IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

ATLANTIC COAST PIPELINE, LLC	)	
	)	
Plaintiff,	)	
	)	Case No. 3:18-cv-00115
v.	)	
	)	
NELSON COUNTY BOARD OF SUPERVISORS, et al.	)	
	)	
Defendants.	)	

MEMORANDUM IN OPPOSITION TO MOTION FOR JUDGMENT ON THE PLEADINGS

Defendants Nelson County Board of Supervisors ("Board") and Nelson County, Virginia ("County"), by counsel, submit their memorandum in opposition to plaintiff' motion for judgment on the pleadings.

ARGUMENT

I. THE COUNTY'S FLOODPLAIN MANAGEMENT ORDINANCE IS NOT PREEMPTED BY THE NATURAL GAS ACT.

Congress may explicitly or implicitly preempt state law. *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1595, 191 L. Ed. 2d 511 (2015); *see Wash. Gas Light Co. v. Prince George's Cty. Council*, 711 F.3d 412, 419-20 (4th Cir. 2013) (describing the three methods of federal preemption: express preemption, field preemption, and conflict preemption). ACP does not allege that Congress expressly preempted state law, making this an issue of implicit preemption through either field or conflict preemption.

Several general rules of interpretation set the stage for a preemption analysis. First, although there is a presumption against federal preemption when Congress legislates in a field traditionally occupied by the states, the presumption is inapplicable in fields where the federal

government has had a longstanding regulatory presence. *See United Parcel Service, Inc. v. Flores–Galarza,* 318 F.3d 323, 336 (1st Cir.2003). Second, "[a] pre-emption question requires an examination of congressional intent." *Schneidewind v. ANR Pipeline Co.,* 485 U.S. 293, 299, 108 S.Ct. 1145, 99 L.Ed.2d 316 (1988). Third, "the best indication of Congress' intentions, as usual, is the text of the statute itself." *South Port Marine, LLC v. Gulf Oil Ltd. P'ship,* 234 F.3d 58, 65 (1st Cir.2000). Finally, to determine Congress' intent, the Court must consider not only the statute itself, but the federal regulations implementing and explaining it. *See Capital Cities Cable, Inc. v. Crisp,* 467 U.S. 691, 699, 104 S.Ct. 2694, 81 L.Ed.2d 580 (1984).

A. FIELD PREEMPTION

Field preemption arises where "Congress may have intended 'to foreclose any state regulation in the area,' irrespective of whether state law is consistent or inconsistent with 'federal standards.'" *Oneok*, 135 S.Ct. at 1595 (emphasis omitted) (quoting *Arizona v. United States*, 567 U.S. 387, 401, 132 S.Ct. 2492, 183 L.Ed.2d 351 (2012)).

"Actual conflict between a challenged state enactment and relevant federal law is unnecessary to a finding of field preemption; instead, it is the mere fact of intrusion that offends the Supremacy Clause." *PPL EnergyPlus, LLC v. Nazarian*, 753 F.3d 467, 474 (4th Cir. 2014) (citing *N. Nat. Gas Co. v. State Corp. Comm'n*, 372 U.S. 84, 97-98, 83 S.Ct. 646, 9 L.Ed.2d 601 (1963)).

A state law is preempted under field preemption when Congress has "occupied the field" by creating "a framework of regulation 'so pervasive ... that Congress left no room for the States to supplement it' " or "where there is a 'federal interest ... so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.'" *Arizona v. United States*, 567 U.S. 387, 399, 132 S.Ct. 2492, 183 L.Ed.2d 351 (2012) (alterations in original)

(quoting *Rice v. Santa Fe Elevator Corp*., 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947)).

While the NGA does give FERC jurisdiction over the location of pipelines pursuant to 15 U.S.C. § 717(f)(c), no intent is envisioned in the text of the NGA or implementing regulations to occupy the field of floodplain management. That province is left strictly and solely to FEMA, and FEMA, through the NFIA and NFIP implementing regulations, has imposed that obligation on localities.

