

D I A L O G U E

THE FUTURE OF PIPELINES

SUMMARY

New oil and gas pipeline construction is increasingly controversial, with environmental and indigenous groups warning of leaks and spills, increased reliance on fossil fuels, and infringement upon indigenous land. Recent setbacks to three projects—the Dakota Access Pipeline, Keystone XL Pipeline, and Atlantic Coast Pipeline—reflect shifting legal, economic, and policy pressures facing new construction. On September 30, 2020, the Environmental Law Institute hosted a panel of experts who explored the emerging challenges facing oil and gas pipelines and discussed their future. Below, we present a transcript of the discussion, which has been edited for style, clarity, and space considerations.

Chandler Randol is Manager of Educational Programs at the Environmental Law Institute.

Kamilah L. Jones (moderator) is an Associate at Bryan Cave Leighton Paisner LLP.

Alexandra B. Klass is a Distinguished McKnight University Professor at the University of Minnesota Law School.

Jan Hasselman is a Staff Attorney at Earthjustice.

Thomas C. Jensen is a Partner at Perkins Coie LLP.

Chandler Randol: I would like to introduce today's moderator. Kami Jones is an associate practicing in Bryan Cave's Energy, Environment, and Infrastructure Practice Group. Her experience covers a broad array of legal issues, including wind farm acquisitions, permit analysis and transfer, responses to agency citations and violations, environmental indemnification analysis, and regulatory compliance. Kami received her J.D. from Washington University School of Law, where she was the vice president of the Women of Color Law Society and a staff editor of the *Journal of Law and Policy*.

Kamilah Jones: We have a great presentation prepared for you. First, you're going to hear from Alexandra Klass, a well-published professor at the University of Minnesota Law School. She has expertise in the areas of energy law, environmental law, natural resources law, tort law, and property law, and will provide background on the history of oil and gas permitting, eminent domain, and controversies surrounding pipelines.

You're also going to hear from Jan Hasselman, a staff attorney at Earthjustice's Northwest office in Seattle. In that role, he's litigated a number of regional and national issues, including salmon under the Endangered Species Act (ESA),¹ stormwater pollution, coal-fired power plants, and coal and crude oil terminals. He's going to provide over-

views of the concerns for pipelines moving forward, and a case study of the Dakota Access Pipeline.

After that, you'll hear from Tom Jensen, a partner at Perkins Coie. He has expertise in a variety of topics, such as energy and water pipelines, electric transmission projects, transportation facilities, hydropower and other energy generation assets, and capital-intensive infrastructure projects. He's going to talk about the practical considerations for building new projects, and the Mountain Valley Pipeline project as an example.

Alexandra Klass: I'm going to provide a brief overview of the permitting processes and eminent domain for oil and gas pipelines to set the stage for the rest of our speakers, who will talk in more detail about controversies associated with particular pipeline projects.

It's important to know that interstate oil pipelines and interstate natural gas pipelines are permitted completely differently. We have different levels of government that are in charge. Interstate oil pipelines are regulated almost exclusively at the state level. The only time the federal government gets involved in the actual permits to approve a pipeline is if there's an international border crossing, like the Keystone XL Pipeline. But even in those circumstances, you need approval from every state through which the pipeline travels. So, there are no required federal permits for the pipeline itself (other than specific permits for certain water crossings, endangered species requirements, etc.), and states really vary with regard to what permits or certificates are needed for a pipeline to go through their state.

For instance, in Texas, all you need to do really is check a box saying you're a common carrier, and you can go ahead and build your pipeline. Other states, like Illinois and Minnesota, often have pretty elaborate certificate-of-need requirements, and the public utilities commission (PUC) or the equivalent state agency needs to grant approval. There may be federal permits required for water crossings,

1. 16 U.S.C. §§1531-1544, ELR STAT. ESA §§2-18.

or to deal with impacts to endangered species under existing federal laws, like the Clean Water Act (CWA)² or the ESA, which apply to all projects that have those impacts. But there's no specific required federal permit for the interstate pipeline itself. Instead, you need multiple state permits if you're crossing multiple states.

Interstate natural gas pipelines are totally different. Since the 1930s, these have been regulated at the federal level under the Natural Gas Act (NGA).³ If you want to build a natural gas pipeline, the pipeline operator needs to get a certificate of public convenience and necessity from the Federal Energy Regulatory Commission (FERC). States really don't have any direct veto power or permitting authority over these pipelines, but they can significantly influence the process through authority under other federal statutes, like §401 of the CWA. We see states on the East Coast opposing natural gas pipelines in that way. But there's no direct state permits that are required. It's really the federal government that is in charge.

So, in addition to permits, unless a pipeline is able to get voluntary easement agreements from all the owners of the land that the pipeline is going across, pipelines use eminent domain. Eminent domain is allowed in this country under the U.S. Constitution and under most state constitutions if a project is a public use and if just compensation is paid. We have lots of examples of the government exercising eminent domain—for example, to build highways and roads. Economic development and redevelopment projects are also areas where the government exercises eminent domain, usually at the state or local level.

But then, we have examples where states or the federal government delegates to private entities the right of eminent domain, and they do that by statute. Oil and gas pipelines are an example of that. The U.S. Congress has delegated eminent domain authority to a natural gas pipeline once it obtains the federal certificate of public convenience and necessity. Oil pipelines are generally defined by state statute as a public use. Thus, the oil pipeline can exercise eminent domain, and the same thing works for electric transmission lines. These last two are examples of private use of eminent domain through delegated authority from the state or federal government.

