AJM

JUL 0 6 2016

Final Proposal No. 2016-78
Date Filed 7-6-16

7/12

COVER SHEET FOR FINAL PROPOSAL

Notice Number	2016-78	Rule Number	Site 301.03(e); 301.08 intro., (c) & (d); 301.14(f); 302.01(f); 302.02(d); 302.03(d) & (e)

1. Agency Name & Address:

Site Evaluation Committee
Pamela G. Monroe, Administrator
21 South Fruit Street, Suite 10
Concord, NH 03301-2429

"Note to JCAR" attached after the Appendices to the rules.

2. RSA Authority: **RSA 162-H:10,VI; RSA 162-H:10-b,II**

3. Federal Authority:

4. Type of Action:
- ☐ Adopt
- ☒ Amendment
- ☐ Repeal
- ☐ Readoption
- ☐ Readoption w/amendment

5. Short Title: **Enforcement and High Pressure Natural Gas Pipeline Amendments**

6. Contact person for copies and questions:

Name:	**Pamela G. Monroe**	Title:	**Administrator**
Address:	**21 South Fruit Street, Suite 10 Concord, NH 03301-2429**	Phone #:	**603-271-2435**

7. Yes ☐ No ☒ Agency requests review by Committee legal staff in the Office of Legislative Services and delayed Committee review pursuant to RSA 541-A:12, I-a.

8. The rulemaking notice appeared in the Rulemaking Register on **May 26, 2016**

9. Yes ☒ N/A ☐ Agency notified policy committees, or House Speaker and Senate President, pursuant to RSA 541-A:10, I because this is the first time this rule or its amendments have been proposed to implement newly-enacted state authority.

SEE THE INSTRUCTIONS--PLEASE SUBMIT ONE COPY OF THIS COVER SHEET AND ONE COPY OF THE FOLLOWING:
(optional to number correspondingly)

10. The "Final Proposal-Fixed Text," including the cross-reference table required by RSA 541-A:3-a, II as an appendix.

11. Yes ☒ N/A ☐ Incorporation by Reference Statement(s) because this rule incorporates a document or Internet content by reference for which an Incorporation by Reference Statement is required pursuant to RSA 541-A:12, III.

12. Yes ☒ N/A ☐ The "Final Proposal-Annotated Text," indicating how the proposed rule was changed because the text of the rule changed from the Initial Proposal pursuant to RSA 541-A:12, II(d).

13. Yes ☐ N/A ☒ The amended fiscal impact statement because the change to the text of the Initial Proposal affects the original fiscal impact statement (FIS) pursuant to RSA 541-A:5, VI.

LBAO
FIS 16:090
05/12/16

Fiscal Impact Statement for Site Evaluation Committee rules governing Enforcement and High Pressure Natural Gas Pipeline Amendments. [Site 301, 302]

1. **Comparison of the costs of the proposed rule(s) to the existing rule(s):**
   When compared to the existing rules, the proposed rules will increase costs to independently owned businesses by an indeterminable amount.

2. **Cite the Federal mandate. Identify the impact on state funds:**
   No federal mandate, no impact on state funds.

3. **Cost and benefits of the proposed rule(s):**

   A. **To State general or State special funds:**
      None.

   B. **To State citizens and political subdivisions:**
      None.

   C. **To independently owned businesses:**
      The proposed rules would add the requirement that the applicant conduct a comprehensive health impact assessment. The costs of conducting an assessment is indeterminable and would vary depending on the size of the project. The Site Evaluation Committee sites cost estimates from the Society of Practitioners of Health Impact Assessment which range from $75,000 to $100,000. In addition the Society also assumes the average health impact assessment would require a part-time employee qualified to coordinate the project, perform the assessment and write the report.

APPENDIX II-H

INCORPORATION BY REFERENCE STATEMENT

**PLEASE LIST THE FOLLOWING:

1. Name of Agency. **Site Evaluation Committee**

2. Person who has reviewed the material to be incorporated into the agency's rules:

Name:	**Pamela G. Monroe**	Title:	**Administrator**
Address:	**21 South Fruit Street, Suite 10 Concord, NH 03301-2429**	Phone #:	**603-271-2435**

3. Specific rule number where the material is incorporated: **Site 301.08(c)(2)**

**PLEASE ATTACH THE FOLLOWING, numbered to correspond to the number on this sheet (a separate sheet is not required for every item):

4. The complete title of the material which is to be incorporated including the date on which the material became effective (or a document identification number) or, if the material is undated Internet content, the date the material was accessed and printed, and the title of the entity that created or promulgated the material.

5. How the agency modified the text of the material incorporated, clearly identifying where amendments have been made to the text.

6. How the material incorporated can be obtained by the public (include cost and the address of the unrelated third party which published the material, and the Internet source URL if it appears in the rule, for example if the material is Internet content only available online).

7. Why the agency did not choose to reproduce the incorporated material in full in its rules. The discussion shall include more than the obvious reason that it is less expensive to incorporate by reference.

