

SURVEY OR NOT – THAT IS THE QUESTION....

A survey of state survey laws on property access pre-FERC Certificate issuance

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If you're a community or property owner impacted by a proposed pipeline, one of the first decisions that you may have to make early in the process is whether to allow the pipeline to access your property to survey the potential pipeline route. To complicate matters, you'll be confronted with conflicting information from competing sources: on the one hand, the pipeline's land agents may tell you that they can take your property by eminent domain so you might as well cooperate, while project opponents – many of whom do not actually own property impacted by the pipeline – will try to persuade you that if everyone along the pipeline denies the company the right to survey, the project will go away.

The truth is that there's little truth to either of these positions. A pipeline cannot invoke eminent domain until FERC grants a certificate, which can take anywhere between six months and two years. At the same time, surveys aren't necessary for a pipeline to file a FERC application (companies can gather information from public files and even Google so denying access won't stop the project from moving forward.

Ultimately, the decision as to whether to grant a pipeline the right to access your property to survey is an entirely individual and fact-specific decision that belongs to you - the impacted landowner. Generally speaking, in *most* cases, there's little to be gained by allowing access for surveys. Still, in some instances you may not have a choice (because entry is allowed under state law), and in other scenarios, granting access may result in a route change that could minimize impacts to your property.

Finally, in NO instance should landowners ever grant a company *carte blanche* access to their property. Any grant of a right of entry should be memorialized in a written agreement that among other things (1) provides for advance notice of a site visit, and limits access to a single site visit; (2) provides landowners with all survey results and (3) preserves the landowners' objection to the project so that a pipeline cannot mischaracterize a grant of entry as support.

To assist landowners, this pamphlet summarizes the considerations to take into account in making a decision on whether to allow a pipeline to survey the property, along with a survey of select state laws and court rulings on the access question. **Please bear in mind that this pamphlet DOES NOT constitute legal advice or any type of recommendation to grant or deny surveys, which remains a decision within the sole discretion of each impacted landowner.**

LANDOWNER SURVEY CONSIDERATIONS

Questions to Consider	Discussion	Options
Does state law give the pipeline the right of entry?	Under federal law, a pipeline does not have a right to survey property <i>prior</i> to obtaining a FERC certificate (after the certificate is issued, it can gain access by eminent domain). As the attached chart shows, state laws vary, and some grant the pipeline the right to survey property to prepare its application. Do NOT accept the pipeline's word that state law authorizes access; instead, read the statute yourself or consult with an attorney. Where state law allows surveys, landowner options are limited.	<p>If state law or courts allow access, landowners can...</p> <p>Consider a constitutional challenge to the law if it does not compensate landowners for access [note-constitutional challenges may be costly]</p> <p>Accompany land agents during the survey and memorialize the visit with notes, photographs and video;</p> <p>Request a site visit from FERC staff or retain your own experts or consultants for an independent evaluation [note – cost of consultant may be prohibitive]</p>
Are the proposed surveys invasive?	Most of the pre-certificate surveys requested are relatively non-invasive and involve mostly tracking the route or observation of terrain. However, sometimes, a pipeline may seek permission for more invasive studies – such as core sampling or other geotechnical tests which can cause more damage.	There is no reason to allow invasive surveys pre-certificate and even those state laws that allow entry for non-invasive studies often prohibit ground-breaking activity.

