his rights were violated, and went to court. He expected

> to have his case decided by judges whose independence from political pressure was ensured by the safeguards of Article III—life tenure and salary protection. It was instead decided by Congress, in favor of the litigant it preferred, under a law adopted just for the occasion. But it is our responsibility under the Constitution to decide cases and controversies according to law. It is our responsibility to, as the judicial oath provides, "administer justice without respect to persons." 28 U.S.C. § 453. And it is our responsibility to "firm[ly]" and "inflexibl[y]" resist any effort by the Legislature to seize the judicial power for itself. The Federalist No. 78, at 470.

Id. at 922 (alteration original). Through Section 324(e)(1), Congress attempts to "seize the judicial power for itself" in this case. *Id.* That effort "to manipulate[] jurisdictional rules" must fail. *Id*. at 920.

b. Section 324 does not moot this petition because MVP's proffered constructions of its ratification, supersession, and maintenance provisions are unconstitutional.

MVP argues (at 12, 14) that the petition for review of the Biological Opinion is moot because Section 324(c)(1) purports to "ratif[y] and approve[]" the Biological Opinion, making it impossible (in MVP's view) for Appalachian Voices to obtain effective relief. That argument fails because Section 324(c) attempts to unconstitutionally compel a result in this pending action in violation of the separation-of-powers doctrine and is thus void.

Through Section 324(c), Congress did not prescribe amendments to the Endangered Species Act or APA. Indeed, Congress created no new substantive law for courts to apply. Rather it purported to "ratif[y] and approve[]" the February 28, 2023 Biological Opinion. But the question whether to approve the Biological Opinion is a judicial one, presented to the Fourth Circuit through the pending petition for review. By attempting to declare a victor under old law, Congress impermissibly usurped the judicial power, effectively directing that, in this pending case, the Government (and MVP) win. This improper exercise of judicial power is unconstitutional and cannot render this case moot. *Sioux Nation*, 448 U.S. at 404; *Klein*, 80 U.S. at 146–47.

Congress's attempt to direct a specific result in a pending case, without any room for judicial construction, is not a valid change in law for separation-of-powers purposes. *Cf. Bank Markazi*, 578 U.S. at 230 n.20, 231 (upholding provision that "changed the law by establishing new substantive standards" and left the court "plenty . . . to adjudicate");[14] *id*. at 231 (explaining that, in *Robertson*, the Court "upheld the legislation because it left for judicial determination whether any particular actions violated the new prescription"); *Sioux Nation*, 448 U.S. at 406–07 (upholding amendment where "Congress in no way attempted to prescribe the outcome of the [court's] new review of the merits").

Contrary to MVP's *ipse dixit* assertion (at 18), Section 324(c)(1) provides no new substantive standards for courts to apply. Rather, it simply declares the Biological Opinion "ratifi[ed] and approve[d]." In that way, Section 324 is distinguishable from the statute at issue in *Robertson*, which provided alternative standards (i.e., new law) to govern national forest management in lieu of the statutes at issue in two specifically referenced pending cases.[15] 503 U.S. at 437–38. In contrast, Section 324(c) provides nothing for the court to apply. Rather, it declares the Biological Opinion to be lawfully issued, as if Congress were issuing a declaratory judgment in the pending case. That it cannot do.

Section 324(c)(1)'s "ratification" language cannot save it. Although "Congress may, *by enactment not otherwise inappropriate*, ratify acts which it might have authorized," *Swayne &*

[14] In *Bank Markazi*, the Court also "stress[ed]" that the statute was "an exercise of congressional authority regarding foreign affairs, a domain in which the controlling role of the political branches is both necessary and proper," and that it was "designed to aid in the enforcement of federal-court judgments" by judgment creditors who had already "prevailed on the merits of their respective cases." 578 U.S. at 231 n. 21, 234, 236. Such reasoning is inapplicable here.

[15] Importantly, in *Robertson*, the new statute "referenced particular cases only as a shorthand for describing certain environmental law requirements, not to limit the statute's effect to those cases alone." *Bank Markazi*, 578 U.S. at 248 (Roberts, C.J., dissenting) (citation omitted).

Hoyt, Ltd. v. United States, 300 U.S. 297, 301–02 (1937) (emphasis added; cleaned up), that proposition does not authorize congressional attempts to invade the judicial function by dictating results in pending litigation. It is certainly inappropriate for Congress to exercise the judicial power and direct the outcome in a pending case under the guise of ratification. That is particularly so where (like here) a motion for stay pending review was ripe for determination. Stated otherwise, the scope of Congress's ratification power does not encompass the authority to command a result in a pending case without supplying a new legal standard for the courts to apply.

MVP insists that the new legal standard is whether the action is "necessary for the construction and initial operation at full capacity of the Mountain Valley Pipeline." Appl. 19 (quoting Section 324(c)). And the Solicitor General (at 19) argues a court must determine also whether the action was taken by an agency listed in Section 324(e)(1). Under those views, if the answer to the questions is "yes," then the Government and MVP must prevail. But that is no standard at all. As several federal court scholars, including Dean Erwin Chemerinsky, explained in an amicus brief in the related Jefferson National Forest cases:

> [O]ne could argue that Section 324(c)(1) permits [a] Court to ask whether the challenge is against a federal approval of the project. But how is that any more than a fig leaf? Even th[is] Court's example of a law declaring "Smith wins," which would infringe Article III, could be read to leave room for a court to determine whether the case before it deals with Smith and which party Smith is. But this exercise would constitute nothing more than empty formalism indeed, obliterating the line between lawmaking and adjudicating.

Br. of Federal Courts Scholars as *Amici Curiae* in Supp. of Pet'rs' Opp'n to Federal Resp'ts' Mot. to Dismiss & Intervenor's Mot. to Dismiss or, in the Alternative, for Summ. Denial at 10–11, *The Wilderness Soc'y v. U.S. Forest Serv.*, No. 23-1592, ECF No. 28 (4th Cir. July 5, 2023).

Furthermore, Section 324(c)(1)'s impermissible invasion of the judicial power cannot be made constitutional by Congress's prefatory phrase "[n]otwithstanding any other provision of

law." Although such language may sometimes override conflicting provisions, *see, e.g.*, *Cisneros v. Alpine Ridge Grp.*, 508 U.S. 10, 18 (1993), it cannot transform an unconstitutional exercise of judicial power into a permissible one. In pending cases where Congress has not created new substantive legal standards for judicial application, Congress cannot simply add a magic phrase and thereby authorize itself to violate the separation-of-powers doctrine.[16] A provision stating "In the pending case of *Smith v. Jones*, Smith wins, notwithstanding any other provision of law" is still unconstitutional.

Moreover, Section 324(f)'s effort to "supersede[]" "inconsistent" provisions of law likewise does not provide new law for the court to apply, as required under *Bank Markazi*. 578 U.S. at 231. Although Congress "may amend the law and make the change applicable to pending cases, even when the amendment is outcome determinative," *id.* at 215, the amendment must "supply [a] new legal standard," *id.* at 231. It cannot "compel findings or results under old law." *Id.* at 231 (quoting *Robertson*, 503 U.S. at 438) (cleaned up). Unlike the statutes at issue in *Bank Markazi* and *Robertson*, Section 324(f) provides no replacement legal standards that could constitute new law for the court to apply. Indeed, Congress did not even bother to identify the laws that it purports to supersede. Rather, Section 324(f) is just another impermissible direction by Congress that the Government should prevail under old law.

Finally, Section 324(c)(2)'s direction to the Secretary of the Interior to "maintain" the Biological Opinion does not render this case moot as MVP suggests (at 14). Properly construed, the most Section 324(c)(2) does is prohibit the Fish and Wildlife Service from unilaterally

[16] The statute at issue in *Bank Markazi* included the phrase "notwithstanding any other provision of law," 578 U.S. at 218 n.4, but that phrase did not play a role in the Court's reasoning upholding the statute because the statute provided new substantive standards for judicial application, *id.* at 231.

suspending or revoking the Biological Opinion. It cannot be read to prohibit the Fish and Wildlife Service from following a judicial order vacating and/or remanding the Biological Opinion without violating the canon of constitutional avoidance discussed above. A direction from the legislative branch to the executive branch to give no effect to a lawful order from the judicial branch would certainly be unconstitutional.[17] *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948).