**PLEASE SIGN THE FOLLOWING:

I, the adopting authority,* certify that the text of the material which the agency is incorporating by reference in these rules has been reviewed by this agency. To the best of my knowledge and belief, this agency has complied with the requirements of RSA 541-A:12, IV and Section 3.12 of Chapter 4 of the Drafting and Procedure Manual for Administrative Rules. I further certify that the agency has the capability and the intent to enforce the material incorporated into the rules, as identified above.

Date: JULY 6, 2016

Signature: [signature]

Name: MARTIN HONIGBERG

Title: CHAIR, SITE EVALUATION COMM

*("Adopting authority" is the official empowered by statute to adopt the rule, or a member of the group of individuals empowered by statute to adopt the rule.)

INCORPORATION BY REFERENCE STATEMENT

Rulemaking Notice No. 2016-78

Site 301.08(c)(2)

4. ANSI/ASA S12.9-2013 Part 3 Quantities and Procedures for Description and Measurement of Environmental Sound – Part 3: Short-term Measurements with an Observer Present, is prepared and published by the American National Standards Institute (ANSI) and the Acoustical Society of America (ASA).

5. The agency did not modify the text.

6. A copy of ANSI/ASA S12.9-2013 Part 3 can be obtained in hard copy or in electronic form from the American National Standards Institute for $115.00. A copy can be purchased online at http://webstore.ansi.org/ or by mailing a request to American National Standards Institute, 25 West 43rd St., 4th Floor, New York, NY 10036, telephone no. 212-642-4980.

7. The agency chose not to reproduce the incorporated materials because the document is protected by copyright.

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Address:	**21 South Fruit Street, Suite 10 Concord, NH 03301-2429**	Phone #:	**603-271-2435**

3. Specific rule number where the material is incorporated: **Site 301.14(f)(5)a. & c.**

**PLEASE ATTACH THE FOLLOWING, numbered to correspond to the number on this sheet (a separate sheet is not required for every item):

4. The complete title of the material which is to be incorporated including the date on which the material became effective (or a document identification number) or, if the material is undated Internet content, the date the material was accessed and printed, and the title of the entity that created or promulgated the material.

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Date: JULY 6, 2016

Signature: [signature]

Name: MARTIN HONIGBERG

Title: CHAIR, SITE EVALUATION COMM.

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INCORPORATION BY REFERENCE STATEMENT

Rulemaking Notice No. 2016-78

Site 301.14(f)(5)a. & c.

4. Title 18, Code of Federal Regulations, section 380.12(k), was promulgated by the U.S. Environmental Protection Agency.

5. The agency did not modify the text.

6. A copy of 18 C.F.R. §380.12(k) can be obtained in electronic form from the U.S. Government Publishing Office for free. A copy can be downloaded at http://www.ecfr.gov/cgi-bin/ECFR?page=browse.

7. The agency chose not to reproduce the incorporated materials to reduce the length of the rule and to insure that the state rule would not differ from the federal regulation.

APPENDIX II-H

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1. Name of Agency. **Site Evaluation Committee**

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Address:	**21 South Fruit Street, Suite 10 Concord, NH 03301-2429**	Phone #:	**603-271-2435**

3. Specific rule number where the material is incorporated: **Site 301.14(f)(5)e.**

**PLEASE ATTACH THE FOLLOWING, numbered to correspond to the number on this sheet (a separate sheet is not required for every item):

4. The complete title of the material which is to be incorporated including the date on which the material became effective (or a document identification number) or, if the material is undated Internet content, the date the material was accessed and printed, and the title of the entity that created or promulgated the material.

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**PLEASE SIGN THE FOLLOWING:

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Date: July 6, 2016

Signature: [signature]

Name: MARTIN HOWIGBERG

Title: CHAIR, SITE EVALUATION COMM

*("Adopting authority" is the official empowered by statute to adopt the rule, or a member of the group of individuals empowered by statute to adopt the rule.)

INCORPORATION BY REFERENCE STATEMENT

Rulemaking Notice No. 2016-78

Site 301.14(f)(5)e.

4. Title 49, Code of Federal Regulations, sections 192.5(b)(4) and 192.903, were promulgated by the U.S. Environmental Protection Agency.

5. The agency did not modify the text.

6. Copies of 49 C.F.R. §192.5(b)(4) and 192.903 can be obtained in electronic form from the U.S. Government Publishing Office for free. A copy can be downloaded at http://www.ecfr.gov/cgi-bin/ECFR?page=browse.

7. The agency chose not to reproduce the incorporated materials to reduce the length of the rule and to insure that the state rule would not differ from the federal regulations.

See attached Note to JLCAR.

Amend Site 301.01(e), effective 12-16-15 (Document #10994), cited and to read as follows:

CHAPTER Site 300 CERTIFICATES OF SITE AND FACILITY

PART Site 301 REQUIREMENTS FOR APPLICATIONS FOR CERTIFICATES

Site 301.03 Contents of Application.

