**THE JOELTON GAS COMPRESSOR STATION—ANOTHER FEDERAL BATTLEFIELD IN THE NATURAL GAS INDUSTRY**

Table of Contents

[Introduction 2](#_Toc463031246)

[I. Preemption of State and Local Siting Authority and the Savings Clause under the Natural Gas Act 4](#_Toc463031247)

[1. Preemption of State and Local Siting Authority under the Natural Gas Act 4](#_Toc463031248)

[2. The Savings Clause: Preservation of State Authority Under Federal Statutes 5](#_Toc463031249)

[II. Cooperative Federalism Under the Clean Air Act 6](#_Toc463031250)

[1. State Implementation Plans (SIPs) and Clean Air Act Requirements 6](#_Toc463031251)

[2. Case Studies: *Dominion Transmission, Inc. v. Summers* and *Myersville Citizens for a Rural Community, Inc. v. FERC* 9](#_Toc463031252)

[III. Possible Arguments in the Joelton Case 11](#_Toc463031253)

[1. The Threshold Question: Standing 11](#_Toc463031254)

[2. Arguments On the Merits 13](#_Toc463031255)

[A. Both the Construction Permit and the drafted/proposed Part 70 Operation Permit violate the applicable regulation by failure to apply RACT to reduce the toxic emissions. 13](#_Toc463031256)

[B. The Construction Permit violates the applicable law, thus should be denied. 16](#_Toc463031257)

[Conclusion 20](#_Toc463031258)

# 

# Introduction

Legal proceedings to determine whether gas pipelines can be constructed are often costly and time-consuming. These proceedings often pit gas companies against local entities who are concerned about the environmental and zoning effects of proposed construction. State and local governments are able to challenge proposed construction that has already been approved by the federal government, based on more strict state-based environmental regulations. These conflicts are likely to play out in the legal situation surrounding the proposed Joelton Compressor Station in Tennessee. While the outcome is still unknown, the legal issues surrounding the Joelton station are exemplary of the current unwieldy system regulating natural gas project construction.

The Joelton Compressor Station is the largest and most expensive component of a project that is being initiated in Davidson County, Tennessee.[[1]](#footnote-1) On September 6, 2016, the Federal Energy Regulatory Commission (FERC) issued a Certificate Order to the Broad Run Expansion Project, proposed by Tennessee Gas Pipeline Company (Tennessee), LLC.[[2]](#footnote-2) The compressor station consists of two natural gas-fired turbines rated at 207.8 MMBtu per hour used to compress pipeline natural gas, one natural gas-fired boiler rated at 4.6 MMBtu per hour, one 1,500 kW natural gas-fired emergency generator powered by a 2,175 hp spark ignition (SI) engine, and a collection of fugitive emissions components.[[3]](#footnote-4) Once completed, the Joelton station would be among the largest gas compressor stations nationwide.[[4]](#footnote-5)

Controversy about the environmental impact of the plant may delay or prevent construction. With FERC’s Certificate Order in hand, now the only permits Tennessee needs to get before commencing the construction of the Joelton station are the Clean Air Act Permits issued by Nashville’s Metro Public Health Department, Air Pollution Control Division. The Health Department has released the drafted construction and operation permits and opened them up for public comments until August 3, 2016. Numerous parties including the rural Joelton residents and environmental groups like the Sierra Club and CCSE (the Concerned Citizens for a Safe Environment) filed comments in opposition to the project. Currently[[5]](#footnote-6), the Health Department is reviewing the comments and making its final decision.

Local government is opposed to the project. As an effort to stop the proposed compressor station, Nashville’s Metropolitan Council recently passed two local ordinances. One restricts gas compressor stations to only industrial-zoned areas in Davidson County.[[6]](#footnote-7) The other required that no new source be granted a construction permit “unless the new source complies with the Metropolitan Zoning Code for the use of the property on which the new source is to be constructed.”[[7]](#footnote-8)

Local air pollution control agencies may also play a role in determining the station’s fate. Tennessee Code Annotated Title 68 allows for the existence of such local agencies to carry out the functions of the State Air Pollution Control agency in a local jurisdiction, such as Nashville/Davidson County.[[8]](#footnote-9) Accordingly, on August 25, 2016, Nashville’s Metro Public Health Department Air Quality Control Division submitted a request to amend a portion of the State Implementation Plan (SIP), which includes the latter ordinance, Second Substitute Ordinance No. BL2016-234.[[9]](#footnote-10) This amendment to the SIP would become federally enforceable upon being submitted and approved by the EPA.[[10]](#footnote-11) The State of Tennessee Air Pollution Control Division is seeking comments by November 15, 2016 on whether this local ordinance amendment should be incorporated into the SIP.[[11]](#footnote-12)

The battle over the Joelton station will continue to see Federalism conflicts play out between federal regulators and state and local legislatures and agencies. Part I of this essay discusses federal preemption in pipeline transportation and the states’ preserved authorities under the saving clauses of the Natural Gas Act. Part II explores the cooperative federalism under the Clean Air Act. It examines State Implementation Plans (SIPs), Clean Air Act Requirements and two case studies which serve as examples of how such conflicts play out. Finally, part III discusses possible arguments in the Joelton case.

