
THE LOCAL ROLE IN PERMITTING INTERSTATE NATURAL GAS PIPELINES

PRESENTATION AT CITIZEN PLANNER TRAINING COLLABORATIVE CONFERENCE

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Massachusetts Association of Conservation Commissions (MACC)

Non-profit, established in 1961, incorporated in 1978

Membership Organization

- Conservation Commissions pay annual dues and are the voting members
- Corporate, individual, and government members

Funding

- Membership Dues
- Earned Income
- Grants and Donations

Board and Staff

- 3 full-time; 1 part-time staff
- 21 person Board of Directors; majority current or former conservation commissioners



Massachusetts Association of Conservation Commissions (MACC)

Mission

- MACC protects Massachusetts natural resources by supporting conservation commissions through education and advocacy

Programs

- Education: Annual Environmental Conference; Fall Conference; Fundamentals for Conservation Commissioners training program; workshops throughout the year
- Support: Helpline; *Protecting Wetlands and Open Space: MACC's Environmental Handbook for Massachusetts Conservation Commissioners*; *Massachusetts Runoff, Erosion & Sediment Control Field Guide*; MACC Web Forum; model bylaws and forms
- Advocacy: sound, science-based laws and regulations; advisory committees; comments on proposed laws, regulations, and policies



Federal Laws and Natural Gas Pipelines

THE NATURAL GAS AND HAZARDOUS MATERIALS PIPELINE SAFETY ACT

THE NATURAL GAS ACT



Natural Gas and Hazardous Materials Pipeline Safety Act

Comprehensive federal statute regulating the safety of natural gas pipelines that provides:

Secretary of Transportation sets minimum safety standards for pipeline transportation and facilities that apply to design, installation, inspection, emergency plans and procedures, testing, construction, extension, operation, replacement, and maintenance

A state may adopt additional or more stringent safety standards for intrastate pipeline facilities and transportation *only* if such standards are compatible with the federal minimum standards

A state may not adopt or continue in force safety standards for interstate pipeline facilities or transportation



Natural Gas Act

Comprehensive federal statute regulating the interstate transportation and sale of natural gas for ultimate distribution to the public

Requires a natural gas company to obtain a certificate of public convenience and necessity from the Federal Regulatory Energy Commission (FERC) to transport, sell, construct, extend, acquire, or operate any natural gas facility

FERC analyzes all aspects of the proposal, including location, construction, and environmental impacts

FERC will issue a certificate of public convenience and necessity if:

- The company is able and willing to do what it has proposed and meet the requirements of the NGA and FERC regulations; and
- The service, sale, operation, construction, extension, or acquisition is or will be required by present or future public convenience or necessity to the extent authorized by the certificate



Natural Gas Act

The NGA gives a natural gas company with a certificate of public convenience and necessity from the FERC the power of eminent domain to acquire the necessary rights of way, land, and other property to construct, operate, and maintain the natural gas pipeline and facilities

If the company cannot reach agreement with the landowner for the sale of the right of way, land, or other property, it can file in federal court for a condemnation order. The issue there will be the market value (“just compensation”) of the right of way or land taken

The NGA does not specifically allow a natural gas company to take possession of property pending the trial on just compensation -- but courts have often granted possession under a preliminary injunction procedure pending the trial on just compensation



FERC and State Laws

CAN THE STATE OR LOCALITY REGULATE OR PROHIBIT PIPELINES APPROVED BY THE FERC?



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”



Federal Preemption

A state law that conflicts with a federal law is without effect. It is preempted by the federal law

Two types of federal preemption:

Express preemption: the federal law explicitly defines the extent to which the law preempts state law

Implied preemption

- Field preemption: the federal law occupies a given field to the exclusion of state law
- Conflict preemption: the federal law has not entirely displaced state law, but the state law is preempted when it actually conflicts with the federal law



Federal Preemption and Natural Gas Pipelines

The United States Supreme Court has determined that Congress occupied the field of matters relating to the transportation of natural gas in interstate commerce. *Schneiderwind v. ANR Pipeline Co.*, 485 U.S. 293 (1988)

Federal courts have repeatedly held that state and local regulation which affects the location, construction, operation, maintenance, and safety of interstate natural gas pipelines is invalid. That includes land use, zoning, and development regulations

