

Pipelines and Compressors: What You Need To Know



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I. Can Municipalities Regulate Pipelines? The Issue of Preemption.

A. Interstate Natural Gas Pipelines.

1. Interstate natural gas pipelines are regulated by the Federal Energy Regulatory Commission (FERC). State and local land use and permitting requirements are preempted, except that the State of New Jersey retains some oversight over interstate natural gas pipeline projects under the federal Clean Water Act. See 33 U.S.C. § 1344 et. seq. The first provision, Section 401 of the Clean Water Act, 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). The second provision, § 404 of the Clean Water Act, 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 Clean Water Act § 404 authority into the Freshwater Wetlands Protection Act (FWPA). See N.J.S.A. 13:9B-5(a).

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

3. Interstate natural gas pipeline developers may file a request with FERC to use the Commission's pre-filing procedures. See 18 C.F.R. 157.21. This procedure is designed to encourage the developers to engage in project development activities with interested stakeholders, which includes municipal and state governments. Once stakeholder input is obtained, a developer can amend its plan with proposed environmental mitigation measures before applying formally to FERC. After the pre-filing process concludes, the developer may provide FERC with a resource report which the Commission will use to conduct its own environmental review.

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4. Since FERC is a federal agency, FERC's environmental review is conducted under the National Environmental Policy Act (NEPA). See 42 U.S.C. § 4321 et. seq. NEPA requires FERC to consider the potential environmental impacts of granting a pipeline certificate and communicating that information to the public. **The review process is the following:**

- a. An Environmental Assessment (EA) is used to determine whether the Commission must prepare an Environmental Impact Statement (EIS) or if it can make a Finding of No Significant Impact (FONSI). A FONSI explains the reasons why the project will not have a significant effect on the environment. It must include the EA or a summary of the EA supporting the FONSI determination. Generally in the case of pipelines, an EIS will be required.
- b. The first step in EIS preparation is scoping – consultant review and public participation - to identify potential impacts and alternatives which should be studied in the EIS.

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- c. A draft EIS is issued for public comment. Public comments, once received, can be incorporated in the final EIS.
- d. The EIS must include discussion of reasonable alternatives and a “no build” alternative.
- e. The EIS must also include actions to avoid, minimize, mitigate or compensate for the negative environmental impacts of the project.
- f. There may be multiple versions of an EIS, as public comments are received and supplemental EIS(s) are prepared to address the comments.
- g. The project developer can assist in the preparation of the EIS by submitting environmental information and participating in environmental studies for the EIS.

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- h. NEPA is a procedural statute, not a substantive one. A NEPA lawsuit cannot result in a termination of a project. Objector success in a NEPA lawsuit requires that the agency go back and do a better EIS.
- i. The pipeline developer must also file a formal application with FERC for a pipeline certificate. After receiving an application, FERC publishes a notice in the Federal Register and begins the application process. FERC must determine if the proposed pipeline would be in the public interest by considering a number of factors.
- j. If FERC grants a pipeline certificate, the Commission's order will state the terms and conditions of approval, including the route that has been authorized and any required environmental mitigation measures. The FERC certificate provides the pipeline developer with eminent domain authority. See 15 U.S.C. § 717(f)(h). **Federal law preempts any state or local law that would obstruct federal law, such as siting, and municipalities cannot withhold approval for these projects.**

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5. Interstate natural gas pipelines may also be subject to U.S. Army Corps of Engineers permitting if the project involves navigable waters or wetlands outside of state jurisdiction.

6. Safety issues and pipeline operations and maintenance (O&M) are regulated by the U.S. Dept. of Transportation's Pipeline and Hazardous Materials Safety Administration after the siting of the pipeline is approved.



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B. Interstate Oil Pipelines.

1. **The Federal Energy Regulatory Commission (FERC) does not approve the siting of interstate oil pipelines.** Interstate oil pipelines are subject to environmental review under New Jersey state law.

2. Pipeline companies have eminent domain authority in New Jersey. See N.J.S.A. 48:10-1. State law provides that “pipeline companies, associations and corporations may acquire by condemnation land and other property necessary for public use for right of way [pursuant to the statutory requirements for condemnation found in Title 20 of the Revised Statutes].” See N.J.S.A. 48:10-1.
 - a. The New Jersey Superior Court, Law Division in *Faubel v. Buckeye Pipeline Co.*, 20 N.J. Super. 116 (N.J. Law Div. 1952) held that a pipeline company does not need to be a “public utility” to use this provision. The Board of Public Utilities (BPU) does not oversee the use of eminent domain by oil pipeline companies, as it would with a state public utility. See N.J.S.A. 48:3-17.7.