2. The Fourth Circuit did not err in applying the other stay factors.

a. The stay was, and still is, necessary to avoid irreparable harm to Appalachian Voices and appropriately balance the equities.

MVP entirely ignores the evidence submitted to the Fourth Circuit establishing irreparable injury to the petitioning parties and their members without the stay. Indeed, "establishing irreparable injury should not be an onerous task" for citizens seeking to enforce the Endangered Species Act "in light of [that statute's] purposes." *Cottonwood Env't L. Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1091 (9th Cir. 2015). If the stay is vacated, MVP will undoubtedly engage in construction activities that will cause irreparable harm. For example, new grading, trenching, stream crossings, and other construction activities will increase sediment loads in streams, irreparably harming endangered species through direct mortality and habitat degradation. Joint Pet. for Review, Ex. A at 179, 283, *Appalachian Voices v. U.S. Dep't of the Interior*, No. 23-1384, ECF No. 3 (4th Cir. Apr. 10, 2023). And, based on MVP's track record, predictions of excess sedimentation are not merely speculative. MVP has been assessed millions of dollars in fines by state regulatory authorities because of its poor compliance with sedimentation prohibitions. *FERC*,

[17] Representative Carol Miller from West Virginia's 1st Congressional District has, in fact, "urge[d] all parties involved with the construction of [the Mountain Valley Pipeline] to ignore the 4th circuit and continue as scheduled." Rep. Carol Miller (@RepCarolMiller), TWITTER (July 11, 2023, 11:22 AM), https://twitter.com/RepCarolMiller/status/1678786838062854144.

68 F.4th at 638–39; *W. Va. Dep't of Env't Prot.*, 64 F.4th at 502. And in at least three cases, federal circuit courts have recognized that MVP's environmental compliance record calls into question its promises that the project could be completed without harming streams in its path, including streams that provide habitat for endangered species.[18]

Harm to streams and species will, in turn, irreparably harm the interests of the petitioning parties and their members. Those members enjoy observing, searching for, and studying the endangered species harmed by construction and are injured by impacts that occur because of the Fish and Wildlife Service's unlawful Biological Opinion. Thus, the Fourth Circuit determined, when issuing the stay, that construction activities such as grading, trenching, and other activities that increase sediment loads in streams *will cause irreparable harm* to the challengers of the Biological Opinion, their members, and endangered species.[19]

Although MVP would apparently have the Court ignore this factor entirely, the irreparable harm to the interests of Appalachian Voices in protecting endangered species if construction is allowed to continue counsels strongly against vacating the stay while the Fourth Circuit decides the motions to dismiss. MVP's silence on this important factor speaks volumes.[20] *See Amoco Prod. Co. v. Gambell*, 480 U.S. 531, 545 (1987) ("Environmental injury, by its nature, can seldom be

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[18] *See FERC*, 68 F.4th at 651; *W. Va. Dep't of Env't Prot.*, 64 F.4th at 501–05; *U.S. Forest Serv.*, 24 F.4th at 927–28.

[19] MVP does not argue that the Fourth Circuit erred in finding irreparable harm. That finding was based on declarations in the record. Pet'rs' Mot. for Stay of Resp't U.S. Fish & Wildlife Serv.'s Biological Op. & Incidental Take Statement at Exs. T, U, V, W, X, Y, Z, CC, *Appalachian Voices v. U.S. Dep't of the Interior*, No. 23-1384, ECF Nos. 17-22, 17-23, 17-24, 17-25, 17-26, 17-27, 17-28, 17-31 (4th Cir. Apr. 27, 2023).

[20] MVP's argument (at 26–27) that lifting the stay is necessary to protect the environment is disingenuous and incriminating. It calls into question MVP's strategy of employing best management practices to control sediment during lulls in construction instead of fully restoring its worksites. MVP cannot tip the scales in the public interest analysis by holding environmental integrity hostage.

adequately remedied by money damages and is often permanent or at least of long duration, *i.e.,* irreparable."). Moreover, the Fourth Circuit also correctly determined that the balance of equities favored the stay, given that the risk of irreparable harm to the environment vastly overweighed any financial loss MVP might suffer as a result of the stay. As established below in Section I.B, MVP has entirely failed to establish that it will suffer irreparable harm without vacatur of the Fourth Circuit's stay.

b. The stay was, and still is, in the public interest.

As this Court has held, Congress has made clear that the public interest in avoiding the extinction of species is "incalculable." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 187 (1978). And where "[e]nvironmental injury" is "sufficiently likely," the "balance of harms will usually favor . . . the environment." *Amoco Prod. Co.*, 480 U.S. at 545. Thus, in *Hill*, the Court disagreed that "the loss of millions of unrecoverable dollars" of public funds, 437 U.S. at 187, or the "permanent halting of a virtually completed dam," *id*. at 172, outweighed the need to avoid the jeopardy of an endangered fish species. "The plain intent of Congress in enacting [the Endangered Species Act] was to halt and reverse the trend toward species extinction, whatever the cost." *Id*. at 184.

And the language of Section 324, which states that construction of the Mountain Valley Pipeline is "in the national interest," does not alter the balance here. Although Congress may believe that this project, which has repeatedly failed to comply with bedrock environmental laws, would nonetheless provide public benefits, that language pales in comparison to the congressional intent to "establish[] an *unparalleled* public interest in the '*incalculable'* value of preserving endangered species." *Cottonwood Env't L. Ctr.*, 789 F.3d at 1090 (quoting *Hill*, 437 U.S. at 187–88) (emphasis added); *cf. Amoco Prod. Co.*, 480 U.S. at 543 n.9 (explaining that the Endangered

Species Act "foreclose[s] the traditional discretion possessed by an equity court," citing *Hill*, 437 U.S. at 173).

Nor does Section 324(f)'s supersession clause change that result. The Court's decision in *Hill* was premised on the Endangered Species Act's restricting equitable discretion. That case declared that Congress's clear purpose in creating the Endangered Species Act rendered it impermissible to weigh the congressionally declared public interest in preventing the extinction of endangered species against the public interest in completing a congressionally authorized dam. *Hill*, 437 U.S. at 187–88. The national interest Congress identified in completing the Mountain Valley Pipeline focused on its purported economic value. Act § 324(b) (predicting completion of the pipeline would result in "reasonable prices" for natural gas). But, as this Court observed in *Hill*, Congress appraised the value of endangered species as "incalculable." *Hill*, 437 U.S. at 187. And "it would be difficult for a court to balance a loss of a sum certain . . . against a congressionally declared 'incalculable' value, even assuming we had the power to engage in such a weighing process, which we emphatically do not." *Id.* at 187–88.

Thus, although Section 324(b) of the Act states that the Mountain Valley Pipeline is "in the national interest," it does not expressly alter "the order of priorities," *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 497 (2001), by stating that it is the *foremost* national interest such that Section 324's language undermines the underlying basis for the Court's interpretation of the Endangered Species Act to establish the "*highest* of priorities," *Hill*, 437 U.S. at 194 (emphasis added). And since "repeals by implication are not favored," *Morton v. Mancari*, 417 U.S. 535, 549 (1974) (internal quotation marks omitted), and this Court does "not lightly assume" Congress has altered "the equitable powers of the federal courts," *Miller v. French*, 530 U.S. 327, 336 (2000), Section 324 should not be interpreted to alter

that well-established balance in favor of protecting species at risk of extinction, no matter the cost. That is particularly true because the Fiscal Responsibility Act is analogous to an appropriations act, and the doctrine disfavoring repeals by implication "applies with even *greater* force" in such situations. *Hill*, 437 U.S. at 190 (emphasis original). Accordingly, Section 324(b)'s statement of national interest and any disruptions MVP complains of cannot support vacating the Fourth Circuit's stay in light of the serious Endangered Species Act violations at issue.