There is always the question as to whether a state law or regulation is within the field occupied by Congressional action. In *Schneiderwind*, the Supreme Court determined that a Michigan requirement on the issuance of securities by natural gas companies was preempted by the NGA because the Michigan requirement might impact on matters the FERC regulates even though the FERC does not regulate securities. There is a case now at the Supreme Court on whether the NGA preempts state antitrust laws as they affect retail gas prices

There is no federal preemption of federal requirements, such as the federal Clean Water Act



Federal Preemption and Natural Gas Pipelines

In eminent domain condemnation cases, courts have consistently ruled that state laws are preempted by the NGA

Those cases include finding federal preemption and allowing a taking of property that was being used for a public purpose and where there was a state statute requiring that the new public purpose or public use be of higher necessity or public use than the current necessity or use

In a Massachusetts federal case in 1995 involving Tennessee Gas Pipeline, the court determined that the state law prohibiting the taking of property near a railroad was preempted by the NGA

Article 97 of the MA Constitution has not been the subject of a NGA preemption determination to our knowledge. Also uncertain is whether the no net loss policy would be preempted even if Article 97 were preempted because we do not know how large a field the NGA would occupy in that circumstance



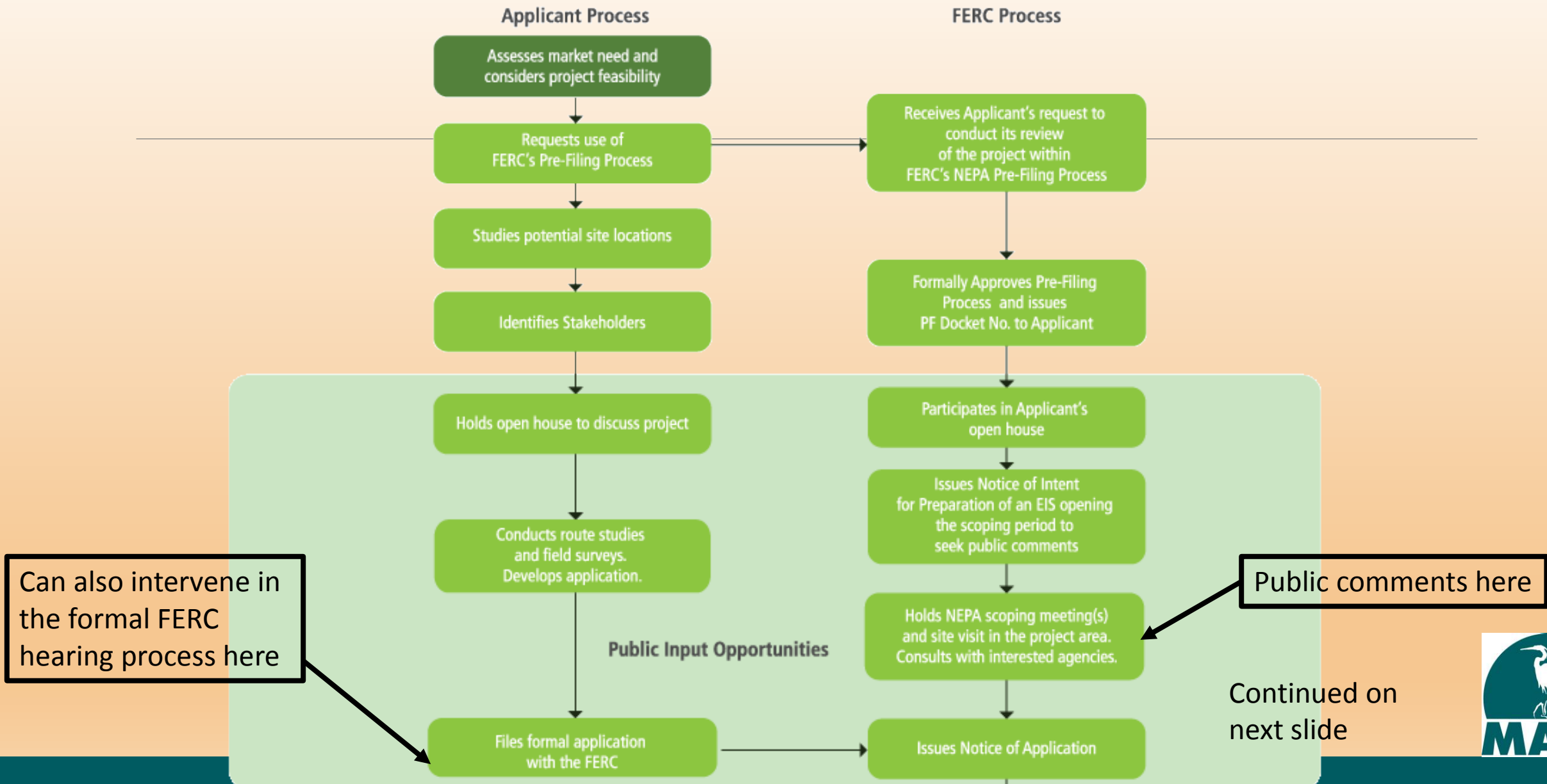
Opportunities for Local Involvement

FERC AND NEPA

USING THE PROPOSED KINDER MORGAN PIPELINE AS AN EXAMPLE



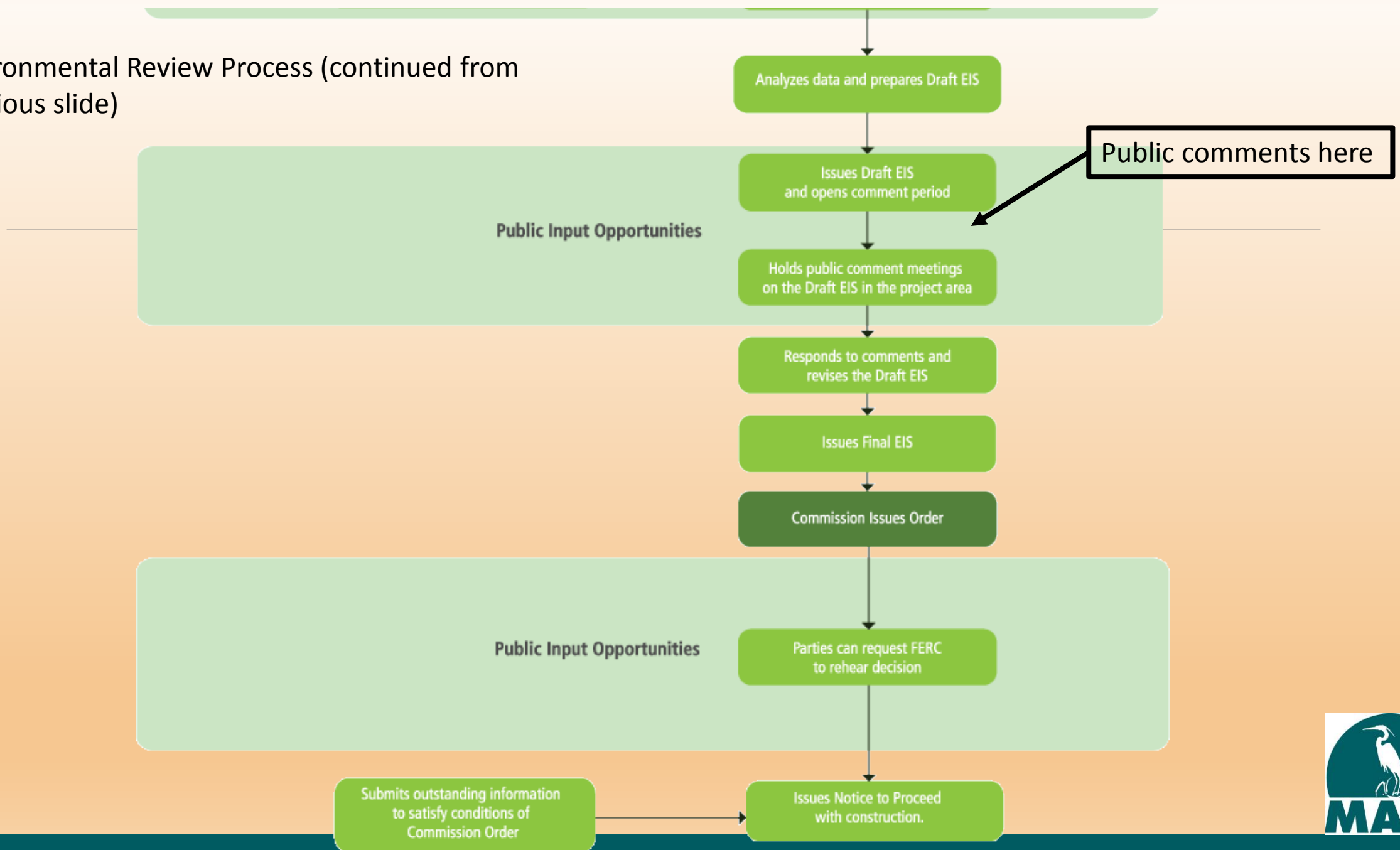
EIS Pre-Filing Environmental Review Process



