www.ogel.org

ISSN : 1875-418X
Issue : Vol. 17 - issue 5
Published : November 2019

This paper is part of the OGEL Special Issue on *"Natural Gas Pipeline Construction and Regulation"* edited by:

T.J. Dimitroff
Roland Berger GmbH; Infrastructure Development Partnership LLP

View profile

K. Talus
Tulane Center for Energy Law, Tulane Law School; UEF Law School; University of Helsinki
View profile

Oil, Gas & Energy Law Intelligence

The Impact of the Interface of Regulatory Jurisdictional issues on the Life Cycle of Natural Gas Pipelines in the United States of America
by B.B. Pollett

About OGEL

OGEL (Oil, Gas & Energy Law Intelligence): Focusing on recent developments in the area of oil-gas-energy law, regulation, treaties, judicial and arbitral cases, voluntary guidelines, tax and contracting, including the oil-gas-energy geopolitics.

For full Terms & Conditions and subscription rates, please visit our website at www.ogel.org.

Open to all to read and to contribute

OGEL has become the hub of a global professional and academic network. Therefore we invite all those with an interest in oil-gas-energy law and regulation to contribute. We are looking mainly for short comments on recent developments of broad interest. We would like where possible for such comments to be backed-up by provision of in-depth notes and articles (which we will be published in our 'knowledge bank') and primary legal and regulatory materials.

Please contact us at info@ogel.org if you would like to participate in this global network: we are ready to publish relevant and quality contributions with name, photo, and brief biographical description - but we will also accept anonymous ones where there is a good reason. We do not expect contributors to produce long academic articles (though we publish a select number of academic studies either as an advance version or an OGEL-focused republication), but rather concise comments from the author's professional 'workshop'.

OGEL is linked to **OGELFORUM**, a place for discussion, sharing of insights and intelligence, of relevant issues related in a significant way to oil, gas and energy issues: Policy, legislation, contracting, security strategy, climate change related to energy.

The Impact of the Interface of Regulatory Jurisdictional issues on the Life Cycle of Natural Gas Pipelines in the United States of America[1]

Buford Boyd Pollett[2], The University of Tulsa

Introduction

This paper outlines the regulatory background and highlights the jurisdictional interactions applicable to the life cycle of natural gas pipelines in the United States.

The natural gas pipeline systems in the United States of America (USA) generally consist of the following:

- Gathering lines - move the produced natural gas from the wellhead to systems in the field that store and initially process the produced natural gas);
- Feeder lines - move natural gas from storage tanks and processing facilities to transmission pipelines;
- Transmission pipelines - move the processed natural gas over long distances from supply areas to market areas; and
- Distribution lines - move then natural gas to the residential, commercial, industrial, and power generation end-users.

Natural gas pipelines also have a lifecycle that generally involves a planning phase, construction phase, operation, and maintenance phase, decommissioning and abandonment phase, and reclamation phase.

Since the USA is a constitutional republic, government agencies at the federal and state regulate natural gas pipelines in the United States. Thus, this paper will examine how the regulatory framework in the USA impacts the lifecycle of the natural gas pipeline system in the United States.

Legal Framework

Political Divisions

The political divisions within the USA are the following:

- The Federal government,

[1] The author would like to thank Mr. Tom Seng, Director, Collins College of Business School of Energy, University of Tulsa, for his contributions, feedback and insights during the process of researching and drafting this paper, as well as his family for their invaluable support, encouragement. Please note the author retains all responsibility for any errors in the paper.

[2] Genave King Rogers Assistant Professor of Energy Law and Commerce, The University of Tulsa, Collins College of Business, School of Energy Economics, Policy and Commerce website: https://faculty.utulsa.edu/faculty/buford-pollett/ and Managing Attorney, EMC Law PLLC website: https://www.emclaw.us/. Linkedin profile link https://www.linkedin.com/in/bufordpollettattu. Email: buford-pollett@utulsa.edu, bufordpollett@emclaw.us.

- 50 States, 16 territories (non-states), and one federal district (*i.e.*, District of Columbia)
- Political subdivisions of states - counties, parishes (i.e., Louisiana) and boroughs (i.e., in Alaska), and political subdivisions of territories (non-states)– districts and municipios (i.e., Puerto Rico)
- Cities and towns, districts, and wards.[3]

The jurisdictional separation and interaction of these political divisions substantially impacts the entire lifecycle of pipelines the USA. Thus, the legal framework in the USA demonstrates the complex jurisdictional interactions present in a constitutional republic.

Constitutional Republic

The USA has a decentralized legal framework rooted in the Constitution of the USA (The Constitution). Currently, the Constitution consists of 7 Articles and 27 amendments. *The Constitution contains 4,543 words, including the signatures and has four sheets, 28-3/4 inches by 23-5/8 inches each.* [The Constitution in its current form] *contains 7,591 words including the 27 amendments. It is the oldest and shortest written Constitution of any major government in the world*.[4]

At the federal level, we focus our analysis on the following provisions of the Constitution:

- Article I - the express power of the Congress to regulate commerce as enumerated in Article I, Section 8, Clause 3 (*i.e.*, The Commerce Clause) of The Constitution,
- Article VI, Clause 2 – the Supremacy Clause of the Constitution,
- The 5th Amendment of The Constitution (5th Amendment) - the Due Process Clause of the 5th Amendment applies to government action impacting natural gas pipeline activities in the USA, and
- The 14th Amendment of The Constitution (14th Amendment) - the 14th Amendment applies the due process provisions of the 5th Amendment to the states.

We will also examine other applicable powers of the federal government (*e.g.*, the power of federal agencies to promulgate regulations under federal statutes and the federal courts' jurisdiction to review disputes), but I will limit those discussions to the relevant areas of discussion in this paper.

Factors Affecting Governmental Jurisdiction over Natural Gas Pipelines in the USA

When determining jurisdiction over pipelines in the USA, a party must consider a variety of factors, for example, the:

- Location of the natural gas pipeline,
- Type of natural gas pipeline, and

[3] *How many counties are there in the United States?* https://www.usgs.gov/faqs/how-many-counties-are-there-united-states (last visited 31 August 2019).

[4] *Fascinating Facts about the U.S. Constitution* https://www.constitutionfacts.com/us-constitution-amendments/fascinating-facts/ (last visited 31 August 2019).

- Constitutional, statutory and regulatory limitations under the legal framework of the U.S.A as amended over time.

Location of the Pipeline

Concerning location, we need to know if the pipeline's location is:

- On federal land (offshore submerged land or onshore land),
- On state land (offshore submerged land or onshore land),
- Only in one state,
- Crossing state lines,
- Crossing navigable waterways, shorelines, and navigation fairways,[5] or
- Crossing international boundaries.

