

Libertarian group eyes eminent domain reform on Capitol Hill

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A new lobbying effort pushes changes to how the Federal Energy Regulatory Commission oversees land acquisition for natural gas pipelines. Ryan McKnight/Flickr

A libertarian think tank is looking to Congress for stronger protections for landowners in the path of natural gas pipelines.

The Niskanen Center is launching a lobbying campaign on Capitol Hill to push amendments to the Natural Gas Act that would tweak the way eminent domain is used for interstate gas pipelines, among other changes.

"We're going to aim to get a nonpartisan group together to say, 'We've got some problems here. How do we protect or enhance the protection for property owners without adversely affecting the permitting for energy infrastructure?'" Niskanen chief counsel David Bookbinder told E&E News. "We think it's possible."

The Federal Energy Regulatory Commission has faced increased scrutiny over the past year for how it grants condemnation authority to private developers acquiring land for approved projects. A series of recent lawsuits challenge the system as unconstitutional ([Energywire](#), Sept. 13, 2017).

Niskanen's proposal steers clear of those broad constitutional questions and instead zeroes in on discrete adjustments to landowner engagement and windows for judicial review. Bookbinder said the recommendations are a first step toward broader reform.

First, the group is pushing a Natural Gas Act change that would bar pipeline companies from using eminent domain under a conditional FERC certificate. Developers would have to meet all the conditions before having the power to take any land.

"Right now, you get a conditioned certificate, you can go out and exercise eminent domain, even though the conditions aren't fulfilled, and the pipeline either may never be built or may not be built right there where they say it will be built — especially given the conditions include state water quality certification and Army Corps permissions," Bookbinder said.

"It just doesn't make sense to allow the taking of property until such time as you're certain that that's where it is going to be built," he added.

The proposal would also impose additional requirements on pipeline builders' communication with landowners: It would require them to notify landowners that they can intervene in FERC proceedings electronically, and it would require notification of all affected landowners — whether or not they've intervened — when FERC grants a pipeline certificate, plus an outline of how and when they can seek rehearing and judicial review.

A more controversial measure addresses FERC's use of "tolling orders," which the agency often issues to extend the amount of time it has to reach a decision on a rehearing request. Pipeline opponents generally cannot pursue litigation until FERC has issued a final decision, leading many advocates to complain that tolling orders keep them out of the courtroom until long after the start of construction ([Energywire](#), Nov. 15, 2017).

The Niskanen proposal would set a hard deadline for FERC to respond to rehearing requests within 30 days. Whatever decision the agency makes during that time would be subject to judicial review.

Bookbinder noted that while the pending courtroom challenges to FERC's eminent domain practice are more sweeping, a legislative fix would be "far more durable and far more certain than victories in a particular pipeline case." He said he believes landowner protections will resonate on both sides of the aisle.

"These are simply issues of fundamental fairness," he said. "Even if fully enacted, these do not stop the construction of any pipeline or change FERC's criteria for how it decides what pipelines should be built. All it does is build in some procedural safeguards for the people who are most in need of it and have no way to cope with the resources that pipeline companies have."

Niskanen has brought on Green Capitol LLC's Lloyd Ritter, a former staffer for then-Sen. Tom Harkin (D-Iowa), to lobby lawmakers on the proposal. This is the think tank's first time hiring a lobbyist, according to disclosure records.

Founded in 2015, the Niskanen Center is known for pushing libertarian policies that sometimes align with environmental goals, including a carbon tax and other climate action. Before joining the group, Bookbinder was general counsel for the Sierra Club.