# Preemption of State and Local Siting Authority and the Savings Clause under the Natural Gas Act

## Preemption of State and Local Siting Authority under the Natural Gas Act

The authority of state and local authorities to control the station is limited by Section 7 of the Natural Gas Act of 1938, which establishes FERC’s sitting and eminent domain authority for any interstate natural gas pipeline.[[12]](#footnote-14) This section also applies to related facilities, such as compressor stations.[[13]](#footnote-15) According to its provisions, a natural gas company must obtain a certificate of public convenience and necessity from FERC to undertake jurisdictional service, construct or extend facilities for such service, or acquire and operate such facilities.[[14]](#footnote-16) Applications for a certificate must be set for hearing (or a “paper hearing”), while a temporary certificate may be issued in an emergency without notice or a hearing.[[15]](#footnote-17) The FERC shall issue the certificate if the applicant “is able and willing properly to… conform to the FERC’s requirements,” and if the proposed natural gas facilities “[are] or will be required by the present or future public convenience and necessity.”[[16]](#footnote-18)

The Supreme Court has held that the entity holding FERC’s certificate under the Natural Gas Act is not subject to any state or local rules (e.g. local zoning laws) which contradict FERC’s regulations.[[17]](#footnote-19) State regulation that interferes with FERC’s regulatory authority over the transportation of natural gas is preempted.[[18]](#footnote-20) Thus, the Natural Gas Act and its subsequent court interpretations leave state and local governments little authority to regulate interstate gas pipeline projects in any manner that interferes with FERC’s regulation of them.

## The Savings Clause: Preservation of State Authority Under Federal Statutes

Some exceptions exist which undercut on environmental grounds this concentration of power in federal hands. A later statute, the Energy Policy Act of 2005, contains a savings clause, which preserves states’ “rights” under three federal environmental statutes: the Clean Water Act, the Clean Air Act and the Coastal Zone Management Act.[[19]](#footnote-21) Since the Health Department is currently in the process of deciding whether to issue the permits, Nashville’s local government may use its authority under the Clean Air Act to block the construction of the proposed Joelton station.[[20]](#footnote-22)

# Cooperative Federalism Under the Clean Air Act

## State Implementation Plans (SIPs) and Clean Air Act Requirements

The Clean Air Act regulates emissions of certain kinds of air pollutants to protect and enhance ambient or outdoor air quality.[[21]](#footnote-23) The manner in which it functions is “an exercise in cooperative federalism,” in which the EPA promulgates air quality standards and the states typically adopt state implementation plans (SIPs) to enforce those air quality standards. [[22]](#footnote-24) A SIP needs the EPA’s approval to be enforceable.[[23]](#footnote-25)

Meeting clean air standards is a significant hurdle in the construction of natural gas facilities. Construction and operation of pipeline-related facilities (e.g. natural gas compressor stations) may require Clean Air Act permits “from the EPA or authorized state, tribal or local government.”[[24]](#footnote-26) Permitting requirements for a specific facility depend on (1) the types and qualities of air pollutants the facility would emit and (2) “the air quality attainment states for those pollutants” in the area of the proposed facility.[[25]](#footnote-27)

Which regulations a proposed station must meet depends on a variety of factors, such as where it is located and whether it is a new or existing facility. The applicable Clean Air Act permitting requirements for pipeline related facilities include (1) the Title V operating permitting program, which requires major sources of air pollutants, and certain other sources, to obtain and operate in compliance with an operating permit;[[26]](#footnote-28) and (2) the New Source Review (NSR) permitting program, which provides air pollutant standards for new facilities or any modifications to existing facilities that would create a "significant increase" of a regulated pollutant.[[27]](#footnote-29) Additionally, the EPA establishes New Source Performance Standards (NSPS) as the technology-based emissions standards only for new and modified sources.[[28]](#footnote-30)

The NSR permitting system is itself complex and has different components depending on the type of facility being evaluated. There are three branches of the NSR program: the Prevention of Significant Deterioration (PSD) program, which applies to a new major source or a source making a major modification in an attainment area; the Nonattainment NSR program, which applies to a new major source or a source making a major modification in a nonattainment area; and the Minor NSR program, which applies to a new minor source and/or a minor modification at both major and minor sources, in both attainment and nonattainment areas. The Lowest Achievable Emissions Rate (LAER) standard, the most stringent standard, is required for a new, stationary source that is to be located in a nonattainment area.[[29]](#footnote-31) The Best Available Control Technology (BACT) standard is required on a major new or modified source in an attainment area.[[30]](#footnote-32) The Reasonably Available Control Technology (RACT) standard, the least stringent standard, applies to existing sources in areas that are not meeting national ambient air quality standards on controlled air pollutants, and is required on all sources that meet these criteria.

When state and local guidelines come into conflict, the stricter state guidelines typically prevail. The Clean Air Act allows states to set stricter air pollutants standards under SIPs than the EPA’s federal standards.[[31]](#footnote-33) However, when a state or local government does not follow EPA’s requirement, the EPA remains the authority to “prevent construction or modification of a major stationary… source.”[[32]](#footnote-34) For example, the EPA may veto state-issued Title V permits if they do not meet requirements in the Clean Air Act or the state’s SIPs.[[33]](#footnote-35)

The Natural Gas Act allows the federal courts of appeals to serve as an additional check on the state’s preserved rights under the Clean Air Act, by vesting the courts with

original and exclusive jurisdiction over civil suits seeking judicial review of federal or state actions or omissions concerning issuance, denial, or conditioning of a permit or other approval under federal law when it would interfere with construction of a FERC-certificated facility.[[34]](#footnote-36)

If the court holds that the actions or omissions conflict with the federal regulations, or would delay the construction and operation of facilities approved by FERC, it must remand the relevant federal or local agencies to take further action consist with the court’s order, to be undertaken before a court-imposed deadline.[[35]](#footnote-37) Two D.C. Circuit cases, *Dominion Transmission, Inc. v. Summers* and *Myersville Citizens for a Rural Community, Inc. v. FERC*, are landmark cases within this category.[[36]](#footnote-38)