Interstate versus Intrastate Pipelines

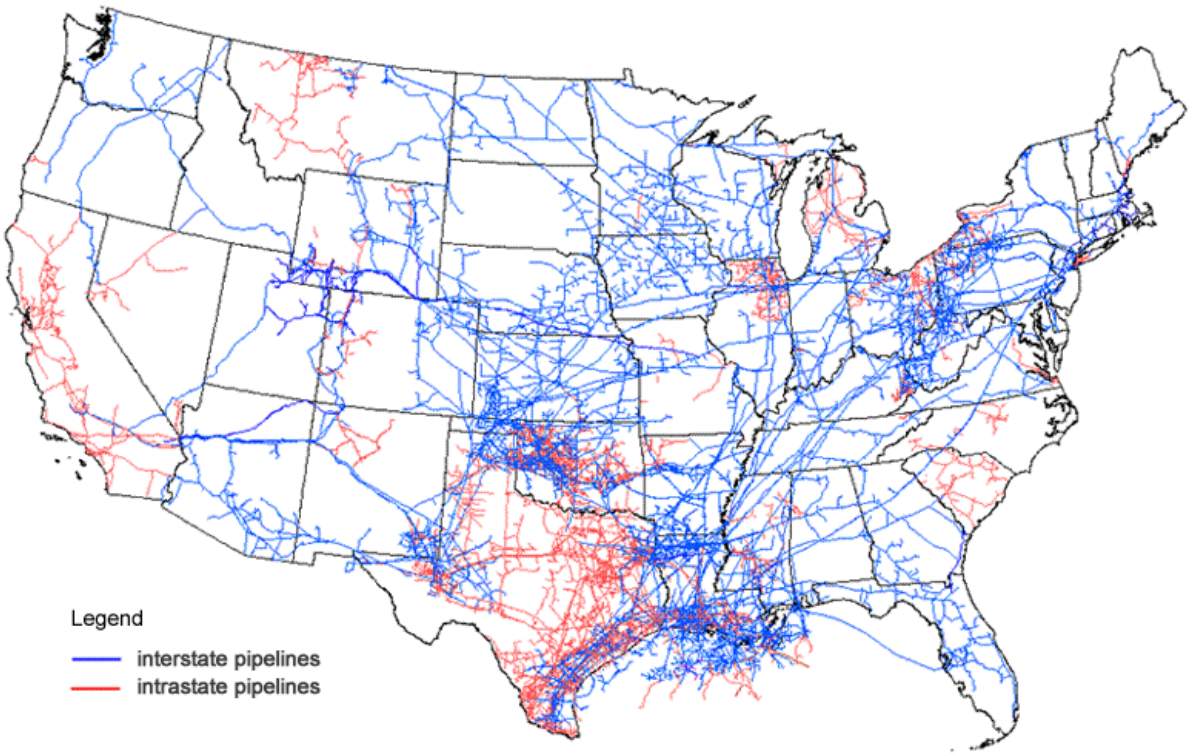
In the USA, interstate and intrastate pipeline networks constitute the two main types of natural gas networks. An interstate pipeline is a pipeline that crosses one or more states boundaries. The interstate natural gas pipeline network is larger than the intrastate pipeline network and in the lower 48 states. Roughly two-thirds of the lower 48 states rely on the interstate pipeline network for their natural gas supplies.[6]

Intrastate pipelines are the second type of natural gas pipeline network in the USA. An intrastate natural gas pipeline operates within the borders of a state and services as a link between natural gas producers and local markets within that state. Approximately 29 percent of the total miles of natural gas pipelines in the U.S. are intrastate pipelines. "Although an intrastate pipeline system is defined as one that operates totally within a State, an intrastate pipeline company may have operations in more than one State. As long as these operations are separate, that is, they do not physically interconnect, they are considered intrastate, and are not jurisdictional to the Federal Energy Regulatory Commission (FERC)." *Id*.

[5] *Regulatory Jurisdiction and Enforcement*, https://www.nap.edu/read/2347/chapter/8 (last visited 31 August 2019).

[6] *Natural Gas Interstate and Intrastate Pipelines*, updated: Aug 23, 2019 http://fedmaps.maps.arcgis.com/home/item.html?id=d0f8fcd8bd7f48f7bc477b5acf9a945a (last visited 31 August 2019).

Map of U.S. interstate and intrastate natural gas pipelines



Source: U.S. Energy Information Administration, *About U.S. Natural Gas Pipelines*

[7]

Type of Pipeline

We generally find four types of pipelines. Most pipelines fit into one of the following categories:

- *Gathering Lines: These lines are 10-30 centimeters in diameter, and work to transport natural gas, crude oil, and natural gas liquids short distances. They exist mainly to gather products from wells and move them for processing.*
- *Feeder Lines: Feeder lines move crude oil, natural gas, and natural gas liquids from storage tanks and processing facilities to transmission pipelines.*
- *Transmission Pipelines: These can range from 10 centimeters in diameter to over a meter. They carry natural gas, natural gas liquids, crude oil, and refined products (depending on whether they are liquids or natural gas pipelines). These transport petroleum products long distances, including over international boundaries.*
- *Distribution Pipelines: These range in diameter from 1-15 centimeters and are used to distribute natural gas to homes and businesses.*[8]

[7] Source: https://www.eia.gov/energyexplained/natural-gas/natural-gas-pipelines.php (last visited 1 September 2019).

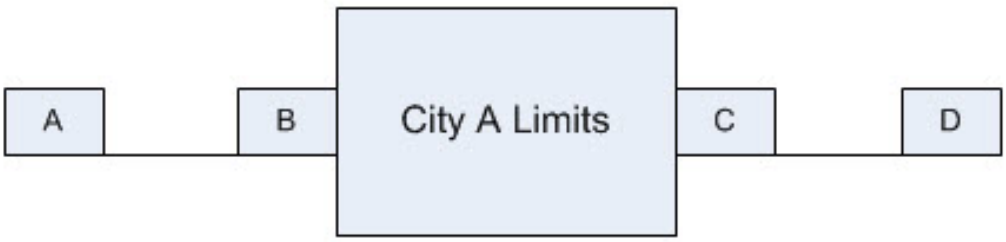
[8] *Types of Pipelines*, https://energyeducation.ca/encyclopedia/Pipeline (last visited 31 August 2019).

Jurisdiction over Gathering Lines

Gathering lines under the jurisdiction of the federal Department of Transport (D.O.T.) are under the delegated authority of the Pipeline and Hazardous Materials Safety Administration (PHMSA).[9]

Likewise, PHMSA has promulgated regulations regarding gathering lines in 49 C.F.R. Parts 192 and 195. PHMSA has defined gathering lines for natural gas as "a pipeline that transports gas from a current production facility to a transmission line or main (49 CFR 192.3) as determined using an industry standard (49 CFR 192.8)." In most cases, gathering lines operate at relatively low pressures and flow, and are smaller in diameter than transmission lines. In the past, if PHMSA had jurisdiction to regulate a gathering line, then PHMSA required that the pipelines comply with the regulations regarding PHMSA regulated transmission lines, especially in rural areas of the USA. However, in response to concerns raised by Congress, PHMSA has changed this approach, especially concerning gathering lines in populated areas. *Id*.

Previously, PHMSA pipeline regulations contained exceptions and clarifications for natural gas gathering pipelines covered under PHMSA regulations. The exceptions and clarifications are applicable to gathering pipelines located in sparsely populated areas as compared to populated areas.[10]



Gathering line diagram[11]

If an onshore crude oil gathering line runs from point A to point D, passing through the area within City A's limits, the section represented by point B to point C would be regulated. The sections running between points A-B and C-D would be non-regulated. The regulated sections would have to meet the requirements of 49 C.F.R. Part 195.

Redefining the regulation of gathering pipelines

Until recently, the portions of gas gathering pipelines that were regulated were determined using a similar approach. This resulted in some portions of gas gathering lines that pass close to areas where people work or live not being regulated (because they were in "rural" areas), while some portions where an accident would likely not affect people were regulated only because they were in cities, towns or other designated

[9] *Fact Sheet: Gathering Pipelines*, https://primis.phmsa.dot.gov/comm/FactSheets/FSGatheringPipelines.htm?nocache=4761 (last visited 31 August 2019).
[10] *Id.*
[11] *Id.*

areas. Congress directed that D.O.T. more clearly define which portions of gathering pipelines should be regulated.