Appalachian Voices's stay motion in the Fourth Circuit showed that the Fish and Wildlife Service failed to ensure against jeopardy to listed species, as the Endangered Species Act requires. For example, the agency did not properly consider the highly imperiled status of the candy darter, an endangered fish, when it issued the Biological Opinion. Pet'rs' Mot. for Stay of Resp't U.S. Fish & Wildlife Serv.'s Biological Op. & Incidental Take Statement at 4–7, *Appalachian Voices v. U.S. Dep't of the Interior*, No. 23-1384, ECF No. 17 (4th Cir. Apr. 27, 2023). That failure ignored the Fourth Circuit's prior admonition that "if a species is already speeding toward the extinction cliff, an agency may not press on the gas." *Appalachian Voices*, 25 F.4th at 279. Thus, the Fish and Wildlife Service's violation allows for "take" that is likely to jeopardize the continued existence of a "not-long-for-this-world" species, *id.*—the very harm that the Endangered Species Act forbids. Since the effects of construction activities could be disastrous, the consequent harm to the clear public interest in protecting imperiled species militates against vacating the stay.

MVP avoids entirely any discussion of the true equities at issue here: whether the economic interests of a corporation can outweigh the potential for irrevocable harm to highly imperiled species, which may be driven to extinction by the continued construction of the pipeline. Rather, MVP relies on red herrings, attempting to focus the Court's attention on inapposite arguments regarding timing and forum shopping, which should have no bearing on the balance of the equities.

Regarding MVP's questions about timing (at 27–29), the petition for review of the Biological Opinion was filed on April 10, 2023, and the stay motion that the Fourth Circuit granted was ripe for determination by May 16, 2023. Pet'rs' Reply in Supp. of Mot. for Stay of Resp't U.S. Fish & Wildlife Serv.'s Biological Op. & Incidental Take Statement, *Appalachian Voices v. U.S. Dep't of the Interior*, No. 23-1384, ECF No. 26 (4th Cir. May 16, 2023). That was well before the Mountain Valley Pipeline–specific provisions of the Fiscal Responsibility Act were publicly announced, let alone enacted. Indeed, after the Fiscal Responsibility Act's provisions were announced (but prior to enactment), MVP invited the Fourth Circuit to take additional time to consider the stay motion, by informing the court that it had delayed its intended construction start date from May 31, 2023, to June 15, 2023. Notice Regarding MVP's Construction Plans, *Appalachian Voices v. U.S. Dep't of the Interior*, No. 23-1384, ECF No. 33 (4th Cir. May 30, 2023). Consequently, the motion to stay the Biological Opinion was not untimely, and it was MVP that encouraged the Fourth Circuit to take additional time before issuing it.

MVP's accusations (at 29–30) of forum shopping are also unavailing. The Natural Gas Act vests original and exclusive jurisdiction for judicial review of most authorizations for interstate natural gas pipelines in "[t]he United States Court of Appeals for the circuit in which a facility . . . is proposed to be constructed"—which, for this project, is the Fourth Circuit. 15 U.S.C. § 717r(d)(1). Accordingly, the petitioners filed their petition for review of the Biological Opinion, and their stay motion, in the only permissible venue: the Fourth Circuit. The Government and MVP filed motions to dismiss in that case, and the petitioners properly filed their opposition to those motions in the same docket. Therefore, the pending motion to voluntarily dismiss a different D.C. Circuit case challenging a FERC order is entirely irrelevant, particularly since the D.C. Circuit has no jurisdiction over the underlying Endangered Species Act claims that undergird the

Fourth Circuit's stay. Thus, MVP's equitable arguments provide no basis for this Court's emergency intervention.

Finally, MVP's arguments (at 26) regarding harm to customers and businesses from potential natural gas supply challenges or price fluctuations (and Amici's similar contentions) also fail to establish that vacatur of the challenged stay is in the public interest. Such harms are entirely speculative. MVP (at 26) cherry-picks two data points to suggest that the question of whether its pipeline will be in service this winter is affecting natural gas futures. But correlation is not causation, and the mere fact that MVP is able to identify two modest price fluctuations that roughly correspond to dates in the timeline of this litigation is too slim a reed to support MVP's claim to be the dominant factor in gas commodity pricing. Demand for natural gas fluctuates based on many factors, including the weather—perhaps the most speculative of phenomena. And MVP's focus (at 26) on prior winter storms ignores the inexact nature of meteorological forecasting and fails to account for a principle common to both market pricing and the weather: past performance is not predictive of future performance. *See SAS Inst., Inc. v. World Programming Ltd.*, 874 F.3d 370, 386 (4th Cir. 2017) ("[T]he existence of past harm is far from dispositive on the question of irreparable future harm." (citing *Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983))). Accordingly, MVP's conjecture about natural gas pricing and demand are far too speculative to establish that any public interest in completing the project this year outweighs the public interest in preventing the extinction of the candy darter.

B. Leaving the Stay in Place Will Not Result in Irreparable Harm.

MVP has not carried its heavy burden under *Western Airlines* to establish that it will endure irreparable harm if the stay remains in place while the Fourth Circuit considers the important

constitutional issues raised by Congress's intrusion into this litigation.[21] Nor do its claims of injury undermine the Fourth Circuit's balancing of the equities, as addressed above in Section I.A.2.a.

MVP focuses on vague and speculative assertions of impacts from its purported inability to complete the pipeline by the end of the year if the stay is not lifted by July 26, 2023. But "[t]he key word in this consideration is irreparable," *Sampson v. Murray*, 415 U.S. 61, 90 (1974), and the company never makes clear why or how it would be *irreparably* harmed if pipeline service were merely delayed into 2024. Therefore, MVP has not satisfied a key element required to warrant the extraordinary intervention it seeks from this Court.

It is readily apparent from MVP's application that its claims of irreparable harm are entirely speculative and thus cannot support vacatur of the stay. *See Lyons*, 461 U.S. at 111 (holding that "speculative" claims of future injury "requires a finding that [the irreparable harm] prerequisite of equitable relief has not been fulfilled"). MVP contends (at 25) that delay past July 26, 2023, might prevent completion of its project until 2024. Even assuming that were substantiated (it is not), MVP fails to explain why the consequences of that delay would cause it irreparable harm. Delay is not *per se* irreparable harm. *See Sampson*, 415 U.S at 90.

In any event, the Court should not blindly accept the unsupported projections of MVP's declarant—Robert Cooper—that construction must commence by July 26, 2023. *See* Appl. 25 (citing App'x 58). Mr. Cooper has previously clarified that when he predicts a date by which

[21] MVP's opening salvo (at 24) regarding irreparable harm from barring a "sovereign from employing a duly enacted statute," is entirely misplaced. Not only is the Fourth Circuit poised to act expeditiously on these questions, but the cases that MVP cites pertain to entirely inapposite contexts. *See, e.g.*, *Maryland v. King*, 567 U.S. 1301, 1301–05 (2012) (Roberts, C.J., in chambers) (issuing stay to allow state to continue using DNA samples taken from arrestees to investigate unsolved crimes); *INS v. Legalization Assistance Project of the L.A. Cnty. Fed'n of Labor*, 510 U.S. 1301, 1301–06 (1993) (O'Connor, J., in chambers) (issuing stay to allow implementation of immigration statute).

