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MEMORANDUM

TO: Susan Forcier, Esq., Rhode Island Department of Environmental Management ("RIDEM")

CC: Kelly Owens and Joseph Martella, Office of Waste Management, RIDEM
Michele Leone and Amy Willoughby, National Grid

FROM: Robin L. Main

DATE: September 26, 2016

RE: Liquefaction Project, 121 Terminal Road, Providence, Rhode Island

I. Summary

As the Rhode Island Department of Environmental Management ("RIDEM") is aware, National Grid LNG, LLC ("NGLNG") is proposing to build a natural gas liquefaction facility (the "Project") at its existing storage facility at 121 Terminal Road in Providence, Rhode Island (the "Site"). This Project will be a reliable, safe, cost-effective way to ensure that National Grid's customers have the natural gas they need to heat their homes and businesses, particularly when the demand is greatest. NGLNG has sought approval for this project from the Federal Energy Regulatory Commission ("FERC").[1]

RIDEM and NGLNG have discussed the effect of federal preemption upon certain statutes and processes under RIDEM's purview. This memorandum provides a brief background of the Project and a summary of NGLNG's position that federal law preempts certain RIDEM regulations or processes related to this Project.[2]

[1] FERC has jurisdiction over the Project pursuant to 15 U.S.C. § 717f(c)(1)(A), which provides that "[n]o natural-gas company . . . shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations." *See also Algonquin Lng v. Loqa,* 79 F. Supp. 2d 49, 50 (D.R.I. 2000).

[2] In a March 2016 report included in the NGLNG certificate application to FERC, Resource Report No. 7 Soils, NGLNG told FERC that soil disturbance associated with the Project would be managed under a short term response

Federal statutes and regulations concerning the construction of natural gas facilities preempt state, site-specific environmental regulations such as the environmental remediation statutes administered by RIDEM.[3] *See Nat'l Fuel Gas Supply Corp. v. Public Service Commission,* 894 F.2d 571, 579 (2d Cir.1990) (holding state site-specific environmental review preempted by authority granted to FERC); *see also Algonquin Lng v. Loqa*, 79 F. Supp. 2d 49, 51 (D.R.I. 2000) (recognizing the impact of *National Fuel Gas Supply* while analyzing preemption issues related to the same property at issue). Further, where a procedure set in place by RIDEM, such as the creation of a Public Involvement Plan ("PIP"), would delay or burden a FERC-approved project, federal law also preempts that process. *See N. Nat. Gas Co. v. Munns*, 254 F. Supp. 2d 1103, 1111–12 (S.D. Iowa 2003) (reasoning that "the burden and delay caused by the concurrent state review . . . supports a conclusion of preemption."); *see also Nat'l Fuel Gas Supply Corp.*, 894 F.2d at 578-79 ("Allowing all the sites and all the specifics to be regulated by agencies with only local constituencies would delay or prevent construction that has won approval after federal consideration of environmental factors and interstate need, with the increased costs or lack of gas to be borne by utility consumers in other states.").

As outlined more extensively below, NGLNG believes RIDEM cannot seek to impose its remediation statutes or its PIP process on NGLNG with respect to the Project as it lacks the jurisdiction to do so.

II. Project Description

A. Liquefier Facility

NGLNG is undertaking the Project at the request of its two affiliated storage customers, The Narragansett Electric Company ("TNEC") and Boston Gas Company, to add liquefaction capability so that they can deliver gas for storage in vapor form as an alternative to delivering liquefied natural gas ("LNG") to the site by tanker trucks. The Project will include one new 20

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action plan ("STRAP") that RIDEM approves. FERC policy encourages but does not mandate voluntary compliance with state and local requirements to the extent possible, and this filing was consistent with that policy. Since that FERC filing, NGLNG has determined that it would be more appropriate for NGLNG to proceed under the 2012 Soil Management Plan ("SMP") (discussed *infra*) to handle soil disturbance and any associated groundwater that is encountered during excavations. NGLNG will provide the SMP to FERC. In the event that FERC finds the SMP insufficient for the Project, FERC will mandate that NGLNG take additional or alternative steps to handle soil management, as well as any contaminated groundwater encountered during excavation. As such, soil and groundwater management during the Project will have FERC oversight and will not be conducted at the sole discretion of NGLNG.

[3] The FERC process does not preempt all statutes administered by RIDEM. The Natural Gas Act specifically states that nothing in that Act affects the rights of the States under 1) the Coastal Zone Management Act ("CZMA"); 2) the Clean Air Act ("CAA"); and 3) the Federal Water Pollution Control Act, commonly known as the Clean Water Act ("CWA"). 15 U.S.C. §717b(d). To the extent RIDEM acts pursuant to authority delegated by the federal government under the CZMA, the CAA or the CWA, its actions are not preempted. Here, the Rhode Island Industrial Property Remediation and Reuse Act, R.I. Gen. Laws §§ 23-19.14-1 *et. seq.*, ("IPRRA") is not promulgated under authority delegated by the federal government to the state under any statute, including the CZMA, the CAA or the CWA. Instead, in passing the statute, the Rhode Island General Assembly explicitly referenced Rhode Island specific concerns. R.I. Gen. Laws §§ 23-19.14-1(1) and 23-19.14-1(6). For this reason, IPRRA and its implementing regulations are not within the exceptions to FERC preemption.

million standard cubic feet of gas per day ("MMscfd") gas pretreatment and liquefaction system to convert domestic natural gas delivered by pipeline into LNG by cooling it to a liquid state for storage. Feed gas will be transported to the Project via an existing 12" pipeline owned by TNEC. Pre-treatment will consist of one train capable of providing treated gas to a liquefaction facility for producing 20 MMscfd vapor equivalent of LNG for storage. The existing storage capacity will remain unchanged. There will be no change to the LNG storage tank and no relocation of the existing cryogenic piping or vaporization equipment is proposed.

The purpose and need for the Project is to add liquefaction capability to the existing NGLNG storage facility, which will enable the facility's customers to fill their contracted storage capacity with pipeline-sourced natural gas as an alternative to supplying gas for storage that is already in a liquid state. The current storage operation does not include any liquefaction equipment and receives LNG by truck to fill the 600,000 Barrels ("Bbl") (~2.0 Bcf) storage tank for the peak season needs. The local distribution company customers that have requested this additional service will use this capability to reduce their dependence on imported LNG supplies acquired from LNG import terminals. The purpose is to reduce the customers' supply risks, and related exposure to sharp cost increases, for obtaining the LNG that they store at the existing facility, which enhances the reliability of the downstream gas service the customers provide.

The Project will involve raising grades to lift the facility out of the flood zone, utility work, pile driving for equipment foundations, construction of the facility itself, paving and fencing. The majority of the proposed work is to be above current site grades. As with a construction project of this nature, there will be a lay down area with a gravel base for equipment, temporary office trailers, and fencing. The SMP will be followed, along with any FERC adjustments to it, for the Project work. At its core, this is a FERC jurisdictional construction project.

B. The SMP

In September 2012, GZA submitted the SMP to RIDEM.[4] The purpose of the SMP is to set forth detailed procedures that will be followed during construction/maintenance activities at the Site that require the management of soils excavated and groundwater removed from the subsurface. In other words, the SMP is the "instruction manual" for the excavation, storage, and reuse or disposal of soils from the Site and the handling and management of groundwater encountered during soil excavation. The SMP is attached in Exhibit A and made a part hereof. As the SMP acknowledges, formal RIDEM approval of planned utility/construction projects is not required, but it is recommended that RIDEM be notified prior to commencing these types of activities. *See* SMP, p. 6. Since its submittal to RIDEM in 2012, at least six projects have been successfully completed following the SMP at the Site, including the upgrade of 900+ feet of 16-inch diameter water main, emergency gas leak repairs, and the upgrade of the gas regulator station. NGLNG intends to perform the Project under the SMP, will notify FERC of this process and agrees to notify RIDEM of its planned work and of any FERC comments on the SMP.

[4] The 2012 SMP is based in part on the May 2009 SMP that Vanasse Hangen Brustlin submitted to RIDEM for the Site.

III. Federal Regulation Preempts RIDEM's Remediation Statute and Regulations

A. Remediation Statute and Regulations

Federal statutes, federal regulations and decisions from federal courts establish that RIDEM's remediation statute and the Remediation Regulations are preempted. "Since the [facility] is engaged in interstate transportation and sale of natural gas, it is subject to federal regulation under the Commerce Clause." *Algonquin Lng*, 79 F. Supp. 2d at 51.[5] "Congress has exercised its Constitutional authority by enacting the [Natural Gas Act] and the [Pipeline Safety Act]." *Id.*

These statutes, together with the regulations promulgated pursuant to them, establish a comprehensive scheme of federal regulation that the United States Supreme Court has determined confers upon FERC "exclusive jurisdiction over the transportation and sale of natural gas in interstate commerce." *Id.*

The FERC regulatory scheme "governs virtually every aspect of the transportation and sale of natural gas" including "whether natural gas facilities may be built or modified, where they may be located, the methods by which they are constructed, and the safety standards that must be observed." *Algonquin Lng*, 79 F. Supp. 2d at 51.[6] In particular, "[p]ursuant to Section 717f(c) [of the Natural Gas Act], a natural-gas company must obtain a 'certificate of public convenience and necessity' from the FERC before constructing or operating facilities used for the interstate transportation and sale of natural gas." *Nat'l Fuel Gas Supply Corp.* 894 F.2d at 573. NGLNG is currently engaged with FERC on this process and expects FERC approval of the Project in early 2017.

Of particular importance here, FERC regulations impose environmental restrictions upon natural gas companies during the site approval process. *Nat'l Fuel Gas Supply Corp.,* 894 F.2d at 573. For example, an applicant "must . . . provide a statement that it has followed the guidelines for planning, locating, constructing and maintaining facilities set out in 18 C.F.R. § 2.69" so that certificates granted by FERC under Section 7(c) of the Natural Gas Act minimize adverse impacts on preserving scenic, historic, wildlife and recreational values. *Id.* NGLNG has done this; the Project will be subject to scrutiny from an environmental standpoint and to public participation and comment as discussed below. Further, the Project is subject to FERC's Upland Erosion Control, Revegetation, and Maintenance Plan. In addition, FERC will require an

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[5] NGLNG is a natural gas company engaged in the transportation and sale of natural gas in interstate commerce. Therefore, it is subject to FERC regulation under the Natural Gas Act. *Nat'l Fuel Gas Supply Corp. v. Pub. Serv. Comm'n of State of N.Y.*, 894 F.2d 571, 573 (2d Cir. 1990). Additionally, NGLNG operates an interstate liquefied storage facility that is subject to the jurisdiction of FERC under the Natural Gas Act and is therefore subject to the Pipeline Safety Act, 49 U.S.C. § 60101 *et. seq.* FERC and the U.S. Department of Transportation have promulgated extensive regulations pursuant to both of these statutes.

[6] Congress's decision to create this comprehensive regulatory scheme reflects the "strong federal interest in establishing a uniform system of regulation designed to implement a national policy of ensuring an adequate supply of natural gas at reasonable prices." *Algonquin Lng*, 79 F. Supp. 2d at 52.

Environmental Inspector for the Project, and NGLNG has committed to FERC that such Inspector will conduct daily inspections during the construction of the Project.

Given FERC's jurisdiction here, where Rhode Island seeks to regulate the environmental compatibility of the Project in the face of this federal regulation, the state's efforts are preempted. *Id.* at 574 ("Because FERC has authority to consider environmental issues, states may not engage in concurrent site-specific environmental review."); *see also Islander E. Pipeline Co. v. Blumenthal*, 478 F. Supp. 2d 289, 291 (D. Conn. 2007) (holding Connecticut Department of Environmental Protection enforcement of state "Structures, Dredging and Fill Act" was preempted by FERC process); *N. Nat. Gas Co.*, 254 F. Supp. 2d at 1110-12 (holding that regulations concerning land restoration after construction are preempted and reasoning in part that "[t]he breadth of these statutes and regulations, when combined with extensive safety regulations applicable to pipeline construction, compel the conclusion that Congress has occupied the field of interstate gas pipeline regulation, including land maintenance and restoration standards."); *see also Algonquin Lng,* 79 F. Supp. 2d at 52 (holding that Congress "clearly has manifested an intent to occupy the field" and has therefore preempted local regulations). Thus, the dictates of IPRRA and the Remediation Regulations promulgated thereunder are preempted.

B. The PIP Process and Public Participation in the FERC Review

The PIP process is also preempted here. The PIP process is applicable to site investigation and environmental cleanup activities requiring remedial actions that fall under the jurisdiction of the Remediation Regulations.[7] Because federal regulation preempts these Remediation Regulations, they also preempt the PIP process.[8]

Moreover, where a state regulation threatens to delay or burden a FERC approved project, it too is preempted. *N. Nat. Gas Co.*, 254 F. Supp. 2d at 1111–12 ("Moreover, the Iowa regulatory scheme imposes impermissible delays and burdens on the construction of a pipeline that already received federal approval, exemplified here by Northern Natural's waiver application and the Boards' rejection of it because, at least in part, the FERC Plan does not provide the

[7] Under Section 7.07(E) of the Remediation Regulations, public involvement plans are for "any Contaminated Site for which [RIDEM] has received a Notification of Release and for which a minimum of twenty-five (25) . . . interested parties have requested . . . that a formal process be set up for their participation in the cleanup planning." Here, not only is this process preempted, but even if it were not, the Project work is not in the cleanup process. Instead, this is a construction project that falls directly under the SMP. There will not be remedial actions with site investigations, remedial action work plans, and the like. This is in contrast to other work at the Site that is neither preempted nor exempted from the PIP Process, such as the completion of the Site Investigation Report (SIR) and proposed remediation of the remaining portions of the Site which are not capped consistent with RIDEM requirements. TNEC expects to submit a *Site Investigation Report (SIR) Addendum* to RIDEM in early 2017.

[8] Further, the PIP process is not intended to apply to projects involving limited subsurface disturbance associated with construction activities or those located in areas previously capped consistent with typical RIDEM requirements. In addition, this process does not apply to work necessary to maintain day to day operations at existing facilities or facility emergencies, including repairs and maintenance of the natural gas regulating facility, compressed natural gas fueling station, liquefied natural gas facility, and cement distribution facility. This process also does not apply to projects involving minor soil disturbances only (utility work, installation of fence posts, etc.).

minimum level of protection required by the Board's rule.") The PIP process would both delay and burden the Project. Therefore, federal regulations preempt this process.

Public participation is not excluded from the FERC review. Rather, the FERC process mandates public notification and input. *Nat'l Fuel Gas Supply Corp.*, 894 F.2d at 573. In particular, 18 C.F.R. § 157.9 requires notice of an application for a certificate of public convenience and necessity to be published and copies sent to the States affected. Further, 18 C.F.R. § 157.10 permits persons to intervene or file a protest with respect to an application for a certificate of public convenience and necessity. As such, in this case, the FERC review of the Project is subject to public review. Indeed, members of the public here already have moved to intervene in the FERC proceeding and many have obtained intervener status. Other members of the public, some of whom signed the petition for the PIP, are on the NGLNG/ FERC mailing list for the Project and receive periodic newsletters. In addition, NGLNG has held community meetings on the Project, and created a website (i.e., http://www.fieldspointngrid.com/) that provides the public with current and detailed Project information, including information about soil management and other environmental issues at the Site and how they will be handled. Therefore, the application process for the Project has been held open to public scrutiny through the federal regulations that govern its application process. Imposing a duplicative state process would improperly delay and burden the Project and is preempted by federal authority.

IV. Conclusion

For the Project, IPRRA and the Remediation Regulations are preempted by the federal regulatory scheme under FERC. As such, NGLNG does not intend to apply for any RIDEM approvals under IPPRA and the Remediation Regulations associated with soil disturbance work and the handling of any impacted groundwater encountered during excavations for the Project. Because there is no trigger for a PIP for the Project, NGLNG's work on the Project will not be included in the PIP Plan.

NGLNG values and respects the regulatory process, transparency and public comment on its work. NGLNG will not conduct this Project without oversight. Instead, NGLNG will continue to provide publicly available documents to FERC for the FERC approval process so that FERC may review the plans for soil and groundwater handling. In addition, the FERC process mandates notice to the public and invites public comment. Finally, the FERC process mandates an Environmental Inspector for the Project.

NGLNG expects FERC approval of the Project by early 2017. NGLNG respectfully requests that RIDEM inform it by October 7, 2016, if it does not agree in any way with the position set forth herein.

SOIL MANAGEMENT PLAN
642 ALLENS AVENUE
PROVIDENCE, RHODE ISLAND

PREPARED FOR:
RIDEM
Providence, Rhode Island

ON BEHALF OF:
National Grid
Waltham, Massachusetts

PREPARED BY:
GZA GeoEnvironmental, Inc.
Providence, Rhode Island

September 2012
File No. 33554.00

GZA
GeoEnvironmental, Inc.

Engineers and
Scientists

September 12, 2012
File No. 03.0033554.00-C

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Re: Soil Management Plan
642 Allens Avenue
Providence, Rhode Island

Dear Mr. Martella:

Attached is the most recent version of the *Soil Management Plan* (SMP) for the 642 Allens Avenue Property (Site) in Providence, Rhode Island. The plan was prepared by GZA GeoEnvironmental, Inc., (GZA), on behalf of National Grid, to establish procedures to be followed during the installation of subsurface lines and other construction related activities at the Site that disturbs the subsurface.

Should you have any questions or comments, do not hesitate to call the undersigned at 401-421-4140, or Amy McKinnon, from National Grid, at 781-907-3644.

Very truly yours,

GZA GEOENVIRONMENTAL, INC.

Margaret S. Kilpatrick, P.E.
Senior Project Manager

James J. Clark, P.E.
Principal

MSK/JJC:tja

Attachments: Soil Management Plan

cc: Amy McKinnon, National Grid

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APPENDICES

1.00 INTRODUCTION

On behalf of the Narragansett Electric Company d/b/a/ National Grid (National Grid), GZA GeoEnvironmental, Inc., (GZA) has prepared this *Soil Management Plan* (SMP). The SMP serves to provide guidance relating to the excavation, storage, and reuse or disposal of soils from the National Grid-owned property located at 642 Allens Avenue in Providence, Rhode Island (the "Site"). This plan also provides guidance related to the handling and management of groundwater. This SMP is subject to the Limitations provided in Appendix A.

The Site is identified on the Providence Tax Assessor's Map as Assessors Plat (AP), Lots 5, 273, 316, and 317, and as Plat 101, Lot 1. A Site *Locus Plan* is included as Figure 1.

The Site is the location of a former manufactured gas plant (MGP) and prior environmental testing indicated the presence of MGP-related contaminants at concentrations above certain regulatory criteria. The Site is currently occupied by National Grid for use as an active natural gas distribution facility. A tenant Holcim (Canada) Inc., (Holcim), a cement company, occupies the southeastern portion of the Site.

Note that the coastal resource areas of the Site (the Providence River) are subject to regulation by the Coastal Resources Management Council (CRMC), Rhode Island Department of Environmental Management (RIDEM), the U.S. Army Corps of Engineers (ACOE), and the U.S. Coast Guard (USCG). In addition, stormwater management, treatment and discharge may be subject to Narragansett Bay Commission (NBC) or RIDEM Rhode Island Point Discharge Elimination System (RIPDES) jurisdiction. Accordingly, an evaluation of potential regulatory requirements must be evaluated prior to the initiation of projects by National Grid Environmental personnel.

This SMP is based in part on the May 2009 SMP developed by VHB on behalf of National Grid. It has been prepared to establish procedures that will be followed during future construction/maintenance activities at the Site, which require the need to manage soils excavated and groundwater removed from the subsurface.

- Section 1.0 includes this introduction;
- Section 2.0 describes the Site and provides relevant background information;
- Section 3.0 presents a summary of the Site hydrogeologic features;
- Section 4.0 summarizes soil and groundwater quality data;
- Section 5.0 presents soil and groundwater management guidelines; and
- Section 6.0 presents health and safety guidelines.

2.00 SITE DESCRIPTION/BACKGROUND

The following provides a brief description and history of the Site and a summary of relevant past operations. For more detailed information, please refer to the April 2003 *Site Investigation Report* (SIR) submitted to RIDEM.

The Site consists of an approximately 42-acre parcel of land and is bound to the west by Allens Avenue, to the east by the Providence River, to the northwest by the Motiva Terminal property, to the northeast by a water lot owned by Motiva, to the southwest by Terminal Road, and to the south and southeast by UNIVAR (a chemical distributor), the former Sun Oil/ProvPort facility, the LeHigh Cement Distribution Company and the New England Petroleum Terminal Corporation. All surrounding properties are industrial in nature and either historically or currently store(d) petroleum and/or hazardous materials and have the potential to impact the Site. (Refer to Figure 2 for a *Site Plan*).

The Site is comprised of three principal areas and associated operations (as shown on Figure 2):

- National Grid's 642 Allens Avenue facility;
- National Grid's 670 Allens Avenue Compressed Natural Gas (CNG) Fueling Station;
- The Liquefied Natural Gas (LNG) facility operated by National Grid LNG; and
- Holcim's Cement facility.

The MGP occupied portions of all three locations described above. The main entrance to the Site is on Allens Avenue, on the west side of the Site. There are also gated entrances to the National Grid LNG site and Holcim facilities off Terminal Road.

From 1910 until 1954, an MGP operated at the Site producing coal gas, carbureted water gas, and high-BTU oil gas. Gas manufacturing by-products were routinely managed through recovery, storage, recycling, reprocessing, and resale of the by-products. Such by-products included coke, coal tar, ammonia, toluene, and benzene. B.P. Clapp operated an ammonia works at the Site beginning in 1910, and managed the recycling and sale of ammonia by-products. The United States Government operated a toluene facility at the Site for a short period of time during 1918.

In 1952, a liquefied petroleum gas distribution plant began operation at the Site. By 1954, coal gasification operations at the Site had ceased. As indicated previously, a LNG facility has operated on the eastern and southeastern portions of the Site since 1972 and Holcim (formerly, St. Lawrence Cement Company) has leased the southeastern section of the Site since 1961.

3.00 HYDROGEOLOGIC CONDITIONS

Site stratigraphy generally consists of fill materials, underlain by organic deposits/ materials, underlain by a discontinuous layer of sorted sands (outwash deposits) and underlain by glacial till. In general, the shallow fill consists of sands and gravels with cinders, cinder ash, coal fragments, wood chips and bricks. Bedrock is expected to be more than 100 feet below ground surface (bgs). The organic materials, which occurs at various depths ranging from 16.5 to 19 feet bgs is likely to an original tidal mud deposit. The glacial till is very dense, heterogeneous and poorly sorted.

Groundwater is encountered at depths of approximately 2 to 8 feet below the ground surface across the Site and is inferred to flow to the northeast toward the Providence River and to the north towards the cove area. Groundwater is tidally influenced and the groundwater table is predominantly encountered within the fill materials. Groundwater underlying the Site is classified by RIDEM as "GB" or not suitable for potable use without treatment due to known or presumed degradation.