Gathering Lines

PHMSA revised its regulations concerning gas gathering pipelines in response to this mandate on March 15, 2006. The new requirements incorporate an industry-standard, American Petroleum Institute Recommended Practice 80 (API RP 80), to better define which portions of the natural gas pipeline network are considered "gathering" pipelines. The revision also changed how a pipeline operator must determine which of its gas gathering pipelines are subject to regulation, i.e., which are "regulated gathering lines." This is done using criteria that determine when a gas gathering pipeline is close enough to a number of homes or to areas/buildings where people congregate, that an accident on the pipeline could impact them. Offshore gas gathering pipelines and high-pressure onshore lines meeting these criteria must meet all requirements of 49 C.F.R. Part 192 applicable to gas transmission pipelines. Onshore gas gathering pipelines that operate at lower pressures must comply with a subset of these requirements specified in 49 CFR 192.9.[12]

Jurisdiction over Natural Distribution Lines

Local distribution companies (LDCs) receive natural gas from the transmission pipelines. The LDCs own, operate and maintain the natural gas distribution pipelines that distribute the natural gas to commercial and residential end-users. Generally, these distribution pipelines are made of plastic pipe rather than steel, especially since these distribution lines are smaller in diameter than gas transmission pipelines and operate at lower pressures.[13]

The point at which the local distribution system connects to the natural gas transmission pipeline is known as the city gate. At the city gate, the gas pressure is lowered and a sour-smelling odorant is added to the gas to help users detect even small quantities of leaking gas. Natural gas distribution pipeline systems are regulated by PHMSA and its state partners under 49 C.F.R. Part 192.[14]

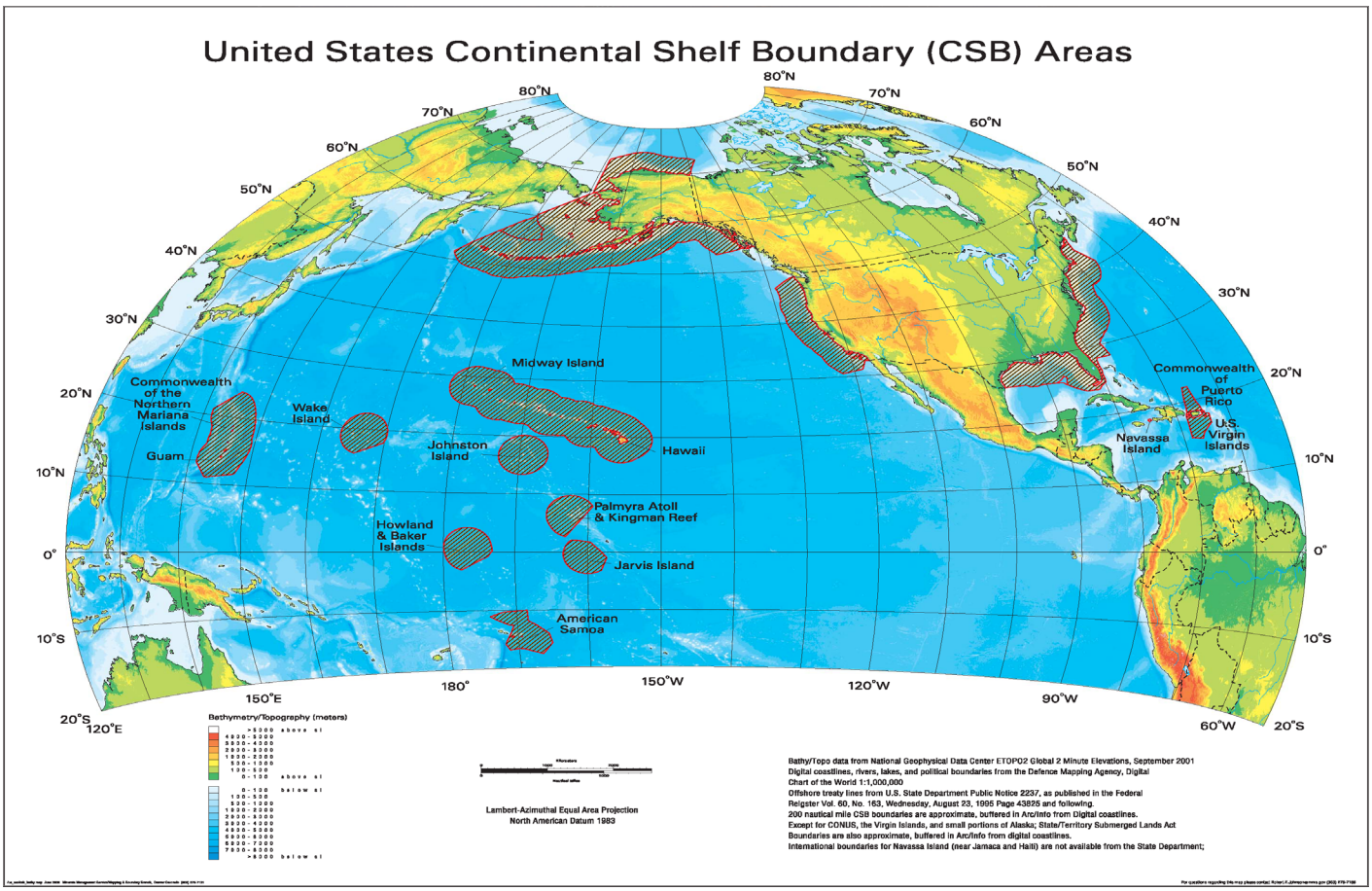
Pipelines on Federal Offshore Submerged Land

Appreciating which federal agencies have regulatory jurisdiction over pipelines on pipelines on federal offshore submerged land requires an examination of the applicable relevant enabling statutes that apply to the scope of activities associated with the planning, installation, operation, maintenance, abandoning and decommissioning of pipelines. For example, the "regulatory processes and jurisdictional authority concerning pipelines on the O.C.S. and in coastal areas are shared by several Federal agencies, including the Department of the Interior (D.O.I.), Department of Transportation (D.O.T.), U. S. Army Corps of Engineers (U.S.C.O.E.), the

[12] *Id*.
[13] *Fact Sheet: Distribution Pipelines,* https://primis.phmsa.dot.gov/comm/FactSheets/FSDistributionPipelines.htm?nocache=9207 (last visited 31 August 2019).
[14] *Id*.

Federal Energy."[15] "The Corps has regulatory responsibilities pursuant to Section 404 of the Clean Water Act (33 U.S.C. §1344), under which the Corps authorizes activities that may discharge dredge or fill material into waters of the United States, including wetlands. The agency also has regulatory responsibilities pursuant to Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. §403), under which the Corps authorizes structures and work in or affecting the course, condition, or capacity of navigable waters."[16] However, "pipe or pipelines used to transport gaseous, liquid, liquescent, or slurry substances over navigable waters of the USA are considered to be bridges, not utility lines, and may require a permit from the U.S. Coast Guard pursuant to section 9 of the Rivers and Harbors Act of 1899."[17]

Federal submerged lands are defined in federal law as evidenced by the following map.[18]



The boundaries between federal and state offshore submerged land best shown by the following diagram.[19]

---

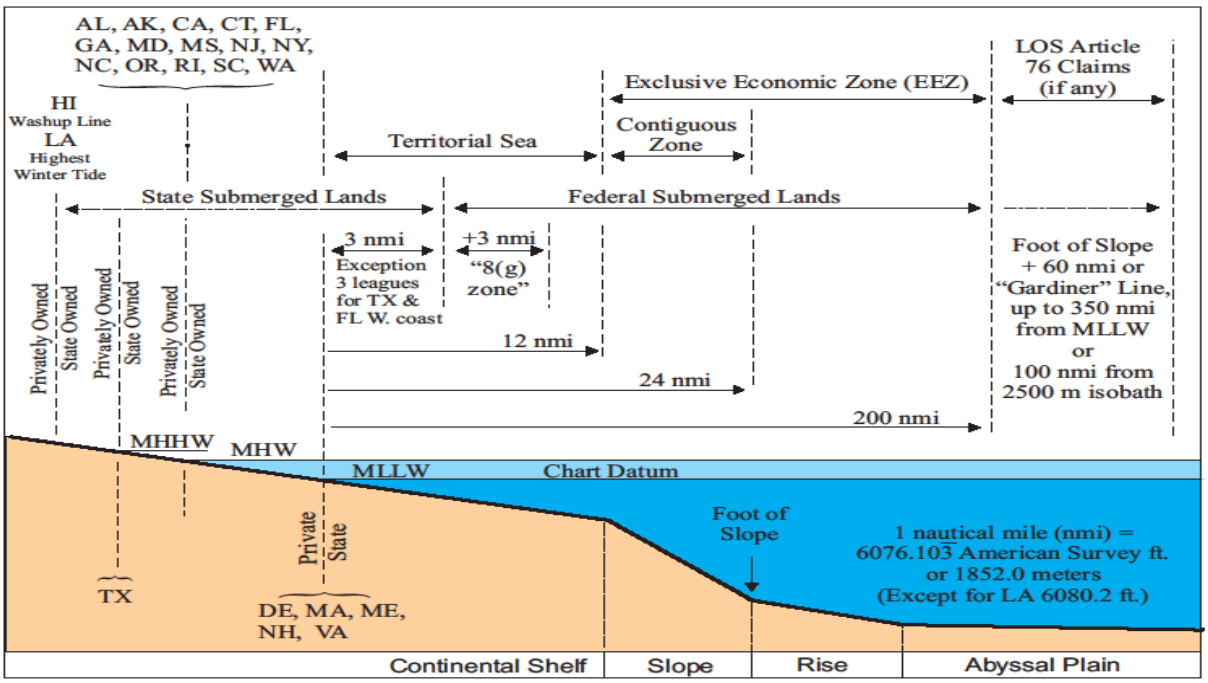
[15] *Brief Overview of Gulf of Mexico O.C.S. Oil and Gas Pipelines: Installation, Potential Impacts, and Mitigation Measures*, O.C.S. Report MMS 2001-06. https://www.boem.gov/BOEM-Newsroom/Library/Publications/2001/2001-067.aspx (last visited 31 August 2019).

