Natural Gas Pipelines: The Role of Conservation Commissions

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Presentation Topics

1. NATURAL GAS ACT AND FERC
2. FEDERAL PREEMPTION AND THE ROLE OF CONSERVATION COMMISSIONS

FERC review and approval process

The role of conservation commissions under the MA Wetlands Protection Act if a pipeline gets a certificate of public convenience and necessity from FERC

The role of conservation commissions as owners and managers of municipal conservation lands

3. DPU SURVEY ORDERS

The role of conservation commissions under the Wetlands Protection Act if DPU grants a survey order for a pipeline company to enter on private property to survey for a pipeline
Natural Gas Act and FERC

WHAT’S FERC HAVE TO DO WITH IT?
FERC is in Charge

An interstate gas pipeline may not construct facilities, initiate a service, abandon facilities, or abandon a service without the prior approval of the Federal Energy Regulatory Commission (FERC)

FERC
- Authorized to regulate the transportation of natural gas in interstate commerce
- Reviews applications for the construction and operation of interstate natural gas pipelines
- Approves an application to construct and operate an interstate gas pipeline by issuing a certificate of public convenience and necessity
- May include reasonable terms and conditions in any certificate it issues
What is an Interstate Gas Pipeline

An interstate gas pipeline may include:

- Large main transmission pipeline that transports gas in interstate commerce from a producing area to a market area, market hub or center, or local distribution company or companies
- Compressor stations that increase the pressure and rate of flow of the gas
- Lateral pipelines that branch off from the main transmission pipeline to connect with or serve one or more customers (most often local distribution companies)
- Gas storage facilities and other appurtenances

Compressor stations, laterals, and storage facilities all require FERC approval as part of an interstate pipeline system even if the compressor station, lateral, or storage facility is wholly within one state.
FERC Certificate

FERC must issue a certificate of public convenience and necessity if it finds that a proposed pipeline or service “is or will be required by present or future public convenience and necessity”

FERC has said the standard is flexible and case specific. It looks at

- Reasonable expectations of customers
- Adequacy to serve customers
- Ability to finance the pipeline
- If the costs of the pipeline appear reasonable
- If initial rates are reasonable for customers and revenues for the pipeline

FERC has issued certificates to pipelines with capacity subscribed as low as 60%
Natural Gas Act, FERC, and NEPA

National Environmental Policy Act (NEPA) review of a pipeline proposal occurs during FERC review

- FERC is the lead federal agency and prepares (usually with a contractor) the Environmental Assessment or Environmental Impact Statement
- Public comments can be made during scoping and on the EA or EIS
- NEPA requires a rigorous and objective assessment of the proposed pipeline and of reasonable alternatives, including a no action alternative
- Review should include a discussion of possible conflicts between the proposed pipeline and federal, state, and local land use plans, policies, and requirements
- NEPA does not mandate a specific outcome. FERC balances the environmental impact against economic benefit and may decide not to choose the alternative with the least environmental impact
Natural Gas Act and Eminent Domain

A pipeline with a FERC certificate is given eminent domain authority for the rights of way it needs for its approved pipeline.

Eminent domain is the power to take private property and pay just compensation to the owner of the property for the taking.

If the pipeline cannot obtain the easement through negotiation, it may sue the property owner in federal court to obtain the easement. The court will defer to the FERC certificate on location of the pipeline and environmental conditions.

Courts have ruled that a company holding a certificate need not enter into good faith negotiations if a landowner rejects its offer. Rather, a company need only show that it:

1) holds a FERC certificate authorizing the project,
2) needs the land for the project, and
3) the landowner has not agreed on a price for the taking.
Federal Preemption

WHEN FEDERAL LAW CONTROLS
Federal System of Government

U.S. Constitution

- Federal Government powers and limitations are found in the Constitution
Federal Preemption of State Laws

Federal Supremacy

- U. S. Constitution, Article 6, clause 2 (the Supremacy Clause):
  - “This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.”
Where Federal Preemption is Found

Federal Preemption

◦ Express preemption
  ◦ Specifically stated in the law

◦ Implied preemption (as determined by a court)

  ◦ Field preemption
    ◦ Pervasive federal framework or dominant federal interest (no room left for state regulation because Congress intended the federal law to occupy the field)

  ◦ Conflict preemption
    ◦ Impossibility or obstacle to accomplishing the federal purpose

◦ If a state law is preempted, it is without effect – cannot be implemented or enforced
Natural Gas Act and Federal Preemption

The United States Supreme Court has ruled that Congress has occupied the field in matters relating to the transportation of natural gas in interstate commerce:

The NGA has long been recognized as a “comprehensive scheme of federal regulation of all wholesales of natural gas in interstate commerce.” ... The NGA confers upon FERC exclusive jurisdiction over the transportation and sale of natural gas in interstate commerce for resale.


