

From: NJLM to Municipal Officials [mailto:njlm-clerks@njslom.com]

Sent: Tuesday, January 20, 2015 4:19 PM

Subject: Interstate Natural Gas Pipeline Projects in NJ

Mayors Advisory

Date: January 20, 2015

Re: Interstate Natural Gas Pipeline Projects in New Jersey

Dear Mayor:

This notice is to discuss the current regulatory review process for interstate natural gas pipelines in New Jersey. To be clear, this letter will not discuss interstate oil pipelines. New Jersey and federal law treats these projects differently. Interstate oil pipelines will be a subject of a different notice.

Because the federal regulatory review of interstate natural gas pipelines preempts traditional municipal land use powers, the League wishes to advise you of this process.

By way of background there are currently two such proposed pipelines, at different stages of the review process, in New Jersey. Both of these projects are for the construction of interstate natural gas pipelines and are subject to the jurisdiction of the Federal Energy Regulatory Commission (FERC) under the Natural Gas Act.

They are: 1) Penn East Pipeline , and 2) Diamond East Pipeline.

The Penn East Pipeline is a proposal for a new pipeline that will cross the Delaware River and stretch from Hunterdon County to the Hopewell Valley Section of Mercer County. The Penn East Pipeline is a project of AGL Resources, NJR Pipeline Company, Public Service Enterprise Group, South Jersey Industries and UGI Energy Services. The Diamond East Pipeline, a project of Williams' Transco, is a proposal for an additional pipeline in an existing right of way within Mercer County.

A. Federal Energy Regulatory Commission Review

There are two components to Federal Energy Regulatory Commission's (FERC) review: 1) a pre-filing and environmental review; and 2) an application to the FERC for a pipeline certificate which allows a broad preemption of state and local regulation.

First, developers may file a request with FERC to use the commissioner's pre-filing procedures. *See* 18 C.F.R. 157.21. This procedure is meant to encourage developers to engage in project development activities with interested stakeholders, including municipal and state government. Taking into account stakeholder input, the developer can amend its plan with proposed environmental mitigation measures before applying to FERC. After this process concludes the developer may provide FERC with a resource report which the commission will use to conduct its own environmental review.

FERC's environmental review is conducted pursuant to the National Environmental Policy Act (NEPA). *See* 42 U.S.C. § 4321. This federal law requires FERC to consider the potential environmental impacts of granting a pipeline certificate and to communicate that information to the public. The process of review and seeking feedback from the public by FERC staff is called "scoping." After the initial scoping period, FERC issues a draft Environmental Impact Statement (EIS), first to cooperating federal agencies for review, and then to the public. After holding another set of public hearings and seeking input, FERC issues a final EIS.

Second, the developer must file a formal application with FERC for a pipeline certificate. Upon receiving an application, FERC publishes a notice in the federal register and begins the application

process. In order to make its determination FERC must determine if the proposed pipeline would be in the public interest by considering a number of factors.

If FERC grants a pipeline certificate, the commission's order may state the terms and conditions of approval, including the route that has been authorized, along with any environmental mitigation measures required by the project. Importantly, a FERC certificate confers upon the developer eminent domain authority. 15 U.S.C. §717f(h). Because federal law preempts any state or local law that would obstruct federal law, such as siting and zoning, municipalities will not be able to withhold approval for these projects. However, the state does have some oversight consistent with its authority under the federal Clean Water Act (CWA).

B. State Oversight

As noted above, while local authority is preempted, the state does maintain some oversight over interstate natural gas pipeline projects through provisions of the Clean Water Act. See 33 U.S.C. § 1344. The first provision, section 401 of the CWA, gives states the ability to deny certification of a project which "may discharge into the navigable waters" of the state. See 33 U.S.C. §1341(a)(1); see also *Alabama Rivers Alliance v. Federal Energy Regulatory Commission*, 325 F.3d 290 (D.C. Circ. Ct. 2003). The second provision, section 404, gives states the authority to regulate the impact of a pipeline project on wetlands. See 33 U.S.C. § 1344. New Jersey has incorporated its section 404 authority into the Freshwater Wetlands Protection Act (FWPA). See N.J.S.A. 13:9B-5(a).

The state may begin to review a developer's application after it submits its initial resource report to the FERC prior to their environmental review. Generally, this process is completed before the FERC issues a pipeline certificate. In any event, construction cannot begin until the project has received these state approvals.

C. Conclusion and Recommendations

The League is very sensitive to the limited amount of local oversight which can be applied to these projects. We urge local elected officials to communicate their concerns to the pipeline developers, the FERC and the DEP.

Municipalities may also wish to file an application to become an intervenor in the application process for two reasons. First, as an intervenor, a municipality will be added to the service list and therefore receive copies of all documents filed during the application process. This includes, but is not limited to, reports filed by the applicant, letters and comments submitted by the public, reports and requests issued by the FERC, and any other document filed for consideration in the application process. Second, as an intervenor, a municipality would have legal standing as an official party to the action and would be authorized to appear before the FERC administrative law judges, and in any challenge to the FERC's decision before the U.S. Court of Appeals.

We also specifically urge the DEP to do its utmost to review these proposed projects under § 401 and § 404 of the CWA, the FWPA and any other applicable regulations. New Jersey's natural resources are important to the local elected officials of New Jersey and the people they serve.

If you have any questions or need additional information on this matter about this letter please contact Ed Purcell Esq. at [609\) 695-3481 x. 137](tel:6096953481) or epurcell@njslom.com.

Very Truly Yours,

William G. Dressel, Jr.
Executive Director