

Chapter 4

The Intersection of the Natural Gas Act and Environmental/Land Use Laws

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§ 4.01. Introduction to Natural Gas Act Preemption.

In 1938, the Natural Gas Act (“NGA” or the “Act”) was enacted to regulate the interstate transmission and sale of natural gas in the United States.² Congress enacted the Natural Gas Act to devise “a comprehensive scheme of federal regulation of ‘all wholesales of natural gas in interstate commerce, whether by a pipeline company or not and whether occurring before, during, or after transmission by an interstate pipeline company.’”³ The NGA confers upon the Federal Energy Regulatory Commission (“FERC”)

¹ With special appreciation to Sean Thomas, third-year law student at West Virginia University, for his contribution to this chapter.

² 15B U.S.C. § 717 *et seq.*

³ *Northern Nat. Gas Co. v. State Corp. Comm’n of Kan.*, 372 U.S. 84 (1963) (quoting *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 682 (1954)).

near-exclusive jurisdiction to regulate interstate gas projects.⁴ However, the NGA does not infringe upon a state’s right to regulate purely *intrastate* pipelines or local retail distribution.⁵

Before a natural gas company may begin construction and operation of a natural gas facility, the natural gas company must obtain a “certificate of public convenience and necessity” from FERC.⁶ During the certificate application process, FERC thoroughly investigates the proposed project, as required by the NGA.⁷ This includes an extensive environmental review. Because a FERC certificate is a federal license, FERC’s review triggers the National Environmental Policy Act (“NEPA”), which requires the preparation of an Environmental Assessment or Environmental Impact Statement.⁸ Under the NGA, even though other federal agencies may be involved in reviewing interstate natural gas projects, FERC has been designated as the lead agency for purposes of discharging NEPA obligations.⁹

A FERC certificate is issued upon finding that the natural gas company “is able and willing” to comply with the NGA and the proposed project “is or will be required by the present or future public convenience and necessity.”¹⁰ As discussed more thoroughly below, compliance with the NGA will often involve cooperation with state and local authorities.¹¹

[1] — Natural Gas Act Preemption.

The Supremacy Clause of Article VI of the United States Constitution grants Congress the right to preempt state or local law.¹² Preemption can occur in three different forms: express preemption, field preemption, or

4 Islander East Pipeline Co. v. Conn. Dep’t. of Env’tl. Prot., 467 F.3d 295, 299 (2d. Cir. 2006) (republished at 482 F.3d 79, 84 (2d. Cir. 2006)); *see* 15 U.S.C. § 717(b).

5 15B U.S.C. § 717(c).

6 *Id.* at § 717f(c)(1)(A).

7 *See* FERC Applications, 18 C.F.R. pts. 153, 156, 157 (2018).

8 *See* 42 U.S.C. § 4321 *et seq.*; 40 C.F.R. pts. 1500-1508.

9 15 U.S.C. § 717n(b)(1).

10 *Id.* at § 717f(e).

11 *See* Sections 4.01 & 4.02.

12 U.S. CONST. amend. VI.