

# Eminent Domain

Laws and Loopholes That Benefit Fracking and Pipeline Companies

*No person shall be deprived of life, liberty or property ...*

*unless the oil and gas industry says so*

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The rapid expansion of hydraulic fracturing, or fracking — a process that the oil and gas industry uses to extract natural gas and oil from shale rock formations buried deep within the Earth<sup>1</sup> — has caused environmental and public health problems,<sup>2</sup> and weak eminent domain laws and laws that cater to fracking and pipeline companies will only help spread these problems.

Eminent domain is the government’s power to take private land for “public use” as long as “just compensation” is provided, as required by the Fifth Amendment’s “takings” clause.<sup>3</sup> States delegate eminent domain authority to cities, quasi-public entities and even certain private companies,<sup>4</sup> but the degree and type of power varies in each state.<sup>5</sup> Some local governments can further delegate eminent domain powers to specific “designees,” such as a development authority.<sup>6</sup>

Indeed, many federal and state eminent domain laws seem to favor or provide explicit regulatory loopholes and exemptions that benefit oil and gas companies.

## Justifying Natural Resource Takings by Touting “Public Use”

Seizing land for the development of oil, gas and coal — also referred to as natural resource development takings — often supports corporate gain, not public use.<sup>7</sup> Traditionally, “public use” referred to public projects like roads, civic buildings, parks and other facilities that could be directly used by all.<sup>8</sup> But in the last century, case law has broadened what consti-

tutes a “public use” to include economic development.<sup>9</sup> Now, pipeline and oil and gas companies can more easily pursue land grabs by claiming that eminent domain for the construction of pipelines or shale gas and oil development will foster economic development and is therefore a “public use.”<sup>10</sup>

As University of Minnesota Law professor Alexandra Klass explained, “[E]minent domain is often a tool used by private industry to promote private interests at the expense of other private parties with no state or local government involvement in the eminent domain proceeding.”<sup>11</sup> She also stated, “In many natural resource-rich areas of the country ... the knock on the door is less likely to come from a government official and much more likely to come from a mining, oil, or gas company representative.”<sup>12</sup>

The controversial *Kelo v. City of New London, Connecticut* (2005) opinion is one of the three Supreme Court decisions that helped broaden the Fifth Amendment’s takings authority with its broad interpretation of “public use.”<sup>13</sup> In this case, the Supreme Court ruled in favor of New London, deciding that the city could take private property and give it to another

private entity for “economic development.”<sup>14</sup> A public use, in effect, became reinterpreted to mean public purpose.<sup>15</sup>

Now it seems that oil and gas companies are capitalizing on this, and other precedent-setting cases, by claiming that eminent domain for the construction of a natural gas pipeline or fracking well will foster economic development.<sup>16</sup>

## The Natural Gas Act: A Pipeline of Problems

Pipeline infrastructure and fracking often go hand in hand.<sup>17</sup> By expanding access and opening up markets, pipelines can accelerate the development of unconventional oil and gas resources through fracking.<sup>18</sup>

Under the federal law known as the Natural Gas Act,<sup>19</sup> the Federal Energy Regulatory Commission (FERC) is the lead government agency involved in approving or rejecting pipelines that cross state borders.<sup>20</sup> If FERC concludes, based on its narrow review, that “the public benefits from the project outweigh any adverse effects,”<sup>21</sup> then FERC can grant a pipeline company a “certificate of public convenience and necessity.”<sup>22</sup> This certificate grants the company the right to exercise eminent domain and take private property for constructing and maintaining a pipeline.<sup>23</sup>

For instance, a 2012 FERC decision allowed Tennessee Gas Pipeline Co., a subsidiary of Kinder Morgan, to use eminent domain to take property from an 87-year-old New Jersey man and his wife for the construction of a pipeline that will transport Pennsylvania’s Marcellus Shale gas.<sup>24</sup> In December 2012, a federal court relied on FERC’s decision that the pipeline was in the public interest to authorize the company to take the couple’s property before even compensating them.<sup>25</sup> By February 2013, even though construction permits had yet to be approved, the company began cutting down the trees directly behind the couple’s home.<sup>26</sup>

Moreover, FERC fails to fully account for how individual pipeline projects, taken together with any resulting increase in drilling activity, negatively impact public health and the environment.<sup>27</sup> And this is just one example of how the oil and gas industry’s legal advantages can hurt homeowners.