Of all the federal cases addressing the issue of preemption, none provide that Congress intended to grant FERC the powers to ignore or usurp FEMA's role in adopting a unified national program for floodplain management or that the regulation of natural gas utilities necessarily trumped the national interest in preserving federal resources in the event of flooding. FEMA imposed on the County the obligation "to adopt adequate flood plain ordinances with effective enforcement provisions consistent with Federal standards to reduce or avoid future flood losses." 42 U.S.C. §§ 4001(e), 4002(b)(3). FEMA's regulations occupy the field of floodplain management, and the County's ordinance, which is adopted in accordance with FEMA regulations and approved by FEMA, complies with FEMA's mandate to implement the NFIA.

Because Congress did not, by adopting the NGA, evidence an intent to occupy the field of floodplain management, the plaintiff cannot establish that the NGA preempts the Floodplain Management Ordinance.

B. CONFLICT PREEMPTION

A state law is preempted under conflict preemption when it either makes "compliance with both federal and state regulations [ ] a physical impossibility," *Arizona v. United States*, 567

U.S. 387, 399, 132 S.Ct. 2492, 183 L.Ed.2d 351 (2012) (quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–143, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963)), or "stand[s] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id*. (quoting *Hines v. Davidowitz,* 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581 (1941)).

The Fourth Circuit instructs that

> [a]ssessing a conflict preemption claim requires "a two-step process of first ascertaining the construction of the two statutes and then determining the constitutional question [of] whether they are in conflict." *Chi. & Nw. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317, 101 S.Ct. 1124, 67 L.Ed.2d 258 (1981) (internal quotation marks omitted). In making this determination, a court "should not seek out conflicts ... where none clearly exist[]." *College Loan Corp. v. SLM Corp.*, 396 F.3d 588, 595-96 (4th Cir. 2005) (internal quotation marks and alteration omitted).

H&R Block E. Enters. v. Raskin, 591 F.3d 718, 723 (4th Cir. 2010) (last alteration added).

1. The Floodplain Management Ordinance was adopted pursuant to federal law.

The County is cognizant that this Court has ruled that the County's Floodplain Management Ordinance, which adopts FEMA's federal floodplain management regulations, does not, in and of itself, have the force of federal law. Such a ruling, however, does not change the fact that the County's ordinance is the embodiment of the federal regulations, which the Acts were designed to induce.

The Fifth Circuit provides a tidy historical overview of the legislation, as follows:

> The National Flood Insurance Act of 1968 was enacted to provide previously unavailable flood insurance protection to property owners in flood prone areas. 42 U.S.C. § 4001, *et seq.* Dissatisfied with the lack of commitment being made to the program by the municipalities to which insurance was available, Congress added additional incentives for communities to participate in the NFIP.

> Congress' persuasive stick—used as an aid to the insufficient insurance carrot—was the Flood Disaster Protection Act of 1973.
>
> To qualify for the sale of federally subsidized flood insurance, a community was required to adopt and submit as part of its application, flood plain management regulations. These regulations were designed to reduce or avoid future flood damages. To qualify for flood insurance, a community was required to apply for the entire area within its jurisdiction. The program requires the community to designate an agency or official with responsibility, authority, and means to implement the specific requirements of the program and to make an annual report concerning the community's participation in the program. The regulations provide that a community is subject to suspension from the NFIP for failure to implement adequate flood plain management regulations. During a suspension, no flood insurance may be sold or renewed.
>
> Thus, the Act contemplates the participation of both the federal agency charged with the program's oversight and the local community government charged with implementing the agency's flood plain regulations. ***Under the regulations, however, ultimate responsibility for community compliance remains with the Agency since it has the power to suspend any municipality for lack of compliance with the NFIP.***

United States v. St. Bernard Par., 756 F.2d 1116, 1120–21 (5th Cir. 1985) (emphasis added).

The procedures created by the 1968 Act were voluntary in nature. Congress anticipated that the local communities would voluntarily adopt the land use restrictions necessary for its citizens to participate in the flood insurance plan. However, it became clear that local acceptance of the voluntary program was inadequate. Accordingly, Congress enacted the Flood Disaster Protection Act of 1973 which amended the Program to essentially make its adoption by the local governing bodies mandatory. *Till v. Unifirst Fed. Sav. & Loan Ass'n*, 653 F.2d 152, 156 (5th Cir. 1981).