Questions to Consider	Discussion	Options
<p>Will the proposed pipeline route impact critical, unique or environmentally or culturally sensitive features of the property?</p>	<p>Sometimes, the proposed pipeline route will run in close proximity to a landowners' home, septic or wells or may impact sensitive features of the property such as wetlands or cultural resources. Alternatively, the pipeline might bisect the property and limit uses and create more significant harm than a route adjustment. If a pipeline is unaware of these impacts and adopts a particular route, it may be more difficult to change farther into the process.</p>	<p>OPTION 1: In some instances, allowing a pipeline access to survey can result in avoiding these types of individual impacts, subject to the restrictions below:</p> <p>Landowners should document in writing (and file at FERC) that granting access is for purpose of identifying certain impacts along the route and that landowner continues to object to the pipeline;</p> <p>Landowner should require pipeline to produce all survey results</p> <p>OPTION 2: Instead of allowing pipeline access to survey property, landowner can retain its own consultants to prepare information showing impacts and make them available to pipeline and FERC. A landowner can also invite FERC staff or other public officials to visit the property and conduct their own independent analysis of impacts.</p>
<p>Will the company agree to my proposed conditions of access?</p>	<p>If landowners decide to allow access, they can impose certain limits on access (this can be communicated through a formal letter or a simple list transmitted by email). These may include advance notice of site visits, access to survey results, and agreement to remediate any damages caused during the site visit.</p>	<p>If a company refuses to agree in writing to the terms of a landowner access agreement for surveys (or at a minimum, offer an alternative agreement), the company's denial should be documented at FERC – and the landowner should refuse deny any further access at that point.</p>

Questions to Consider	Discussion	Options
Will denial of access stop or slow the pipeline process?	Project opponents often contend that denying access for surveys will slow or even stop the pipeline. This is not entirely true. Pipelines can gather most of the data required for the FERC certificate through existing information and even tools like Google Maps. FERC will allow the pipeline to conduct surveys after the certificate is granted and the pipeline gains the power of eminent domain. And while many state agencies will not issue a permit without survey data, FERC can still grant a certificate conditioned on the company's subsequent receipt of state permits. Simply put, there is no evidence to suggest that denying survey access will stop or even delay the pipeline.	As a landowner, your property is constitutionally protected by the Fifth Amendment, and (barring state laws to the contrary), you have the right to deny the pipeline the right to survey for whatever reason. But bear in mind that denying surveys will not stop the pipeline – and you must take steps to protect yourself and your property beyond simply denying access.
Has the pipeline come on my property without authorization?	In some instances, pipeline land agents will access property even without seeking permission. This alone justifies barring access in the future.	If a land agent arrives on a property without authorization, this constitutes trespass. Landowners may contact law enforcement to have the land agent removed from the property.

A Survey of State Survey Laws

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STATE	APPLICABLE STATUTES	ALLOWANCE OF PRE-CERTIFICATE SURVEY ACCESS?	RELEVANT COURT DECISIONS
Alabama	Ala. Code § 18-1A-50 Ala. Code § 18-1A-3 <i>Ala. Code § 10A-21-2.01</i>	<p>Yes. § 18-1A-50 states that “[a] condemnor [defined in § 18-1A-3 as “[a] person empowered to condemn”] and its agents and employees may enter upon real property for a reasonable time and make surveys, examinations, photographs, tests, soundings, borings, and samplings, or engage in other activities for the purpose of appraising the property or determining whether it is suitable and within the power of the condemnor to take for public use...”</p> <p>A pipeline company is so empowered, and is able to file for entry in circuit court under § 18-1A-51. Under § 10A-21-2.01, a corporation “formed for the purpose of constructing, operating, or maintaining pipelines” may exercise state eminent domain.</p>	<p>Walker v. Gateway Pipeline Co., 601 So.2d 970 (Ala. 1992) (upholding a lower court’s order permitting entry by pipeline company to conduct pre-condemnation surveys in pursuit of a FERC certificate)</p>
Alaska			
Arizona			
Arkansas			
California			
Colorado			
Connecticut	Conn. Gen. Stat. § 48-13	<p>Probably not. § 48-13 provides: “Upon filing a notice of condemnation of a condemning authority, either before or after the institution of a condemnation proceeding and after reasonable notice to the property owner or owners affected, the Superior Court...may authorize such condemning authority to enter upon and into land...for the purpose of inspection, survey, borings and other tests.” This does not seem to extend survey authority to an entity lacking FERC certification.</p>	<p>Town of Wallingford v. Werbiski, 274 Conn. 483 (2005) (holding that a town seeking to condemn private property was entitled to an injunction preventing landowners from interfering with survey activity, interpreting § 48-13 to reinforce broad surveying authorities already given to municipalities).</p>
Delaware			