[16] Oil and Natural Gas Pipelines: Role of the U.S. Army Corps of Engineers, June 28, 2017 https://www.everycrsreport.com/reports/R44880.html (last visited 31 August 2019).

[17] The 2017 Nationwide Permits, General Conditions, District Engineer's Decision, Further Information, and Definitions were published in the Federal Register on January 6, 2017 (82 FR 1860).

[18] *United States Continental Shelf Boundaries (C.S.P.) Map*, https://www.boem.gov/Oil-and-Gas-Energy-Program/Mapping-and-Data/csb_bathy112106-pdf.aspx

[19] *Marine Boundaries*,



The Submerged Lands Act (S.L.A.) of 1953 grants individual states rights to the natural resources of submerged lands from their respective coastline to no more than 3 nautical miles (5.6 km) into the Atlantic, Pacific, the Arctic Oceans, and the Gulf of Mexico. The only exceptions are Texas and the west coast of Florida, where state jurisdiction extends from the coastline to no more than 3 marine leagues (16.2 km) into the Gulf of Mexico.[20]

The S.L.A. also reaffirmed the federal government's claim to the lands of the Outer Continental Shelf (O.C.S.), which consists of those submerged lands seaward of state jurisdiction. The S.L.A. led to the passage of the Outer Continental Shelf Lands Act later in 1953 (OCSLA). The OCSLA and subsequent amendments, in later years, outlines the federal government's responsibility for the submerged lands of the O.C.S.[21]

Since the USA wanted to facilitate the wise development and use of the oceans beyond its territory and adjacent to its territorial seas in a manner consistent with international law, President Ronald Reagan signed Presidential Proclamation (5030) on March 10, 1983, creating the U.S. Exclusive Economic Zone (EEZ). As a result, the EEZ now consists of those areas adjoining the:

- Territorial sea of the USA,
- Commonwealth of Puerto Rico,
- Commonwealth of Northern Mariana Islands, and
- U.S. overseas territories and possessions.

https://www.boem.gov/Oil-and-Gas-Energy-Program/Mapping-and-Data/boundaries4-pdf.aspx (last visited 31 August 2019).

[20] *BSEE Governing Statutes,* https://www.bsee.gov/guidance-and-regulations/regulations/bsee-governing-statutes (last visited 31 August 2019).

[21] *BSEE Governing Statutes,* https://www.bsee.gov/guidance-and-regulations/regulations/bsee-governing-statutes (last visited 31 August 2019).

As result, the EEZ extends up to 200 nautical miles (370 km) from the coastline of the U.S.A and ranges from the continental shelf (*i.e.*, shallower than 200 m (656 ft.) to the abyssal plain (*i.e.*, water depths reach 3,000–5,000 m (9,843–16,405 ft.).[22]

Even though the OCSLA provides the basic jurisdictional framework for submerged federal lands, there are other federal laws that supplement this legal framework, and these laws include the:

- *National Environmental Policy Act of 1970 (NEPA) - The NEPA requires a detailed environmental review before any major or controversial federal action;*
- *Clean Air Act of 1970 (C.A.A., reauthorized in 1990) - The C.A.A. regulates the emission of air pollutants from industrial activities;*
- *Coastal Zone Management Act of 1972 (CZMA, reauthorized in 1990) - The CZMA requires State review of federal action that affects the land and water use of the coastal zone;*
- *Clean Water Act of 1977 (C.W.A.) - The C.W.A., through the issuance of National Pollutant Discharge and Elimination System permits, regulates the discharge of toxic and nontoxic pollutants into the surface waters of the USA;*
- *Oil Pollution Act of 1990 (O.P.A. 90) - O.P.A. 90 amended the Clean Water Act and addressed a wide range of issues associated with prevention, response, and the cost of oil pollution incidents in U.S. navigable waters;*
- *Federal Oil and Gas Royalty Management Act of 1982 (FOGRAMA) - The FOGRAMA requires that oil and gas facilities be built in a way that protects the environment and conserves Federal resources;*
- *Marine Mammals Protection Act of 1972 (MMPA) - The MMPA provides for the protection and conservation of all marine mammals and their habitats; and*
- *Endangered Species Act of 1973 (E.S.A.) - The E.S.A. requires a permit for the taking of any protected species. It also requires that all federal actions not significantly impair or jeopardize protected species or their habitats.*[23]

Types of Pipelines on Federal Offshore Submerged Land

The type of pipeline also affects the jurisdiction of the federal agency with the appropriate regulatory authority over pipelines of submerged federal lands. Transmission and gathering pipelines on submerged federal land are under the jurisdiction of the Pipeline and Hazardous Materials Safety Administration Office of Pipeline Safety (O.P.S.) in the U.S. Department of Transportation or by the Bureau of Safety and Environmental Enforcement (BSEE) in the U.S. Department of the Interior. Also, transmission and gathering pipelines on state submerged land are regulated by either O.P.S. or by certified state agencies.[24]

Background - The Reorganization of the Former M.M.S.

In reviewing the applicable law, one should note that following the *Deepwater Horizon incident* on April 20, of 2010, the Secretary of the Department of Interior on May 19, 2010,

---

[22] *Id*.
[23] *Id.*
[24] *Fact Sheet: Offshore Pipelines*, https://primis.phmsa.dot.gov/comm/FactSheets/FSOffshorePipelines.htm?nocache=6144 (last visited 31 August 2019).

replaced the Minerals Management with Bureau of Ocean Energy Management, Regulation and Enforcement (BOEMRE) via a signed a Secretarial Order.[25] Subsequently, BOEMRE got divided into three different federal agencies.

- The Office of Natural Resources Revenue (ONRR) – responsible for payment of revenues owed for the development of energy and natural resources on submerged federal land and onshore Federal and Indian lands.[26]
- Bureau of Ocean Energy Management (BOEM) – responsible for managing the development of the nation's offshore resources in an environmentally and economically responsible way. Functions include Leasing, Plan Administration, Environmental Studies, National Environmental Policy Act (NEPA) Analysis, Resource Evaluation, Economic Analysis and the Renewable Energy Program.
- Bureau of Safety and Environmental Enforcement (BSEE) - responsible for enforcing all safety and environmental regulations. Functions include all field operations including Permitting and Research, Inspections, Offshore Regulatory Programs, Oil Spill Response, and newly formed Training and Environmental Compliance functions.[27]

Federal HSE and Technical Regulations - Understanding the Jurisdictional Boundary of the Department of Interior and the Department of Transportation Concerning Pipelines on Submerged Federal Land

The former M.M.S. and the Research and Special Programs Administration with the Department of Transportation (RSPA) participated in meeting in May 1996 with a joint industry workgroup led by the American Petroleum Institute. The joint industry workgroup suggested that the M.M.S. and the RSPA rely upon individual operators of natural gas and hazardous liquid production and transportation pipeline facilities to identify the boundaries of their respective facilities. The M.M.S. and RSPA agreed with this industry proposal and as a result, these two federal agencies executed an interagency Memorandum of Understanding (M.O.U.) on December 10, 1996, and published this M.O.U. in a joint MMS-RSPA Federal Register Notice (February 14, 1997; 62 FR 7037-7039).[28]

This M.O.U. placed the O.C.S. production pipelines under D.O.I. responsibility and placed the O.C.S. transportation pipelines under D.O.T. responsibility. As a result, the M.O.U. granted the RSPA the primary regulatory responsibility for transporter-operated pipelines (*i.e.* companies which are engaged in the transportation of those hydrocarbons from the O.C.S and the associated pumping or compressor facilities on the O.C.S.). The M.O.U granted the then M.M.S. primary regulatory responsibility for the producer-operated facilities and pipelines (*i.e.* companies which are engaged in the extraction and processing of hydrocarbons on the O.C.S.).