## Case Studies: *Dominion Transmission, Inc. v. Summers* and *Myersville Citizens for a Rural Community, Inc. v. FERC*

The *Dominion Transmission* case represents an instance in which a plaintiff denied permits to a natural gas company, but was ordered by the courts either to give a specific reason for denying the permits or to issue them. In this case the pipeline company received a certificate of public convenience and necessity from FERC, but the Maryland Department of Environment refused to process the company's permit application based on the company's alleged failure to comply with local zoning and land use requirements.[[37]](#footnote-39) The court rejected the pipeline company's argument that the Natural Gas Act preempts a state law requirement that a proposed compressor station be in compliance with local law.[[38]](#footnote-40) The requirements have been incorporated into Maryland's SIP, and Congress expressly saved states' Clean Air Act powers from preemption when it enacted the Natural Gas Act.[[39]](#footnote-41) Nevertheless, the state law requirement expressly permits an applicant to avoid involvement by the local zoning authority altogether if it provides documentation that the source meets all applicable zoning and land use requirements.[[40]](#footnote-42) The state agency's purported requirement of a written statement of compliance from the local zoning authority was therefore contrary to law.[[41]](#footnote-43) To reject the company’s permit application, the state agency has to give the specific reason for the denial.[[42]](#footnote-44) On remand, the Maryland Department of Environment must either identify one or more applicable zoning or land use requirements with which the company has not demonstrated compliance, or it must process the company's application for an air quality permit.[[43]](#footnote-45)

In another D.C. Circuit case, *Myersville Citizens for a Rural Community, Inc. v. FERC*, the court upheld the FERC’s approval of the pipeline company’s construction of a natural gas compressor station in Myersville, Maryland.[[44]](#footnote-46) The court determined that FERC did not intrude on Maryland’s rights under the Clean Air Act.[[45]](#footnote-47) Specifically, the citizen group argued that FERC violated Maryland’s rights as the permit issuer. The rationale for this was that FERC had granting approval conditional on the company’s subsequent receipt of a permit under that act; according to Myersville Citizens, the conditional approval unlawfully influenced the state to grant a permit to the company.[[46]](#footnote-48) As a threshold matter, the court held that the citizen group had standing to file this lawsuit, rejecting the company’s argument that they fell outside of the Act’s “zone of interests.”[[47]](#footnote-49) On the merit, the court held that this conditional approval did not intrude on state jurisdiction; Maryland remained free to interpret its own law and independently determine whether to issue a permit under the Clean Air Act, and the question of whether the state properly did so was not before this court, but instead is being challenged in a separate action in state court.[[48]](#footnote-50)

The courts’ opinions in both cases show that the D.C. Circuit reviews the FERC’s actions with considerable deference. Meanwhile, it makes sure that the citizen groups or other individuals or entities will have the standing to bring this type of challenge before court.[[49]](#footnote-51)

These two cases are important references for discussion of the Joelton station case, since the new station is likely to face a similar legal challenge. Even though the proposed Joelton station is still waiting for its Clean Air Act permits from Nashville’s Metro Health Department, which has not reached its final determination, the local citizen group CCSE (the Concerned Citizens for a Safe Environment) has made the decision to appeal to the Sixth Circuit if the final Clean Air Act permits would be issued to Tennessee.

# Possible Arguments in the Joelton Case

## The Threshold Question: Standing

Before courts can address the merits of the case, CCSE must meet the standing requirement to bring a lawsuit against the Joelton station. Similar to *Myersville Citizens for a Rural Community, Inc.*, CCSE will meet the standing requirement for such a lawsuit.[[50]](#footnote-52) The Supreme Court has clarified that the test for standing is the zone-of-interests test, a test which CCSE passes by being comprised of members of the community whom the new station would affect.[[51]](#footnote-53) The zone-of-interests test requires the court to “determine, using traditional tools of statutory interpretation, whether a legislatively conferred cause of action encompasses a particular plaintiff's claim.”[[52]](#footnote-54) To further explain the zone-of-interest test, the Court says

we presume that a statutory cause of action extends only to plaintiffs whose interests fall within the zone of interests protected by the law invoked. The test is lenient and not especially demanding. In addition, we generally presume that a statutory cause of action is limited to plaintiffs whose injuries are proximately caused by violations of the statute. (citations omitted) (quotation marks omitted).[[53]](#footnote-55)

First, the proximate causation requirement of the zone-of-interest requirement would be satisfied by CCSE. CCSE is made up of local residents from the Joelton community. They have been arguing in opposition to the Joelton station that they would be affected by construction and operation of the proposed station because its negative impacts on their property values and on the regional environment. They are concerned with the safety hazards and health impact the station would pose to the general public, as well as the noise and various pollutants it would produce. These injuries would be proximately caused by the approval of the station.

The fact that the CCSE would be relying on environmental laws such as the Clean Air act could also bring them legitimate standing. The D.C. Circuit has ruled in *Myersville Citizens for a Rural Community, Inc.* that the statutes a plaintiff relies on to bring its action could be both the Natural Gas Act and the Clean Air Act, provisions focusing on the preservation of state and local authorities.[[54]](#footnote-56) The statutory provision at issue does not need to be intended to benefit the plaintiff. As long as the asserted interests arguably fall in the scope of the provisions, they are sufficient to support the plaintiff’s standard.[[55]](#footnote-57)

Moreover, CCSE would satisfy the Article III standing requirement by seeking remedy for their depressed property values, increased noise and air pollution and heightened safety and health risks, etc.[[56]](#footnote-58) These are concrete and cognizable injuries stemming from the proposed approval of the compressor station.[[57]](#footnote-59) Like *Myersville Citizens for a Rural Community, Inc.*, these claims are not political or procedural.[[58]](#footnote-60) Therefore, the CCSE would probably meet the threshold of standing.

## Arguments On the Merits

Arguments on the merits would likely focus on air quality and zoning ordinances. During the opening public comments period after Nashville’s Metro Public Health Department announced the drafted construction and operation permits to Tennessee, the CCSE, represented by the Southern Environmental Law Center (SELC), filed comments against the proposed permit. If the permits are issued by the Health Department, arguments in the SELC’s comments would possibly be the same as those made in the CCSE’s claims on appeal.[[59]](#footnote-61) SELC’s arguments that (1) issuance of the construction permit and the Drafted/Proposed Part 70 Operation Permit would violate the applicable regulations because “they fail to apply adequate Reasonably Available Control Technology (RACT) to reduce toxic NOx emissions; and (2) issuance of the drafted construction permit because the proposed Joelton station violate a local zoning ordinance.[[60]](#footnote-62)

### Both the Construction Permit and the drafted/proposed Part 70 Operation Permit violate the applicable regulation by failure to apply RACT to reduce the toxic emissions.

