

A Landowner's
Know Your Rights and Options Manual
Regarding Proposed Surveys and Pipeline
Placement on Your Property by Natural
*Gas Companies or Their Agents*¹

Prepared by
Citizens Preserving Floyd County
(CPFC)

<http://www.preservefloyd.org/>

¹ This purpose of this document is educational. CPFC does not intend this document to advocate one position or another, nor give legal advice.

Introduction to “Know Your Rights and Options.”

The following “Know Your Rights” manual contains some basic information for landowners about their rights and options

- 1) for dealing with natural gas pipeline companies and/or their agents who have contacted the property owner to perform a survey on the property, and/or
- 2) who may later decide to allow pipeline placement on their property and/or
- 3) what scenarios might occur if a landowner decides not to allow access.

CPFC recommends that landowners contact competent legal counsel for further questions and/or advice.

Question: Can I prevent a surveyor from the Natural Gas Pipeline Company from coming on my property?

Answer: In responding to this question from the residents of Nelson County, Commonwealth Attorney Anthony Martin responded that

1. A person can only be convicted of trespassing if they fail to leave after being told to, disobey clearly marked no-trespassing signs, or enter the premises after receiving previous notice to not come onto the property either in person, over the phone, or sending a notice in the mail.

2. According to Virginia Law, Section 56-49.01 and the Virginia Attorney General’s interpretation of that law,

if the company has followed all the steps outlined in the statute to enter the property, such as

a) sending the owner of the property a request by certified mail;

b) setting forth the date such inspection is proposed to be made, and

c) the notice was mailed not less than 15 days prior to the proposed date for inspection

and if the landowner does not respond to the certified letter within the 15 day time period, the gas company can come onto your property without your permission. In other words, if the pipeline company does not hear back from the property owner within fifteen days from the mailing of the notice, the pipeline company will assume they have the property owner's permission to enter and survey the property.

If the property owner responds to the request to enter within the fifteen day time period, stating clearly that the company does not have permission to enter, and the property owners also posts no trespass signs on the property, then the gas company does not have a legal right to enter the property owner's property unless a prior easement that is still in effect was previously granted to the gas company or its predecessors in interest.²

Question: If I allow the gas company or their agents to enter my property to survey the property for a proposed pipeline, will the company compensate me for any damages incurred to my property?

Answer: Sec. 56-49.01 states that "the natural gas company shall make reimbursement for any actual damages resulting from such entry."

² Some landowners have received letters from the Pipeline company agents expressing an interest in surveying the property. This is different from an actual request to survey. The actual request to survey must be sent by certified mail and must set forth the actual proposed date of the survey. See VA. Law, Sec. 56-49.01. Some landowners upon receiving an "interest" letter have responded stating that permission at this time is not granted but the owner reserves the right to meet with the company representatives before any permission is granted.

Question: If I refuse to allow the gas company access to my property, does that mean that they will not end up placing the pipeline on my property?

There are a few different viewpoints on this issue. CPCF presents all the viewpoints.

Answer #1: Attorney Carolyn Elefant, a former FERC attorney and an attorney who represents landowners in similar situations writes:

Refusing to let a pipeline come on your property for surveys won't do much to deter the project. Most pipeline companies allocate millions of dollars for the certification process and have already factored in the cost of dealing with uncooperative landowners. Moreover, by denying access, you may hurt your own interests, because the company will go ahead using the best available information and assumptions. As a result, the pipeline may choose a route that places the pipeline closer to your residence than you might have preferred or requires removal of trees because the pipeline was unable to perform an accurate survey due to lack of access....

[Pipeline] companies are notorious for abusing the privilege of access, which is why you should memorialize any terms of access in a written agreement if you agree to deal with the company.

Carolyn Elefant confirms that “if you feel strongly about keeping the pipeline off your property you have a right to do so unless 1) the pipeline already has access to the property via an existing right of way or 2) state law empowers the pipeline access.

Answer #2: Individual Landowner Resistance

The website listed below entitled “No Fracking Way” is a different approach than that recommended by former FERC lawyer Carolyn Elefant.

<http://www.nofrackingway.us/2013/07/08/come-and-take-it-why-eminent-domainmay-be-the-best-option/>

The landowner at this website decided to fight the pipeline company all the way and writes that

by forcing the company to try to take the land in an eminent domain proceeding—ie. condemnation—which ostensibly would force a fair valuation of the property—substantially more than what the pipeline developers are offering. Believe it or not, forcing a condemnation actually can be the best option-preferable to an outright sale.

