



Overcoming Local Roadblocks to Energy Transport and a Cleaner New Energy System

By James W. Coleman

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Key Points

- Unlike traditional energy sources such as oil and coal, cleaner energy sources such as natural gas, hydrogen, and electricity depend on building long-distance linear infrastructure: pipelines and power lines.
- State and local governments continue to prevent the construction of crucial infrastructure for energy transport, including by blocking key permits and preventing the use of eminent domain.
- Congress and the courts must act to ensure commonsense development of energy infrastructure by securing free trade in the energy market.

In the years leading up to the 2020 pandemic, the United States experienced the largest energy bonanza the world has ever seen, powered by three simultaneous booms in oil, natural gas, and renewable power production. New technology unlocked abundant and affordable energy—so affordable that natural gas and wind power are often free at the wellhead and wind turbine. American companies are now producing so much natural gas and power that at times they even pay to have it taken away.

Historically, the global economy relied mostly on oil and coal for energy. Oil is still the world's largest energy source overall, and coal is still the largest electricity source. The great advantage of oil and coal is that they are easy and affordable to transport: They can be shipped by many different means, including ship and rail. But the world is moving toward new energy sources, such as clean-burning natural gas and solar and wind power.

Unfortunately, these cleaner energy sources are much more expensive to transport, requiring pipelines and power lines that often cost billions to build. So with the transition to natural gas and renewable energy, the central challenge in energy law is no longer how to extract energy at an affordable price; it is how to transport this abundant energy to the consumers who need it at an affordable price. How can we build the pipelines, power lines, and liquefied natural gas terminals to ensure that all consumers benefit from this American bounty?

At this crucial moment, state and local governments are erecting new roadblocks to energy transport, preventing these new resources from reaching the consumers who need them. These governments are denying permits for transporting energy sources to assert their authority over other states' and countries' production and consumption decisions. And they are increasingly denying

use of eminent domain to build necessary infrastructure such as pipelines and power lines to serve out-of-state customers.

These local roadblocks threaten to squander the American energy boom's benefits. Congress and the courts should act now to ensure Americans retain the benefits of free trade in energy.

The American Energy Boom and the Need for New Energy Transport

In 2018, the US increased its oil production faster than any country has ever done, and this surge alone was seven times bigger than the world's previous largest commodity boom.¹ This new production is concentrated in New Mexico, North Dakota, and Texas, and it requires new pipelines to get to market.

But it's not just oil. Gas production boomed as well. In 2008, the US was building terminals to import liquefied natural gas. Since then, gas production has increased so much that the US became the biggest liquefied natural gas exporter at the end of 2021.²

Despite this increase, some markets are being left behind. Twice in the past five years, the US East Coast has faced gas shortages because it lacks enough pipelines to import the gas it needs from nearby Pennsylvania.³ And frequently, gas producers in Texas and North Dakota are forced to burn off, or "flare," their natural gas production—or even pay others to take it—because there are not enough pipelines to carry it to the consumers who desperately need it.⁴

Renewable power production is also rapidly increasing, as improving technology has made wind power cheaper over vast regions of the US, particularly its windy prairies.⁵ This clean energy could help reduce fossil fuel use if it could be transported to urban markets in the Southeast and on the Atlantic coast that lack abundant wind power.⁶

But there is not enough transmission to send this power to the markets where it is needed, so wind-power producers must sometimes curtail their output or even pay to have their power taken away.⁷ In 2019, for instance, power prices in Tulsa, Oklahoma, went negative after the state experienced

above-average temperatures and wind, forcing energy producers to pay for removing generated energy.⁸

Local Governments Denying Permits for Energy Transport

Despite this desperate need for new energy transport, state and local governments are increasingly blocking energy transport as they try to shape global energy markets. The most frequently reported roadblocks have come from states looking to stop fossil fuel transport because they believe that other states and countries are not adequately regulating fuel production and use. But states have also repeatedly blocked new power lines for transporting renewable power.

State and local efforts to hinder national and international fossil fuel trade have become increasingly prominent. Recent examples include:

- In 2014, and again in 2017, New York state denied Clean Water Act water quality certifications to federally approved natural gas pipelines.⁹
- In 2014, Portland, Maine, passed an ordinance to prohibit oil loading in its harbor.¹⁰
- In 2016, Oakland, California, banned coal exports from a planned terminal.¹¹
- In 2017, Washington state denied Clean Water Act water quality certifications to the proposed Millennium Bulk Terminal coal export facility.¹²
- In 2019, Michigan's new governor attempted to revoke an agreement for Enbridge to replace its existing pipeline across the Straits of Mackinac.¹³

In each case, much of the organizing enthusiasm against fossil fuel transport has come from climate activists concerned about long-term fossil fuel consumption rather than the local impacts of a pipeline or oil terminal.¹⁴

Additionally, many states are adopting new supply-chain standards for transportation fuels that prescribe how these fuels can be made in other states—demanding, for instance, that ethanol and crude oil be produced by low-carbon methods.¹⁵

States are also adopting these standards for electricity, declaring that they will accept electricity only if it is made by a process the state approves.¹⁶ Because states' energy policies differ, these supply-chain standards splinter interstate energy markets.

