

# Pipeline Routing and Siting Issues

## Who is responsible for siting new pipelines?

For nearly all new pipeline siting, the pipeline company decides on a general route they prefer for their proposed pipeline, and possibly some alternative routes. Once they feel fairly confident with the feasibility of their chosen route the more formal process with various government agencies begins. That process is not consistent for all types of pipelines, but varies greatly based on the type of pipeline and where it is to run. Pipelines that will cross international or state boundaries (interstate lines) have different siting processes than those that will stay within just one state (intrastate lines).

**Siting of new interstate natural gas pipelines:** For new interstate gas lines, once the pipeline company has a pipeline proposal and route in mind they must apply to the Federal Energy Regulatory Commission (FERC) for approval. That approval comes in the form of a Certificate of Public Convenience and Necessity from FERC. Before that approval is granted, FERC undertakes a complete environmental review that normally includes development of an environmental impact statement. The process is quite extensive and includes many opportunities for landowners to become involved. Many who have been through the FERC process question whether FERC's mission to provide energy to consumers across the nation sometimes trumps individual property owner's concerns and protection of the environment. In a quick and not exhaustive check, we were unable to find a single FERC denial of an application for a Certificate of Public Convenience and Necessity for an interstate gas transmission line. We found one denial for a natural gas storage site, based on the applicant's failure to provide evidence that they had customers lined up for the storage, but the details here are not important. The message is: *FERC very rarely denies an application.* There are sometimes changes in routes, and changes to other operational details, like the number and/or location of compressor stations, that would nonetheless be of great interest to landowners and local governments along the route. Because of this, it is still very important that neighbors and neighboring local governments participate in the FERC process.

There is a citizen's guide to the FERC process on its website: <http://www.ferc.gov/for-citizens/citizen-guides.asp>. The guide describes the FERC process, including when pre-filing occurs, when an application is filed, the deadlines for intervening in the FERC proceeding, and how to find information on the FERC website regarding a particular project.

Another guide, written from a slightly different perspective by a former FERC attorney now in private practice representing landowners and local governments, provides very practical advice on the FERC process and urges early participation by both landowners and local governments. She also describes in an attached legal memo the state of the law (as of 2010) relating to eminent domain in various pipeline proceedings. That guide and the legal memo can be found here: <http://www.scribd.com/doc/33801163/Knowing-and-Protecting-Your-Rights-When-an-Interstate-Gas-Pipeline-Comes-to-Your-Community>. One point that the author makes very clearly is that if a local or state agency has a permitting process that the applicant must complete, FERC will frequently make obtaining those permits a condition of approval for any Certificate issued by FERC. But FERC doesn't go out of its way to find out about these local ordinances and state permitting requirements: It is very important that the agencies intervene and participate in the FERC proceedings to ensure that their permitting process is made a condition of any Certificate.

**Siting of new interstate hazardous liquid pipelines:** There is no comprehensive federal permitting process for the routing of interstate hazardous liquids pipelines. If a pipeline crosses an international border (Canada or Mexico), then a permit is required from the State Department and it takes the lead on the proposal in a process similar to the one described for FERC above. If the pipeline does not cross an international border then the responsibility for approval of the pipeline route falls on the individual states, and if the state has no agency in charge of pipeline siting then the responsibility falls to the regular land use authority of local governments along the proposed route, although few local governments have a process established to exercise this authority.

**Siting of intrastate natural gas and hazardous liquid pipelines:** The federal government plays no role in the siting of pipelines that are entirely within the borders of a single state. Several states have agencies charged with siting various energy facilities; in some instances that includes intrastate pipelines and interstate liquid. The state rules for pipeline routing vary significantly, from some states that identify avoidance and exclusion areas for new pipelines to some that allow the development of alternative routing, to other states that have no regulations at all for the location of new intrastate and interstate hazardous liquid lines.

If the state has no agency in charge of pipeline siting then the responsibility falls to the regular land use authority of local governments along the proposed route. Check with your state's pipeline regulator to find out if your state has an energy facility siting agency, and whether it has authority over pipeline siting decisions. They should also be able to provide you the agency's procedural regulations. You can also find citations to state siting laws in our [Local Government Guide to Pipelines](#).