construction must begin to avoid purportedly irreparable harm to MVP, his prediction is based on the company's *current* plan, and that implementing a *different* plan may allow MVP to accomplish construction tasks more rapidly. For example, when MVP haled hundreds of landowners into federal court to condemn easements for the pipeline rights-of-way and sought injunctive relief for immediate possession of those easements, Mr. Cooper declared under oath that if MVP were "unable to begin the tree clearing and construction activities of the MVP Project on the Landowners' properties by February 1, 2018, it will be unable to complete the work according to its construction schedule[.]" AV App'x 4. A hearing was not held on MVP's preliminary injunction motion until *after* February 1, 2018—a fact not lost on the district judge. *Mountain Valley Pipeline, LLC v. An Easement to Construct, Operate and Maintain a 42-Inch Gas Transmission Line*, No. 2:17-cv-04214, 2018 WL 1004745, at *9 (S.D. W. Va. Feb. 21, 2018). At that hearing, Mr. Cooper explained that the passage of February 1 did not negate MVP's need for relief. Rather, it only resulted in the accrual of extra costs. *Id.* Mr. Cooper explained that the company could "initiate things beyond the normal schedule," albeit "more expensive[ly]," such as by adding additional construction workers, to "change the way we do things to get the project done." AV App'x 12, 16. Accordingly, although MVP's *current* plan might *contemplate* construction resuming by July 26, 2023, Mr. Cooper's previous concessions show that this is a moving target and MVP's plans can be altered, such as by adding construction crews. Moreover, MVP's assertion (at 25) that remobilizing work crews "may take weeks" is not only speculative but also belied by Mr. Cooper's declaration submitted to the Fourth Circuit, in which he stated that "[t]he process of re-mobilizing crews after a stay has been lifted will take several days." App'x 14. Consequently, MVP's claim that the stay must be vacated by July 26, 2023, to enable it to complete construction by year's end is unsubstantiated.

Finally, MVP's delay arguments are premised on its predictions that weather will force it to halt activities before early November. App'x 58. But MVP offers little to support its meteorological forecasts and ignores recent predictions of a strengthening El Niño weather pattern into the winter—with its accompanying higher temperatures and drier conditions.[22] And MVP's claims are further undermined by MVP's past construction activities that persisted well into November. *See* AV App'x 27–28 (describing MVP construction activities at Bottom Creek Road over Thanksgiving weekend in 2018).

At bottom, economic impacts are the most that would befall MVP from a delay in construction. But to the extent that MVP (at 27) relies on predictions of economic loss in the form of maintenance costs during a stay and delays in recouping investments in an effort to establish irreparable harm, that effort fails because economic loss is rarely cognizable as irreparable harm. As this Court has recognized, "[m]ere injuries, however substantial, in terms of money, time and energy necessarily expended . . . are not enough" to show irreparable harm. *Sampson*, 415 U.S at 90 (quoting *Va. Petroleum Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958)). Such economic consequences are temporary and do not outweigh irreparable environmental injuries, since such "lost profits and industrial inconvenience[s]" are "the nature of doing business, especially in an area fraught with bureaucracy and litigation." *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 282 F. Supp. 3d 91, 104 (D.D.C. 2017); *accord N. Cheyenne Tribe v. Hodel*, 851 F.2d 1152, 1157 (9th Cir. 1988).

Because irreparable harm "must be both certain and great," *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985), there is a magnitude component to irreparable harm. "[E]conomic

[22] *See NOAA Declares the Arrival of El Niño*, NAT'L WEATHER SERV. (June 8, 2023), https://www.weather.gov/news/230706-ElNino.

loss does not, in and of itself, constitute irreparable harm." *Id.* Accordingly, "[t]he wiser formula requires that the economic harm be significant, even where it is irretrievable . . . ." *See Air Transp. Ass'n of Am. v. Exp.-Imp. Bank of the U.S.*, 840 F. Supp. 2d 327, 335 (D.D.C. 2012). Significance is shown "where the loss threatens the very existence of the movant's business." *See Wis. Gas Co.*, 758 F.2d at 674. Here, MVP does not claim that its predicted economic losses threaten its existence or that the speculative costs of delay are insurmountable and therefore irreparable. Indeed, the economic losses predicted by MVP are but a small fraction of the project's multibillion dollar capital budget. Accordingly, it has not shown the "certain and great" economic losses necessary to transubstantiate ordinary monetary injury into extraordinary irreparable harm.

The harm to the Government claimed by the Solicitor General (at 31–32) from being unable to implement Section 324(c)(2)'s provision requiring agencies to "continue to maintain" the stayed actions also fails to constitute cognizable irreparable injury. As discussed above, Section 324(c)(2) only prohibits the agencies from unilaterally revoking or suspending the authorizations; it cannot constitutionally be construed to require the agencies to keep the actions in place even in the face of a lawful court order staying or vacating them. The agencies cannot be irreparably harmed from being deprived of the opportunity to implement an unconstitutional statute.

II. MVP'S ADDITIONAL REQUESTS FOR RELIEF ARE INAPPROPRIATE UNDER THESE CIRCUMSTANCES.

MVP's requested additional relief (at 30–34) of (1) a writ of mandamus directing the Fourth Circuit to dismiss the petitions for review or (2) a grant of certiorari before judgment would both be inappropriate here, especially given that the Fourth Circuit is moving expeditiously to resolve pending motions to dismiss in both cases.

MVP correctly states (at 30) that this Court issues writs of mandamus only when "'necessary or appropriate in aid of [its] respective jurisdiction[] . . . .'" (quoting 28 U.S.C.

§ 1651(a); alterations in Application). That should be the end of this Court's consideration of this issue because, regardless of the Court's view of the merits, there is no current need to protect this Court's jurisdiction. Indeed, nothing in MVP's emergency application suggests that this Court's potential future jurisdiction is threatened by the stays about which MVP complains.

Furthermore, MVP has not shown, and cannot show, that it meets all of the requirements for a writ of mandamus. For example, it fails to establish that its "right to issuance of the writ is clear and indisputable." *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 380 (2004) (cleaned up). The constitutionality of Section 324 is a legal question of first impression that has not been addressed in a final decision by any court, involving an area of constitutional law on which this Court did not reach a majority opinion the last time it considered the issue. *See Patchak*, 138 S. Ct. at 902 (plurality opinion); *id.* at 911 (Breyer, J., concurring); *id.* at 912 (Ginsburg, J., concurring); *id.* at 913 (Sotomayor, J., concurring); *id.* at 914 (Roberts, C.J., dissenting). Because mandamus is not necessary to protect this Court's jurisdiction, and because the right to the writ is not clear and indisputable, mandamus should not issue as requested by MVP, or on the terms proposed by the Solicitor General (at 33–34).

Likewise, MVP falls far short of meeting the "very demanding standard" required for this Court to grant certiorari before judgment. *Mount Soledad Mem'l Ass'n v. Trunk*, 573 U.S. 954, 954 (2014) (Alito, J., respecting the denial of the petition for a writ of certiorari before judgment). A petition for a writ of certiorari before judgment "will be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." Sup. Ct. R. 11.

MVP (at 30) cites *Biden v. Nebraska*, 143 S. Ct. 477 (2022) (Mem), as a recent example of this Court granting certiorari before judgment. The contrasting level of public importance

between that case and this one is telling. *Biden v. Nebraska* resolved the legality of a loan forgiveness program that would have cancelled $430 billion of federal student loan balances and affected 43 million borrowers. *Biden v. Nebraska*, 143 S. Ct. 2355, 2362 (2023). While that case remained pending, those 43 million people were in limbo, making daily financial decisions without the benefit of knowing whether they would be responsible for repaying their loans. In contrast, no such "imperative public importance" requires immediate intervention in these cases involving a single pipeline company that wants to resume construction immediately in endangered species habitats. Sup. Ct. R. 11.