The volume of pollution that would be produced by the station could lend validity to an argument based on air quality. Under the Health Department’s Regulation No. 14 §14-2(a), “any owner or operator of a facility which emits or has the potential to emit one hundred (100) tons per year or more of nitrogen oxides (NOx) shall apply reasonably available control technology (RACT) to control NOx emissions from that source.” The owner or operator is required to submit the RACT analysis for evaluation by the Health Department. [[61]](#footnote-63)

According to the Construction Permit and the drafted/proposed Part 70 Operation Permit, the total amount of the annual NOx emissions from the two turbines in the Joelton station is 167.4 tons.[[62]](#footnote-64) This makes it a “major source” under the Health Department’s air quality regulations.[[63]](#footnote-65) Major sources are subject to the federal Title V operation permit program and are required to apply RACT to reduce NOx emissions.[[64]](#footnote-66)

As the SELC argues, the RACT analysis submitted by Tennessee “uses outdated and incomplete information to incorrectly conclude that an NOx limit of 25ppm is RACT for the two Titan turbines” at the proposed Joelton station. The health Department “erroneously accepted the RACT analysis essentially no critical or independent review.”[[65]](#footnote-67)

There are a number of potential issues with the state’s RACT analysis. Existing evidence suggests that the NOx limit could be significantly higher than was suggested in the information provided. Pursuant to the analysis in the Powers Project,

properly determined NOx RACT for the two Titan 250 turbines is wither 9ppm NOx using advanced dry low NOx technology or 2.5 ppm NOx using selective catalytic reduction. Both of these alternatives are technically and economically feasible using a NOx RACT cost-effectiveness ceiling of $2,500/ton to $5,000/ton.[[66]](#footnote-68)

However, Tennessee failed to disclose that in its RACT analysis.

In addition to this potential miscalculation, there are possible large-scale problems with its RACT analysis. It is insufficient in the sense that

1. There is an almost exclusive reliance on the EPA’s limited RACT/BACT/LAER Clearinghouse to evaluate NOx limits and controls for gas turbines.
2. There is no identification or discussion of the three different dry low NOx (DLN) control levels offered by the manufacturer for the Titan turbine: 25 ppm, 15 ppm, and 9 ppm, or of NOx limits in contemporaneous Titan (or smaller) gas turbine compressor station air permit applications.
3. It relies on generic and obsolete selective catalytic reduction and DLN cost data from 1990.
4. There is no identification of an appropriate $/ton con-effectiveness ceiling by which to compare the cost feasibility of available RACT options.[[67]](#footnote-69)

For these reasons, the SELC has potential legal ground for its requests that the permits be denied.

### The Construction Permit violates the applicable law, thus should be denied.

The Joelton station can also be challenged on zoning grounds. The proposed property for the Joelton station is zoned for agricultural use[[68]](#footnote-70), while the Metropolitan zoning provides that compressor stations should be located only in areas zoned for industrial use.[[69]](#footnote-71) A newly passed Second Substitute Ordinance No. BL2016-234 requires that no new source be granted a construction permit until it complies with the Metropolitan Zoning Code for the use of the property where the it is to be constructed. Thus, SELC argues that issuing the construction permit for the Joelton station would violate this Second Substitute Ordinance No. BL2016-234.[[70]](#footnote-72)

While this claim has some validity, it also has weaknesses. Both *Dominion Transmission, Inc* and *Myersville Citizens for a Rural Community, Inc.* have clarified that to deny an application for an air quality permit, the state or local agency has the obligation to explain why it has refused to process the application.[[71]](#footnote-73) The fact the Second Substitute Ordinance No. BL2016-234 is still not part of the SIP[[72]](#footnote-74) poses a problem for SELC’s argument because there is no applicable provision in the SIP that require an applicant of air quality permits to comply with the local zoning rules. Without including a compliance requirement in the SIP, the local zoning rule that is inconsistent with the FERC’s regulation is preempted under the Natural Gas Act.[[73]](#footnote-75)

This argument would be much stronger once the Second Substitute Ordinance No. BL2016-234 is approved by the EPA as part of the SIP. The Clean Air Act’s non-preemption provision allows the state to set a more stringent air quality standard in its SIP than the federal standard.[[74]](#footnote-76) The Six Circuit also ruled in *Merrick v. Diageo Americas Supply, Inc.* that “the fact that a state has more stringent regulations than a federal law does not constitute conflict preemption.”[[75]](#footnote-77) While the regulations overlap, they do not come into conflict because the stronger state statutes override the weaker federal ones.

A state statute is far more likely to carry weight if it is part of a SIP. The D.C. Circuit makes it clear in *Dominion Transmission, Inc.* and *Myersville Citizens for a Rural Community, Inc.* that “the Natural Gas Act savings clause for state Clean Air Act regulation saves a state statute from preemption despite the fact that it requires compliance with local zoning ordinances, as long as the statute is part of the SIP.” The court found the Maryland statute in *Dominion Transmission, Inc.* to be part of the SIP although it was not listed in the Code of Federal Regulations because it was incorporated by reference.[[76]](#footnote-78)

Therefore, the SELC’s current argument that the drafted construction permit would violate the local law is arguably weak because the local zoning requirement has not been included in the state’s SIP, the provisions on which the state’s preserved authority under the Clean Air Act can rely.

