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## LAW

# 2021 legal fights will test Biden energy agenda

[Niina H. Farah](#), E&E News reporter Published: Friday, January 15, 2021



From pipeline battles to President Trump-era changes to the Migratory Bird Treaty Act, federal courts will be busy this year hearing a slew of energy-related cases. Jordan Cove LNG; Manjith Kainickara/Flickr (pelican); Tony Webster/Flickr (pipeline)

Legal experts will be watching to see what happens with courtroom battles over major oil and gas projects and the Trump administration's regulatory rollbacks when President-elect Joe Biden takes office next week.

Pending litigation over land grabs and water permits for energy operations have the potential to draw the attention of the Supreme Court. And the new administration will need to contend with a string of lawsuits challenging President Trump's latest efforts to weaken energy and climate rules.

"What will be interesting is to see how the new Biden administration handles litigation that has already been filed against the midnight regulations," said Robert Percival, director of the environmental law program at the University of Maryland.

Biden may circumvent the courts in some cases if he chooses to take swift action to block controversial projects like the Keystone XL oil pipeline. The incoming president last year signaled his intention to revoke Trump's permit allowing the project to cross into Canada.

It is less clear what action Biden may take on the Dakota Access pipeline, which is currently operating without a key easement. The Interior Department could use its enforcement discretion to stop oil flowing through the pipeline at any point, as a district court decision to revoke Dakota Access' permit remains under review in the U.S. Court of Appeals for the District of Columbia Circuit.

Legal battles over oil and gas projects that survive under Biden's leadership may serve as early stress tests of the new administration's energy agenda. Biden's litigation success rate will be compared to Trump's, who closed out his four years in office with one of the worst legal records in modern history ([Greenwire](#), Jan. 11).

"If the Biden administration keeps working with these projects, then the question becomes: Does the Biden administration have a better record of success with the courts than the Trump administration did?" said James Coleman, a law professor at Southern Methodist University.

Here are some of the top energy cases to watch in 2021:

### **Trump-era deregulation**

Many of the legal issues facing Biden at the start of his term will be ongoing courtroom battles over Trump-era rules.

Biden will have to decide whether and how his administration will change course on issues such as rollbacks of energy efficiency standards for appliances, as well as deregulation of greenhouse gas emissions from power plants and the oil and gas sector.

Expect to see requests from the Justice Department later this month asking federal courts to slow down proceedings to give agencies time to reconsider their positions, said Sarah Stellberg, a staff attorney at Advocates for the West.

"We won't see immediate shifts in cases," she said. "That will take time for the new administration to evaluate all the ongoing cases and whether or not it agrees with whether or

not they should be litigated and whether or not they want to take a different stance in the cases."

Some legal experts speculate that the D.C. Circuit may still reach a decision in the lawsuit over the repeal and replacement of EPA's Clean Power Plan, after hearing marathon oral arguments on the issue last fall ([Energywire](#), Oct. 9, 2020).

The court previously declared litigation over the Clean Power Plan moot when Trump first took office and announced his plans to eventually replace the Obama-era regulation with the Affordable Clean Energy rule.

### **Migratory Bird Treaty Act**

As lawmakers weigh which late-breaking Trump actions to undo via congressional action, conservation groups are also preparing for lawsuits over the president's latest environmental rules.

One of those potential targets is the Trump administration's new interpretation of the Migratory Bird Treaty Act.

The new Fish and Wildlife Service rule limits protections under the statute to cover only intentional bird killings. "Incidental take," such as bird deaths caused by oil slicks and power lines, are no longer subject to prosecution.

"Essentially the Trump administration made it impossible for the executive branch to bring its own enforcement actions in a criminal action, or use the potential for criminal action to basically try to get industries to do the right thing by birds," said Eric Glitzenstein, director of litigation at the Center for Biological Diversity.

He called the rule a "high priority" for repeal.

Glitzenstein said he is confident that a court would quickly throw out the rule because the U.S. District Court for the Southern District of New York has already struck down the rationale for changing its enforcement.

The Trump administration ignored the court's decision when it finalized the migratory bird rule, Glitzenstein said.

