

## Supreme Court To Decide If Pipeline Builder Can Seize 42 Properties In New Jersey

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Last week, the United States Supreme Court agreed to hear the legal dispute that has stymied completion of the proposed \$1 Billion PennEast Pipeline from the Marcellus Shale gas fields of Northeastern Pennsylvania to Central New Jersey. In September 2019, the Third Circuit Court of Appeals reversed a decision of the United States District Court and ruled that PennEast Pipeline Co. LLC, the owners of the PennEast Pipeline, could not condemn over 40 properties in New Jersey needed to complete the project. Ironically, it may be in the infrastructure area that the new Supreme Court Justices appointed by President Donald Trump will make their mark first, and it may be President Biden who becomes the beneficiary.

Legally, this is an eminent domain case. To build the pipeline, the developer needs to condemn 42 parcels of property in New Jersey that are either state-owned or are private land on which there is a conservation permit. Under the Federal Natural Gas Act, the Federal Energy Regulatory Commission (FERC) is permitted to grant Certificates allowing private pipeline operators to take property by eminent domain.

In 2019, the Third Circuit Court ruled that this grant of eminent domain power by the Federal Energy Regulatory Commission violates the 11th Amendment to the United States Constitution, which grants sovereign immunity to states, shielding them from private lawsuits.

As with so many other issues in the energy field, this lawsuit puts the political parties at odds with their normal positions. The anti-fossil fuel groups are demanding that state's rights be upheld, by permitting the State of New Jersey to block what FERC has determined to be a federal priority. On the other hand, the pro-pipeline groups argue federal supremacy, stating that States should not have the ability to disrupt federal policy in energy development. Into the fray steps the Supreme Court, with the new Trumpian Conservative majority.

The Court actually will be acting on at least three levels. (A possible fourth level concerns the esoteric procedural question of whether the Third Circuit Court of Appeals had jurisdiction to decide the case at all, or whether the case should have been before the Federal Circuit Court of Appeals in Washington, DC, instead. This issue surfaced only recently, when the Supreme Court asked it to be briefed when it agreed to hear the case.)

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The first level will be the specifics of the case. Presumably, this will determine whether FERC's grant of eminent domain authority over public lands is even constitutional.

Even if the Court reverses the Third Circuit decision and allows the developer to seize the 42 parcels (with compensation of course), there still remain numerous ways for New Jersey to disrupt construction. PennEast crosses numerous waterways. As he did with the Northeast Supply Enhancement Pipeline (NESE), New Jersey Governor Phil Murphy could simply refuse to grant Penn East the required Section 401 Clean Streams Certifications to allow such crossings.

This is the second level on which the Supreme Court may be working. Generally, courts do not extend their reach beyond the specific issue at hand – in this case eminent domain. However, given the federal priority regarding oil and gas pipelines that has been completely disrupted over the last five years, it is not beyond imagination for the newly constituted Court to state in its opinion that it will not tolerate these infringements by states into clearly defined federal priorities through improper use of such tactics such as the Section 401 Clean Streams Certifications. Complicating things further, if the Supreme Court makes any mention of this issue at all, it would likely fall under the category of what is called “obiter dictum” – or basically, pronouncements by a court that are not integral to its ruling and thus, that are technically not binding precedent.

Finally, there is the third level, which is the area that President Biden will be focusing on. The President has made it a priority of his Administration to massively increase the creation and use of renewable energy, especially solar and wind power. He also wants to pass a huge infrastructure bill. Under current law and practice, both could be bottled up for decades by court and local governmental challenges, including the issue of access to state and local property necessary to carry out infrastructure rebuilding.

Any delay in carrying out this infrastructure improvement would be quite a turnaround for the proponents of the “Green New Deal.” There are few projects that have actually been fully conceptualized at this time. However, once this does happen, these infrastructure and “Green” projects will then become subject to the same challenges against them as their proponents have made against oil and gas development.

In the topsy turvy world in which we now live, it may ironically be the proponents of the Green New Deal and supporters of President Biden who wind up hoping that the newly styled United States Supreme Court actually votes to reverse the Third Circuit on extremely broad terms, thus paving the way for completion of the PennEast Pipelines (and other pipelines), while allowing for the future Green New Deal projects and infrastructure renewal as well.

#### **ATTORNEYS MENTIONED**

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