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Permitting of "Export" Natural Gas Pipelines

Energy Export & Transportation
Oregon State Bar Environmental and Natural Resources Section
Environmental Year in Review
October 24, 2014

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Summary: Although the Energy Policy Act of 2005 in many respects strengthened FERC's authority over the siting and operation of both interstate gas pipelines and LNG terminals, it expressly preserved the role of state governments through their delegated authority under three federal statutes: the Coastal Zone Management Act, the Clean Water Act, and the Clean Air Act. As a consequence, the siting of LNG terminals – or the natural gas pipelines that serve them – should not be viewed as a simple exercise in federal preemption.

I. NGA, EPAct and FERC's Exclusive Jurisdiction

Under the Natural Gas Act (NGA),[1] the Federal Energy Regulatory Commission has long had broad authority to regulate transportation of natural gas in interstate commerce. The provisions of the NGA

> apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, and to the importation or exportation of natural gas in foreign commerce and to persons engaged in such importation or exportation, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.[2]

The authority of FERC under the NGA is not only broad, it is exclusive.[3] In the parlance of preemption, Congress through the NGA "occupied the field" in a manner precluding state regulation of interstate natural gas facilities.

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[1] 15 U.S.C. §§ 717-717w.
[2] *Id.* § 717(b).
[3] *Schneidewind v. ANR Pipeline Co.,* 485 U.S. 293, 300-01 (1988), *citing Northern Natural Gas Co. v. State Corporation Comm'n of Kansas, 372 U.S. 84, 89 (1963).*

Under Section 7(c) of the Natural Gas Act, a FERC-issued "certificate of public convenience and necessity" is necessary in order to construct an "interstate" gas pipeline:

> No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations ….[4]

FERC's order approving a certificate of public convenience and necessity for a pipeline will set forth the conditions of the approval, including the approved route and any required measures to mitigate impacts of construction or operation of the pipeline. The FERC certificate, moreover, confers on the holder the power of eminent domain, which may be exercised in federal or state court.[5]

With the enactment of the Energy Policy Act of 2005 (EPAct),[6] Congress resolved any lingering issue regarding FERC's authority over LNG terminals,[7] unequivocally stating that FERC "shall have the exclusive authority to approve or deny an application for the siting, construction, expansion, or operation of an LNG terminal."[8] EPAct also expanded FERC's role as the agency responsible for coordinating approvals from other federal and state agencies for NGA jurisdictional facilities and establishing a schedule for action by those agencies – a schedule enforceable through judicial review.[9]

One provision of EPAct targeted specifically to LNG facilities has, through FERC rulemaking, also affected pipeline permitting. EPAct required that FERC promulgate rules establishing a "pre-filing" process that must "commence at least 6 months prior to the filing of an application for authorization to construct an LNG terminal and encourage applicants to cooperate with State and local officials."[10] FERC's regulations made the pre-filing process -- previously a voluntary step for interstate pipelines – mandatory for both a prospective applicant for an LNG terminal and an applicant for a related jurisdictional natural gas facility.[11] For purposes of the pre-filing requirement, FERC's rules define "related jurisdictional natural gas facilities" to mean

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[4] 15 U.S.C. § 717f(c)(1)(a).
[5] *Id.* § 717f(h).
[6] Pub. L. No. 109-58 (2005).
[7] "LNG terminal" is defined in 15 U.S.C. § 717a(11) to include:

> … all natural gas facilities located onshore or in State waters that are used to receive, unload, load, store, transport, gasify, liquefy, or process natural gas that is imported to the United States from a foreign country, exported to a foreign country from the United States, or transported in interstate commerce by waterborne vessel, but does not include—
>
> (A) waterborne vessels used to deliver natural gas to or from any such facility; or
>
> (B) any pipeline or storage facility subject to the jurisdiction of the Commission under section 717f of this title.

[8] 15 U.S.C. § 717b(e)(1).
[9] *Id.* §§ 717n(c)(2), 717r(d)(2).
[10] *Id.* § 717b-1(a).
[11] 18 C.F.R. § 157.21(a) ("A prospective applicant for authorization to site, construct and operate facilities included within the definition of "LNG terminal," as defined in § 153.2(d), and any prospective applicant for related jurisdictional natural gas facilities must comply with this section's pre-filing procedures and review process").