[25] *The Reorganization of the Former M.M.S.*, https://www.boem.gov/Reorganization/ (last visited 31 August 2019).
[26] *About ONRR*, https://www.onrr.gov/ (last visited 31 August 2019).
[27] The Reorganization of the Former M.M.S., https://www.boem.gov/Reorganization/ (last visited 31 August 2019).
[28] 67 FR 16355, See also 1996 MMS/DOT national Memorandum of Understanding and/or other regional agreements (e.g., the "Offshore California Pipeline Inspection Survey Plan" and its implementing Memorandum of Agreement) as applicable.

Thus, this M.O.U. formalized the regulatory boundary between producer operated pipeline transfers to transporter operator pipelines on the on federal submerged lands.[29]

> *The M.O.U. did not address the producer-operated pipelines that cross the Federal/State boundary without a transfer on the O.C.S. However, the M.O.U. provided the agencies with the flexibility to address situations that do not correspond to the general definition of the regulatory boundary.*[30]

Federal Commercial Regulations - Jurisdiction Concerning Transport or Purchase Without Discrimination of Natural Gas Produced from Submerged Lands on the Outer Continental Shelf Land

As noted by Mr. Edwin I. Malet in his Louisiana Law Review Article, offshore pipelines raise similar competition concerns to onshore pipelines (*i.e.,* "(1) economies of scale, (2) high barriers to entry because of the large investment requirements and restrictive permitting regulations, and (3) ownership and operation by integrated oil companies").[31]

Historically, federal agencies have interpreted their regulatory authority very broadly concerning combating discriminatory market practices. As the Secretary of Interior expressed in The Outer Continental Shelf Act, Congressional Hearings on before the Senate Committee on Interior, 83d Cong., 1st Sess. 61 in 1953,:

> *[P]ipelines exercising rights-of-way granted by the Department of the Interior should be required to transport or purchase without discrimination oil or natural gas produced from the submerged lands of the outer Continental Shelf in the vicinity of the pipelines in such proportionate amounts as the Federal Power Commission, in the case of gas, and the Interstate Commerce Commission, in the case of oil, may after a full hearing with due notice* [this due notice is required a procedural requirement under the 5th Amendment of The Constitution] *thereof to the interested parties, determine to be reasonable.*
>
> *The Secretary stated that the condition would be "substantially the same as one contained in section 28 [of the Mineral Lands Act] except that the Federal Power and Interstate Commerce Commissions are respectively substituted for the Secretary of Interior." He continued, "[S]ince all the oil and gas produced in the outer Continental Shelf will come from Federal lands the additional 'common carrier' obligation imposed by section 28 does not appear to be needed . . . ."*[32]

The Federal Energy Regulatory Authority (FERC) asserted broad regulatory authority under OCSLA to enhance transparency and ensure a competitive marketplace when the FERC issued

---

[29] 67 FR 16355, See also 1996 MMS/DOT national Memorandum of Understanding and/or other regional agreements (e.g., the "Offshore California Pipeline Inspection Survey Plan" and its implementing Memorandum of Agreement) as applicable.

[30] 67 FR 16355, See also 1996 MMS/DOT national Memorandum of Understanding and/or other regional agreements (e.g., the "Offshore California Pipeline Inspection Survey Plan" and its implementing Memorandum of Agreement) as applicable.

[31] Edwin I. Malet, Legislative Assistant to Senator Howard Metzenbaum of Ohio; Former Special Assistant to the Director, Office of Regulatory Analysis, Federal Energy Regulatory Commission, *Mineral Law and Energy Policy: Outer Continental Shelf Oil Pipelines under the Interstate Commerce Act*, 43 La. L. Rev. 1143 (1983).

[32] *Id*.

Regulations Under the Outer Continental Shelf Lands Act Governing the Movement of Natural Gas on Facilities on the Outer Continental Shelf 65 FR 47294 on April 10, 2000. Several members of the pipeline industry promptly filed suit in federal district court challenging FERC's authority to issue these regulations.[33] The plaintiffs expressed concerns that they would suffer injury by having to comply with FERC's requirement that the plaintiffs file with FERC "quarterly reports containing information related to their contractual activities on the O.C.S. In particular, the plaintiff companies were required file a description and map of their facilities, a list of their affiliates, and their conditions of service (including the names of the shippers receiving service, the type of service provided, the primary receipt and delivery points, and the rates they charge each customer)".[34] Following a ruling by the Court granting the natural gas service providers' motions for summary judgment, the case went on appeal to United States Court of Appeals for the District of Columbia Circuit (Appeals Court). The Appeals Court cited the background of the FERC rule in question:

> *On April 10, 2000, the Federal Energy Regulatory Commission, exercising authority it claimed under the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. §§ 1331-1356, issued regulations affecting companies providing natural gas transportation service--including "gathering" service--in the Outer Continental Shelf. The regulations required the companies to periodically file information with FERC concerning their pricing and service structures, thereby implementing FERC's view that the resulting transparency would enhance competitive and open access to gas transportation.*[35]

The Appeals Court examined the FERC's authority under 43 U.S.C. §§ 1334(e) of OCSLA:

> *The crux of § 1334(e) is to require the Secretary (of the Interior) to impose open-access conditions in his or her issuance of rights-of-way through submerged lands of the Outer Continental Shelf. To help achieve the open access goal, § 1334(e) grants FERC a single power: to determine, along with the Secretary of Energy, the proportions of oil, gas, or other minerals that each member of any relevant group of pipelines may be required to transport or purchase under those conditions.*[36]

The Appeals Court then examined FERC's regulatory authority 43 U.S.C. §§ 1334(f) of OCSLA.

> *Section 1334(f) similarly fails to provide FERC with a general power to enforce OCSLA's open access provisions. Subsection (f)(1) states that permits, licenses, easements, etc., granted to pipelines for transportation through the O.C.S., "shall require" the firms in question to operate their pipelines in accordance with the "following competitive principles," which it then sets forth in subparts (A) and (B). Obviously when FERC issues a license covered by § 1334(f), such as a certificate of convenience and necessity under § 7(c) of the Natural Gas Act for transportation of gas through the Outer Continental Shelf, 15 U.S.C. § 717f(c), it is to include terms meeting the requirements set out in § 1334(f)(1). Subsection (f)(3) recognizes FERC's role as licensor, directing FERC (as well as the Secretary of Energy) to consult with the Attorney General on the "specific conditions" to be imposed when crafting any*

[33] See *Chevron U.S.A., Inc. v. FERC*, 193 F. Supp. 2d 54, 2002 U.S. Dist. LEXIS 1532 (D.D.C., 2002)
[34] *Id*.
[35] *Williams Cos. v. FERC*, 345 F.3d 910, (D.C. Cir. 2003).
[36] *Id*.

> *"license," etc., governed by (f)(1). FERC, indeed, has not hesitated to impose such conditions.*[37]

Likewise, the FERC did not persuade the Appeals Court by citing the legislative history OCSLA. FERC had argued for the broader scope of regulatory authority by citing a discussion by two U.S. Senators memorialized in 123 Cong. Rec. S23,253 (daily ed. July 15, 1977). The Appeals Court emphatically stated, "*[w]hat we said in an earlier case where a litigant invoked "bits and pieces of legislative history surrounding the 1978 Amendments to OCSLA" is equally true today: "**Snippets of legislative history do not a law make***."[38]

As a result, the Appeals Court held, "[s]ections 5(e) and (f) of OCSLA do not grant FERC general powers to create and enforce open-access rules on the O.C.S., but merely assign it a few well-defined tasks. As FERC was without authority to issue the regulations at issue here, the judgment of the district court is Affirmed."