(e) If the application is for an energy facility, including an energy transmission pipeline, that is not an electric generating facility or an electric transmission line, the application shall include:

(1) The type of facility being proposed;

(2) A description of the process to extract, produce, manufacture, transport or refine the source of energy;

(3) The facility's size and configuration;

(4) The ability to increase the capacity of the facility in the future;

(5) Raw materials used or transported, as follows:

a. An inventory, including amounts and specifications;

b. A plan for procurement, describing sources and availability; and

c. A description of the means of transportation;

(6) Production information, as follows:

a. An inventory of products and waste streams, including blowdown emissions from a high pressure gas pipeline;

b. The quantities and specifications of hazardous materials; and

c. Waste management plans;

(7) A map showing the entire energy facility, including, in the case of an energy transmission pipeline, the location of each compressor station, pumping station, storage facility, and other ancillary facilities associated with the energy facility, and the corridor width and length in the case of a proposed new route or widening along an existing route; and

(8) For a high pressure gas pipeline, the following information:

a. Construction information, including a description of the pipe to be used, depth of pipeline placement, type of fuel to be used to power any associated compressor station, and a description of any compressor station emergency shutdown system;

b. Proposed construction schedule, including start date and scheduled completion date;

c. Operation and maintenance information, including a description of measures to be taken to notify adjacent landowners and minimize sound during blowdown events;

(1) Except as otherwise provided in (a)(1) above, an assessment of operational sound associated with the proposed facility, if the facility would involve use of equipment that might reasonably be expected to increase sound by 10 decibel A-weighted (dBA) or more over background levels, measured at the L-90 sound level, at the property boundary of the proposed facility site or, in the case of an electric transmission line or an energy transmission pipeline, at the edge of the right-of-way or the edge of the property boundary if the proposed facility, or portion thereof, will be located on land owned, leased or otherwise controlled by the applicant or an affiliate of the applicant;

(2) A facility decommissioning plan prepared by an independent, qualified person with demonstrated knowledge and experience in similar energy facility projects and cost estimates; the decommissioning plan shall include each of the following:

a. A description of sufficient and secure funding to implement the plan, which shall not account for the anticipated salvage value of facility components or materials;

b. The provision of financial assurance in the form of an irrevocable standby letter of credit, performance bond, surety bond, or unconditional payment guaranty executed by a parent company of the facility owner maintaining at all times an investment grade credit rating;

c. All transformers shall be transported off-site; and

d. All underground infrastructure at depths less than four feet below grade shall be removed from the site and all underground infrastructure at depths greater than four feet below finished grade shall be abandoned in place;

(3) A plan for fire safety prepared by or in consultation with a fire safety expert;

(4) A plan for emergency response to the proposed facility site; and

(5) A description of any additional measures taken or planned to avoid, minimize, or mitigate public health and safety impacts that would result from the construction and operation of the proposed facility, and the alternative measures considered but rejected by the applicant.

Amend Site 301.14(f), effective 12-16-15 (Document #10994), cited and to read as follows:

Site 301.14 Criteria Relative to Findings of Unreasonable Adverse Effects.

(f) In determining whether a proposed energy facility will have an unreasonable adverse effect on public health and safety, the committee shall:

(1) For all energy facilities, consider the information submitted pursuant to Site 301.08 and other relevant evidence submitted pursuant to Site 202.24, the potential adverse effects of construction and operation of the proposed facility on public health and safety, the effectiveness of measures undertaken or planned to avoid, minimize, or mitigate such potential adverse effects, and the extent to which such measures represent best practical measures;

(2) For wind energy systems, apply the following standards:

a. With respect to sound standards, the A-weighted equivalent sound levels produced by the applicant's energy facility during operations shall not exceed the greater of 45 dBA or 5 dBA

above background levels, measured at the L-90 sound level, between the hours of 8:00 a.m. and 8:00 p.m. each day, and the greater of 40 dBA or 5 dBA above background levels, measured at the L-90 sound level, at all other times during each day, as measured using microphone placement at least 7.5 meters from any surface where reflections may influence measured sound pressure levels, on property that is used in whole or in part for permanent or temporary residential purposes, at a location between the nearest building on the property used for such purposes and the closest wind turbine; and

b. With respect to shadow flicker, the shadow flicker created by the applicant's energy facility during operations shall not occur more than 8 hours per year at or within any residence, learning space, workplace, health care setting, outdoor or indoor public gathering area, or other occupied building;

(3) For wind energy systems, consider the proximity and use of buildings, property lines, public roads, and overhead and underground energy infrastructure and energy transmission pipelines, the risks of ice throw, blade shear, tower collapse, and other potential adverse effects of facility operation, and the effectiveness of measures undertaken or planned to avoid, minimize, or mitigate such potential adverse effects, and the extent to which such measures represent best practical measures;

(4) For electric transmission lines, consider the proximity and use of buildings, property lines, and public roads, the risks of collapse of towers, poles, or other supporting structures, the potential impacts on public health and safety of electric and magnetic fields generated by the proposed facility, and the effectiveness of measures undertaken or planned to avoid, minimize, or mitigate such potential adverse effects, and the extent to which such measures represent best practical measures;

