

## Pipeline Information for Local Government

For the most part the regulatory authority for the siting and safety of pipelines falls upon the federal government, and to a lesser extent state government. Yet local government has to respond to pipeline emergencies, and local government is where citizens often turn for answers to pipeline questions. One area where local government does play an important role in pipeline safety is through zoning and land use rule making. Transmission pipelines were once built mainly in rural areas, but as our cities and towns expand outward new businesses and housing developments are encroaching on pipeline right-of-ways. Often entities such as local school boards or hospitals have little or no knowledge of pipelines, so it is important that local communities think about the siting of such structures near pipelines. Below are some strategies that communities are starting to embrace, along with links of where to get more information.

### Improved Planning Near Pipelines

One way that many communities have started to protect both their citizens and the pipelines is by passing ordinances that address land use issues near pipelines. The Washington Municipal Research and Services Center has a website about planning near pipelines that can be accessed <http://www.mrsc.org/subjects/pubsafe/transpipes.aspx>. One of the easiest ways to increase safety is through the use of Consultation Zones. To download a proposed ordinance that implements Consultation Zones [http://pstrust.org/docs/pipeline\\_ordinance2.pdf](http://pstrust.org/docs/pipeline_ordinance2.pdf). Some communities have instituted setbacks from pipelines. To review some sample and actual setback ordinances <http://pstrust.org/about-pipelines1/setbacks>.

### Disclosure Requirements

There have been situations around the country where people have bought property only to find out later that there are existing or proposed pipeline right-of-ways on or near that property. This has caused much unnecessary conflict between property owners, pipeline operators, local government, and real estate professionals. One very basic way to avoid such conflict is to ensure that those buying property have been clearly notified about the right-of-ways that exist so they can make an informed decision about buying such property. Some states and local government have passed disclosure laws to ensure such clear notification. To review some sample disclosure laws <http://pstrust.org/about-pipelines1/sample-disclosure-ordinance>.

# Pipeline Information for Local Government

## Emergency Responder Training

Numerous national, state, and private organizations have prepared training information or provide in-person training programs for emergency responders to better prepare them for responding to a variety of pipeline emergency situations. To find out more about these programs <http://pstrust.org/about-pipelines1/emergency-responder-training-opportunities>.

## National Pipeline Mapping System

The National Pipeline Mapping System (NPMS) is a geographic information system (GIS) created by the U.S. Department of Transportation, Pipeline and Hazardous Materials Safety Administration (PHMSA), Office of Pipeline Safety (OPS) in cooperation with other federal and state governmental agencies and the pipeline industry. The NPMS consists of geospatial data, attribute data, public contact information, and metadata pertaining to the interstate and intrastate gas and hazardous liquid transmission pipelines, liquefied natural gas (LNG) facilities, and hazardous liquid breakout tanks jurisdictional to PHMSA. These GIS layers are available to local governments.

The nominal accuracy of geospatial data in the NPMS is +/-500 feet. Therefore, the NPMS should never be used as a substitute for contacting a one-call center before excavating.

**Remember to call before you dig by dialing 811!** To find a pipeline in your area visit the National Pipeline Mapping System click here. <https://www.npms.phmsa.dot.gov/>

## Creating a Pipeline Safety Advisory Committee

One great asset to a state is the creation of a citizens committee on Pipeline Safety. In 2000, the Washington State Governor and the State Legislature established, in state law, the Citizens Committee on Pipeline Safety (CCOP). CCOP has been established to advise the state agencies and other appropriate federal and local government agencies and officials on matters relating to hazardous liquid and gas pipeline safety, routing, construction, operation, and maintenance.” The committee consists of nine voting members representing the public, including local government, and elected officials. Four non-voting members represent owners and operators of hazardous liquid and gas pipelines. More information on the Citizens Committee on Pipeline Safety Please check out the following information. **Revised Code of Washington (RCW) 81.88.140** <http://apps.leg.wa.gov/RCW/default.aspx?cite=81.88.140>

# Pipeline Information for Local Government

**The Washington State Citizens Committee on Pipeline Safety** <http://www.governor.wa.gov/boards/profiles/1000336.asp>

**Washington Utilities and Trade Commission**  
<http://www.wutc.wa.gov/pipeline/ccops>

## **National Association of Regulatory Utility Commissioners (NARUC)**

NARUC's mission is to serve the public interest by improving the quality and effectiveness of public utility regulation. Under State law, NARUC's members have the obligation to ensure the establishment and maintenance of utility services as may be required by the public convenience and necessity, and to ensure that such services are provided at rates and conditions that are just, reasonable and nondiscriminatory for all consumers.

<http://www.naruc.org/>

Contact information for the Staff Subcommittee on Pipeline Safety

<http://www.naruc.org/committees.cfm?c=25>

## **Community Assistance and Technical Services (CATS)**

Everyone has a stake in the safety and integrity of energy pipelines. CATS is an innovative program within the Pipelines & Hazardous Materials Safety Administration (PHMSA) designed to meet the growing demand for enhanced stakeholder communications and to help facilitate permitting processes related to pipeline safety.

The mission of the OPS CATS is to advance public safety, environmental protection and pipeline reliability by facilitating clear communications among all pipeline stakeholders, including the public, the operators and government officials.

<http://primis.phmsa.dot.gov/comm/CATS.htm>

## **Pipeline Studies and Special Reports**

[http://www.nts.gov/Publictn/P\\_Stu.htm](http://www.nts.gov/Publictn/P_Stu.htm)

<http://primis.phmsa.dot.gov/comm/LocalOfficials.htm>

<http://pstrust.org/about-pipelines1/local-governments>



**Domina Law Group pc llo**

**Green Paper**  
**Corrected Copy**

- 1) Nebraska's Regulatory Authority Over Oil Pipelines.**
- 2) Nebraska's Non-Preempted Right To Regulate Land Use.**
- 3) Legal Authority for Action By Nebraska.**

**Prepared for**

***BOLD NEBRASKA***

**And**

**Public Interest**

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**Nebraska Governmental Authority & Oil Pipelines**

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**Note:** This Green Paper is prepared for Educational Reasons. Its function is to inform readers, encourage additional inquiry, and prompt appropriate action by government officials. It is not legal advice upon which the reader should, or may, rely to make individual decisions involving specific instances. It is a Paper addressing structural legal, and policy, issues.