> any pipeline or other natural gas facilities which are subject to section 7 of the NGA; will directly interconnect with the facilities of an LNG terminal, as defined in paragraph (d) of this section; and which are necessary to transport gas to or regasified LNG from:
> (1) A planned but not yet authorized LNG terminal; or
> (2) An existing or authorized LNG terminal for which prospective modifications are subject pursuant to section 157.21(e)(2) to a mandatory pre-filing process.[12]

Under the pre-filing process, the prospective applicant must make an "initial filing" before filing the application; that initial filing, extensive in its own right, must identify federal and state agencies with permit requirements and describe how the applicant intends to respond to requests for information from those agencies.[13]

The extensive FERC permitting process, beginning with pre-filing, is summarized in the flow chart attached as Appendix A.

II. The Preservation of a Delegated State Role: CZMA, CWA and CAA

Although the role of a state in the siting and operation of NGA jurisdictional facilities is largely advisory and consultative, EPAct preserved what can be a significant state role by providing that, except as specifically provided, the statute does not affect the rights of states under the Coastal Zone Management Act, the Clean Water Act, and the Clean Air Act.[14]

A. Coastal Zone Management Act

The Coastal Zone Management Act,[15] enacted in 1972, was designed to foster the development of state programs for "the effective management, beneficial use, protection, and development of the coastal zone."[16] If a state wishes to participate, it submits its program to protect the water and land resources of the coastal zone – its "coastal management program" (CMP) – to the U.S. Department of Commerce for approval. States are not required to participate; indeed, Alaska – the state with the longest coastline – withdrew from the coastal zone management program effective July 1, 2011.[17]

Unlike other federal regulatory programs, including the Clean Water Act and the Clean Air Act, the federal government does not administer a coastal zone program if a state elects not to participate.

Moreover, the programs – including the description of the "coastal zone"[18] -- vary widely from one state to another. CMPs may incorporate, among other things, state and federal water quality requirements, resource protection laws, and local comprehensive plans and zoning ordinances.

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[12] *Id.* § 153.2(e).
[13] *Id.* § 157.21(d).
[14] 15 U.S.C. § 717b(d).
[15] 16 U.S.C. § 1451 et seq.
[16] *Id.* § 1451(a).
[17] 76 Fed. Reg. 39,857 (2011).
[18] "Coastal zone" is defined by statute, 16 U.S.C. § 1453(1), but the definition requires factual determinations that vary with geography and resources. A table summarizing the coastal zone boundaries of the participating states and territories is available at: http://coastalmanagement.noaa.gov/mystate/docs/StateCZBoundaries.pdf

The CZMA offers an unusually succinct explanation of the effect of an approved CMP, the process for state review of an applicant's certification of consistency with the "enforceable policies" of the CMP, and the process and standard for review by the Secretary of Commerce:

> After final approval by the Secretary of a state's management program, any applicant for a required Federal license or permit to conduct an activity, in or outside of the coastal zone, affecting any land or water use or natural resource of the coastal zone of that state shall provide in the application to the licensing or permitting agency a certification that the proposed activity complies with the enforceable policies of the state's approved program and that such activity will be conducted in a manner consistent with the program. At the same time, the applicant shall furnish to the state or its designated agency a copy of the certification, with all necessary information and data. Each coastal state shall establish procedures for public notice in the case of all such certifications and, to the extent it deems appropriate, procedures for public hearings in connection therewith. At the earliest practicable time, the state or its designated agency shall notify the Federal agency concerned that the state concurs with or objects to the applicant's certification. If the state or its designated agency fails to furnish the required notification within six months after receipt of its copy of the applicant's certification, the state's concurrence with the certification shall be conclusively presumed. No license or permit shall be granted by the Federal agency until the state or its designated agency has concurred with the applicant's certification or until, by the state's failure to act, the concurrence is conclusively presumed, unless the Secretary, on his own initiative or upon appeal by the applicant, finds after providing a reasonable opportunity for detailed comments from the Federal agency involved and from the state, that the activity is consistent with the objectives of this chapter or is otherwise necessary in the interest of national security.[19]

