Manchin's Side Deal Threatens An Independent Judiciary

Senator Manchin's side deal includes dangerous provisions that would weaken judicial review for energy projects and throw in doubt the integrity of our independent judicial system.

Judges Are Not Biased When They Rule Against Fossil Fuels.

- All federal courts already have clear ethical rules and principles, and a fair process to address perceptions of bias and conflicts of interest within the judiciary.
- Based on the false belief held by the Mountain Valley Pipeline (MVP) company that the federal judges who reviewed their pipeline were biased, Sen. Manchin's legislation would alter the fundamental operations of *all* federal circuit courts to address non-existent bias and provide special treatment to the MVP by transferring future litigation to the D.C. Circuit.
- The three-judge panels randomly assigned to review the Mountain Valley Pipeline included judges appointed by *both* political parties, including one judge personally endorsed by Sen. Manchin. The judges involved in review of the MVP are as follows:
  - *Chief Judge Gregory* of Virginia, appointed by George W. Bush in 2000, confirmed 91-1.
  - *Judge Wynn* of North Carolina, appointed by Barack Obama in 2010, confirmed by Voice Vote.
  - *Judge Thacker* of West Virginia, appointed by Barack Obama in 2012, confirmed 91-3. Sen. Manchin voted yes to confirm her and spoke twice on the Senate floor, stating: "she is renowned in our state for her mastery of the law and of the courtroom, and I have no doubt that she will make a highly successful federal judge."
  - *Judge Traxler* of South Carolina, appointed by Bill Clinton in 1998, confirmed by Voice Vote.
  - *Judge Harris* of Maryland, appointed by Barack Obama in 2014, confirmed 50-43.

Artificial Deadlines for Judicial Remands Undermines Environmental Justice, Judicial Independence and Agency Adherence to Environmental Laws.

- Where courts find environmental errors and order federal agencies to correct such errors, the courts either set deadlines or not, depending on what furthers the cause of justice. Limiting this discretion would be an unprecedented attack on the independence of federal courts.
- Limiting judicial remands also hamstrings environmental justice. For example, if a court requires a new environmental impact statement under the National Environmental Policy Act, it is unreasonable to set an artificial deadline that limits the ability to provide public input or address the underlying errors. Communities that brought their concerns to court and prevailed would be unable to provide input as required by law due to Manchin's legislation.
- Sen. Manchin's legislation would limit all remands without exception to 180 days, even if doing so makes it impossible for a federal agency to comply with the very laws they are mandated to enforce. Many Clean Air Act, Clean Water Act, and Endangered Species Act permits require highly complex scientific determinations. If such determinations take more time than 180 days, federal agencies would have to cut corners and ignore science to meet the deadlines on remand.

Federal Courts Retain Jurisdiction Due to Expertise and Improve Judicial Efficiency.

- All federal courts, including circuit courts, randomly assign judges to hear cases to ensure fairness and protect the legitimacy of the legal system.
- Judges may retain jurisdiction and may continue to hear a case on the same topic with the same parties only because many environmental cases are highly technical and involve scientific questions that are complex.
- Judges that retain jurisdiction are not biased, nor do they become biased, because they hear subsequent challenges. The fact that the Mountain Valley Pipeline *unanimously and repeatedly lost* in court was because of the severe environmental harm that the pipeline represents, and the failure of the pipeline to comply with environmental laws, not a biased judiciary.
- Transferring jurisdiction of one specific fossil fuel project to another Circuit Court is virtually unprecedented in the history of this nation, for any area of law, for any particular subject, and represents an egregiously dangerous precedent for this Congress to take.
- Below are excerpts from the unanimous opinions on the Mountain Valley Pipeline explaining some of the clear errors of environmental law that occurred in the review of the pipeline:

> "American citizens understandably place their trust in the Forest Service to protect and preserve this country's forests, and they deserve more than silent acquiescence to a pipeline company's justification for upending large swaths of national forest lands."
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> The Bureau of Land Management "entirely failed to consider an important aspect of the problem…It never decided that the utilization of an existing right of way would be impractical. Indeed, it never even purported to do so. Had the BLM done so, its analysis — rather than favoring the proposed route by rejecting alternatives unless they were substantially better — would have favored routes utilizing existing rights of way unless those alternatives were impractical."
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> "The Forest Service and the BLM erroneously failed to account for real-world data suggesting increased sedimentation along the Pipeline route. There is no evidence that the agencies reviewed the USGS water quality monitoring data from the Roanoke River, which may indicate a significant increase in sedimentation beyond that predicted in the modeling used for the supplemental EIS. At the very least, the supplemental EIS should have acknowledged this disparity and explained its impact on the agencies' reliance on the sedimentation data in the hydrological analyses."
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> "But we caution that when baseline conditions or cumulative effects are already jeopardizing a species, an agency may not take action that deepens the jeopardy by causing additional harm. Put differently, if a species is already speeding toward the extinction cliff, an agency may not press on the gas."