## Executive Summary

1. TransCanada, a foreign company engaged in the business of oil transportation by pipeline holds itself out as a leader in the development and operation of North American energy infrastructure. The company proposes a Keystone pipeline which, when built, will be a 1,833 mile long pipeline that transports crude oil from Hardisty, Alberta, across Montana, South Dakota, Nebraska, including a portion of the Nebraska Sandhills and Ogallala Aquifer, Kansas, Missouri, and Oklahoma with a terminus at Cushing, Oklahoma. There the transported oil will connect with another pipeline system and move to Port Arthur, Texas, to be processed and sold on the international oil market.

2. The pipeline will pass through an area of Nebraska not now punctuated by oil pipeline structures. The area to be crossed includes the pristine Ogallala Aquifer and the fragile Nebraska Sandhills. A map of the project borrowed from the US Department of State website<sup>1</sup> appears below. The Ogallala Aquifer is depicted below, too.



US State Dept Map<sup>1</sup>

<sup>1</sup> <http://keystonepipeline-xl.state.gov/clientsite/keystonexl.nsf/map.jpg?OpenFileResource>



The Ogallala Aquifer<sup>2</sup>

3. Legal questions have arisen concerning Nebraska's role and authority as a State government. This green paper analyzes legal concerns in three areas:

- 3.1 Where oil pipelines are concerned, what can Nebraska regulate?
- 3.2 Does Nebraska have authority to regulate its land use by limiting pipeline routes?
- 3.3 If Nebraska has the authority to act, how and when must it do so?

4. After careful study, we conclude Nebraska can regulate its own land use. Federal safety regulations preempt *how* the pipeline must be built, but Nebraska has the right to control, reasonably and responsibly, *where* it must be built. Pipeline *safety* is federally preempted but oil pipeline *siting* is not.

5. Nebraska's authority must be exercised by its Legislature. The Legislature should act before commencement of State Department authorization for a Canadian border crossing, or construction as eminent domain proceedings which will likely follow in Nebraska.

6. Unlike the federal government's control of pipeline safety, the United States lacks authority to regulate, prescribe, or proscribe sites or routes for proposed pipelines, even

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<sup>2</sup> Source: <http://web.mit.edu/>



if they are interstate lines. This deficit concerning oil pipelines contrasts with national authority over natural gas pipelines. Federal control over such pipelines is found in the *Natural Gas Act*, 15 USC §§ 717 *et seq.* While certificates of public convenience and necessity are required to operate gas pipelines, no similar requirement mandates oil pipeline owners or operators must obtain certification from the Federal Energy Regulatory Commission (FERC) or any other federal agency.

7. The federal government has not preempted the States enacting pipeline siting issues within a State. Where the federal government has not acted, the States may. Federal law preempts pipeline safety issues so Nebraska has no significant role in pipeline design or construction criteria which is wholly separate from route siting.

8. Though Nebraska has the power to regulate locations at which pipelines will be placed, it has not exercised this power. Nebraska is without a statute designing how a proposed route submitted for approval is to be handled. Simply, Nebraska has no statute pertaining to any permitting requirements that apply specifically to construction or operation of oil pipelines.

9. Nebraska has the legal power to regulate its land use and thereby control the routes for oil pipelines across the State. TransCanada has one oil pipeline across Nebraska; its location was acquired without controversy about three years ago. This pipeline lies in an easement large enough to accommodate TransCanada's second pipeline across the State. The Legislature can require TransCanada to use its existing corridor again in eastern Nebraska by enacting a law generally requiring pipeline companies to consolidate their pipelines in reasonable corridors to maximize land utilization and minimize interference with land use by others.

10. But, to exercise this power, the Legislature must enact a statute and the Governor must approve it. This should occur and be accomplished by the end of 2011. Presently, Nebraska has no pipeline siting statute. It does have an eminent domain statute that permits pipelines to exercise the power of eminent domain. *Neb Rev Stat* § 57-1101. If Nebraska's Legislature enacts a thoughtful statute governing pipeline siting, it is likely the statute will be valid and enforceable against TransCanada and all other oil pipeline companies. At ¶¶ 86 *et seq.* possible courses of action are collected and listed. The list is not exhaustive.

11. Nebraska's siting authority may be more theoretical than real if it delays action. Once the United States State Department issues a permit authorizing construction of the pipeline and the route across Montana and South Dakota is finalized, it will be difficult to compel TransCanada to move its proposed pipeline eastward to its existing corridor.

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## Analysis

### I. What Is Nebraska's Regulatory Interest Over Oil Pipelines?

12. Oil pipelines consume land, interfere with its use, limit alternatives for its economic development and create barriers for owners and the public. They must be accepted when planning, accommodated when building, and avoided when digging. As structures pipelines can force rerouting, or halt development of water and sewer mains, electrical and telecommunications lines, and constrain economic growth. Accordingly, pipelines must be dealt with in land use terms. They cannot be permitted to be placed willy-nilly everywhere. Oil pipeline placement is, therefore, a matter of undeniable State interest.<sup>3</sup>

13. In recent publications by TransCanada and its lawyers, arguments have been made suggesting that Nebraska's regulatory authority over pipelines has been preempted by the federal government. But, this is not correct. Federal regulatory preemption governing oil pipelines has occurred only in the area of pipeline design and construction safety. Regulation of land use within States, i.e., defining the route or site at which a pipeline can be constructed, has not been preempted by federal law.

14. Indeed, State oil pipeline approval is required in numerous areas of regulatory activity. This is readily displayed in the permits, approvals, and regulatory requirements section of the US Environmental Protection Agency's Environmental Impact Study of the proposed TransCanada Keystone pipeline.<sup>4</sup> It names numerous State and local governmental approvals, collaborations, and reviews necessarily completed before oil pipeline construction can occur.

15. Certainly, federal authority is present in connection with TransCanada's need for government approval for its proposed pipeline project. The US President's Executive Order 1337 commits to the Department of State oversight and review in

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<sup>3</sup> Zoning laws are the classic example, see *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (prohibition of brickyard operations); *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926) (prohibition of industrial use); *Gorieb v. Fox*, 274 U.S. 603, 608 (1927) (requirement that portions of parcels be left unbuilt); *Welch v. Swasey*, 214 U.S. 91 (1909) (height restriction), which have been viewed as permissible governmental action even when prohibiting the most beneficial use of the property.