Since Schneidewind, courts have regularly held that state and local requirements regarding siting, construction, extension, and operation of natural gas facilities in interstate commerce are preempted by the NGA
Pipeline Safety and Federal Preemption

Pipeline safety is not the responsibility of FERC, although FERC will require an applicant to explain how it will meet pipeline safety requirements.

The Natural Gas and Hazardous Materials Pipeline Safety Act:

• Authorizes the U.S. Department of Transportation Pipeline and Hazardous Materials Safety Administration to set and enforce safety standards for interstate gas pipelines.

• Preempts state and local pipeline safety requirements.
  • Courts have found both express and implied federal preemption.
What’s not preempted?

Federal regulatory requirements are not preempted unless specifically provided by statute.

Federal requirements that would apply to a pipeline include:
- Clean Water Act
- Clean Air Act
- Endangered Species Act
- Historic Preservation Act
- Property purchased with federal Land and Water Conservation Fund grants (for some of the properties, depending on the program terms at the time)

State requirements that are outside the field of the NGA:
- Claims under state anti-trust laws that affect retail rates (but may still be subject to conflict preemption)
A Role for Conservation Commissions

UNDER THE WETLANDS PROTECTION ACT AND AS OWNERS AND MANAGERS OF MUNICIPAL CONSERVATION LAND
Wetlands

FERC often requires applicants to comply with state and local licensing and permitting requirements unless such requirements are inconsistent with their federal certificate.

Pipeline companies filing NOIs with conservation commissions:

- Commissions can issue Orders of Conditions that are consistent with the pipeline certificate.
- Conditions that might be consistent could include wetlands delineation; storm water management; runoff and sediment control; construction monitoring; restoration; restoration monitoring.
- We think commissions should be able to require payment for peer review under appropriate circumstances.
  - c.44, § 53G
- Conditions that would be inconsistent would most likely include pipeline location, type of pipe, construction technique that FERC has included in the certificate.

Much of this will depend on the terms of the certificate.

Thus, getting good conditions in the certificate is essential.
Land Managers

Know your property boundaries

Know your property natural resources

Know which federal regulatory requirements apply to the work to be done on your property and how to participate in those processes

Know if any of the land was purchased with federal LWCF grants

Determine the Article 97 properties review status

Determine the monetary value of any right of way or potential taking

Determine monitoring, mitigation, and restoration for any work to be done on the right of way and property and consider negotiating for those as part of the right of way negotiation
DPU Survey Orders

AND WETLANDS PROTECTION
DPU Authority

The MA Department of Public Utilities may authorize a gas pipeline company to enter upon lands of any person or corporation for the purpose of making a survey preliminary to eminent domain proceedings. M.G.L. c.164, § 75D and 72A

DPU is not required to hold a hearing before granting a petition for a survey

DPU must give notice of the authorization granted, by registered mail, to the landowners involved at least five days before any entry

The company entering upon any such lands shall be subject to liability for any damages occasioned thereby

It is unclear if the authority extends to a public place, park, or reservation

The survey authority does not override other state laws
Wetlands and Surveys

The MA WPA and wetlands bylaws apply to surveying work absent a FERC order or certificate.

Surveying may be exempt from WPA requirements if it is a minor activity within a buffer zone or riverfront area and is temporary in nature, has negligible impacts, and is necessary for planning and design purposes (e.g., rod and transit or laser surveying, sediment sampling). Surveying is not exempt in a buffer zone or riverfront area if it would have more than a negligible impact or is more than temporary in nature.

Surveying is not so exempt from WPA requirements if done in a resource area but not every survey would alter a resource area or have an impact on an interest that would trigger WPA requirements.

- For example, it is very unlikely property line surveying using rod and transit or laser would constitute an activity that would alter a resource area and thus require conservation commission approval. Normal land surveying practices usually have not required prior authorization. On the other hand, if a survey were intrusive, such as significant vegetation cutting, earth moving, or holes digging, there might be an alteration requiring prior approval. That is a judgment to be made by the commission.
Wetlands and Surveys

If there is a question about the survey work, or a resource area crossing, a Request for Determination of Applicability or Notice of Intent should be filed with the conservation commission -- or the commission could consider a RDA filed by someone else or itself

- If there is a positive Determination of Applicability, there must be a Notice of Intent and an Order of Conditions before the survey may proceed

Notices of Intent are required to be filed by the landowner or with the written permission of the landowner (except for work proposed on great ponds or Commonwealth tidelands). 310 CMR 10.05(4) (same for ANRADs)

- MACC is not aware of 1) any instance in which a DPU survey order has superseded that requirement, or 2) any provision of law that would allow DPU to supersede that requirement
- A DPU survey order does not result in a change in land ownership
- Thus, a commission should deny a survey NOI that is not filed by the landowner or with the landowner’s written permission
Questions and Discussion
Role of MACC

MASSACHUSETTS ASSOCIATION OF CONSERVATION COMMISSIONS