Legal battles concerning whether to issue the permits are likely to be significant and affect the timing of the project, even if the permits are ultimately issued. For Tennessee, the pipeline company, the air quality permits from Nashville’s Metro Public Health Department are the last obstacle before it can begin the construction of the Joelton station. However, considering the opposition from citizen groups like CCSE, the battle about the Joelton project probably will not see a final result until the latter half of 2017, or even later. According to the Health Department, it probably will not decide whether to issue the permits or not by the end of October 2016. With either result, the unsatisfied party would appeal the decision to the Sixth Circuit. It is hard to predict how long the potential trial process would take. Usually it will not be less than six months. Even though the Joelton Station’s permit application seems to reach the last step, relevant parties still have to be prepared for a long-time battle before the court makes its final decision.

The federal-state conflict in this case, and in other similar situated cases such as *Dominion Transmission, Inc.* and *Myersville Citizens for a Rural Community, Inc.*, indicate the tension between the environmental interests and the streamlined federal siting mechanism of the natural gas pipelines. Federal law typically favors the gas companies, in opposition to the local interests of community members who would be affected by the construction. Historically, “the fact that federal law rather than state law governs the construction of interstate natural gas pipelines has allowed the natural gas industry to significantly expand the infrastructure necessary to meet increased production when necessary.”[[77]](#footnote-79) Meanwhile, the land use, local environmental or even climate change concerns need to be addressed when dealing with each pipeline-related project. A separate state authority to address these concerns under the Natural Gas Act’s savings clause is both costly and inefficient, and frequently causes conflict with the federal authority, which often leads to a lawsuit before the federal court.[[78]](#footnote-80) The judicial review of the federalism battles like in *Dominion Transmission, Inc.* and *Myersville Citizens for a Rural Community, Inc.* produces considerable delay for pipeline projects and consumes a great deal of judicial resources in the federal system.

It would be beneficial if it were possible to reach balanced legal decisions about gas pipeline construction while consuming fewer legal resources than are consumed by typical legislation. Reforms to the current system could accomplish this. As suggested by Alexandra B. Klass & Jim Rossi’s recent article “Reconstituting The Federalism Battle in Energy Transportation,” one possible way to reform the current framework is to address the environmental impacts in an earlier stage, which requires FERC to make “more comprehensive procedural decisions” in pipeline siting “without expanding either state or federal authority over projects”.[[79]](#footnote-81) This could reduce delays in the approval of gas pipeline projects while still allowing for consideration of the state environmental impacts. It also could save money for all parties by reducing the kind of conflict that leads litigants to waste substantial resources in litigating jurisdictional issues.

# Conclusion

The proposed Joelton Project is emblematic of federal tensions that arise surrounding natural gas projects. The complexities of this case are the result of competing authority and jurisdiction among different entities. The 1938 Natural Gas Act grants FERC with the preempted authority in interstate pipeline transportation, while a later enacted savings clause in the Energy Policy Act of 2005 preserves state authority to issue permits under the Clean Air Act, the Clean Water Act and the Coastal Zone Management Act. The proposed Joelton station has the FERC’s Certificate Order and Nashville’s Metro Public Health Department’s drafted air quality permits.

Other issues with the station involve the quality of information supplied by Tennessee in its analysis of the project’s environmental impact. In opposition to the issuance of the permits, the Southern Environmental Law Center (SELC) raised two arguments in its comment to the Health Department. One contends that the Tennessee did not apply the required RACT in its RACT analysis; the other contends that the issuance of the construction permit would violate local law. The latter argument is weaker in the sense that the local law that SELC relies on has not been included into the SIP.

Not matter what the final outcome, the Joelton case demonstrates a costly and inefficient approach to pipeline siting that requires better coordination between federal, state and local authorities. To better address this problem, the FERC may consider the environmental concerns earlier in its decision making process.

