

LAW OFFICES
ARTHUR B. CUNNINGHAM
79 Checkerberry Lane, Hopkinton, NH 03229

June 16, 2016

Pam Monroe, Administrator
Site Evaluation Committee
21 South Fruit Street
Concord, NH 03301-2429

Via email

Dear Administrator Monroe:

On behalf of the Town of Fitzwilliam, New Hampshire, I propose the following rules pursuant to the RSA 162-H:10-b Site Evaluation Committee, May 18, 2016, Rulemaking Notice.

The Historic Town of Fitzwilliam and the Impacts of Development

The historic Town of Fitzwilliam has adopted plans and ordinances carefully crafted to protect the valued assets of the Town against the adverse impacts of development.

Those valued assets include the things included in the Town Conservation Commission's Open Space Plan, Table of important resources: clean water, clean air, historic homes and buildings, wild life habitat, wetlands, scenic qualities and peace and quiet.

The Town of Fitzwilliam has a Masterplan adopted pursuant to RSA 674:1. The Masterplan charges the Town Planning Board with the responsibility to balance matters of energy, conservation, the protection of natural resources and economic development that maintains the rural character of the Town and sustains a viable community.

The Town has a blasting ordinance. Chapter 110, Code of the Town of Fitzwilliam. The Town has a ground water protection ordinance. Chapter 113, Code of the Town of Fitzwilliam, Groundwater Protection Overlay District. Chapter 137, Code of Town of Fitzwilliam covers the Rural Character of the Town.

Federal Law Does Not Preempt Local Ordinances Enacted to Protect Against the Adverse Impacts of Development

The Natural Gas Act (NGA) does not preempt the application of local law and regulation. The National Environmental Policy Act (NEPA) encourages the cooperation amongst project sponsoring agencies, project developers, tribes, states and municipalities.

The claims of pipeline promoters that interstate high pressure gas pipelines are exempt from local regulation are wrong. The United States Supreme Court, in Panhandle Eastern Pipeline Co., v. Public Service Commission of Indiana, 332 US 507, 517-518 (1947), recently affirmed in Oneok, Inc. v. Learjet, Inc. has held, at page 10: "...As we have repeatedly stressed, the Natural Gas Act was drawn with meticulous regard for the for the continued exercise of state power, not to dilute or

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handicap it in any way... (citations omitted). Although Oneok dealt with state antitrust regulation, the principle remains. State and local regulation is not barred unless expressly preempted.

The Town is cognizant that there are some federal rules regarding the construction of high pressure gas pipelines. See 18 CFR Part 380. 18 CFR 380 Part 380 does not preempt local regulation. The purpose of that rulemaking requires, in very general terms, that promoters of high pressure gas pipelines engage in an environmental review of the projects.

18 CFR 380.6(a) requires that promoters of major pipeline construction projects conduct an environmental impact statement (EIS) under NEPA. 42 USC 4331-4335. 40 CFR 1501.01-08.

NEPA requires that a project promoter provide a scoping process that ensures appropriate consideration of NEPA policies in order to ensure consultation among agencies with jurisdiction over the project. 40 CFR 1501.1(b).

NEPA requires that the project promoter engage the relevant state agencies and town agencies in the scoping process. 40 CFR 1501.2(d)(2), 40 CFR 1501.6.

The Town of Fitzwilliam, as do most towns, has particularized concerns about its water supply and wetlands that require the application of its ordinances.¹ It has particularized concerns about the health and safety of townspeople during the construction and operation of pipeline projects. It has particularized concerns about the historic and rural character of the Town.

The Town regulatory bodies and Town ordinances must be part of the permitting processes for the construction of high pressure gas pipelines.

Additions to Site 301.03 Contents of Application

Site 301.03(e)

Add subparagraph: "(8) For transmission pipelines subject to the jurisdiction of the Federal Energy Regulatory Commission (FERC), a sworn certificate that applicant has complied with the National Environmental Policy Act (NEPA). The certificate shall include the following information and documentation:

- a. A copy of the environmental impact statement (EIS), environmental assessment (EA) or other document demonstrating that applicant has satisfied the obligations required by NEPA;
- b. A detailed description, if not fully detailed in the EIS, EA or other document, of how applicant plans to comply with the federal permitting requirements under the Clean Water Act (CWA) during the construction and operation of the project, including, but not limited to, the water quality certification required by CWA Section 401 and wetland permitting and

¹ The recent NED proposal makes the point that state and local ordinances must be observed in the EIS process. For example, K-M would have been required to obtain a NHDES alteration of terrain permit and dredge and fill permit to construct the pipeline through Fitzwilliam's Scott Pond and the Gaseau conservation area. Thirty-five (35) town homes lie within 200 feet of the project and rely on wells for water. K-M had to provide detailed studies of the hydro-geology that may impact these homes and its blasting plans to the Town Blasting Administrator and Town Planning Board.

mitigation required by CWA Section 404, together with the date applicant filed, or expects to file, such permit application and the timeline for public participation in each permit process and, information how the public can access and view the permit application and process.