Several aspects of the consistency determination process are worth highlighting. First, not all elements of an approved CMP are "enforceable policies" for purposes of the CZMA consistency determination. Rather, enforceable policies are those portions of the program "which are legally binding through constitutional provisions, laws, regulations, land use plans, ordinances, or judicial or administrative decisions, by which a State exerts control over private and public land and water uses and natural resources in the coastal zone."[20] A state, moreover, cannot bar a gas pipeline or LNG terminal merely by adopting as part of its CMP a state or local standard prohibiting such facilities: the Fourth Circuit has held that a state cannot invoke the "savings clause" for the CZMA if it has not obtained Department of Commerce approval of an amendment to its CMP.[21]

Second, a state cannot delay NGA jurisdictional projects simply by withholding indefinitely its concurrence on the applicant's consistency determination. If the state fails to act within six months of receiving the application, concurrence is "conclusively presumed." Under CZMA regulations, the review period is actually triggered by the state agency's receipt of "the consistency determination required by § 930.57 and all the necessary data and information required by § 930.58(a)."[22] If the state agency authorized to review the applicant's consistency determination does not receive that determination or "all

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[19] *Id.* § 1456(c)(3)(A).

[20] *Id.* § 1453(6a); *see also* 15 C.F.R. § 930.11(h).

[21] *AES Sparrows Point LNG, LLC v. Smith*, 527 F.3d 120, 126-27 (4th Cir. 2008). Because Maryland had not obtained Department of Commerce approval of an amendment to the state's management program, the Fourth Circuit left unanswered whether a CMP provision banning LNG terminals would be preempted by the NGA if the CMP amendment were approved by the Department of Commerce.

[22] 15 C.F.R. § 930.60(a).

the necessary information," it may toll the six-month review period by providing notice to the applicant and FERC within 30 days of receipt of the incomplete submittal.

Third, the Secretary of Commerce can override a state's objection by concluding that the proposed activity "is consistent with the objectives of this chapter or is otherwise necessary in the interest of national security." In other words, the Secretary does not review the activity for consistency with the state's approved management program, but rather for consistency with the objectives of the CZMA itself. The Secretary's decision is subject to judicial review in U.S. District Court as a final agency action under the Administrative Procedure Act; judicial review is based on the consolidated record maintained by FERC in cooperation with federal and state agencies.[23]

B. Clean Water Act

Two provisions of the Clean Water Act (CWA)[24] -- Section 401[25] concerning water quality certification and Section 402[26] concerning National Pollutant Discharge Elimination System (NPDES) permits for discharges of water pollutants -- delegate to states authority affecting the permitting of NGA jurisdictional facilities. Of the two provisions, Section 401 presents far wider latitude for states to halt such facilities, particularly if a facility requires only general rather than individual NPDES permits.

Section 401 requires that an applicant for "a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate … that any such discharge will comply" with the with the CWA's effluent limitations, water quality standards and national performance standards.[27]

Water quality certification under Section 401 is a pre-requisite to issuance of the federal license or permit: "No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied …."[28] Moreover, the state must include in any water quality certification "any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply" with the applicable effluent limitations, water quality standards and performance standards, as well as "any other appropriate requirement of State law set forth in such certification"; the conditions to the certification then must become conditions of the federal license or permit.[29]

Section 401 has a noteworthy history with FERC-regulated projects. In *PUD No. 1 of Jefferson County v. Wash. Dept. of Ecology*,[30] the U.S. Supreme Court upheld the determination of the Washington Supreme Court that the Washington Department of Ecology could include a minimum streamflow requirement in the water quality certification for a FERC-licensed hydropower project because the requirement was necessary to enforce a use of the subject river as fish habitat.[31] In *S.D. Warren Co. v. Maine Bd. of Envtl.*

[23] 15 U.S.C. § 717n(d).
[24] 33 U.S.C. §§ 1251-1387.
[25] *Id.* § 1341.
[26] *Id.* § 1342.
[27] *Id.* § 1341(a)(1).
[28] *Id.*
[29] *Id.* § 1341(d).
[30] 511 U.S. 700 (1994).
[31] *Id.* at 714-15.