<sup>4</sup> See USEPA EIS, Keystone XL Pipeline Projection, Table 1.8-1, Permits, Licenses, Approvals, and Consultation Requirements, identifying state and municipal approval authorities in Montana, South Dakota, Nebraska (historical preservation, Department of Environmental Quality, Division of Air Quality, Department of Natural Resources, Game & Parks Commission, Department of Transportation, County Roads Departments, and county and local authorities), Kansas, Oklahoma, and Texas.

connection with applications for Presidential Permits for pipeline border crossings. A series of additional executive orders ensure compliance in other areas.<sup>5</sup>

16. The TransCanada Keystone pipeline, as proposed, illustrates the massive, long term impact of a pipeline on land use in the State. In Nebraska, the TransCanada Keystone pipeline proposes to encompass these land requirements:

16.1 A 110-foot wide construction right of right-of-way easement across the width of the State consisting of a:

16.1.1 60-foot temporary workspace easement generally across the State; and

16.1.2 50-foot permanent easement for construction and service.

17. Greater than 3,400 acres of Nebraska land will be affected directly during construction, and 1,560 acres of Nebraska land will be effectively taken on a permanent basis. Millions of cubic yards of borrow material are expected to be required for temporary storage during construction, and to stabilize land and permanent facilities and to pad pipelines. Seven contractor yards, from Holt County in the north to Gage County in the south of Nebraska, are expected to be used, covering a combined 191 acres. Three railroad siding facilities in Merrick, York, and Jefferson Counties, utilizing 60 acres, will be committed to the project. Nine pump storage sites in eight Nebraska counties will use 274 combined acres. Four of those counties, Keya Paha, Holt, Wheeler, and Greeley, include stretches of the Nebraska Sandhills. At least six of them, Keya Paha, Holt, Wheeler, Greeley, Nance, and Hamilton also include reaches of the Ogallala Aquifer.

18. The EPA's Environmental Impact Statement discloses the pipeline will cross under or through these Nebraska rivers<sup>6</sup>:

Keya Paha	Niobrara
Cedar	Loup
Platte	Blue, West Fork
Beaver Creek	

19. The EPA's EIS also identifies the fact that 160 additional water body crossings are expected to occur in Nebraska. Both rainwater basin wetlands and

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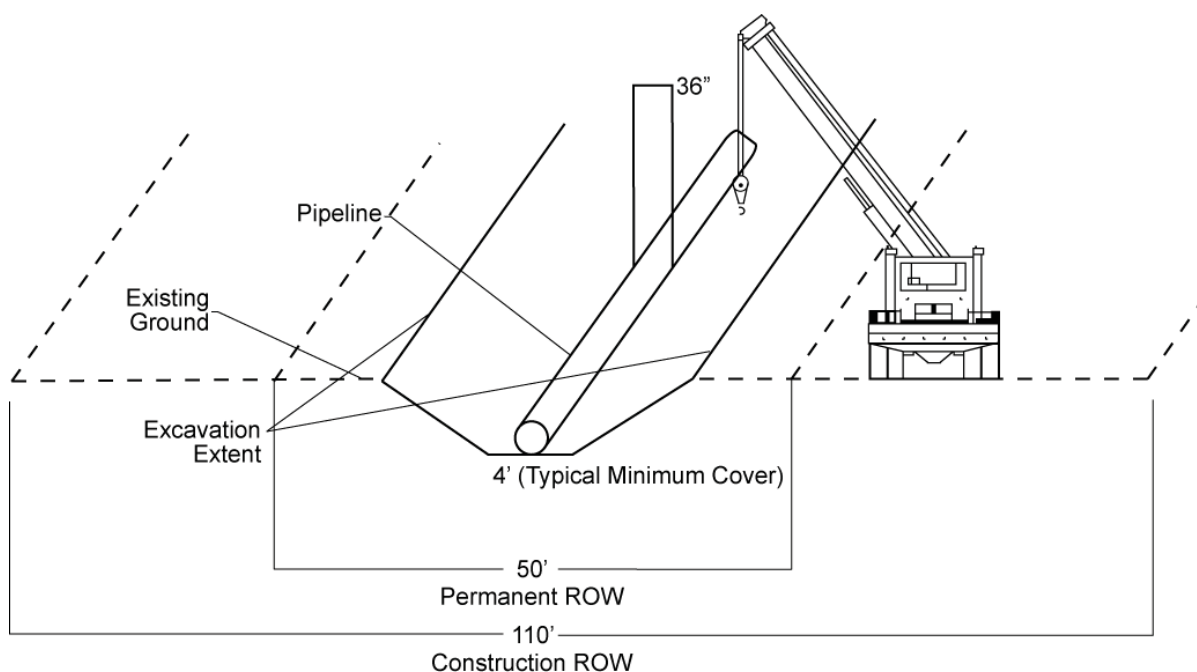
<sup>5</sup> EO11988, Flood Plain Management; EO11990, Protection of Wetlands; EO12114, Environment Effects; EO12898, Environmental Justice, Minority, and Low Income Populations; EO13007, American Indian Sacred Sites; EO13112, Endangered Species; EO13175, Consultation and Coordination With Tribal Governments; EO13186, Responsibility to Protect Migratory Birds; & EO13212, Expedition of Energy-Related Projects.

<sup>6</sup> US EPA Environmental Impact Statement Table 3.3 *et seq.* Aug 26, 2011.

Sandhills wetlands would be crossed within the State. As planned, the project proposes open cut crossings, including streambed disturbances.<sup>7</sup>

20. At least three endangered species of wildlife within the State will be affected. So will endangered aquatic, plant, and insect species.<sup>8</sup>

21. As proposed, the TransCanada pipeline will cross 254.1 miles of privately-owned Nebraska land, and includes 15% of the length of the project. 115.3 miles of this land is used for crop production. 124.7 miles is used as range land. The remainder is developed, open water, wetland, or wooded land.<sup>9</sup> Its permanent right of way, and construction furrow will look like this<sup>10</sup>:



22. The pipeline, as proposed, will pass within two miles of seven Nebraska communities, ranging from Ericson in Wheeler County to Steele City in Jefferson County.<sup>11</sup> Under Nebraska law, TransCanada may be required to comply with municipal regulations.<sup>12</sup> The pipeline will constitute a 36" diameter<sup>13</sup> barrier to be dealt with on hundreds of east-west roads, dozens of railroads, and bridges, and will impact

<sup>7</sup> Environmental Impact Statement § 3.7. Aug 26, 2011.

