

States Advance New Penalties for Disrupting Pipeline Operations

States and Local Groups Push back against Trump's Support for Pipelines

Industry Insight

To overcome protests against oil and gas pipelines, at least 8 states are advancing bills creating new penalties for disrupting pipeline operations. Despite the Trump administration's moves to support pipeline developers, the opposition - consisting of environmentalists, landowners, and a few state governments - has dramatically slowed down some projects.

Main Trends

Protests and Pushback



Strong protests against the controversial Dakota Access pipeline in Standing Rock through 2016 signified the growing public resistance to fossil fuel infrastructure, but also prompted a series of anti-protest measures. In January, American Legislative Exchange Council issued model legislation following Oklahoma's laws cracking down on pipeline protests. In February 2017, North Dakota issued an Executive Order (2017-01) directing mandatory evacuation of the Dakota Access pipeline protest camp. **Several state lawmakers have started to crack down on pipeline protests** creating new penalties for disrupters.

Ballooning Litigation

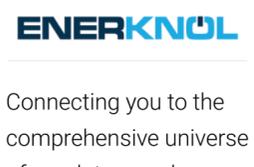


Although ballooning litigation against pipeline projects seems to have some traction in courts, **there haven't been a lot of wins for opponents.** The growing controversy indicates the increasing scrutiny of every step in the pipeline approval process. The recent string of split pipeline approvals by the Federal Energy Regulatory Commission indicate the **need to broaden the scope of environmental reviews** required under NEPA for pipeline projects and other energy infrastructure.

Criticism of FERC



Recent FERC approvals have drawn **sharp criticism from environmental groups**, with Sierra Club calling it a "rubber stamp" for projects that have raised widespread concerns and opposition. Notably, on March 14, FERC reinstated certificate authorizations for the Southeast Market Pipeline Project responding to a court ruling to redo the environmental review which failed to consider the indirect environmental effects of burning the transported natural gas in power plants. In December 2017, FERC Chairman Kevin McIntyre announced that **the agency plans to review the permitting process and procedures for natural gas pipelines.** According to an Analysis Group report issued in November 2017, **FERC has rejected only two out of the more than 400 pipeline applications received since 1999**, when it last updated its pipeline review process.



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ACCESS

#1: Bills Aimed at Curbing Protests against Pipelines

- WV SF 0074** (Passed Both Chambers | 15 Mar, 2018): Would create crimes of trespassing on critical infrastructure and impeding critical infrastructure.
- CO SB 17-035** (Passed one chamber | 12 April 2017): Would include placing another at risk of death or serious bodily injury as part of the crime of tampering with equipment associated with oil or gas gathering operations, and would increase the penalty from a class 2 misdemeanor to a class 6 felony.
- OK HB 1123** (Enacted | 03 May, 2017): A person who willfully trespasses or enters a critical infrastructure property, upon conviction, is guilty of a misdemeanor punishable by a fine of \$1,000 or a six-month imprisonment, or both.
- LA HB 727** (Introduced | 6 April 2018): Would broaden the definition of critical infrastructure to include oil and gas pipelines and create a crime of conspiracy to engage in unauthorized entry of critical infrastructure.
- IA SF 2235** (Passed Both Chambers | 3 April 2018): Would create the crime of committing sabotage of critical infrastructure including oil and gas pipelines as a Class B felony punishable by up to 25 years confinement.
- OH SB 250** (Introduced | 28 Feb, 2018): Would prohibit criminal mischief, criminal trespass, and aggravated trespass on a critical infrastructure including oil and gas related facilities.
- PA SB 652** (Introduced | 27 Mar, 2018): Would grade as misdemeanor the offenses of entering critical infrastructure facilities with the intent to willfully damage, destroy, vandalize, deface, tamper with equipment or impede or inhibit operations, defy an order to leave, and conspire with another person to commit a prohibited act.
- MIN HF 3693** (Introduced | 29 March 2018): Would create liability and vicarious liability for trespass to critical infrastructure including pipelines; would create a crime for recruiting or educating individuals to trespass on or damage critical infrastructure.