MVP (at 34) also cites a 1976 case in which the Federal Power Commission challenged an interlocutory order of the D.C. Circuit requiring it to conduct an evidentiary investigation of an actual natural gas shortage (not simply speculative predictions of one) within thirty days. *See generally Fed. Power Comm'n v. Transcon. Gas Pipe Line Corp.*, 423 U.S. 326 (1976). The mandatory nature of the order—compelling the Federal Power Commission to immediately begin an investigation, complete it within thirty days, and report its results to the court—would change the status quo, making "the effect of the order . . . immediate and irreparable . . . ." *Id.* at 331. In contrast, there is no such urgency here, where the stays at issue *preserve* the status quo pending review. MVP's arguments for immediate intervention here are therefore unavailing.

CONCLUSION

Because MVP has not met the high burdens for the extraordinary relief it seeks, this Court should deny the emergency application for vacatur of the stays, writ of mandamus, and certiorari before judgment.

Dated: July 25, 2023

Respectfully submitted,

/s/ Jason C. Rylander

Jason C. Rylander
Counsel of Record
CENTER FOR BIOLOGICAL DIVERSITY
1411 K Street NW, Suite 1300
Washington, D.C. 20005
(202) 744-2244
jrylander@biologicaldiversity.org

Jared Margolis
CENTER FOR BIOLOGICAL DIVERSITY
2852 Willamette Street, #171
Eugene, OR 87405

Elizabeth F. Benson
SIERRA CLUB
2101 Webster Street, Suite 1300
Oakland, CA 94612

Derek O. Teaney
Claire Horan
APPALACHIAN MOUNTAIN ADVOCATES, INC.
P.O. Box 507
Lewisburg, WV 24901

Counsel for Respondents Appalachian Voices, Wild Virginia, West Virginia Rivers Coalition, Preserve Giles County, Preserve Bent Mountain, West Virginia Highlands Conservancy, Indian Creek Watershed Association, Sierra Club, Chesapeake Climate Action Network, and Center for Biological Diversity

APPENDIX

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

MOUNTAIN VALLEY PIPELINE, LLC, Plaintiff, vs. AN EASEMENT TO CONSTRUCT, OPERATE AND MAINTAIN A 42-INCH GAS TRANSMISSION LINE ACROSS PROPERTIES IN THE COUNTIES OF NICHOLAS, GREENBRIER, MONROE, SUMMERS, BRAXTON, HARRISON, LEWIS, WEBSTER, AND WETZEL, WEST VIRGINIA, et al. Defendants.	:	Civil Action No. 2:17-cv-04214

DECLARATION OF ROBERT J. COOPER
ON ACCESS FOR CONSTRUCTION

I, Robert J. Cooper, an adult over the age of 18, declare as follows:

1. I am the Senior Vice President of Engineering and Construction at Mountain Valley Pipeline, LLC ("MVP").

2. I have worked at MVP on the Mountain Valley Pipeline Project ("MVP Project") since 2013, and have worked for one of MVP's partners, Equitrans, L.P., for fourteen years.

3. In my role as Senior Vice President of Engineering and Construction at MVP, I am the company-wide leader for the MVP Project and am responsible for overseeing all construction, engineering, environmental, and land functions for the MVP Project. I am responsible for ensuring that the necessary land rights are acquired for the MVP Project and that all construction and engineering is accomplished safely, effectively, and in accordance with applicable regulations, permits, and contracts.

4. I am familiar with the above-captioned litigation, in which MVP is condemning the remaining land rights necessary for the MVP Project pursuant to the Natural Gas Act, 15 U.S.C. § 717f(h), and Federal Rule of Civil Procedure 71.1.

5. The MVP Project includes approximately 303 miles of new 42-inch-diameter natural gas pipeline from Wetzel County, West Virginia to Pittsylvania County, Virginia, three new compressor stations, four new meter and regulation stations and interconnections, and other appurtenances.

6. The MVP Project will transport natural gas from Northern West Virginia and Western Pennsylvania to commercial, domestic, and industrial users in the Northeast, Mid-Atlantic and Southeast regions of the United States, where capacity is currently constrained. It will also have one tap for Roanoke Gas, a distribution company, and will access the WB pipeline interconnect to potentially send natural gas to the Washington, D.C. area.

7. MVP acquired a number of the easements required for the MVP Project by agreement with landowners.

8. MVP made offers of at least $3,000 to acquire the required easements from the defendants in this litigation ("Landowners"), but was unable to acquire them by agreement.

9. On October 13, 2017, MVP received a Certificate of Public Convenience and Necessity from the Federal Energy Regulatory Commission ("FERC") for the MVP Project, and I am familiar with and knowledgeable about MVP's application process and approval from FERC.

10. The easements condemned by MVP are necessary to safely construct, operate, and maintain the MVP Project as certificated by FERC.

11. The easements condemned are (1) permanent and exclusive rights-of-way with the right to construct, operate, maintain, replace, repair, remove or abandon the pipeline, as appropriate for each property, and appurtenant equipment, with ingress to and egress from the rights-of-way by means of existing or future roads or other reasonable routes on the premises and on the Landowners' adjoining lands, and (2) temporary construction rights-of-way for the construction of the pipelines and appurtenant natural gas facilities, (3) temporary workspace rights-of-way for the construction of the pipelines and appurtenant natural gas facilities, and (4) access road rights-of-way.

12. MVP needs access to the permanent and exclusive rights-of-way, access road rights-of-way, temporary construction rights-of-way, and temporary workspace rights-of-way across the Landowners' properties by February 1, 2018 to begin construction activities in order to safely and effectively accomplish the MVP Project on schedule.

13. MVP plans to construct the pipeline and place it into service by December 2018.

14. To meet this schedule, the MVP Project will be constructed simultaneously across eleven segments, each of which includes approximately 30 miles of pipeline and permanent rights-of-way.

15. In February 2018, MVP will begin mobilizing its construction crews across each of the eleven segments of the MVP Project.

16. MVP and its contractors will first fell and clear trees from properties used for service facilities and access roads, and those properties impacted by endangered species.

17. For each of the eleven segments of the MVP Project, MVP and its contractors will then work in a continuous straight line down the path of the pipeline and rights-of-way, clearing

and grading the rights-of-way, ditching the line, and moving the pipe from the laydown yard to the rights-of-way.

18. By mid-April to early May 2018, MVP and its contractors are scheduled to be welding pipe in each of the eleven segments of the MVP Project.

19. After welding is complete, MVP and its contractors will test the welds, lower the pipe into the trench, cover and grade the surface over the pipeline, work on crossings and tie-ins to the pipeline, clean and dry the pipeline, and finally put gas into the pipeline.

20. This construction is planned to be complete along the full length of the pipeline by winter 2018, with meters being placed in late November or December 2018.

21. MVP's construction schedule is designed to protect a number of environmentally sensitive species of bats and migratory birds along dozens of miles of the pipeline's path.

22. Tree clearing and other pre-construction activities on these properties must be completed in compliance with environmental restrictions, which require the tree clearing to be complete prior to March 31, 2018, for locations with protected bats, and prior to May 31, 2018, for locations with protected migratory birds.

23. In addition, many properties have identified wetlands or streams which are subject to environmental regulations with which MVP must comply and which restrict its construction activities and schedule.

24. If MVP is unable to begin the tree clearing and construction activities of the MVP Project on the Landowners' properties by February 1, 2018, it will be unable to complete the work according to its construction schedule, and it will incur additional delay fees and contractor costs.

25. MVP has contractual requirements to begin clearing activities in February 2018. MVP also has must comply with administrative agency regulations of the United States Fish and Wildlife Service requiring that certain clearing be complete by March 31, 2018, and that construction of roads be complete by March 31, 2018. If construction is delayed, MVP will be unable to comply with those contractual requirements, and agency approvals and permits, and may be subject to fines and will incur damages.

26. MVP also has agreements in place to begin shipping gas in 2018.

27. In its Certificate Order, FERC found that the MVP Project is a public convenience and necessity and that the public interest will be served by construction of the MVP Project. Specifically, the Commission found that "the public at large will benefit from the increased reliability of natural gas supplies." Certificate Order, p. 62. The Commission also found that the MVP Project will benefit producers of natural gas. *Id.*

28. Delaying the MVP Project will unnecessarily postpone the public benefits that the pipeline will provide and unnecessarily increase the costs of completing the work and result in the loss of substantial revenue to MVP.