Eminent domain was not a particularly controversial power, except for the landowners who were affected, until about 2005 when the U.S. Supreme Court decided a fairly controversial case called *Kelo v. City of New London*⁴ that had nothing to do with pipelines. It had to do with a local government's use of eminent domain for a redevelopment plan, for economically benefiting the city by creating jobs and increasing tax revenues. The question was whether that was a "public use" under the Fifth Amendment. Earlier Supreme Court cases had said yes, absolutely, it is.⁵

The Supreme Court agreed in this case, but it was a really close decision, 5-4, and there was an amazing back-

lash to the decision throughout the country. More than 40 states amended their state constitutions or changed their statutes to limit the use of eminent domain for economic redevelopment. They said that might be allowed under the Fifth Amendment of the Constitution, but we in this state are going to protect property rights more.

These changes really focused on the government use of eminent domain. It wasn't focused on private-party use of eminent domain at all, so it didn't have any real impact on oil pipelines or natural gas pipelines. The *Kelo* backlash in these states really didn't change these laws, as it was focused on government use and abuse of eminent domain. Remember, this case was decided in 2005, which is important, as I'll explain in a moment.

Two years after *Kelo*, everything changed. That's when we began fracking in the United States and we've now got new sources of oil and gas all over the country and, most importantly, in new locations. At the same time, we see a continuing concern over climate change and the role of fossil fuels. Because of all these new sources of oil and gas and new locations, oil and gas companies needed new energy transport infrastructure to transport these new energy resources, both domestically and now for export. That means more is getting built.

We've got new oil and gas resources down in Texas; the Marcellus Shale in Pennsylvania and on the East Coast; and lots in North Dakota as well. Of the oil pipelines running through the country, not surprisingly, you see that they're very centered down in Texas and Oklahoma, and places that we've had lots of oil and gas resources for a long time. You don't see a lot going through North Dakota other than ones coming down through Canada. It's the same story for natural gas pipelines. A big concentration of these have been built up from the 1940s, 1950s, and 1960s down in Texas and Oklahoma and Louisiana, and then moving out to the East Coast. But you don't see that same center of activity in Pennsylvania and in other places where we now have all these new gas resources.

Because of all this building to address these gaps in infrastructure, pipelines began to create a lot of controversy. All of a sudden, we have new partnerships between environmental groups and private-property rights advocates. They each are opposing pipelines for their own reasons. Property rights advocates are focusing on protecting private-property rights. Environmental groups are focusing more on climate change, and really putting an emphasis now on pipelines because this is new, long-standing infrastructure that locks us in to fossil fuels for many decades. So, we have a common enemy and a lot of resources going toward opposing pipelines. Examples of this include the Dakota Access, Keystone XL, Mountain Valley, Atlantic Coast, and PennEast Pipelines. There are a lot of pipelines that are now under opposition from this new coalition of groups and we are starting to see results.

All of a sudden, there are some state-law moratoria on oil pipeline eminent domain. There was a controversial pipeline called the Palmetto Pipeline, subject to state authority, not federal authority. Georgia and South Carolina both put in short-term bans on using eminent domain

2. 33 U.S.C. §§1251-1387, ELR STAT. FWPCA §§101-607.

3. 15 U.S.C. §717 et seq.

4. 545 U.S. 469, 35 ELR 20134 (2005).

5. See, e.g., *Berman v. Parker*, 348 U.S. 26 (1954); *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 14 ELR 20549 (1984).

for pipelines, not because of climate change concerns or environmental concerns, but to be responsive to property owners in those states. Georgia and South Carolina are not oil- and gas-producing states, so they didn't see the benefits for their citizens.

There have been many federal lawsuits challenging eminent domain and FERC certificates for natural gas pipelines,⁶ which I know the other speakers are going to speak about in more detail. You see an increasing demand that the courts look at the use of eminent domain for pipelines. Is a pipeline designed to export natural gas to Canada? Is that required by the public convenience and necessity? That's the standard under the NGA. Is it really a public use? Or is it not a public use under the Fifth Amendment?

The Jordan Cove liquefied natural gas (LNG) export project is in litigation right now, discussing whether eminent domain can be used for a natural gas pipeline that's going to export LNG.⁷ Is it a public use? Who is the public? Is it the U.S. public? Do exports count? And then there's also a recent decision from the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit over some FERC uses of "tolling orders,"⁸ which basically delayed appeals by landowners and others of FERC certificates. There was a delay of judicial review, while during the same time the pipeline operator was able to build the pipeline. So, the D.C. Circuit essentially reversed earlier case law that had allowed this use. You see courts questioning more and more the ability to build these pipelines and the use of eminent domain for these pipelines.

I want to leave you with a few thoughts. I think about eminent domain as an incentive to encourage private parties to build infrastructure. It's like a tax incentive or any other incentive. Basically, in the United States, incentives are given to private parties to build projects that in other countries are often built by the government itself. So, it's up to states and Congress to determine what types of infrastructure they want to promote through various incentives, and that includes eminent domain.

A state could certainly decide not to allow eminent domain for oil pipelines anymore and use that as an approach. The federal government, Congress, at some point could decide we don't want to build any more natural gas pipelines—or at least we don't want to incentivize it—so maybe we'll get rid of eminent domain for that.