4.00 SUMMARY OF ENVIRONMENTAL IMPACTS

Based on the type of chemical constituents present at the Site, the potential routes of exposure to excavation and/or utility repair workers include inhalation, dermal contact or accidental ingestion of impacted soil and/or groundwater, and the possible introduction of contaminants through broken skin. Utilization of the appropriate personal protective equipment and the general safety guidelines provided herein will serve to minimize the potential for worker exposure to impacted media while performing work.

The following sections present a summary of soil and groundwater quality at the Site. This information was obtained from previous environmental studies of the Site. For further detail, please refer to the following:

- February 1995 *Summary Report Phase 1A Field Characterization Investigations* prepared by Resource Controls (RCA);
- June 1996 *Summary Report Phase 1B Field Characterization Investigations* prepared by RCA; and,
- September 2003 *Site Investigation Report (SIR)* prepared by VHB.

In planning activities that may include disturbance of impacted materials, a qualified environmental consultant[1] shall review this environmental data and develop appropriate project-specific procedures for addressing impacted soil and groundwater disturbance/ management/disposal and worker health and safety consistent with this SMP.

[1] For the purpose of this document, this term is consistent with the definition of "Environmental Consultant" contained in RIDEM's *Rules and Regulations for Underground Storage Facilities Used for Petroleum Products and Hazardous Material* dated April 2011.

4.10 CONSTITUENTS OF CONCERN

Based on the results of the previous investigations described in the above reports, certain constituents of concern (COCs) were detected in soil and groundwater associated with former operations at concentrations that represent Method 1 exceedances of the RIDEM *Rules and Regulations for the Investigation and Remediation of Hazardous Waste Materials* (Remediation Regulations, DEM-DSR-01-93, as amended). Please refer to the 2003 *SIR* for a complete data set.

For the Site, the following exceedances have been documented:

- **Industrial/Commercial Direct Exposure Criteria (I/C DEC):** arsenic, lead, total petroleum hydrocarbons (TPH), and several polynuclear aromatic hydrocarbons (PAHs);
- **GB Leachability Objectives:** TPH, benzene, toluene, ethylbenzene, and xylene;
- **GB Groundwater Objectives:** benzene and naphthalene;
- **Soil Upper Concentration Limits:** TPH, lead, and naphthalene; and
- **Groundwater Upper Concentration Limits:** light non-aqueous phase liquid (LNAPL) and trace amounts of dense non-aqueous phase liquid (DNAPL).

4.20 EXTENT OF CONTAMINATION

The extent of impacted soil associated with the former MGP usage varies throughout the Site. In addition to MGP impacts, much of the Site and its surroundings are filled land and may contain hazardous materials-impacted soils not associated with the former MGP. Based on the above, soil management guidelines are necessary to ensure soils are managed with consideration to the project remedial goals and the Remediation Regulations.

Areas that have been remediated and capped with approximately 2 feet of cover material include the former Compressor Building No. 1 area and the northwestern and southern portions of the National Grid LNG Site (see Areas 1, 2, and 3 on Figure 3, *Remediated Areas*). The former Materials Handling Area has had approximately 6 inches of clean loam applied and has a grass cover established to stabilize the soils.

Subsurface soil exceedances exist throughout the Site, but there appears to be concentrated areas of exceedances in the general vicinity of the former Gasholders No. 18 and No. 21, the former Purifier Area, and the National Grid Regulator Area.

NAPL has been observed in the subsurface throughout the Site, with both LNAPL and dense non-aqueous phase liquid (DNAPL) occurring. LNAPL occurs in trace amounts proximate to the former Gasholders Nos. 18 and 21, trace amounts proximate to the former propane cradles in the central portion of the Site and in thicknesses ranging from approximately trace amounts to 3 feet thick in the eastern portion of the Site (within the LNG facility). DNAPL occurs in the northern portion of the Site, proximate to the cove, in trace amounts only.

4.30 REMEDIAL ACTIONS

Several remedial actions have been completed at the Site.

In June 1999, Environmental Science Services (ESS) supervised the excavation of surface and subsurface soils in preparation for the construction of a vaporizer pad, located to the south of the offload area on the National Grid LNG portion of the Site. Subsurface piping was removed and recovery wells and groundwater flow barriers were installed to aid in the recovery of LNAPL. Areas that were excavated were capped with approximately 2 feet of clean fill or were covered by structures (the vaporizer pad). The area west of the LNG tank sub-impoundment was also excavated as part of these remedial activities. See Area 1 on Figure 3, for the location of this area.

Additional remedial actions were initiated in May 2002 at the Site and were conducted in accordance with the ESS *Remedial Action Work Plan* (RAWP) (as amended), which was approved in 1998 and a Temporary Remedial Action Permit issued by RIDEM in 2002. See Areas 2 and 3 on Figure 3 for the location of the remediated areas. These remedial actions consisted of the removal of MGP waste and impacted soils from subsurface structures and their surroundings and construction of engineered caps in portions of the Site. VHB supervised some of these remedial actions. The Remedial Objectives (ROs) for this project were divided into three categories: surface soil objectives (0-2 feet bgs); subsurface soil objectives (>2 feet bgs) within 100 feet from the shore; and subsurface soil greater than 100 feet from the shore. These ROs were based on the RIDEM DEC (surface soil) and UCLs (subsurface soil). The ROs from the 1998 ESS RAWP are provided in Appendix B.

Based on the industrial nature of the surrounding properties, the documented releases of petroleum hydrocarbons on all surrounding properties, the continued large-capacity storage of petroleum products, and the excavation of source materials within the Site, it was proposed, in the *Site Investigation Report*, to address groundwater impacts through monitoring and passive recovery of non-aqueous phase liquid (NAPL).

5.00 SOIL AND GROUNDWATER MANAGEMENT GUIDELINES

This SMP has been prepared to establish procedures that will be followed should future construction/maintenance activities at the Site require the need to manage soils and groundwater during excavation activities. As previously noted, soils have been detected at the Site exceeding the RIDEM-approved Remedial Objectives, as well as RIDEM Industrial/Commercial DEC, GB Leachability Criteria, and UCLs.

Soils generated from an excavation conducted at the Site may be placed back into its original excavation, based on the discretion of the environmental consultant (refer to Section 5.20). However, so as to maintain known exposure scenarios, every attempt shall be made to backfill the excavation so that the corresponding depth and location of the backfilled soil resembles the depth and location at which the soil originally existed. In certain areas where remedial

actions have been completed, this requirement includes the reinstallation of the geosynthetic barrier and the re-placement of the engineered control cap. Excess materials and/or materials deemed unsuitable for use as backfill shall be managed and disposed of in accordance with this SMP. As described previously, the natural groundwater table is encountered at depths ranging from approximately 2 to 8 feet below grade and has been observed to be tidally influenced, with the groundwater table is generally observed within the fill unit. In addition, NAPL has been observed in certain areas of the Site. Projects involving excavation below the water table and/or disturbance of impacted groundwater will require additional controls and Best Management Practices (BMPs) as described below. As part of any construction activities, soils will need to be stockpiled within the Site area. Specifics regarding stockpiling protocol are outlined in the following sub-sections.

5.10 PRELIMINARY ACTIVITIES

- While formal RIDEM approval of planned utility/construction projects is not a requirement, it is recommended that RIDEM be notified prior to commencing these types of activities.

- Before preparing for any planned activities involving the disturbance of materials beneath any of the engineered controls, this SMP shall be reviewed by a qualified environmental consultant. Project-specific plans shall be prepared in consideration of the Site conditions and soil and groundwater impacts described herein, so as to prevent potential human exposures to or migration of hazardous materials.

- Should any project require the need for dewatering and/or disturbance of impacted groundwater in support of excavation/construction, the qualified environmental consultant shall plan to manage, contain, treat (if necessary) and discharge or dispose of impacted groundwater. In addition, all appropriate regulatory approvals related to the removal, handling, treatment and discharge of impacted groundwater shall be in-place prior to the initiation of the project. Such plans shall, at a minimum, include an evaluation of water quality and the potential presence of NAPL, the method by which water will be treated, contained and/or discharged/disposed and the necessary regulatory approvals, permits, *etc.* Impacted, untreated groundwater shall not be discharged directly to the ground surface, collection utilities or neighboring water bodies.

- Prior to the initiation of soil excavation, the selected contractor or any other personnel performing subsurface work at the Site shall contact DIGSAFE® and appropriate utility companies to identify and mark the location of below grade utilities.

- Prior to performing the proposed work, the selected contractor and/or responsible party shall obtain all applicable federal, state and local permits. As noted, portions of the Site are located within the jurisdictional limits of the CRMC. A jurisdictional determination of the requirements of the CRMC shall be made prior to the implementation of proposed construction projects. If applicable, CRMC approval shall be obtained prior to conducting the work.

- As described further herein, prior to conducting any earthwork/construction activities that involves disturbance of materials, a qualified environmental consultant shall be consulted to determine the appropriate level of health and safety training required by personnel involved with the work, the personal protection equipment required, and general health and safety guidelines. A project-specific Health and Safety Plan (HASP) shall be prepared by a qualified Certified Industrial Hygienist (CIH) and strictly adhered to during all phases of the work.

5.20 SOIL SCREENING/DISPOSAL REQUIREMENTS

- Environmental consultant(s) will be available during earthwork activities to provide guidance regarding the management of potentially impacted soil and groundwater. The environmental consultant will monitor the work areas during soil excavation to conduct observations and for field screening/soil sampling, and will be available on a fulltime or as needed basis. The environmental consultant will summarize all observations and sampling activities in daily field reports that will serve as the Operating Log.

- If unusual observations are made during excavation anywhere in the work area (*e.g.*, NAPL, buried containers, or unusual odors), work in the subject areas shall stop immediately. Workers should not excessively handle the material of interest and will notify the NGRID's construction project supervisor and request further direction. The construction project supervisor will in turn notify NGRID's Environmental Department. Unusual material will be segregated by the contractor and characterized by the environmental consultant per the following bullet.

- The contractors, with guidance from the environmental consultant, will segregate any suspect soil ("suspect soil" includes observations of NAPL or unusual odors) based on visual observations and total volatile organic compounds (TVOC) headspace screening via a photo ionization detector (PID). Any soils which exceed a TVOC concentration of 50 parts per million per volume (ppmv) or which exhibits visual or olfactory evidence of contamination will be segregated for laboratory analysis for comparison to the RIDEM regulatory criteria and disposal parameters. The segregated soil will be stockpiled by placing on two layers of 6 mil polyethylene sheeting, or stored in roll-off type containers or drums. In either case, the material in storage will be covered with secured polyethylene sheeting at the end of each work day, as specified in Section 5.30. All other soil will be considered suitable for reuse on the Site, but must be stockpiled in accordance with Section 5.30. The environmental consultant will sample segregated soil every 1,000 cubic yards for TPH via Method 8100M, semi-volatile organic compounds (SVOCs) via Method 8270, arsenic and lead via Methods 200s/6010/7000s and volatile organic compounds (VOCs) via Method 8260/5035. A determination regarding the potential for such soils to be reused on the Site will be made by comparing the laboratory analytical data to the RIDEM approved surface and subsurface Remedial Objectives per the 1998 RAWP (see Appendix B).

- Should soils with evidence of NAPL be discovered during excavation, these materials and/or soils shall be segregated for disposal at a licensed facility approved by National Grid.

- Soil disposal documentation for non-hazardous soil will be maintained on file by National Grid.

- For soil disposed of as a hazardous waste, disposal documentation (*i.e.,* Hazardous Waste Manifests) will be provided to National Grid for distribution to RIDEM.

- Any soil remaining after the completion of construction activities requiring disposal (based on analytical results) at a licensed and National Grid approved facility will be kept on polyethylene sheeting and covered until it is shipped off-Site.

- **Soils excavated from the Site shall not be re-used at non-permitted locations off-Site.** All excess Non-RCRA Hazardous soils shall be transported to a licensed thermal desorption or other similar type of facility for treatment/recycling. In the event RCRA Hazardous materials are generated, these materials shall be disposed off-Site at a licensed hazardous waste disposal facility. A qualified environmental consultant shall collect samples of the excavated soils (either during excavation or from stockpiles) for laboratory testing. Soil must be sampled at a frequency adequate to support the data requirements of the selected recycling/disposal facility.

- The National Grid Environmental contact will make arrangements for the disposal of the material and will sign as the generator of these materials on all waste profiles and shipping manifests. Copies of these records shall be provided to National Grid.

5.30 SOIL STOCKPILE MANAGEMENT/EROSION CONTROL

- Segregated materials which meet the on-Site re-use requirements, and can be re-used on the Site considering the scope of the active project, will be temporarily stockpiled on 6 mil polyethylene sheeting. Temporary stockpiles may also be created adjacent to excavation areas to accommodate the contractor's work schedule throughout the Site area.

- Excavated materials shall be temporarily staged on two layers of 6-mil polyethylene sheeting in working stockpiles adjacent to excavations. Depending on the volume of material involved in the project, soils shall be either stockpiled on polyethylene sheeting as described herein, or stored in lined roll-off type containers or drums. No excavated materials shall be placed directly on the ground surface. At the end of each work day, all stockpiles shall be covered with 6-mil polyethylene sheeting to control the generation of wind-blown dusts and potential migration of soils with stormwater runoff. Stockpile areas shall be equipped with appropriate controls to limit the loss of the cover and protect against storm water erosion. These controls shall include the installation of hay bales, silt fencing and any other appropriate measures during the

entire duration of the project. Stockpiles shall be inspected daily by site personnel. Should tears or punctures be observed in either the polyethylene sheeting covering or underlying the piles, repairs shall be made immediately. Daily shutdown procedures shall include the covering and securing of all stockpiled material area with polyethylene sheeting and appropriately sized materials to secure the polyethylene sheeting in place.

- All catch basins/storm drains proximate to work areas will also be protected from excessive sediment discharge by placing staked haybales or similar protective devices around its perimeter. All catch basins/storm drains will be protected and inspected daily during the course of the entire project to ensure haybale placement and integrity.

- Stockpiled soils shall be staged and temporarily stored in a designated area of the Site for no more than 90 days. To the extent practical, the storage location shall be selected to limit the unauthorized access to the materials (*i.e.,* away from public roadways/walkways).

- Soil, construction material and/or debris stockpile areas shall not be located on any coastal feature, within 200-feet of the inland edge of the coastal feature or in coastal waters.

5.40 DUST AND ODOR CONTROL

All reasonable precautions must be taken to prevent the excessive generation of dust and/or nuisance odor during soil excavation, stockpiling, loading, and other soil handling activities. At a minimum, the PM_{10} dust concentration, as measured with a real-time dust monitor, shall not exceed 150 ug/m^3 over a 24-hour period. Dust control measures must be implemented, as required, to prevent airborne particulate matter from leaving the Site at all times. Methods of stabilization consisting of sprinkling, mulching, or similar methods shall be employed as soil conditions warrant (*i.e.,* visual evidence of dust). Odor controls such as sprinkling, covering of piles and/or disturbed areas, and use of foams or other techniques shall also be employed as necessary to control odors.

Work at the Site must comply with all applicable federal, state, and local regulations, including the RIDEM's *Air Pollution Control Regulations*, and specifically Regulation No.5 regarding control of fugitive dust. The contractor will conduct dust/odor control measures during and after normal work hours and on weekends as necessary to control dust/odors. All stockpiles shall be inspected on a daily basis to ensure compliance with RIDEM *Air Pollution Control Regulations*.

5.50 CAPPING REQUIREMENTS

Following construction activities, soils will be managed in a manner which ultimately results in these materials being interred in the following manner.

- All excavated soils which meet the re-use criteria (refer to Appendix B – RIDEM approved Remedial Objectives) will be re-interred (if possible).
- Soil meeting the surface soil Remedial Objectives will be used as surface soil or subsurface backfill. Soil passing the subsurface soil Remedial Objectives will be used only as subsurface soil backfill.
- Soil not meeting the subsurface Remedial Objectives or soils that cannot be reused will be disposed at a National Grid approved licensed facility.
- The replacement of the existing surficial cap should consist of either: (1) two feet of clean soil, (2) one foot of clean soil underlain by permeable geosynthetic; (3) asphalt pavement cover; or (4) permanent structures with concrete slab.

5.60 DECONTAMINATION PROTOCOL

Since heavy equipment/hand tools may remain onsite for several days, decontamination need not occur on a daily basis. At the conclusion of the construction activities, heavy equipment and tools will be decontaminated. Soil will be brushed from the equipment and containerized prior to washing the equipment surfaces. The containerized material should be sampled for disposal determination (as required) and then properly disposed at on off-Site facility. All liquid (water) generated as a result of decontamination procedures will be spread over as large an area as possible and allowed to infiltrate the ground surface.

Crushed gravel will be placed at the construction boundary zone to facilitate the removal of excess soil from vehicle tires for vehicles which need to leave the work zone on a daily basis (such as vehicles used to transport soil).

5.70 OTHER SOILS

Any clean fill material brought on-Site is required to meet the RIDEM's Method 1 Residential Direct Exposure Criteria or be designated by a qualified environmental consultant as Non-Jurisdictional under the Remediation Regulations. All clean fill, including sub-grade material and loam, imported to the Site must be sampled prior to delivery and placement. Laboratory analytical results shall be reviewed by a qualified environmental consultant and National Grid prior to acceptance or delivery to the Site. Clean fill and loam shall be sampled for arsenic at a minimum frequency of one sample per 500 cubic yards. One-quarter of the total number of compliance samples of clean fill and loam shall be sampled for total petroleum hydrocarbons (TPH), volatile organic compounds (VOCs), semi-volatile organic compounds (SVOCs), polychlorinated biphenyls (PCBs) and the 13 priority pollutant metals. Any fill determined to be non-jurisdictional will also require the submission of a written certification by a qualified

environmental consultant designating that the fill is not jurisdictional. Any clean fill that is stockpiled on the Site prior to use will be segregated from any stockpiles of excavated soils, although must be stockpiled pursuant to Section 5.30.

5.80 DEWATERING

Laboratory analytical results of Site groundwater samples indicate the detection of hazardous substances that exceed RIDEM GB Groundwater Objectives and possibly sewer or surface water discharge criteria. If dewatering is necessary, all impacted fluids shall either be properly treated on-site for subsequent surface water or Narragansett Bay Commission (NBC) discharge, or containerized for off-Site disposal. Any discharges shall be performed consistent with all applicable regulations and permits. With respect to fluids to be disposed off-site (including NAPL), they shall be properly transferred and containerized to prevent discharges or leaks, characterized per the requirements of the receiving facility, and subsequently transported to a fully licensed/permitted treatment/recycling facility. **Impacted, untreated groundwater shall not be discharged directly to the ground surface, collection utilities or neighboring water bodies.** Open excavations shall be protected when feasible to prevent introduction of stormwater runoff and/or precipitation into the excavation (ie. staked haybales to berm the edge of excavations, etc.) If dewatering is part of the Contractor's scope of work, the cost implication of dewatering, permitting and disposal must be included in the bid costs.

5.90 MANAGEMENT OF NON SOILS

Work area excavations may unearth solid debris and/or refuse materials such as concrete, brick, rubble, pipe, lumber and other building materials. This material should be segregated to the extent feasible and stockpiled separately utilizing the procedures outlined above. Disposal of this material is not the subject of this plan and will be handled by the contractor in a manner consistent with demolition and refuse clearing projects and in accordance with RIDEM *Solid Waste Regulations*, and subject to National Grid approval.

6.00 HEALTH AND SAFETY GUIDELINES

The basic health and safety procedures outlined below are intended as a general guideline for basic short-term excavation activity conducted at the Site and that a project- specific HASP may be warranted for complex or long-duration subsurface work. **The contractor is responsible for developing their own HASP and to provide site safety personnel who will be responsible for ensuring that safety measures are strictly followed.** Prior to starting work, the project-specific HASP must be reviewed by National Grid.

6.10 PERSONNEL PROTECTIVE EQUIPMENT (PPE)

In general, the level of protection which will be used by workers will be determined by the task which the person is performing; however, at a minimum, workers performing excavation

work subject to the SMP are required to wear the following Level D personnel protection equipment (PPE):

- Safety leather steel toe boots;
- Rubber or leather gloves;
- Eye and hearing protection;
- Hard hats; and
- Florescent vests.

6.20 SITE OPERATING PROCEDURES / SAFETY GUIDELINES

Regardless of the level of PPE necessary to complete work, the following general health and safety guidelines shall be followed during the performance of any excavation activities conducted.

- Workers conducting site activities under this SMP should do so with consideration to OSHA Standards including OSHA Standard 29 CFR 19.10-120.

- Site security shall be maintained on a continuous basis. No trespassers will be allowed.

- Work in the LNG portion of the site will be performed in accordance with National Grid's LNG safe practice procedures for that area of the Site.

- A pre-work meeting will be conducted at the start of every workday to discuss the health and safety procedures.

- The location of all utilities in the vicinity of the excavation shall be established prior to beginning work.

- Practice contamination avoidance: never sit or kneel in an excavation; never lay equipment on the ground; avoid obvious sources of contamination; and avoid unnecessary contact with objects in an excavation.

- Be alert to any unusual changes in your physical condition; never ignore warning signs. Notify the responsible employee as to any changed conditions.

- All equipment used in an excavation shall be properly cleaned and maintained in good working order. Equipment shall be inspected for signs of defect and/or contamination before use.

- Eating, drinking, chewing gum, and smoking shall be prohibited in active excavation areas.

- During working hours, workers who stop to drink or eat should leave the active work area, remove PPE, and wash hands thoroughly with soap and water prior to eating or drinking.