Answer # 3: Coordinated Community Resistance

Residents in Schoharie County, in New York, faced a similar pipeline to what is being proposed in Floyd County.

Here is their response:

For almost two years residents of Schoharie County have faced the possibility that a large, high-pressure natural gas pipeline would cut through the heart of the County while landowners in its path would face the seizure of their property under eminent domain or be forced to settle for a small one-time payment in exchange for giving up control of their property to Constitution Pipeline Company forever. At the same time many read news stories about the terrible safety record of the very companies proposing to build the pipeline, with almost monthly reports of fires and explosions, all to facilitate the export of fracked gas to Canada and ultimately overseas.

The residents of the County organized and published this message to the residents of the County:

The only way to stop them is to refuse to allow them to survey, to refuse to sign your rights away. Constitution is in trouble because the

residents of our region have said no in large numbers. So far Schoharie County has been stronger than the drillers and the pipeline companies. We need to continue to be strong and not allow the dangerous industrialization of our rural communities.

CPFC notes that the approach of Schoharie County is based on the belief that the citizens still have control over their own destinies, and that if they unite, those citizens do have the power to resist huge corporations that use big government to further the interests of the corporation and not the interests of the citizenry. See also

<http://earthfirstjournal.org/newswire/2014/08/03/massachusetts-landowners-blockpipeline-surveyors/#more-35655> and see *Delaware Rivers Network v. FERC*, 753 F3d 1304 (D.C. Cir. June 6, 2014)(Circuit court sends case back to FERC ordering FERC to complete an Environmental Impact Statement on the environmental effect of the entire pipeline).

Question: If the Pipeline does not comply with State law, or Federal law, will the Federal Energy Regulatory Commission (FERC) still grant a certificate to the pipeline company allowing them to condemn any property they need through eminent domain?

Answer: Attorney Carolyn Elefant writes

FERC's authority to grant a certificate for pipelines is broad, but it neither preempts all state requirements nor renders state and local participation irrelevant. Generally only state or local permitting processes that duplicate the FERC process—such as siting or zoning requirements—will be deemed preempted (*preempted means that the FERC actions override state law*) by federal law. Where state or local agencies require environmental permits or propose conditions to protect local resources, FERC frequently makes compliance with these requirements a condition of the certificate.

CPFC notes that FERC will not preempt the Clean Water Act, the Endangered Species Act or any other federal act that protects the environment or natural

resources.

Question: What is Eminent Domain?

Answer: Eminent Domain, is the power of his “Eminence”, the King, or in the present day, the government, to seize back or return to the King “his” domain or land. The foundation of this legal premise goes back to English feudal times, where the King owned all property but gave or allowed the use of such property to the Lords, in what was, and still is termed, “fee simple.” Ownership of property today, is still based on feudal property concepts. If someone tries to take your property illegally, trespass or damage your property, the property owner calls the sheriff, the enforcement arm of the government to protect their property. Thus, each landowner’s property rights are still beholden to the King or the present day Government.

Question: How is Eminent Domain Used by the Pipeline Company to Enter my Land and Place a Pipeline on it?

Answer:

The interstate distribution of natural gas is governed by two federal statutes: The Natural Gas Act, 15 U.S.C. §§ 717 to 717Z (the "NGA") and the Natural Gas and Hazardous Materials Pipeline Safety Act, 49 U.S.C. §§ 60101 to 60125 (the NGPSA"). The NGA is a comprehensive scheme regulating the interstate transportation and sale of natural gas for ultimate distribution to the public. 15 U.S.C. § 717.[1] The NGPSA is a comprehensive federal statute regulating the safety of natural gas pipelines. 49 U.S.C. § 60102.

The NGA provides that a natural gas company must obtain a certificate of public convenience and necessity from the Federal Energy Regulatory Commission ("FERC") in order to transport, sell, construct, extend, acquire or operate any natural gas facility. 15 U.S.C. §717f©. To obtain a certificate, a natural gas company must

submit an application to FERC to engage in these activities. 15 U.S.C. §717f(d). The process FERC uses to determine whether to issue a certificate of public convenience and necessity is subject to extensive federal regulation. 18 C.F.R. Part 157. The nature of the FERC proceedings is beyond the scope of this paper. For purposes of this paper, the FERC process analyzes all aspects of the proposed action including the location, construction, and environmental impacts of the proposed action.