I do have concern over limiting eminent domain too broadly. If we want to transition to clean energy, we're

going to have to build a lot of clean energy infrastructure like renewable energy facilities and electric transmission lines. So, I actually think we should be limiting or eliminating the use of eminent domain for fossil fuel projects and expanding it for clean energy projects. Otherwise, we end up with a no-build situation that does nothing to promote any sort of clean energy transition.

Jan Hasselman: If you're not familiar with Earthjustice, we're a nonprofit law firm. We represent without charge organizations, community groups, and tribes in legal advocacy to protect the environment.

I've had the dubious honor of being involved in several pipeline fights over the past five years or so: the Trans Mountain Pipeline in Canada, the Jordan Cove project in Oregon, and the Bayou Bridge Pipeline in Louisiana, which we successfully enjoined before the U.S. Court of Appeals for the Fifth Circuit overruled us.⁹ And I represent the Standing Rock Sioux Tribe in the fight against the Dakota Access Pipeline.

I first want to provide some context on why these projects have become such a focal point of opposition and controversy and litigation. I live in the West. And for a couple of weeks this summer, my family and millions of other people were blanketed in really unhealthy levels of smoke from the catastrophic wildfires there. This summer, we saw temperatures reach unprecedented heights in large parts of the country. Places in the Midwest and South are seeing 500-year storms and floods every other year. The ice sheets are falling apart. The scientific community is freaking out, because the things that they predicted for 20 years from now are happening today.

We are in a climate crisis. I think we need to get our heads around that. The climate crisis is here. We need to radically shift away from fossil fuel production-consumption immediately. There just isn't any more time for long conversations, long phaseouts; we need to get to this immediately.

Pipelines are controversial, in part, because they are multibillion dollar investments that are intended to last for decades. The Dakota Access Pipeline costs \$4 billion or \$5 billion to construct. That's not a short-term investment. That's not a short-term piece of infrastructure. It's meant to be there for many, many years.

At this point, in light of the climate crisis, it's morally unconscionable to be promoting these multi-decade investments in fossil fuels. I know we're accustomed to speaking a little more politely to each other than that, but I think that's where we are. We're in a crisis and we just have to stop.

There is maybe a belief that the pipeline doesn't actually do anything for production or consumption of fossil fuels except move it from one place to another. That's false. When the U.S. Army Corps of Engineers (the Corps) was permitting the Dakota Access Pipeline, it said it was not going to have any effect on production of oil in North

6. See, e.g., Arianna Skibell & Carlos Anchondo, *With Atlantic Coast Dead, Is This Pipeline Next?*, E&E NEWS, July 8, 2020, <https://www.eenews.net/stories/1063524537>; Nina H. Farah, *Nuns Revive Legal Battle Against Pa. Pipeline*, E&E NEWS, Nov. 13, 2020, <https://www.eenews.net/energywire/stories/1063718395>; Jeremy Dillon, *FERC Punts on Intervention in PennEast Litigation*, E&E NEWS, Jan. 23, 2020, <https://www.eenews.net/eenewspm/2020/01/23/stories/1062159981>; Nina H. Farah, *Judges: FERC "Failed" on Pipeline Approval*, E&E NEWS, Sept. 9, 2019, <https://www.eenews.net/energywire/stories/1061111563/>.

7. See Nina H. Farah & Carlos Anchondo, *If Lawsuits Don't Kill Ore. LNG Terminal, Pandemic Might*, E&E NEWS, Sept. 9, 2020, <https://www.eenews.net/stories/1063713053>.

8. *Alleghany Def. Project v. Federal Energy Regul. Comm'n*, 964 F.3d 1 (D.C. Cir. 2020).

9. See, e.g., Earthjustice, *The Latest on: Bayou Bridge Pipeline*, <https://earthjustice.org/case/bayou-bridge-pipeline> (last visited Dec. 1, 2020).

Dakota. It's just going to get it to market more safely. Well, we knew that was a lie when they said it, and it was clearly a lie after the pipeline came online after that. It's carrying half a million barrels per day and production in North Dakota skyrocketed.

When we were in litigation about closing the pipeline, which the district court did in July, we had a pile of declarations from industry folks saying, if you close the pipeline, production in North Dakota is going to plummet.¹⁰ That it would be a disaster. So clearly there is a relationship between this infrastructure and the production of fossil fuels. The takeaway is that any new major investment in fossil fuel infrastructure is going to be a flashpoint. If someone thinks that they're going to be able to reach agreements and get a big, happy deal around some big pipeline, I think that's a false hope.

Indigenous land is an issue that came to the forefront in the Dakota Access case. I hear some people say, well, that pipeline wasn't on the reservation. That wasn't on Indian land. That's a pretty sensitive issue for my clients. Leave aside the fact that it crosses the Missouri River half a mile upstream of their reservation so that any spill in the pipeline would immediately be their problem. But it's important to understand a little bit of the history.

In the 1800s, the U.S. government signed a treaty with the Great Sioux Nation. The Sioux reserved their land for a substantial portion of the Great Plains and they ceded their claims to the remainder of the continent, in exchange for a promise from the government that that land would be protected in perpetuity for the exclusive use of the Indians. It was not more than a few years later that the U.S. government violated that promise. It did not protect the land and ultimately Congress enacted statutes that stripped most of the land out of that reservation. It stole the land. There's no other word for it. People are still mad about it.