STATE	APPLICABLE STATUTES	ALLOWANCE OF PRE-CERTIFICATE SURVEY ACCESS?	RELEVANT COURT DECISIONS
Florida	Fla. Stat. § 361.01 Fla. Stat. § 361.05	Yes. § 361.01 allows any corporation “organized for the purpose of constructing, maintaining, or operating public works, or their properly authorized agents” to “enter upon any lands” necessary to their business and condemn such land. §361.05 clarifies that any natural gas company—whether state- or FERC-regulated, can exercise eminent domain and may enter/survey/examine properties to determine the most advantageous route(s).	N/A
Georgia	Ga. Code Ann. § 22-3-82 Ga. Code Ann. § 22-3-88	Yes. § 22-3-82(b) states that “[a] pipeline company shall have a right of reasonable access to property proposed as the site of a pipeline for the purpose of conducting a survey of the surface of such property for use in determining the suitability of such property for placement of a pipeline.” § 22-3-88 clarifies that this right extends to companies “transport[ing] or distribut[ing]” natural gas in Georgia.	N/A
Hawaii Idaho Illinois Indiana Iowa Kansas			

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Kentucky	Ky. Rev. Stat. Ann. § 278.502 Ky. Rev. Stat. Ann. § 416.230 Ky. Rev. Stat. Ann. § 416.540	Probably not. § 278.502 states that natural gas companies regulated by the State Public Service Commission may “condemn the lands and material or the use and occupation of the lands” needed for the pipeline. § 416.230 sets out Kentucky’s condemnation petition process for gas pipelines in Circuit Court. § 416.540 defines a condemnor as any “person, corporation, or entity” who is given eminent domain power, which encompasses “the right of [such entities] to [take for a public use]” under Kentucky law.	Bluegrass Pipeline Co., LLC v. Kentuckians United to Restrain Eminent Domain, Inc. , 2015 WL 2437864 (Ct. App. Ky. May 22, 2015) (holding that state eminent domain power reaches only companies regulated by the State Public Service Commission).
Louisiana Maine Maryland	Md. Real Prop. § 12-111	No. § 12-111 only allows entry and surveying by entities who are “acting on behalf of the State or of any of its instrumentalities or any body politic or corporate having the power of eminent domain...” Under Maryland law, pipelines are not public utilities and therefore do not have “power of eminent domain;” however, once the certificate is granted, the companies may be granted the right to survey.	King v. Mayor & Council of Rockville , 52 Md.App. 113, 123 (1982) (“We think, without deciding, that if [an entity] undertook activities beyond the scope of those anticipated under [§ 12-111], [landowners] could invoke the power of the court to enjoin such actions.”). NOTE – there is at least one unreported MD lower court case involving a <i>pro se</i> litigant that allowed survey access <i>prior</i> to the Company attaining a certificate.

STATE	APPLICABLE STATUTES	ALLOWANCE OF PRE-CERTIFICATE SURVEY ACCESS?	RELEVANT COURT DECISIONS
Massachusetts	<p>Mass. Ann. Laws ch. 164, §72 <i>Mass. Ann. Laws ch. 164, §72A</i> <i>Mass. Ann. Laws ch. 164, §75B</i> <i>Mass. Ann. Laws ch. 164, §75C</i> <i>Mass. Ann. Laws ch. 164, §75D</i></p>	<p>Yes but requires company to seek authorization from DPU. Section 72 states that any “company...providing or seeking to provide transmission service” may petition the Department of Public Utilities (DPU) to construct a transmission or distribution line, and DPU may authorize exercise of eminent domain authority. § 72A allows DPU to authorize <i>Massachusetts electric companies</i>, which do not include interstate natural gas companies (under Ch. 164, § 1) to conduct surveys before eminent domain proceedings. (Under § 75B, any natural gas company, whether organized under Mass. law or those of any other state, which has a FERC Certificate, falls under the umbrella of Chapter 164 once it files a copy of the Certificate with DPU.) § 75D incorporates § 72A to allow DPU to authorize natural gas pipeline companies to conduct preliminary surveys.</p>	<p><u>Carlisle v. Department of Public Utilities</u>, 353 Mass. 722 (1968) (upholding DPU’s power to grant authority to enter private lands for preliminary surveys without a prior grant of power to make a taking).</p>
Michigan	<p>Mich. Comp. Laws Serv. § 213.51 <i>Mich. Comp. Laws Serv. § 213.54</i> <i>Mich. Comp. Laws Serv. § 483.102</i></p>	<p>Maybe. For condemnation purposes, § 213.51 defines a private agency as any corporation “authorized by law to condemn property.” § 483.102 gives this power to companies transporting natural gas via pipelines – but only if the lines will be used within the state (and an interstate pipeline likely will not) § 213.54(3) states that, with reasonable notice to the landowner, “[a]n agency or an agent or employee of an agency may enter upon property before filing an action for the purpose of making surveys, measurements, examinations, tests, soundings, and borings...”</p>	<p><u>City of Melvindale v. Trenton Warehouse Co.</u>, 506 N.W.2d 540, 541 (Mich. App. 1993) (upholding a lower court’s grant of a permit to the City to enter private property to inspect and test it pursuant to § 213.54(3) despite the fact that “public use and purpose” had not yet been established). NOTE – not an NGA case</p>
Minnesota Mississippi Missouri Montana			