- c. A detailed description of how the applicant plans to comply with the state permitting process as required by New Hampshire RSA Chapters of Title L: Water Management and Protection and the rules set forth in Env-Wq and Env Wt for the construction and operation of the project, together with the date applicant filed, or expects to file, such permit application, the timeline for public participation in each permit process; and, information how the public can access and view the permit application and process. The description of applicant's plan to comply with the CWA and RSA Chapters of Title L shall include an assessment of the pre-construction condition of all contiguous wetlands, i.e. their extent, cover types and functions; mapped spatial locations of proposed wetlands impacts; detailed impact classifications, e.g. temporary versus permanent; an assessment of the impacts to wetlands functions; and, an assessment of the suitability of the proposed avoidance and minimization of wetlands impacts as required by the CWA and RSA Title L;
- d. A detailed description of how the applicant plans to comply with town and municipal ordinances and permit requirements enacted to protect town and municipal water resources, including surface waters, lakes, ponds, rivers, streams, wetlands and drinking water aquifers during the construction and operation of the project.

The above draft rules were prepared with the expert advice of Rick Van de Poll, Ph.D., CWS #110, Ecosystem Management Consultants, 30 North Sandwich Road, Center Sandwich, NH 03227.

Site 301.03(e) during construction:

Add a subparagraph: "(9) A detailed emergency response plan for the construction and operation of the project which shall include the following information:

- a. A detailed description of the fire suppression plan. The description shall include a listing of high risk locations including locations close to schools, residences, businesses, electrical transmission and distribution infrastructure, including sub-stations;
- b. A detailed description of and locations for gas leak detectors;
- c. A detailed description of the training that applicant will provide for first responders (fire, ambulance, emergency management and highway);
- d. A detailed description of applicant's emergency responding personnel, including trench and confined space rescue personnel, together with a summary of the training and experience of such personnel to ensure that such personnel meet or exceed the standards in OSHA 1910.120;
- e. A detailed description of the turnout gear needed by first responders to pipeline incidents, including what, if any, financial commitment applicant will to ensure that first responders are fully equipped during project construction;
- f. A detailed description of security monitoring to be provided by applicant during project construction, including fences, alarms, cameras, and patrols. The description should include monitoring responsibilities, data storage, tapes and images and the identities of those who may access the information;
- g. A detailed description of who may, including first responders, access the construction site and what times, together with a description of how the construction site shall be accessed, e.g., keys to gates;

- h. A detailed description of the vehicles, equipment and materials, including emergency medical equipment, that will be provided to first responders to enable them to timely respond to project emergencies;
- i. A detailed description of evacuation routes during an incident;
- j. A detailed description of the plan to protect the construction site from soft terrorism;
- k. A detailed description of applicants' plan to keep and maintain road access to the project, including the pipeline and compressor stations. The plan should include snow removal and road maintenance in order that emergency vehicles may respond;
- l. A detailed description of applicants' plan to keep and maintain road access to homes and neighborhoods that may have limited access during construction of the project. The plan should include snow removal and road maintenance in order that emergency vehicles may respond;
- m. A detailed list of applicant's emergency contacts with a written commitment that the list be current during construction of the project;
- n. A detailed summary of the financial obligations applicant will undertake to reimburse first responders for emergency responses including alarm activations and full blown incidents;
- o. A detailed summary of applicant's plan to compensate municipalities, towns and persons for personal injury and property damage caused incidents arising from the construction of the project. The description should include a listing of primary insurance carriers with coverages, policy limits and loss payees. The description should also include plans detailing coverage for catastrophic loss.

The list provided above that address the safety of pipeline projects were developed by Nancy Carney, Chief, Fitzwilliam Fire Department, 6 Church Street, Fitzwilliam, New Hampshire 03447-0425. (603-585-6561)

Very truly yours,

Arthur B. Cunningham

Cc: Service list