<sup>8</sup> *Id.*

<sup>9</sup> US EPA Environmental Impact Statement Aug 26, 2011.

<sup>10</sup> *Id.* at ES-6

<sup>11</sup> *Id.*

<sup>12</sup> *City of Alma v. Furnas County Farms*, 266 Neb 558, 667 NW2d 512 (2003).

<sup>13</sup> Pipeline specifications are for an outside diameter of 36" and operating pressure of 1,308 psig. EPA Environmental Statement ES-3, Aug 26, 2011.

infrastructure development and repair in the State, driving up costs for Nebraska and its political subdivisions for the foreseeable future. Nebraska does not permit private road construction, or other common carrier infrastructure to be built without State attention to land use interests. Even a single storage tank for oil is regulated.<sup>14</sup> The smallest phone company, serving the smallest village, must obtain State permission for most actions, and certainly to operate.<sup>15</sup> Yet, under current State law, oil pipeline siting is not regulated.

23. TransCanada has a pipeline through the State now. It was acquired recently with no controversy. Alternate routes for the Keystone pipeline have been discussed. Some are exemplified in Appendix 1.<sup>16</sup> But this Green Paper's purpose is not to focus on a single pipeline or route. It is to study and provide information concerning the legal authority Nebraska possesses and the alternatives available to the State to control use of its land and resources. After consideration, the conclusion emerges that State authority to regulate exists in federal and state law. But it can also be found within the brief history of the TransCanada Keystone pipeline. To this extent, the Keystone pipeline provides some useful information that informs one to the answer of the legal question under scrutiny.

24. The EPA found that TransCanada must comply with State air quality and noise restrictions, noting that Montana's requirements are more stringent than those imposed by federal law.<sup>17</sup> This point does not appear to be contested by TransCanada. This is an overt concession to the power of State governments to regulate the pipeline in areas not preempted by federal law. The concession is well placed since federal preemption of siting has not occurred.

### **Areas of Federal Regulation**

25. The United States, as a federal government, embarked on preemptive regulation in the area of pipeline safety in 1992, by enacting the *Pipeline Safety Act*, 49 USC §§ 60101 *et seq.*<sup>18</sup>

26. Pipeline safety is preempted by federal law, and regulations issued under the Act are given effect to assure pipeline design and construction safety.<sup>19</sup> Even drug testing regulations for workers have been upheld under the Act.<sup>20</sup> The regulations under

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<sup>14</sup> 267 *Neb Admin Code* § 3-024, and other rules of the Nebraska Oil & Gas Conservation Comm'n.

<sup>15</sup> 291 *Neb Admin Code* § 5-001.

<sup>16</sup> Appendix 1, Fig 1. is an illustration of the authors based on data from TransCanada's publications. App 1, Fig 2 is taken from EPA Environment Impact Statement, ES 13 Aug 26, 2011.

<sup>17</sup> EPA Environment Impact Statement, § 3.12, Aug 26, 2011.

<sup>18</sup> This Act combined and recodified two previous safety statutes, the *Hazardous Liquid Pipeline Safety Act* of 1979 and the *Natural Gas Pipeline Safety Act* of 1968.

<sup>19</sup> *Skinner v. Mid America Pipeline Co*, 490 US 212 (1989)

<sup>20</sup> *International Broth of Elec Workers Local 1245 v. Skinner*, 912 F2d 1454 (9th Cir 1990).

the Act depend on a definition of “pipeline.” The term is defined by federal regulations as but not by Nebraska law. Under federal regulations:

Pipeline or pipeline system means all parts of a pipeline facility through which a hazardous liquid or carbon dioxide moves in transportation, including, but not limited to, the pipe, valves, and other appurtenances connected to line pipe, pumping units, fabricated assemblies associated with pumping units, metering, and delivery stations, and fabricated assemblies therein, and break-out tanks.... Pipeline facility means new and existing pipe, rights-of-way, and any equipment, facility, or building used in the transportation of hazardous liquids or carbon dioxide.<sup>21</sup>

Crude oil pipelines and natural gas pipelines must both comply with federal safety criteria. Natural gas pipelines, which transport a hazardous ultimately usable product must comply with federal siting criteria. There are no such federal siting criteria for crude oil pipelines like the proposed TransCanada Keystone line.

27. A number of judicial decisions have dealt with what is preempted by the *Pipeline Safety Act* and its regulations. Generally, States are permitted to impose fees on pipeline operators to delay costs of conducting inspections where required to be permitted by States.<sup>22</sup> State law, governing land use and requiring a pipeline company to deepen its lines to accommodate drainage improvements, was not preempted.<sup>23</sup> In the Eighth Circuit, control of pipeline crossings under county roads does not appear to be wholly preempted.<sup>24</sup>

28. The United States Court of Appeals for the Eighth Circuit has held that State laws purporting to regulate the safety aspects of pipeline design or construction are preempted by federal law.<sup>25</sup> In *Kinley*, the court cited the US Supreme Court’s Supremacy Clause<sup>26</sup> and noted that federal law may supersede State law in multiple ways, but that congressional intention to supersede, or refrain from doing so, is critical to determining whether supersession occurs. The court noted that the *Pipeline Safety Act* of 1992 amended numerous statutes and imposed new duties on the US Secretary of Transportation.<sup>27</sup>

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<sup>21</sup> 49 CFR § 195.2. Definitions.

<sup>22</sup> *Tenneco Inc., v. Public Service Commission of West Virginia*, 489 F2d 334 (4th Cir 1993).

<sup>23</sup> *Panhandle Eastern Pipeline Co., v. Madison County Drainage Board*, 898 FSupp 1302 (SD Ind 1995).

<sup>24</sup> *Williams Pipeline Co., v. City of Mounds View, Minn*, 704 FSupp 914 (D Minn 1989).