Following the Appeals Court's rejection of the regulatory authority under 65 FR 47294, FERC issued on March 8, 2004 ORDER NO. 639-b Final Rule *Regulations under the Outer Continental Shelf Lands Act Governing the Movement of Natural Gas on Facilities on the Outer Continental Shelf* that removed the regulations requiring the reporting information that the Appeals Court found outside of FERC's statutory authority.

Federal HSE and Technical Regulations - Natural Gas Pipelines on Federal Land (Onshore)

The Department of Interior has jurisdiction over almost all leasing, exploration, development, and production of natural gas on federal and Native American lands. The Bureau of Land Management (B.L.M.) has the authority to promulgate rules and standards for drilling and production and require all operations on federal land to comply with state and local regulations and protect life, property, and environmental quality.[39]

The National Park Service has the legal authority to regulate the small amount natural gas activity in National Parks (roughly 550 active wells in 2015), where the federal government owns the land surface but not the underlying oil, natural gas, or mineral resources.[40]

The D.O.I. also has regulatory authority over the relationship between the federal and tribal authority for natural gas pipelines that cross Native American land.

> *For example, a pipeline project might have to obtain a right-of-way (R.O.W.) over lands that the United States holds in trust for an Indian tribe or that individual Indians own with restrictions on alienation imposed under federal law. See Department of the Interior (D.O.I.), Bureau of Indian Affairs (B.I.A.), Final Rule, Rights-of-Way on Indian Land, 80 Federal Register 72492 (November 19, 2015) (to be codified at 25 C.F.R. Part*

---

[37] *Id.*

[38] *Id*. citing *ExxonMobil Gas Marketing Co. v. FERC*, 353 U.S. App. D.C. 170, 297 F.3d 1071, 1088 (D.C. Cir. 2002).

[39] *Federal and state regulation of exploration, production, transportation, and more* https://www.americangeosciences.org/geoscience-currents/us-regulation-oil-and-gas-operations (last visited 31 August 2019).

[40] *Id*.

169). Various federal statutory provisions authorize D.O.I. to grant or approve R.O.W. over Indian lands. E.g., 25 U.S.C. §§321, 323-328, 2218.[41]

Pipelines on the State Offshore Submerged Land and Onshore Land

Federal and state agencies have jurisdiction to regulate the pipelines on state submerged land and onshore land. FERC and PHMSA have jurisdiction over various aspects of interstate natural gas pipelines. FERC has the legal authority to regulate pipelines, storage, natural gas transportation in interstate commerce, and liquefied natural gas facility construction. Also once operational, FERC has jurisdiction over natural gas pipeline facilities for imports and exports at U.S. points of entry for natural gas imports and exports and FERC also is the responsible federal agency for examining the environmental impacts of such natural gas projects.[42]

Similarly, PHMSA (acting through the Office of Pipeline Safety (O.P.S.), regulates, monitors and enforces safety on interstate natural gas pipelines once these pipelines become operational. Even though the federal government maintains responsibility for developing, issuing, and enforcing pipeline safety regulations on interstate natural gas pipelines, state regulatory agencies conduct most inspections. Generally, state regulatory agencies have jurisdiction over the regulation, inspection, and enforcement of pipelines intrastate natural pipelines. As required by the Supremacy Clause of the Constitution, the state regulations must be at least as stringent as the federal regulations.[43]

PHMSA's Office of Pipeline Safety (O.P.S.) has the legal authority to certify state agencies annually to perform their regulatory duties. Even though O.P.S. retains its enforcement authority, O.P.S. has the legal authority to delegate to states the ability to inspect interstate pipelines. The following states are examples of states that O.P.S. has authorized to act as such interstate agents:

- Arizona,
- Connecticut,
- Iowa,
- Michigan,
- Minnesota,
- New York,
- Ohio,
- Washington, and
- West Virginia.

Additionally, O.P.S. regulates all the natural gas pipe (interstate and intrastate) in Alaska and Hawaii.[44]

---

[41] Brandon J. Murrill, *Pipeline Transportation of Natural Gas and Crude Oil: Federal and State Regulatory Authority,* Congressional Research Service, March 28, 2016. See footnote 8 in https://fas.org/sgp/crs/misc/R44432.pdf (last visited 31 August 2019).

[42] *Making State Gas Pipelines Safe and Reliable: An Assessment of State Policy*, http://www.ncsl.org/research/energy/state-gas-pipelines-federal-and-state-responsibili.aspx#F4 (last visited 31 August 2019).

[43] *Id.*

[44] *Id.*

Recent Natural Gas Pipelines Incidents on Natural Gas Pipeline Regulation in the USA

Due to a series of incidents and the increase of natural gas utilization in the USA, natural gas pipelines have gotten increased scrutiny for security and safety concerns.[45] The National Transportation Safety Board (N.T.S.B.) is the federal agency with the D.O.T. that has the regulatory authority to investigate "accidents in the aviation, highway, marine, pipeline, and railroad modes, as well as accidents related to the transportation of hazardous materials."[46]

- **2010** - An explosion caused by a natural gas pipeline in San Bruno, CA, killed eight people, injured 60 others, and destroyed 37 homes;
- **2011**- An explosion caused by a natural gas pipeline in Allentown, PA, killed five people, damaged 50 buildings, and caused 500 people to be evacuated;
- **2012** - An explosion caused by a natural gas pipeline in Springfield, MA, injured 21 people and damaged over a dozen buildings;
- **2014** - An explosion caused by a natural gas distribution pipeline in New York City killed eight people, injured 50 others, and destroyed two 5-story buildings;
- **2015** - The Aliso Canyon underground natural gas storage facility in Los Angeles County, CA, released 5.4 billion cubic feet of gas, causing the temporary relocation of over 2,000 households and two schools in Porter Ranch;
- **2016** - An explosion caused by a natural gas distribution pipeline in Canton, OH, killed one person, injured 11 others, and damaged over 50 buildings; and
- **2018** - Explosions and fires caused by natural gas distribution pipelines in the Merrimack Valley, MA, killed one person, injured 21 others, damaged 131 structures, and required 30,000 residents to evacuate.[47]

These natural gas pipeline and associated facilities have substantially increased stakeholder concerns. As a result, there has been increased scrutiny of federal and state regulators with jurisdiction to regulate natural gas pipelines in order to ensure pipeline safety to protect the general public.

Federal Natural Gas Commercial Regulations

The federal regulation of natural gas in interstate commerce began with the Natural Gas Act of 1938 (the "NGA of 1938").[48] The NGA of 1938 permitted natural gas pipeline entities to obtain utility status, a protected service territory or, "franchise" and, granted a certificate of "pubic convenience and necessity" under Sec. 7(c)[49] of the NGA of 1938. Interstate natural gas pipeline entities must show that their project is "in the public interest" and they provide "just and reasonable" rates of service. The utility status also granted the pipelines the "right of eminent domain" where the acquisition of land needed for right-of-way purposes. Also, the

---

[45] *Making State Gas Pipelines Safe and Reliable: An Assessment of State Policy*, http://www.ncsl.org/research/energy/state-gas-pipelines-federal-and-state-responsibili.aspx#F4 (last visited 31 August 2019).

[46] *History of The National Transportation Safety Board*, https://www.ntsb.gov/about/history/Pages/default.aspx (last visited 31 August 2019).

[47] *D.O.T.'s Federal Pipeline Safety Program: Background and Key Issues for Congress*, Congressional Research Service, Updated March 29, 2019
https://fas.org/sgp/crs/misc/R44201.pdf (last visited 31 August 2019).

[48] See https://www.energy.gov/sites/prod/files/2013/04/f0/2011usc15.pdf

[49] 15 US Code § 717f. *Construction, extension or abandonment of facilities*.

pipeline companies bought natural gas from producers under long-term purchase agreements, and the pipeline companies were the sole transporters and sellers of the gas.