STATE	APPLICABLE STATUTES	ALLOWANCE OF PRE-CERTIFICATE SURVEY ACCESS?	RELEVANT COURT DECISIONS
Nebraska Nevada New Hampshire	N.H. Rev. Stat. Ann. § 362.2 N.H. Rev. Stat. Ann. § 371:2-a	Unlikely given limited purpose. § 362.2 defines “public utility” to include corporations and companies “owning or operating any pipeline...for the transportation, distribution or sale of gas...” § 371:2a then extends the right to enter land “over which a public utility desires to erect facilities” “for the purpose of surveying and making such other investigation as is necessary to determine the locations of the boundaries of such land and of the facilities it desires to erect thereon...” <i>but only</i> where utility has need to ascertain ownership or has “filed a petition at the NH PUC (as opposed to FERC)...with respect to a particular tract of land”	N/A
New Jersey	N.J. Stat. Ann. § 20:3-2 N.J. Stat. Ann. § 20:3-16 N.J. Stat. Ann. § 48:10-1	Unlikely. § 20:3-2(m), for eminent domain purposes, defines “public utility” to include “every natural gas pipeline utility...vested with the power of eminent domain and subject to regulation under State or Federal law.” An interstate pipeline is not “vested” with eminent domain authority until a certificate issues. § 20:3-16 states that a “prospective condemnor...may enter upon any property which it has authority to condemn for the purpose of making studies, surveys, tests, soundings, borings and appraisals” with ten days’ notice. § 48:10-1 affirms that pipeline companies can condemn land for easements.	Creek Ranch, Inc. v. New Jersey Turnpike Authority , 383 A.2d 110, 114 (N.J. 1978) (citing §20:3-16 as providing authority for the prospective condemnor to survey, but also to acquire a broader right-of-entry permit to “clear, grade, and drain...land...”) but does not involve interstate pipeline.
New Mexico			