(5) For high pressure gas pipelines, apply the following standards:

a. With respect to sound standards for interstate pipelines, the noise attributable to any new compressor station, compression added to an existing station, or any modification, upgrade or update of an existing station, shall not exceed a day-night sound level (Ldn) of 55 dBA at any pre-existing noise-sensitive area, such as schools, hospitals, or residences, as provided in 18 CFR §380.12(k), available as noted in Appendix B;

b. With respect to sound standards for intrastate pipelines, the noise attributable to any new compressor station, compression added to an existing station, or any modification, upgrade or update of an existing station, shall not exceed the standards set forth in (2)a., above, regarding wind energy systems;

c. With respect to vibration, compressor stations or modifications of existing compressor stations shall not result in a perceptible increase in vibration at any pre-existing noise-sensitive area, such as schools, hospitals, or residences, as provided in 18 CFR §380.12(k), available as noted in Appendix B, or a level of 2.0 peak particle velocity, whichever is less;

d. With respect to exterior lighting at compressor stations, no light shall be projected above the horizontal plane or projected beyond the property lines;

e. With respect to pipeline construction and safety, the requirements in Puc 506 and Puc 508 for a class 4 location in a high consequence area, as those terms are defined in 49 CFR §192.5(b)(4) and 49 CFR §192.903, available as noted in Appendix B, respectively; and

(6) For high pressure gas pipelines, consider:

a. The results of the comprehensive health impact assessment;

b. The proximity of electric transmission lines to the high pressure gas pipeline;

c. The proximity of any compressor station to schools, day-care centers, health care facilities, residences, residential neighborhoods, places of worship, elderly care facilities, and farms;

d. The effectiveness of measures undertaken or planned to avoid, minimize, or mitigate such potential adverse effects; and

e. The extent to which the measures in d. represent best practical measures.

Amend Site 302.01(f) and Site 302.02(d), effective 12-16-15 (Document #10994), cited and to read as follows:

PART Site 302 ENFORCEMENT OF TERMS AND CONDITIONS

Site 302.01 Determination of Certificate Violation.

(f) If the committee determines following the adjudicative proceeding that a certificate violation has occurred and is continuing, the committee shall issue an order that suspends the holder's certificate until such time as the violation has been corrected if the committee determines, after due consideration of any mitigating circumstances and a determination of whether suspension is in the best interests of the public, or would result in an inability to assure that the state has an adequate and reliable supply of energy in conformance with sound environmental principles, that the following criteria have been met:

(1) The violation will not be terminated within 30 days from the date of the committee's decision; and

(2) The violation will have an unreasonable adverse effect pursuant to Site 301.14 on aesthetics, historic sites, air and water quality, the natural environment, or public health and safety.

Site 302.02 Determination of Misrepresentation or Non-Compliance.

(d) If the committee determines following the adjudicative proceeding that a material misrepresentation or violation of RSA 162-H or its rules has occurred, the committee shall issue an order that suspends the holder's certificate until such time as the holder has corrected and mitigated the consequences of such misrepresentation or violation if the committee determines, after due consideration of any mitigating circumstances and a determination of whether suspension is in the best interests of the public, or would result in an inability to assure that the state has an adequate and reliable supply of energy in conformance with sound environmental principles, that the following criteria have been met:

(1) The violation will not be terminated within 30 days from the date of the committee's decision; and

(2) The violation will have an unreasonable adverse effect pursuant to Site 301.14 on aesthetics, historic sites, air and water quality, the natural environment, or public health and safety.

Amend Site 302.03, effective 12-16-15 (Document #10994), by inserting (d) and renumbering the existing (d) as (e), so that Site 302.03(d) and (e) are cited and read as follows:

Site 302.03 Revocation of Certificate.

(d) Following the adjudicative proceeding, the committee shall revoke the holder's certificate if the committee determines, after due consideration of any mitigating circumstances and a determination of whether revocation is in the best interests of the public, or would result in an inability to assure that the state has an adequate and reliable supply of energy in conformance with sound environmental principles, that one or more of the following criteria have been met:

(1) The certificate holder obtained the certificate through fraud, deceit, or falsification;

(2) The certificate holder knowingly violated the rules of the committee, the conditions of the holder's certificate, or the rules or permits of any agency that participated in the holder's certificate proceeding;

(3) The certificate holder failed to comply with an order of the committee or an order imposed as a result of a judicial action taken to enforce any statute or rule implemented by the committee, unless the certificate holder is complying in accordance with a compliance schedule and is current with all items; or

(4) The certificate holder is a chronic non-complier.

(e) If the holder's certificate is revoked by order of the committee, then the holder shall permanently cease construction or operation of the energy facility subject to the certificate as of the time specified in the order and shall commence and complete decommissioning of the facility within the time period specified in the order.