The Natural Gas Policy Act of 1978 (NPGA) was Congress's reaction to concerns over dwindling natural gas supplies in North America and, especially, in interstate commerce. Further, the NGPA authorized the creation of the Federal Energy Regulatory Commission (FERC) and established prices for natural gas sold into interstate commerce and provided monthly price escalators that were absent from any market sensitivity. Pipelines, which traditionally bought long-term supply through acreage dedications or "firm" (*i.e.* binding) volume commitments, were now doing so at ever-increasing prices. A considerable gas market "bubble" ensued, and the natural gas industry market experienced a “bust” in the early 1980s. Eventually, these price controls on new natural gas and certain existing intrastate contract gas expired on January 1985[50], and this precipitated the dawn of the "spot" market for natural gas. As a result, the FERC, the successor to the Federal Power Agency, now has jurisdiction over interstate natural gas pipelines and enforces the provisions of the NGA of 1938.

FERC promulgated a series of regulations in 1985 that would help relieve pipelines of their burden of the long-term supply contracts, but they would have to forego their merchant function. Beginning with Order No. 436, the "Open Access Rule," interstate pipelines would no longer buy, transport and sell natural gas. These pipeline companies had to open their capacity to "third-party" shippers on a "non-discriminatory" basis. These shippers would now, in turn, purchase supplies either through long-term contracts or, a shorter period, "spot" purchases, transport and, sell the natural gas in interstate commerce. They would, essentially, re-bundle the service previously provided by the pipelines.

Abuses of the new system occurred as the interstate natural gas pipeline entities eventually began to create marketing affiliates and awarded large quantities of the released natural gas capacity to the marketing affiliates along with, in some cases, supply contracts. FERC attempted to stop this practice by issuing Order No. 500, the "Marketing Affiliates Rule" which set forth restrictions on the relationship between an interstate natural gas pipeline entity and its marketing affiliate. Order No. 600 would be the final order the FERC would issue on "open access" and solidify the federal rules still in place today.

Pipeline Projects

A natural pipeline entity may initiate a pipeline project if the entity sees a need, an end-user wishing a new source of supply or, a producer wishing to guarantee takeaway capacity out of a constrained area or one where no infrastructure currently exists. With the advent of the "shale revolution," the majority of new transmission pipeline projects have been initiated by producers. Since the shale gas had not been previously accessible, infrastructure was lacking in these major basins.

If a natural gas pipeline entity defines a possible need or, is approached by producers and/or end-users, the entity will put together a draft proposal for the project. This proposal would include at least the route and capacity. The company would then solicit interest via a "Non-binding Open Season." All parties who may want to participate in the project would indicate so to the pipeline company and give a potential volume they might want to ship. This initial

[50] Robert R. Nordhaus, *Producer Regulation and the Natural Gas Policy Act of 1978*, 19 Nat Resources J. 4 (Fall 1979).

expression of interest does not bind these parties. In most cases, the pipeline entity already has some parties who will commit to the project and provide the volume, term of commitment, and rate; they are willing to pay for the service. These are known as the "anchor" Shippers.

Once the natural gas pipeline entity has garnered some interest, the entity then establishes a "Binding Open Season" whereby, only those genuinely interested in participating will send a good faith "Letter of Intent" as well as non-refundable, monetary deposit to the natural gas pipeline entity. The potential Shippers will state the volume, term, and rate within their letters. If the natural gas pipeline entity accepts the interested party's terms, the natural gas pipeline entity will then send the appropriate transportation agreements to the interested party. If the natural gas pipeline entity accepts their terms, but, the interested party refuses to execute the transportation agreements, the interested party loses their deposit. However, if the natural gas pipeline entity does not accept their proposal, the deposit is refunded or, negotiations may take place to arrive at a mutually-acceptable arrangement.

The natural gas pipeline entity would now usually meet again with the FERC staff to review the status of their project and indicate the level of interest expressed by the committed shippers. The natural gas pipeline entity should also obtain clarity on all the requisite documents that they must submit to the FERC in the "final" proposal.

The pipeline entity's submission to FERC for receiving the necessary Sec. 7(c) certificate will be extremely detailed and include, for example, the executed transportation agreements from all anchor shippers, route maps, cost of service study, environmental impact statement, proposed rate schedule, and the proposed general terms & conditions.

After the submission, FERC will post a public notice period whereby interested parties may file comments and/or objections to the project with the agency. If there are no objections filed, FERC will proceed with reviewing the project, including, conducting an environmental impact study of their own. Construction may not start and, equipment may not even be placed on the right-of-way until the natural gas pipeline entity has obtained FERC approval. Additionally, there may be several other federal and state agencies that may have to give their approvals before construction can commence.

Siting and Abandonment of Interstate Natural Gas Pipelines

Within the federal government, FERC has the regulatory authority for approving the siting and abandonment interstate natural gas facilities (*e.g.,* pipelines, storage, and liquefied natural gas (LNG) facilities).[51] Under 15 U.S. Code § 717f, a party "seeking to construct, extend, acquire, or operate a facility for the transportation or wholesale sale of natural gas in interstate commerce must obtain from FERC a certificate of public convenience and necessity authorizing these actions."[52] As a result, FERC may only issue such certificates after notice, a hearing, and determining the:

- Applicant is willing and able to provide the service;
- Applicant will comply with the NGA and FERC rules promulgated thereunder; and

[51] See 15 U.S.C, § 717. *Regulation of natural gas companies*
[52] Brandon J. Murrill, *Pipeline Transportation of Natural Gas and Crude Oil: Federal and State Regulatory Authority,* Congressional Research Service, March 28, 2016.

- Action will be "**required by the present or future public convenience and necessity**."[53]

Thus, FERC's has siting jurisdiction for interstate natural gas facilities, but the individual states have siting jurisdiction for intrastate pipelines within their state borders (i.e., pipelines not engaged in interstate commerce or pipeline construction and operation of cross-border oil or gas pipeline facilities requires a presidential permit. Since Article II of the Constitution includes the President's power to conduct the nation's foreign relations, federal courts have generally held that the President has authority over foreign commerce and foreign affairs.[54] Thus, a party seeking to "construct and operate cross-border facilities necessary for a pipeline to transport natural gas or crude oil between the USA and a foreign country, must obtain a presidential permit."[55]

Recent Interpretation of Public Convenience and Necessity under the Section 7 Certificating Process

Since 1969, the USA has been exporting natural gas cooled down into liquid form (*i.e.*, LNG) to Japan from an LNG facility in Kenai, Alaska, but only recently (with the advent of the "shale revolution,") has the Unites States begun to export natural gas facility in the lower 48 states. Thus, resource owners, natural gas producers, and natural gas pipeline entities now have a renewed interest in building natural gas infrastructure to access the shale gas in these basins. Under the NGA of 1938, as amended, any party wanting to import and/or export natural gas from and/or to a foreign country must first obtain an authorization from the Department of Energy (DOE) per 10 CFR Part 590 of DOE's regulations.[56] Even though the DOE regulates the export of the natural gas, the FERC retains regulatory jurisdiction over the siting, construction, and operation of the natural gas import and export facilities.

This new interest in exporting natural gas from the USA has created a legal challenge to the interpretation of *public convenience and necessity* under the Section 7 certificating process. In the case of *Oberlin v. FERC*, No. 18-1248 (D.C. Cir. 2019), certain landowners challenged the FERC's orders under 15 U.S.C.S. § 717r authorizing the construction of a natural gas pipeline crossing the landowners' properties.

The Appeals Court in the case reviewed "the unanswered question of whether — given the fact that Section 7 authorizes the use of eminent domain — it is lawful for the [FERC] to credit precedent agreements for export toward a finding that a pipeline is required by the public convenience and necessity."[57]

In the case, Nexus Gas Transmission, LLC (Nexus) had sought authorization from the FERC under Section 7 of the NGA of 1938 "to build and operate approximately 257 miles of a new

---

[53] *Id*. **Emphasis** added.
[54] *Id*. Footnote 66 citing *5 U.S. Const. art. I, §8, cl. 3 (giving Congress the power to "regulate commerce with foreign nations"); id. art. II, §2 (setting forth several presidential authorities over foreign affairs)*.
[55] *Id*. Footnote 64 citing *Exec. Orders 10485, 11423, 13337. In order to export natural gas or crude oil, additional federal authorizations may be required. See, e.g., 15 U.S.C. §717b (natural gas). For a discussion of when modifications to an existing cross-border energy facility require a new presidential permit, see CRS Report R43261, Presidential Permits for Border Crossing Energy Facilities, by Adam Vann and Paul W. Parfomak.*
[56] Source: *How to Obtain Authorization to Import and/or Export Natural Gas and LNG*, https://www.energy.gov/fe/services/natural-gas-regulation/how-obtain-authorization-import-andor-export-natural-gas-and-lng.
[57] *Id*.

natural gas pipeline to transport 1.5 million dekatherms per day ("dth/day") of Appalachian Basin shale gas to consuming markets in northern Ohio, southeastern Michigan, and Ontario, Canada."