STATE	APPLICABLE STATUTES	ALLOWANCE OF PRE-CERTIFICATE SURVEY ACCESS?	RELEVANT COURT DECISIONS
New York	<i>N.Y. Pub. Serv. Law § 120</i>	<p>Unclear. Pub. Serv. Law § 120 states that the New York law on siting transmission lines includes “fuel gas transmission line[s]” 1,000 feet or longer and transporting gas at ≥125,000 psi. There is no statute providing for pre-condemnation surveys of potential pipeline sites. Organizations like Stop NY Fracked Gas Pipeline assert landowners can refuse pre-Certification entry for surveys but do not cite statutes to that effect (http://stopnypipeline.org/wp-content/uploads/2015/02/LawyerMemo_020215.pdf).</p>	<p><u>King v. Power Authority</u>, 44 A.D.2d 74, 76 (N.Y. App. Div. 1974) (holding that a state power authority’s entry onto private land for seismological and subsurface examinations was not unconstitutional, and noting that “[t]he Legislature has long recognized the necessity for entry upon private property for the purpose of making surveys...prior to construction of public improvements”) (<u>aff’d King v. Power Authority</u>, 38 N.Y.2d 756 (N.Y. 1975)).</p>
North Carolina	<p><i>N.C. Gen. Stat. § 40A-3(a)</i> <u>N.C. Gen. Stat. § 40A-11</u> <u>N.C. Gen. Stat. § 62-190</u></p>	<p>Sometimes. § 40A-3(a) defines a private condemnor to include “[c]orporations, bodies politic or persons hav[ing] the power of eminent domain for the construction of...pipelines...originating in North Carolina for the transportation of...gas.” This section also limits the width of any natural gas pipeline easement to 100 feet. § 40A-11 then states that “[a]ny condemnor without having filed a petition or complaint...is authorized to enter upon any lands, but not structures, to make surveys, borings, examinations, and appraisals as may be necessary or expedient in carrying out and performing its rights or duties under this Chapter” with 30 days’ notice to the landowner. § 62-190 extends eminent domain rights to pipeline companies incorporated in North Carolina or “foreign corporations domesticated under” NC law. Such corporations may then extend pipelines from within NC into another state.</p>	<p><u>Duke Power Co. v. Herndon</u>, 217 S.E.2d 82, 84 (N.C. Ct. App. 1975) (“The present action is not an action to condemn a right-of-way across defendants’ lands. This is an action to enforce the statutory right of plaintiff under G.S. 40-3 to ‘enter upon’ defendants’ lands for the purpose of making a survey of the proposed route. Such a survey clearly is necessary before plaintiff can undertake intelligent negotiations with defendants for a purchase...or...institute condemnation proceedings.”).</p>

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<p>North Dakota</p> <p>Ohio</p>	<p>Ohio Rev. Code Ann. § 163.01 Ohio Rev. Code Ann. § 163.03 Ohio Rev. Code Ann. § 163.05 Ohio Code 4905.02</p>	<p>Unclear but see caselaw. § 163.01(G) defines a public utility as including any public or private agency regulated by the state Public Utilities Commission or, meeting the definition of Ohio Code 4905.02 (which requires service for end use) or “holding a certificate of public convenience and necessity granted by [FERC].” § 163.03 states that any agency may, “prior to...the filing of a petition [for appropriation under § 163.05], enter upon any lands, waters, and premises for the purpose of making such surveys, soundings, drillings, appraisals, and examinations as are necessary or proper for the purpose of the agency under sections 163.01 to 163.22...” Under strict terms of statute, pipeline without a certificate may not qualify as utility, but caselaw (next column) reaches contrary result and allows surveys.</p>	<p>Texas Eastern Transmission, LP v. Barack, 2014 WL 1408058 (S.D. Ohio Apr. 11, 2014) (finding that plaintiff with a pending FERC certificate application was a “company organized for the purpose of transporting natural...gas through...pipes” and is therefore an “agency that has the power of eminent domain”; holding that plaintiff “is permitted pursuant to...§ 163.03 to enter upon lands...for the purpose of conducting necessary surveys...”; and granting a request for a preliminary injunction for immediate access).</p>
<p>Oklahoma</p>	<p>Okla. Stat. tit. 27, § 7 Okla. Stat. tit. 66, § 51</p>	<p>Maybe. The place to start with Oklahoma eminent domain is with railroads; 66 Okl. St. § 51 states that “any railroad corporation authorized to construct, operate, or maintain a railroad within this state, has power and is authorized to enter upon any land for the purpose of examining and surveying its railroad...” 27 Okl. St. § 7 then states that natural gas distribution companies have the same eminent domain power as railroad corporations.</p>	<p>N/A</p>
<p>Oregon</p>			