<sup>25</sup> *Kinleyv. Iowa Utilities Board*, 999 F2d 354 (8th Cir 1993) (interstate hazardous liquid pipeline extending 13 miles from terminal near Council Bluffs to Offutt Air Force Base, Bellevue Nebraska, four inches in diameter to transport aviation jet fuel).

<sup>26</sup> *US Const Art VI CL 2.*

<sup>27</sup> 49 USC § 2002(a), (b), confirming the court’s view that safety standards were preempted by the Act.



29. But *Kinley* does not address questions concerning State authority to regulate land use. It is well settled that “the historic police powers of the States [are] not to be superseded by [a] federal act unless that [is] the clear and manifest purpose of Congress.”<sup>28</sup> One must “look first to the language of a statute to determine Congress’s intent.”<sup>29</sup> Further, “[t]here is a presumption against preemption in areas of traditional State regulation,”<sup>30</sup> which “is overcome if it was the ‘clear and manifest purpose of [the agency]’ to supersede State authority.”<sup>31</sup>

30. The States historically control land use issues. Land use and zoning issues have “‘always been an intensely local area of the law.’”<sup>32</sup> More specifically, it has been established for quite some time that zoning restrictions on the sizes and placement of outdoor advertisements are well within the police power of States and municipalities.<sup>33</sup> In 2009, the Tenth Circuit Court of Appeals held:

“Land use policy such as zoning customarily has been considered a feature of local government and an area in which the tenets of federalism are particularly strong.” *Mount Olivet*, 164 F3d at 487. In such circumstances, we are particularly averse to find preemption. See *Ramsey Winch Inc. v. Henry*, 555 F3d 1199, 1204 (10th Cir 2009) (holding that the presumption against preemption “applies with greater force when the alleged conflict is in an area traditionally occupied by the States”).<sup>34</sup>

31. In the area of natural gas, the Federal Energy Regulatory Commission has been given “exclusive authority to approve or deny an application for the siting... of natural gas pipelines and terminals.”<sup>35</sup> But, there is no such statute governing the construction of oil pipelines. No federal agency has been given regulatory control over oil pipeline siting. The Eighth Circuit recognized this dilemma, noting that natural gas pipelines are a scheme of federal laws preempting the States,<sup>36</sup> but also noting there is no such express regulation affecting oil pipelines.<sup>37</sup>

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<sup>28</sup> *Cipollone v. Liggett Group, Inc.*, 505 US 504, 516 (1992); *AES Sparrow Point Lng LLC v. Smith*, 527 F3d 120, 125 (4th Cir 2008).

<sup>29</sup> *Spritsna v. Mercury Marine*, 537 US 51, 62 (2002).

<sup>30</sup> *Wuebker v. Wilbur-Ellis Co.*, 418 F3d 883, 887 (8th Cir 2005) (citing *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 151, 121 S Ct 1322, 149 L.Ed.2d 264 (2001)).

<sup>31</sup> *In re Aurora Dairy Corp. Organic Milk Mktg. & Sales Practices Litig.*, 621 F3d 781, 794 (8th Cir 2010).

<sup>32</sup> *Gardner v. City of Baltimore Mayor and City Council*, 969 F.2d 63, 67 (4th Cir 1992) (quoting Carol M. Rose, Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy, 71 Calif. L. Rev 837, 839 (1983)) (tracing the history of land-use and zoning regulations in the United States); see also *River Park, Inc. v. City of Highland Park*, 23 F3d 164, 165, 167 (7th Cir 1994); *Muckway v. Craft*, 789 F.2d 517, 523 (7th Cir 1986).

<sup>33</sup> See *St. Louis Poster Adver. Co. v. City of St. Louis*, 249 U.S. 269, 274, 39 S Ct 274, 63 L.Ed. 599 (1919); *Thomas Cusack Co. v. City of Chicago*, 242 U.S. 526, 529-31, 37 S Ct 190, 61 L.Ed. 472 (1917).

<sup>34</sup> *Deane v. United States*, 329 F App'x 809, 814 (10th Cir 2009).

<sup>35</sup> 15 USC § 717(b).

<sup>36</sup> *Northern Natural Gas Co. v. Iowa Utilities Board*, 377 F3d 817 (8th Cir 2004).

<sup>37</sup> *Kinley*, *supra*, fn 23.

32. In short, the federal government has regulated in the area of oil pipeline safety, but not siting. The States are left with the right to decide where, within their jurisdictions, pipelines can be sited so long as they exercise the power in a manner that does not so obstruct commerce as to interfere unreasonably with its conduct.

### **Federal Constitutional Considerations**

33. The Supremacy Clause and Commerce Clause of the US Constitution are two prominent federal constitutional considerations that impact State regulation of oil pipelines. As noted above, the Supremacy Clause, which serves as the foundation for the doctrine of federal preemption, does not prevent Nebraska from regulating land use by requiring that pipelines be located reasonably within the State so as to protect the State's land use plan and prevent undue interference with others. There is no federal statutory or regulatory scheme preempting Nebraska's regulation of land use in connection with oil pipelines. Congress's intention to leave this to the State is manifest in its decision to give siting authority over gas pipelines to a federal agency.<sup>38</sup> The Congressional Research Office so informed Nebraska Congressman Lee Terry in a September 20, 2010 Memorandum.<sup>39</sup>

34. The Commerce Clause prevents Nebraska from enacting laws or regulations that unduly impede commerce between or among the States. Nebraska cannot grant undue preferences to its own citizens in matters affecting interstate commerce. It cannot engage in favoritism. But, the State can regulate land use even-handedly so its regulations apply, with equal force and clarity to Nebraskans and non-Nebraskans, without running afoul of the dormant Commerce Clause. Discussion appears below.