## State Laws Supporting Land Grabs for Oil and Gas Development

Although individual state laws vary, several states also provide special rights and benefits to the oil and gas industry. Indeed, a review of eminent domain laws shows that from the east to the west coast, no one is safe from industry land grabs.

### West Virginia

West Virginia considers oil and gas pipeline construction and maintenance a “public use” for which private land can be taken or damaged.<sup>28</sup>



### Utah

In Utah, eminent domain can be pursued to condemn land for “gas, oil or coal pipelines, tanks or reservoirs” and for road construction to access oil and gas resources.<sup>29</sup>

### Washington

The Underground Natural Gas Storage Act in Washington State declares, “The underground storage of natural gas will promote the economic development of the state and provide for more economic distribution of natural gas to the domestic, commercial and industrial consumers of this state, thereby serving the public interest.” As a result, natural gas companies have certain eminent domain rights.<sup>30</sup>

### North Carolina

Despite legalizing horizontal drilling and fracking in 2012, North Carolina has not begun to develop shale gas due to a fracking moratorium,<sup>31</sup> but the state grants oil and gas companies the right to condemn land to construct pipelines for natural gas transportation.<sup>32</sup> As a supervising attorney at

the Duke Environmental Law and Policy Clinic points out, there could be even bigger implications than taking land for pipeline construction.<sup>33</sup>

North Carolina grants eminent domain authority to certain private entities; state law explicitly says, “Corporations ... have the power of eminent domain for the construction of ... pipelines or mains originating in North Carolina for the transportation of petroleum products, coal, gas, limestone or minerals.”<sup>34</sup>

According to an article in the North Carolina Journal of Law & Technology, North Carolina should protect the rights of individual property owners by amending its constitution and eminent domain laws to limit the oil and gas industry’s condemnation authority.<sup>35</sup>

## Pennsylvania

On Valentines Day 2012, Pennsylvania Governor Tom Corbett — who personally received \$1.8 million in campaign contributions from the natural gas industry between 2000 and April 2012<sup>36</sup> — showed his love for the industry by signing into law Act 13,<sup>37</sup> a piece of legislation revising the commonwealth’s Oil and Gas Act.<sup>38</sup> Among the different facets of the law were provisions intended to prevent local zoning rules for gas drilling and fracking, but in July 2012, the Commonwealth Court ruled those provisions unconstitutional.<sup>39</sup> Unfortunately, challenges to the eminent domain provisions of Act 13 were dismissed,<sup>40</sup> so oil and gas companies now have the authority to pursue eminent domain to take certain property for “injection, storage and removal from storage of natural gas.”<sup>41</sup>

Pennsylvania’s pro-industry Act 13 is not surprising considering the financial growth that is occurring in the pocket-books of Pennsylvania’s elected officials. MarcellusMoney.org — a project of Common Cause PA and Conservation Voters of PA — reported that as of April 2012, natural gas companies and associated industry groups had spent \$8 million on campaign contributions since 2000 and nearly \$16 million on lobbying expenditures since 2007 just in Pennsylvania, and \$5 million was spent to lobby Pennsylvania officials in 2011 alone.<sup>42</sup>

## Texas

Upon signing a bill curbing some uses of eminent domain, Texas Governor Rick Perry told the state Agriculture Commissioner, “I don’t suppose there’s anything that’s more important than our private property rights in the state of Texas.”<sup>43</sup> Yet the rule that Perry signed into law exempted oil and gas pipelines from the new restrictions on eminent domain.<sup>44</sup> The law expressly exempted energy transporters, which transport oil, gas or oil and gas products by pipeline,<sup>45</sup> and common-carrier pipelines, which are pipelines that transport crude petroleum, coal and certain other substances.<sup>46</sup>