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Environmental Review Process (continued from previous slide)



Now that KM has pre-filed with FERC

KM may be doing more surveys, requesting landowner permission to survey property

Landowners are not required to give permission. It is an individual decision

KM can file with the MA Department of Public Utilities (DPU) or FERC for an order giving it authority to enter property to survey where a landowner denies permission

For land with conservation restrictions or easements: the restriction or easement may not allow the landowner to give permission for some surveys, but FERC and DPU can nonetheless authorize entry and surveying. Take a look at what KM proposes to do with the survey and compare it to the wording for the conservation restriction or easement

MACC suggests that municipalities know and map what is on the land they own/manage, and for which they have conservation easements: vernal pools, endangered species, protected habitats, archeological resources, historic sites, etc.

Municipalities should know about drinking water wells and aquifers and other sensitive receptors

Also confirm that all the deeds for conservation land and CRs are recorded at the Registry of Deeds



Now that KM has pre-filed with FERC

KM is not exempt from state and local laws until it receives a certificate or order from FERC

MA Wetlands Protection Act and local wetlands bylaws thus apply to KM surveying work

KM surveying may be exempt from WPA if it is a minor activity within a buffer zone that is temporary in nature, has negligible impacts, and is necessary for planning and design purposes (*e.g.*, surveying, sediment sampling)

KM surveying is not exempt in a buffer zone if it would have more than a negligible impact or is more than temporary in nature

If there is a question about the survey work, KM should file a Request for Determination or Notice of Intent, or the commission could consider a RDA filed by someone else or itself

If there is a positive Determination of Applicability, KM must file a Notice of Intent and receive an Order of Conditions before it may proceed with the survey



NEPA

KM's pre-filing with FERC will trigger review of the project under the National Environmental Policy Act (NEPA). (It may run concurrently with MEPA review)

NEPA goal: assess the environmental impact of the project and alternatives and identify mitigation for impacts

NEPA requires public involvement, including public notice and public comment

FERC will hold site visits and scoping meetings in the project area. Scoping highlights the issues that should be addressed in the NEPA review (for example, potential other routes for the pipeline, impacts on wetlands and endangered species, and the no-build alternative)

MACC suggests it is very important to participate in the NEPA process (and MEPA) by filing detailed comments on scoping and on the DEIS about significant environmental concerns and options