- The discovery of any condition that would suggest the existence of a situation more hazardous than anticipated shall result in the evacuation of personnel from the excavation and the re-evaluation of the hazard and the level of protection; and

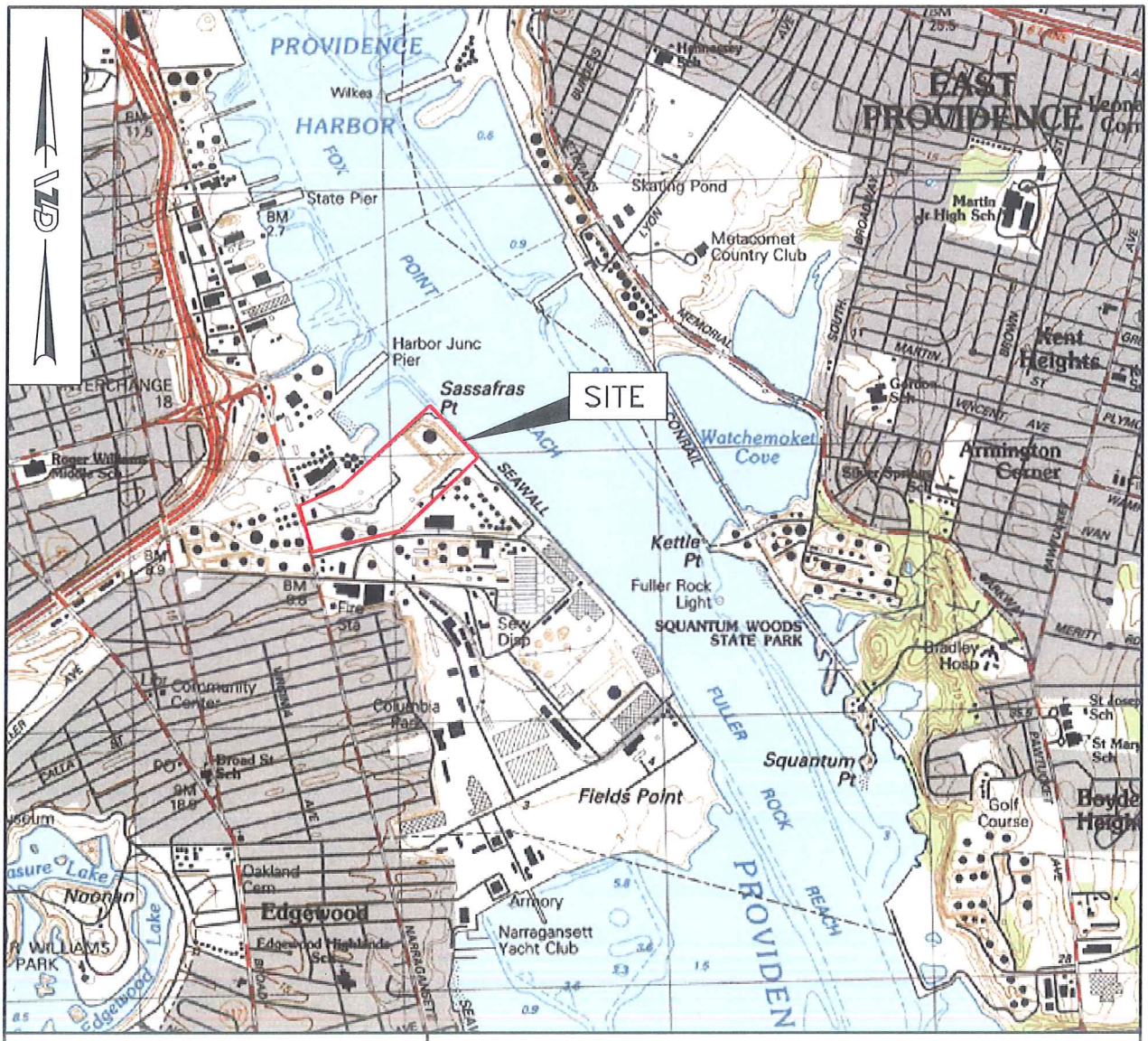
- At the completion of work, workers are required to wash their hands with soap and water or use pre-moistened wipes (such as Go-Jo wipes) before leaving the Site. All workers' safety boots are required to be brushed with a stiff bristle brush or similar instrument (not by hand) to remove residual soil. Used disposable PPE (such as Go-Jo® wipes, nitrile or latex gloves, boot covers, and Tyvek® suits, if necessary) is required to be disposed according to applicable regulations.

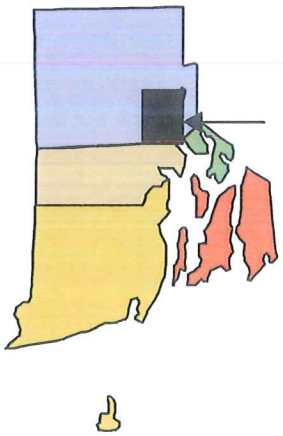
6.30 EMERGENCY PHONE NUMBERS

Emergency telephone numbers and the directions to the nearest hospital are included below. This information shall also be included in the project-specific HASPs developed for the activity and shall be periodically reviewed and updated as needed.

Response Agency	Phone Number
Ambulance	911
Police	911
Fire	911
RIDEM/Office of Compliance & Inspection/Emergency response Program	(401) 222-1360 or (401) 222-3070 (non-business hours)
USEPA/Hazardous Materials Spills	(800) 424-8802
Poison Control Center	(800) 562-8236
DigSafe® (Utility Clearance)	1-888-DIGSAFE
Hospital	
Rhode Island Hospital 593 Eddy Street Providence, RI 02903	401-444-4000
Route to Hospital	
1. Turn RIGHT out of the Site onto ALLENS AVENUE 2. Turn LEFT at the ninth turn onto PUBLIC STREET 3. Turn RIGHT at the first turn onto EDDY STREET 4. End at 593 EDDY STREET	

FIGURES





BASE MAP FROM THE FOLLOWING USGS QUADRANGLE MAP:
PROVIDENCE, RHODE ISLAND–MASSACHUSETTS (1987)

DIGITAL TOPOGRAPHIC MAPS PROVIDED MY MAPTECH. INC.

CONTOUR ELEVATIONS REFERENCE NGVD 29,
CONTOURS ARE SHOWN IN METERS AT 3 INTERVALS

APPROXIMATE SCALE IN FEET

0' 1000' 2000' 4000'

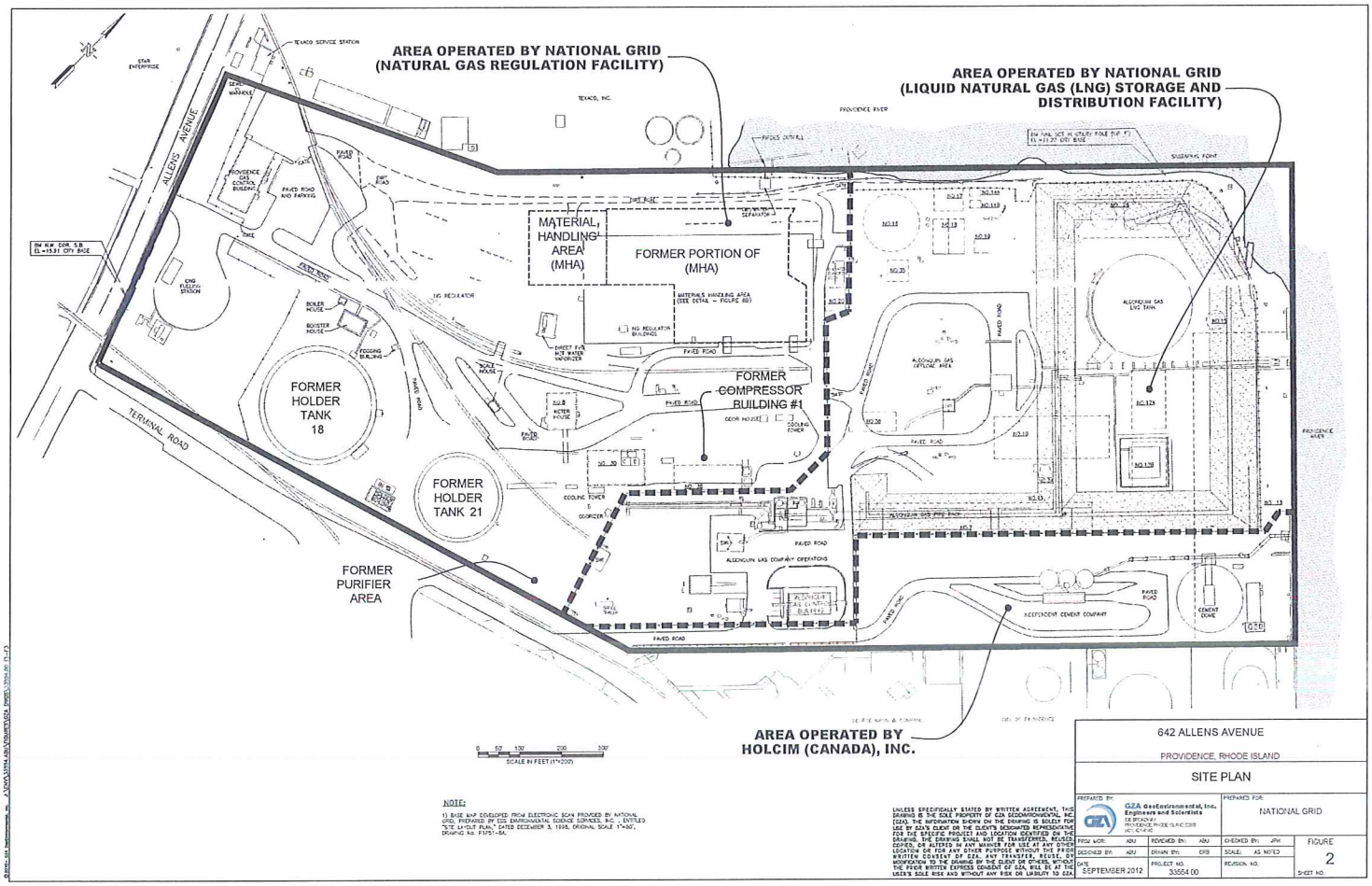
NATIONAL GRID GAS FACILITY
642 ALLENS AVENUE

PROVIDENCE, RHODE ISLAND

LOCUS PLAN

SEPTEMBER 2012

FIGURE NO. 1



NOTE:

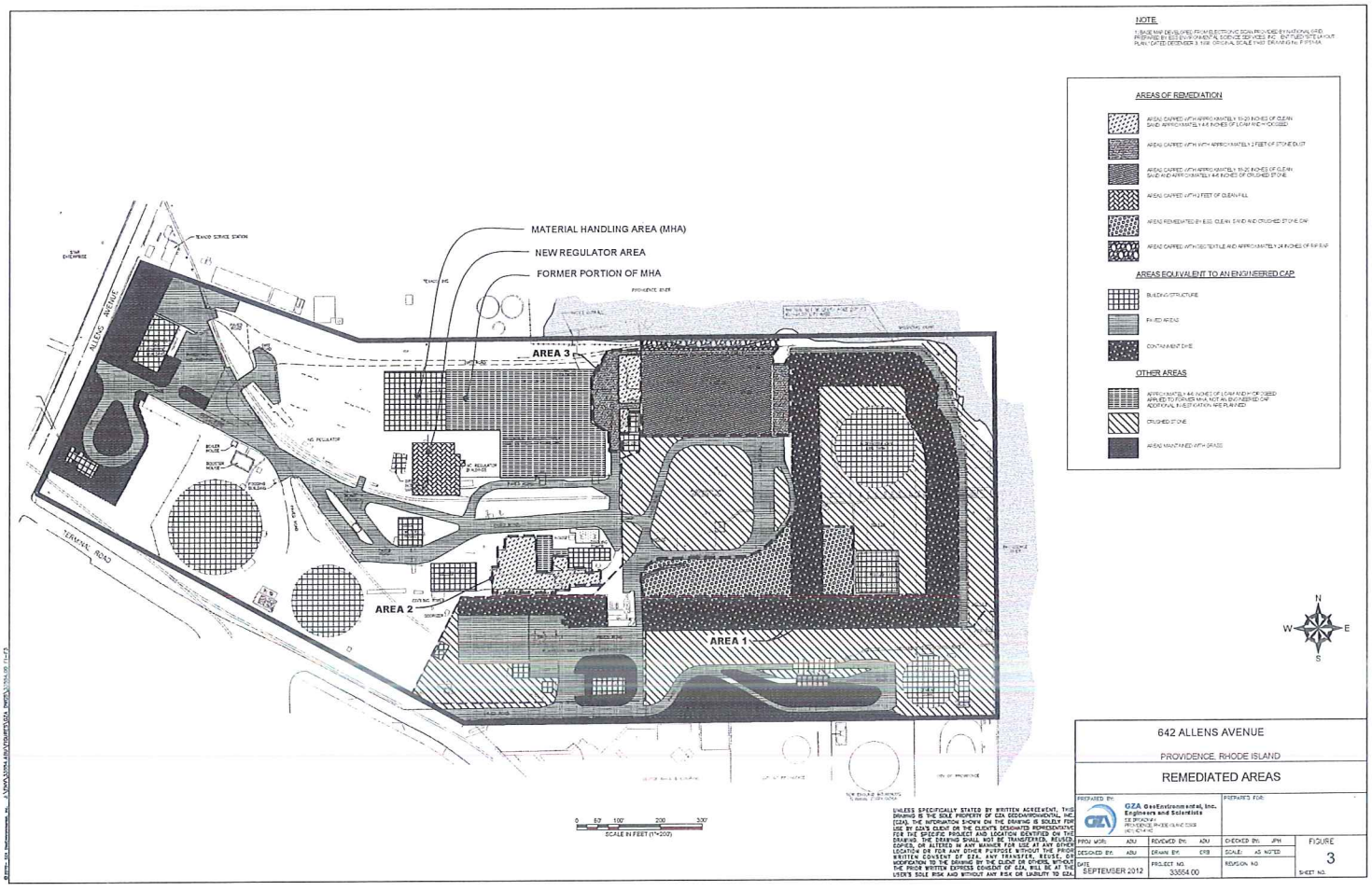
1) BASE MAP DEVELOPED FROM ELECTRONIC SCAN PROVIDED BY NATIONAL GRID, PREPARED BY EEA ENVIRONMENTAL SCIENCE SERVICES, INC., ENTITLED "S.E. LAYOUT PLAN," DATED DECEMBER 3, 1998, ORIGINAL SCALE 1"=40', DRAWING NO. F1751-SA.

642 ALLENS AVENUE

PROVIDENCE, RHODE ISLAND

SITE PLAN

PREPARED BY: GZA GeoEnvironmental, Inc. Engineers and Scientists, 380 Pleasant Street, Providence, Rhode Island 02906, 401-421-4140		PREPARED FOR: NATIONAL GRID	
PROJ MGR: ADU	REVIEWED BY: ADU	CHECKED BY: JPH	FIGURE 2
DESIGNED BY: ADU	DRAWN BY: CRB	SCALE: AS NOTED	
DATE: SEPTEMBER 2012	PROJECT NO. 33554.00	REVISION NO.	SHEET NO.



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642 ALLENS AVENUE

PROVIDENCE, RHODE ISLAND

REMEDIATED AREAS

PREPARED BY: GZA GeoEnvironmental, Inc. Engineers and Scientists 55 Jonspin Road Wilmington, MA 01887-1039 (978) 658-0500		PREPARED FOR:	
PROJ MGR: ADU	REVIEWED BY: ADU	CHECKED BY: JPH	FIGURE 3
DESIGNED BY: ADU	DRAWN BY: EPB	SCALE: AS NOTED	
DATE: SEPTEMBER 2012	PROJECT NO. 33554.00	REVISION NO.	SHEET NO.

APPENDIX A

LIMITATIONS

LIMITATIONS

1. This Soil Management Plan has been prepared on behalf of and for the exclusive use of The Narragansett Electric Company d/b/a National Grid (National Grid), solely for use at the 642 Allens Avenue Providence, Rhode Island ("Site") in documenting the work completed as described herein at the Former Tidewater MGP and Power Plant Site ("Site") under the applicable provisions of the State of Rhode Island Department of Environmental Management Rules and Regulations for the Investigation and Remediation of Hazardous Material Releases (Remediation Regulations). This report and the findings contained herein shall not, in whole or in part, be disseminated or conveyed to any other party, nor used by any other party in whole or in part, without the prior written consent of GZA GeoEnvironmental, Inc.(GZA) or National Grid.

2. GZA's work was performed in accordance with generally accepted practices of other consultants undertaking similar studies at the same time and in the same geographical area, and GZA observed that degree of care and skill generally exercised by other consultants under similar circumstances and conditions. GZA's findings and conclusions must be considered not as scientific certainties, but rather as our professional opinion concerning the significance of the limited data gathered during the course of the study. No other warranty, express or implied is made. Specifically, GZA does not and cannot represent that the Site contains no hazardous material, oil, or other latent condition beyond that observed by GZA as described herein.

3. The observations described in this report were made under the conditions stated therein. The conclusions presented in the report were based upon services performed and observations made by GZA.

4. In the event that National Grid or others authorized to use this report obtain information on environmental or hazardous waste issues at the Site not contained in this report, such information shall be brought to GZA's attention forthwith. GZA will evaluate such information and, on the basis of this evaluation, may modify the conclusions stated in this report.

5. The conclusions and recommendations contained in this report are based in part upon the data obtained from environmental samples obtained from relatively widely spread subsurface explorations. The nature and extent of variations between these explorations may not become evident until further exploration. If variations or other latent conditions then appear evident, it will be necessary to reevaluate the conclusions and recommendations of this report.

6. The generalized soil profile described in the text is intended to convey trends in subsurface conditions. The boundaries between strata are approximate and idealized and have been developed by interpretations of widely spaced explorations and samples; actual soil transitions are probably more gradual. For specific information, refer to the boring logs.

7. In the event this work included the collection of water level data, these readings have been made in the test pits, borings and/or observation wells at times and under conditions stated on the exploration logs. These data have been reviewed and interpretations have been made in the text of this report. However, it must be noted that fluctuations in the level of the groundwater may occur due to variations in rainfall and other factors different from those prevailing at the time measurements were made.

8. The conclusions contained in this report are based in part upon various types of chemical data and are contingent upon their validity. These data have been reviewed and interpretations made in the report. Moreover, it should be noted that variations in the types and concentrations of contaminants and variations in their flow paths may occur due to seasonal water table fluctuations, past disposal practices, the passage of time, and other factors. Should additional chemical data become available in the future, these data should be reviewed by GZA and the conclusions and recommendations presented herein modified accordingly.

APPENDIX B

RIDEM APPROVED REMEDIAL OBJECTIVES

Appendix B
RIDEM-Approved Remedial Objectives
642 Allens Avenue
Providence, Rhode Island

Constituent (mg/kg)	RIDEM			RIDEM Approved Remedial Objectives		
	I/C DEC	GB Leachability Criteria	UCL	Surface Soils	Subsurface Soils <100 feet from shore	Subsurface Soils >100 feet from shore
Metals						
Arsenic	7	NE	10,000	7	-	-
Cyanide	10,000	NE	10,000	10,000	-	-
Lead	500	NE	10,000	500	-	-
PAHs						
2,4-Dimethylphenol	10,000	NE	10,000	10,000	10,000	10,000
2,6-Dinitrotoluene	NE	NE	10,000	10,000	10,000	10,000
2-Methylnaphthalene	10,000	NE	10,000	10,000	10,000	10,000
Acenaphthene	10,000	NE	10,000	10,000	10,000	10,000
Acenaphthylene	10,000	NE	10,000	10,000	10,000	10,000
Anthracene	10,000	NE	10,000	10,000	10,000	10,000
Benzo (a) anthracene	7.8	NE	10,000	7.8	10,000	10,000
Benzo (a) pyrene	0.8	NE	10,000	0.8	10,000	10,000
Benzo (b) fluoranthene	7.8	NE	10,000	7.8	10,000	10,000
Benzo [g,h,i] Perylene	10,000	NE	10,000	10,000	10,000	10,000
Benzo [k] Fluoranthene	78	NE	10,000	78	10,000	10,000
Chrysene	780	NE	10,000	780	10,000	10,000
Dibenzo (a,h) anthracene	0.8	NE	10,000	0.8	10,000	10,000
Fluoranthene	10,000	NE	10,000	10,000	10,000	10,000
Fluorene	10,000	NE	10,000	10,000	10,000	10,000
Indeno [1,2,3-cd] Pyrene	7.8	NE	10,000	7.8	10,000	10,000
Naphthalene	10,000	NE	10,000	10,000	500	5,000
PCBs	10	10	10,000	10	10,000	10,000
Pentachlorophenol	48	NE	10,000	48	10,000	10,000
Phenanthrene	10,000	NE	10,000	10,000	10,000	10,000
Pyrene	10,000	NE	10,000	10,000	10,000	10,000
TPH						
TPH	2,500	2,500	30,000	2,500	15,000	30,000
VOCs						
Benzene	200	4.3	10,000	200	4.3	43
Ethylbenzene	10,000	62	10,000	10,000	62	620
Toulene	10,000	54	10,000	10,000	54	540
Xylenes	NE	NE	10,000	10,000	540	540

NE - Not Established
- No Remedial Objective established for this consistuent

KeyCite Yellow Flag - Negative Treatment
Distinguished by Washington Gas Light Co. v. Prince George's County Council, 4th Cir.(Md.), March 25, 2013

79 F.Supp.2d 49
United States District Court,
D. Rhode Island.

ALGONQUIN LNG

v.

Ramzi J. LOQA, in his capacity as Director of the Department of Inspection and Standards for the City of Providence; and Stephen T. Napolitano, in his capacity as City Treasurer of the City of Providence.

No. 99–575–T.
|
Jan. 7, 2000.

Owner of liquid natural gas facility brought action to have city ordinance declared inapplicable to proposed modifications to facility, and for injunction prohibiting local officials from requiring modifications to comply with local building code. The District Court, Torres, Chief Judge, held that zoning ordinance was preempted by federal law.

Judgment for plaintiff.

West Headnotes (2)

[1] **Zoning and Planning**
Other particular cases

Zoning ordinance requiring that modifications to liquid natural gas facility conform to local building codes was preempted by federal regulatory scheme regulating location, construction and modification of natural gas facilities; federal scheme was comprehensive, local ordinance required showing that failure to obtain variance would deprive owner of all beneficial uses of property, and city told facility that it would violate ordinance unless it obtained variance. Natural Gas Act, § 1 et seq., 15 U.S.C.A. § 717 et seq.; 49 U.S.C.A. § 60103; 18 C.F.R. § 380.12.

8 Cases that cite this headnote

[2] **Gas**
Mains, pipes, and appliances
Municipal Corporations
Political Status and Relations
States
Energy and public utilities

State and local laws that have only indirect effect on interstate gas facilities are not preempted by federal law.

5 Cases that cite this headnote

Attorneys and Law Firms

*49 Henry M. Swan, Davis, Kilmarx, Swan & Kohlenberg, Providence, RI, James M. Behnke, Rich, May, Bilodeau & Flaherty, P.C., Boston, MA, Thomas L. Stanton, Jr., Algonquin Gas Transmission Company, Boston, MA, for Algonquin LNG, Inc., plaintiff.

Kevin F. McHugh, City of Providence, Law Department, Providence, RI, for Ramzi J. Loqa, In his capacity as Director of the Department of Inspection and Standards for the City of Providence, defendant.

MEMORANDUM OF DECISION

TORRES, Chief Judge.

Algonquin LNG brought this action for a declaratory judgment declaring that the Providence Zoning Ordinance is inapplicable to proposed modifications to a natural gas facility that Algonquin operates in the City of Providence and for an injunction prohibiting the City's building official from requiring that the modifications comply with the provisions of the Ordinance or local building codes.

The issue presented is whether and to what extent the Natural Gas Act, 15 U.S.C. §§ 717 *et seq.* ("NGA"), and the Natural Gas Pipeline Safety Act, 49 U.S.C. §§ 60101 *et seq.* ("NGPSA"), and the regulations promulgated pursuant to those statutes pre-empt local regulation of such projects.

Procedural History

This case was tried, on an expedited basis, before the Court sitting without a jury; and, due to the urgency of the matter, an immediate bench decision was rendered. This Memorandum of Decision is being issued because the question presented is an important one on which there is a dearth of authority.

Facts

The facts are relatively simple and undisputed. For approximately 30 years, Algonquin ***50** has operated a facility in the City of Providence that is engaged in the interstate transportation and sale of natural gas. Liquid natural gas ("LNG") from outside of Rhode Island is delivered to the facility where it is stored in large tanks. The LNG, then, is converted into a gaseous state and is transmitted through pipelines to customers within and outside of Rhode Island. The customers include a number of public utilities.