Because the County's floodplain management ordinance must cover the entire jurisdiction of the County in order to qualify under the NFIP, it cannot excise portions of the County to which pipeline companies wish to install pipelines and related infrastructure. As

argued in an earlier memorandum, the County does not choose when or how to amend its ordinances. Such a decision is made for the County by FEMA. FEMA's minimum floodplain management regulations are set forth in 44 C.F.R. Part 60, Subpart A. The County's Floodplain Management Ordinance tracks the federal regulations. *Compare* 44 C.F.R. § 60.3 and Nelson County Floodplain Management Ordinance, § 10.8. The variance criteria of concern to ACP were promulgated by FEMA. *Compare, e.g.,* Floodplain Management Ordinance, §§ 10.8.A.1, 10.14 – 10.18 and 44 C.F.R. § 60.3; and Floodplain Management Ordinance, §§ 10.14, 10.21 and 44 C.F.R. § 60.6.

When FEMA amends its regulations, the County is given six months' notice to revise its Floodplain Management Ordinance to comply with FEMA's revised regulations. 44 C.F.R.§ 60.7. The County cannot change the delineation of any of its floodplain districts, even upon provision of studies of natural or man-made changes by the US Army Corps of Engineers, without prior approval from FEMA. Floodplain Management Ordinance, § 10.23(E).

While this Court may have held that the County's ordinance is not entitled to the deference as a federal statute and its implementing regulations, such information is important for the Court's consideration of Congressional intent in the area of conflict preemption.

2. *The County's Floodplain Management Ordinance does not "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."*

The plaintiff does not allege that compliance with both the NGA and the County's Floodplain Management Ordinance, which was adopted in accordance with the National Flood Insurance Acts, would result in a physical impossibility. Indeed, the plaintiff's efforts to comply with the Floodplain Management Ordinance have resulted in improvements to the safety of the project in Nelson County. Instead, the plaintiff alleges that the County's Floodplain

Management Ordinance "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

To determine whether the Floodplain Management Ordinance, which adopts federal regulations on the local stage, "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," this Court must first look at the two statutes and determine whether a conflict actually exists.

In enacting the NGA, Congress declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest. 15 U.S.C.A. § 717. Little more is stated as to the Congressional findings or declaration of purpose. Historically, however, the purpose behind the NGA was to regulate rates and prevent monopolistic practices over the sale of natural gas through interstate commerce.

In the NFIA's Congressional findings and declaration of purpose, Congress states that "flood disasters have … required unforeseen disaster relief measures and have placed an increasing burden on the Nation's resources…," and finds that "(1) a program of flood insurance can promote the public interest by providing appropriate protection against the perils of flood losses and encouraging sound land use by minimizing exposure of property to flood losses; and (2) ***the objectives of a flood insurance program should be integrally related to a unified national program for flood plain management***…." 42 U.S.C. § 4001(a), (c) (emphasis added).

Among the purposes of the NFIA, Congress states, "It is the further purpose of this chapter to (1) encourage State and local governments to make appropriate land use adjustments to constrict the development of land which is exposed to flood damage and minimize damage

caused by flood losses, (2) guide the development of proposed future construction, where practicable, away from locations which are threatened by flood hazards…." and to… ***require States or local communities, as a condition of future Federal financial assistance, to participate in the flood insurance program and to adopt adequate flood plain ordinances with effective enforcement provisions consistent with Federal standards to reduce or avoid future flood losses.***" 42 U.S.C. §§ 4001(e), 4002(b)(3) (emphasis added).

As between the two statutes, there is no conflict in the full purposes and objectives of Congress. Different Congressional purposes, each meeting a distinct federal need, are stated. Regulation of the Acts are placed in distinct federal agencies: FERC for the NGA and FEMA for the NFIA. To accomplish and execute the full purposes and objectives of Congress, both statutes may be read together.

CONCLUSION

For the foregoing reasons, the Nelson County Board of Supervisors and Nelson County, Virginia, by counsel, request that this Court deny the plaintiff's motion for judgment on the pleadings and for such other and further relief as may be necessary and this Court deems appropriate.

NELSON COUNTY BOARD OF SUPERVISORS
and
NELSON COUNTY, VIRGINIA

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of August, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will then send notification of such filing (NEF) to the following users:

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