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- b. Over 60 years ago, the New Jersey Superior Court, Law Division held that N.J.S.A. 48:10-1, originally enacted in 1918, was constitutional. *Texas Pipeline v. Snelbaker*, 30 N.J. Super. 171 (N.J. Law Div. 1954). The constitutionality of N.J.S.A. 48:10-1 has not been reviewed by the Appellate Division or the New Jersey Supreme Court. In *Application of Buckeye Pipeline Co.*, 13 N.J. 385 (1953), a private landowner argued that N.J.S.A. 48:10-1 was unconstitutional under the United States and the New Jersey Constitutions. The New Jersey Supreme Court did not rule on the constitutionality of N.J.S.A. 48:10-1, but found against the landowner on procedural grounds. One Dissenting Judge, Justice Heher, stated that the Court should have considered the substantive constitutional issue, and observed that the statute could present a constitutional vagueness issue for its failure to specify the particular pipeline public uses for which the power of condemnation could be exercised under the statute.

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- c. There are no reported cases which determine whether oil pipelines are subject to municipal land use authority. However, there are cases which address the relationship between state eminent domain and municipal land use powers which suggest that municipal land use authority may be preempted. The New Jersey Supreme Court has held that municipalities cannot exercise land use authority over state highway projects. See, e.g., *City of Newark v. Jersey Turnpike Authority*, 7 N.J. 377 (1951), *New Jersey Turnpike Authority v. Sisselman*, 106 N.J. Super. 358 (App. Div. 1969). In *United Water, Inc. v. Borough of Hillsdale*, 438 N.J. Super. 309 (App. Div. 2014), the Appellate Division held that Hillsdale's land use approval requirements and ordinances were preempted under the New Jersey Safe Dam Act, N.J.S.A. 58:4-1, from application to a dam improvement project.

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- d. At least one case, however, has suggested that municipal use ordinances may not be preempted as applying to oil pipelines. See, *State of New Jersey v. Strategic Environmental Partners, LLC*, 2015 N.J. Super. Unpub. LEXIS 3657 (App. Div. Nov. 19, 2015) (found no preemption of the Township of Roxbury's Landfill Odor Ordinance regulating emissions from the Fenimore Landfill; there was no preemption of the ordinance by the New Jersey Solid Waste Management Act, and finding that the ordinance was not unconstitutionally vague).



II. Interstate Oil Pipelines Are Subject To Environmental Review Under New Jersey Law.

a. NJDEP considers interstate oil pipeline projects as large infrastructure projects, and it can be expected that oil pipeline applications will be submitted to NJDEP's Office of Permit Coordination and Environmental Review. See, NJDEP's December 9, 2011 Large Linear Infrastructure Project Guidance Document and NJDEP's January 2012 Linear Construction Technical Guidance.

b. NJDEP's Office of Permit Coordination and Environmental Review has a Permit Readiness Checklist which lists potentially applicable NJDEP programs and permit requirements. Some examples of NJDEP regulatory requirements which might **apply to interstate oil pipelines in New Jersey are:**

1. **Coastal Zone Management Rules.** N.J.A.C. 7:7-4.8 (Permit By Rule 8 for Construction of Utility Line attended to Bridge or Culvert); N.J.A.C. 7:7-12.15 (Submerged Pipelines).

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- 2. Freshwater Wetlands Protection Act.** The disturbance of regulated wetlands for pipelines can be approved under Freshwater Wetlands Protection Act (FWPA) general permits subject to certain requirements. See, e.g., N.J.A.C. 7:7A-5.2(b) (General Permit for Underground Utility Lines). These are wetlands transition area waivers for linear development. See, e.g., N.J.A.C. 7:7A-6.3(e). Even under the General Permits, however, mitigation may be required, involving on-site restoration or off-site restoration including the purchase of credits from wetlands mitigation banks. See, e.g., N.J.A.C. 7:7A-15 et. seq.
- 3.** New Jersey pipeline projects may also need other permits like a minor road crossing General Permit.
- 4.** New Jersey oil pipelines might also need U.S. Army Corps of Engineers and federal Clean Water Act Section 401 or 404 Permits if the project involves the crossing of navigable waters and/or wetlands outside the scope of the New Jersey Freshwater Wetlands Protection Act (FWPA). This applies to coastal wetlands and wetlands in the Meadowlands District.