Algonquin's facility is located in what the Providence Zoning Ordinance designates as a W–3 zone that is intended primarily for transportation and limited business uses. It is classified as a petroleum refinery, which is a use not permitted in a W–3 zone or any other zone. However, the facility is a valid nonconforming use because it existed before the Providence zoning ordinance was amended to exclude petroleum refineries.

The facility includes vaporizers that convert liquid natural gas ("LNG") to its gaseous state and compressors that compress the gaseous "boil off" from the vaporizers. The gases produced, then, are introduced into the pipeline system for distribution. The proposed modifications consist of replacing the three existing vaporizers with three newer models and building a structure to house the boil-off compressor. The proposed modifications will not increase the quantity of LNG stored at the facility, but will increase, by fifty percent, the rate at which it can be processed and distributed.

As required by the NGA, *see* 15 U.S.C. § 717f(c)(1)(A), Algonquin applied to the Federal Energy Regulatory Commission ("FERC") for a Certificate of Public Convenience and Necessity ("CPCN") authorizing these modifications. The application was published in the Federal Register, and interested parties were given an opportunity to participate in the hearings.

It is not clear whether the City of Providence received specific notice of the application, but it was informed of an environmental assessment that was performed in connection with the application. In any event, the City did not participate in the hearings before FERC, and a CPCN was issued on June 16, 1999.

After receiving the CPCN, Algonquin representatives met with city officials to discuss the proposed construction. Ramzi Loqa, the City's Building Official, stated that the proposed modifications would require a zoning variance and that no building permit would be issued until a zoning variance was obtained.

Algonquin, maintaining that federal law preempts the Providence Zoning Ordinance, proceeded with construction without seeking a variance. The City responded with a cease and desist order and a threat of criminal prosecution if construction continued. Algonquin, then, brought this action.

Discussion

I. Preemption Principles

Preemption refers to the displacement of state or local law by federal law on the same subject. The preemption doctrine derives from the Supremacy Clause of the Constitution, which provides that federal laws, Constitutionally enacted, take precedence over state and local laws on the same subject. *See* U.S. Const., Art. VI.

There are three basic types of preemption. The first is what is called express preemption. It occurs when Congress expressly states an intent to preempt state or local law. *See Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 299, 108 S.Ct. 1145, 99 L.Ed.2d 316 (1988). Express preemption is not at issue in this case because, although the parties agree that the NGPSA specifically preempts state and local regulation with respect to safety standards, *see* 49 U.S.C. § 60104(c), the Act does not refer to zoning ordinances.

The second type of preemption is known as implied preemption. It exists where the intent to preempt

reasonably may be inferred either because the scheme of federal regulation is so comprehensive that *51 there is no room for supplementary state or local regulation or because the field is one in which the federal interest is so dominant that it precludes state regulation on the same subject. *See Schneidewind,* 485 U.S. at 300, 108 S.Ct. 1145.

The third type of preemption is referred to as conflict preemption. It exists when federal regulation does not completely preclude state regulation in a particular field, but the state regulation actually conflicts with federal law. *Id.* Conflict preemption may occur when it is impossible to comply with both the federal and state regulatory schemes. *Id.* It also may occur where the state or local regulation stands as an obstacle to fully achieving the federal objective. *Id.*

II. Federal Regulation

Since the Algonquin facility is engaged in interstate transportation and sale of natural gas, it is subject to federal regulation under the Commerce Clause. *See* U.S. Const., Art. I, § 8. Congress has exercised its Constitutional authority by enacting the NGA and the NGPSA. These statutes, together with the regulations promulgated pursuant to them, establish a comprehensive scheme of federal regulation that the Supreme Court has said confers upon FERC exclusive jurisdiction over the transportation and sale of natural gas in interstate commerce. *See Schneidewind,* 485 U.S. at 300–01, 108 S.Ct. 1145.

That regulatory scheme governs virtually every aspect of the transportation and sale of natural gas. It includes provisions for determining the price at which natural gas my be sold, whether natural gas facilities may be built or modified, where they may be be located, the methods by which they are constructed, and the safety standards that must be observed. *See, e.g., Schneidewind,* 485 U.S. at 306, 108 S.Ct. 1145 (Michigan cannot regulate rates charged for natural gas); *National Fuel Gas Supply Corp. v. Public Service Commission,* 894 F.2d 571, 579 (2d Cir.1990) (New York may not engage in site-specific environmental review of facilities); *ANR Pipeline Co. v. Iowa State Commerce Commission,* 828 F.2d 465, 470 (8th Cir.1987) (Iowa may not impose its own safety standards on facilities); *Northern Border Pipeline Co. v. Jackson County,* 512 F.Supp. 1261, 1263 (D.Minn.1981) (invalidating zoning requirement that pipeline must be buried six feet underground).

For example, the NGPSA requires the gas pipeline facilities to meet minimum safety standards set by the Secretary of the Department of Transportation. *See* 49 U.S.C. §§ 60102–03. In setting those standards, the Secretary is required to consider the location of the facility, including *inter alia* the population and demographics of the surrounding area, existing and proposed land uses near the location, natural physical aspects of the location, and medical, and law enforcement and fire prevention capabilities near that location that could cope with any risk caused by the facility. *Id.* § 60103(a). The safety standards also are required to address the design, construction and testing of such facilities. *Id.* § 60103(b).

[1] The regulations require that applicants who seek permission to construct or modify natural gas facilities must submit detailed information describing the existing use of the land on which the facility is or will be located and the land within a quarter-mile radius of the facility. The applicant also must describe the likely impact on land use if the facility is approved. *See* 18 C.F.R. § 380.12(j). A checklist known as Resource Report No. 8 requires that the information provided must include a description of all recreational or scenic areas crossed by the project, and it must identify residences within fifty feet of the proposed construction. *Id.* The regulations also require that such projects be undertaken in a way that avoids or minimizes effects on scenic, historic, wildlife and recreational areas and that landowner concerns be taken into account in deciding *52 where to locate the facility. *See Id.* § 380.15

Because of the strong federal interest in establishing a uniform system of regulation designed to implement a national policy of ensuring an adequate supply of natural gas at reasonable prices; and, because the federal regulatory scheme comprehensively regulates the location, construction and modification of natural gas facilities, there is no room for local zoning or building code regulations on the same subjects. In short, Congress clearly has manifested an intent to occupy the field and has preempted local zoning ordinances and building codes to the extent that they purport to regulate matters addressed by federal law.

The Providence Zoning Ordinance and building code also are preempted because they directly conflict with the federal regulatory provisions. FERC has determined that

the proposed modifications to Algonquin's facility meet all of the requirements under federal law, including those relating to siting and construction standards. On the other hand, the Providence Zoning Ordinance would not allow the modifications unless Algonquin, first, obtains a use variance from the Providence Zoning Board of Review. However, in order to obtain such a variance, Algonquin would be required to show that, without a variance, it would be deprived of all beneficial uses of its property. *See* R.I.Gen.Laws § 45–24–41(D); Providence Zoning Code, § 904.2. Since Algonquin currently is operating a natural gas facility at the site, such a showing would be impossible.

The City argues that Section 302 of the zoning ordinance may provide a basis for obtaining a variance. That section provides that: "[t]his ordinance shall not be construed so as to eliminate or interfere with the construction, installation, operation and maintenance for public utility purposes of water and gas pipes." Providence Zoning Code, § 302. Even assuming, *arguendo,* that this provision applies to facilities like Algonquin's, it does not purport to exempt such facilities from complying with use regulations or other requirements of the ordinance. Indeed, the City, itself, maintains that Algonquin would be violating the ordinance unless it obtains a variance.

In short, federal and state law conflict as to whether Algonquin should be allowed to proceed with the project. Although the project satisfies all applicable federal requirements, it does not and cannot satisfy the requirements of the Providence Zoning Ordinance. Accordingly, subjecting the project to regulation under the ordinance would be tantamount to conferring on the City the power to review and nullify FERC's decision regarding the modification of a facility used in the interstate transportation and sale of natural gas. The inevitable result would be to delay or prevent completion of the project, thereby presenting an obstacle to accomplishing the important federal purpose of ensuring that adequate and affordable natural gas is provided to home owners and businesses. Therefore, the ordinance and any licensing requirements contingent upon compliance with it are preempted be federal law.

Of course, this does not mean that local interests are or can be ignored by federal regulatory authorities. On the contrary, the NGPSA requires that appropriate state officials be provided with notice of an application for a CPCN and an opportunity to comment on the application. *See* 49 U.S.C., § 60112(c). The statute further provides that state comment shall incorporate comments of affected local officials. *See id.* Moreover, FERC's regulations require that notice of applications for CPCNs be published in the Federal Register and that all interested parties may petition to intervene. *See* 18 C.F.R. § 157.9.

In addition, any party aggrieved by a FERC decision may seek reconsideration, pursuant to 15 U.S.C. § 717r(a), or appeal to a United States Court of Appeals, pursuant to 15 U.S.C. § 717r(b).

[2] Finally, it should be noted that interstate gas facilities are not entirely insulated ***53** from local regulation. State and local laws that have only an indirect effect on interstate gas facilities are not preempted. *See Schneidewind,* 485 U.S. at 308, 108 S.Ct. 1145; *ANR Pipeline,* 828 F.2d at 474. Moreover, local regulation with respect to matters or activities that are separate and distinct from subjects of federal regulation may be permissible if they do not impede or prevent the accomplishment of a legitimate federal objective.

In this case, the ordinances and codes at issue are not peripheral regulations that have only an indirect effect on Algonquin's proposed project. Rather, they seek to regulate aspects of the project that are regulated, expressly, by federal law and that Congress intended to be regulated by FERC, alone. In addition, they conflict with the federal regulatory scheme and thus interfere with the accomplishment of important federal objectives.

Conclusion

For all the foregoing reasons, it is hereby ordered that judgment be entered in favor of the Plaintiff as follows:

1. It is hereby declared that any provisions of the Providence Zoning Ordinance, any building or other codes administered by the City of Providence, and any licensing or certification requirements that are contingent upon approval pursuant to them are preempted insofar as they purport to apply to the FERC-approved modifications to Algonquin's natural gas facility.

2. The defendants, their agents, and all persons acting in concert with them are hereby enjoined from interfering with the aforesaid modifications or with

the operation of the facility that is the subject of this action to the extent that such modification and/or operation have been approved by FERC.

IT IS SO ORDERED.

All Citations

79 F.Supp.2d 49, 147 Oil & Gas Rep. 128

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478 F.Supp.2d 289
United States District Court,
D. Connecticut.

ISLANDER EAST PIPELINE CO., L.L.C., Plaintiff,
v.
Richard BLUMENTHAL, et al., Defendants.

No. 06cv725 (JBA).
|
March 22, 2007.

Synopsis

Background: Natural gas company brought action against Connecticut Attorney General, state of Connecticut, Connecticut Department of Environmental Protection (CT DEP) and its commissioner, and town and its first selectwoman, seeking declaratory and injunctive relief from defendants' requirement that it obtain a state permit under Connecticut's Structures, Dredging and Fill Act (SDF), in order to lawfully carry out its activities related to construction of an interstate natural gas pipeline. Company moved for summary judgment.

Holdings: The District Court, Arterton, J., held that:

[1] defendants' imposition of requirement that company obtain SDF permit was preempted by the Natural Gas Act (NGA) and Federal Energy Regulatory Commission (FERC) orders, and

[2] District Court lacked jurisdiction to hear defendants' arguments concerning submerged lands.

Motion granted.

West Headnotes (6)

[1] **Gas**
Mains, pipes, and appliances
States
Energy and public utilities

That a state or local authority requires something more or different than Federal Energy Regulatory Commission (FERC) does not make it unreasonable for an applicant to comply with both FERC's and another agency's requirements, but where a conflict arises between the requirements of a state or local agency and FERC's conditions for certificate of public convenience and necessity to construct and operate natural gas pipeline, the principles of preemption will apply and the federal authorization will preempt the state or local requirements.

Cases that cite this headnote

[2] **Gas**
Mains, pipes, and appliances
Municipal Corporations
Political Status and Relations
States
Energy and public utilities

Local and state officials' imposition of requirement that natural gas company obtain a state permit under Connecticut's Structures, Dredging and Fill Act (SDF), in order to lawfully carry out its activities related to construction of an interstate natural gas pipeline, was preempted by the NGA and Federal Energy Regulatory Commission (FERC) orders, which only mandated company's compliance with state and local requirements when they did not conflict with FERC's, and when compliance would not prohibit or delay construction and operation of the FERC-approved project. Natural Gas Act, § 1 et seq., 15 U.S.C.A. § 717 et seq.; C.G.S.A. § 22a–359 et seq.

Cases that cite this headnote

[3] **States**
Preemption in general

The question of preemption is rooted in the Supremacy Clause of the Constitution, and can generally occur in three ways: (1) where Congress has expressly preempted state law; (2) where Congress has legislated so comprehensively that federal law occupies an entire field of regulation and leaves no room

for state law; or (3) where federal law conflicts with state law. U.S.C.A. Const. Art. 6, cl. 2.

Cases that cite this headnote

[4] **Gas**
Power to control and regulate

The NGA confers upon Federal Energy Regulatory Commission (FERC) exclusive jurisdiction over the transportation and sale of natural gas in interstate commerce for resale. Natural Gas Act, § 1 et seq., 15 U.S.C.A. § 717 et seq.

Cases that cite this headnote

[5] **Gas**
Mains, pipes, and appliances
Municipal Corporations
Political Status and Relations
States
Energy and public utilities

District Court lacked jurisdiction over question whether Federal Energy Regulatory Commission's (FERC's) certificate of public convenience and necessity to construct and operate natural gas pipeline preempted state and local requirements, under Connecticut's Structures, Dredging and Fill Act (SDF), with respect to submerged lands that could be impacted by natural gas company's activities related to construction of an interstate natural gas pipeline, where the issue could have and should have been raised before FERC or on appeal. Natural Gas Act, § 19(b), 15 U.S.C.A. § 717r(b); C.G.S.A. § 22a–361.

Cases that cite this headnote

[6] **Gas**
Mains, pipes, and appliances

The province of the district courts with respect to Federal Energy Regulatory Commission (FERC) certificates of public convenience and necessity to construct and operate natural gas pipeline is not appellate but, rather, to provide for enforcement. Natural Gas Act, § 19(b), 15 U.S.C.A. § 717r(b).

Cases that cite this headnote

Attorneys and Law Firms

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RULING ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT [DOC. # 33]

ARTERTON, District Judge.

Plaintiff Islander East Pipeline Company, L.L.C. ("Islander East") seeks declaratory and injunctive relief from the defendants' requirement that it obtain a state permit under Connecticut's Structures, Dredging and Fill Act ("SDF"), Conn. Gen.Stat. § 22a–359 *et seq.*, in order to lawfully carry out its activities related to construction of an interstate natural gas pipeline connecting New England and Eastern Long Island, including pre-construction core sampling. The action is brought against defendants Connecticut Attorney General Richard Blumenthal ("CT AG"), the State of Connecticut, the Connecticut Department of Environmental Protection ("CT DEP") and its Commissioner Gina McCarthy, and the Town of Branford and its First Selectwoman Cheryl Morris, and is in essence the mirror image of litigation commenced by defendant *291 McCarthy to enjoin plaintiff from such construction until it obtains a state SDF permit. *See McCarthy v. Islander East,* No. 06cv756 (JBA) (D.Conn.). Plaintiff now moves for summary judgment, principally on the grounds that the Natural Gas Act ("NGA"), 15 U.S.C. § 717 *et seq.,* and orders of the Federal Energy Regulatory Commission ("FERC") preempt the CT DEP's authority to require plaintiff to submit to SDF permitting. Plaintiff's Motion for Summary Judgment is granted, as the Court finds that requiring plaintiff to obtain a state SDF permit for the pre-construction,

construction, and operation of its federally authorized gas pipeline conflicts with FERC's orders certifying this project, and the permit requirement is therefore preempted by the federal NGA.

I. Factual Background

Plaintiff Islander East, a Delaware natural-gas company with its principal place of business in Houston, Texas, is authorized by the FERC to construct and operate a gas pipeline project running from Connecticut to New York to supply natural gas to customers on Long Island. In October 2001, plaintiff gave notice to CT DEP of its "core sampling" program in Long Island Sound needed to prepare construction plans for the project. Thereafter, the CT DEP wrote to the CT AG to advise that although "core sampling can be considered 'work incidental thereto' for purposes of the permitting authority of [the SDF statute]," [1] it decided "to not require an application from Islander East for this sampling work" based on the "determin[ation] that any sedimentation ... would be short-term in nature and would be expected to minimally impact only those shellfish in the immediate vicinity of the core." (Nov. 5, 2001 CT DEP letter, Mulherr Aff. [Doc. # 33], Ex. C.) Plaintiff's sampling program commenced in October 2001 but was interrupted by the arrest of an Islander East employee on charges of criminal trespass by the Branford police; the charges were dismissed in November 2002. (Apr. 27, 2006 Pl. letter, Mulherr Aff., Ex. D.)

Although the CT DEP had not required plaintiff to obtain a SDF permit, plaintiff submitted an application to the agency on February 13, 2002 and amended it in March 2003. (Jacobson Aff. [Doc. # 38–4] ¶¶ 3, 4.) In April 2003, the CT DEP informed plaintiff that the application processing fee would be $1.4 million. (Second Mulherr Aff. [Doc. # 40–2] ¶ 3.) Plaintiff disputed the amount of the fee, estimating that it should be only $41,865. (Apr. 28, 2003 Pl. letter, Second Mulherr Aff., Ex. B.) The fee issue apparently was left unresolved, and the application process ceased. (Second Mulherr Aff. ¶ 6.)

Preliminary sampling was revived in 2006, when plaintiff advised the CT DEP in an April 27 letter that it was "now resuming the core sampling program, and offshore survey activities, and intends to take samples." (*Id.*) On May 9, 2006, plaintiff updated the agency on its "intention to resume the offshore core sampling no sooner than the week of May 22, 2006. The [CT DEP] has already determined ***292** that (1) the core sampling will have minimal impact, and (2) no permit is required for this activity under [the SDF statute]." (May 9, 2006 Pl. letter, Mulherr Aff., Ex. E.) Plaintiff stated that "[t]he impact of the core sampling that Islander East intends to resume will not materially differ from that previously reviewed by the Connecticut DEP in 2001." (*Id.*) Two days later, the CT DEP wrote plaintiff of its determination that plaintiff's "currently proposed activities" were "quite different" from those proposed in October 2001, and that the agency therefore "determined that the activities which [plaintiff] [had] outlined in the April 27, 2006 and May 9, 2006 letters are regulated activities which require authorization in the form of a[SDF] permit." (CT DEP May 11, 2006 letter, Mulherr Aff., Ex. F.)

CT DEP Commissioner Gina McCarthy brought a state court injunctive action dated May 15, 2006, seeking to enjoin Islander East from "conducting any drill, core sampling, invasive offshore survey and related activities in the waters of Long Island Sound ... along or in the vicinity of the route of the proposed Islander East pipeline," which was removed to federal court. (*See* Compl. [Doc. # 1–3], *McCarthy.*) McCarthy's application for a temporary injunction to enjoin plaintiff from undertaking its scheduled surveys without first obtaining a SDF permit was heard and denied on May 19, 2006. (*See* [Doc. # 20], *McCarthy.*) [2]

FERC Proceedings

On December 21, 2001, after a hearing on non-environmental dimensions of the project, FERC issued a Preliminary Determination which "provide[d] certainty concerning the economic aspects of Islander East's ... proposals" and certified the project pending environmental review. *Islander East Pipeline Co.*, 97 F.E.R.C. ¶ 61,363 (2001). On September 19, 2002, after environmental review was completed, FERC issued its "final decision on Islander East's ... request for authorizations," wherein FERC "determine[d] that the proposed facilities and services are required by public convenience and necessity." *Islander East Pipeline Co.*, 100 F.E.R.C. ¶ 61,276 (2002) ("Order"). The FERC Order was issued with reference to the Final Environmental Impact Statement ("FEIS") prepared for the project pursuant to the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4432 *et seq.*, 18 C.F.R. §

380.6. In the Order, FERC "note[s] that the NGA and the regulations promulgated by the Commission under that statute generally preempt state and local law," but "encourages cooperation between interstate pipelines and local authorities. However, this does not mean that state and local agencies, through application of state or local laws, may prohibit or unreasonably delay the construction or operation of facilities approved by [FERC]." *See* 102 F.E.R.C. ¶ 61,276 at ¶¶ 62,111, 62,123.

[1] Upon request for rehearing by *inter alios* defendants Town of Branford and the CT AG, FERC issued a second Order ("Rehearing Order") on January 17, 2003 specifically conditioning final approval of ***293** the project on completion of Islander East's surveys and environmental studies and issuance of federal permits under the Coastal Zone Management Act ("CZMA"), 16 U.S.C. § 1451 *et seq.*,[3] and the Clean Water Act ("CWA"), 33 U.S.C. § 1251 et seq.,[4] and stating that any state or local permits issued should be consistent with the conditions set by FERC. *See Islander East Pipeline Co.*, 102 F.E.R.C. ¶ 61,054 (2003). "That a state or local authority requires something more or different than [FERC] ... does not make it unreasonable for an applicant to comply with both [FERC's] and another agency's requirements," but where a conflict arises "between the requirements of a state or local agency and [FERC's] certificate conditions, the principles of preemption will apply and the federal authorization will preempt the state or local requirements." 102 F.E.R.C. ¶ 61,054 at ¶ 61,130.

II. Standard

The facts underlying this Motion for Summary Judgment are not genuinely disputed, as all propositions in plaintiff's substituted Rule 56(a) Statement of Undisputed Facts are admitted in material part. (See Pl. 56(a)(1) [Doc. # 33–2]; Def. 56(a)(2) [Doc. # 38–3].) Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits ... show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c).

III. Discussion

[2] Islander East seeks a declaratory judgment that the CT DEP does not have the authority to require it to submit to the State's SDF permitting authority under Conn. Gen.Stat. § 22a361, as well as a permanent injunction against state enforcement of such a requirement. Plaintiff advances three arguments in support of its position that defendants may not regulate, interfere with, or assert jurisdiction over plaintiff's FERC-certified natural gas pipeline construction activities: 1) that the NGA and FERC regulations preempt the State's SDF permitting program; 2) that Islander East does not require the State's consent to occupy submerged lands held by the State as a public trustee to perform its survey, construction, or operation activities; and 3) that this Court lacks jurisdiction to entertain a collateral attack on the FERC Orders or the activities authorized therein.[5] (*See* Pl. Mem.) Defendants maintain in response: 1) that the SDF permitting requirement is compatible with and not preempted by the NGA; 2) that Connecticut has an absolute right to its public trust lands; and 3) that no collateral estoppel-type argument is applicable because defendants are "not challenging the validity of the FERC [O]rders." (*See* Def. Opp. Mem.)