#2: Split Decisions and Dissents at FERC

Given FERC's track record, recent FERC approvals have called attention to the **commission's divided approach to assess greenhouse gas emissions.**

- PennEast**: In the January 19 decision approving the PennEast pipeline project (CP15-558-000), Commissioner Glick dissented, questioning the need for the pipeline and that the commission must consider additional evidence in determining the need. The commission relies on precedent agreements with to conclude that the project is needed, but in this case, PennEast's affiliates hold more than 75 percent of the subscribed capacity.
- Birdsboro**: In the March 15 decision approving (CP17-409-000) DTE Midstream Appalachia's Birdsboro Pipeline Project, Commissioners Glick and LaFleur disagreed with the conclusion that the social cost of carbon is not an appropriate tool for estimating the impacts of a specific project. They also expressed concerns with the commission's new policy on being less flexible with untimely interventions saying that it could adversely impact landowners and community organizations that may not have enough resources to keep up with every docket. In a recent rehearing order (CP16-4-001) involving Tennessee Gas Pipeline Company's Orion Pipeline Project, the commission said that it will be "less lenient in the grant of late interventions."
- Atlantic Coast/Mountain Valley**: In the October 13, 2017 decision approving the Atlantic Coast (Docket No. CP15-554-000) and Mountain Valley (Docket No. CP16-10-000) pipeline projects, Commissioner LaFleur dissented, saying that FERC should balance the collective environmental impacts with the economic need for the projects given their common location and destination markets. LaFleur called for consideration of a fuller record to better balance environmental issues, including downstream impacts, with the project need and its benefits, and also expressed support for a generic proceeding to determine how FERC evaluates need. The need for these pipelines is based on precedent agreements demonstrating that they will be subscribed, but LaFleur noted that one of the projects has agreements for about 13 percent of its capacity, with the remainder unknown and to be determined by price differentials across markets.
- Southeast Market**: In the March 14 decision reinstating authorization for the Southeast Market Pipeline (Docket Nos. CP14-554-000, CP15-16-000, and CP15-17-000), Commissioner Richard Glick dissented and Commissioner Cheryl LaFleur dissented in part. Glick noted that the commission failed to fulfill its duties under the Natural Gas Act and National Environmental Policy Act by refusing to use the social cost of carbon in the environmental review or even assess the emissions impact. LaFleur agreed that the project is needed to deliver gas to downstream customers but disagreed with the assertion that quantifying greenhouse gas emissions cannot help determine public interest.

#3: Recent Setbacks and Successes for Pipelines Nationwide

- On January 25, South Dakota state House Democrats including Shawn Bordeaux and Republican Ryan Maher introduced draft legislation (HB 1223) that would impose a moratorium on the construction of new oil pipeline infrastructure in the state. TransCanada Corp's Keystone Pipeline leaked 210,000 gallons of oil in November of the northeast part of the state, marking the project's largest release to date.
- The Colorado Oil and Gas Conservation Commission issued stricter rules for installing, testing and shutting down oil and natural gas flow lines following a fatal accident last spring caused by a leaking pipe.
- On March 15, the Fifth Circuit Court of Appeals reversed a federal court's preliminary injunction halting work on the Bayou Bridge pipeline in Louisiana. The decision will allow construction to proceed while Bayou Bridge Pipeline LLC appeals the injunction.
- On March 16, The Pennsylvania Department of Environmental Protection issued a notice of violation to Sunoco Pipeline LP, a unit of Energy Transfer Partners LP, after drilling fluids from its 350-mile Mariner East 2 natural gas liquids pipeline were released into a creek in the southeastern part of the state, the third such spill in the area.
- On January 11, FERC rejected Constitution Pipeline's request (CP18-5-000) to invalidate the New York Department of Environmental Conservation's (NY DEC) denial for a Clean Water Act permit for the project. The NY DEC denied the permit in April 2016 citing inadequate information to confirm compliance, dealing a setback for the project approved by FERC in December 2014. Last August, the Second Circuit Court of Appeals upheld the NY DEC denial.
- On February 1, the New Jersey Department of Environmental Protection informed PennEast Pipeline Co. LLC that it will have to re-submit a new application for a freshwater wetlands permit for the natural gas link because the original application was incomplete and had been dismissed.
- On February 2, the U.S. Court of Appeals for the District of Columbia Circuit dismissed a request by the environmental group Appalachian Voices to suspend pre-construction activities for the 300-mile, \$3 Billion Mountain Valley Pipeline, owned by EQT Midstream Partners LP, and NextEra US Gas Assets LLC, Con Edison Transmission Inc. The court denied FERC's request to throw out the challenge, and the merits of the project will be heard by a new panel. The case is Appalachian Voices v. FERC (17-1271).