1. Comments of the Concerned Citizens for A Safe Environment (CCSE) and Individual Members Urging Rejection of the Draft Environmental Assessment for the Broad Run Expansion Project, <http://media.wix.com/ugd/719f5a_ce3ec25d533241a3962f0cfb52e35de7.pdf>. [↑](#footnote-ref-1)
2. Tenn. Gas Pipeline Co., 156 FERC ¶ 61,157 (Sept. 9, 2016), <http://www.ferc.gov/CalendarFiles/20160906171831-CP15-77-000.pdf>. [↑](#footnote-ref-2)
3. Nashville’s Metro Public Health Department, Air Pollution Control Division, Part 70 Operating Permit Application Review, http://media.wix.com/ugd/719f5a\_3157507646b24235b83273ada9cf0df1.pdf. [↑](#footnote-ref-4)
4. Erika Kurre, *Gas Compressor Stations Moving in Middle Tennessee*, Fox17 News (July 21th, 2016), <http://fox17.com/news/local/gas-compressor-stations-moving-in-middle-tennessee>. [↑](#footnote-ref-5)
5. As of October 22, 2016. [↑](#footnote-ref-6)
6. Nashville & Davidson County, Tenn., Second Substitute Ordinance No. BL2015-1210 (August 10, 2015); SELC’s comment to the Metro Public Health Department, footnote 8 (this ordinance was passed by the Metropolitan Council on August 4, 2014 and approved by Mayer Megan Barry on August 10, 2015). [↑](#footnote-ref-7)
7. Nashville & Davidson County, Tenn., Second Substitute Ordinance No. BL2016-234; SELC’s comment to the Metro Public Health Department, footnote 6 (this ordinance was passed by the Metropolitan Council on July 5, 2016 and approved by Mayer Megan Barry on July 6, 2016). [↑](#footnote-ref-8)
8. “Any city, town or county having a population of six hundred thousand (600,000) or more, according to the federal census of 1960 or any subsequent federal census, is authorized to enact, by its chief legislative body, ordinances or regulations not less stringent than the provisions of part 1 of this chapter. A violation of any of the ordinances or enactments of the chief legislative body is punishable as a Class A misdemeanor.” TCA 68-201-202: Local ordinances. [↑](#footnote-ref-9)
9. Tennessee Department of Environment and Conservation Division of Air Pollution Control, Notice of Hearing, http://www.tennessee.gov/assets/entities/environment/attachments/ppo-air\_APC-Davidson-County-Notice-and-Amendment-to-Construction-Permits\_SIP\_Amendment-Completce-20160928-(3).pdf. [↑](#footnote-ref-10)
10. *Id.* [↑](#footnote-ref-11)
11. *Id.* [↑](#footnote-ref-12)
12. *See* 15 U.S.C. § 717(f). [↑](#footnote-ref-14)
13. Alexandra B. Klass & Jim Rossi, *Reconstituting The Federalism Battle in Energy Transportation* 7 (2016). [↑](#footnote-ref-15)
14. 15 U.S.C. § 717(f). [↑](#footnote-ref-16)
15. *Id.* [↑](#footnote-ref-17)
16. 15 U.S.C. § 717(e). [↑](#footnote-ref-18)
17. *See* *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 310 (1988) (“When a state regulation ‘affects the ability of FERC to regulate comprehensively ... the transportation and sale of natural gas, and to achieve the uniformity of regulation which was an objective of the [NGA]’ or presents the ‘prospect of interference with the federal regulatory power,’ then the state law may be pre-empted even though ‘collision between the state and federal regulation may not be an inevitable consequence.’ ... We therefore conclude that [the state law at issue] impinges on a field that the federal regulatory scheme has occupied.”) (citation omitted). [↑](#footnote-ref-19)
18. *See* *Schneidewind*, 485 U.S. at 306-08; *Dominion Transmission, Inc. v. Summers,* 723 F.3d 238, 243 (D.C. Cir. 2013) (state and local regulation is preempted by the NGA to the extent it conflicts with federal regulation, or would delay the construction and operation of facilities approved by the Commission). [↑](#footnote-ref-20)
19. 15 U.S.C. §717b(d). [↑](#footnote-ref-21)
20. *See generally* Richard K. Lattanzio, *An Overview of Air Quality Issues in Natural Gas System*, Cong. Res. Serv. (June 1, 2016), https://www.fas.org/sgp/crs/misc/R42986.pdf (noting that “natural gas systems contribute to air pollution in several ways, including (1) the leaking, venting, and combustion of natural gas in the course of production operations, and (2) the combustion of other fossil fuel resources during associated operations. Emission sources include pad, road, and pipeline construction; well drilling, completion, and flowback activities; and gas processing and transmission equipment such as controllers, compressors, dehydrators, pipes, and storage vessels. Pollutants include, most prominently, methane and volatile organic compounds (VOCs)—of which the natural gas industry is one of the highest-emitting industrial sectors in the United States—as well as nitrogen oxides, sulfur dioxide, particulate matter, and various forms of hazardous air pollutants.”) [↑](#footnote-ref-22)
21. 42 U.S.C §§7401, et seq; Brandon Murrill, *Pipeline Transportation of Natural Gas and Crude Oil: Federal and State Regulatory Authority,* Cong. Res. Serv. 16 (March 28, 2016), https://www.fas.org/sgp/crs/misc/R44432.pdf. [↑](#footnote-ref-23)
22. *Myersville Citizens for a Rural Community, Inc. v. FERC*, 783 F.3d 1301, 1317 (D.C. Cir. 2015) (citing Dominion Transmission, Inc. v. Summers, 723 F.3d 238, 240 (D.C.Cir.2013)). [↑](#footnote-ref-24)
23. *Myersville Citizens for a Rural Community*, 783 F.3d at 1317; *Michigan v. EPA*, 213 F.3d 663, 669 (D.C. Cir. 2000). *See also* 402 U.S.C § 7410(a). [↑](#footnote-ref-25)
24. Murrill, *supra* note 21, at 17. [↑](#footnote-ref-26)
25. *Id.* [↑](#footnote-ref-27)
26. 42 U.S.C. § 7661(a). The NSR program applies to regulated NSR pollutants. In the PSD program, the regulated NSR pollutants include the National Ambient Air Quality Standards (NAAQS) pollutants and some other pollutants including sulfuric acid mist, hydrogen sulfide, etc. In nonattainment NSR, the regulated NSR pollutants are only the NAAQS pollutants. https://www.epa.gov/sites/production/files/2015-12/documents/nsrbasicsfactsheet103106.pdf. [↑](#footnote-ref-28)
27. 42 U.S.C. §7475 (Prevention of Significant Deterioration (PSD) program for attainment areas); 42 U.S.C. §7503 (nonattainment NSR program). [↑](#footnote-ref-29)
28. 42 U.S.C. §7411; 40 C.F.R. Part 60. [↑](#footnote-ref-30)
29. Under LAER, the rate of emissions that reflects: (1) the most stringent emission limitation included in the implementation plan of any state for a similar source unless the facility owner or operator demonstrates such limitations are not achievable; or (2) the most stringent emissions limitation achieved in practice, whichever is more stringent. [↑](#footnote-ref-31)
30. BACT sets emission limitation based on the maximum degree of emission reduction (considering energy, environmental, and economic impacts) achievable through application of production processes and available methods, systems, and techniques. [↑](#footnote-ref-32)
31. 42 U.S.C § 7416. [↑](#footnote-ref-33)
32. Murrill, *supra* note 21, at 18 (citing 42 U.S.C. §7413(a)(5); *see also* Alaska Dep’t of Envtl. Conservation v. EPA, 540 U.S. 461, 468-69 (2004)). [↑](#footnote-ref-34)
33. *Id.* (cite to 42 U.S.C. §7661d(b)-(c)). [↑](#footnote-ref-35)
34. Murrill, *supra* note 21, at 5. The provision for judicial review (15 U.S.C. §717r(d)) also applies to Clean Water Act water quality certifications, but does not apply with respect to the CZMA, which contains its own administrative review process administered by the Secretary of Commerce.) [↑](#footnote-ref-36)
35. Murrill, *supra* note 21, at 5 (“It is important to note that the CAA and CWA authorize the Environmental Protection Agency (EPA) to exercise continuing oversight over a state’s administration and enforcement of federal environmental law permitting programs relevant to pipeline siting.”). [↑](#footnote-ref-37)
36. *Myersville Citizens for a Rural Community, Inc. v. FERC*, 783 F.3d 1301 (D.C. Cir. 2015), *Dominion Transmission, Inc. v. Summers,* 723 F.3d 238 (D.C. Cir. 2013). [↑](#footnote-ref-38)
37. *Dominion Transmission, Inc.*, 723 F.3d at 240. [↑](#footnote-ref-39)
38. *Id.* at 244. [↑](#footnote-ref-40)
39. *Id.* [↑](#footnote-ref-41)
40. *Id.* [↑](#footnote-ref-42)
41. *Id.* at 245. [↑](#footnote-ref-43)
42. *Id.* [↑](#footnote-ref-44)
43. *Id.* [↑](#footnote-ref-45)
44. *Myersville Citizens for a Rural Community, Inc.*, 783 F.3d at 1306. [↑](#footnote-ref-46)
45. *Id.* at 1307. [↑](#footnote-ref-47)
46. *Id.* [↑](#footnote-ref-48)
47. *Id.* at 1316-17. [↑](#footnote-ref-49)
48. *Id.* at 1317-19. [↑](#footnote-ref-50)
49. *Id.* at 1316-17. [↑](#footnote-ref-51)
50. *See* *id.* [↑](#footnote-ref-52)
51. *Id.* at 1316. *See also* *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S.Ct. 1377, 1387 (2014); *Ass'n of Battery Recyclers, Inc. v. EPA*, 716 F.3d 667, 675–76 (D.C.Cir.2013) (Silberman, J. concurring)). [↑](#footnote-ref-53)
52. *Id.* (citing *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S.Ct. at 1387.) [↑](#footnote-ref-54)
53. *Id.* [↑](#footnote-ref-55)
54. *Id.* [↑](#footnote-ref-56)
55. *Id.* [↑](#footnote-ref-57)
56. *See* *id.* at 1317. [↑](#footnote-ref-58)
57. *See* *id.* [↑](#footnote-ref-59)
58. *See* *id.* [↑](#footnote-ref-60)
59. SELC’s comment to the Metro Public Health Department (on file with SELC). [↑](#footnote-ref-61)
60. *Id.* [↑](#footnote-ref-62)
61. Metro Public Health Department Air Quality Division Regulation No. 14 §14-3: Procedure for Determining RACT. The owner or operator of each source of nitrogen oxides subject to this Regulation, except large utility boilers, shall investigate all reasonably available emission reduction methods which have been demonstrated on identical or similar types of nitrogen oxides emitting equipment and propose what he considers to be RACT. This will require the owner or operator to:

    (1) Fully describe the applicable emission points and basis for estimating current and potential emissions;

    (2) List the emission points and possible source emission points available for emission reductions;

    (3) List each alternative nitrogen oxides control technique for each emission point such as burner modifications, process modifications, add-on control devices, etc., along with the emission reduction achievable by use of each alternative;

    (4) List the cost of each alternative control technique, including initial costs as well as cost effectiveness (cost of control per ton of emission reduction);

    (5) Where applicable, list regulatory requirements in other states in which identical or similar sources are subject to nitrogen oxide RACT requirement; and

    (6) Recommend the level of control considered to be RACT.

    (b) Upon receipt of the above RACT proposal the Pollution Control Division of the Metropolitan Health Department will review the submittal and determine whether or not the RACT demonstration is adequate to justify the RACT recommendation and whether or not the recommended RACT level is proper. This will be accomplished by reviewing the list of alternative control techniques evaluated to ensure that all reasonable available and demonstrated control techniques were considered, by reviewing the cost analysis for reasonableness, by independently contacting other air pollution control agencies and the U.S. EPA to determine what level of control is required or suggested at identical or similar sources in other areas of jurisdiction. If an initial proposal is determined deficient, the Pollution Control Division will negotiate the matter with the source owner or operator. If necessary, Pollution Control Division’s independent judgement will control.

