

The Biggest Energy Rulings Of 2020: Part 2

By **Keith Goldberg**

Law360 (December 15, 2020, 4:32 PM EST) -- Federal courts this year gave the energy industry guidance on the review and permitting of controversial pipeline projects, and key rulings from state courts will impact how oil and gas partnerships are formed and how potential liability for gas drillers from fracking is determined.

In the second part of a two-part series, Law360 breaks down more of the biggest energy-related court decisions of 2020:

Justices Rule Pipeline Can Cross Appalachian Trail

The U.S. Supreme Court on June 15 reversed the Fourth Circuit's ruling that the U.S. Forest Service lacked the authority to allow the \$8 billion Atlantic Coast pipeline project to cross the Appalachian Trail.

The high court ruled 7-2 that the U.S. Department of the Interior's decision to give oversight of the Appalachian Trail to the National Park Service didn't transform the trail into part of the National Park System. That means the Forest Service retains authority under the Mineral Leasing Act to grant a right-of-way for the pipeline to cross the trail, the majority concluded.

The decision was a victory for energy industry groups concerned that the Fourth Circuit's ruling could be used to block pipelines and other energy infrastructure projects from crossing the Appalachian Trail, as well as other national trails administered by the National Park Service.

"That could remove an ambiguity about the authority of the Forest Service, for sure," Mayer Brown LLP energy litigation partner Mike Lennon said.

Ultimately, it wasn't enough to save the Atlantic Coast pipeline. Less than a month after the high court's ruling, developers Duke Energy Corp. and Dominion Energy Inc. said they were pulling the plug on the project, which had faced several other legal challenges.

The cases are U.S. Forest Service et al. v. Cowpasture River Preservation Association et al., case number 18-1584, and Atlantic Coast Pipeline LLC v. Cowpasture River Preservation Association et al., case number 18-1587, in the U.S. Supreme Court.

Keystone XL Pipeline Nationwide Permit Wiped Out

A Montana federal judge on April 15 invalidated a nationwide water permit used by the U.S. Army Corps of Engineers to approve the controversial Keystone XL pipeline, throwing into question the permit's use for pipelines, power lines and other long-distance energy infrastructure projects.

U.S. District Judge Brian Morris agreed with the Sierra Club and other environmental organizations challenging Nationwide Permit 12, finding that the Keystone XL pipeline was not properly evaluated under the Endangered Species Act when the Trump administration renewed it in 2017.

Nationwide Permit 12 provides projects with an expedited path to Clean Water Act compliance if certain conditions are met. By vacating the permit, the judge forced the Corps to temporarily halt its use.

Facing concerns that his ruling would disrupt thousands of infrastructure projects across the country that rely on the permit, Judge Morris eventually narrowed his ruling to only cover new oil and gas pipelines. The Supreme Court in July narrowed the ruling even further to only apply to the Keystone XL pipeline while Judge Morris' decision is appealed in the Ninth Circuit.

The case is Northern Plains Resource Council et al. v. Army Corps of Engineers et al., case number 4:19-cv-00044, in the U.S. District Court for the District of Montana.

Judge Nixes Army Corps Permit For Dakota Access Pipeline

In another blow to a controversial oil pipeline, a D.C. federal judge invalidated the U.S. Army Corps of Engineers' approval of an easement for the Dakota Access pipeline under the Missouri River near tribal lands and in August vacated the easement and ordered the pipeline to shut down after concluding the Corps flubbed its consideration of oil spill risks.

The D.C. Circuit stayed U.S. District Judge James E. Boasberg's shutdown order while it considers an appeal from the Corps and pipeline operator Energy Transfer Partners LP. But the appeals court refused to stay Judge Boasberg's order that the Corps prepare a more stringent environmental impact statement after concluding the agency's environmental assessment wasn't up to par.

"Is that going to become a new normal, that full-blown National Environmental Policy Act environmental impact statement has to be done for the entire length of the pipeline?" Mayer Brown partner Lennon said. "That could end up being very costly for the industry."

During oral arguments in November, D.C. Circuit judges appeared to sympathize with the lower court's conclusion that the Corps' environmental assessment was inadequate, though less certain that the easement should be vacated and the Dakota Access pipeline shut down.

The case is Standing Rock Sioux Tribe et al. v. U.S. Army Corps of Engineers et al., case number 1:16-cv-01534, in the U.S. District Court for the District of Columbia.

Texas High Court Says Contracts Prevail In Pipeline Partnership Fight

The Texas Supreme Court on Jan. 31 declined to reinstate a \$535 million judgment against Enterprise Products Partners LP over a soured deal with Energy Transfer Partners. In doing so, the high court elevated written contracts between parties above Texas' partnership law.

The court unanimously found that no partnership between ETP and Enterprise could have existed, because their agreement to market and potentially develop a crude oil pipeline contained conditions that would trigger a formal partnership, and the companies hadn't met them.

Enterprise had developed a pipeline along a similar route with Enbridge Inc., and ETP claimed it was a jilted partner whose relationship with Enterprise had evolved into a full partnership despite their initial marketing agreement.

Lennon said the Texas Supreme Court's ruling "brought us back to thinking that the law of Texas is what we always thought it was, but there was a lot of angst over that."

The Texas Supreme Court took a narrow view of what evidence would be sufficient to prove companies have waived partnership-triggering contractual conditions, saying "only evidence directly tied to the condition precedent is relevant" and ETP hadn't provided such evidence.

McKool Smith PC principal Willie Wood said additional partnership disclaimer language is popping up in letters of intent and other transactional documents following the Texas Supreme Court's ruling.

"You have to be extremely literal in your letters of intent and term sheets," Wood said. "You just need to be careful about reminding people that there is no deal until there's a deal."

The case is Energy Transfer Partners LP et al. v. Enterprise Products Partners LP et al., case number 17-0862, in the Texas Supreme Court.

Pennsylvania Supreme Court Preserves Rule Of Capture For Fracking

The Pennsylvania Supreme Court on Jan. 24 affirmed that a century-old precedent shielding drillers from trespassing liability when a well drilled on one property taps into oil and gas beneath a neighboring property can be applied to hydraulically fractured wells, but that legal shield isn't absolute

Overtaking a lower court ruling, the justices ruled that, absent claims that fractures from a fracked well actually crossed property lines below ground, the so-called rule of capture was just as applicable to fracking as it was to any other means of artificially stimulating the flow of oil and gas.

The Pennsylvania Supreme Court's ruling largely echoes a 2008 decision by the Texas Supreme Court that the rule of capture applies to fracking, avoiding a potential patchwork of legal risks for drillers that operate in both gas-rich states. But it differs in concluding that landowners can assert trespass claims against drillers if they can show that fracking fluids and other materials physically crossed property lines.

"That stands in pretty stark contrast to the Texas Supreme Court's decision ... which rejected the deep underground trespass theory," Lennon of Mayer Brown said. "I think it's going to cause some careful planning about how they do fracture stimulation in Pennsylvania to try and minimize this risk."

That includes where to place drilling sites, what part of a shale gas formation a driller will tap, as well as the direction of the actual fracking, according to Wood of McKool Smith.

"Companies will do the best they can to include acreage from small landowners to avoid these issues," Wood said. "Ultimately, in the lease language, you may also end up putting in some more liberal setback

requirements for wells."

The case is Adam Briggs et al. v. Southwestern Energy Production Co., case number 63 MAP 2018, in the Pennsylvania Supreme Court.

--Additional reporting by Matt Fair. Editing by Nicole Bleier.

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