#4: Prominent Cases: Rover, Keystone XL, and Dakota Access

- Setback in West Virginia**: On March 5, the West Virginia Department of Environmental Protection ordered Energy Transfer Partners LP to halt construction until a full inspection is undertaken following its failure to provide notification of more than a dozen environmental violations. The 713-mile, \$4.2-billion link has incurred dozens of violations and has had operations suspended over failure to comply with rules. Rover is expected to be in full service by the end of the first quarter of 2018, according to a project website.
- Trouble over Landslides**: On February 22, the Ohio Environmental Protection Agency blasted Energy Transfer Partners for failing to provide notification of over two dozen landslides along the Rover natural gas line that are said to pose a "serious threat" to the environment. The agency ordered Energy Transfer to report on the "land slips" and coordinate with the U.S. Army Corps of Engineers and U.S. Fish and Wildlife Service on additional measures to take. The 713-mile, \$4.2 billion link has drawn heightened scrutiny from regulators and has had construction suspended after incurring over a dozen environmental violations. Rover is expected to be in full service by the end of the first quarter of 2018.
- Hotly Debated**: Keystone XL has been the most highly debated pipeline in U.S. history. TransCanada submitted its first Presidential Permit application for the proposed cross-border pipeline project in September 2008. President Obama denied the permit in January 2012, citing environmental concerns posed by the pipeline route through Nebraska's Sand Hills region. Subsequently, TransCanada advanced the southern leg of the pipeline — Gulf Coast Project — which did not require a presidential permit as it does not cross an international border. In May 2012, TransCanada filed a new application for Keystone XL with a revised route. In January 2013, Nebraska Governor Dave Heineman approved TransCanada's revised route, sending the project back to the State Department for review, while opponents filed a lawsuit claiming the state law used to review the revised route was unconstitutional.
- In January 2014, the State Department released its Final SEIS for the proposed pipeline, finding that approval or denial of the pipeline would not affect the rate of Canadian oil sands extraction or U.S. refineries' heavy crude demand and hence the pipeline is unlikely to have a significant effect on emissions. In February 2014, a Nebraska court ruled that the law used to approve Keystone XL was unconstitutional, but in January 2015, the Nebraska Supreme Court struck down the lower court decision. In March 2015, Obama vetoed legislation to approve the Keystone XL pipeline, and in November 2015 rejected the pipeline permit saying it would not make a meaningful long-term contribution to the economy. In January 2016, TransCanada announced that it has filed a claim under NAFTA to recover more than \$15 billion in costs and damages that it has suffered due to U.S. violation of NAFTA obligations.
- Trump's Support**: In January 2017, President Trump issued an executive action to advance the controversial Keystone XL pipeline and in response, TransCanada reapplied for a presidential permit. In February 2017, TransCanada filed an application with the Nebraska Public Service Commission (NE PSC) seeking approval for the pipeline route through the state.
- In March 2017, the State Department issued a Presidential permit authorizing TransCanada to construct, pipeline facilities at the U.S.-Canadian border in Phillips County, Montana for crude oil transport. TransCanada announced it has discontinued its claim under Chapter 11 of the North American Free Trade Agreement (NAFTA) and will end its U.S. Constitutional challenge.
- In November 2017, NE PSC approved an alternative route to construct the 280-mile Keystone XL oil pipeline, marking the end of an over nine-month long legal process.
- Connecting Bakken**: The proposed Dakota Access Pipeline is \$3.8 billion, 1,172-mile pipeline that would connect the Bakken and Three Forks oil production areas in North Dakota to a crude oil terminal in Illinois. The pipeline is expected to transport approximately 470,000 barrels of oil per day, with a capacity of up to 570,000 barrels. Energy Transfer Partners applied for permits in December 2014 was approved by South Dakota Public Utilities Commission (HP14-002), North Dakota Public Service Commission, Iowa Utilities Board, Illinois Commerce Commission (14-0754), and U.S. Army Corps of Engineers.
- Protests and Resolution**: The Standing Rock Sioux Tribe, which has strongly protested the DAPL route due to the threat posed to their water supply. In September 2016, a federal district court in Washington DC denied the Tribe's motion for a preliminary injunction. In December 2016, the Department of the Army denied the approval of easements under Lake Oahe for the proposed pipeline based on the need to explore alternative routes that would be accomplished through an EIS with public input and analysis. The current proposed route would cross Lake Oahe, an Army Corps of Engineers project on the Missouri River.

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