***294** A. Preemption

[3] "The question of preemption 'is rooted in the Supremacy Clause of the Constitution .... [and] can generally occur in three ways: where Congress has expressly preempted state law, where Congress has legislated so comprehensively that federal law occupies an entire field of regulation and leaves no room for state law, or where federal law conflicts with state law." *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305, 313–14 (2d Cir.2005). Defendants argue that the NGA neither expressly nor implicitly preempts nor irreconcilably conflicts with state environmental law. Plaintiff, while agreeing that the NGA does not preempt state environmental laws, claims conflict preemption under its circumstances.

[4] "The NGA long has been recognized as a 'comprehensive scheme of federal regulation of all wholesales of natural gas in interstate commerce.' ... The NGA confers upon FERC exclusive jurisdiction over the transportation and sale of natural gas in interstate commerce for resale." *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300–01, 108 S.Ct. 1145, 99 L.Ed.2d 316 (1988). In *National Fuel Gas Supply Corp. v. Public Service Commission of the State of New York*, 894 F.2d 571 (2d Cir.1990), the Second Circuit read Schneidewind to hold that New York's environmental regulation of plaintiff's FERC-approved project was preempted by the NGA,

rejecting defendant's argument that piecemeal application of the New York law was possible to avoid conflict. "Because FERC has authority to consider environmental issues, states may not engage in concurrent site-specific environmental review." *Id.* at 579. *See also Islander East Pipeline v. Conn. Dep't Env'tl. Prot.*, 467 F.3d 295, 305 (2d Cir.2006) ("Congress wholly preempted and completely federalized the area of natural gas regulation by enacting the NGA.").

The FERC Orders require plaintiff to conduct preparatory surveys and authorize construction and operation of the pipeline, conditioned on obtaining federal CZMA and CWA permits, implicating coordination with the CT DEP.[6] As well, both FERC Orders reference "state or local permits issued with respect to the [project]" but specify that "this does not mean that state and local agencies, through application of state or local laws, may prohibit or unreasonably delay the construction or operation of facilities approved by [FERC]." The Rehearing Order stated that it would not "be unreasonable for an applicant to comply with both [FERC's] and another agency's requirements," but "between the requirements of a state or local agency and [FERC's] certificate conditions, the principles of preemption will apply and the federal authorization will preempt the state or local requirements."

Despite the language of the FERC Orders, the CT DEP claims authority to prosecute plaintiff's "unauthorized activities" because plaintiff has not received a SDF permit, Compl. ¶ 1, McCarthy, and asserts "authority to deny a permit" to Islander East (Def. Opp. Mem. at 9). Defendants concede that plaintiff cooperated ***295** with the CT DEP "to seek to obtain state and/or local permits as encouraged by the FERC [Orders]," namely the SDF permit in 2001.[7] (Def.56(a)(2) ¶¶ 14, 15.) Were defendant CT DEP allowed to enforce the SDF requirement and potentially deny plaintiff's permit application, it would pose a significant obstacle to the project, presenting the "imminent possibility of collision ... [with] the NGA," Schneidewind, 485 U.S. at 310, 108 S.Ct. 1145.

As the FERC Order mandates Islander East's compliance with state and local requirements only where they do not conflict with FERC's and where compliance would not prohibit or delay construction and operation of the FERC-approved project, the Court finds that the defendants' imposition of a SDF permit requirement with respect to plaintiff's pipeline pre-construction and construction activities conflicts with and is therefore preempted by the Orders of FERC, which has "exclusive jurisdiction over the transportation and sale of natural gas in interstate commerce for resale." *Id.* at 300–01, 108 S.Ct. 1145.

B. Jurisdiction

[5] In addition to the preemption issue, plaintiff claims that the Court lacks jurisdiction to hear defendants' arguments concerning submerged lands, which were or should have been raised at FERC or on appeal at the D.C. Circuit, because defendants' assertion of rights constitutes a collateral attack on the FERC Orders.

[6] Under Section 19(b) of the NGA:

> any party aggrieved by an order issued by [FERC] ... may obtain a review of such order in the [circuit] court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia ... No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do.

15 U.S.C. § 717r(b). Pursuant to this provision, it was incumbent on the defendants, if aggrieved by the FERC Orders, to pursue appeals before a proper Court of Appeals; indeed, the CT AG filed, but later withdrew, its appeal before the D.C. Circuit. The province of the district courts with respect to FERC certificates is "not appellate but, rather, to provide for enforcement." *See Williams Natural Gas Co. v. City of Oklahoma*, 890 F.2d 255, 264 (10th Cir.1989) (holding that the state court lacked jurisdiction to entertain a challenge to a FERC certificate and reversing district court's decision to abstain from enforcing the FERC certificate based on the state court's injunction: "Judicial ***296** review under § 19(b)

is exclusive in the courts of appeals once the FERC certificate issues.").

In *City of Tacoma v. Taxpayers of Tacoma,* 357 U.S. 320, 78 S.Ct. 1209, 2 L.Ed.2d 1345 (1958), the Supreme Court examined whether the disputed issue of the City's legal capacity to act had been decided by the Court of Appeals in the context of a license issued by the Federal Power Commission (FERC's predecessor). The Supreme Court concluded:

> But even if it might be thought that this issue was not raised in the Court of Appeals, it cannot be doubted that it could and should have been, for that was the court to which Congress had given "exclusive jurisdiction to affirm, modify, or set aside" the Commission's order. And the State may not reserve the point, for another round of piecemeal litigation, by remaining silent on the issue while its action to review and reverse the Commission's order was pending in that court—which had "exclusive jurisdiction" of the proceeding and whose judgment therein as declared by Congress "shall be final," subject to review by this Court upon certiorari or certification.

City of Tacoma, 357 U.S. at 339, 78 S.Ct. 1209. *See, e.g., Tenn. Gas Pipeline Co. v. 104 Acres of Land,* 749 F.Supp. 427 (D.R.I.1990) ("Disputes over the validity of the certificate based on FERC's failure to require compliance with the [CWA] or state law must be brought to the Commission for rehearing."); *Guardian Pipeline, L.L.C. v. 529.42 Acres of Land,* 210 F.Supp.2d 971 (N.D.Ill.2002) ("The jurisdiction of this court is limited to evaluating the scope of the FERC Certificate and ordering condemnation as authorized by that certificate."). Thus, the relevant inquiry is whether defendants' argument could and should have been raised before the FERC or the court having exclusive appellate jurisdiction.

After the FERC Order was issued, defendant CT AG moved for a stay based on *inter alia* the pendency of administrative proceedings related to Islander East's application for CWA and CZMA permits, and future "[Rivers and Harbors Act] section 10 and [CWA] 404 permit proceedings before the United States Army Corps of Engineers." [8] *See Islander East,* 102 FERC at ¶ 61,116. The Rehearing Order denied the motion for stay, finding no showing of irreparable injury, and reasoning that Islander East in any case "cannot commence construction of the facilities until it receives all necessary federal permits, including federal permits issued by the State through its delegated authority." *See id.* at ¶ 61,118. In December 2004, the CT AG, on appeal of the FERC Orders, argued in its D.C. Circuit brief:

> No activity can occur on these public trust lands, ... without permission from the State, which permission may take the form of a Structures and Dredging permit under Conn. Gen.Stat. § 22a–361. No such permit has been issued to Islander East. However, the Order baldly states ... that all state permits must be consistent with the terms of the Order and cannot prohibit or delay this project.
>
> (*See* CT AG Br. [Doc. # 40–7] at 32). On appeal, the CT AG relied on the doctrine of state sovereign immunity to argue that SDF permitting should not be subordinated to the FERC Orders. (*Id.* at 33.)

***297** It is of no consequence that defendant CT AG ultimately withdrew its appeal to the D.C. Circuit; appeals from FERC Orders which could and should have been raised before the Court of Appeals may not be raised now before this Court, *i.e.,* such issues must be raised "by direct attack, pursuant to the appellate structure of § 19(b), or not at all," *Williams Natural Gas Co. v. Okla. City,* 890 F.2d at 264 (citing *City of Tacoma,* 357 U.S. at 336, 78 S.Ct. 1209). The public trust argument is identical to defendants' present contention that Connecticut can require SDF permitting because it holds submerged lands "in public trust for the benefit of all of its citizens" (Defs. Opp. Mem. at 10); therefore, the submerged lands issue is beyond this Court's jurisdictional purview and may not serve as a ground for defendant CT DEP to require SDF permitting of plaintiff.

C. Requested Relief

Having found SDF permitting as applied to plaintiff to be preempted by the NGA and the FERC Orders, the Court grants summary judgment to Islander East pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201 (authorizing the federal courts to render declaratory judgments in any "case of actual controversy within [their] jurisdiction"); *see Sheet Metal Div. v. Local 38 of the Sheet Metal Workers Int'l Ass'n,* 208 F.3d 18, 22 (2d Cir.2000) ("It is well-settled that the trial court's decision to exercise declaratory jurisdiction is a discretionary one.") (internal quotation marks and citation omitted). Accordingly, a declaratory judgment will enter that the SDF permit program, with respect to plaintiff's pre-

construction surveys and construction and operation of its FERC-certified natural gas pipeline project, is preempted by the NGA and FERC regulations and orders issued thereunder.

Having entered a declaratory judgment that the state SDF permitting program is preempted as applied to Islander East's pipeline construction operation, the Court considers plaintiff's request for preliminary and/or permanent injunction. "Generally, courts have invoked the [Declaratory Judgment] Act to permit plaintiffs who have won a declaratory judgment from the court to enforce that judgment through injunction, damages and other relief." *Starter Corp. v. Converse, Inc.*, 170 F.3d 286, 298 (2d Cir.1999). Presuming that the defendants will take no further enforcement action to require plaintiff to obtain a SDF permit, in accordance with this declaratory judgment, and will accordingly withdraw forthwith *McCarthy v. Islander East,* No. 06cv756, which seeks to enforce plaintiff's compliance with the SDF permitting program, the Court sees no need for injunctive relief to enforce its declaratory judgment.

IV. Conclusion

Accordingly, Plaintiff's Motion for Summary Judgment [Doc. # 33] is GRANTED. The Clerk is directed to close this case.

IT IS SO ORDERED.

All Citations

478 F.Supp.2d 289, 167 Oil & Gas Rep. 253

Footnotes

1 The statute provides in relevant part:

> No person, firm or corporation, public, municipal or private, shall dredge, erect any structure, place any fill, obstruction or encroachment or carry out any work incidental thereto or retain or maintain any structure, dredging or fill, in the tidal, coastal or navigable waters of the state waterward of the high tide line until such person, firm or corporation has submitted an application and has secured from said commissioner a certificate or permit for such work and has agreed to carry out any conditions necessary to the implementation of such certificate or permit.

Conn. Gen.Stat. § 22a–361(a).

2 At the temporary injunction hearing on May 19, 2006, Susan L. Jacobson of the CT DEP acknowledged that the description in plaintiff's April 26, 2006 letter of "four water-based borings" was identical to the "four geotechnical borings" set out in plaintiff's 2001 letter to the agency, and explained that the CT DEP's decision to now require SDF permitting was based only on the map attached to plaintiff's 2006 letter indicating five or six borings, but which may have been "just ... an error on the map." (*See* May 19, 2006 Hrg. Tr., *McCarthy,* 06cv756.) The record contains nothing further showing that plaintiff had substantively changed its exploratory borings plan between 2001 and 2006.

3 The State of Connecticut and the CT DEP's appeal from the Secretary of Commerce's override of the CT DEP's denial of the CZMA 16 U.S.C. § 1456(c)(3)(A) certificate to plaintiff is currently pending in this District. *See State of Conn., et al. v. United States Dep't of Commerce, et al.,* No. 04cv1271 (SRU).

4 The Second Circuit reviewed the CT DEP's denial of Islander East's water quality certificate application under CWA § 401 and concluded its denial was arbitrary and capricious, remanding Islander East's application to the agency for further action. *See Islander East Pipeline Co., LLC v. Conn. Dep't of Env'tl. Prot.*, 467 F.3d 295 (2d Cir.2006).

5 It is unnecessary for the Court to address plaintiff's subordinate argument that "Islander East may acquire the right to survey for, construct, and operate the Project in the Connecticut portion of Long Island Sound through the exercise of its federal eminent domain power" (Pl. Mem. at 11).

6 Under the CWA, "[a]ny applicant for a Federal license or permit to ... construct[ ] or operat[e] ... facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates." 33 U.S.C. § 1341(a). Similarly, under the CZMA, "any applicant for a required Federal license or permit to conduct an activity ... affecting any land or water use or natural resource of the coastal zone of that state shall provide ... a certification that the proposed activity complies with the enforceable policies of the state's approved program." 16 U.S.C. § 1456(c)(3)(A).

7 Presumably because the CT DEP concluded in November 2001 that core sampling boring would have minimal environmental impact and that a SDF permit would therefore be unnecessary, it did not pursue the issue of this permitting requirement before the FERC in 2002 or 2003, nor when plaintiff applied for a SDF permit in February 2002 (amended March 2003), which fee dispute remained unresolved as of April 2003. Yet, in 2004, defendant resurrected the SDF

permitting issue in its brief to the D.C. Circuit, arguing that the permit requirement fell within the State's authority over submerged lands. It withdrew its appeal and no more was heard on the issue until Spring 2006, when, 11 days before plaintiff's announced date for commencement of its core sampling project, the CT DEP informed plaintiff that it would now require a SDF permit before the core sampling could lawfully begin and sought injunctive relief against Islander East to force its compliance with the SDF permitting program.

8 At the Rehearing, defendant CT DEP's motion for late intervention based in part on the Order's "interfere[nce] with the [CT] DEP Commissioner's CMZA permit process" was denied for lack of good cause. *See Islander East,* 102 FERC at ¶¶ 61,115–16.

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KeyCite Yellow Flag - Negative Treatment
Distinguished by Garbaccio v. Columbia Gas Transmission Corp., N.D.Ohio, October 3, 2003

894 F.2d 571
United States Court of Appeals,
Second Circuit.

NATIONAL FUEL GAS SUPPLY CORPORATION, Plaintiff–Appellant,
v.
PUBLIC SERVICE COMMISSION OF the STATE OF NEW YORK, Peter A. Bradford, Harold A. Jerry, Jr., Gail Garfield Schwartz, Eli M. Noam, James T. McFarland, Edward M. Kresky, and Henry G. Williams, in their official capacity as Commissioners of the Public Service Commission of the State of New York, Defendants–Appellees.

No. 231, Docket 89–7458.
|
Argued Nov. 6, 1989.
|
Decided Jan. 24, 1990.

Interstate natural gas company brought suit seeking declaratory judgment and injunction to prevent Public Service Commission of State of New York from regulating its pipeline facilities under state's Public Service Law. On cross motions for summary judgment, the United States District Court for the Northern District of New York, Howard G. Munson, J., granted New York's motion for summary judgment. Natural gas company appealed. The Court of Appeals, Winter, Circuit Judge, held that state regulatory scheme encroached upon jurisdiction of Federal Energy Regulatory Commission and was preempted.

Reversed.

West Headnotes (2)

[1] **States**
Federal administrative regulations

Federal law need not be statutory to preempt state law; regulations promulgated by agency pursuant to its delegated authority may preempt similar state regulations. U.S.C.A. Const. Art. 6, cl. 2.

14 Cases that cite this headnote

[2] **Gas**
Mains, pipes, and appliances
States
Carriers;railroads

New York regulatory scheme governing construction of natural gas transmission lines was preempted by Federal Energy Regulatory Commission (FERC) regulations of natural gas companies, which required issuance of certificate of public convenience and necessity from FERC before constructing or operating interstate natural gas pipeline facilities; Congress intended to vest exclusive jurisdiction to regulate pipelines in FERC and had occupied field of regulation regarding interstate gas transmission facilities so as to preempt field, even assuming that New York regulatory scheme was amenable to piecemeal application. N.Y.McKinney's Public Service Law §§ 120–130, 121, 121, subd. 4, par. c, 121–a, subd. 7; Natural Gas Act, §§ 1–24, 15 U.S.C.A. §§ 717–717w; Natural Gas Pipeline Safety Act of 1968, §§ 2–19, as amended, 49 U.S.C.A.App. §§ 1671–1686.

31 Cases that cite this headnote

Attorneys and Law Firms

*572 Grant S. Lewis (Bruce V. Miller, Ronald J. Gizzi, Jon R. Mostel, LeBoeuf, Lamb, Leiby & MacRae, New York City, Richard DiValerio, David W. Reitz, Nat. Fuel Gas Supply Corp., Buffalo, N.Y., of counsel), for plaintiff-appellant.

Jonathan D. Feinberg (William J. Cowan, Public Service Com'n of the State of N.Y., Albany, N.Y., of counsel), for defendants-appellees.

Before TIMBERS and WINTER, Circuit Judges, and LEISURE,* District Judge.

Opinion

WINTER, Circuit Judge:

This appeal involves the interrelationship between state and federal regulatory authorities governing the planning and construction of pipeline facilities for the interstate transportation of natural gas. Appellant National Fuel Gas Supply Corporation ("National Fuel") brought this action in the Northern District of New York seeking a declaratory judgment and an injunction to prevent the Public Service Commission of the State of New York ("PSC") from regulating certain of National Fuel's pipeline facilities under Article VII of the Public Service Law of the State of New York, N.Y.Pub.Serv.Law §§ 120–130 (McKinney 1989). In proceedings before the Federal Energy Regulatory Commission ("FERC") National Fuel had obtained a federal permit to construct a length of pipeline in West Seneca, New York. The basis for the *573 instant action is National Fuel's claim that the FERC proceedings preempted enforcement by the PSC of Article VII's requirements with regard to the project.

National Fuel and the PSC filed cross-motions for summary judgment. Judge Munson granted the PSC's motion, holding that Article VII could be applied by the PSC so as not to conflict with the federal regulatory scheme. We disagree and reverse.

BACKGROUND

1. *Federal Regulatory Framework and National Fuel's Application*

National Fuel transports and sells natural gas in interstate commerce and is a "natural-gas company" subject to FERC regulation under Section 717a(6) of the Natural Gas Act, 15 U.S.C. §§ 717–717w (1988). Pursuant to Section 717f(c), a natural-gas company must obtain a "certificate of public convenience and necessity" from the FERC before constructing or operating facilities used for the interstate transportation and sale of natural gas. Similarly, before abandoning any portion of those facilities, a natural-gas company must obtain the permission and approval of the FERC. *See* 15 U.S.C. § 717f(b).

Acting under the Natural Gas Act and the Natural Gas Pipeline Safety Act, 49 U.S.C.App. §§ 1671–1686 (1982 & Supp. V 1987), the FERC has promulgated detailed regulations concerning applications for such certificates and for orders permitting abandonment. *See* 18 C.F.R. Part 157, Subpart A (1989). These regulations require an applicant to attach certain exhibits to its application. These are to provide data pertinent to the abandonment of the old line, 18 C.F.R. § 157.18, and to describe the characteristics of the new pipeline project, 18 C.F.R. § 157.14. The necessary exhibits include a map showing the location and dimensions of the new project, flow diagrams representing daily operational capacity with and without the proposed change, and a statement setting forth the arrangements regarding the supervision and management of the new construction. 18 C.F.R. § 157.14(a).

In addition, the FERC requires a statement of factors considered by a natural-gas company in arriving at a given site proposal. These include a discussion of the possibility of using existing rights-of-way, 18 C.F.R. § 157.14(a)(6–a), and, if applicable, a statement explaining the factors considered in routing a facility through an officially designated scenic, historic, recreational or wildlife area with a list of the designated federal or state authorities notified by the applicant of the proceeding before the FERC, 18 C.F.R. § 157.14(a)(6–b). An applicant must also provide a statement that it has followed the guidelines for planning, locating, constructing and maintaining facilities set out in 18 C.F.R. § 2.69, in order that "[i]n the interest of preserving scenic, historic, wildlife and recreational values, the construction and maintenance of facilities authorized by certificates granted under Section 7(c) of the Natural Gas Act should be undertaken in a manner that will minimize adverse effects on these values." *See also* 18 C.F.R. § 157.14(a)(6–c). Also, as required by the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321–4347 (1982 & Supp. V 1987), an applicant must submit an environmental impact statement detailing potential adverse effects of the project and alternatives which might avoid them. 18 C.F.R. § 157.14(a)(6–d).

FERC regulations provide for the participation of interested parties in certification proceedings. Notice of each application is published in the Federal Register, with a copy of the notice mailed to the affected state or states. 18 C.F.R. §§ 157.9, 157.10. State commissions may intervene as of right. 18 C.F.R. § 385.214.

On January 21, 1986, National Fuel filed an application with the FERC seeking permission to abandon 1.78 miles

of interstate pipeline and an accompanying regulator station. It also sought a certificate of public convenience and necessity authorizing construction of a replacement line of 1.61 miles of pipe and a new regulator station. The facilities to be abandoned and the proposed replacements are all located in the town of West Seneca, Erie County, New *574 York. Both the old facility and the replacement are designed solely to transport natural gas in interstate commerce. The PSC was given notice of National Fuel's application but declined to exercise its right to intervene.

On June 16, 1986, the FERC issued an order approving the proposed abandonment and issuing a certificate of public convenience and necessity for the West Seneca project, "authorizing National Fuel to construct and operate the subject facilities and to deliver gas at the new delivery point." In October 1987, National Fuel filed a petition to revise the route of the replacement pipeline to run 1.45 miles instead of 1.61 miles. Revisions were made to the project exhibits, including the environmental report. The PSC again declined to intervene. On July 5, 1988, the FERC issued an Order Amending Certificate approving the revised route.

2. *The New York Regulatory Framework and the Instant Action*

New York State, under Public Service Law Section 121, requires persons proposing to construct natural gas transmission lines extending one thousand feet or longer to be used to transport gas at pressures of one hundred twenty-five pounds per square inch or more to obtain a "certificate of environmental compatibility and public need" from the PSC. N.Y.Pub.Serv.Law § 121 (McKinney 1989). National Fuel's project in the instant matter meets these jurisdictional dimensions.

Article VII of the Public Service Law governs the PSC's handling of certification procedures. Section 126 provides that before issuing such a certificate the PSC "shall find and determine" several factors. Although there are seven factors in all, only five of them need be met by a proposed facility that, like National Fuel's, is less than ten miles in length. N.Y.Pub.Serv.Law § 121–a(7). Those five necessary findings are:

(a) the basis of the need for the facility;

(b) the nature of the probable environmental impact;

(e) ... that the location of the line will not pose an undue hazard to persons or property along the area traversed by the line;

(f) that the location of the facility as proposed conforms to applicable state and local laws and regulations issued thereunder, all of which shall be binding upon the commission, except that the commission may refuse to apply any local ordinance, law, resolution or other action or any regulation issued thereunder or any local standard or requirement which would be otherwise applicable if it finds that as applied to the proposed facility such is unreasonably restrictive in view of the existing technology, or of factors of cost or economics, or of the needs of consumers whether located inside or outside of such municipality.

(g) that the facility will serve the public interest, convenience, and necessity....