III. Municipal Issues and Ordinances Relating to Oil Pipelines.

1. Municipalities should review impacts of oil pipelines within their jurisdictions including, inter alia (a) threatened/endangered species; (b) Category I waters; (c) water supply/groundwater impacts; and (d) stormwater/runoff impacts.

2. Are there municipal land use ordinances which prohibit and/or regulate the construction and placement of pipelines within municipal borders?
 - a. A number of municipalities have enacted municipal ordinances which specifically regulate oil and hazardous substance pipelines. The substance of these ordinances varies, **but they generally address the following issues:**
 - i. Are there any impacted critical land uses, including open space, Green Acres, municipally owned lands designated as open space preservation areas, farmland preservation areas, historic preservation areas or active and passive recreation areas?;

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- ii. Prohibiting pipeline construction in residential zones and districts, and classifying pipelines as conditional uses;
- iii. Requiring pipeline construction details, including pipeline dimensions, valve placement, proposed construction and siting;
- iv. Requiring setbacks in well head protection areas and from wetlands, streams, rivers, public or private wells, residential properties and steep slope areas;
- v. Requiring the submission by the pipeline operator of emergency preparedness plans, insurance coverage, indemnification and hold harmless;
- vi. Requiring that the pipeline operator have a reporting plan for pipeline failure and remediation plan for pipeline spills;

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3. Other municipal ordinances which relate to setbacks, conditional uses, steep slopes, etc. need to be reviewed even if there is no municipal pipeline ordinance.

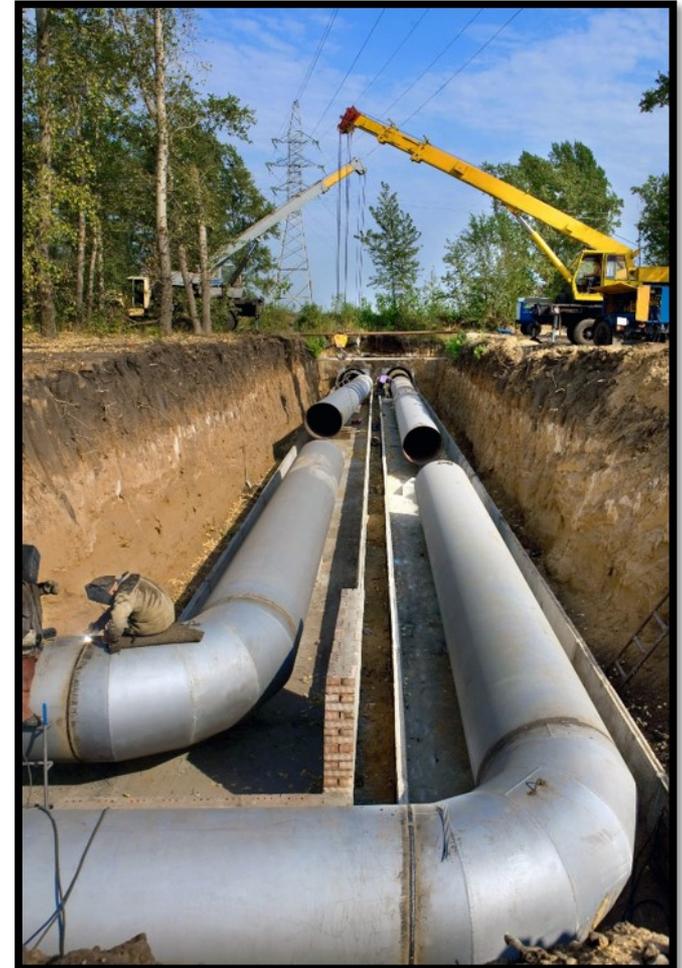
4. Review the potential impact of pipeline siting on brownfields areas and hazardous waste sites within the municipality. Environmental contamination caused by excavation and filling on contaminated sites could give rise to federal or state environmental liability. See, e.g. *Kaiser Aluminum v. Catellus Development*, 976 F. 2d. 1338 (9th Cir. 1992). See also, *U.S. v. CMDG*, 875 F. Supp. 1077 (D.N.J. 1995).



IV. County Oil Pipeline Jurisdiction.

1. Under the County Planning Act, N.J.S.A. 40:27-1 et. seq. and case law, County planning boards have no jurisdiction to require oil pipeline developers to obtain county site plan approval, unless the county engineer makes a finding that the construction would have an impact on traffic or drainage on a county road and county drainage facilities.

2. To the extent that a pipeline route requires the crossing of any county property or right-of-way, however, a county could require the oil pipeline developer to enter into a right-of-way agreement or easement agreement for the crossing.



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