Although climate-based opposition to energy transport makes more national headlines, all the tools used to block fuel transport have been used to block new renewable power transport. Here are some recent examples:

- In 2018, New Hampshire blocked a new power line designed to carry hydropower from Quebec to customers who needed it.¹⁷
- In November 2021, Maine voters rejected a power line designed for the same purpose.¹⁸
- Similarly, in 2019, a Massachusetts town concerned about offshore wind power tried to block the cables necessary to bring that power to shore.¹⁹
- Missouri and Arkansas have repeatedly delayed permits for power lines designed to carry wind power to Chicago and Tennessee.²⁰

Local Roadblocks to Eminent Domain

In recent years, another threat has emerged to energy transport: new limits on eminent domain. Environmental groups have increasingly teamed up with landowners and state policymakers to challenge the use of eminent domain for facilitating pipeline and power-line construction. They argue that eminent domain is unconstitutional when exercised by private companies that plan to export the energy products they are transporting. And some courts seem to agree.

In 2015, the Kentucky Court of Appeals held that a pipeline could not exercise eminent domain because it would transport natural gas liquids to the Gulf of Mexico, meaning it would not provide a "public service" to Kentuckians.²¹ According to this court, the other Americans who would benefit from the pipeline did not count as part of the relevant public.

West Virginia's Supreme Court of Appeals reached a similar decision in 2016, but in 2019 Iowa's Supreme Court held that transporting oil to markets outside the state could count as a public

benefit given oil's importance to the national economy.²² In 2019, the US Court of Appeals for the DC Circuit held that the Federal Energy Regulatory Commission must show how a gas pipeline that would ship natural gas to Canada could count as a public benefit.²³ Limits on eminent domain threaten to withhold from citizens valuable public goods such as improved energy infrastructure and reduced energy costs.

These limits on eminent domain will only grow more costly as the United States turns to cleaner energy sources. While coal and oil producers have many methods of reaching faraway markets, cleaner energy sources such as electricity and natural gas depend on long-distance linear infrastructure. Also, because electricity and gas are more expensive to store than oil and coal, sufficient excess transport capacity is all the more crucial, to allow ramping up gas and electricity transmission to meet extraordinary demand for heating and cooling in times of extreme temperatures. Furthermore, some future energy technologies necessary to reach low carbon emissions, such as carbon capture and hydrogen, will depend on long-distance pipelines.

Congress and the Courts Should Ensure Free Trade in Energy Markets

It is a crucial moment for interstate energy trade. American industry has unlocked vast supplies of oil, gas, and renewable energy, but there is not enough transportation to carry it to market. As a result, American resources cannot reach the markets where they are needed most in the US and abroad. The courts and Congress should act quickly to ensure that free trade in energy brings the full benefits of the energy boom to all Americans.

In *Federalist* 11, Alexander Hamilton argues that our Constitution was adopted to create "an unconstrained intercourse between the states . . . advanc[ing] the trade of each by an interchange of their respective productions."²⁴ The dormant commerce clause may have fallen out of favor with some courts, but it remains our nation's best defense of its common market. The courts should not flinch from enforcing the clause's limits on state policies designed to slow energy commodity

trade. And the courts should strike down state policies designed to regulate energy production in other states or limit interstate energy transport.

If the courts do not act, Congress must. Congress should enact commonsense limits on state intransigence, eliminating state vetoes over critical energy

infrastructure and preempting state regulations that purport to control energy production in other states and countries. The federal government should ensure that American consumers and allies can benefit from America's growing supply of cleaner energy sources.

About the Author

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Notes

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10. *Portland Pipe Line Corp. v. City of South Portland*, 164 F. Supp. 3d 157 (D. Me. 2016).
11. *Oakland Bulk and Oversized Terminal v. City of Oakland*, 321 F. Supp. 3d 986, 991 (N.D. Cal. 2018). The neighboring city of Richmond, Maine, is now considering an ordinance to shut down its coal exports. See Dylan Brown, "How a Local Ordinance Could Clog Coal Exports," E&E News, December 4, 2019, <https://www.eenews.net/articles/how-a-local-ordinance-could-clog-coal-exports>.
12. *Lighthouse Resources v. Inslee*, No. 3:18-cv-05005-RJB, 2018 WL 5264334 (W.D. Wash. 2018).
13. Megan Devlin, "Michigan Increases Pressure in Enbridge Line 5 Court Battle, Arguing That Signed Deal Is Unconstitutional," *Globe and Mail*, August 16, 2019, <https://www.theglobeandmail.com/business/industry-news/energy-and-resources/article-michigan-increases-pressure-in-enbridge-line-5-court-battle-arguing>.
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15. Coleman, "Importing Energy, Exporting Regulation," 1373–74.

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17. James W. Coleman and Alexandra B. Klass, “Energy and Eminent Domain,” *Minnesota Law Review* 104, no. 659 (2019): 101, 147–48; and State of New Hampshire Site Evaluation Committee, “Decision and Order Denying Application for Certificate of Site and Facility,” March 30, 2018, https://www.nhsec.nh.gov/projects/2015-06/orders-notices/2015-06_2018-03-30_order_deny_app_cert_site_facility.pdf. As with the oil pipelines, some environmental groups objected to the power line because they worried it would enable energy sources—in this case hydropower, which they disfavor. See David Brooks, “What Does the Quick Approval of a Vermont Power Line Say About Northern Pass?,” *Concord Monitor*, January 8, 2016.
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24. *Federalist*, no. 11 (Alexander Hamilton). See also *Baldwin v. G. A. F. Seelig*, 294 US 511, 522 (1935).

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