The pipeline crossed land that was part of the original Great Sioux Nation Reservation, but was stolen and is viewed by many as still Indian land. It crossed an area at the place where the Cannonball River intersects the Missouri. It's a place of great cultural and religious significance, a place of prayer and ceremony and burials. But they wouldn't have known that, because they never came and consulted with the Standing Rock or any of the other tribes. They view consultation as a check-the-box exercise. They planned their route, and they came in and said this is where we're going to put the pipeline and asked, do you have anything to say before we get started?

Not surprisingly, that wasn't a particularly satisfying experience for my clients, especially when they found out that the initial route crossed the Missouri River just north of Bismarck, which is a comparatively wealthy and predominantly white community. And that route was rejected because of the risk to the Bismarck water supply of crossing the Missouri River at that location. So they stuck it downstream at the doorsteps of an Indian reservation, one of the poorest communities in the country.

10. See, e.g., Earthjustice, *The Latest on: Dakota Access Pipeline*, <https://earthjustice.org/case/dakota-access-pipeline> (last visited Dec. 1, 2020).

That's textbook environmental racism. It comes in on the heels of this history of government-sponsored dispossession. All of that history catalyzed these movements that we saw in 2016 at Standing Rock, where indigenous communities, not just from all over the country, but all over the world came together to support the Standing Rock in their fight against the pipeline.

The indigenous land issue is not going to be present everywhere, but it's present in a lot of places. We're seeing more and more indigenous-led opposition to these projects. They recognize the risks—pipelines leak and they spill—and if it happens in a place where indigenous communities are tied to the land, that is an existential-level threat.

Let me shift gears and talk a bit about the finances. If folks don't care about climate, if they don't care about indigenous land, maybe they care about money. I think the picture for these investments is looking more and more bleak. If you look at what's happening in the coal industry right now, you get a preview of where oil and gas is heading in the decade ahead. All of the major coal companies have either declared bankruptcy or are getting closed. They've been delisted from the stock exchange. I read an article yesterday that Arch Coal is getting out of coal.¹¹ I don't know what they're going to do, because they're a coal company, but the coal industry is collapsing.

Pipelines are heading for a similar bust. There is a massive overbuild underway. There is not enough consumption to accommodate all of this development. If we are going to get anywhere close to what the Intergovernmental Panel on Climate Change says that we need to be doing in terms of transitioning from fossil fuels,¹² we are going to be walking away from a whole lot of these investments. They're going to be stranded assets. Demand is declining. The production in North Dakota has collapsed prior to any discussion around closing the Dakota Access Pipeline due to COVID-19. A lot of experts think it's not coming back. At the same time, the price for solar and wind keeps dropping faster and faster. It's getting close to being effectively free.

So, if we think about these projects as multibillion dollar investments with decades of financial returns, I don't think that's what is ahead. We're looking at a whole bunch of stranded assets. That gets us to the concept of social license, a concept that's used a lot by my counterparts in other countries, but we don't use it as much here in the United States. It refers to the idea that communities have a say in the companies and projects that are in operation and that affect them. The oil and gas industry is able to operate in part because it has a license from the community and some sort of goodwill with the community in order to do so. That's why you see in Washington that the Shell oil refinery sponsors the Little League team. Their companies do a lot of advertising and charitable donations to help build that social license.

11. See, e.g., Benjamin Storrow, *Coal Giant Moves Away From Fueling Power Plants*, E&E NEWS, Sept. 30, 2020, <https://www.eenews.net/stories/1063715059>.

12. See Intergovernmental Panel on Climate Change, *Home Page*, <https://www.ipcc.ch/> (last visited Dec. 1, 2020).

Well, the social license of the industry is collapsing. Again, in the Dakota Access case, people saw that the only way to get that pipeline built was to push through a largely peaceful opposition movement using militarized force. I think it catalyzed people to make a choice: whose side are you on here?

We're seeing in all these different ways that the community license to these companies is being diminished. One way we see that is the divestment movement. Many thousands of institutions have divested from the oil and gas industry to the tune of trillions of dollars in capital. This isn't small money anymore; whole countries are doing it. Gov. Gavin Newsom recently announced that California will phase out gas-powered cars.¹³

When we look at a lot of these decisions—the Mountain Valley Pipeline, the Dakota Access Pipeline, the Bayou Bridge Pipeline—we're seeing these judicial rulings as well as these state-level rulings blocking new pipelines. Part of that arises from the context of a diminished social license to these companies, that they have overplayed their hand and communities are fighting back.

Politics looms pretty large, there's no question about it. There are very different philosophies, if you want to call it that, between the two major parties. We have a very big election coming up. The trajectory of new fossil fuel infrastructure like pipelines is going to be greatly influenced by what happens in the election.

But even if the pro-fossil fuel, pro-pipeline party remains in a position of power, we are seeing states take the lead where the federal government has failed in terms of adopting policies to shift the switch from fossil fuels. We are seeing companies take the lead, recognizing this is the way the world is going.

So yes, there is a rocky road for pipelines ahead. I think it's the bottom line. This should be the time to stop building new pipelines and figure out a new way forward.