APPENDIX A

Proposed Rule	**Statute**
Site 301.03(e)	RSA 162-H:7,IV and V
Site 301.08 intro., (c) and (d)	RSA 162-H:7,IV and V; 10-b,II
Site 301.14(f)	RSA 162-H:10-b,II
Site 302.01(f)	RSA 162-H:10,VI and VII, 12
Site 302.02(d)	RSA 162-H:10,VI and VII, 12
Site 302.03(d) and (e)	RSA 162-H:10,VI and VII, 12

APPENDIX B: INCORPORATION BY REFERENCE INFORMATION

RULE	TITLE/CITATION (DATE)	SOURCE
Site 301.08(c)(2)	ANSI/ASA S12.9-2013 Part 3 Quantities and Procedures for Description and Measurement of Environmental Sound – Part 3: Short-term Measurements with an Observer Present	Published by American National Standards Institute, 25 West 43rd Street, 4th Floor, New York, NY 10036 Hard copy or electronic copy can be purchased for $115.00 at: http://webstore.ansi.org
Site 301.08(c)(2)	ANSI/ASA S12.9-1992 2013 Part 2, Quantities and Procedures for Description and Measurement of Environmental Sound. Part 2: Measurement of long-term, wide-area sound	Published by American National Standards Institute, 25 West 43rd Street, 4th Floor, New York, NY 10036 Hard copy or electronic copy can be purchased for $100.00 at: http://webstore.ansi.org
Site 301.14(f)(5)a. & c.	18 C.F.R. §380.12(k) (2016)	Available from U.S. Government Publishing Office, http://www.gpo.gov
Site 301.14(f)(5)e.	49 C.F.R. §192.5(b)(4) (2016)	Available from U.S. Government Publishing Office, http://www.gpo.gov
Site 301.14(f)(5)e.	49 C.F.R. §192.903 (2016)	Available from U.S. Government Publishing Office, http://www.gpo.gov

Note to JLCAR:

Conclusion

While these rules seek to regulate in an area of excessive federal regulation, the unique circumstances surrounding interstate pipelines would allow RSA 162-H:10-b and these rules to have legal effect despite potential constitutional issues. Properly implemented, these rules are lawful.

Because RSA 162-H:10-b and these rules could be valid in some circumstances, and invalid in others, JLCAR staff's legal opinion is that they are valid rules, but subject to potential challenge. No apparent basis for JLCAR objection exists.

Constitutional Issue of Federal Preemption and State Authority:

The potential problem with these rules is actually a problem with the underlying statute. Based on United States Supreme Court precedent, the federal Natural Gas Act (NGA) implicitly pre-empts state regulation of interstate natural gas pipelines, rendering most state regulations of such pipelines invalid.[1] RSA 162-H:10-b appears to require siting standards for the same pipelines that the NGA regulates.

When Congress authorizes regulation in an area, the question arises whether it intended to allow the states to adopt additional regulations governing that field. Article VI, Clause 2 of the United States Constitution provides that "the Laws of the United States shall be the supreme law of the Land…Any thing in the Constitution or Laws of any state to the Contrary notwithstanding." This clause makes it clear that Federal, not state, law governs when the two conflict.

There is an additional doctrine, however, which prohibits all state regulation in a particular field if Congress intended the Federal regulation to be exclusive. Called "field pre-emption," this doctrine holds that where Congress has pervasively regulated a field, or explicitly stated its intention that states not hold concurrent power to regulate, states are prohibited from adopting any law or rule dealing with the subject matter of those regulations, regardless of whether an actual conflict exists.[2]

In looking to see whether "field preemption" applies, a court will determine if "in the absence of explicit statutory language" if Congress has indicated the "intent to occupy a given field to the exclusion of state law."[3] "Such a purpose may be inferred," the Supreme Court says, "where the pervasiveness of

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[1] *Schniedewind v. ANR Pipeline Co.*, 485 U.S. 293, 385 (1988).
[2] *See Sprietsma v. Mercury Marine*, 537 U.S. 51, 64 (2002).
[3] *Schniedewind*, 485 U.S. at 300.

the federal regulation precludes supplementation by the states, where the Federal interest in the field is sufficiently dominant, or where the object sought to be obtained by the federal law and the character of obligations imposed by it reveal the same purpose."[4]

Pursuant to 15 U.S.C. §717, the provisions of the NGA apply to:

> [T]he 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.

To exercise this jurisdiction, the Federal Energy Regulatory Commission (FERC) follows the remaining provisions of the chapter and its own rules. The most relevant section to these rules is 15 U.S.C. § 717f, which governs the construction, extension, or abandonment of natural gas facilities. That section explains how natural gas companies may apply for and receive "certificates of public convenience and necessity," which allow them to construct natural gas facilities.

This certificate of public convenience and necessity appears to, in essence, be the federal equivalent of the New Hampshire Site Evaluation Committee (SEC) "certificate of site and facility" created by RSA 162-H.

A New Hampshire certificate of site and facility is "a document issued by the committee, containing such terms and conditions as the committee deems appropriate, that authorizes the applicant to proceed with the proposed site and facility."[5]

A Federal certificate of public convenience and necessity is required in order to construct, extend, or operate a facility used in the transportation or sale of natural gas.[6] While the certificate of public convenience and necessity apparently also covers ongoing projects, both certificates are effectively licenses to construct or extend a facility.

Because both the state and federal certificates are effectively licenses required to lawfully engage in the same conduct, it would appear that the NGA preempts equivalent state laws. Both certificates in "the object sought" and "the character of the obligations imposed" go to "the same purpose."

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[4] *Id.*
[5] RSA 162-H:2, II-a.
[6] 15 U.S.C. §717f(c)(1)(A)

Unique Circumstances Surrounding Federal Preemption and the Federal Energy Regulatory Commission:

While state regulations governing the siting of interstate natural gas pipelines would normally be preempted, the FERC has chosen to adopt a cooperative approach with states, taking state views of proper regulation under consideration and even mandating compliance with them as part of its own certificate process.