35. Some concern has been expressed that the Commerce Clause of the US Constitution preempts action by Nebraska. The US Constitution gives Congress the power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."<sup>40</sup> This "Commerce Clause" is sometimes said to have an implicit, or "dormant" component that empowers the federal government to trump states when federal interests outweigh those of the States, individually.<sup>41</sup> State regulations are not inherently, or even preferentially, preempted by the dormant Commerce Clause:

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<sup>38</sup> Many authorities support this statement. One interesting one is, Briefing Paper #1: *Regulatory Aspects of CO2 Pipeline Infrastructure Development*, Colorado Dept of Natural Resources, available at <http://dnr.state.co.us/SiteCollectionDocuments/CCS%20DOCS/CO2PipelineInfrastructure.pdf>

<sup>39</sup> The Memorandum, by Paul Parfomak, Specialist in Energy & Infrastructure Policy, 7-0030 is entitled "Information on Federal Law Related to Siting and Safety of Oil Pipelines. See, the paper at <http://boldnebraska.org/uploaded/pipeline/CongressionalResearchServicereport.pdf>

<sup>40</sup> *US Const* Art I, Sec 8, Cl 3.

<sup>41</sup> The balancing of interest process was overtly announced in *Pike v Bruce Church, Inc.*, 397 US 137 (1970).



“Where the [State] statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.”<sup>42</sup>

Under the *Pike* standard, the burden is on the party challenging a State law to prove it imposes a burden on interstate commerce that is too great to bear.

36. The Commerce Clause must be considered in connection with the federal Supremacy Clause<sup>43</sup> providing for the superiority of federal law in areas where the federal government legislates or regulates. Preemption may be express or implied. As noted above, there is no express federal preemption of oil pipeline siting. Implied preemption can occur in two ways, i.e., a field can be preempted, or conflicts between State and federal laws can have the effect of preempting.<sup>44</sup> Field preemption exists when Congress’s intent to supersede State law altogether is found in a scheme of federal regulation “so pervasive as to make reasonable the inference that Congress left no room to supplement it.”<sup>45</sup> “Conflict preemption” occurs when compliance “with both federal and State regulations is a physical impossibility.”<sup>46</sup> Conflict preemption also occurs where State law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”<sup>47</sup>

37. Nebraska has no known land use regulation that expressly conflicts with the federal government. The federal government has no law or regulation suggesting that oil pipelines can be built willy-nilly across States in criss-cross fashion, or a few hundred feet apart. There is nothing to suggest that States cannot require reasonable corridors for pipeline construction to protect and preserve populations, land structures and formations, wilderness areas, or to otherwise preserve and regulate land quality and land use, or to protect natural resources within a State.

38. Nothing expressed in any federal statute suggests that Congress intended to leave no room for States to supplement the control of pipelines by defining where they may be built. To the contrary, there is authority that where regulations do not impermissibly discriminate against interstate commerce, State and local taxes, permit requirements, and construction location requirements will be held valid. For example, a franchise fee of \$59,000 per mile for an oil pipeline across Santa Monica, California, was

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<sup>42</sup> *Id.*

<sup>43</sup> *US Const* Art VI Cl 2.

<sup>44</sup> *Gade v. Nat’l Solid Wastes Management Ass’n*, 505 US 88, 98 (1992).

<sup>45</sup> *Pacific Gas & Electric Co v. State Energy Res Cons & Dev Commission*, 461 US 190, 203 (1983).

<sup>46</sup> *Florida Lime & Avocado Growers, Inc., v. Paul*, 373 US 132, 142 (1963)

<sup>47</sup> *Hines v. Davidowitz*, 312 US 52, 67 (1941).

valid.<sup>48</sup> The dormant Commerce Clause was rejected in a case holding that States can regulate the manner in which contracts involving pipelines are negotiated.<sup>49</sup>

39. Public safety measures concerning construction or operation of a pipeline are preempted by federal law.<sup>50</sup> But, there is no indication that land use requirements, if reasonable and not unduly restrictive of commerce, will be enforced.

40. The Commerce Clause forbids only the promotion of local economic interest over out-of-state interests. It does not forbid restrictions that even-handedly apply to both interstate and intrastate companies.<sup>51</sup> Nebraska is not precluded by the dormant Commerce Clause from adopting a statute that would apply equally to State and local oil pipeline companies, and to those from outside the State, or outside the United States.

41. This is the analysis applied to determine whether the dormant Commerce Clause requires that a State or local law be stricken as unduly burdensome to interstate commerce:

To determine whether a law violates this so-called “dormant” aspect of the Commerce Clause, we first ask whether it discriminates on its face against interstate commerce. *American Trucking Assns., Inc. v. Michigan Pub. Serv. Comm’n*, 545 U.S. 429, 433, 125 S Ct 2419, 162 L Ed 2d 407 (2005); *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources*, 504 U.S. 353, 359, 112 S Ct 2019, 119 L Ed 2d 139 (1992). In this context, “ ‘discrimination’ simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.” *Oregon Waste Systems, Inc. v. Department of Environmental Quality of Ore.*, 511 U.S. 93, 99, 114 S Ct 1345, 128 L Ed 2d 13 (1994); *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273, 108 S Ct 1803, 100 L Ed 2d 302 (1988). Discriminatory laws motivated by “simple economic protectionism” are subject to a “virtually *per se* rule of invalidity,” *Philadelphia v. New Jersey*, 437 U.S. 617, 624, 98 S Ct 2531, 57 L Ed 2d 475 (1978), which can only be overcome by a showing that the State has no other means to advance a legitimate local purpose, *Maine v. Taylor*, 477 U.S. 131, 138, 106 S Ct 2440, 91 L Ed 2d 110 (1986).<sup>52</sup>

42. Nebraska’s adoption of pipeline siting regulations, expressed in a statute applying universally to a class of pipelines, and not discriminating on its face against

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<sup>48</sup> *Shell Oil Company v. City of Santa Monica*, 830 F2d 1052 (9th Cir 1987).

<sup>49</sup> *Central Valley Chrysler Valley Jeep Inc., v. Witherspoon*, 2006 WL1883363 (Ed CA) (application of California Health & Safety Code, and Regulations governing air quality to pipeline).

<sup>50</sup> *Olympic Pipe Line Co., v. City of Seattle*, 437 F3d 872 (9<sup>th</sup> 2006).

<sup>51</sup> *Oregon Waste Systems, Inc. v. Department of Environmental Quality of Ore.*, 511 US 93, 99 (1994).