Thomas Jensen: I'm going to start with a couple of disclaimers. The first is that I'm not speaking on behalf of any of my firm's clients, or the firm itself. I'm speaking simply for myself. The second disclaimer is really—and I'm repeating Jan's penultimate point—that the immediate and near- and long-term future is ripe with all sorts of possibilities because of the election and the universe of potential consequences there. We've all learned to be rather cautious about making predictions. So, I'll exercise some caution here today while trying to take this as far forward as I can.

For anybody who is considering the development of a gas or oil pipeline, the starting point is to anticipate a highly sophisticated, determined, well-resourced opposition. This is especially true for projects outside of the fuel patches, projects in blue states, in coastal areas—which

are only part of the country, but they are the areas where domestic and export markets are the greatest. They're not the only markets, but they're the greatest and where there's the greatest potential for growth.

Pipeline opponents are represented by excellent legal and strategic counsel. They are backed by highly skilled public affairs colleagues, and by political organizations. There is absolutely no doubt in my mind that if ever there were a time when there was a talent mismatch between the investment community, development community, on the one hand, and the opponents on the other, that time is well past. And Jan, you and your organization are at the forefront of many extraordinary efforts and successes in your advocacy.

I'm going to focus on natural gas projects in part because I'm more familiar with them at this point in my career. Also, because Jan and Alex have pointed out that, for the most part, oil pipelines are creatures of state law with some overlay of federal permitting. In my view, for project planning done right—and I'm talking about the internal planning when people set off on a course to organize capital around a particular piece of pipeline infrastructure—you have to put substantial emphasis now on an honest appraisal of the political and regulatory risks, the stakeholder interests and their leverage. It's not enough to listen to the traditional voices on Wall Street or just to the engineers. Building a pipeline is a campaign. It is not project development. It is a campaign, with a campaign on the other side as well.

Many of my most experienced colleagues in the profession have been expressing this view for some time, admittedly with mixed results. Internal business cultures vary greatly. There are those who operate quite happily and comfortably from a “damn the torpedoes” perspective. You could say they have a high degree of risk tolerance. Others emphasize upfront and continuing diplomacy, and focus on the social license to operate.

If you look across the landscape for pipeline projects in the country right now, especially gas projects, you can see a range of examples of these different approaches, a range of experiences from the developers and the opposition. We can make predictions based on what we see around the country, including examples that both Alex and Jan have touched on. Let me make some predictions or point to things that I think have some predictive power.

First is that notwithstanding the controversies in the shifting scientific, economic, and cultural understandings and norms, FERC's NGA siting authority is an extremely powerful tool for pipeline developers. It is the law at this point. It is written to incentivize development of gas infrastructure and there is not a countervailing law. As in many situations, sometimes you have laws that are in tension with each other on a particular issue. There really isn't anything in tension with the NGA support for pipeline development.

It's relevant for a number of reasons. I think the best way to illustrate it is to think of any individual pipeline project permitting occurring under a big tent, a circus tent admittedly, but a big tent. And that tent is the National Environ-

13. Press Release, Office of Governor Gavin Newsom, Governor Newsom Announces California Will Phase Out Gasoline-Powered Cars & Drastically Reduce Demand for Fossil Fuel in California's Fight Against Climate Change (Sept. 23, 2020), <https://www.gov.ca.gov/2020/09/23/governor-newsom-announces-california-will-phase-out-gasoline-powered-cars-drastically-reduce-demand-for-fossil-fuel-in-californias-fight-against-climate-change/>.

mental Policy Act (NEPA).¹⁴ In the middle of that tent is the NGA. It is the long stout pole in the middle of the tent.

Around the perimeter of the tent, you've got the CWA, ESA, National Historic Preservation Act, Coastal Zone Management Act (CZMA),¹⁵ Clean Air Act (CAA),¹⁶ National Forest Management Act (NFMA),¹⁷ Federal Land Policy and Management Act (FLPMA),¹⁸ Mineral Leasing Act, issues of environmental justice, and, as we saw recently in the *Cowpasture* case,¹⁹ the National Trails System Act²⁰ and the Weeks Act.²¹ Those are all the shorter, skinnier poles around the perimeter of the tent. Gas pipeline opponents have become extremely proficient at attacking each of the tent poles. But they're finding their greatest successes around the perimeter with the shorter poles.

A recent example that has been much in the press and trade press and SCOTUSblog would be the *Cowpasture* litigation involving the Atlantic Coast Pipeline and, incidentally, the other main gas pipeline project coming out of the Marcellus and the Eastern Seaboard, the Mountain Valley Pipeline,²² where the weak pole in the tent was the National Trails System Act. The U.S. Court of Appeals for the Fourth Circuit was persuaded on the basis of essentially an unbriefed argument, a page and a quarter in a reply brief, that the National Trails System Act, in creating the Appalachian Trail, created parkland that could not be used for a right-of-way issued under the Mineral Leasing Act.²³ The Supreme Court reversed that opinion. But it's an extraordinarily poignant example of how a very peripheral issue and piece of law can become a significant impediment to moving forward with a project still held up by the central pole in the tent under the NGA.

Now, why is that the case? Why are project opponents becoming as successful as they are with their challenges? Each of the prior panelists has spoken to it, but there is clearly a very high level of skepticism from the courts about agency decisionmaking for the projects currently in litigation, which translates into a very significant loss of deference that one would ordinarily see—deference on even very technical, very minute issues.

