

High Court Ruling Won't Stop States From Thwarting Pipelines

By **Yvonne Hennessey and Mark McNamara** (July 9, 2021)

In a much anticipated ruling this June, the U.S. Supreme Court sided with a natural gas pipeline developer in PennEast Pipeline Co. LLC v. New Jersey, holding that PennEast had the power under the Natural Gas Act as the federal government's delegatee to take right-of-way interests in land owned by New Jersey for construction of its 116-mile pipeline through an eminent domain action against New Jersey in federal court.

With the increased opposition to pipeline development and fossil fuel sourced energy, the effect of the court's 5-4 decision is to eliminate at least one, but not all, significant means by which states can block such development.

The Court's Decision

The Natural Gas Act, or NGA, Section 717(f)(h), authorizes private companies to exercise the federal government's eminent domain power via condemnation actions.

PennEast obtained a certificate of public convenience and necessity from the Federal Energy Regulatory Commission, and then brought suit in federal court to take various rights-of-way along the pipeline route including in certain lands owned by the state of New Jersey. It also sought injunctive relief to take immediate possession of such rights-of-way in advance of any award of just compensation consistent with federal procedure.

The district court initially ruled that New Jersey was not immune from PennEast's exercise of the federal government's delegated eminent domain power, denying New Jersey's motion to dismiss on immunity grounds and granting PennEast's requests for a condemnation order and injunctive relief.

On appeal, the U.S. Court of Appeals for the Third Circuit vacated the district court's holding with respect to New Jersey's property interests. While the Third Circuit and the parties all agreed the federal government can delegate its eminent domain power to private parties, it found reason to doubt that the federal government could do so when it concerns an exemption from state sovereign immunity and nonconsenting states.

Further, the Supreme Court had long held that any legislative abrogation of state sovereign immunity by Congress must be unmistakably clear and nothing in the NGA indicates Congress intended such abrogation.

The Supreme Court reversed the Third Circuit. Chief Justice John Roberts, writing for the majority, described that since its founding, the United States has used its power of eminent domain to build a variety of infrastructure projects and has done so on its own and through private delegates, through legal proceedings and upfront takings, and against private property and property owned by the states.

Specifically, the Supreme Court held the federal government can constitutionally confer on pipeline companies the authority to condemn necessary rights-of-way in which a state has



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an interest.

While the Supreme Court agreed nonconsenting states are generally immune from suit, it concluded that states, including New Jersey, had surrendered their immunity from the exercise of the federal eminent domain power when they ratified the Constitution. This included PennEast's suits brought under the NGA because the statute delegates the federal eminent domain power to private parties, including against state-owned property.

This sparked two dissents, including one written by the newest member of the Supreme Court, Justice Amy Coney Barrett, joined by Justices Clarence Thomas, Elena Kagan and Neil Gorsuch. Although recognizing that a ruling in favor of sovereign immunity in this instance "has the potential of making it easier for states to get away with bad behavior" and thwart federal policy, Justice Barrett chides the majority opinion for what she characterizes as the majority's lack of compelling evidence or any basis in history for its holding.

In doing so, Barrett's dissent argued that there is no standalone eminent domain constitutional clause, and the federal government may exercise the right of eminent domain only "so far as is necessary to the enjoyment of the powers conferred upon it by the Constitution."

Given that the NGA was enacted as an exercise of the federal government's power under the commerce clause, Barrett maintains that the right to eminent domain authorized by the NGA should not be treated any differently from any other action under the commerce clause — actions for which New Jersey has not waived its sovereign immunity.

The Decision's Impact on Pipeline Development

As controversy surrounding natural gas infrastructure continues to grow, so have project opponents' efforts to stop them.

This includes states that are opposed to natural gas infrastructure, such as New Jersey in PennEast, and other states like New York that see natural gas infrastructure as a roadblock to their ambitious climate change agenda.

As a result, all too often, project developers have seen a state look to its authority under Section 401 of the Clean Water Act to block a project. More rare, as was the case in PennEast, a state has attempted to thwart a project by refusing to grant a developer the necessary land rights to cross state lands on its pipeline route.

In the latter scenario, the Supreme Court's decision limits a state's ability to block a pipeline. The 5-4 majority, led by Chief Justice John Roberts, confirmed that private project developers are authorized under the Natural Gas Act to condemn state lands. This means that a state has one less tool in its toolbox to halt a natural gas pipeline. While seen as a victory for the industry, it may not be as significant as it seems.

In PennEast, the Supreme Court's decision confirms that it has the legal right to condemn the New Jersey lands. That does not, however, equate to the project moving forward as the pipeline still faces a number of other hurdles.

Indeed, Penn East is still lacking other key approvals to move forward with its proposed pipeline, which originates in Dallas, Pennsylvania, and terminates at Transco's pipeline interconnection near Pennington, New Jersey.

New Jersey has denied a Clean Water Act Section 401 certificate for the New Jersey segment of the pipeline, and Pennsylvania has yet to issue certain permits for the pipeline.

On top of that, the Delaware River Basin Commission, or DRBC, an interstate agency, has yet to grant a permit for the pipeline to cross through the Delaware River basin watershed. And it is unlikely that the DRBC will.

Not only is New Jersey a member of the DRBC along with other anti-pipeline states, but it has a long history of not being a proponent of natural gas development as exhibited by its decision to ban hydraulic fracturing earlier this year. Furthermore, the Supreme Court's ruling will restart a pending legal battle in the D.C. Circuit over the underlying need for the PennEast project, which has been on hold pending the Supreme Court's eminent domain decision.

Industrywide, the decision may not have much of an impact. In the first instance, many states continue to welcome natural gas pipelines to the extent that there is likely no need for eminent domain authority. Indeed, PennEast is one of only a handful of cases where a private party has sought to exercise eminent domain authority against a state under the Natural Gas Act.

Secondly, not all pipelines cross state lands, making eminent domain a nonissue. And, for those pipelines proposed in states with a politically adverse climate, many could be sited to avoid state lands just as they are sited to avoid environmentally sensitive areas, such as wetlands or critical habitat for endangered species.

It remains to be seen on a case-by-case basis, however, if such careful siting of a pipeline could result in greater environmental impacts by crossing sensitive resources that would not otherwise need to be crossed or whether more private lands will be impacted in states opposed to natural gas development.

The Supreme Court's decision in PennEast definitively permits pipeline companies in projects under the NGA to take interests in state lands to construct their pipelines.

However, in those rare instances where a pipeline project requires siting along a route crossing state lands and the state is unwilling to grant those land rights, the Supreme Court's decision in no way eliminates all the means available to a state to attempt to stop a pipeline.

Irrespective of the Supreme Court's decision, states continue to have their Clean Water Act authority and other federally delegated authority they can attempt to exploit in order to block a pipeline. Much litigation has occurred concerning a state's failure to timely act under Section 401, so the industry is unlikely to see many, if any, future waivers.

What has not been fully clarified by the courts is the extent of a state's jurisdiction under Section 401 to deny a project on the merits. The Supreme Court's ruling only underscores the importance of this issue, which is likely to be the subject of future court decisions — that is, if pipeline developers are willing to risk the investment and an uncertain permitting path in states that are obviously anti-fossil fuel.

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