Interstate Natural Gas Pipelines: The Role of Massachusetts Conservation Commissions

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PRESENTED IN GRAFTON, MA
AUGUST 24, 2016
Role of Conservation Commissions

What may conservation commissions do concerning a proposed interstate natural gas pipeline, considering their statutory responsibilities and authorities to:

- Implement and enforce the MA Wetlands Protection Act and local wetlands bylaws
- Manage open space
- Inform, advocate, and plan for natural resources protection
- Be on Community Preservation Committees and be consulted on use of CPA funds
Agenda

Introductions
Overview of Access Northeast
Natural Gas Act and FERC
Federal Preemption
Surveys
Other items to be ready
If FERC issues a certificate for a pipeline
Introductions

Name

Conservation Commission

Whether your commission owns or manages land the pipeline would cross

Whether the pipeline would trigger WPA requirements in your town

What you hope to get from this evening’s meeting
Access Northeast Overview
Proposed Pipeline Route and Facilities (Eastern Massachusetts)

- West Boylston M&R Station
- West Boylston Lateral
  - Medway to West Boylston
    - 26.8 miles
- Q-1 Loop
  - Medway to Canton
    - 21.7 miles
- I-8 Loop
  - Braintree to Weymouth
    - 4.2 miles
- Weymouth Compressor Station
Proposed Pipeline Route and Facilities (Southeastern Massachusetts)

- Rehoboth Compressor Station
- Acushnet Pipe Connector
  - Freetown to Acushnet
  - 3.0 miles
- Acushnet M&R Station
- Acushnet LNG Storage Facility
## Communities Affected by Proposed Pipeline

<table>
<thead>
<tr>
<th>Worcester County</th>
<th>Norfolk County</th>
<th>Bristol County</th>
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<tr>
<td>• Boylston</td>
<td>• Bellingham</td>
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<td>• Grafton</td>
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<td>• Milford</td>
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<td>Agency</td>
<td>Permits/Consultations</td>
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<tr>
<td><strong>Federal Energy Regulatory Commission (FERC)</strong></td>
<td>Certificate of Public Convenience and Necessity to construct, install, own, operate, and maintain a pipeline under Section 7 (c) of the Natural Gas Act (15 USC § 717f (c))</td>
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</table>
| **U.S. Army Corps of Engineers (USACE)**         | **Required Permits:**  
   • Section 10 of the Rivers and Harbors Act and Section 404 of the Clean Water Act (CWA) Individual Permit |
| New York and New England Districts Regulatory Division |                                                                                                                                                                   |
| **U.S. Environmental Protection Agency (USEPA)** | **Consultation:**  
   • Consultation through the USACE Section 404 of the CWA process;  
   • Consultation during NEPA review and oversight of air permits;  
   • Establish Spill Prevention, Control and Countermeasures (SPCC) Plan prior to start of construction (no review/approval required) |
| Regions 1 and 2                                   |                                                                                                                                                                   |
| **National Marine Fisheries Service (NOAA Fisheries)** | **Consultation:**  
   • Consultation under section 7(a)(2) of the Endangered Species Act (ESA); and  
   • Consultation under the Magnuson-Stevens Fishery Conservation and Management Act. |
| **U.S. Fish and Wildlife Service (USFWS)**       | **Consultation:**  
   • Consultation under Section 7 of the ESA;  
   • Consultation under the Migratory Bird Treaty Act, and  
   • Consultation under the Fish and Wildlife Coordination Act (16 USC §§ 1531 et seq.). |
| New York and New England Field Offices            |                                                                                                                                                                   |
| **Native American Tribes**                       | **Consultation:**  
   • Section 106, National Historic Preservation Act (16 USC § 470f)                                                                                                                                 |

