



New Hampshire Association of Conservation Commissions

SERVING NEW HAMPSHIRE'S COMMUNITIES SINCE 1970

54 Portsmouth Street, Concord, NH 03301 | (603) 224-7867 | www.nhacc.org

Frequently Asked Questions – Northeast Energy Direct Project

What is eminent domain (ED) and how does it work?

Eminent domain is a power held by the state and federal governments to take (or authorize others to take) private property for a public purpose on the condition of paying just compensation. States generally delegate some of this power to municipalities for particular local purposes and to utility companies supplying vital services through networked systems.

Because Congress considers natural gas pipelines an important aspect of interstate commerce, it has preempted state law regarding approval of pipelines and the exercise of eminent domain to acquire necessary property rights. The relevant law is the The Natural Gas Act, 15 U.S.Code §§ 717 – 717Z.

What are town/individual rights as property owners, if ED applies to their land?

A negotiated, voluntary purchase of the relevant property rights is usually in the interest of both parties. Eminent domain proceedings involve delay and expense. However, so long as the exercise of the power is within the government's delegation, the proper notices are given, and there is a public purpose, the only thing in issue is the amount of compensation. Landowners who reject the company's last offer have a right to litigate the amount of compensation (fair market value of what is taken), but must pay their own appraisers and attorneys.

A company must secure 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. The FERC proceedings to decide whether to issue this certificate are governed by fairly complex regulations involving public notice and opportunity to comment. The issuance of the Certificate settles the public purpose question. Once a company has the certificate, it may use the power of eminent domain to secure property necessary for the project in a "service area" designated by FERC. It may do so in state court, or, if the landowner's claim is more than \$3,000, it may choose the U.S. District Court.

How is it possible for a private company to have the right of ED?

By delegation through legislation, state or federal, to accomplish some substantial public purpose. As with highways, dams, and bridges, practical and economical networked utility systems would be vulnerable to extortionate "hold-outs" if they did not have the power of eminent domain as a last resort.

When could ED be invoked for the Northeast Energy Direct pipeline project?

Any time the company has the certificate and "is unable to agree with the owner of property to the compensation to be paid."

How does ED apply if there is a conservation easement or similar deed restriction on town/private property?

The N.H. Attorney General takes the position that all conservation easements, whoever is the record owner, are held in trust for the public and therefore subject to the law of Charitable Trusts and regulation by the Director of Charitable Trusts (an Assistant AG running a special Division of the AG's office). That means that the Director must be served in any legal proceedings involving the easement and may act to protect the public interest. It also probably means that any voluntary sale affecting the easement would have to be reported to the Director, with published notice. This does not mean the Director can stop the taking. The Director can litigate valuation and must take steps to assure that the portion of any proceeds attributable to damage to the conservation easement goes to support the same charitable purpose—perhaps put toward acquiring a similar easement.

What information about individual or town land do owners have to provide to Kinder Morgan or its representatives if they ask?

Unless formal eminent domain proceedings have started, landowners are not required to co-operate with Kinder Morgan.

Why might individuals/towns want to provide Kinder Morgan with information about their land?

A negotiated voluntary sale is usually in the landowners' interest. Information, a view, even permission to survey make that easier. In the end, the company can take the property. If it is uncertain about the condition of the property, its offers are likely to be conservative. If it has to start the taking process just to get surveyors or appraisers on the land, a mutually satisfactory settlement may be less likely.

Why is FERC (Federal Energy Regulatory Commission) making the decisions about the pipeline project?

Congress has pre-empted state laws using its power under the commerce clause and put regulation of all natural gas pipeline construction and siting under FERC's control through the federal Natural Gas Act.

More FAQs coming soon. Check this page for updates: <http://www.nhacc.org/resources/energy/>

This document summarizes the New Hampshire Association of Conservation Commissions' best understanding of the processes regulating natural gas pipelines. This document is not legal advice and it is not the policy of the NHACC. Conservation commissions should consult their own legal counsel for legal advice and to confirm all details in this document.