"We and other organizations will be looking at all of those options and thinking about what makes the most sense relative to other priorities that are out there," he said.

### **Nationwide Permit 12**

Regardless of what action Biden takes on Keystone XL's border-crossing permit, environmental groups are gearing up to raise a broader threat to the pipeline project.

A high-profile legal battle over the Army Corps of Engineers' use of its Nationwide Permit 12 to authorize dredge-and-fill activities along Keystone XL's route is pending before the 9th U.S. Circuit Court of Appeals. A lower bench ruled last year to suspend use of the permitting program for all new oil and gas pipelines due to Endangered Species Act violations.

The Supreme Court later limited the scope of the ruling to Keystone XL, a 1,200-mile project that would connect Canada's oil sands to an existing pipeline serving ports and refineries in the Gulf of Mexico.

Even if Keystone XL is canceled or its developers move forward with getting an individual water permit instead, the underlying problem with the Army Corps program remains, said Jared Margolis, a senior attorney at CBD.

"We were self-limited to Nationwide Permit 12 in this litigation because we were focused on Keystone," he said. "It was a pipeline-specific case."

Margolis added that the Army Corps needs to conduct an interagency consultation under the Endangered Species Act to study how the overall use of its permitting program affects vulnerable plants and animals. He noted that the Trump administration's recent finalization of the nationwide permit — a year ahead of schedule — still falls short of that requirement ([Greenwire](#), Jan. 6).

"The next step, the next litigation could be broader," Margolis said.

The center is also weighing National Environmental Policy Act and Clean Water Act challenges to the permitting program.

## **Jordan Cove**

Legal experts are keeping a close eye on an eminent domain fight over a pipeline that would supply the embattled Jordan Cove liquefied natural gas project in Oregon.

Opponents of the project want the D.C. Circuit to scrap the Federal Energy Regulatory Commission's approval of the Pacific Connector pipeline, since demand for the LNG from Jordan Cove comes not from the United States but from foreign markets.

"This should be a big, big decision because the issue is, do pipelines that feed export facilities get eminent domain authority?" said David Bookbinder, chief counsel at the Niskanen Center, who is representing landowner challengers in the case.

A judge for the U.S. District Court for the District of Columbia denied a request last year to immediately toss out FERC's certificate for the Pacific Connector project.

But the court left the door open for a future challenge if the pipeline developer begins condemning private land in the pipeline's path ([Energywire](#), Oct. 7, 2020).

## **PennEast pipeline**

In one of the biggest potential energy battles of 2021, the Supreme Court will soon decide whether to take up a dispute over land seized for a natural gas pipeline.

Judges for the 3rd U.S. Circuit Court of Appeals decided in 2019 that developers of the PennEast pipeline could not bring New Jersey to federal court involuntarily in order to take state-controlled land to build the 116-mile project from Pennsylvania, since doing so violated the state's sovereign immunity under the Constitution.

The eminent domain case is "very interesting because it raises issues that the court has been interested in the past with respect to states' rights and the 11th Amendment," said Percival of the University of Maryland.

Acting Solicitor General Jeffrey Wall has urged the Supreme Court to take up the case, claiming the 3rd Circuit lacked jurisdiction to hear the dispute in the first place. He also supported PennEast Pipeline Co. LLC's argument that FERC's approval for the project gave it the authority to seize the state-owned land ([Energywire](#), Dec. 11, 2020).

The solicitor general's input could increase the chances that the justices will review the case, but environmental groups also contend that without disagreement among the circuit courts on the issue of sovereign immunity, it may be too soon to raise the challenge at the high court.

The Supreme Court may decide on Jan. 22 whether to hear the dispute. If the high court does take the case, the outcome could result in a lose-lose scenario, said Carolyn Elefant, a former FERC attorney who currently represents landowners in private practice.

A win for PennEast would allow developers to continue the project, but it wouldn't change the fate of other pipelines, she said.

On the other hand, "if the pipeline loses and they can't go through state land, it doesn't mean pipelines don't get built," Elefant said. "It just means that they are going to go through private property ... and I think landowners are often hurt more."