Once this administrative process is completed, FERC will issue a certificate if two conditions are satisfied: 1) the natural gas company is able and willing to do the acts and perform the services proposed, to conform to the provisions of the NGA, and to conform to the regulations of FERC, and 2) the service, sale, operation, construction, extension, or acquisition is or will be required by the present or future public convenience and necessity to the extent authorized by the certificate. 15 U.S.C. § 717f(e).

The NGA specifically provides that a natural gas company has the power of eminent domain to construct natural gas pipelines and facilities:

When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipeline or pipelines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary for the proper operation of such pipeline or pipelines, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts. The practice or procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in

similar action or proceeding in the courts of the state where the property is situated: Provided, that the United States district courts shall have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds \$3,000.³

Question: Will State and Local Laws Including Zoning Laws, Land Trusts and/or Easements Prevent Pipeline Company From Asserting Eminent Domain?

Answer: No. State law, zoning law, state and local regulations are preempted by FERC's power of eminent domain. However, "where state or local agencies require environmental permits or propose conditions to protect local resources, FERC frequently makes compliance with these requirements a condition of the certificate." Carolyn Elefant. However, ultimately all state laws, property ownership rights and easements are preempted by federal law.

When Congress enacted the NGA, it intended to create a comprehensive and effective regulatory scheme which would occupy the field to the **exclusion of state regulation.**

The courts have repeatedly held that **state and local regulations which impact the location, construction, operation, maintenance, and safety of interstate natural gas pipelines are invalid.**

It is well established that a state cannot interfere with the federal regulation of a natural gas company operating its facilities under the jurisdiction of the FERC. This prohibition has been extended to local governmental attempts to regulate interstate natural gas facilities through land use, zoning and development regulations. For example, in Northern Border Pipeline Company, the district court enjoined the Jackson County Board of County Commissioners from attempting to regulate a natural gas pipeline facility through the use of

³ Courtesy of John C. Lemaster and Ryley Carlock and Appelwhite:
<http://www.rcalaw.com/condemnation-issues-under-the-natural-gas-act>

its zoning power. In that case, the court ruled, "We hold that the County lacks statutory authority to exercise its zoning power over interstate gas pipelines." ⁴

Question: If the Pipeline Company has not yet satisfied all the conditions to the permit, will the Pipeline Company be able to assert eminent domain?

Answer: Yes. Carolyn Elefant writes:

Most of the conditions contained in a FERC certificate affect a pipeline's ability commence project construction, not its ability to initiate eminent domain. The sole exception is with regard to conditions related to site specific plans, where FERC will often prohibit the pipeline from exercising eminent domain until it provides site specific plans to landowners whose residences are 50 feet or less from the pipeline.

In most other cases, federal district courts hold that a company may proceed with condemnation notwithstanding its failure to obtain necessary permits or comply with other conditions of the certificate—even if denial of the permits might necessitate reconfiguration of the project and avoidance of the property subject to condemnation. This is one of the most serious drawbacks of the FERC process because in the absence of permits, landowners are subject to eminent domain for a project which may never go through their property.

⁴ <http://www.rcalaw.com/condemnation-issues-under-the-natural-gas-act>

Question: Do I need to retain legal counsel if contacted by the Pipeline Company and/or the Company requests entry on to my property to survey?

Answer: It is recommended that landowners in this position seek legal counsel. Some landowners have decided to reduce legal costs by banding together in opposing a pipeline and/or in retaining an attorney.⁵

Question: If I end up deciding to allow the surveyors and a pipeline on my land, what is the best approach to doing this?

Answer: Agricultural extension educators in Ohio who were faced with a pipeline placement similar to Floyd County put together the following suggestions that we recommend a landowner read. The recommendations can be found at

<http://www.farmanddairy.com/top-stories/read-this-before-you-sign-that-pipelineeasement-lease/49966.html>

The language in many proposed standardized easements are purposefully vague. You have the right to demand specific language and to amend or alter the agreement.

