

PIPELINES

Biden admin holds firm on Trump-era Dakota Access defense

Niina H. Farah, E&E News reporter • Published: Tuesday, May 4, 2021



Army Corps of Engineers headquarters in Washington. Francis Chung/E&E News

The Biden administration says it will leave the decision to temporarily stop the flow of crude oil through the Dakota Access pipeline up to the "sound discretion" of a federal court.

In a filing last night, the Army Corps of Engineers told the U.S. District Court for the District of Columbia that it plans to complete a court-ordered environmental impact statement (EIS) evaluating the risk of spills from the 1,172-mile pipeline in March 2022. In the meantime, it is allowing the pipeline to keep carrying oil.

The position is in keeping with that of the Trump administration.

"The Corps expects to use that timeframe to fulfill its commitment to undertaking an open, transparent, and public EIS process which rigorously explores and objectively evaluates reasonable alternatives," the agency wrote in an [update](#) to the court.

The Army Corps' update appears to show the agency's timeline has slipped slightly last month, ClearView Energy Partners LLC said in a note to clients yesterday. The agency previously said it would issue a record of decision (ROD) in March 2022. It can take an agency 30 days or longer to issue an EIS after an ROD.

The Army Corps filing follows a decision last year by Judge James Boasberg to shut down Dakota Access, which is currently in operation, after he found that a key permit for the project violated the National Environmental Policy Act.

A panel of judges for the U.S. Court of Appeals for the District of Columbia Circuit then overturned Boasberg's shutdown order, but it affirmed his NEPA finding earlier this year.

Dakota Access opponents had hoped that the Army Corps, which is now under the Biden administration's leadership, would take up the D.C. Circuit's invitation to shut down the pipeline pending completion of the EIS. The conduit from North Dakota to Illinois is currently operating without a key permit to cross beneath Lake Oahe in the Dakotas, located less than a mile from the Standing Rock Sioux Reservation.

The Army Corps notified Boasberg last month that it would not be taking enforcement action to pause operation of the project.

But the judge, an Obama appointee, is still free to issue an injunction against the pipeline now that he is fully briefed on the potential impact of a shutdown, the agency wrote last night.

"As to whether an injunction should issue, the EIS process in which the Corps is currently engaged examines many factors including some that may be relevant to the permanent injunction standard," the Army Corps wrote.

The agency later added: "It is possible that in the EIS process the Corps would find new information, but to date the Corps is not aware of information that would cause it to evaluate the injunction factors differently than in its previous filing."

Dakota Access developer Energy Transfer LP, however, has argued that Boasberg cannot issue an injunction while an appeal is pending in another court. The company has signaled that it plans to bring its case up to the Supreme Court ([Energywire](#), April 30).

An attorney for the Standing Rock Sioux Tribe opposed the pipeline and criticized the Army Corps for not supporting a temporary shutdown of the project.

"On Earth Day, President Biden sat down with world leaders to discuss how we will collectively address climate change. His administration has also promised to be more sensitive to concerns voiced by Indigenous leaders and Tribal governments," said Earthjustice attorney Jan Hasselman in a statement.

"Given all this, it's baffling that when it comes to the Dakota Access Pipeline, Biden's Army Corps is standing in the way of justice for Standing Rock by opposing a court order to shut down this infrastructure while environmental and safety consequences are fully evaluated," he said.

The trade group Grow America's Infrastructure Now (GAIN) praised the Army Corps for continuing to decline to shut down the pipeline.

"When politics is set aside and science allowed to lead, the Dakota Access pipeline withstands every single challenge — a reality that today's Army Corps of Engineers' filing reinforced," said GAIN spokesman Craig Stevens. "The engineers who designed the line, the geologists who helped site it, and the skilled labor who assembled it — all experts in their field — produced one of the safest, most technologically-advanced pipelines in the history of the world."

N.D. intervention

In a separate [brief](#) yesterday, the Standing Rock Sioux and other tribes opposing the pipeline urged Boasberg not to allow North Dakota to intervene so late in the case.

North Dakota last month urged the court to let it get involved in the proceedings after it said the Biden administration was not adequately defending the pipeline ([Energywire](#), April 20).

The tribes noted that Energy Transfer had "always mentioned" the impacts on North Dakota in its briefs and that the state was free to participate as an amicus, or "friend of the court," in the litigation.

"[T]he Court should, in its discretion, deny permissive intervention given that Dakota Access has zealously defended the pipeline, and will continue to do so," the tribes wrote.

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