*Algonquin Gas Transmission, LLC v. Weymouth, Massachusetts*
919 F3d 54 (1st Cir. 2019)

## I. BACKGROUND

Algonquin Gas Transmission, LLC ("Algonquin") received a Certificate Order from the Federal Energy Regulatory Commission ("FERC") authorizing construction and operation of the Atlantic Bridge Project, which included construction of a new compressor station to be located in the Massachusetts coastal zone. As a result, the FERC Certificate Order required Algonquin to obtain, prior to construction, a determination from the Massachusetts Office of Coastal Zone Management ("CZM") pursuant to the Coastal Zone Management Act ("CZMA") that Algonquin's proposed activities are consistent with the Massachusetts Coastal Management Program ("CMP"). One of the Enforceable Policies of the Massachusetts CMP is to obtain an authorization under the Massachusetts Wetlands Protection Act ("WPA") from the Massachusetts Department of Environmental Protection ("DEP"). Under state law, DEP cannot issue a WPA authorization if the locality in which the activity takes place denies a permit for that activity under its local ordinance, which in this case was the Town of Weymouth's Wetland Protection Ordinance ("WPO"). The Weymouth WPO, however, is not included among the Enforceable Policies listed in the Massachusetts CMP.

The Town of Weymouth denied Algonquin's application for a WPO permit. As a result, Massachusetts DEP declined to issue the WPA authorization Algonquin required to demonstrate consistency with the Massachusetts CMP, unless Algonquin obtained a court order that the Weymouth WPO was preempted under the Natural Gas Act ("NGA"). Algonquin therefore commenced an action against the Town of Weymouth in federal district court seeking a declaration that the Weymouth WPO, as applied to the compressor station, was preempted by the NGA.

## II. CASE SYNOPSIS

After dispensing with arguments concerning timeliness and jurisdiction, the district court granted summary judgment for Algonquin, holding that the Weymouth WPO is preempted by the NGA.[1] Although the NGA provides certain exceptions to preemption—among them "the rights of States" under the CZMA[2]—the district court held the WPO was not saved from preemption because it was not "passed pursuant to the authority reserved to the states under the CZMA" and listed in the Massachusetts CMP.[3] Therefore, the WPO was not "'protected from preemption by one of the NGA's statutory preemption exceptions.'"[4]

The Town of Weymouth appealed. On appeal, the First Circuit likewise determined that Algonquin's claim was not time-barred and was ripe for review.[5] The First Circuit then affirmed

[1] *Algonquin Gas Transmission, LLC v. Weymouth Conservation Comm'n,* No. 17-10788-DJC, 2017 WL 6757544, at *5-7 (D. Mass. Dec. 29, 2017)(hereinafter "District Court Decision").
[2] 15 U.S.C. 717b(d)(1).
[3] District Court Decision at *6.
[4] *Id.* (citing *Dominion Transmission, Inc. v. Town of Myersville Town Council*, 982 F.Supp.2d 570, 579 (D. Md. 2013).
[5] *Algonquin Gas Transmission, LLC v. Weymouth Massachusetts,* 919 F3d 54, 62-63 (1st Cir. 2019).

the district court's decision on the merits, holding that "FERC's issuance of a [Certificate Order] to Algonquin in this case conflict preempts [Weymouth's] WPO permit denial."[6]

## III. ANALYSIS

### A. NGA Preemption Generally

A federal statute may expressly or impliedly preempt state law. Express preemption occurs when Congress explicitly defines the extent to which federal law displaces state law.[7] There are two types of implied preemption—field preemption and conflict preemption. Under the field preemption doctrine, state laws are preempted 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."[8] Under the conflict preemption doctrine, state laws are preempted when they conflict with the Constitution or federal law such that "'compliance with both federal and state regulations is a physical impossibility'" or where the state law frustrates the federal scheme by "'stand[ing] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"[9]

Courts have held that the NGA, and FERC Certificate Orders issued pursuant to the NGA,[10] preempt various state and local regulations governing natural gas pipelines or facilities under both field and conflict preemption theories.[11] In *Weaver's Cove Energy, LLC v. Rhode Island Coastal Resource Management Council*, for example, the First Circuit struck down a Rhode Island licensing program for coastal dredging under a conflict preemption theory after the State declined to process the developer's application for a license in an attempt to block a dredging project approved by FERC.[12] The Court reasoned that "FERC has interpreted the Rhode Island dredging at issue in this case to be within its jurisdiction," an interpretation the State did not contest, and that the State's licensing program "both conflicts with and is an obstacle to the authority FERC has asserted in this case."[13]

### B. NGA Savings Clause

The 'savings clause' of the NGA, however, provides three exceptions to preemption—"the rights of States" under (1) the CZMA, (2) the Clean Air Act, and (3) the Clean Water Act.[14] Courts have

[6] *Id.* at 65.
[7] *See Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541 (2001).
[8] *Arizona v. United States*, 567 U.S. 387, 399 (2012)(citation and quotation marks omitted).
[9] *Id.* (citation omitted).
[10] *See Dominion Transmission, Inc. v. Summers*, 723 F.3d 238, 244 (D.C. Cir. 2013)("FERC's certificate preempts all local requirements that regulate in the same field as the NGA."); *Fitzgerald v. Harris*, 549 F.3d 46, 55 (1st Cir. 2008)("The proposition that federal agency action, taken pursuant to its interpretation of a statute, may itself preempt is quite correct.").
[11] *See, e.g., Colorado Interstate Gas Co. v. Wright*, 707 F. Supp. 2d 1169, 1180 (D. Kan. 2010)(collecting preemption cases).
[12] *See Weaver's Cove Energy, LLC v. Rhode Island Coastal Res. Mgm't Council*, 589 F.3d 458, 473-74 (1st Cir. 2009).
[13] *Id.* at 473.
[14] 15 U.S.C. 717b(d). While this provision appears in section 3 of the NGA, which governs exportation and importation of natural gas and LNG terminals, it expressly applies to the entire "chapter," which contains the NGA as a whole. *See Delaware Riverkeeper Network v. Secretary Penn. Dep't of Env. Prot.*, 833 F.3d 360, 372 (3d Cir. 2016).