The FERC will not allow state regulations to unduly burden its own certificate process, but it will require compliance with them if they are reasonable.[7] If these rules, or RSA 162-H:10-b, interfered with that process, then FERC would overrule them. Under such conditions, it is clear which side would prevail: these rules and any statute authorizing their adoption would be ruled unconstitutional. However, absent such a challenge, these rules would be valid.

One summary of recent FERC cooperation with state regulators notes that "virtually every FERC order authorizing construction contains a paragraph similar to this one:

> Any state or local permits issued with respect to jurisdictional facilities authorized herein must be consistent with the conditions of this certificate. The Commission encourages cooperation between interstate pipelines and local authorities. However, this does not mean that state and local agencies, through application of state or local laws, may prohibit or unreasonably delay the construction or operation of facilities approved by this Commission"[8]

In this way, FERC operates much like the SEC does at the state level. In its own rules, at Site 301.09, the SEC looks to compliance with local ordinances to determine the effect of a facility on the orderly development of a region. The SEC does not need to follow with local ordinances; it has the authority to preempt them, but it chooses to look to them. In that way, these rules operate like those local ordinances, providing FERC with guidance on what local communities think of potential products.

These rules are valid insofar as FERC can require compliance with them; there appears to be no basis for objection regarding Federal preemption.

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[7] VanNess Feldman LLP, *Federal Preemption Under the Natural Gas Act*, January 21, 2016, Page 5.

[8] *Id.* at 4.

VanNess Feldman LLP

1050 Thomas Jefferson Street, NW
Seventh Floor
Washington, DC 20007
(202) 298-1800 Phone
(202) 338-2416 Fax

Federal Preemption Under the Natural Gas Act

This paper discusses Federal preemption of state and local laws under provisions of the Natural Gas Act ("NGA"), focusing on the role of state and local permitting requirements as they may apply to the construction of interstate pipelines certificated under section 7 of the Natural Gas Act.[1] An extensive body of case law holds that the NGA grants exclusive jurisdiction to the FERC to authorize and site interstate natural gas pipelines and that this exclusive jurisdiction preempts conflicting state law under the Supremacy Clause of the Constitution. However, a number of federal statutes like the Clean Air Act ("CAA"), Clean Water Act ("CWA"), Coastal Zone Management Act ("CZMA"), Endangered Species Act and National Historic Preservation Act are administered under delegated authority to state agencies and pipeline applicants for authorization before the Federal Energy Regulatory Commission ("FERC" or "Commission") must comply with these federal requirements, even though they are administered by state agencies. In addition, FERC has a longstanding policy, however, of "encouraging" cooperation between pipelines and local authorities, with the caveat that any state or local permits must be consistent with the conditions of the certificate.

I. Federal Preemption over State and Local Permitting Requirements

The Supreme Court has long recognized that the Commission's jurisdiction over interstate commerce is "plenary."[2] Within four years of enactment of the NGA, the Supreme Court reviewed the scope of the Commission's authority thereunder to preempt actions by states affecting jurisdictional natural gas companies. In *Illinois Natural Gas Co. v. Central Illinois Public Service Co.* (*"Illinois Central"*), the Court rejected an attempt by the Illinois Commerce Commission to require an interstate pipeline to extend service within the state.[3] The Court noted that the purpose of the NGA was to bring regulation of interstate commerce under uniform federal control. Through section 7, Congress granted the Commission plenary authority to regulate interstate natural gas facilities, including extensions of gas transportation facilities that Illinois was attempting to regulate.[4] The state commission was without power to regulate such facilities. The holding in *Illinois Central* has been consistently confirmed.[5]

The Commission's plenary authority also extends over municipal and county permitting requirements. In *Algonquin LNG v. Loqa*, after Algonquin LNG received a FERC certificate

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1 15 U.S.C. §§ 717f(c) (2012).

2 *FPC v. So. Cal. Edison. Co.*, 376 U.S. 205, 216 (1964).

3 314 U.S. 498 (1942).

4 *Id.* at 510.

5 *Islander East Pipeline Co., L.L.C. v. Blumenthal*, 478 F. Supp. 2d 289 (D. Ct. 2007) (finding that the NGA confers upon FERC exclusive jurisdiction over the transportation and sale of natural gas in interstate commerce for resale, and that because FERC has authority to consider environmental issues, states may not engage in concurrent site-specific environmental review); *Schneidewind v. ANR Pipeline Company*, 485 U.S. 293 (1988); *Public Service Commission of West Virginia v. FPC*, 437 F.2d 1234 (4th Cir. 1971); *National Fuel Gas Supply Corp. v. Public Service Commission of New York*, 894 F.2d 571 (2d Cir. 1990).