N.Y.Pub.Serv.Law § 126(1). [1]

Like the FERC proceeding, the PSC's application process involves the filing of supporting documentation by the applicant. Section 122 of the Public Service Law states that

> [a]n applicant for a certificate shall file with the commission an application, in such form as the commission may prescribe, containing the following information: (a) the location of the site or right-of-way; (b) a description of the transmission facility to be built thereon; (c) a summary of any studies which have been made of the environmental impact of the project, and a description of such studies; (d) a statement explaining the need for the facility; (e) a description of any reasonable *575 alternate location or locations for the proposed facility, a description of the comparative methods and detriments of each location submitted, and a statement of the reasons why the primary proposed location is best suited for the facility; and (f) such other

> information as the applicant may consider relevant or the commission may by regulation require. Copies of all the studies referred to in (c) above shall be filed with the commission and shall be available for public inspection.

N.Y.Pub.Serv.Law § 122(1). Gas lines extending less than ten miles and those extending less than five miles with a nominal diameter of six inches or less require the filing of somewhat abbreviated versions of the survey above. N.Y.Pub.Serv.Law §§ 121–a(2), 121–a(3).

For many years after enactment of Article VII, the PSC had never attempted to subject interstate pipeline construction to Article VII's regulatory scheme. In recent times, however, the PSC has attempted to assert authority over such construction. Anticipating an attempt by the PSC to review the National Fuel project at issue in the instant matter, National Fuel took the position that it did not need to seek a PSC certificate because Article VII was preempted by the various federal statutes and FERC regulations adopted pursuant to them. National Fuel therefore brought this action in the Northern District of New York seeking a declaratory judgment and an injunction against the PSC.

On cross-motions for summary judgment, the district court ruled in favor of the PSC and dismissed the complaint. Judge Munson held that even if the Natural Gas Act and the Natural Gas Pipeline Safety Act created an area preempted by FERC, that area is "pockmarked with exceptions." Relying on Public Service Law Section 121(4), which states that Article VII "shall not apply to any major utility transmission facility ... [o]ver which any agency or department of the federal government has exclusive jurisdiction, or has jurisdiction concurrent with that of the state and has exercised such jurisdiction, to the exclusion of regulation of the facility by the state," N.Y.Pub.Serv.Law §§ 121(4), 121(4)(c), Judge Munson held that Article VII could be applied in a way that would avoid encroaching on the FERC's jurisdiction. Finally, he held that Congress, in passing the various statutes in question, did not intend to preempt the states from maintaining their own environmental supervision of FERC-authorized projects. We disagree on all points.

DISCUSSION

The preemption doctrine is rooted in the Supremacy Clause of the Constitution, Article VI, clause 2, which states, "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

[1] Preemption exists under the Supremacy Clause where (i) Congress expressly intended to preempt state law, *Jones v. Rath Packing Co.*, 430 U.S. 519, 97 S.Ct. 1305, 51 L.Ed.2d 604 (1977); (ii) there is actual conflict between federal and state law, *Free v. Bland*, 369 U.S. 663, 82 S.Ct. 1089, 8 L.Ed.2d 180 (1962); (iii) compliance with both federal and state law is impossible, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963); (iv) there is implicit in federal law a barrier to state regulation, *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983); (v) Congress has "occupied the field" of the regulation, leaving no room for a state to supplement the federal law, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947); or (vi) the state statute forms an obstacle to the realization of Congressional objectives, *Hines v. Davidowitz*, 312 U.S. 52, 61 S.Ct. 399, 85 L.Ed. 581 (1941). *See generally* ***576** *Louisiana Pub. Serv. Comm'n v. Federal Communications Comm'n*, 476 U.S. 355, 368–69, 106 S.Ct. 1890, 1898–99, 90 L.Ed.2d 369 (1986). Federal law need not be statutory to preempt state law. Regulations promulgated by an agency pursuant to its delegated authority may preempt similar state regulations. *See Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 104 S.Ct. 2694, 81 L.Ed.2d 580 (1984); *Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 102 S.Ct. 3014, 73 L.Ed.2d 664 (1982).

National Fuel's preemption argument rests on two theories. First, it argues that the Natural Gas Act was intended by Congress to vest exclusive jurisdiction in the FERC to regulate natural gas pipelines used in interstate commerce. Second, it asserts that a comparison of Article VII and the FERC regime demonstrates that Congress has fully occupied the field that the PSC would regulate. Given the considerable overlap of the two regulatory

schemes and the delay or frustration of federally approved projects that would be the inevitable outcome of PSC proceedings regarding every interstate project, National Fuel's arguments seem facially overwhelming. To these arguments, however, the PSC offers an inventive response. Conceding *sub silentio* that FERC proceedings and the whole of Article VII cannot coexist, the PSC argues that Article VII may be applied piecemeal under Section 121(4)(c), which disclaims state jurisdiction where there is exclusive federal jurisdiction or concurrent federal jurisdiction that has been exercised. The PSC goes on to argue that the FERC does not conduct "site-specific" environmental review and that such review is therefore neither a matter within exclusive federal jurisdiction nor a matter within concurrent federal jurisdiction that has been exercised. Such review, it is argued, may thus be the subject of PSC proceedings.

[2] As to National Fuel's argument that Congress intended to vest exclusive jurisdiction to regulate pipelines in the FERC, a recent Supreme Court decision weighs heavily in National Fuel's favor. In *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 108 S.Ct. 1145, 99 L.Ed.2d 316 (1988), the Court held 8–0 that a Michigan statute requiring natural gas companies to obtain approval from the Michigan Public Service Commission before issuing long-term securities was preempted by the Natural Gas Act. Writing for the Court, Justice Blackmun defined the preemption issue broadly as a question of "whether [the Michigan law] is a regulation of the rates and facilities of natural gas companies used in transportation and sale for resale of natural gas in interstate commerce." 108 S.Ct. at 1154. Finding that the Michigan law was such a regulation, the Court concluded that it was preempted. *See id.*

The PSC seeks to distinguish *Schneidewind* on the ground that the Michigan law in question, although it affected only the issuance of securities, "had as its central purpose[] the maintenance of [natural-gas companies'] rates at what the State considered a reasonable level," thereby encroaching upon the FERC's jurisdiction, Appellees' brief at 15 (quoting *Northwest Cent. Pipeline Corp. v. State Corp. Comm'n of Kansas*, 489 U.S. 493, 109 S.Ct. 1262, 1275 n. 10, 103 L.Ed.2d 509 (1989)). In contrast, it argues that site-specific environmental review has no such effect.

Schneidewind stated, however, that the FERC has exclusive authority over the "rates *and facilities* " of interstate gas pipelines. *See* 108 S.Ct. at 1151, 1154 (emphasis added). Even if we assume that the proposed PSC regulation would be limited to site-specific environmental review—an issue discussed *infra*—that review is undeniably a regulation of a facility used in the interstate transportation of natural gas. Such proceedings would certainly delay[2] and might well, by the imposition of additional requirements or prohibitions, prevent the construction of federally approved interstate ***577** gas facilities. Indeed, we were advised at oral argument that the PSC is prepared to use the threat of route-refusal or fines of $100,000 per day against National Fuel in the event of non-compliance. In *Schneidewind,* the Court noted a similar "imminent possibility" of conflict in holding the Michigan statute preempted. *See* 108 S.Ct. at 1156; *see also Northern Natural Gas Co. v. State Corp. Comm'n of Kansas,* 372 U.S. 84, 91–93, 83 S.Ct. 646, 650–652, 9 L.Ed.2d 601 (1963); *National Steel Corp. v. Long,* 689 F.Supp. 729, 738 (W.D.Mich.1988), *aff'd sub nom. Michigan Consolidated Gas Co. v. Panhandle Eastern Pipe Line Co.,* 887 F.2d 1295 (6th Cir.1989), *Northwest Central Pipeline,* relied upon by the PSC, is not to the contrary. The Kansas law upheld there was found by the Court to be plausibly intended as a regulation of the "production or gathering" of natural gas, an area expressly preserved for the states by Section 1(b) of the Natural Gas Act, 15 U.S.C. § 717(b). *See* 109 S.Ct. at 1275.

The validity of National Fuel's second argument—that preemption may be inferred because Congress has occupied the field of regulation regarding interstate gas transmission facilities—is also apparent. The overlap of the pertinent federal and state regulatory regimes is very substantial. For instance, an applicant for a PSC certificate of environmental compatibility and public need must satisfy the PSC regarding "the basis of the need for the facility," and must show "that the facility *will serve the public interest, convenience, and necessity.*" N.Y.Pub.Serv.Law §§ 126(1)(a), 126(1)(g) (emphasis added). The FERC, meanwhile, will issue a certificate only if it finds that:

> the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and

> that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, *is or will be required by the present or future public convenience and necessity;* otherwise such application shall be denied.

15 U.S.C. § 717f(e) (emphasis added).

Article VII requires a finding by the PSC regarding "the nature of the probable environmental impact," and, for lines longer than ten miles, requires a finding "that the facility represents the minimum adverse environmental impact" under the prevailing technological and economic circumstances. *See* N.Y.Pub.Serv.Law §§ 126(1)(b), 126(1)(c); *supra* note 1. The FERC also requires environmental information, including a statement of the factors considered in arriving at a given site proposal, a statement exploring the factors considered in proposing a route through scenic, historic, recreational or wildlife areas, 18 C.F.R. § 157.14(a)(6–b), a statement adopting the guidelines of 18 C.F.R. § 2.69 regarding the preservation of scenic, historic, wildlife and recreational values, 18 C.F.R. § 157.14(a)(6–c), and an environmental impact statement in compliance with the NEPA. 18 C.F.R. § 380.3.

With regard to safety considerations, Article VII requires that the PSC determine "that the location of the line will not pose an undue hazard to persons or property along the area traversed by the line," and "that the location of the facility as proposed conforms to applicable state and local laws and regulations issued thereunder." N.Y.Pub.Serv.Law §§ 126(1)(e), 126(1)(f). The National Gas Pipeline Safety Act governs safety requirements for interstate gas transmission lines and expressly preempts more stringent regulation of such lines by state agencies. *See* 49 U.S.C.App. § 1672(a)(1).

The PSC does not deny that Article VII is substantially preempted by the FERC's regulatory authority. Instead, it argues that Section 121(4)(c), negating application of the Article to facilities "[o]ver which any agency or department of the federal government has exclusive jurisdiction, or has jurisdiction concurrent with that of the state and has exercised such jurisdiction, to the exclusion of regulation of the facility by the state," allows the PSC to pick and choose among Article VII's various requirements *578 and to apply the Article piecemeal in each case to substantive areas it deems unregulated by the federal government.

We are not persuaded. Were we a New York state court, we would not hesitate to hold that Article VII is not amenable to piecemeal application. Article VII states that each of the five (in the case of longer pipelines, seven) requisite findings must be made by the PSC before a certificate will be issued. It thus makes no provision for issuance of a certificate when some but not other of the findings have been made. Similarly, the language of Section 121(4)(c) is most easily read as a statement that Article VII is inapplicable in its entirety when federal authority has been exercised. Tellingly, moreover, the PSC itself appears for many years to have agreed that piecemeal application was not authorized and did not attempt to regulate pipelines carrying natural gas in interstate commerce until recently.

We are not a New York state court, however, and will not dwell on the meaning of Article VII because we believe that even if the PSC's present view is correct and piecemeal application of Article VII was intended by the New York legislature, Section 121(4)(c) is insufficient to preserve the authority asserted. As the PSC interprets it, Section 121(4) says no more than that the PSC should not exercise authority preempted under the Supremacy Clause. That Section does not purport to identify what portions of PSC authority under Article VII are viable or preempted in particular cases. Rather, once PSC proceedings begin, it can in its discretion attempt to exercise whatever portions of its regulatory authority it chooses, subject only to review by the New York courts with the possibility of discretionary review in the United States Supreme Court. Although its litigating posture in this case is to designate site-specific environmental review as its goal, Article VII offers no guidelines or directions preventing the PSC from attempting to exercise other aspects of its regulatory authority with regard to National Fuel's project. So-called piecemeal application of Article VII would thus allow the PSC to confront interstate transporters of gas with as much of the panoply of Article VII regulation as it chooses and to force them to litigate the preemption question issue by issue in state tribunals. Even if a transporter were ultimately successful before the PSC, the practical effect would be to undermine the FERC approval by imposing the costs and delays inherent in litigation that must be undertaken without any guidelines as to limits

on the exercise of state authority. If the PSC is correct, moreover, no state law, no matter how inconsistent with a federal law, would ever be facially preempted so long as it included a provision stating that the relevant state tribunals would abide by the Supremacy Clause, an obligation to which they are already bound.

Third, even if we assume that a small residue of valid PSC authority may exist, that the residue is easily identifiable, and that the PSC will forebear the exercise of the rest of its powers, the subject matter assertedly "saved" by Section 121(4)(c)—site-specific environmental review—is not New York's to save. The FERC expressly considered various data regarding the environmental effects of National Fuel's project before issuing a certificate of public convenience and necessity. National Fuel had to provide to the FERC a statement of factors considered in locating the facilities, including the possibility of using existing rights-of-way. It further provided a statement of factors considered in locating the facilities in scenic, historic, recreational or wildlife areas and the reasons for doing so. It had to provide yet another statement that it had followed federal guidelines minimizing adverse effects on scenic, historic, wildlife and recreational values. Finally, it had to submit an environmental impact statement to the FERC pursuant to NEPA.[3] The PSC was free to intervene ***579** and present whatever contrary data it wished. It declined to do so.

The matters sought to be regulated by the PSC were thus directly considered by the FERC. Under *Schneidewind,* such direct consideration is more than enough to preempt state regulation. In that case, the Court invalidated a Michigan law that concerned a matter not explicitly considered by the FERC, namely the issuance of long-term securities, because the law affected a preempted area, namely rate-making. Here, we confront a state law concerning a matter explicitly considered by the FERC and affecting a preempted area.

Congress placed authority regarding the location of interstate pipelines—in the present case affecting citizens of four states in addition to New York—in the FERC, a federal body that can make choices in the interests of energy consumers nationally, with intervention afforded as of right to relevant state commissions. Because FERC has authority to consider environmental issues, states may not engage in concurrent site-specific environmental review. Allowing all the sites and all the specifics to be regulated by agencies with only local constituencies would delay or prevent construction that has won approval after federal consideration of environmental factors and interstate need, with the increased costs or lack of gas to be borne by utility consumers in other states.

Finally, the PSC argues that the FERC regulations themselves require that an applicant obtain certain state river crossing permits, *see* 18 C.F.R. Part 380, App.A., ¶ 9.1, and that the PSC is the authority responsible for the issuance of those permits. We need not pause to consider this argument in detail, because National Fuel's action seeks neither to relieve itself of the requirements of the FERC certificate nor to avoid FERC regulation. To the extent that the PSC desires to challenge National Fuel's compliance with the FERC order, it may pursue whatever federal administrative and judicial remedies are available to compel that compliance. Similarly, to the extent that the PSC desires to enforce federal regulations through available federal administrative or judicial decisions, nothing in our present decision prevents it from doing so.

CONCLUSION

We reverse the decision of the district court and remand with instructions to enter judgment for National Fuel.

All Citations

894 F.2d 571, 109 P.U.R.4th 383, 58 USLW 2457

Footnotes

* The Hon. Peter K. Leisure, United States District Judge for the Southern District of New York, sitting by designation.

1 Section 126(1)(d) applies only to electric transmission lines. Section 126(1)(c), although not applicable here, does affect gas lines longer than ten miles under Section 121–a(7). It requires a finding by the PSC:

> that the facility represents the minimum adverse environmental impact, considering the state of available technology and the nature and economics of the various alternatives, and other pertinent considerations including but not limited to, the effect on agricultural lands, wetlands, parklands and river corridors traversed.

N.Y.Pub.Serv.Law § 126(1)(c).

2 The PSC concedes that just such delays were visited upon *amicus curiae* Columbia Gas Transmission Corporation in an Article VII proceeding concerning an interstate gas facility. It argues, however, that those delays were caused by extraordinary and exceptional local opposition. We perceive no reason to expect that local opposition will be an exceptional event, particularly because there may generally be little local benefit from interstate facilities.

3 The PSC argues strenuously that the fact that the environmental impact statement submitted to the FERC was required by NEPA rather than the Natural Gas Act somehow lessens the preemptive effect of the FERC's approval. We believe this argument is misplaced. As the text indicates, the FERC requires under its own authority extensive environmental data and considers that data in making its decision. It also considers the environmental impact statement required by NEPA. The decision is then made by the FERC, and whether NEPA itself preempts or does not preempt is simply irrelevant to the preemptive effect of that decision.

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254 F.Supp.2d 1103
United States District Court,
S.D. Iowa,
Central Division.

NORTHERN NATURAL GAS COMPANY and Northern Border Pipeline Company, Plaintiffs,
v.
Diane MUNNS, Mark O. Lambert, and Elliott Smith, Individually in their Official Capacities as Members of the Iowa Utilities Board, Defendants.

No. CIV. 4–01–CV–70473.
|
Feb. 28, 2003.

Interstate natural gas pipeline companies brought action against members of Iowa Utilities Board for declaratory judgment that state laws relating to natural gas pipelines were preempted by federal statutes and regulations. On cross-motions for summary judgment, the District Court, Vietor, J., held that: (1) state law was preempted by federal law; (2) state law violated contract clause; and (3) companies had no individualized federal rights enforceable under §1983.

Motions of plaintiff granted in part and denied in part, and motions of defendant denied.

West Headnotes (10)

[1] **States**
Conflicting or conforming laws or regulations

State laws that are contrary to or interfere with federal law are invalid, since federal law preempts state laws. U.S.C.A. Const. Art. 6, cl. 2.

Cases that cite this headnote

[2] **Environmental Law**
Federal preemption

States
Environment;nuclear projects

Iowa statute and regulations on environmental standards for construction of interstate natural gas pipelines were preempted by federal law, since they encroached upon authority of Federal Energy Regulatory Commission (FERC) under Natural Gas Act (NGA) and National Environmental Policy Act (NEPA) to consider and determine environmental and land use standards surrounding construction of interstate natural gas pipelines. U.S.C.A. Const. Art. 6, cl. 2; Natural Gas Act, § 1 et seq., 15 U.S.C.A. § 717 et seq.; National Environmental Policy Act, § 2 et seq., 42 U.S.C.A. § 4321 et seq.; I.C.A. §479A.1 et seq.

3 Cases that cite this headnote

[3] **Constitutional Law**
Existence and extent of impairment

Constitutional Law
Police power;purpose of regulation

In determining whether state law runs afoul of Contract Clause, court must determine whether state law substantially impairs existing contracts, and, if so, whether law is supported by significant and legitimate public purpose, and whether adjustment of contracting parties' rights and responsibilities is based on reasonable conditions and is appropriate in light of state's public purpose justifying the legislation. U.S.C.A. Const. Art. 1, § 10, cl. 1.

Cases that cite this headnote

[4] **Constitutional Law**
Existence and extent of impairment

Whether impairment of contract is substantial, as would violate contracts clause, depends in part upon extent to which impairment has disrupted the contracting parties' reasonable expectations, measured by whether industry in question has been regulated in past and nature of those regulations. U.S.C.A. Const. Art. 1, § 10, cl. 1.

Cases that cite this headnote

[5] **Constitutional Law**
Application to state and local laws and regulations
Constitutional Law
Application to federal laws and regulations
Constitutional Law
Existence and extent of impairment
Gas
Statutory and municipal regulation in general

Iowa statute placing use requirements on continuation of natural gas pipeline easements violated contracts clause, which significantly altered contracting parties' expectations, since parties contracted for perpetual easements; statute was a substantial impairment to parties' contract for natural gas pipeline easement and there was no evidence of harms created by nonuse of pipeline easements that were remedied by statute, which applied only to landowners who contracted with natural gas pipeline companies. U.S.C.A. Const. Art. 1, § 10, cl. 1; I.C.A. § 479A.27, subd. 1.

Cases that cite this headnote

[6] **Constitutional Law**
Police power;purpose of regulation

State statute substantially impairing contract rights of parties may survive constitutional challenge, if statute imposes a generally applicable rule of conduct designed to advance broad societal interest, and not merely prescribe a rule limited in effect to contractual obligations or remedies. U.S.C.A. Const. Art. 1, § 10, cl. 1.

Cases that cite this headnote

[7] **Constitutional Law**
Existence and extent of impairment
Constitutional Law
Police power;purpose of regulation
Constitutional Law
Real property in general
Gas
Statutory and municipal regulation in general

Iowa statute listing compensable losses to landowners, including loss of or damage to trees in construction of pipeline, violated Contracts Clause, since statute was a substantial impairment to parties' contract for natural gas pipeline easements and previous state statutory damages were limited in scope, contracting parties specifically contracted for right to remove trees and brush, and statute was not justified by significant and legitimate purpose. U.S.C.A. Const. Art. 1, § 10, cl. 1; I.C.A. § 479A.24.

Cases that cite this headnote

[8] **Civil Rights**
Other particular rights

Violation of Supremacy Clause does not give rise to §1983 claim, since Supremacy Clause is not the source of any substantive federal rights, rather it secures federal rights by giving them priority when they conflict with state law; such remedy would depend on whether federal statute that preempts state law creates a federal right. U.S.C.A. Const. Art. 6, cl. 2; 42 U.S.C.A. § 1983.

Cases that cite this headnote

[9] **Action**
Statutory rights of action

To create an enforceable federal right, statute must unambiguously convey Congress' intent to confer individual rights, through rights-creating language.

Cases that cite this headnote

[10] **Civil Rights**
Other particular rights

Natural Gas Act (NGA) did not confer on natural gas pipeline company a right not to be regulated by states, enforceable under §1983, since NGA had no individualized, rights-creating language in favor of natural gas

pipeline company. Natural Gas Act, § 1 et seq., 15 U.S.C.A. § 717 et seq.; 42 U.S.C.A. § 1983.

2 Cases that cite this headnote

West Codenotes

Preempted
I.C.A. §§ 479A.1, 479A.2, 479A.3, 479A.4, 479A.5, 479A.6, 479A.7, 479A.8, 479A.9, 479A.10, 479A.11, 479A.12, 479A.13, 479A.14, 479A.15, 479A.16, 479A.17, 479A.18, 479A.19, 479A.20, 479A.21, 479A.22, 479A.23, 479A.24, 479A.25, 479A.26, 479A.27 479A.28.

Prior Version Recognized as Preempted
I.C.A. §§ 479.1, 479.2, 479.3, 479.4, 479.5, 479.6, 479.7, 479.8, 479.9, 479.10, 479.11, 479.12, 479.13, 479.14, 479.15, 479.16, 479.16, 479.17, 479.18, 479.19, 479.20, 479.21, 479.22, 479.23, 479.24, 479.25, 479.26, 479.27, 479.28, 479.29, 479.30, 479.31, 479.32, 479.33, 479.34, 479.41, 479.42, 479.43, 479.44, 479.45, 479.46, 479.47.

Attorneys and Law Firms

***1105** Philip E Stoffregen, Helen C Adams, Bret A Dublinske, Dickinson Mackaman Tyler & Hagen PC, Des Moines, for Northern Natural Gas Co, Northern Border Pipeline Company, plaintiffs.

David Jay Lynch, Iowa Utilities Board Dept of Commerce, Des Moines, for Allan T Thomas, Diane Munns, Susan Frye, Mark O Lambert, Elliott Smith, defendants.