29. The Landowners may continue to fully use and enjoy the premises so long as such use and enjoyment does not interfere with or obstruct MVP's rights-of-way.

30. Granting MVP access to the easements condemned will not affect the Landowners' rights to receive just compensation.

31. MVP is prepared to post a bond equal to its estimate of the just compensation due to the Landowners.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Dated this 27th day of October, 2017.

Robert J. Cooper

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

MOUNTAIN VALLEY PIPELINE, L.L.C., Plaintiff,	:	CIVIL ACTION NO. 2:17-cv-04214
-vs-	:	
AN EASEMENT TO CONSTRUCT, OPERATE AND MAINTAIN A 42-INCH GAS TRANSMISSION LINE ACROSS PROPERTIES IN THE COUNTIES OF NICHOLAS, GREENBRIER, MONROE, SUMMERS, BRAXTON, HARRISON, LEWIS, WEBSTER, AND WETZEL, WEST VIRGINIA, et. al., Defendants.	:	

TRANSCRIPT OF PRELIMINARY INJUNCTION HEARING
BEFORE THE HONORABLE JOHN T. COPENHAVER, JR.
UNITED STATES DISTRICT JUDGE
FEBRUARY 7, 2018

APPEARANCES:

FOR THE PLAINTIFF: **NICOLLE R. SNYDER BAGNELL, ESQ.**
Reed Smith LLP
Reed Smith Centre
225 Fifth Avenue
Pittsburgh, PA 15222

FOR THE DEFENDANTS: **DEREK O. TEANEY, ESQ.**
Appalachian Mountain Advocates
P.O. Box 507
Lewisburg, WV 24901

FOR THE DEFENDANTS: **ISAK JORDAN HOWELL, ESQ.**
117 East Washington Street
Suite 1
Lewisburg, WV 24901

CONTINUED APPEARANCES:

FOR THE DEFENDANTS: **ANNA RUTH ZIEGLER, ESQ.**
Ziegler & Ziegler
110 James Street
Hinton, WV 25951

FOR THE DEFENDANTS: **C. JOSEPH STEVENS, ESQ.**
Stevens & Stevens
P.O. Box 635
8137 Court Avenue
Hamlin, WV 25523

FOR THE DEFENDANTS: **HOWARD M. PERSINGER, III, ESQ.**
Persinger & Persinger
237 Capitol Street
Charleston, WV 25301

FOR THE DEFENDANTS: **COURTNEY A. KIRTLEY, ESQ.**
Kay Casto & Chaney
103 Fayette Avenue
Fayetteville, WV 25840

FOR THE DEFENDANTS: **GEORGE A. PATTERSON, III, ESQ.**
Bowles Rice
600 Quarrier Street
Charleston, WV 25301

CONTINUED APPEARANCES:

FOR THE DEFENDANTS: **ERIC M. JOHNSON, ESQ.**
Flaherty Sensabaugh & Bonasso
P.O. Box 3843
200 Capitol Street
Charleston, WV 25338-3843

FOR THE DEFENDANTS: **STEPHEN J. CLARKE, ESQ.**
Waldo & Lyle
301 West Freemason Street
Norfolk, VA 25338-3843

FOR THE DEFENDANTS: **CHARLES M. LOLLAR, ESQ.**
Lollar Law
109 East Main Street
Norfolk, VA 25310

Proceedings recorded by mechanical stenography, transcript produced by computer.

_____
CATHERINE SCHUTTE-STANT, RDR, CRR
Federal Official Court Reporter
300 Virginia Street, East
Room 6009
Charleston, WV 25301

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are part of the bat window in this case? Do you know? Have you broken that down?

A. By the individual parcels?

Q. Yes.

A. I have not. I've just --

Q. Okay. So you also couldn't tell us, then, which parcels are not subject to the bat restrictions, correct?

A. No, sir.

Q. And that's because your goal is to get access for all and cut all the trees by March 31, regardless of whether the bat window applies or not, correct?

A. Yes. From the perspective of how best to build the pipeline, as we've described earlier.

Q. Okay. You submitted a declaration in this matter, correct?

A. I did, sir.

Q. Okay. And you testified, I think, earlier this morning that everything in there was accurate, correct?

A. To the best of my knowledge, yes, sir.

Q. And I think you stated in that declaration that you needed to start tree felling by February 1st or you would miss the tree window; is that correct?

A. That's correct, sir.

Q. Okay. Today is February 7th, correct?

A. It is, indeed.

Q. You haven't started tree felling, have you?

A. Not on the properties we don't have access to.

Q. Right. But yet, you still maintain that you can achieve that by March 31?

A. Yes. As I've stated earlier, what that then requires is that requires us to move those crews around; it requires us to initiate things beyond the normal schedule, where we have to pay incremental fees to have workers do things by hand versus the schedule anticipated that the contractors could choose their method of tree felling. There are things that we can do on the properties we have related to survey and setting those things up. So it's not that we can't get there yet, it's that the original schedule -- and that's what the original ask was about, was on how you plan to do the work.

Every day we progress through February without initiating those activities, then we get closer to the point that it's unviable, and the only way to make up for that is to do non-efficient, more expensive -- you know, add more folks than what were in your schedule. There are things we can do to accommodate for some of the date that weren't in the original plan.

Q. Right. But you swore under oath that you needed to start felling trees by February 1st in order to achieve the deadline, correct?

A. Correct, under the plan that we established.

Q. Do you think the paragraph qualified it that way? That it said, "Under our plan"?

A. I didn't say, "Under our plan." I said that's the date I need.

Q. What is the real date? What is the real date by which you need to start cutting trees on this property to achieve your March 31 deadline?

MS. BAGNELL: Objection, Your Honor. This has been -- he's already answered this question, and the hearing date was set by the Court.

THE COURT: And the witness may answer.

THE WITNESS: The date would depend upon how many properties we have access to, and those that we don't.

In the Southern District, as we've said, there are about half of the total miles. If we were on those properties in clearing and, as I said before, it takes us roughly two weeks of access prior to clearing to make sure that we have the survey correct, that we have the limits of disturbance correct, so that we are only touching the things that we have a right to, all right. So that amount of mileage, if I had all the other things done, probably is somewhere around the 10th to the 15th of March. But it would be a race at that point to hit the window, because we would have to take -- have everything else done, mobilize

the workers, basically be just a hundred yards ahead doing the survey, knocking the trees down, and hoping that there is not a mid-March storm that substantially impacts that.

BY MR. TEANEY:

Q. Okay. Thank you. Talking about -- well, another factor that you need, of course, are the Notices to Proceed, correct?

A. Yes, sir.

Q. And just to clarify, you need a Notice to Proceed before you cut a tree, either with a chain saw or with a bulldozer, correct?

A. Yes, sir.

Q. Okay. I think you testified there were certain preconstruction activities that you could do without a Notice to Proceed, that's the surveying and staking. You can't cut a tree without a Notice to Proceed, right?

A. That's correct, sir.

Q. Thank you. You requested, I think you said, eight Notices to Proceed; is that correct, in total, for the project?

A. There are eight that have been submitted; two more this week.

Q. And each one of those includes a date by which MVP wants FERC to issue the notice, correct?

A. Sure.

feet as possible. Because every amount of soil that we remove is -- you know, that's excavation, that's money, that's time.

So we want to go to the depth we're required, and we're not going to dig anywhere else deeper than that unless there is a physical engineering reason.

Q. But because there might be adjustments, at this time, you don't know how deep that pipe is going to be when you finish, right?

A. That's a fair characterization.

Q. Okay. And after it's built, you'll do an as-built survey. Will that tell us the depth?

A. Yes.

Q. Okay.

MR. PATTERSON: All right. That's all I have.

THE COURT: Thank you.

Are there others?