authorizing modifications to a natural gas processing and storage facility, the City of Providence, Rhode Island, attempted to require Algonquin LNG to obtain a local zoning permit to make the modifications. Algonquin sought a declaration from the federal district court for Rhode Island that Providence's zoning requirements were inapplicable to the proposed modifications, and for an injunction prohibiting local officials from requiring that modifications to the facility comply with the local building code.[6] Finding in favor of Algonquin LNG, the court stated that the NGA and the Natural Gas Pipeline Safety Act ("NGPSA") preempted the local zoning requirements because they comprehensively regulate the location, construction, and modification of natural gas facilities, leaving no room for local regulation of these matters, and because the local requirements directly conflicted with the federal regulations. However, the court noted that state and local requirements would still apply if they have only an indirect effect on interstate facilities, and further opined that "local regulation with respect to matters or activities that are separate and distinct from subjects of federal regulation may be permissible if they do not impede or prevent the accomplishment of a legitimate federal objective."[7]

The Fourth Circuit recently addressed the issue of the NGA's preemption over local zoning ordinances in *Washington Gas Light Co. v. Prince George's County Council*.[8] Washington Gas Light Co. ("WGL") is a local distribution company not subject to the NGA, but because its operations cross state lines, it operates pursuant to a "service area designation" under NGA section 7(f), which permits it to expand its facilities in designated areas without permission from FERC.[9] WGL challenged the county's denial of zoning approval for a proposed expansion of a natural gas substation. WGL asserted among other things, that the NGA preempted the county's zoning authority through the NGA section 7(f) service area designation. After the federal district court denied a series of WGL's complaints, WGL appealed to the Fourth Circuit.

Citing *Algonquin LNG v. Loqa*, the Fourth Circuit recognized that the NGA could preempt the county zoning ordinance if WGL had been an interstate pipeline. However, the court distinguished the case on the grounds that WGL was a local distribution company not subject to the NGA, so the substation was not an interstate facility subject to the comprehensive scheme of FERC regulation.[10] As a result, the Fourth Circuit found that the NGA did not preempt the county's zoning

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6 79 F. Supp. 2d 49 (D.R.I. 2000).

7 *Id.* at 53. The Commission has expressed the same view of its preemptive authority over state and local regulations. In *Texas E. Transmission,* 121 FERC ¶ 61,003, at P 12 (2007), the Commission stated that its preemptive authority does not exempt pipelines from having to apply for state or local permits where no conflict with FERC regulation exists:

> the Commission emphasizes that, while state and local regulation is preempted by the NGA where such requirements conflict with federal regulation or would delay construction, applicants may be required to comply with appropriate state and local regulations where no conflict exists. Accordingly, while the Commission's exclusive jurisdiction preempts local and state regulations to the extent they impose requirements above federal requirements or delay construction, this does not exempt Texas Eastern from having to apply for state or local permits that target other concerns.

8 711 F.3d 412 (4th Cir. 2013).

9 15 U.S.C. § 717f(f)(1)-(2).

10 711 F.3d at 425-26.

ordinance in this case.[11]

A recent preemption case highlights the distinction between FERC's preemption over truly local requirements and its lack of preemptive authority over local regulations administered pursuant to delegated authority under various federal statutes. In December 2012, the Commission issued Dominion Transmission Inc. ("Dominion") a certificate of public convenience and necessity for the construction and operation of the Alleghany Storage Project, which includes, among other facilities, the construction and operation of the Myersville Compressor Station.[12] While the certificate proceeding was pending, the Town of Myersville denied Dominion's zoning request to site the Myersville Compressor Station in the town. After FERC approved the certificate, Dominion applied for an air quality permit with the Maryland Department of the Environment ("MDE"). The MDE has authority to issue permits under the CAA pursuant to Maryland's State Implementation Plan. The MDE refused to process the application because Dominion had not received zoning approval from the Town of Myersville.

Despite the denial of the zoning request, the U.S. Court of Appeals for the District of Columbia Circuit ruled that the MDE was required to process Dominion's air permit application and remanded the air permit dismissal to the MDE for review.[13] In October 2013, a federal district court in Pennsylvania ruled that the NGA preempted "those portions of the [Myersville] Town Code directly affecting the siting, construction, or operation of the Myersville Compressor" and those laws were "null and void as applied to Dominion except for those laws or regulations enacted pursuant to the State's rights under" federal statutes like the CZMA, CAA, and the CWA.[14]

II. Federal Authorities Delegated to the States and the Energy Policy Act of 2005

Although FERC's jurisdiction preempts conflicting state law, various federal statutes also affect pipeline siting and construction by requiring permits from other agencies, including state agencies with delegated authority under federal statutes. In some instances, states have used the authority granted by these statutes to deny companies the authorizations necessary to construct pipeline projects, even when such projects have received FERC certificates under the NGA.

The Energy Policy Act of 2005 ("EPAct 2005") adopted several provisions to assist companies encountering difficulty developing interstate pipeline projects due to denials of these state permits. EPAct 2005 codified the existing practice in which FERC acts as the lead agency for coordinating all federal authorizations for natural gas infrastructure projects for the purpose of complying with the National Environmental Policy Act ("NEPA"). EPAct 2005 also authorized FERC to establish a schedule for state agencies that are acting under delegated federal authority to complete their reviews of gas projects.

EPAct 2005 also amended section 19 of the NGA to create a direct, expedited appeal to the

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[11] The Fourth Circuit also denied arguments that the NGPSA preempted the county zoning ordinance, stating that the NGPSA expressly preempts local and state law in the field of safety, but not regulation of land use. *Id.* at 420-22.