The NEPA process will conclude after KM's formal filing with FERC

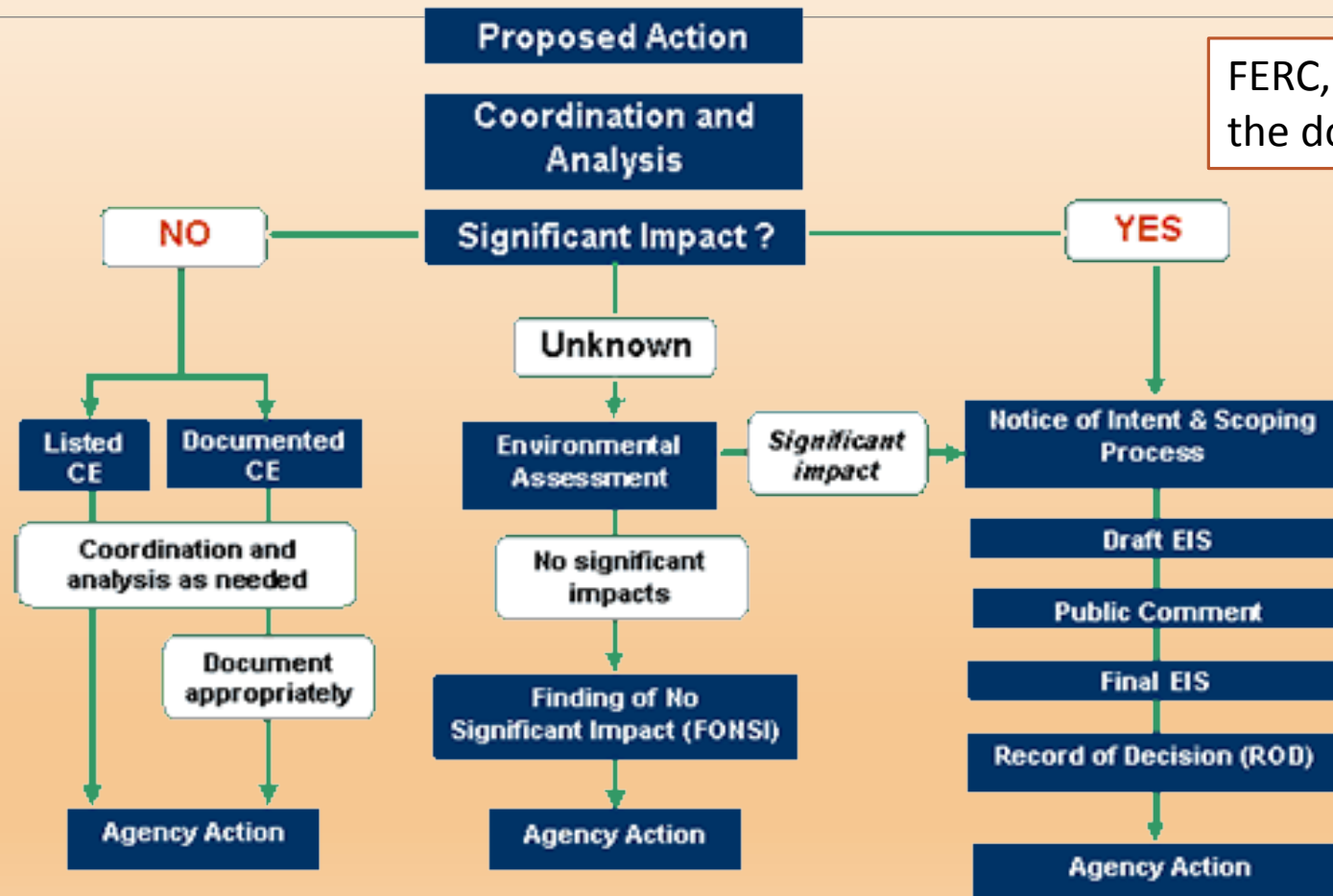
FERC ultimately decides if the NEPA review was adequate. The FERC NEPA decision can be appealed to court (issue for court review is process, not substance)



NEPA Environmental Impact Statement



NEPA Process



FERC, not KM, is responsible for the documents and process



During the FERC Process

KM files a formal application with FERC

“Public convenience and necessity “must be shown by KM

Environmental Report filed by KM / NEPA process completed

People and groups can petition to intervene or protest the application

- Request that FERC require KM to get approval from legislature to cross Art. 97 land
- Advocate for an alternative route with less environmental impact

FERC will schedule a public hearing on the application – can be a long process at the FERC

If FERC approves the project, it will issue a certificate of public convenience and necessity. With that certificate, local and state laws and regulations are preempted unless the certificate states otherwise

Potential: use the FERC process to have the FERC include conditions in the certificate that require compliance with MESA, MA WPA, Article 97, and Ch.44 §53G



After the FERC Process

Important considerations:

Negotiating a price for right of ways and land or litigating price in federal court

Knowing what is involved in constructing a gas pipeline

Knowing what FERC included as conditions in the certificate. Will there be a role for conservation commissions or other municipal entities?

How can municipal entities ensure that lands disturbed during construction are restored and that there is other appropriate mitigation?

How can municipal entities ensure that KM maintains the pipeline route in an environmentally sensitive and appropriate manner?