Protection,[32] the Supreme Court affirmed a decision of the Maine Supreme Court that hydroelectric dams could create a "discharge" into navigable waters within the meaning of the CWA, and that relicensing of such dams by FERC under the Federal Power Act therefore requires state water quality certification under Section 401.

Unlike the CZMA, the CWA provides no means by which any federal agency – including FERC -- may override a state's determination to deny a water quality certification or to issue that certification with conditions. Indeed, in another case involving Section 401 and hydropower licensing under the Federal Power Act, the Second Circuit held that FERC could not second-guess the conditions imposed by the state under a properly issued water quality certification: "While the Commission may determine whether the proper state has issued the certification or whether a state issued the certification within the prescribed period, the Commission does not possess a roving mandate to decide that substantive aspects of state-imposed conditions are inconsistent with the terms of § 401."[33]

Although Congress has not provided a means for FERC to override state agency decisions under the CWA (or the Clean Air Act), Congress foresaw the need to expedite review of permitting decisions associated with natural gas facilities. In the *PUD No. 1* and *S.D. Warren* cases discussed above, for example, decisions of state agencies on water quality certifications for Federal Power Act hydroelectric projects were subject to review under state administrative and judicial review procedures – all the way through the state supreme court – before reaching the U.S. Supreme Court. EPAct amended the NGA to provide for exclusive review in the U.S. Court of Appeals:

> The United States Court of Appeals for the circuit in which a facility subject to section 717b of this title or section 717f of this title is proposed to be constructed, expanded, or operated shall have original and exclusive jurisdiction over any civil action for the review of an order or action of a Federal agency (other than the Commission) or State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit, license, concurrence, or approval (hereinafter collectively referred to as "permit") required under Federal law, other than the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.).[34]

The Court of Appeals also has exclusive jurisdiction over any civil suit alleging that a federal or state agency has failed to take action – again, the Coastal Zone Management Act is excepted.[35] The court is required to afford expedited review to any such suit challenging agency action or inaction.[36] As with review of CZMA determinations, review is based on the consolidated record maintained by FERC. On review, if the court finds "such order or action is inconsistent with the Federal law governing such permit and would prevent the construction, expansion, or operation of the facility," it must not only remand to the agency for action consistent with the court's order, it must also set a "reasonable schedule and deadline for the agency to act on remand."[37] An agency's failure to meet the schedule and deadlines established by FERC is, by statute, "inconsistent with Federal law."[38]