Why? In part, I think it's a result of some of the criticism leveled against the judiciary by the president, which has been at some points quite personal and with predictable results. I also think there have been some problematic agency decisionmaking processes with hurried or inadequate documentation. But fundamentally, the problem that is shifting the outcome of the courts is the 800-pound gorilla that is made up of the unresolved questions about climate and greenhouse gas policy. The courts are

alert to the fact that, at this point, there is tension between those unanswered questions about what the country and the world are going to do around fossil fuel emissions and greenhouse gas policy, and the laws and policies of the federal government that promote new development of infrastructure with greenhouse gas-related consequences.

Looking ahead, without trying to make predictions about where the election will come out, one of the greatest variables to look for regarding the fate of future pipelines is whether FERC is going to choose, or be forced to choose, to begin finding ways to make it economically prudent or attractive for pipeline developers to address the net greenhouse gas emissions from construction or operation of their projects. And I say construction or operation of the projects, to separate those from the separate question of whether national policy will put a price tag on emissions from the gas once it's burned.

To illustrate the point, when regulated electric utility infrastructure is built, mitigation investments are often profitable. In the case of pipelines, because there's a guaranteed rate of return for regulated utilities, there's nothing similar really in the gas regulatory arena. But it's possible; we've seen arguments that FERC could do something like that. Will they? I don't know.

The second greatest variable looking ahead will be the fate of the new NEPA regulations.²⁴ Clearly, they were written to make it easier for project developers of all sorts to complete the NEPA process and all the affiliated permitting faster and with less risk, and to forestall or defend against litigation. Are the NEPA regulations going to survive current or future litigation or survive the election? Who knows? But it's a key variable.

Irrespective of the outcome of the election, I think the greatest prospects for success in new developments will lie with developers who take the initiative to demonstrate an awareness and at least some acceptance of the emerging social consensus around greenhouse gas emissions, around climate change, including the social and environmental impacts of climate change in those areas through which pipeline projects are constructed; not the delivery point, not the source points, but in between. Even those developers will struggle with the forces that I described earlier in opposition. There's no reason to think those forces will diminish. It is a very challenging environment, but not an impossible one. But it certainly is a cautionary environment at this point.

Kamilah Jones: We have a question directed at Jan. Do you think that some of the recent legal and financial challenges facing pipeline projects foreshadow repeats on future projects or were these unique challenges?

Jan Hasselman: Every project is unique. I don't think there's any question about that. The specifics of where they're located, what communities are affected, what the

14. 42 U.S.C. §§4321-4370h, ELR STAT. NEPA §§2-209.

15. 16 U.S.C. §§1451-1466, ELR STAT. CZMA §§302-319.

16. 42 U.S.C. §§7401-7671q, ELR STAT. CAA §§101-618.

17. 16 U.S.C. §§1600-1687, ELR STAT. NFMA §§2-16.

18. 43 U.S.C. §§1701-1785, ELR STAT. FLPMA §§102-603.

19. *United States Forest Serv. v. Cowpasture River Preservation Ass'n*, 140 S. Ct. 1837, 50 ELR 20148 (2020).

20. 16 U.S.C. §§1241 et seq.

21. 16 U.S.C. §500.

22. Editor's Note: Thomas Jensen serves as outside regulatory and litigation counsel to Mountain Valley Pipeline.

23. *Cowpasture River Preservation Ass'n v. Forest Service*, No. 18-1144, 48 ELR 20204 (4th Cir. Dec. 13, 2018).

24. Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act; Final Rule, 85 Fed. Reg. 43304 (July 16, 2020), available at <https://www.govinfo.gov/content/pkg/FR-2020-07-16/pdf/2020-15179.pdf>.

ecological conditions are, and what permits they need. Look at the Mountain Valley Pipeline that got hung up over an ESA consultation involving the rusty patched bumble bee, which although that is just a delightfully named critter, my suspicion is that it wasn't a bunch of die-hard rusty patched bumble bee aficionados that led the movement against the pipeline. That impact on the bee provided one of the poles in the tent that Tom was talking about. I think that analogy is really helpful, providing an opportunity to kick out one of the poles in the tent.

What we do see are some commonalities, such as a likelihood of being highly organized, a highly expert opposition that will find whatever regulatory opportunities to bring challenges alongside all of the public messaging and public advocacy.

Kamilah Jones: Our next question is for Professor Klass. You noted that eminent domain is an important tool for renewable energy. Could we see similar environmental justice concerns, specifically for indigenous communities, with increased renewable infrastructure?

Alexandra Klass: That's a good question. Any large project is going to have environmental impacts and environmental justice impacts potentially. It depends how you build it and where you build it, whether we're talking about an electric transmission line or a wind farm or a solar farm. To be clear, eminent domain is rarely authorized for power facilities themselves, at least not renewable ones.

Typically, at least now, there's no right of eminent domain to build a wind farm or a solar farm. There's no need for that, because it's in one spot. It might be a large spot, but you're not worried about assembling thousands of small different parcels of land like you do for a natural gas pipeline or an oil pipeline or electric transmission line that's going to move across multiple states.

In general, you need to follow all the environmental laws and work with landowners to figure out where the resources are, the particular areas for sun or wind. And typically, landowners are very much in favor of having the actual energy generation projects on their land. They often get significant payments for that, and these are often in agricultural areas where these additional payments become a huge part of landowner income and there's also very valuable tax incentives for local communities.