Some of the most important suggestions follow

1. **Do Your Homework:** When presented with a proposal to grant an easement to a company for pipeline construction on your property the money may seem attractive, but it is important you take time to carefully review the proposal.

The language in the first easement offered will generally not be favorable to the landowner. Additionally, the per foot rate offered may be less than what can be negotiated.

⁵ http://lancasteronline.com/news/local/martic-township-landowners-accuse-gas-pipelinecrews-of-trespassing/article_b3239232-1d98-11e4-8f07-001a4bcf6878.html?mode=story

2. **Easements Can be Temporary or Perpetual:** When presented with a proposal to grant an easement to a company for pipeline construction on your property the money may seem attractive, but it is important you take time to carefully review the proposal.

The language in the first easement offered will generally not be favorable to the landowner. Additionally, the per foot rate offered may be less than what can be negotiated.

3. **Beware of Signing a “Standard Agreement”:**

Here are some of the following areas of concern in the signing of a standard lease:

The ability to use pipelines for any other products raises concerns about what those products might be.

This lease gives the company the right to install additional lines at any time. It is suggested additional lines be negotiated separately and one at a time.

What size is the line? As pipe size increases the payments per foot should also increase.

Do you want above ground pipes and other items on your property? For safety reasons, its best that there be nothing sticking out of the ground.

Temporary periods? How long are these temporary periods? Does this mean there could be future temporary periods?

Description of Right-of-Way:

Is the 40 foot area a total of 40 feet, along one side, or 40 feet on each side? Or is it 20 feet on either side of the right-of-way? The terms overlay and overlap may be of concern.

The term overlay generally refers to a pipeline on the same property, while overlap refers to pipelines laying over part of another property.

Temporary roads are mentioned. Of what material will these be constructed? What happens to these temporary roads upon completion of the project? Would you prefer these temporary roads become permanent roads?

Other temporary work space is referenced. What is this? What does it include?

Timber and brush:

It's reasonable to expect that there will be areas where removal of timber and brush will be necessary during construction. However, as the landowner you should specify what you want done with the timber and brush. Where do you want it to be placed?

If timber and brush are taken off-site who pays for disposal?

Is there marketable timber on the property? Who/how is the value determined? Will you be compensated? If so, how?

Right of Ingress/Egress:

This agreement allows the company to enter and exit the property at any location. It should be clearly specified where access is and is not allowed.

It should be clearly understood that the ingress and egress are for the purposes of installing and maintaining this pipeline only. Do you want to allow access by any roads? Specify which can or can't be used. It is recommended that the company stay on the easement.

Who has keys to any locks on any gates?

Freedom from Obstructions:

This agreement does not specify how deep the line will be buried. A minimum of 36 inches is a must. The deeper the better.

Use of Premises/Duty to Repair:

The agreement mentions the Grantee will repair gates and fences they damage. All fence and gates replaced must be of equal or greater quality.

Specify what you do or don't want seeded upon completion of the installation. There are a number of new varieties that will out-perform and out-yield older varieties.

Right to Install Additional Pipelines:

We strongly encourage landowners to negotiate for one pipeline at a time.

Other Considerations:

There is no mention as to topsoil. All topsoil should be removed and placed separate from the other soil removed and be the last to be returned.

Does this agreement allow the Grantee to sub-lease? If so, do you want to be notified if this occurs? Do you want to be notified within a specified period of time?

There is no mention of a starting and ending date for installation. It is recommended that a reasonable time be assigned for the project to begin and end.

There is no mention of any manner to terminate the agreement. A clause should be included that the agreement terminates if construction is not completed in a specified time period. If the installation is not completed on time a penalty should be assessed for each day the project is not complete. Consideration should also be given to a means to terminate the agreement if the line is not in use for a specified time.

If the affected land loses its status in Current Agricultural Use Value (CAUV) the grantee should be responsible for any assessments.

A hold harmless agreement should be included. It should be understood that as the property owner you accept no responsibility for any injury to the Grantee, its employees, sub-contractors, etc.

The above concerns are not exhaustive. The affected landowner may want to consider hiring legal counsel to help them negotiate a lease. The main point here is that the landowner does not have to accept a standardized easement agreement.

Citizens Preserving Floyd County (CPFC) has put together this question and answer ***Know Your Rights and Options*** Manual as a public service for Floyd County residents.

See our website at:

<http://www.preservefloyd.org/>