The Appeals Court in the case stated the following regarding the proposed natural gas pipeline.

- The pipeline is entirely within the USA (*i.e.,* Hanover Township in Columbiana County, Ohio, to Ypsilanti Township in Washtenaw County, Michigan);
- In marketing the pipeline from 2012 through 2015, Nexus entered into precedent agreements - *i.e*., long-term contracts — with eight different entities, for 885,000 dth/day, or 59%, of the pipeline's 1.5 million dth/day capacity;
- Nexus contracted with eight entities of which four are affiliates of the pipeline's sponsors, and two are "Canadian companies serving customers in Canada;" and
- Nexus's precedent agreements with the Canadian shippers are for a total of 260,000 dth/day.[58]

The landowners in the case (Petitioners) claimed that Nexus's precedent agreements did not demonstrate strong evidence of market demand since Nexus had dedicated a substantial portion of the natural gas for export to foreign natural gas markets.

> *In Petitioners' view, because the Secretary of Energy authorizes exports under Section 3 of the Act, the Commission may not use precedent agreements for export "to justify project need under Section 7 [,] which governs certificates for projects in interstate commerce." Moreover, Petitioners contend, because Section 7 confers on a certificate holder the right to exercise eminent domain, crediting export agreements toward a Section 7 finding of project need runs afoul of the Takings Clause, as a private pipeline selling gas to foreign shippers serving foreign customers does not serve a "public use" within the meaning of the Fifth Amendment. Id. at 36 (quoting U.S. Const. amend. V ("[P]rivate property [shall not] be taken for public use, without just compensation.")).*

The Appeals Court said the FERC's legal argument raised genuine questions that the FERC had not sufficiently answered in the case. The Appeals Court noted the following points regarding the dedicated natural gas contracts for the proposed pipeline:

- Two of Nexus's precedent agreements for a total of 260,000 dth/day with "Canadian companies serving customers in Canada; and
- Removing these two agreements from Section 7 analysis of the project need, Nexus had only precedent agreements for only 625,000 dth/day, or approximately 41.6% of its 1.5 million dth/day capacity.[59]

The Appeals Court said the FERC did not evaluate whether the public benefits of the proposed Nexus pipeline would outweigh its adverse impacts if the pipeline had dedicated contracts at the lower level of 625,000 dth/day as compared the FERC evaluated level of 805,000 dth/day. Thus, the Appeals Court stated "we may affirm [the FERC's] finding of public convenience

[58] *Id*.
[59] *Id*.

and necessity only if the [FERC's] inclusion of the export precedent agreements in its analysis was proper."[60]

Additionally, the Appeals Court noted:

> *But the [FERC] never explained why it is lawful to credit demand for export capacity in issuing a Section 7 certificate to an interstate pipeline. In response to Petitioners' argument that it is not, the [FERC] simply recited its findings that: (1) a substantial amount of the pipeline's subscribed capacity is for domestic consumption; (2) all shipper commitments have secondary delivery rights within the United States; and (3) Nexus's application listed eleven interconnections with potential customers. J.A. 1228-29. But these facts do not explain why it is lawful for the [FERC] to predicate a Section 7 finding of project need on precedent agreements with foreign shippers serving foreign customers.* ***Section 7 states that the [FERC] may issue a certificate of public convenience and necessity for "the transportation in interstate commerce,"*** *§ 717f(c)(2) (emphasis added),* ***and we have explicitly refused to "interpret 'interstate commerce'" within the context of the Act "so as to include foreign commerce,"*** *Border Pipe Line Co. v. Fed. Power Comm'n, 171 F.2d 149, 152, 84 U.S. App. D.C. 142 (D.C. Cir. 1948). See also Distrigas Corp. v. Fed. Power Comm'n, 495 F.2d 1057, 1063, 162 U.S. App. D.C. 1 (D.C. Cir. 1974) (reaffirming Border Pipe Line).*[61]

After reviewing the record and the applicable law, the Appeals Court found the FERC failed to provide a proper explanation to the "question of why it is lawful for the Commission, as it did here, to predicate a Section 7 finding of need for an interstate pipeline on a pipeline's precedent agreements for export." As a result the Appeals Court remanded the case "for further explanation of why — under the [NGA of 1938], the Takings Clause, and the precedent of this Court and the Supreme Court — it is lawful to credit precedent agreements with foreign shippers serving foreign customers toward a finding that an interstate pipeline is required by the public convenience and necessity under Section 7 of the [NGA of 1938]."[62]

Conclusion

The USA has experienced a significant increase in natural gas output due the application of enhanced recovery techniques combined with directional drilling techniques that together have revolutionized the natural gas industry; however "the midstream infrastructure to pipe this new supply around the country has simply not kept up.[63] In addition, the regulatory environment in the USA creates many challenges in understanding the jurisdictional interfaces between the federal and state legal framework, as evidenced by the complex landscape of federal and state regulatory agencies that have jurisdiction in regulating natural gas pipelines. The complexity of these jurisdictional interfaces becomes even more apparent as one views the regulatory landscape over the entire life cycle of natural gas pipelines. One can better understand these regulatory interfaces by analyzing the following factors:

- Location of the natural gas pipeline,

---

[60] *Id.*
[61] *Id.* ***Emphasis*** *added.*
[62] *Id*.
[63] Jude Clemente, *America Needs More Oil And Natural Gas Pipelines*, Forbes, Jan 27, 2019. See https://www.forbes.com/sites/judeclemente/2019/01/27/america-needs-more-oil-and-natural-gas-pipelines/#672690df452c.

- Type of natural gas pipeline,
- Constitutional, statutory and regulatory limitations under the legal framework of the USA.

This dissecting of the natural gas pipeline regulatory jurisdictions creates an opportunity for a better understanding of how these federal and state agencies work together to ensure safety, protect the environment and work to maintain competitive natural gas markets in the USA.

Additionally, safety, environmental protection, and competitive markets depend on regulators effectively working together with the natural gas pipeline industry to carry out their regulatory missions in an efficient, competent, and coherent manner.

Thus, the social license to utilize natural gas pipelines depends on an effective regulatory environment that covers all phases (*i.e.*, planning, construction, operation, maintenance, decommissioning, abandonment, and reclamation). When stakeholders in the public arena witness failures in the U.S. natural gas pipeline network, the social license to utilize natural gas pipelines in the USA diminishes substantially. Therefore, the natural gas pipeline industry and regulators in the USA must continuously work to enhance performance and to improve public confidence in the U.S. natural gas pipeline network.

Similarly, even though a substantial number of homes and commercial properties in the Unites States have the ability to use natural gas as an energy source especially as a source of heating, a substantial number of rural areas and small communities don't have the ability to utilize natural gas to its fullest potential. Yes, some states have not fostered the development of natural gas pipelines, but it is also true that natural gas pipelines often cross a substantial amount of rural land and small communities in order to transport the natural gas to distribute the natural gas to the larger natural gas markets. Even though the rural landowners, residents in the small communities or their predecessors may have received easement payments for the right of ways for the natural gas pipelines, the current landowners and small local communities often do not realize any benefit from the natural gas pipeline infrastructure crossing their land or in proximity to their local communities.

Therefore, natural gas pipeline entities, investors, technical professionals, legal practitioners, and policymakers must look for creative opportunities to enhance the local benefits that landowners and local communities realize in having this infrastructure critical to the natural gas industry on the land of the landowners or near local communities. Otherwise, the natural gas industry may substantially limit its advocates and increase its opposition which may ultimately impede the growth in the natural gas industry especially considering the current legal framework present in the USA.