MASSACHUSETTS ASSOCIATION OF CONSERVATION COMMISSIONS
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<tr>
<td><strong>Massachusetts Executive Office of Energy and Environmental Affairs (EEA)</strong>&lt;br&gt;Massachusetts Environmental Protection Act (MEPA) Office</td>
<td>Required Permits:&lt;br&gt;• Compliance with MEPA Regulations (G.L. c. 30, §§ 61, through 62H; 301 CMR 11.00)</td>
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<tr>
<td><strong>Massachusetts Office of Coastal Zone Management</strong></td>
<td>Required Permits:&lt;br&gt;• Coastal Zone Management Consistency Determination</td>
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<td><strong>Massachusetts Department of Environmental Protection (MassDEP)</strong>&lt;br&gt;Southeast Region Office</td>
<td>Required Permits:&lt;br&gt;• 401 Water Quality Certification for Discharge of Dredged or Fill Material, Dredging, and Dredged Material Disposal in Waters Within the Commonwealth.&lt;br&gt;• Chapter 91 License for Filled Tidelands&lt;br&gt;• Massachusetts Wetland Protection Act (MWPA – Municipalities typically cover local wetland permitting)&lt;br&gt;Required Permits:&lt;br&gt;• Non-Major Comprehensive Plan Approval required.</td>
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<tr>
<td><strong>MassDEP</strong>&lt;br&gt;Central Region Office</td>
<td>Required Permits:&lt;br&gt;• 401 Water Quality Certification for Discharge of Dredged or Fill Material, Dredging, and Dredged Material Disposal in Waters Within the Commonwealth.&lt;br&gt;• Massachusetts Wetland Protection Act 310 CMR 10.00&lt;br&gt;• 310 CMR 40.0 Massachusetts Contingency Plan</td>
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<td><strong>Massachusetts EEA</strong>&lt;br&gt;Energy Facilities Siting Board (EFSB)</td>
<td>Consultation:&lt;br&gt;• Review and comment on FERC-regulated energy projects (M.G.L. c.164, §§ 69H, 69J; 980 CMR)</td>
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## State Permits and Consultations (Cont.)

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<tr>
<td>Department of Conservation and Recreation</td>
<td>• ROW and easement through Upton State Forest</td>
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<td>Massachusetts EEA</td>
<td>Consultation:</td>
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<tr>
<td>Natural Heritage &amp; Endangered Species Program</td>
<td>• Pursuant to 321 CMR 10:00 MESA</td>
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<tr>
<td>Massachusetts Historical Commission</td>
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<td>Municipal Conservation Commissions</td>
<td>Required Permits:</td>
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<td></td>
<td>• Order of Conditions - Wetlands Protection Act (Massachusetts General Law Chapter 131 Section 40) Notice of Intent.</td>
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Engie Gas and LNG, Inc. v. Department of Public Utilities

MA SJC decision, August 17, 2016

DPU had allowed electric utilities to enter into long term contracts for new gas transmission capacity. Theory was that more gas pipeline capacity is needed but pipeline companies would not assume the financial risk of building a new pipeline without knowing they would have enough revenue assured to pay for the pipeline.

DPU would also allow the costs of the contracts, including the costs to build the pipeline, to be recovered through electric utility rates.

SJC ruled that DPU did not have the authority to review and approve ratepayer-backed, long-term contracts by electric utilities for natural gas capacity and the DPU decision would re-expose ratepayers to the types of financial risks from which the Legislature sought to protect them.

Spectra had intended to fund Access Northeast through that mechanism. Now says it is still committed to building the pipeline and has other funding options.
Natural Gas Act and FERC

WHAT’S FERC HAVE TO DO WITH IT?
Natural Gas Act and FERC

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
Natural Gas Act and FERC

An interstate 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

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.
Natural Gas Act and FERC

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 less than 100% capacity subscribed
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
NEPA

MACC advises that it is important to be involved in the NEPA process and submit detailed comments that describe and explain any significant environmental concerns that you may have about the project.

The NEPA process will conclude after Spectra’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
FERC, not Spectra, is responsible for the documents and process.
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 or state 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.”
Federal Preemption of State Laws

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)
During the FERC Process

Surveys

Know your conservation land the pipeline might traverse

Be ready if FERC approves the pipeline
Surveys

AND WETLAND PROTECTION
Wetlands and Surveys

The MA WPA and wetlands bylaws apply to surveying work absent a FERC order or certificate
(There is no federal preemption without a FERC 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). 310 CMR 10.02(2)(b)2.g. 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

What type of surveying is it
  ◦ Rod and transit or laser
  ◦ Cutting of vegetation
  ◦ Vehicular access
  ◦ Drilling rigs or other equipment
Wetlands and Surveys

Surveying is not 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)

- A commission can deny a survey NOI that is not filed by the landowner or with the landowner’s written permission
Surveys and Conservation Land

Land owners are not required to allow pipeline representatives to enter their lands to conduct surveys, unless the pipeline has obtained a legal order to that effect.