<sup>52</sup> *United Haulers Ass’n v Oneida-Herkimer Solid Waste Mgmt Auth*, 550 US 330, 338-89 (2007).

interstate commerce, does not constitute “simply economic protectionism.” Indeed, if the statute simply requires that all pipeline companies, or all pipeline companies with actual or proposed pipelines similarly situated, must act similarly as they seek a route through the State, is not discriminatory but advances legitimate State purposes. Nebraska has an interest in controlling the number of interstate structures carrying hazardous liquids across the State.<sup>53</sup> It has an interest in confining the geographic location of those structures to maximize land use, as well as other efficiencies. And, it has an interest in protecting the land.<sup>54</sup> These interests can be advanced by adopting legislation that takes one of several forms, including these two forms generally:

42.1 The legislation can define a set of circumstances applying to all pipelines whose circumstances fall within the definitions. For example, if a pipeline company has an existing oil pipeline route through the State and desires to build a second and if the pipeline can be built within the location of the original pipeline’s easement, or adjacent to it, without undue or unreasonable restraint on interstate commerce, then the State can require that the company place its pipelines in the same easement area.

42.2 Second, the State could require pipeline companies apply for corridor permits to build their presently-proposed and future pipelines across the State, and existing pipelines will be grandfathered in, provided their routes shall constitute the corridor for their owners, or the affiliates of their owners and their owners’ successors, across Nebraska. This approach, too, would assure that legitimate State interests in land utilization and preservation are advanced by consolidating geographic areas where pipelines pass, and thereby limiting the impositions on land use and infrastructure that can come from the lack of foresight, coordination, and creation of utility corridors for oil pipelines.

43. In TransCanada’s case, the company has an existing pipeline route extending from near Yankton, South Dakota, southward to Steele City, Nebraska. It now proposes a pipeline entering the State approximately 100 miles west of Yankton, and angling vertically across the Ogallala Aquifer, and a stretch of the Sandhills, southward eventually to Steele City but forming a triangle in the northern two-thirds of the State. This triangulated line can be eliminated by a statute requiring consolidation of pipelines into a corridor, or utilization of an existing pipeline easement for a second line to be owned by the company already transacting oil pipeline business within the State.

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<sup>53</sup> See, e.g., Sorenson et al, *New Mexican Nationalism and the Evolution of Energy Policy in New Mexico*, 17 Nat Res J 283 (1977) for a discussion of state interests.

<sup>54</sup> See commentary of University of Nebraska water scientists report at <http://watercenter.unl.edu/Archives/2011WaterScientistsWarn.asp>

## II. Is Nebraska's Legal Authority To Regulate Land Use Preempted?

44. Nebraska's legal authority to regulate land use with respect to oil pipelines crossing the State has not been preempted by federal law. The State's authority to require that oil pipelines be placed in approved sites, or sites that meet reasonable Legislature criteria, is intact.

45. In fact, Nebraska's law clearly does regulate certain pipelines. Its laws will control the process of acquiring land for the pipeline from Nebraskans, and the State's law, including its eminent domain law, is a sovereign power held exclusively by the State. The State can regulate oil pipeline siting by constricting the use of the power of eminent domain to circumstances in which legislative criteria, reasonably established, are satisfied.

46. Nebraska has a well established eminent domain procedure and a history of legislative protection, and extension, of the sovereign authority to delegees. Delegation has occurred to departments of State government, local government, and utilities.<sup>55</sup> It has consciously delegated or withheld the power of eminent domain as a matter of legislative prerogative.

The legislature has the plenary power not only to grant or withhold the right to exercise the power of eminent domain, but also to define the quantum of interest or estate which may be acquired, whether an easement or the fee or some estate intermediate these two, such as a base, conditional, or determinable fee.<sup>56</sup>

47. The Nebraska Legislature's oil pipeline legislative authority is substantial; the Body is not obligated to delegate sovereign powers, including eminent domain, to a private company.

### State Pipeline Regulations

48. Nebraska has adopted, administratively sections of the federal regulations<sup>57</sup> enacted pursuant *Natural Gas Pipeline Safety Act*.<sup>58</sup> Nebraska does not appear to have adopted any federal regulations related, in any way, to oil pipeline safety. There are no federal oil pipeline siting regulations. The State's pipeline regulations are negligible.

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<sup>55</sup> Natural Resource Districts, *Neb Rev Stat* § 2-3234; Aeronautics, *Neb Rev Stat* § 3-144; Roads, *Neb Rev Stat* § 39-1320; Cities, e.g., *Neb Rev Stat* § 14-2003; etc.; counties, *Neb Rev Stat* § 39-1710; power and irrigation districts, *Neb Rev Stat* § 70-760. These are examples.

<sup>56</sup> *Burnett v. Central. Neb Pub Power & Irr. Dist.*, 147 Neb 458, 466, 23 NW2d 661, 666 (1946).

<sup>57</sup> Nebraska's regulations are at 155 *Neb Admin Code* 001 *et seq.* The federal regulations adopted by incorporation into state law are at 49 CFR Pts 191, 192, 193 & 199.

<sup>58</sup> 49 USC § 6101 *et seq.*

## Control of Eminent Domain

49. No one doubts that Nebraska law controls the eminent domain process applicable to right-of-way condemnation by utilities, and pipelines.

50. Eminent domain authority emanates from one federal and one State constitutional source. First the Fifth Amendment to the US Constitution provides, among its guaranteed rights:

No person shall be ... deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.<sup>59</sup>

51. The Nebraska Constitution's eminent domain clause is notably broader than the federal provision:

The property of no person shall be taken or damaged for public use without just compensation therefor.<sup>60</sup>

52. Eminent domain was explained in 2010 by the Nebraska Court of Appeals as follows:

We first summarize the nature of eminent domain. Eminent domain is defined generally as the power of the nation or a State, or authorized public agency, to take or to authorize the taking of private property for a public use without the owner's consent, conditioned upon the payment of just compensation. *Krambeck v. City of Gretna*, 198 Neb 608, 254 NW2d 691 (1977). The power of eminent domain is a sovereign power which exists independent of the Constitution of Nebraska. *Burger v. City of Beatrice*, 181 Neb 213, 147 NW2d 784 (1967). The Legislature may delegate the power of eminent domain. See *Burlington Northern Santa Fe Ry. Co. v. Chaulk*, 262 Neb 235, 631 NW2d 131 (2001). The Constitution of Nebraska and legislative enactments pursuant thereto are in no sense a grant of power, but are and should be treated as a limitation of the power of eminent domain.<sup>61</sup>

The important teaching of these holdings is that the Legislature has broad authority to grant or withhold delegation of the power of condemnation.