MR. CLARKE: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. CLARKE:

Q. Mr. Cooper, good afternoon.

A. Good afternoon, sir.

Q. I just had a couple questions in follow-up. I wanted to start talking about the declaration that you gave, that you submitted. And I know you've testified at the end of

your Direct Examination that it was true and correct. And I think Mr. Teaney asked you some questions about it. And I just wanted to follow-up, because I was a little confused about the timing of what MVP is seeking and some statements in your declaration, and a particular statement in your declaration, that MVP needs access by February 1st to begin construction activities in order to safely and effectively accomplish the MVP project on schedule.

Is that the whole truth?

A. It was the whole truth. And as I've told Mr. Teaney, because there is a way in which you plan to do the job. If you're asking, is there some alternative that you have to adjust to?

Then, obviously, we are at February the 7th or whatever date we are, we're still intending to build this year, but that's already forcing us to change the way we do things to get the project done.

Q. So it is your testimony today that MVP can meet its schedule, it's preferred schedule without access to the properties beginning -- or by February 1st; is that right?

A. Yes. To some of the properties that you can't get on, we've discussed at deposition, we've discussed in other hearings, there are alternatives, and they've been talked about here, about tree clearing in a different way, the skip-arounds, those other things that aren't part of the

planned way in which you build the pipeline, to adapt to the fact that you have a schedule change.

That same schedule is predicated upon having so many rain days as we get going. I can't control the weather. But there are contemplations where you can change things you do to adapt to the weather.

Q. All right. And you've also made the statement in your declaration, tree clearing and other preconstruction activities on these properties -- meaning the properties owned by the landowners in this case -- must be completed in compliance with environmental restrictions, which require the tree clearing to be complete prior to March 31st, 2018, for locations with protected bats, and, prior to May 31st, 2018, for locations with protected migratory birds.

Do you recall that?

A. Yes.

Q. But what you've said today is that you could actually do the tree clearing beyond those dates on a lot of the properties; isn't that right?

A. That's correct.

Q. And I didn't mean to cut you off.

A. I was going to say, and at the time that that was filed, there were a lot of these properties that we had no survey access to. So we had to rely on some general data on the understanding of how many may require the bat

restriction by May 31st.

So, obviously, since most of those landowners have now allowed us to do that and we've surveyed for the species on almost all, you have the clearer picture, some two months later than when we started this process.

Q. Well, I appreciate that. But it's also true that -- and I think you testified essentially to this today -- that you could do the tree clearing starting again in November of 2018; isn't that accurate?

A. In a different schedule for the overall project, yes.

Q. Okay. So it's not -- it's not a requirement by the U.S. Fish and Wildlife Service that MVP clear the trees in the bat areas by March 31st of 2018, correct?

A. Fish and Wildlife Service establishes the windows in which you can do certain activities. They don't say, MVP must do this.

What they say is, if you're going to do this activity, here's the calendar window in which you or any other company doing a FERC project in this area must comply with.

Q. So your statement in your declaration that MVP must comply with administrative agency regulations of the United States Fish and Wildlife Service requiring that certain clearing be complete by March 31st, 2018, that is not accurate? Do you agree with me?

A. No, I don't agree with you. Sorry if my voice cracked.

The statement was, as I have stated multiple times here, is based upon the fact that the project has a schedule to go forward, and in order to achieve the schedule, and in order to achieve what the partnership has requested that we do, those species trees need to be down by March 31st. And then the migratory birds have other restrictions. And the Shrike in Virginia has other restrictions. So in order to get there, February 1st allowed the project, as the way that you normally do a project, to achieve it.

Now, I'm not sure what you're trying to get to in that are there no other possible ways to get there?

I've just testified there are other possible ways. So I'm not sure what you are trying to ask.

Q. Sure. My question really is just about the statement in your declaration and compared to the testimony you've given today, and what it appears to be some discrepancies between those two. And if you say there is not discrepancies, then that's your testimony.

But I think my real question is: The Fish and Wildlife Service isn't saying to MVP -- and I think you'll agree with me -- they aren't saying to MVP that you must clear these trees by March 31, 2018, in the bat areas, or else you won't be able to clear them ever?

A. That is a correct statement, sir.

Q. So that March 31, 2018, is -- that's, for MVP -- that's

MVP's decision to stick with its preferred schedule, correct?

A. That's correct, sir.

Q. Now, Mr. Teaney asked you a little bit about the court proceeding in Virginia, and I think you testified a little bit about that. And if I heard you correctly, I think you said that MVP was intending to get valuations done and submitted by -- I think you said February 19th; is that right?

A. That's what I have been informed, but I'm not directing that process.

Q. And -- but are you supervising the land department that's involved in that process?

A. For the land valuations to the court, no.

Q. Now, how many properties are still at issue in that Virginia lawsuit?

A. I believe there is still in excess of 200.

Q. So MVP's intention is to get valuations, appraisals of somewhere in excess of 200 properties done by February 19th? Is that your testimony?

A. That's what I was informed, yes.

Q. And are any of those appraisals done at this point?

A. I can't answer that question for you, sir.

Q. You don't know?

A. I don't know.

MR. CLARKE: That's all the questions I have. Thank you, Mr. Cooper.

THE COURT: Any other counsel?

If not, Ms. Bagnell.

REDIRECT EXAMINATION

BY MS. BAGNELL:

Q. Mr. Cooper, I want to just clarify, because I think there was confusion about the properties that were subject to the litigation on which the clearing must be done for bats. And there is two different types of bats, correct?

A. Yes. There are two species of bats that are governed by the U.S. Fish and Wildlife Service that have habitat in the area where we're working.

Q. And the mileage you're talking about, is that specific to one of those bats?

A. No.

Q. Can you tell us how many -- if you know, how many miles of pipeline easement need to be -- that is subject to this action -- need to be cleared prior to March 31st, to protect the bats?

A. 6.8 miles of the main line pipeline right-of-way.

Q. And how many miles of -- does that include access roads?

A. It does not. That's just the pipeline itself.

Q. How many miles of access roads need to be cleared to

CERTIFICATE OF OFFICIAL REPORTER

I, Catherine Schutte-Stant, Federal Official Realtime Court Reporter, in and for the United States District Court for the Southern District of West Virginia, do hereby certify that, pursuant to Section 753, Title 28, United States Code, the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

s/Catherine Schutte-Stant, RDR, CRR

_____ February 28, 2018

Catherine Schutte-Stant, RDR, CRR
Federal Official Court Reporter

No. 19-1866

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

WILD VIRGINIA; APPALACHIAN VOICES; PRESERVE BENT MOUNTAIN, a chapter of Blue Ridge Environmental Defense League; SIERRA CLUB; DEFENDERS OF WILDLIFE; CHESAPEAKE CLIMATE ACTION NETWORK; and CENTER FOR BIOLOGICAL DIVERSITY

Petitioners,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR; DAVID BERNHARDT, in his official capacity as Secretary of the U.S. Department of the Interior; UNITED STATES FISH AND WILDLIFE SERVICE, an agency of the U.S. Department of Interior; MARGARET EVERSON, in her official capacity as Principal Deputy Director of the U.S. Fish and Wildlife Service; and CINDY SCHULZ, in her official capacity as Field Supervisor, Virginia Ecological Services, Responsible Official

Respondents.