To become designated as a common carrier, a company simply submits a one-page paper to the Texas Railroad Commission, the state agency that oversees intrastate pipeline rates and safety, and claims status on the paper (called a T-4 form) by checking the right line.<sup>47</sup> Neither the Railroad Commission nor any other state agency must approve or permit the construction of an intrastate pipeline by a common carrier or gas utility pipeline company.<sup>48</sup>

The process of establishing common-carrier status lacks certain due process protections, such as public notification and hearings, which are necessary for eminent domain proceedings under the Fourteenth Amendment’s due process clause.<sup>49</sup> For example, in the Texas Supreme Court case *Texas Rice Land Partners Ltd. v. Denbury Green Pipeline-Texas, LLC*, the court’s opinion by Justice Don Willett said: “The Railroad Commission’s process for handling T-4 permits appears to be one of registration, not of application. The record suggests that in accepting an entity’s paperwork, the Commission performs a clerical rather than an adjudicative act. The registrant simply submits a form indicating its desire to be classified as a common (or private) carrier. No notice is given to affected parties. No hearing is held, no evidence is presented, no investigation is conducted.”<sup>50</sup>

Although the Texas Supreme Court ruled in this March 2012 opinion that the current method of self-declaring common carrier is insufficient under Texas law to acquire “unchallengeable condemnation power,”<sup>51</sup> as of the second quarter of 2013 no reformation bills had been passed.<sup>52</sup> And, in August 2012, Lamar County Judge Bill Harris ruled via an email from his iPhone that TransCanada, the company behind the Keystone XL pipeline, had the power of eminent domain and could take part of a farmer’s land for pipeline construction.<sup>53</sup>



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At the same time that Texas lawmakers are protecting the oil and gas industry’s eminent domain powers to take land, one bill pending in Texas attacks local government control by making it more difficult for cities to ban drilling.

In February 2013, State Representative Van Taylor (R-Plano) introduced a bill that would require a local government to compensate landowners if it passes a law that prevents or prohibits drilling or fracking on their property.<sup>54</sup> The bill would classify local regulations restricting oil and gas drilling as a legal “taking,” so if passed, a city that does not want fracking may have to pay landowners the same amount that a big company would pay in royalties to drill on their land.<sup>55</sup>

This bill would undoubtedly work to the advantage of the oil and gas industry because cities are going to have a difficult time dishing out the same amount of money that a big company could. As a result, a city would be much less likely to implement a ban on fracking.

The bill was left pending in the House Committee on Land & Resource Management at the end of the regular legislative session of 2013.<sup>56</sup>

## Elected Officials: Protect People, Property, the Environment and Public Health

Pipeline expansion facilitates oil and gas drilling and fracking,<sup>57</sup> which jeopardizes water and food<sup>58</sup> and potentially accelerates climate change,<sup>59</sup> all in exchange for dubious public economic benefits.<sup>60</sup>

It is imperative that our government stop letting the oil and gas industry drive the decision making process. Elected officials must protect the people who elected them into office, and not the corporations with vested interests. The laws governing natural resource extraction should not benefit the oil and gas industry at the expense of homeowners.

Therefore, Food & Water Watch recommends:

- Reform eminent domain laws so that they protect people instead of corporate profits;
- Invest in renewable energy and wean the United States off its fossil fuel addiction, making clean, renewable energy the new norm; and
- Ban fracking everywhere.

## Endnotes

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**Food & Water Watch** works to ensure the food, water and fish we consume is safe, accessible and sustainable. So we can all enjoy and trust in what we eat and drink, we help people take charge of where their food comes from, keep clean, affordable, public tap water flowing freely to our homes, protect the environmental quality of oceans, force government to do its job protecting citizens, and educate about the importance of keeping shared resources under public control.