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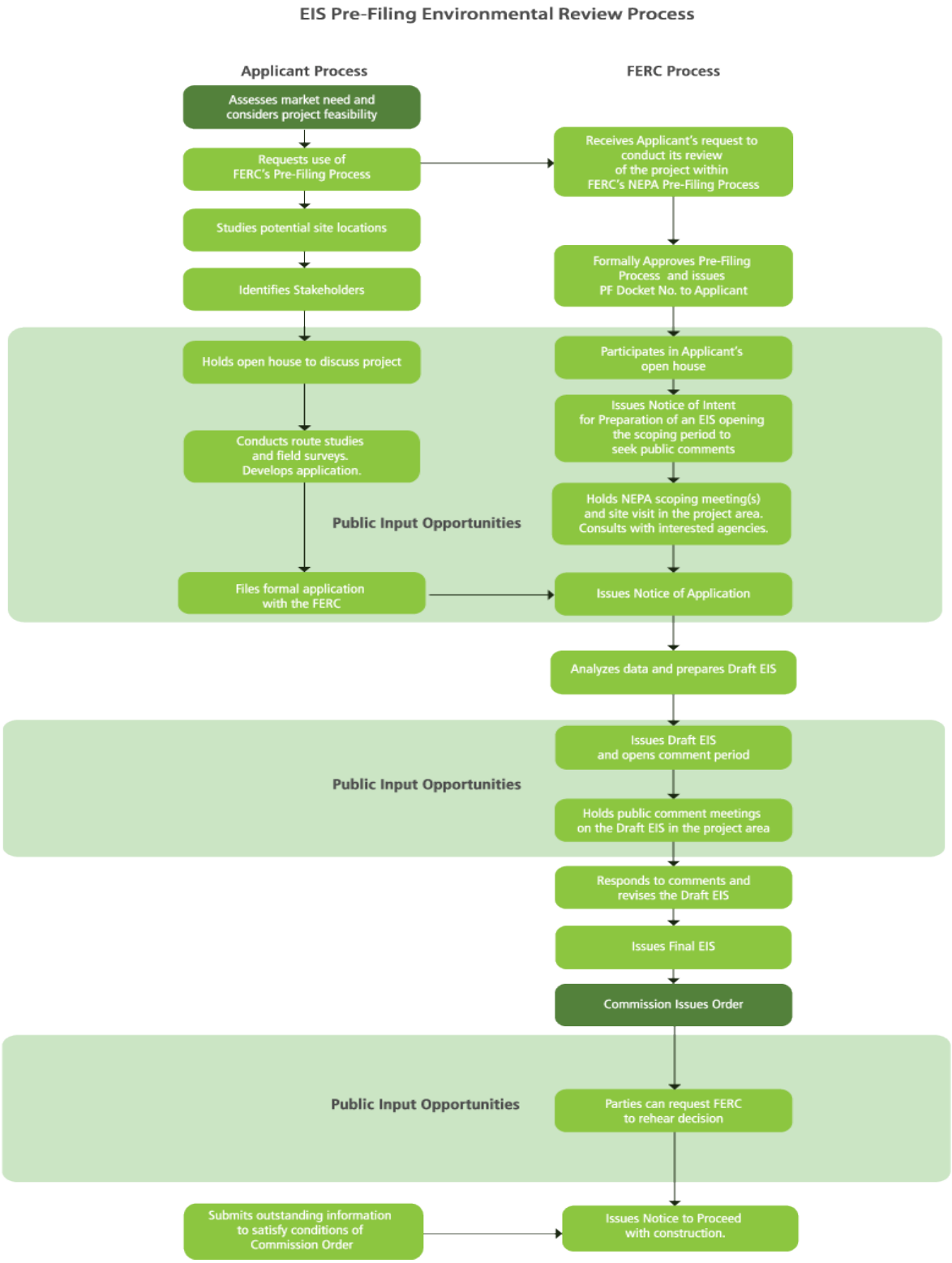
[32] 547 U.S. 370 (2006). The Section 401 certification in *S.D. Warren*, like that in *PUD No. 1*, was conditioned on compliance with minimum stream flow requirements.
[33] *American Rivers, Inc. v. FERC*, 129 F.3d 99, 110-11 (2nd Cir. 1997).
[34] 15 U.S.C. § 717r(d)(1).
[35] *Id.* § 717r(d)(2).
[36] *Id.* § 717r(d)(5).
[37] *Id.* § 717r(d)(3).
[38] *Id.* §§ 717n(c), 717r(d)(4).

The impact of state authority under Section 401 has certainly been felt in the LNG arena. After the Maryland Department of the Environment denied Section 401 certification for the Sparrows Point LNG terminal on four independent and alternative grounds, the Fourth Circuit – reviewing under EPAct's provision of exclusive jurisdiction -- held that Maryland's action was timely and that the denial was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" under the Administrative Procedure Act.[39] Specifically, the court upheld one basis for denial, that "dredging required to accommodate the LNG tankers would create additional deep water areas where dissolved oxygen levels would fail to meet Maryland water quality standards."[40] Having upheld one independent basis for Maryland's denial of water quality certification, the court declined to address the other three grounds.

The Oregon Department of Environmental Quality similarly issued a denial of Section 401 certification for the Bradwood Landing LNG facility – also on multiple grounds[41] -- though the fate of that project likely had already been sealed by the bankruptcy of the project developer.

[39] 5 U.S.C. § 706(2)(A).
[40] *AES Sparrows Point LNG, LLC v. Wilson*, 589 F.3rd 721 (4th Cir. 2009).
[41] The Oregon DEQ's denial letter, and supporting documentation, can be found at: http://www.deq.state.or.us/nwr/LNG/BradwoodLanding/bradwood.htm

Appendix A: FERC Pipeline Permitting – Pre-Filing and EIS



Source: http://www.ferc.gov/help/processes/flow/process-eis.asp