

Biden expected to back pipeline in Supreme Court battle

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The Biden administration's Justice Department may keep supporting a pipeline company's eminent domain power in the latest energy battle to land before the Supreme Court, legal experts say.

Yesterday, the justices agreed to review a 2019 ruling from the 3rd U.S. Circuit Court of Appeals that allowed PennEast Pipeline Co. LLC to sue New Jersey to seize 42 parcels of state-owned land for the company's 116-mile natural gas project.

Former President Trump's acting Solicitor General Jeffrey Wall had backed PennEast's call for the 3rd Circuit ruling to be overturned, noting in a "friend of the court" brief that the decision upended a long-standing interpretation of the Natural Gas Act and violated the Garden State's constitutionally protected sovereign immunity. He also warned that the 3rd Circuit did not have jurisdiction to hear the case ([Energywire](#), Jan. 22).

Wall's jurisdictional claim will now become a part of the core argument in *PennEast v. New Jersey*, according to the Supreme Court's order yesterday agreeing to hear the pipeline company's plea.

"In addition to the question presented by the petition, the parties are directed to brief and argue the following question: Did the Court of Appeals properly exercise jurisdiction over this case?" the [order](#) read.

DOJ, which is now under President Biden's leadership, declined to comment on whether it planned to change its stance in the case. The new administration has taken steps to kill other oil and gas projects, including pulling a key permit for the Keystone XL pipeline.

"I think it would be extremely surprising if DOJ changed their position on this," said Robert McNamara, a senior attorney for the Institute for Justice, a conservative law firm that has worked with landowners involved in pipeline litigation. "It would be extremely newsworthy if it flipped its position."

Wall's argument defends executive power, and DOJ's views on that issue have not traditionally changed between Democratic and Republican administrations, McNamara said.

"DOJ's brief wasn't motivated by a pro-pipeline view but rather an intent to assert the United States' supremacy over states when implementing the Natural Gas Act," said Carolyn Elefant, a former Federal Energy Regulatory Commission attorney who now represents landowners in pipeline disputes.

Congressional intent

The outcome of PennEast's Supreme Court case could have far-reaching consequences for the oil and gas sector.

Under the Natural Gas Act, pipeline developers that have received the necessary federal approvals can seize the land they need to build their projects. But while the act allows the conveyance of the government's eminent domain authority to private companies, New Jersey has argued that the 11th Amendment's sovereign immunity bars federal lawsuits against a state unless that state has agreed to be sued.

"Today's decision by the U.S. Supreme Court granting the petition for certiorari in the PennEast Pipeline case is a major step forward in upholding Congress' clear charge to the Federal Energy Regulatory Commission (FERC) to ensure the availability of affordable domestic energy, delivered safely and reliably via natural gas infrastructure," Tony Cox, chair of PennEast's board of managers, said in a statement.

Cox noted that the 3rd Circuit decision overturned decades of federal government interpretation of the Natural Gas Act, which he said had been passed by Congress to avoid state and local vetoes of interstate projects deemed "in the public need and benefit" by federal regulators.

While PennEast and energy industry groups warned that the 3rd Circuit's ruling would allow states to block natural gas infrastructure, critics of the pipeline said the Supreme Court case could address the broader question of Congress' power to authorize the use of eminent domain against states.

"It could be pretty significant," said David Bookbinder, senior counsel at the Niskanen Center, which represents landowners affected by PennEast.

"At the highest level, it is the examination of federal-state relationships," he continued. "There is an open question as to whether Congress can do this, which will now be addressed."

Renewable energy impact

Eminent domain could be crucial in FERC's efforts to overhaul interstate transmission and promote renewable energy development — another reason why the Biden administration may not want to change its stance in the PennEast case, Elefant wrote in an email.

"If those transmission lines are going to be built to meet the nation's goals of renewables, the Administration may need to give FERC broader power to authorize transmission, including eminent domain authority similar to what is under the Natural Gas Act," she wrote.

Elefant warned that the PennEast case could prove problematic in the long run for landowners if the Supreme Court upholds the 3rd Circuit ruling.

That could push pipeline developers to make more lucrative deals with amenable states, leaving less money available for affected landowners, she said. It could also mean that more projects could be routed across private property.

"As far as pipelines are concerned, this is a one-off case," said Bookbinder. "We haven't seen other states doing this, so we don't think this presents a great national problem."

'Positive step' for pipelines

Industry groups that backed PennEast's arguments in "friend of the court" briefs praised yesterday's news.

"The Court's decision to hear this case is a positive step," said Amy Andryszak, president and CEO of the Interstate Natural Gas Association of America.

"We believe the arguments put forward by PennEast are sound and will prevail following oral arguments later this year," Andryszak said in a statement.

The Consumer Energy Alliance (CEA) said that the Supreme Court's decision to review the 3rd Circuit ruling would help protect consumers from "overtly ideological decisions at the state level" that affect access to natural gas infrastructure.

"The clarity this decision will bring can help create more opportunities for environmentally responsible infrastructure projects like PennEast to revive our post-COVID economy, put our skilled union tradespeople to work, and reduce costs for communities faced with mounting bills, rising unemployment and economic hardship," CEA President David Holt said in a statement.

The case will be set for argument in the court's April argument session.