What gets tricky is when you are building the energy transportation infrastructure, and this is true for an electric transmission line or an oil pipeline or a gas pipeline, where those aren't paid in the same way. Landowners aren't compensated in the same way. You maybe have a one-time easement payment. Landowners and communities don't always see why it's to their benefit to transport an energy resource, whether it's oil, gas, or wind, from a different state through their state to another state. You're not the exporting community; you're not the importing community; you just have the infrastructure in the way.

I think it's super important. Again, this is true for electric transmission lines, oil pipelines, and gas pipelines to really work with those communities early on. And there's

great examples of some transmission lines that have worked with local communities, including tribal communities, to get projects built and doing that early as opposed to just saying, I'm coming in here and using eminent domain, so you, the community, or you, the landowner, don't have any say in the matter so you might as well just sign an easement agreement.

For instance, the Great Northern Transmission Line—not the Northern Pass Transmission Line, which was very controversial on the East Coast—was built very recently to bring hydropower from Manitoba Hydro down to northern Minnesota in Minnesota Power's territory. It went through a lot of tribal lands, both in Canada and the United States. It also needed a border crossing permit from the U.S. Department of Energy. Minnesota Power was really smart about how they went about meeting with communities, meeting with landowners, and getting real support for that project. It was built relatively quickly for a project like that.

I think that can often be a problem for all types of infrastructure projects. But the bottom line is some of these same issues come up with regard to renewable energy projects as well. So, I think that's why developers need to be very careful about where they build them. Renewable energy projects do have the benefit. There can still be opposition from environmental groups with regard to a particular location of a project because it impacts endangered species or other various aesthetic values. That opposition often remains. But at least renewable energy projects can be part of the solution in moving towards a clean energy transition which can sometimes mitigate those concerns.

With a natural gas project or an oil pipeline project, and Jan mentioned this and I did as well, this is billions of dollars of long lived fossil fuel infrastructure. Once it's built, it's going to get used, and it really does have the potential to lock us in to continue to use fossil fuel for decades. We don't have the ability to do that with all of our climate disasters in this country.

Kamilah Jones: We have another question for Jan. You mentioned the role of states in limiting pipeline production. What actions are states taking to do this?

Jan Hasselman: Again, the not-useful answer is that it depends. The first pivot point is whether we're talking about oil or gas. One of the first things Professor Klass pointed out was the very different regulatory regimes attendant to each of those. Crude oil pipelines are really primarily features of state law. To be honest, when it comes to trying to convince North Dakota or Texas to say no to a pipeline, that really is kind of the tough lift. Those are petro states, that's what they do.

But we have seen states like New York and Washington use their authorities in different ways—either state law or particularly the local use of §401 of the CWA, which applies even in the case of FERC-regulated gas pipelines. Section 401 requires a certification from the state that the project will comply with state water quality standards.

We've seen some high-profile examples in the past three years of denials of §401 certifications.

Here in Washington, one that I'm very familiar with was not a pipeline; it was a coal export terminal. It invoked the findings of a state-level NEPA analysis to deny a §401 certification with respect to many impacts that don't really have too much to do with water quality. That is being litigated through the state and federal courts.²⁵

But states have shown that they have been willing to use those authorities aggressively and creatively. New York State denied a certification for the Constitution Pipeline under §401. That was upheld in the federal courts.²⁶ Not surprisingly, we're seeing a backlash to that. The Donald Trump Administration, in addition to seeking to gut the NEPA rules, is seeking to weaken the ability of states to use those §401 authorities. That's being litigated, too.²⁷ The election will be one factor that determines that.

Alexandra Klass: Can I add something? Jan talked about what states are doing through §401 of the CWA to try to stop some natural gas pipelines on the East Coast. Jan is absolutely right that in states that have a big oil production economy, like North Dakota and Texas, it's very difficult to see any real state-law changes to oil pipelines. But it's the states that the oil pipeline is going through, which don't necessarily have an oil production economy, where you see those tensions and that opposition—for instance, the Georgia and South Carolina examples that I gave.

You also see a lot of litigation and disputes over oil pipelines in Minnesota, because you have pipelines that are going from North Dakota to refineries in Minnesota, Wisconsin, and Illinois. There's lots of litigation going on right now in my state of Minnesota over the Enbridge Line 3 pipeline, which is right now going up to the Minnesota Court of Appeals.²⁸ The PUC approved the project, but the state agency, the Minnesota Department of Commerce, actually recommended against the project. They're on the other side.

So, the attorney general's office and the state are going to have to represent both sides of this in the Minnesota Court of Appeals because there's the PUC on one side and

the Department of Commerce on the other. The Department looked at this and said, we don't need this oil pipeline; there's no need for it in the state and therefore the PUC was wrong in granting that certificate.

I think that's where you see some of the pushback, in the energy transport projects like pipelines that have to cross multiple states. All states are not necessarily on board. And you see that play out either through legislation or through various state agency opposition to those projects.

Kamilah Jones: We have another question that's open to the panel. Do you see any significant difference in the difficulty of permitting replacement projects, for example Enbridge's Line 5 in Michigan, versus wholly new capacity like Mountain Valley?

Jan Hasselman: I'm sure each of us would have some thoughts. I hate to keep coming back to it, but it depends, it really depends. I'm trying to think how this would play out in a regulatory context.