### What about other permits?

Many facilities have to obtain a permit to operate, so many people are surprised to learn that there is no overarching federal operating permit required for interstate pipelines. Interstate hazardous liquid lines have no operating permit requirements, and for interstate gas lines once FERC issues a Certificate of Public Conve-

nience and Necessity which typically incorporates other permits, the company can proceed to construction and operation. The lack of a licensing requirement means that license revocation – the removal of the right to operate a pipeline – is not an available sanction for violation of pipeline safety violations. While it may be possible for FERC to revoke a Certificate of Public Convenience and Necessity, since FERC is not a pipeline safety agency this option is not available to PHMSA for pipeline safety violations.

Depending on the areas through which a pipeline is proposed, there are a variety of other permitting processes that may apply, some of which are only tangentially related to pipeline safety, and yet could be relevant to the consequences of an incident: Section 401 Clean Water Act water quality certificates; Section 404 dredge and fill permits from the Army Corps of Engineers, NPDES discharge permit (if applicable), Coastal Zone Management Act determination of consistency, Endangered Species



Act consultation, Historic Preservation Act consultation and impact determination, and a variety of state and local permits - stream crossing, state endangered species, local zoning, shoreline management, critical areas, among others. Each of these permits and determinations has its own set of rules, public process and opportunities for involvement. The federal permits require compliance with the National Environmental Policy Act, and that means some kind of environmental review – either an assessment or a full EIS.

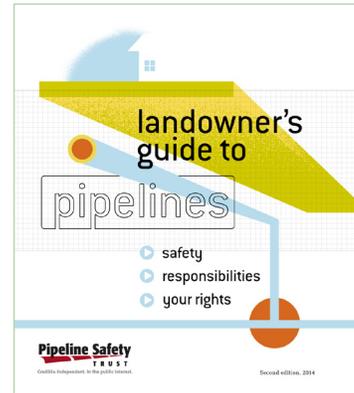
There are some circumstances in which certain state permitting processes might be deemed to be preempted by the Natural Gas Act (NGA) or by the federal pipeline safety statutes, and certain local permitting requirements may be deemed preempted by either federal law or by some state laws limiting local governments' authority. The details of the preemption doctrine are beyond the scope of this briefing paper, but it's an unusual doctrine, in that the results are either: a) pretty simple – for example, when a statute clearly preempts an entire field of regulation, as courts have held that the NGA has done with respect to routing of interstate gas lines; or b) or very complicated and dependent on the facts of the particular situation, and the two sets of regulations involved. The appendix to the [Local Government Guide](#) also describes some of the preemption cases that have been decided dealing with local and state governments' attempts to impose regulations found to be preempted or not preempted by the NGA. It's fair to say that things are not quite so clear-cut with respect to laws governing hazardous liquid lines or intrastate gas lines, and that the field will develop and become more clear as local and state governments continue to enact various regulations that affect pipelines and pipeline companies challenge them.

### **What about pipelines wanting to cross private property?**

Once a route has been settled on, the pipeline company has to obtain legal permission to cross each parcel of property along the route. This permission can be obtained in two ways: by purchase of an easement from the landowner in a voluntary contractual relationship, or in some cases, by use of the power of eminent domain. Interstate natural gas pipelines are granted authority to use eminent domain under federal law once they've obtained their FERC certificate. Other lines must rely on voluntary agreements with landowners, or the use of eminent domain under state law. The circumstances under which pipelines can and cannot use eminent domain and the processes that are used vary from state to state.

Not surprisingly, the use of eminent domain by pipeline companies is controversial, particularly where individual property owners believe that eminent domain should not be available for use by a private for-profit pipeline company, where the pipeline operator has chosen a particularly sensitive route, or is perceived as being unreasonably reluctant to shift a chosen route to avoid a home or particular feature.

An easement agreement becomes one of the documents describing title to a particular piece of property and exists in perpetuity unless the terms of the easement otherwise limit it. It will govern the relationship between the owner of the property and the owner of the pipeline easement for as long as the easement continues. It typically governs construction within the easement, landscaping, construction timing, restoration requirements, and a host of other issues of major concern to the landowner. While we won't go into them in depth in this briefing paper, a somewhat longer introduction to eminent domain and many of the issues relating to easements can be found in the Trust's [Landowners' Guide to Pipelines](#).



**Caveat:** Linking to various documents produced by other individuals or agencies in this paper doesn't constitute an endorsement of them, nor are we providing legal advice about any question discussed in this briefing paper or in those documents. If you are faced with a pipeline question that may affect you or your property, we urge you to consult an experienced attorney at the earliest possible time.