DECLARATION OF GRACE TERRY

I, Grace Terry, declare as follows:

1. My name is Grace Terry. I am over the age of eighteen and am competent to make this declaration.
2. I am a member of Preserve Bent Mountain. I am also a member of the Sierra Club, and previously served on the Executive Committee of the Virginia Chapter's Roanoke Group.
3. I live in Roanoke, Virginia, and work as a naturalist at the Mill Mountain Discovery Center, a nature center run by Roanoke City Parks and Recreation. I teach nature programs to youth and other community members. As part of this work, I've learned about species and watersheds. I have been a volunteer stream monitor, and have learned how to test for water quality.
4. My three siblings and I are the sixth generation to own our family's land in Roanoke County. I know Bent Mountain and the surrounding area well because my father grew up there, and he took my siblings and me there almost every weekend when we were children. There was a working apple orchard at that time. My siblings and I used to do farm chores and play in the creeks during our visits.
5. The Mountain Valley Pipeline (MVP) right-of-way runs directly across my family's property. Several miles of the right-of-way cuts through the property of my two brothers, and it runs within a couple of hundred yards of their houses. The right-of-way also goes half a mile through my sister's property

along Mill Creek. Bottom Creek is a Tier III stream that is a tributary of Mill Creek, which in turn feeds into a fork of the Roanoke River. Permanent access roads for the project go across both my mother's and brothers' properties and my property, through steep, wooded terrain, areas with high soil erodibility and areas with soil of "prime soils of statewide importance" according to a forestry consultant who did a study for our family.

6. Much of our land is mountainous and very steep. It includes the highest point on Poor Mountain and from there makes a descent down to Bent Mountain, traversing a number of different habitats, the most notable of which, according to the forestry consultant, is the "upland wetland" habitat which is found in only a few locations in Virginia. The pipeline right-of-way cuts across the heart of the most buildable, livable and farmable land we have. Even though we have hundreds of acres, the pipeline company doesn't care about locating right next to your house or obstructing your access. One of my brothers has an approximately mile-long driveway to his house, and the pipeline goes right through it. If there was an explosion, he wouldn't be able to escape by vehicle, and he wouldn't be able to climb the steep slopes by foot in time to survive. Roanoke County Fire and Rescue chief has publicly stated that due to the terrain, they will not go in until after the fires burn out in the event of an explosion.

7. There is so much water on our property, you can't go far without encountering a stream or wetland. There are also multiple springs that feed first-order streams. That water eventually drains into tributaries of the Roanoke River and Spring Hollow reservoir that provides drinking water for people in Roanoke County, and the cities of Roanoke and Salem.

8. The Virginia Department of Environmental Quality conducted pre-construction fish and macroinvertebrate sampling in Bottom Creek to document the water quality since our property is upstream of the Tier 3 section designated as "exceptional waters". The fish samples included presence of native brook trout and the orangefin madtom.

9. My property is under a very restrictive Virginia Outdoors Foundation easement, a process which I initiated to realize my dream of conserving my property. The main goal of placing the conservation easement on my property was to protect large tracts of undeveloped intact forest, protect wildlife habitat, conserve viewsheds of Poor Mountain, and protect the riparian habitat of Big Laurel Creek. Under the easement, trees cannot be cut unless they're diseased and no new roads are allowed. I chose to forgo many future uses of my property for me and my heirs because land and water conservation is important to me.

10. Despite these protections, MVP is now being allowed to do things that I, as the landowner, never would have been allowed to do under the easement. A 10-acre tract was ultimately purchased that was supposed to be replacement land of equal or higher conservation value than what was lost on my property. But the area where my property is located is a high-value intact forest core, because several nearby properties are also under conservation easements, whereas the replacement land is lower quality land surrounded by encroaching suburban development. A state official admitted to me that the replacement land was low value compared to other parcels his agency had recommended MVP purchase. He used more colorful language to describe it when saying that the replacement land would never have been acceptable for the TERRA program that VOF is currently administering to distribute forest mitigation money MVP has paid to the state for loss of forested land.

11. In the Bent Mountain area, there was a distinct lull in construction activity since last November. On Thanksgiving weekend, they bored underneath Bottom Creek Road on my sister's property. They worked like mad to get it done during that week. Meanwhile, we were calling and emailing government regulatory agencies because there are wetlands and a creek right next to the road, and they weren't supposed to be working in wetlands and waterways because a court had invalided that permit. Due to the timing of the holiday, it

was difficult to get wetlands inspectors to respond to our concerns. MVP worked every day that long weekend except for Thanksgiving Day, and we were unable to get the government to do anything over Thanksgiving weekend and the work was almost complete by the time it was inspected. That was the last big burst of construction until very recently.

12. That lull in construction activity in the Bent Mountain area ended in the last weeks of July. During the week of July 19, we started seeing machinery and equipment moving up the mountain on Rt. 221 and sounds of heavy construction were reported from Poor Mountain on subsequent days. On Friday, August 2, I went up to Poor Mountain and saw how heavily MVP was back at work on constructing the pipeline. Since they're not allowed to work in wetlands and streams, it's shocking that they can get away with this work and say they're not impacting the streams.

13. I had seen the work sites over on the other side of Poor Mountain on June 27th while traveling on Route 460. It is also obvious there's now a lot of pipelining occurring because there's an uptick of trucks and heavy equipment on the main roads in Roanoke such as Rt. 419 and Rt. 220. Until this recent assault on Poor Mountain, Poor Mountain and Bent Mountain had escaped much of the damage.

14. At the same time that construction started ramping up on Poor Mountain, there were reports of the Roanoke River being extremely muddy in Salem on July 16th and 17th. I saw photos that were posted online, and my boss told me that he had noticed how unusually muddy the river was miles away within Roanoke City even though the water levels were not up.

15. In December 2016, I submitted comments to FERC on the Draft Environmental Impact Statement. I expressed my concerns about environmental degradation due to erosion, runoff, and increased sediment load, and the resulting impacts on wells and waterbodies. I also expressed my concern that the abundant wildlife that lives on Bent Mountain and Poor Mountain would be affected as they suffer reduced quality of water sources and the disruption of their habitats through tree-clearing and noise.

16. In 2017 and 2018, I made multiple inquiries to federal and state agencies to inquire about the presence of threatened and endangered animal and plant species near my property. Because of tree clearing, I was also trying to figure out what kind of studies had been done on Poor Mountain to detect for bats before MVP was authorized to construct the pipeline there, because I had learned that bats had been documented on my property in the past. I learned that in 2011, fourteen bat studies were conducted in the areas of Bent Mountain and on top of Poor Mountain, and close to where MVP put the

access road on my property. I was told by state officials that those fourteen studies which documented the presence of threatened and endangered bats were probably conducted because wind turbines had been proposed.

17. There was also a more recent study done in June 2015, but it was only one study. I'm not sure if this study was done for MVP, but a federally threatened bat was detected. I was informed by a state biologist that bats' populations have declined in recent years due to white-nose syndrome, and that's why only one study was done, but it seems to me that this makes it all the more important to thoroughly investigate whether any threatened or endangered bats are still in the area before allowing MVP to construct the pipeline.

18. We had been told that MVP needed to stop tree-clearing by March 31 (2018) due to the bats, but they continued to cut past that date on my family's property. In April 2018, a FERC official told me that they were trying to get together the information that I had requested about bat studies on my family parcel. I informed him that I was not just requesting information about my family's land – I wanted to know how many studies were done on Bent Mountain and Poor Mountain as part of the MVP approval process, and when they were done. My recollection is that he never responded to that email, and I have been unable to locate any response in my records.

19. There are still areas where trees are planned to be cut down, but have not been cut yet. A number of access roads have not been built yet for the Bent Mountain area, and will require tree cutting. In addition, there are work spaces planned where trees have not yet been cut. This is true for roads and work spaces on my family's properties as well as neighbors' properties. I know this from the alignment sheets that MVP filed on the FERC docket.

20. Seven generations of our family have lived on and cared for our land. By siting this pipeline through all of our properties, the MVP has created many deeply troubling issues for us – including (but certainly not limited to) safety issues, pollution of surface water resources, and loss of agricultural and forested land. I care deeply about the wilderness character of my property, and have been particularly concerned about the impacts on endangered and threatened bat species, which I do not believe were studied sufficiently before MVP was given authorization to construct the pipeline. I support this lawsuit because it could prevent further harm to threatened and endangered species and their habitat.

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

Dated this 14th day of August, 2019.

Grace Terry

Grace Terry