With a crude oil pipeline like Dakota Access, if you were replacing that my guess is that the Corps could authorize water crossings and easements with a pretty streamlined permitting procedure relative to a brand new pipeline. It might be easier to make the case that there are limited environmental effects of a replacement pipeline compared to a new one. So it might be easier to replace.

The Line 3 pipeline in Minnesota is a replacement project, but you don't see the level of opposition being particularly diminished. In my experience, people understand that a replacement pipeline essentially means you're taking a pipeline that's reached the end of its life and you're extending it for another 50 years. I think you'll still see the same level of opposition, but I'm sure my co-panelists have a more coherent response than that.

Alexandra Klass: It depends on, as Tom talked about, the different poles in the tent. Another way to think about it is different pressure points. Where are the pressure points in a project? Anytime you need a new permit for something, there's an opportunity to challenge that—to challenge the environmental review associated with it, to look again at endangered species. Maybe the route is going to change, which is an issue with the Minnesota Enbridge Line 3 pipeline.

Anytime there needs to be a new permit, new triggering of environmental review, new opportunity for input, there's going to be an opportunity for opponents of that project to challenge it—to challenge it at the agency level, to challenge it at the court level. I think replacement projects provide those same opportunities as a new project, so long as you have those pressure points and the ability to challenge an agency action.

Thomas Jensen: I'm going to take a somewhat contrary view. I think a replacement project enjoys significant advantages, both in the law and in the culture, if you will. People are most resistant to change. People grow used to what they see or have grown up around and learned to live with. So,

25. See, e.g., Earthjustice, *Stopping Coal Exports in Washington State*, https://earthjustice.org/our_work/cases/2010/challenge-to-washington-state-coal-export-facility-permit (last visited Dec. 1, 2020).

26. *Constitution Pipeline Co. v. New York State Dep't of Env't Conservation*, No. 16-1568 (2d Cir. Aug. 18, 2017).

27. Press Release, Earthjustice, Tribes and Environmental Groups Sue Trump Administration to Preserve Clean Water Protections (Sept. 1, 2020), <https://earthjustice.org/news/press/2020/tribes-and-environmental-groups-sue-trump-administration-to-preserve-clean-water-protections#:~:text=Under%20Section%20401%20of%20the,or%20to%20reject%20them%20altogether>.

28. See, e.g., Mike Hughlett, *Minnesota Regulators Approve Permits for Enbridge Pipeline*, STAR TRIB., Nov. 12, 2020, <https://www.startribune.com/2-6b-enbridge-pipeline-construction-a-go-after-permits-ok-d/573056841/>; Mike Hughlett, *Complaint Says Enbridge's New \$2.6 Billion Pipeline Is No Longer Necessary*, STAR TRIB., Oct. 27, 2020, <https://www.startribune.com/new-complaint-filed-against-enbridge-regarding-capacity-in-current-pipeline-system/572890911/>; Mike Hughlett, *Minnesota Department of Commerce Again Appeals Approval of Enbridge Pipeline*, STAR TRIB., Aug. 19, 2020, <https://www.startribune.com/minnesota-department-of-commerce-again-appeals-approval-of-enbridge-pipeline/572155352/>.

the intensity of opposition, a place-based opposition, the “not in my backyard” (NIMBY) factors are considerably reduced. That translates into the amount of support for litigation, the amount of political reaction, and so on, that are all meaningful variables here.

This isn't quite the same point, but it's related. Many federal land use laws and policies encourage collocation of infrastructure. Meaning, if you have a new pipe, put it next to an old pipe. If you need to expand a pipe, do it in your existing right-of-way. There are a number of tests or presumptions in federal land law, and in FERC policy—in the case of a gas pipeline—that encourage use of existing rights-of-way for a replacement and usually improvement or expansion of existing infrastructure. On a scale of 1 to 10, if a new project is a 10, a replacement is a 7 or a 6.

Alexandra Klass: I think that's a fair point. Certainly, a sort of one-to-one replacement does have the benefits that Tom mentioned. I think once you're doing a replacement and expansion in terms of capacity, which is what you see with Enbridge Line 3 and some of these other projects, then it ratchets up even a little bit more for some of the reasons that Jan said, because you're extending the life. But in terms of the NIMBY issues and the place-based issues, I agree with Tom's points on that.

Kamilah Jones: We have one final question for the panel. If a pipeline developer approached you, what would you tell them was sufficient consideration of social license and climate issues to give them a reasonable chance of success?

Thomas Jensen: I don't know, frankly. I'm going to cop out because it's 35 days away from an election that's going to determine the answer to that question for the next four to five years, at a minimum. Right now, I think nobody is coming to lawyers saying, how do I build a new pipeline, because they're waiting to see how the election comes out.

They're also waiting to see the fate of some of the projects that are in development, including the one I'm working most closely with, Mountain Valley, where we're 90+% in the ground and, in the past week-and-a-half, most of our permits were reissued or approvals reissued, and we're looking at completing the final U.S. Forest Service NEPA process in December. We'll all see over the course of the coming months how the opposition to Mountain Valley Pipeline plays out in the context of the company's response to the orders from the Fourth Circuit directed to Mountain Valley and also at the former similar project, the Atlantic Coast Pipeline, which was challenged by many of the same parties on similar or twinned theories of law.

Ask me that question in January, and I might have a better answer for you. If a client came to me saying, I want to build a project, I'd say let's wait. Let's see.