AMENDED AND SUBSTITUTED MEMORANDUM OPINION, RULINGS GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, AND ORDER FOR JUDGMENT

VIETOR, Senior District Judge.

Plaintiffs Northern Natural Gas Company ("Northern Natural") and Northern Border Pipeline Company ("Northern Border") (collectively "plaintiffs") brought this action against Dianne Munns, Mark O. Lambert, and Elliott Smith ("the Board members" or "defendants"), individually in their official capacities as members of the Iowa Utilities Board ("the Board").[1] Plaintiffs seek a declaratory judgment that state regulatory laws relating to natural gas pipelines, Iowa Code chapter 479A (2001) and the implementing administrative regulations, 199 Iowa Administrative Code chapters 9 and 12 (collectively "the state laws"), violate the Supremacy Clause, U.S. CONST. art. VI, cl. 2, because they are preempted by federal statutes and regulations.[2] Plaintiffs also claim various portions ***1106** of the state laws violate the Contract Clause, U.S. CONST. art. I, § 10, because they effectively rewrite provisions of plaintiffs' existing easements with landowners. Finally, plaintiffs assert that the Board members' actions in enforcing the state laws deprive them of rights secured by federal law, such that the defendants are liable under 42 U.S.C. § 1983. Plaintiffs also seek injunctive relief to preclude defendants from enforcing the state laws. This court's subject matter jurisdiction rests on 28 U.S.C. § 1331.

Plaintiffs and the Board members filed cross motions for summary judgment. Each party filed a resistance to the other party's motion and replies to those resistances. Oral arguments were heard, and the matter is fully submitted.

I. Background

Northern Natural is an interstate natural gas pipeline company that owns and operates a 17,000–mile interstate pipeline that runs through Iowa. Northern Border, also an interstate natural gas pipeline company, owns and operates a 1,214–mile pipeline which runs through Iowa. Plaintiffs contracted with Iowa landowners for easements on land across which plaintiffs built portions of these interstate pipelines. The easement contracts are composed of standard forms, which are modified in some cases. The contracts generally address damages paid to landowners, depth of cover of pipelines, surface conditions, the perpetual nature of the easements, topsoil protection, rocks and drain tile. Not all contracts address all of these issues.

The Iowa general assembly enacted Iowa Code chapter 479A in 1988 and made substantive amendments in 1995, 1999, and 2000.[3] Specifically, Iowa Code section 479A.14(1) directs the Board, an administrative agency

of the state of Iowa that operates pursuant to Iowa Code chapter 474, to adopt rules establishing standards pertaining to topsoil replacement, removal of rock and debris, erosion control, repairs to drain tile, land restoration plans and other environmental issues during and after pipeline construction.

The Board, whose current members are chairperson Diane Munns, Mark Lambert, and Elliott Smith, originally adopted 199 Iowa Administrative Code chapter 9, concerning the restoration of agricultural lands during and after pipeline construction, in 1980, and chapter 12, concerning interstate natural gas pipelines and underground storage, in 1991. Following the 1999 revision of section 479A.14, the Board initiated rulemaking in September 1999, and subsequently received public comments on its proposed land restoration rules. On January 10, 2001, the Board adopted rules that vacated the existing 199 Iowa Administrative Code chapter 9 and replaced it with the current version of chapter 9, which took effect on March 14, 2001. ***1107** Iowa Administrative Code rule 199–9.2 requires a natural gas pipeline company to file a land restoration plan which must include, but is not limited to, a brief description of the purpose and nature of the construction project, a description of the sequence of events that will occur during construction, and a description of how the natural gas pipeline company will comply with the requirements of Iowa Administrative Code rule 199–9.4(1)–(10). Iowa Administrative Code rule 199–9.4 sets out specifications for topsoil separation and replacement, temporary and permanent repair of drain tile, removal of rock and debris from the right-of-way, soil restoration, erosion control, revegetation, and construction in wet conditions.

In 2001 Northern Natural sought to upgrade a pipeline near DeWitt, Iowa. The construction was authorized under a blanket certificate of public convenience and necessity issued by the Federal Energy Regulatory Commission (FERC) pursuant to section 7 of the Natural Gas Act (NGA). In issuing a blanket certificate, FERC considers possible environmental impact based in part on environmental resource reports prepared and submitted by a natural gas pipeline company pursuant to 18 C.F.R. §§ 380.3(c)(2)(i) and 380.12 (2002). Northern Natural also agreed to follow FERC's "Upland Erosion Control, Revegetation and Maintenance Plan" ("FERC Plan") [4] in its construction. On August 21, 2001, Northern Natural, citing its agreement to follow the FERC Plan, requested a waiver, pursuant to Iowa Administrative Code rule 199–9.2(2), of certain rules in chapter 9 concerning land restoration. The state Office of Consumer Advocate objected, and the Board, on August 31, 2001, issued an order denying Northern Natural's requested waiver. The Board reasoned that "the FERC Plan does not require restoration of the affected land to a condition as good as or better than provided in the Board's rules." Appendix to Plaintiffs' Motion for Summary Judgment [hereinafter "Pls.App."] Section M (Order Denying Request for Waiver) at 5. [5]

II. Legal Analysis

A. Summary Judgment Standards

Summary judgment is appropriate only when the record, viewed in the light most favorable to the nonmoving party, presents no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Nat'l Bank of Commerce v. Dow Chem. Co.*, 165 F.3d 602, 606 (8th Cir.1999). In this case, there are scant if any fact disputes; the issues are legal, not factual.

*1108 B. Preemption

[1] Under the Supremacy Clause of the United States Constitution, U.S. CONST. art. VI, cl. 2, state laws that are contrary to or interfere with federal law are invalid; the federal law preempts the state laws. *Brooks v. Howmedica, Inc.*, 273 F.3d 785, 792 (8th Cir.2001), *cert. denied*, 535 U.S. 1056, 122 S.Ct. 1914, 152 L.Ed.2d 823 (2002). The focus of any preemption analysis is Congress's intent. *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 299, 108 S.Ct. 1145, 99 L.Ed.2d 316 (1988). Plaintiffs identify three different types of preemption, although it is important to note that such categories are not "rigidly distinct." *NE Hub Partners, L.P. v. CNG Transmission Corp.*, 239 F.3d 333, 348 (3d Cir.2001) (quoting *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 n. 5, 110 S.Ct. 2270, 110 L.Ed.2d 65 (1990)). First, Congress may, through a statute's plain language, explicitly preempt state regulation in an area. *Schneidewind*, 485 U.S. at 299, 108 S.Ct. 1145. In *Schneidewind*, the Supreme Court held that "[t]he NGA confers upon FERC exclusive jurisdiction

over the transportation and sale of natural gas in interstate commerce for resale." *Id.* at 300–01, 108 S.Ct. 1145 (citing *N. Natural Gas Co. v. State Corp. Comm'n of Kansas,* 372 U.S. 84, 89, 83 S.Ct. 646, 9 L.Ed.2d 601 (1963)). Plaintiffs, citing *Schneidewind,* argue that by imposing substantive requirements such as restoration standards on the land across which pipelines run, Iowa Code chapter 479A and 199 Iowa Administrative Code chapters 9 and 12 regulate the "transportation of natural gas in interstate commerce" and therefore are expressly preempted by the NGA.

Second, Congress may imply an intent to "occupy the field" through pervasive and comprehensive federal regulations in an area or where the federal interest in an area is sufficiently dominant. *Id.* at 300, 108 S.Ct. 1145 (citing *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947)). Plaintiffs contend that even if the NGA does not explicitly preempt Iowa's regulations, federal laws, including the NGA, the Natural Gas Policy Act (NGPA), the National Environmental Policy Act (NEPA), the Natural Gas Pipeline Safety Act (NGPSA), and FERC and United States Department of Transportation (USDOT) regulations promulgated pursuant to theses statutes, demonstrate Congress's intent to occupy the field of interstate natural gas pipeline construction, operation and maintenance, including environmental aspects of pipeline construction and maintenance.

Finally, state law is preempted to the extent that it actually conflicts with federal law. *Id.* An actual conflict occurs when it is impossible to comply with both the state and federal laws or where "the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Cal. Coastal Comm'n v. Granite Rock Co.,* 480 U.S. 572, 581, 107 S.Ct. 1419, 94 L.Ed.2d 577 (1987) (citation omitted) (quoting *Silkwood v. Kerr–McGee Corp.,* 464 U.S. 238, 248, 104 S.Ct. 615, 78 L.Ed.2d 443 (1984)). Here, plaintiffs contend state regulations with respect to topsoil removal, drain tile screening and rock removal directly conflict with the regulations provided in the FERC Plan.

The Board members counter in support of their motion for summary judgment that the federal statutes and regulations, including the NGA, preempt only state safety regulations relating to interstate natural gas pipelines, not regulations concerning land restoration during and after pipeline construction. They further contend that the Eighth Circuit Court of Appeals in *ANR Pipeline Co. v. Iowa State Commerce Commission* invited Iowa's environmental regulations by stating that although ***1109** Iowa's pipeline safety regulations were preempted, its decision "does not necessarily preclude Iowa from enacting environmental regulations applicable to interstate pipelines, or from providing remedies for its citizens whose property is damaged during pipeline construction." 828 F.2d 465, 473 (8th Cir.1987). Furthermore, certain language in the FERC Plan, according to the Board members, specifically contemplates state regulations, refuting plaintiffs' assertion that federal law occupies the field of interstate natural gas pipelines. With respect to plaintiffs' conflict preemption argument, the Board members contend that the Iowa regulations regarding topsoil segregation, tile screening, and rock removal do not create a direct conflict because plaintiffs can meet both the federal and state requirements, and the more restrictive state regulations do not interfere with the purposes or objectives of federal regulations or the FERC Plan.

The construction of natural gas pipelines is regulated by both statutes (including the NGA, the NGPSA, and the NEPA provisions applicable to pipelines, which control the siting, materials used and maintenance) and regulations promulgated by FERC and the USDOT pursuant to those statutes. The NGA, as noted in *Schneidewind,* provides FERC exclusive jurisdiction over the rates and facilities of the transportation of natural gas. To this end, natural gas pipeline companies must apply for and receive a certificate of public convenience and necessity ("FERC certificate") before the construction of any natural gas pipeline. 15 U.S.C. § 717f(c)(1)(A). Several regulations implementing the NGA and the NEPA require environmental review as part of the certificate application process. Natural gas pipeline companies undertaking major construction of storage tanks or pipelines pursuant to the NGA, where no natural gas pipeline currently exists, must file an environmental impact statement or environmental assessment. 18 C.F.R. § 380.6(a)(2)-(3), (b) (implementing the NEPA); *see, e.g.,* Pls.App. Section G (Northern Border Pipeline Company Project 2000 Environmental Assessment). Moreover, pipeline construction authorized under a FERC certificate must be performed in a manner that takes into account soil stability and the protection of vegetation in clearing a right-of-way and also be consistent with federal environmental acts. 18 C.F.R. § 157.206(b)(1)-(2)

(referencing 18 C.F.R. § 380.15). Additionally, through regulations implementing the NEPA, FERC requires, among other things, that an application for such a certificate under the NGA must include an environmental report that addresses thirteen specific areas, *id.* § 380.12(a), including, in part, water use and quality, *id.* § 380.12(d), vegetation, *id.* § 380.12(e), geological resources, *id.* § 380.12(h), soils, *id.* § 380.12(i), and land use, *id.* § 380.12(j). A natural gas pipeline company must, with respect to soils, describe both the soils that are potentially affected by the construction and the "proposed mitigation measures to reduce the potential for adverse impact to soils or agricultural productivity." *Id.* § 380.12(i)(5) & App. A, Resource Report 7—Soils. In addition, an applicant must compare its proposed mitigation plans with the FERC Plan and explain how its plans provide equivalent or greater environmental protections than those established in the FERC Plan. *Id.* § 380.12(i)(5).

The FERC Plan, which Northern Natural adopted for its DeWitt project, requires at least one environmental inspector for each project during construction to ensure compliance with environmental specifications in the FERC certificate, to test topsoil in agricultural areas to measure compaction, to ensure restoration of topsoil, and to inspect temporary erosion control measures. Pls.App. Section E (FERC ***1110** Plan) at 2–4. FERC also vests inspectors with the authority to stop activities found to violate provisions of the FERC certificate. *Id.* at 2. Following construction, natural gas pipeline companies must monitor all disturbed areas after each of the first two growing seasons to gage the success of revegetation and the need for additional restoration, *id.* at 16, and report certain information, including the dates of backfilling and seeding, *id.* at 17.

Substantively, the FERC Plan covers a wide range of issues in pipeline installation and land restoration. Section IV.B provides that natural gas pipeline companies must make every effort to remove the actual topsoil layer if the layer is less than 12 inches and at least 12 inches in deeper soils. *Id.* at 7. Section IV.C, regarding drain tile repair, provides that natural gas pipeline companies must repair tiles to original or better condition, using screens only if local soil conservation authorities and landowners agree. *Id.* at 8. Section V.A provides that during restoration natural gas pipeline companies must remove rocks from at least the top 12 inches of soil and maintain rocks in the construction work area that are similar in size and density as rocks found in adjacent, non-construction areas. *Id.* at 12. The FERC Plan also mandates testing to measure soil compaction, *id.* at 13, provides seeding requirements for revegetation, *id.* at 14–15, and defines what it considers successful revegetation and restoration, *id.* at 16.

The foregoing federal statutes and regulations specify that environmental and land use issues be reviewed, and ultimately approved, by FERC prior to the issuance of a FERC certificate to begin construction. The materials natural gas pipeline companies file for review must address conditions both during and after construction to restore the affected land. The breadth of these statutes and regulations, when combined with extensive safety regulations applicable to pipeline construction, compel the conclusion that Congress has occupied the field of interstate gas pipeline regulation, including land maintenance and restoration standards. *Nat'l Fuel Gas Supply Corp. v. Pub. Serv. Comm'n,* 894 F.2d 571, 577–79 (2d Cir.), *cert. denied,* 497 U.S. 1004, 110 S.Ct. 3240, 111 L.Ed.2d 750 (1990);[6] *see NE Hub Partners,* 239 F.3d at 346–48; *Algonquin Lng v. Loqa,* 79 F.Supp.2d 49, 51–52 (D.R.I.2000); *No Tanks Inc. v. Pub. Utils. Comm'n,* 697 A.2d 1313, 1315–16 (Me.1997).

Iowa Code chapter 479A, specifically 479A.14, and 199 Iowa Administrative Code chapters 9 and 12, which implement chapter 479A, squarely address the land use issues directly considered by FERC pursuant to the NGA and the NEPA. The purpose of chapter 479A, in part, is to "confer upon the [Board] the power and authority to implement certain controls over the transportation of natural gas to protect landowners and tenants from environmental or economic damages which may result from the construction, operation, or maintenance of a pipeline within the state." Iowa Code § 479A.1. Section 479A.14(1) requires the Board to "adopt rules establishing standards for the restoration of agricultural lands during and after pipeline construction." The non-exclusive list of subject matters that the Board must address include, in part, topsoil separation and replacement, drain tile repair, ***1111** rock removal from the right-of-way, soil compaction, revegetation and erosion control, Iowa Code § 479A.14(1)(a)-(f), the same topics which must be addressed in an application for a FERC certificate and which are addressed in the FERC Plan. The Board responded by establishing minimum requirements in these and other areas. Iowa Admin. Code r. 199–9.4(1)–(10); *id.* r. 199–12.7 (requiring that natural gas pipeline

companies construct pipelines in compliance with 199 Iowa Administrative Code chapter 9). A natural gas pipeline company must then, subject to a waiver from the Board, file a land restoration plan detailing how it will comply with these regulations. Iowa Code § 479A.14(9); Iowa Admin. Code r. 199–9.2(1)(c). Iowa Code section 479A.14(9) and Iowa Administrative Code rule 199–9.2(3) allow the Board to waive the filing of a separate land restoration plan if a FERC-accepted plan satisfies the state substantive requirements.

[2] These substantive provisions not only address the same issues that FERC considers when issuing a certificate authorizing construction, but set different standards. For example, natural gas pipeline companies must remove the actual depth of the topsoil up to 36 inches under Iowa regulations, Iowa Admin. Code r. 199–9.4(1)(a), while the FERC Plan requires removal of the actual depth of topsoil where the topsoil measures less than 12 inches, but the removal of at least 12 inches in deeper soil. With respect to rock removal, Iowa regulations mandate that the top 24 inches of backfilled topsoil shall be free of non-native rock larger than three inches, *id.* r. 199–9.4(3)(a), while the FERC Plan calls for removal of rocks from at least the top 12 inches of soil and provides that rocks may be similar in size to rocks found in adjacent, non-construction land. Iowa rules allow for temporary repairs of drain tiles or, in some cases, screening, *id.* r. 199–9.4(2)(b)(1)–(4), but the FERC Plan only mentions repair to original or better condition and allows filter-covered drain tiles upon agreement of local soil conservation authorities and landowners. A comparison of the state and federal regulations shows not only that Iowa's regulations encroach upon a field Congress has occupied with extensive regulation, but also that they conflict with federal regulations. *See Schneidewind,* 485 U.S. at 310, 108 S.Ct. 1145 (noting that preemption occurs when a state law hinders the federal government from engaging in comprehensive regulation or achieving uniformity in its regulation, even though "collision between the state and federal regulation may be not an inevitable consequence" (quoting *N. Natural Gas Co.,* 372 U.S. at 92, 83 S.Ct. 646)).

Moreover, the Iowa regulatory scheme imposes impermissible delays and burdens on the construction of a pipeline that already received federal approval, exemplified here by Northern Natural's waiver application and the Boards' rejection of it because, at least in part, the FERC Plan does not provide the minimum level of protection required by the Board's rule. *See Nat'l Fuel,* 894 F.2d at 578 (noting that even if an applicant were successful before state board, state review undermines FERC approval and imposes costs and delays); *Kern River Gas Transmission Co. v. Clark County, Nevada,* 757 F.Supp. 1110, 1115 (D.Nev.1990) (finding Nevada pipeline safety regulations preempted, citing in support county official's statements that revealed county fully expected compliance with safety standards "over and above" standards imposed by federal regulatory scheme). While there is no evidence here that defendants, as Board members, are seeking compliance with Iowa regulations for some ulterior purpose, as was the situation in *National Fuel* and *Kern River,* the burden and delay caused by the concurrent state review ***1112** is no less real, and supports a conclusion of preemption.

The defendants point to language in *ANR* in which the Eighth Circuit, in a footnote, noted that certain sections in the FERC regulations apparently anticipate state regulation. 828 F.2d at 473 n. 7. A portion of Section I.A in the FERC Plan, Pls.App. Section E at 1, which defendants cite in support of their argument, provides:

> Once a project is certified, further changes can be approved. Any such changes from the measures in this Plan (or the applicant's approved plan) will be approved by the Director of the Office of Energy Projects (Director), upon the applicant's written request, if the Director agrees that an alternative measure:
>
> ....
>
> 3. is specifically required in writing by another Federal, state, or Native American land management agency for the portion of the project *on its land or under its jurisdiction.*

(Emphasis added.) As the plain language makes clear, however, deviations based on written state regulations are allowed only on the portion of the pipeline running through state-owned (i.e., public) land, not privately owned land within a state. Any consideration of state regulations does not change the fact that FERC, through the NGA and the NEPA, considers and determines a full range of environmental and land use standards surrounding the construction of interstate natural gas pipelines. Likewise, the fact that FERC empowers environmental inspectors in Section II.B of

the Plan to ensure compliance with requirements of the FERC Plan, environmental conditions of the FERC authorization, and "other environmental permits and approvals" does not support defendants' argument. This language does not specify state permits and approvals, suggesting that the phrase "other environmental permits and approvals" may refer to other federal permits and approvals, like 18 C.F.R. § 157.206(b)(2)(i)-(xii), which mandates that activities authorized by a FERC certificate must be performed in accordance with twelve federal environmental acts. None of these arguments diminish the preemptive force of the detailed and comprehensive scheme of federal regulations that control environmental and land restoration issues of interstate natural gas pipeline construction.

In sum, this case is very similar to *National Fuel,* in that the Iowa statutes and regulations at issue, like the New York regulations considered by the Second Circuit, "concern[ ] ... matter[s] explicitly considered by ... FERC and affect[ ] a preempted area." 894 F.2d at 579. Although defendants claim Iowa's regulations "concern[ ] only one narrow part of the environmental impact of pipeline construction," Brief in Support of Defendant Board Members' Motion for Summary Judgment at 3, the federal statutes and regulations discussed above empower FERC to consider those same issues, placing those issues beyond concurrent state review. *Nat'l Fuel,* 894 F.2d at 579. In addition, the Iowa regulations propose different requirements from the FERC Plan. Congress has placed exclusive authority in FERC to consider land use and restoration issues concerning pipeline construction pursuant to the NGA and the NEPA. Accordingly, I conclude that Iowa Code chapter 479A and the accompanying regulations in 199 Iowa Administrative Code chapters 9 and 12 are preempted, and plaintiffs' motion for summary judgment on this issue will be granted, and defendants' motion on the same issue will be denied.

C. Contract Clause

Because my conclusion of preemption as to the reversion provisions and the damages ***1113** provisions of Iowa Code sections 479A.27 and 479A.24 is a close question, I will address plaintiffs' alternative argument that those sections impair pre-existing contracts and thus violate the Contracts Clause.

[3] The Contract Clause of the United States Constitution provides that "[n]o state shall ... pass any ... Law impairing the Obligation of Contracts ...." U.S. CONST. art. 1, § 10, cl. 1. In determining whether a state law runs afoul of the Contract Clause a court must determine whether the state law substantially impairs existing contracts, and, if so, whether the law is supported by a significant and legitimate public purpose, and whether the adjustment of the contracting parties' rights and responsibilities is based on reasonable conditions and is appropriate in light of the state's public purpose justifying the legislation. *Energy Reserves Group, Inc. v. Kan. Power & Light Co.,* 459 U.S. 400, 411–12, 103 S.Ct. 697, 74 L.Ed.2d 569 (1983); *Equip. Mfrs. Inst. v. Janklow,* 300 F.3d 842, 850 (8th Cir.2002). Plaintiffs allege that "all" of the changes in the Iowa Code and Iowa Administrative Code are substantial, but focus only on reversion through abandonment and nonuse of pipeline facilities for purposes of their motion for summary judgment. Defendants, in their motion, argue that any changes in the type and amount of damages owed to landowners and in construction and post-construction remediation requirements do not violate the Contracts Clause. Because I determined that state land use and restoration regulations were preempted, I will only address the impairments imposed by Iowa Code section 479A.27, regarding reversion, and Iowa Code section 479A.24, regarding damages.

1. Iowa Code § 479A.27—Reversion

Iowa Code section 479A.27(1), enacted in 1999, specifies three different ways in which a pipeline right-of-way may revert back to the owner of the land from which the right-of-way was taken.