    When an operating permit is issued for a nitrogen oxides emitting source in accordance with Section 10.56.040, “Operating Permits” of Chapter 1056, “Air Pollution Control” of the Metropolitan Code of Laws or Regulation No. 13, “Part 70 Operating Permit Program” the permit will include sufficient enforceable conditions to specify the required level or type of control, the appropriate averaging time, and recordkeeping, reporting and testing requirements. Where applicable, U.S. EPA recommended test methods will be required. The averaging times for each allowable emission rate will follow minimum EPA requirements for identifiable and enforceable emissions that relate to ozone formation (normally daily or no more than monthly, depending on source operation). [↑](#footnote-ref-63)
62. The Construction Permit, at 2, http://media.wix.com/ugd/719f5a\_a1513710aed5460ba4fdcfb179f6356d.pdf; the Drafted/Proposed Part 70 Operation Permit, at 13, http://media.wix.com/ugd/719f5a\_dd26b26a90504fe59123266072645ee2.pdf. [↑](#footnote-ref-64)
63. Metro Public Health Department Air Quality Division Regulation No. 14, §14-1 (c): “‘Major Stationary Source’ - means any source which emits or has the potential to emit one hundred (100) tons of nitrogen oxides or more per year.” However, the proposed station is not a major source under the federal PSD program, which needs a minimum level of 250 tpy for compressor stations. [↑](#footnote-ref-65)
64. Metro Public Health Department Air Quality Division Regulation No. 13, §13-2. [↑](#footnote-ref-66)
65. Bill Powers, Review of Reasonableness of NOx Emission Limits for Two Titan Turbines at Proposed Joelton, Tennessee Compressor Station 1 (on file with SELC). *See also* Metropolitan Government of Nashville and Davidson County Metropolitan Health Department, Pollution Control Division, Permit to Construct or Modify an Air Pollutant Source, at 5, http://media.wix.com/ugd/719f5a\_a1513710aed5460ba4fdcfb179f6356d.pdf (“The source has the potential to emit 100 tons per year or more of NOX and is, therefore, subject to MCL Regulation No. 14, which requires the use of Reasonably Achievable Control Technology (RACT) in controlling NOX emissions. The Pollution Control Division has determined that the use of SoLoNOX combustion technology in the gas turbines, which are designed to enable the gas turbines to meet a NOx emission limit of 25 ppmdv, will satisfy the RACT requirements of MCL 14-2.”); Metropolitan Government of Nashville and Davidson County Metropolitan Health Department, Pollution Control Division, the Drafted/Proposed Part 70 Operation Permit, at 16, http://media.wix.com/ugd/719f5a\_dd26b26a90504fe59123266072645ee2.pdf (“The source has the potential to emit 100 tons per year or more of NOX and is, therefore, subject to MCL Regulation No. 14, which requires the use of Reasonably Achievable Control Technology (RACT) in controlling NOX emissions. The Pollution Control Division has determined that the use of SoLoNOX combustion technology in the gas turbines, which are designed to enable the gas turbines to meet a NOX emission limit of 25 ppmdv, will satisfy the RACT requirements of MCL 14-2.”). [↑](#footnote-ref-67)
66. Review of Reasonableness of NOx Emission Limits for Two Titan Turbines at Proposed Joelton, Tennessee Compressor Station. [↑](#footnote-ref-68)
67. SELC’s comment to the Metro Public Health Department (on file with the SELC). [↑](#footnote-ref-69)
68. *Id.* (The parcel of land “7650 Whites Creek Pike” is classified under the zoning code AR2A, described on the metro planning website as “agriculture, requiring a minimum lot size of 2 acres and intended for uses that generally occur in rural areas, including single-family, two-family, and mobile homes.” Metro Government of Nashville & Davidson County Department, *Parcel ID 009000002600*, Mapping and GIS (Aug. 2, 2016 at 12:20 PM), http://maps,nashville.gov/ParcelViewer/). [↑](#footnote-ref-70)
69. Nashville & Davidson County, Tenn., Second Substitute Ordinance No. BL2015-1210 (August 10, 2015). [↑](#footnote-ref-71)
70. SELC’s comment to the Metro Public Health Department (on file with SELC). [↑](#footnote-ref-72)
71. *Dominion Transmission, Inc.*, 723 F.3d at 245; *Myersville Citizens for a Rural Community*, 783 F.3d at 1318. [↑](#footnote-ref-73)
72. CCSE has asked the city and the state to get the EPA’s approval to amend its SIP to include Second Substitute Ordinance No. BL2016-234. [↑](#footnote-ref-74)
73. *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 310 (1988); *Northern Natural Gas Co. v. Iowa Utils. Board*, 377 F.3d 817, 824 (8th Cir. 2004) (“The preemptive effect of the NGA, as defined in *Schneidewind*, does not depend on whether the FERC intends to preempt state authority. Congress occupied the field of interstate natural gas rates and facilities by delegating broad power to the FERC to regulate that field.”). [↑](#footnote-ref-75)
74. 42 U.S.C § 7416. [↑](#footnote-ref-76)
75. *Merrick v. Diageo Americas Supply, Inc.*, 805 F.3d 685, 694 (6th Cir. 2015) [↑](#footnote-ref-77)
76. CCSE’s comments to the Metro Health Department (citing 723 F.3d at 243-44.) (on file with SELC). [↑](#footnote-ref-78)
77. Alexandra B. Klass & Jim Rossi, *supra* note 13, at 7 (2016) (unpublished manuscript) (on file with authors) (“For instance, between 1950 and the 1980s U.S. natural gas production grew significantly with the discovery of new natural gas reserves and new technological developments. Because of a streamlined federal siting process, pipeline companies were able to triple and quadruple their capacity to meet the demand created by new supplies. The same was true beginning in the late 2000s, with the advent of hydraulic fracturing, which allowed natural gas companies to access massive new reserves of natural gas trapped in shale rock in Pennsylvania, Texas, Oklahoma, and other states. Between 2000 and 2011, pipeline companies built 14,600 miles of interstate natural gas pipelines, and twice as much transmission capacity was added to the U.S. natural gas pipeline network in 2008 as in 2007. A 2013 Congressional Research Service report concluded that, based on industry statistics, most interstate natural gas pipelines can obtain approval within a year and be built and put into operation soon after that. Moreover, in the Energy Policy Act of 2005, Congress created new processes to streamline and expedite the construction of natural gas infrastructure. The new law made FERC the lead agency for federal environmental review of pipeline projects, granted FERC exclusive authority to review and approve liquefied natural gas import and export terminals (which are used to transport natural gas across oceans), and, as discussed in more detail in Part II, granted a right of immediate appeal to the federal circuit courts for any action by states to block a pipeline project FERC has approved.”) (citation omitted). [↑](#footnote-ref-79)
78. *Id.* at 42 (We see two primary deficiencies in FERC’s current approach to pipeline approval. First, FERC does not systematically invite state environmental regulators to share their expertise and judgment on the record in federal pipeline certification decisions, or regularly grant a hearing for vetting these concerns. Second, the timing of FERC’s Section 7 certificate process seems to invite potential challengers and state regulators to sit back and let FERC decide the locational issues without fully addressing environmental concerns, inviting eleventh hour state veto points in Clean Water Act permits that conflate siting and environmental issues and have no ready resolution.) [↑](#footnote-ref-80)
79. *Id.* [↑](#footnote-ref-81)