Federal laws are not pre-empted (*e.g.*, CWA, CAA, ESA). The public (including municipalities) can participate in those reviews



Agency	Permits and Consultations
COMMONWEALTH OF MASSACHUSETTS	
Massachusetts Executive Office of Energy and Environmental Affairs Massachusetts Environmental Protection Act (MEPA) Office	Required Permit: Secretary Certificate
Massachusetts Office of Coastal Zone Management	Required Permit: Coastal Zone Management Consistency Determination
Massachusetts Department of Environmental Protection (MassDEP)	Required Permit: Section 401 WQC pursuant to Section 401 of the CWA General Permit for Construction Dewatering Water Withdrawal Permit Air Quality Permit
Massachusetts Division of Wildlife and Fisheries Natural Heritage & Endangered Species Program	Required Consultation: Review of state-listed threatened and endangered species; Massachusetts Endangered Species Act (MESA)
Massachusetts Historical Commission	Required Consultation: Section 106, National Historic Preservation Act
Massachusetts Energy Facilities Siting Board	Required Consultation: Review and certification of energy facilities through FERC
Massachusetts Commission on Indian Affairs	Required Consultation: Section 106, National Historic Preservation Act
Massachusetts Town Conservation Commissions	Required Permit: Wetland Protection Act: Notice of Intent



Agency	Permits and Consultations
FEDERAL	
<p>Federal Energy Regulatory Commission (FERC)</p> <p>Office of Energy Projects (OEP)</p>	<p>Required Permit:</p> <p>Certificate of Public Convenience and Necessity.</p> <p>National Environmental Policy Act (NEPA) – Environmental Impact Statement Review</p>
<p>U.S. Army Corps of Engineers (USACE)</p> <p>Baltimore District-Regulatory Division</p> <p>New York District – Regulatory Division</p> <p>New England District – Regulatory Division</p>	<p>Required Permit:</p> <p>Section 404/Individual Permits-Permit review covers impacts to wetlands, waterbodies and navigational concerns</p> <p>Authority granted under Section 10 Rivers and Harbors Act and Section 404 Clean Water Act</p>
<p>U.S. Environmental Protection Agency (USEPA)</p> <p>Region 1 (New England)</p> <p>Region 2 (New York)</p> <p>Region 3 (Pennsylvania)</p>	<p>Required Consultations:</p> <p>Wetland review during USACE Section 404 permit process</p> <p>Consultation during NEPA review and oversight of air permits</p> <p>National Environmental Policy Act (NEPA) – Environmental Impact Statement Review</p>
<p>National Marine Fisheries Service (NOAA Fisheries)</p> <p>Office of Protected Resources</p>	<p>Required Consultations:</p> <p>Federal Endangered Species Act</p> <p>Magnuson-Stevens Fishery Conservation and Management Act</p>
<p>U.S. Fish and Wildlife Service (USFWS)</p> <p>Pennsylvania Field Office</p> <p>New York Field Office</p> <p>New England Field Office</p>	<p>Required Consultations:</p> <p>Federal Endangered Species Act (ESA)</p> <p>Migratory Bird Treaty Act (MBTA)</p> <p>Fish and Wildlife Coordination Act</p> <p>Bald and Golden Eagle Protection Act</p>



What Can Municipalities Do Now?

Inventory conservation lands and document valuable resources

- Submit rare species reports to NHESP
- Certify vernal pools
- Document archaeological resources
- Identify historic sites

Compressor stations: what are the nearest sensitive noise and air pollution receptors and impacts?

Do homework necessary to establish value of conservation land in case of a negotiated easement or an eminent domain taking

Review conservation restrictions on conservation land to see if proposed survey methods would violate restrictions

Make sure CRs and conservation land deeds are recorded at the Registry of Deeds

Make sure the conservation commission has adopted rules for implementing c.44 §53G (hiring outside consultants at applicant's expense)

Review MassDEP's Wildlife Habitat Guidance document



Summary: Opportunities for Involvement

Decisions on survey requests and requests for information

Wetland Protection Act and CR review of surveys when applicable

Know your resources and consider potential impacts of the pipeline

NEPA: comment during scoping and on the DEIS (and comment in MEPA too)

FERC process

Federal Permits (*e.g.*, Clean Water Act, Clean Air Act, Endangered Species Act)

Construction and restoration phases monitoring (WPA permitting?)

Maintenance of the right of way after project construction completed