[12] *Dominion Transmission, Inc.*, 141 FERC ¶ 61,240 (2012), *reh'g denied*, 143 FERC ¶ 61,148 (2013).

[13] *Dominion Transmission, Inc. v. Summers*, 723 F.3d 238 (D.C. Cir. 2013).

[14] *Dominion Transmission, Inc. v. Town of Myersville Town Council*, 982 F.Supp.2d 570, 579 (D. Md. 2013).

U.S. Court of Appeals to challenge an order, an action or the failure of a state or federal agency to act on a timely basis, and provide that the court can schedule a deadline for the agency to act on remand.[15] A challenge to a failure to act must be brought in the U.S. Court of Appeals for the District of Columbia Circuit; a challenge to the merits of the agency action can be brought in the U.S. Court of Appeals where the project is located. If the court finds the agency action inconsistent with applicable federal laws that would prevent the construction, expansion, or operation of the subject facility, the court shall remand the proceeding to the appropriate agency. Judicial review is governed by the "arbitrary and capricious" standard of the Administrative Procedure Act.[16]

In 2006, FERC issued a final rule implementing provisions of EPAct 2005, giving FERC the authority to set a schedule for other federal and state agencies to process natural gas pipeline, liquefied natural gas ("LNG"), and storage projects and to maintain a consolidated record of all agency decisions for use in appeals, including judicial review. The record serves as the basis for judicial appeals of Commission decisions, and reviews of state decisions that claim a gas project is inconsistent with coastal protections under the CZMA.

III. FERC's Cooperation with State and Local Agencies

Despite these consistent court rulings upholding the preemptive effect of FERC certificate orders, FERC has for many years strongly encouraged project sponsors to cooperate with local permitting requirements, as long as the requirements do not conflict with the FERC certificate. Virtually every FERC order authorizing construction contains a paragraph similar to this one:

> Any state or local permits issued with respect to the jurisdictional facilities authorized herein must be consistent with the conditions of this certificate. The Commission encourages cooperation between interstate pipelines and local authorities. However, this does not mean that state and local agencies, through application of state or local laws, may prohibit or unreasonably delay the construction or operation of facilities approved by this Commission.[17]

The Commission typically requires:

> [The certificate-holder] shall notify the Commission's environmental staff by telephone or facsimile of any environmental noncompliance identified by other federal, state, or local agencies on the same day that such agency notifies [the certificate-holder]. [The certificate-holder] shall file written confirmation of such notification with the Secretary of the Commission within 24 hours.[18]

The Commission elaborated on its policy favoring cooperation with state permitting

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15 15 U.S.C. § 717r(d).

16 *See* 5 U.S.C. § 706(2)(A).

17 *Algonquin Gas Transmission, LLC*, 150 FERC ¶ 61,163, at P 151 (2015) (citing *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988); *National Fuel Gas Supply v. Public Service Comm'n*, 894 F.2d 571 (2d Cir. 1990); *Iroquois Gas Transmission System, L.P.*, 52 FERC ¶61,091 (1990) and 59 FERC ¶61,094 (1992)).

18 *Id.* at Ordering Paragraph I.

requirements in a case discussing its exclusive authority to approve LNG import facilities under section 3 of the NGA. In *Sound Energy Solutions*, the Commission clarified that the NGA would preempt state and local regulations to the extent they undermine a Commission authorization. Nevertheless, the Commission stated:

> that a state or local authority requires something more or different than the Commission does not make it unreasonable for an applicant to comply with both the Commission's and another agency's requirements. It is true that additional state and local procedures or requirements can impose more costs on an applicant or cause some delays in constructing a pipeline. However, not all additional costs or delays are unreasonable in light of the Commission's goal to include state and local authorities to the extent possible in the planning and construction of gas projects. A rule of reason must govern both the states' and local authorities' exercise of their power and an applicant's bona fide attempts to comply with state and local requirements.[19]

This indicates that the Commission expects companies to accommodate reasonable local requirements that will not interfere with or delay the construction and operation of the facilities and does not consider all local requirements pertaining to construction to be preempted.

IV. Conclusion

FERC's NGA jurisdiction preempts conflicting state and local laws, but does not preempt authorizations delegated to state agencies by various federal statutes. FERC has authority under EPAct 2005 to prevent delay by acting as the lead agency for NEPA review and by setting deadlines for state and federal agencies to act under their respective federal statutes. Furthermore, FERC will not require a company to adhere to local requirements that conflict with or frustrate a FERC certificate. Regardless, FERC clearly expects companies to cooperate with local authorities and comply with reasonable local permitting requirements.

Please direct any questions or comments to Brian O'Neill (bdo@vnf.com) or Michael Pincus (mrp@vnf.com) at Van Ness Feldman LLP.

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[19] *Sound Energy Solutions, Order Denying Rehearing*, 107 FERC ¶61,263 at P 96 (2004). Although *Sound Energy Solutions* involved the Commission's authority under section 3 and not section 7 of the NGA, the principle of preemption is the same under both sections.