> If a pipeline right-of-way, or any part of a pipeline right-of-way, is wholly abandoned for pipeline purposes by the relocation of the pipeline, is not used or operated for a period of five consecutive years, or if the construction of the pipeline has been commenced and work has ceased and has not in good faith resumed for five years, the right-of-way may revert as provided

> in this section to the person who, at the time of the abandonment or nonuse, is the owner of the tract from which such right-of-way was taken. Abandonment of pipeline facilities requires approval from [FERC] prior to this provision taking effect.

Iowa Code § 479A.27(1).

In determining whether a substantial impairment exists, a court begins by "identifying the precise contractual right that has been impaired ...." *Janklow,* 300 F.3d at 851 (quoting *Keystone Bituminous Coal Ass'n v. DeBenedictis,* 480 U.S. 470, 504, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987) (alteration in original)). Plaintiffs contend that the portion of the statute allowing for reversion after five consecutive years of nonuse impairs the perpetual easements they contracted for with landowners. *See* Pls.App. Section C (sample contracts). The Board members essentially assert that section 479A.27(1) does not impair the perpetual nature of the easements because, under the terms of the statute, pipeline abandonment may occur only with prior FERC approval, and that such proceedings are, according to 18 C.F.R. § 157.18, initiated by the natural gas pipeline company. This is an inaccurate reading of the statute. As the statute is written, "wholly abandoned" is part of only the first of the three clauses defining methods of reversion. The statute goes on to explain how ***1114** abandonment occurs: "by the relocation of the pipeline." The next clause begins with "is," suggesting not another method of abandonment, but another, separate way in which land may revert. This reading is further reinforced by language used later in the sentence, which provides that land reverts to the person who owned the land at the time of abandonment *or* nonuse. The use of "or" clarifies that nonuse is not merely a form of abandonment, but an entirely separate and distinct activity, or lack of activity, that results in reversion. Thus, FERC approval required before abandonment is not, under the terms of Iowa Code section 479A.27(1), required before reversion based on nonuse. Section 479A.27(1) therefore does impair plaintiffs' easements.

[4] Whether an impairment is substantial depends in part upon the extent to which the impairment has disrupted the contracting parties' reasonable expectations, measured by whether the industry in question has been regulated in the past and the nature of those regulations. *Janklow,* 300 F.3d at 854; *McDonald's Corp. v. Nelson,* 822 F.Supp. 597, 606 (S.D.Iowa 1993), *aff'd sub nom. Holiday Inns Franchising, Inc. v. Branstad,* 29 F.3d 383 (8th Cir.), *cert. denied,* 513 U.S. 1032, 115 S.Ct. 613, 130 L.Ed.2d 522 (1994). In other words, did previous regulation in the area make the regulation at issue foreseeable. *Janklow,* 300 F.3d at 857–58. There is no question that the interstate natural gas pipeline industry is heavily regulated. 15 U.S.C. § 717f(b), for example, requires FERC approval before a natural gas pipeline company may abandon a pipeline. Extensive regulation in an area does not, however, necessarily foreclose a conclusion that new regulation acts as a substantial impairment. *In re Workers' Compensation Refund,* 46 F.3d 813, 820 (8th Cir.1995).

[5] Here, neither party has directly addressed the scope of previous regulations, but the court's own research has revealed no previous state or federal regulations in effect limiting the duration of a contracted-for easement on private land or the conditions under which such an easement may exist. In this context, section 479A.27(1), by placing a use requirement on the continuation of an easement when the parties contracted for a perpetual easement, significantly alters the parties' expectations. Similar alternations in the duration of contracts have been found to constitute substantial impairments. *See, e.g., McDonald's Corp.,* 822 F.Supp. at 602–04, 605–07 (concluding portions of Iowa franchise statute creating perpetual franchise in certain situations constituted substantial impairment to contracts containing provisions setting the length of contracts for specific terms of years). Accordingly, this court concludes that Iowa Code section 479A.27(1), as applied to plaintiffs' contracts containing perpetual easements, constitutes a substantial impairment.

[6] Even though Iowa Code section 479A.27(1) acts as an substantial impairment, it will survive if the state, or in this case the Board members, establish a significant and legitimate purpose behind the regulations. The regulations must protect a broad societal interest, "such as the remedying of a broad and general social or economic problem." *Energy Reserves Group,* 459 U.S. at 412, 103 S.Ct. 697. Put another way, the challenged statute must not merely "prescribe a rule limited in effect to contractual obligations or remedies, but instead impose[ ] a generally applicable rule of conduct designed to advance 'a broad societal interest' ....." *Exxon Corp. v. Eagerton,* 462 U.S. 176, 191, 103 S.Ct. 2296, 76 L.Ed.2d 497 (1983) (quoting

*1115 *Allied Structural Steel Co. v. Spannaus,* 438 U.S. 234, 249, 98 S.Ct. 2716, 57 L.Ed.2d 727 (1978)). Here, plaintiffs assert that section 479A.27(1) adjusts the rights bargained for between them and the landowners. The Board members assert that the statute is justified by the same policies behind adverse possession and prescriptive easements, namely that productive use of land is favored over nonuse.

The record here is devoid of most of the usual sources courts have used in determining a statute's purpose, such as an affidavit from a state legislator involved in the lawmaking process, *McDonald's Corp.,* 822 F.Supp. at 608, or any records of legislative committee hearings, *Janklow,* 300 F.3d at 861. The best source of purpose nevertheless appears to be Iowa Code section 479A.1, which provides that the Iowa general assembly enacted the "law to confer upon the [Board] the power and authority to implement certain controls over the transportation of natural gas *to protect landowners and tenants from environmental or economic damages* which may result from the construction, operation, or maintenance of a pipeline within the state." (Emphasis added.) This statement of purpose, which does not mention promoting land use over nonuse, addresses only a narrow class of landowners. Landowners affected by construction, operation, and maintenance, specifically those to whom abandoned or unused tracts of land would revert, have entered into contracts with natural gas pipeline companies in which a company agreed to pay, or negotiate payment, for damages to crops, grasses, and buildings among other things. *See, e.g.,* Pls.App. Section C at 1, 3, 5, 7, 9, 12, 15, 28. Thus, it appears that the provisions in chapter 479A, including section 479A.27, apply not to a general class of landowners, but to those who have contracted with natural gas pipeline companies, an indication that section 479A.27(1) is a "rule limited in effect to contractual obligations or remedies," rather than "a generally applicable rule of conduct." *Exxon Corp.,* 462 U.S. at 191, 103 S.Ct. 2296; *see Whirlpool Corp. v. Ritter,* 929 F.2d 1318, 1323 (8th Cir.1991).

Moreover, the Board members, who carry the burden to justify the substantial impairment, have not produced any evidence of the harms created by nonuse of pipeline easements that would be remedied by section 479A.27. *See Janklow,* 300 F.3d at 860 (state's purported interest in serving farmers and rural communities not significant and legitimate public purpose in Contract Clause analysis when state did not produce any evidence that manufacturers of farm equipment were currently, or would in the future, engage in activity prohibited by challenged statutes). With no evidence to support the asserted broad interest in promoting land use over nonuse, and the statement of purpose that evinces an intent to address interests affecting only a narrow class of landowners, the court concludes that the Board members have not established a significant and legitimate public interest to justify the substantial impairment imposed by Iowa Code section 479A.27. Accordingly, there is no need to address whether the adjustment of the parties' rights is appropriate to the public purpose. *Janklow,* 300 F.3d at 862; *McDonald's Corp.,* 822 F.Supp. at 609. Iowa Code section 479A.27, as a substantial impairment on pre-existing contracts between plaintiffs and landowners, violates the Contract Clause. Summary judgment is therefore appropriate for plaintiffs on this portion of their Contract Clause claim.

2. Iowa Code § 479A.24—Damages

Iowa Code section 479A.24, as amended in 1999, sets out a non-exclusive list of compensable losses to landowners, which includes "loss of or damage to trees of commercial or other value that occurs at the time of construction, restoration, or at *1116 the time of any subsequent work by the pipeline company." Iowa Code § 479A.24(1)(d). Multiple contracts between plaintiffs and landowners allow plaintiffs to remove trees and brush from the right-of-way after construction without liability for damages. *See* Pls.App. Section C at 7, 9, 12, 15, 20; Appendix to Defendant Board Members' Motion for Summary Judgment at 68. Plaintiffs contend that requiring them to pay for damages they specifically contracted not to pay, and in fact considered when setting a price to pay landowners for right-of-ways, is a substantial impairment of their existing contracts. Defendants assert that any impairment imposed by section 479A.24(1)(d) is not substantial because paying for tree removal does not disrupt plaintiffs expectations, and they have not alleged any reasonable reliance on their right to remove trees without paying damages.

The majority of plaintiffs' contracts with landowners contained in the record establish that the parties entered into the right-of-way agreements with specific expectations concerning liability for damages in several

areas, including tree removal. Pls.App. Section C at 7, 9 ("the Grantee shall have the right from time to time to cut or clear trees, brush and other obstructions on said right-of-way that might interfere with the operation or maintenance of Grantee's facilities"); 12 ("the Grantee shall have the right *(without liability for damages)* from time to time after initial construction of the pipeline to reclear the right-of-way by cutting and removing therefrom trees, brush, and other obstructions that may, in Grantee's judgment, interfere with Grantee's use of the easement"); 15 ("Grantee shall ... at its option, restore or pay the Grantor for any damages caused by Grantee to ... crops, grasses, trees, shrubbery, fences, buildings, or livestock ... without liability for damages, from time to time to cut or clear trees, brush, or other obstructions on said right-of-way"); 20 ("Grantee shall have the right, ..., from time to time after initial construction of the pipeline to reclear the easement strip by cutting and removing therefrom trees, brush and other obstructions, without liability for damages to such trees, brush and other obstructions"). Other contracts in the record contain no such right in favor of plaintiffs, but obligate them to pay for damages to trees. *Id.* at 1, 3, 5. The express mention of the right to clear trees without liability for damages is evidence that plaintiffs and landowners considered this right in setting the price paid for the easement. Forcing plaintiffs to pay damages for tree removal after they already compensated landowners for the right to remove trees as part of the price paid for the right-of-way is a material impairment

[7] Looking again to the nature and extent of past regulation as one measure of the parties' expectations, the pre–1999 version of section 479A.24 provided landowners with claims only for two types of damages: the death or injury of livestock because of the interruption or relocation of normal feeding caused by pipeline construction and future crop deficiencies. Iowa Code § 479A.24 (1999). The limited scope of previous statutory damages combined with the fact that the parties specifically contracted for the right to remove trees renders section 479A.24(1)(d) a substantial impairment of plaintiffs pre-existing easements. *See McDonald's Corp.*, 822 F.Supp. at 606–07. Moreover, section 479A.24(1)(d) is not justified by a significant and legitimate purpose for the same reasons discussed in connection with section 479A.27. *See* Part II.C.1, *supra.* Defendants' motion for summary judgment on this issue will be denied.

***1117 D. Action Pursuant to 42 U.S.C. § 1983**

[8] Plaintiffs also request summary judgment on their § 1983 claim based upon a violation of the Supremacy Clause.[7] The Supremacy Clause is not, standing alone, the source of any substantive federal rights, but secures federal rights by giving them priority when they conflict with state law. *Golden State Transit Corp. v. City of Los Angeles,* 493 U.S. 103, 107, 110 S.Ct. 444, 107 L.Ed.2d 420 (1989). Accordingly, a violation of the Supremacy Clause does not, by itself, give rise to a § 1983 claim. *Id.* at 107–08, 110 S.Ct. 444. The availability of a § 1983 claim based upon the Supremacy Clause depends upon whether the federal statute that preempts state law creates a federal right. *Id.* at 108, 110 S.Ct. 444. As the Supreme Court recently clarified in *Gonzaga University v. Doe,* 536 U.S. 273, ——, 122 S.Ct. 2268, 2275 (2002), "it is *rights,* not the broader or vaguer 'benefits' or 'interests,' that may be enforced under the authority of [§ 1983]."

Plaintiffs contend that because the NGA, the NGPSA, the NGPA, and the NEPA preempt state regulation of the environmental aspects of pipeline construction, operation, and maintenance, they create a right not to be regulated in favor of natural gas pipeline companies, which right is enforceable under § 1983. Defendants argue that plaintiffs are not intended beneficiaries of any laws relating to land restoration. They also contend that these statutes do not contain mandatory language creating binding obligations, noting that plaintiffs failed to cite any specific statutory language that creates a right not to be regulated.

The Supreme Court in *Golden State* set out a three-pronged test to determine whether a federal statute underlying a preemption claim creates a federal right enforceable under § 1983.

> [T]he availability of the § 1983 remedy turns on whether the statute [alleged to preempt state law], by its terms or as interpreted, creates obligations "sufficiently specific and definite" to be within "the competence of the judiciary to enforce," is intended to benefit the putative plaintiff, and is not foreclosed "by express provision or other specific evidence from the statute itself."

Golden State, 493 U.S. at 108, 110 S.Ct. 444 (internal citations omitted). In *Gonzaga University,* the Court held that the Family Educational Rights and Privacy Act

of 1974 (FERPA), allowing the withdrawal of federal funding from schools that impermissibly release student records, did not confer rights on individual students enforceable under § 1983. 536 U.S. at—, 122 S.Ct. at 2277–79. Without explicitly rejecting the three-factor test cited in *Golden State* and *Blessing v. Freestone,* 520 U.S. 329, 340–41, 117 S.Ct. 1353, 137 L.Ed.2d 569 (1997), the Court in *Gonzaga University* sharpened its focus and asked whether Congress intended to create a federal right, not merely whether a plaintiff seeking relief under § 1983 falls within the zone of interest a statute was intended to protect or whether a statute was intended to benefit a particular plaintiff. *Gonzaga Univ.,* 536 U.S. at ——, 122 S.Ct. at 2275 (noting "implied right of action cases should guide the determination of whether a statute confers rights enforceable under § 1983" and rejecting "the notion that ... [prior] cases permit anything short of an ***1118** unambiguously conferred right to support a cause of action brought under § 1983"). In short, "[t]he question is not simply who would benefit from [a federal statute], but whether Congress intended to confer federal rights upon those beneficiaries." *California v. Sierra Club,* 451 U.S. 287, 294, 101 S.Ct. 1775, 68 L.Ed.2d 101 (1981).

[9] Under *Gonzaga University,* the analysis here turns on the text and structure of the NGA. *See Gonzaga Univ.,* 536 U.S. at ——, 122 S.Ct. at 2277. To create an enforceable federal right, a statute, through rights-creating language, must unambiguously "convey Congress' intent to confer individual rights ...." *Henry's Wrecker Serv. Co. of Fairfax County, Inc. v. Prince George's County,* 214 F.Supp.2d 541, 545 (D.Md.2002). Plaintiffs do not specify a section of the NGA which they believe confers an enforceable right not to be regulated under § 1983. Looking to their preemption argument, they rely on 15 U.S.C. § 717(b), which states: "The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, ... and to natural-gas companies engaged in such transportation ...." The remaining sections of the NGA deal with fixing rates and charges for the transportation of natural gas, the construction, extension, and abandonment of pipelines, financial records and investigations by FERC, which assumed the functions of the Federal Power Commission pursuant to 42 U.S.C. § 7172. For example, section 717c(a) requires that the rates charged by natural gas pipeline companies be just and reasonable, and section 717c(b) prohibits natural gas pipeline companies from granting undue preferences or advantages and from maintaining unreasonable differences in rates. Section 717d(a) gives FERC the power to determine if a rate is unjust or unreasonable and to set a reasonable rate. Section 717f requires natural gas pipeline companies to obtain authorization before extending, improving, abandoning and constructing facilities.

" 'The question of whether Congress ... intended to create a private right of action [is] definitively answered in the negative' where 'a statute by its terms grants no private rights to any identifiable class.' " *Gonzaga Univ.,* 536 U.S. at ——, 122 S.Ct. at 2275 (quoting *Touche Ross & Co. v. Redington,* 442 U.S. 560, 576, 99 S.Ct. 2479, 61 L.Ed.2d 82 (1979)) (alternations in original). The Court in *Gonzaga University* reasoned that because FERPA's provisions, which directed that "[n]o funds shall be made available" to any school that maintains prohibited policies and practices, spoke only in terms of the party regulated, the Secretary of Education, rather than the protected party, the students, the statute did not create individual rights in favor of students. *Id.* at ——, 122 S.Ct. at 2277. The Court contrasted this language with the "individually focused" language of Title VI and Title IX of the Civil Rights Act—"no person shall be subjected to discrimination"—which has an "unmistakable focus on the benefitted class." *Id.* (quoting *Cannon v. Univ. of Chicago,* 441 U.S. 677, 691, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979)).

[10] None of these sections in the NGA contains any individualized, rights-creating language necessary to grant federal rights in favor of natural gas pipeline companies enforceable under § 1983. The language of the NGA, requiring natural gas pipeline companies to charge just and reasonable rates and prohibiting them from maintaining unreasonable rate differences, is similar to the statute at issue in *Gonzaga University,* in that it focuses on natural gas pipeline companies as regulated parties, operating under the rules and regulations of and whose actions are subject to review by FERC, rather than focusing on them as protected parties. *See, e.g.,* 15 U.S.C. § 717c(e) (FERC, on its own initiative, ***1119** may review new rate schedules submitted by natural gas pipeline companies); *id.* § 717d(a) (FERC, upon finding rates are unjust, unreasonable, or preferential, shall determine just and reasonable rates); *id.* § 717f(c)(1)(A) (FERC must issue certificate of public convenience and necessity prior to natural gas pipeline companies engaging in construction and operation of pipelines). "Statutes that focus on the person regulated rather than

the individuals protected create 'no implication of an intent to confer rights on a particular class of persons.' " *Alexander v. Sandoval,* 532 U.S. 275, 289, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001) (quoting *Sierra Club,* 451 U.S. at 294, 101 S.Ct. 1775). The absence of individualized, rights-creating language in favor of natural gas pipeline companies compels the conclusion that the NGA does not confer a right not to be regulated enforceable under § 1983. *Cf. Henry's Wrecker Serv.,* 214 F.Supp.2d at 545–46 (holding, under the analysis used by Court in *Gonzaga University* rather than *Golden State* 's three-part test, that portion of Interstate Commerce Commission Termination Act, 49 U.S.C. § 14501(c)(1), which prohibits state and local regulation in the areas of "price, route, or service" relating to motor carriers does not contain rights-creating language establishing a right not to be regulated enforceable under § 1983). Accordingly, plaintiffs' motion for summary judgment on this issue will be denied.

III. Rulings and Orders

For the reasons discussed above, plaintiffs' motion for summary judgment is **GRANTED** and defendants' motion for summary judgment is **DENIED** with respect to plaintiffs' preemption claim and Contract Clause claim concerning Iowa Code section 479A.27. Defendants' motion for summary judgment on the portion of plaintiffs' Contract Clause claim concerning Iowa Code section 479A.24 is **DENIED**. Plaintiffs' motion for summary judgment is **DENIED** with respect to their claim under 42 U.S.C. § 1983 concerning the Supremacy Clause.

It is ADJUDICATED and **DECLARED** that Iowa Code chapter 479A and 199 Iowa Administrative Code chapters 9 and 12 are unconstitutional and null and void as applied to interstate natural gas pipeline companies, including plaintiffs. Defendants, as members of the Iowa Utilities Board, and all persons in active concert and participation with the defendants, are permanently **ENJOINED** from taking any action to enforce Iowa Code chapter 479A, 199 Iowa Administrative Code chapters 9 and 12, or any other provision of state law incorporated by reference therein, or any other orders, rules, or regulations issued pursuant thereto, as against interstate natural gas pipeline companies, including plaintiffs.

IT IS ORDERED that plaintiffs' § 1983 claim based upon a violation of the Supremacy Clause be **DISMISSED.**

All Citations

254 F.Supp.2d 1103

Footnotes

1 Plaintiffs originally named the Board as defendants, but the claims against it were dismissed based on its Eleventh Amendment sovereign immunity as a state agency. Plaintiffs subsequently filed a Second Amended and Substituted Complaint for Declaratory and Injunctive Relief naming as defendants only the Board members serving as of December 9, 2002. Allan Thoms, chairman at the time plaintiffs originally filed this action, resigned and was replaced by Elliott Smith. Diane Munns was named the chairperson.

2 These include the Natural Gas Act, 15 U.S.C. §§ 717–717w; the Natural Gas Policy Act, 15 U.S.C. §§ 3301–3432; the National Environmental Policy Act, 42 U.S.C. §§ 4321–4370a; the Natural Gas Pipeline Safety Act, recodified at 49 U.S.C. §§ 60101–60128; regulations adopted by the Federal Energy Regulatory Commission (FERC) pursuant to those statutes, 18 C.F.R. Parts 154, 157, 284, and 380; and the United States Department of Transportation regulations adopted pursuant to those statutes, 49 C.F.R. Parts 190–199.

3 The Eighth Circuit Court of Appeals found Iowa's previous efforts to regulate safety aspects of interstate natural gas pipelines and interstate hazardous liquid pipelines, specifically Iowa Code chapter 479 and accompanying administrative rules, preempted, in *ANR Pipeline Co. v. Iowa State Commerce Commission,* 828 F.2d 465 (8th Cir.1987) (natural gas pipelines), and *Kinley Corp. v. Iowa Utilities Board,* 999 F.2d 354 (8th Cir.1993) (hazardous liquid pipelines). In *ANR,* the court held that the state environmental provisions, requiring natural gas pipeline companies "to preserve topsoil, drainage structures, and underground improvements in burying pipelines," were not severable from the safety provisions, and thus were preempted as well. 828 F.2d at 467, 473.

4 The FERC Plan in effect at the time the parties submitted their briefs and the court heard oral arguments was dated December 2, 1994. On January 17, 2003, just over one week before the original decision in this case was filed, FERC issued a Revised Upland Erosion Control, Revegetation, and Maintenance Plan (the Revised Plan) that included many

changes. The Revised Plan was not brought to the court's attention by counsel before the original decision was filed. The following references to the FERC Plan are to the Revised Plan that became effective on January 17, 2003.

5 Plaintiffs' appendix is not consecutively numbered and therefore fails to conform to Local Rule 56.1(e). Defendants' appendix is not tabbed, which also violates the requirements of Local Rule 56.1(e). Compliance with the Local Rules is not merely a technical matter. Rather, compliance with the Local Rules substantially facilitates the court's use of materials in addressing motions for summary judgment.

Incidently, the Local Rules were amended on January 1, 2003. They may be downloaded from the court's web site at www.iasd.uscourts.gov, or a hard-copy of the new Local Rules may be obtained from the Clerk of Court.

6 As the Second Circuit noted in *National Fuel,* the fact that some of the environmental information submitted to FERC is required by the NEPA rather than the NGA is irrelevant to the preemption analysis. 894 F.2d at 578 n. 3. FERC, as authorized by the NGA, requires the submission of environmental information, and, as part of its decision to issue a certificate, which it is empowered to do pursuant to the NGA, considers this information along with the NEPA information.

7 Plaintiffs also request relief in their second amended and substituted complaint pursuant to § 1983 for violations of the Contract Clause. They do not, however, address this claim in their motion for summary judgment, and I will therefore address only the § 1983 claim based upon a violation of the Supremacy Clause.

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