concluded that certain State laws or actions taken pursuant to those federal statutes are not preempted.[15] It is not enough, however, that a State purports to act in accordance with one of the enumerated statutes. Rather, to avoid preemption, a state or local requirement must first obtain federal approval through the process prescribed in the relevant federal statutes.[16] Such rights excepted from preemption under the NGA include, for example, "enforceable policies" of state Coastal Management Plans under the CZMA.[17] "Enforceable policies" are "state policies which are legally binding through constitutional provisions, laws, regulations, land-use plans, ordinances, or judicial or administrative decisions, by which a State exerts control over private and public land and water uses and natural resources in the coastal zone."[18]

Generally, States may not incorporate enforceable policies by reference. This means that if a state includes a specific policy or statute among its list of enforceable policies, and that listed statute references another state policy or statute, the referenced policy or statute is not an enforceable policy of the federally approved CMP unless it is also expressly included in the CMP approved by the Office of Coastal Management within the National Oceanic and Atmospheric Administration ("NOAA"). NOAA's regulations provide that enforceable policies shall not—

> incorporate by reference other state or local requirements that are not identified, described and evaluated as part of the program change request. Any state or local requirements incorporated by reference shall not be applicable for Federal consistency review purposes unless separately approved by NOAA as enforceable policies.[19]

*AES Sparrows Point LNG v. Smith* provides a good example of how the NGA Savings Clause relating to CZMA enforceable policies works in practice. In that case, AES brought suit against Baltimore County seeking a declaration that a local zoning ordinance, which prohibited the siting of any LNG terminals in the county's Chesapeake Bay Critical Area, is preempted under the NGA.[20] In response, the County argued "that the NGA's Savings Clause operates to save [the local zoning ordinance] from preemption by [the NGA]."[21] Specifically, the County contended "that because [the local zoning ordinance] is part of Maryland's Critical Area Laws, which in turn are one component of the state's CMP, the County's ban on the siting of LNG terminals in the Chesapeake Bay Critical Area is the exercise of its rights under the CZMA."[22]

The district court had granted summary judgment in favor of Baltimore County, but the Fourth Circuit reversed, finding that the local ordinance "is not part of Maryland's federally approved

[15] *See, e.g.*, *Dominion Transmission*, 723 F.3d at 243 ("Congress expressly saved states' [Clean Air Act] powers from preemption. . . . In other words, laws that are part of a state's [State Implementation Plan] are not preempted, unless the NGA says otherwise.").
[16] *See, e.g.*, *AES Sparrows Point LNG v. Smith*, 527 F.3d 120, 126 (4th Cir. 2008)("[T]he County has no authority under the CZMA to enact a ban on LNG terminals unless, at a minimum, this ban is enacted pursuant to the procedures established by the CZMA.").
[17] *Id.* at 125-26.
[18] 15 C.F.R. § 930.11(h).
[19] 15 C.F.R. § 923.84(b)(6).
[20] 527 F.3d at 122.
[21] *Id.* at 126
[22] *Id.*

[CMP], and therefore is not saved from preemption as an exercise of Maryland's rights under the CZMA."[23] The panel reasoned:

> The Savings Clause exempts "rights of States under" the CZMA from the preemptive force of FERC's exclusive authority to site LNG terminals. The mechanism the CZMA provides for the exercise of those rights—whatever their content or source—is a federally approved CMP. Thus the County has no authority under the CZMA to enact a ban on LNG terminals unless, at a minimum that ban is enacted pursuant to the procedures established by the CZMA.[24]

The court continued by noting that "[t]he CZMA makes clear [] that the mere adoption" of a provision in the County's regulations by a state agency "is not sufficient to make [it] part of Maryland's CMP."[25] This must be the case, the court noted, because otherwise "a state could unilaterally amend its CMP in violation of the CZMA's requirement of federal approval."[26] The court explained that the local zoning ordinance was never presented for approval to the Office of Coastal Management within NOAA, and thus never became "part of Maryland's CMP."[27]

C. *Algonquin Gas Transmission, LLC v. Weymouth, Massachusetts* Decision

The First Circuit's opinion in *Algonquin Gas Transmission* is clearer when read in conjunction with the underlying District Court opinion. In that context, the First Circuit's opinion can be seen as a straightforward application of the NGA Savings Clause regarding the "rights of States" under the CZMA, and is consistent with the Fourth Circuit's decision in *AES Sparrows Point LNG.* The First Circuit held the Town of Weymouth's local Wetlands Protection Ordinance is preempted, because it is not included as an enforceable policy approved by NOAA under the Massachusetts CMP. This is true even though under state law the WPO is a precondition to a state Wetlands Protection Act authorization, which is an enforceable policy under the CMP. That is, the WPO is not incorporated by reference as an enforceable policy in the CMP pursuant to state law.

[23] *Id.* at 122.
[24] *Id.* at 126.
[25] *Id.* at 126-127.
[26] *Id.*
[27] *Id.* at 127.