Surveys are not prohibited on conservation land in every instance.

Conservation commissions that own or manage land or have conservation restrictions on land that may be used for the pipeline may wish to review the deeds, funding documents, granting documents, and CRs to determine if a survey or survey method would violate a term of the deed, funding, granting document, or CR.
DPU Authority for Surveys

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 that would apply to the survey
Know your conservation land

Inventory conservation lands and document valuable resources
- Submit rare species reports to NHESP
- Certify vernal pools
- Document archaeological resources
- Identify historic sites

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

Know the funding and acquisition history (e.g., LWCF)

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

Review MA DEP’s Wildlife Habitat Guidance document
Other items to be ready

Make sure your commission has adopted rules for implementing Ch.44 §53G (hiring outside consultants at applicant’s expense)

Assess if there are environmental issues to raise during NEPA review. The more fact-based, the better. If there are alternative routes that would be less damaging to the environment, be sure to set those out in your NEPA comments. Follow the NEPA process so you are ready to submit comments when they are due

Determine whether to participate (comment) in other regulatory reviews (e.g., Clean Water Act)
If FERC Issues a Certificate for the Pipeline

ROLE OF THE CONSERVATION COMMISSION
If a Certificate ...

**Important considerations:**

What is involved in constructing a gas pipeline?

What did FERC include as conditions in the permit? Will there be a role for commissions?

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

How can commissions ensure that Spectra maintains the pipeline route in an environmentally sensitive and appropriate manner?

Federal laws are not pre-empted. Commissions can participate in those reviews (e.g., CWA)
A few places where conservation commissions may be involved

Pre-Construction
- Right of Way Layout and Facilities
- Wetland Delineation
- Boundary Confirmation

Construction
- Access
- Water Control
- Invasives
- Habitat

Cathodic Protection Addition

Pipeline/ROW Maintenance
Conventional Trench and Fill

Horizontal Directional Drilling

These may require Clean Water Act Section 401 and 404 permits and other permits (c.91, for example), depending on location and more
Are the entry hole or exit hole within WPA jurisdiction?

Where is the laydown space?

What is the “frac out” plan?
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 might 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.

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

Exemption for maintenance of utilities does not apply to installation of *new* pipelines.

Exemption in statute and regulations is for *maintenance* of existing utility lines.
Minor Exempt Activities in a Buffer Zone

310 CMR 10.02(2)(b)2.

K. Installation of new equipment within existing or approved electric or gas facilities when such equipment is contained entirely within the developed/disturbed existing fenced yard;

l. Installation of access road gates at public or private road entrances to existing utility right-of-way access roads, provided that all vehicles and machinery are located within the roadway surface during work;

m. Removal of existing utility equipment (poles, anchors, lines) along existing or approved roadways or within existing or approved electric, water or gas facilities provided that all vehicles and machinery are located within the roadway surface during work;
Limited Projects

Construction of new gas lines qualify as limited projects, 310 CMR 10.24(7)(b) and 10.53(3)(d)

FERC sets route

Commission can required reasonable alternative routes for local distribution or connecting lines not reviewed by EFSB

Best Available Measures to minimize adverse effects

Surface vegetation and contours substantially restored

Relief may be granted from usual performance standards

No adverse effects or rare species habitat

Commission shall consider
  Magnitude of alteration
  Significance of the site to the interests of the Act
  Availability of reasonable alternatives
  Minimization
  Mitigation
Pipeline at the Commission

OOC consistent with the FERC certificate and to the extent it can with the WPA and local bylaw

Understand the location of pipeline and other facilities and work areas

Understand the potential construction impacts – on and off site
  ◦ Includes access, water control, and more

Restoration after construction
  ◦ What to require

Ensure the success of the restoration

Potentially use c.44, § 53G to have the pipeline pay for a consultant for the commission for all the above
Commission as a Land Manager

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
Questions and Discussion