STATE	APPLICABLE STATUTES	ALLOWANCE OF PRE-CERTIFICATE SURVEY ACCESS?	RELEVANT COURT DECISIONS
Pennsylvania	26 Pa. Cons. Stat. § 202 26 Pa. Cons. Stat. § 309 66 Pa. Cons. Stat. § 102	No. 66 Pa. Cons. Stat. § 102 defines a “public utility” to include “[a]ny person or corporations...operating in [Pennsylvania] equipment or facilities” for transmitting natural gas to the public. Such an entity is a condemnor under 26 Pa. Cons. Stat. § 202, and under 26 Pa. Cons. Stat. § 309(a), a condemnor may, prior to a taking, with notice, has “the right to enter upon any land or improvement in order to make studies, surveys, tests, soundings and appraisals.” However, the case law (see <i>directly infra</i>) takes care to distinguish between federal and state authority so as to avoid burdening a landowner with the above reading.	Tennessee Gas Pipeline Co. v. Garrison , 2010 U.S. Dist. LEXIS 94422, *3 (M.D. Pa. Sept. 10, 2010) (“In claiming a right to enter Defendants’ property to carry out the surveys, Plaintiff fuses state and federal law in a way that does not stand up to close scrutiny...[T]he Natural Gas Act does not provide for pre-condemnation entry onto Plaintiff’s property, nor does it point to state law for such authorization.”).
Rhode Island South Carolina South Dakota			
Tennessee	Tenn. Code Ann. § 29-16-121 Tenn. Code Ann. § 65-28-101	Yes. § 29-16-121 states that “[a] person or company actually intending to make application for [eminent domain] privileges...and entering upon the land of another for the purposes of making the requisite examinations and surveys...is liable only for the actual damage done...” § 65-28-101 <i>et seq.</i> extend this authority to gas pipelines regulated by Tennessee state agencies.	Midwestern Gas Transmission Co. v. Green , 2006 Tenn. App. LEXIS 115 (Tenn. App. Feb. 24, 2006) (holding that §29-16-121 was not preempted by the Natural Gas Act, and that entities seeking to conduct surveys do not need state condemnation authority or a FERC certificate).
Texas Utah			

STATE	APPLICABLE STATUTES	ALLOWANCE OF PRE-CERTIFICATE SURVEY ACCESS?	RELEVANT COURT DECISIONS
Vermont	Vt. Stat. Ann. tit. 30, § 110 Vt. Stat. Ann. tit. 30, § 116 Vt. Stat. Ann. tit. 30, § 248	<p>Probably not. 30 V.S.A. § 110 extends eminent domain power to Vermont corporations and foreign corporations under VT Public Service Board jurisdiction. § 116 clarifies that this title applies to pipelines.</p> <p>§ 248(a)(3) complicates things regarding interstate pipelines: No company, it says, “may begin site preparation for or commence construction of any [new] natural gas facility...unless the Public Service Board first...issues a certificate” for it. This includes transmission lines that have been certified under the Natural Gas Act. § 248(a)(3)(B), but excludes any company within the meaning of the NGA <i>unless</i> such a company is constructing a pipeline that is “not solely subject to federal [NGA] jurisdiction.” § 248(a)(3)(C) reserves for the Board the right to offer an opinion on a project to be constructed in Vermont “in connection with federal certification” proceedings.</p> <p>5 V.S.A. § 3518 gives railroad corporations the ability to conduct preliminary surveys, but no statute explicitly extends this authority to pipeline companies as is done in Oklahoma.</p>	N/A
Virginia	Va. Code Ann. § 56-49.01	<p>Likely but cases are pending and constitutionality challenged. § 56-49.01 allows any natural gas company to “make such examinations, tests, hand auger borings, appraisals, and surveys for its proposed line...as are necessary...to satisfy any regulatory requirements” without landowner’s permission if the company previously requested and did not receive it.</p>	<p><i>Pending.</i> A lawsuit challenging the constitutionality of § 56-49.01 is ongoing in the U.S. District Court for the Western District of Virginia (Klemic v. Dominion Transmission, Inc., 3:14-cv-00041 (W.D. Va.)). See State Brief Defending Statute</p>
Washington			

STATE	APPLICABLE STATUTES	ALLOWANCE OF PRE-CERTIFICATE SURVEY ACCESS?	RELEVANT COURT DECISIONS
West Virginia	W.Va. Code 54-1-3	Unclear. Allows company with eminent domain to conduct surveys; unclear is interstate pipeline is deemed to have eminent domain in advance of certificate.	Mountain Valley Lawsuit against landowners – pending in federal court, West Virginia, 15-cv-3858.
Wisconsin			
Wyoming			

Appendix (text of applicable statutes):