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<sup>59</sup> *US Const* Amend V, C1 5.

<sup>60</sup> *Neb Const* Art I, § 21.

<sup>61</sup> *City of Omaha v. Tract No. 1*, 18 Neb App 247, 251, 778 NW2d 122, 127 (2010).

53. State Legislatures have some, but not absolute, authority to delegate legal power to private companies. This includes the power to delegate the sovereign power of eminent domain. One common instance of delegation involves common carriers. A common carrier is a business that transports people or services to the general public under a license or authority provided by a regulatory body.<sup>62</sup> The common carrier approach means that the private service provider is subject to special duties to ensure fair terms of access and reasonable rates. Whether a pipeline is a common carrier of a State may depend on State law and case law.

54. The common carrier approach originated with the railroads – a common carrier which transports people and goods, instead of oil via pipeline. As in the railroad industry, monopoly power was a concern in the oil industry at the turn of the 19<sup>th</sup> century, but the concern was dissipated with the breakup of the Standard Oil Trust in 1911.<sup>63</sup> In fact, antitrust policy developed largely as the result of mergers, pricing, and access behavior during the early oil pipeline development period.<sup>64</sup> As a result of abuses by the Standard Oil company, Congress enacted the 1906 Hepburn Amendment to the *Interstate Commerce Act*, which gave the Interstate Commerce Commission (ICC) (which later became the Surface Transportation Board (STB)) federal regulatory responsibility over interstate oil pipelines. Under the Act, most interstate oil pipelines were granted common carrier status, shipment rates were required to be “just and reasonable,” and shipments were required to be allocated on a nondiscriminatory basis.<sup>65</sup>

55. Under a common carrier approach, anyone who wishes to transport oil through a pipeline may do so on payment of the appropriate fee.<sup>66</sup> Common carriage systems fall into two categories: voluntary and compulsory. Under a voluntary common carriage, a pipeline company is free to elect to provide a common carriage service or not.<sup>67</sup> If it provides transportation services to any customer, it must stand ready to provide transportation services to all customers at nondiscriminatory rates.<sup>68</sup> Under compulsory

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<sup>62</sup> Common Carrier, Encyclopedia Britannica Online, at <http://www.britannica.com/EBchecked/topic/128177/common-carrier>.

<sup>63</sup> M.A. de Figueriredo, H.J. Herzog, P.L. Joskow, K.A. Oye & D.M. Reiner, *Regulating CO2 Capture and Storage*, 2 (Center for Energy and Environmental Policy Research, Working paper, April 2007), available at <http://web.mit.edu/ceepr/www/publications/workingpapers.html>.

<sup>64</sup> *Id.* See also, *Briefing Paper #1: Regulatory Aspects of CO2 Pipeline Infrastructure Development*, Colorado Dept of Natural Resources, available at <http://dnr.state.co.us/SiteCollectionDocuments/CCS%20DOCS/CO2PipelineInfrastructure.pdf>

<sup>65</sup> *Id.*

<sup>66</sup> J Bernhardt, *Is Natural Gas Pipeline Regulation Worth the Fuss?*, 40 *Stan L Rev* 753, 756 (1988).

<sup>67</sup> *Id.* See also, *Briefing Paper #1: Regulatory Aspects of CO2 Pipeline Infrastructure Development*, Colorado Dept of Natural Resources, available at <http://dnr.state.co.us/SiteCollectionDocuments/CCS%20DOCS/CO2PipelineInfrastructure.pdf>

<sup>68</sup> *Id.*



common carriage, a pipeline has no option; it must provide transportation services to anyone who wants them.<sup>69</sup>

56. State Legislatures may, but are not required to, delegate the power of eminent domain. The Nebraska Supreme Court explained the process in a comprehensive 1946 decision:

Eminent domain is the power to take private property for public use. 1 Bouv.Law Dict., 588. It is the power which remains in the government to resume the possession of property upon making just compensation therefor, whenever the public interest requires it. This right of resumption may be exercised, when required for the public good, in the construction of a railroad, public road, canal, or other like work. The right of eminent domain, however, does not permit the sovereign power to take the property of one citizen, and transfer it to another even for full compensation. *Beekman v. Saratoga, etc., R. Co.*, 3 Paige, N.Y., [45], 73, [22 Am.Dec. 679]. In other words, the right of eminent domain gives to the legislature the control of private property for public uses, and for public uses only. 2 Kent, Comm., 339, and cases cited. This being the rule, the property must be used for the purpose which justified its taking, otherwise it would be a fraud on the owner and an abuse of power, and the authority being in derogation of private right, is to be strictly construed.’

The right to exercise the power of eminent domain rests in the Legislature. This is stated in *McInnis v. Brown County Water Improvement District No. 1*, Tex.Civ.App., 41 S.W.2d 741, 744, as follows: ‘Eminent domain, or the power to take private property for public use, is an inherent and inalienable attribute of sovereignty. Its delegation to the Legislature is implied from the general grant of legislative power; requires no express authority; and constitutional provisions touching it are generally regarded as limitations upon the legislative authority. See 20 C.J. p. 513, § 1; 10 R.C.L., p. 11, § 9; *Lewis on Eminent Domain* (3d Ed.) vol. 1, pp. 20, 21, §§ 9 and 10.’

The Legislature has the right to delegate this power and to restrict or limit the extent of its use. As stated in 18 Am.Jur., *Eminent Domain*, § 114, p. 740: ‘The legislature has the plenary power not only to grant or withhold the right to exercise the power of eminent domain, but also to define the quantum of interest or estate which may be acquired, whether an easement or the fee or some estate intermediate these two, such as a base, conditional, or determinable fee. The interest taken depends always on the construction of the statute authorizing the taking. Generally, the rule of construction applied to determine the extent of the grant of the power of

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<sup>69</sup> *Id.*

eminent domain is that its exercise is limited to the express terms or clear implication of the statute in which the grant is contained. So, if a statute expressly or by necessary implication declares that a fee shall be taken, the condemner will acquire the fee specified.

Whether the granting of such an estate is good public policy, there being no constitutional restriction, is a legislative, not a judicial, question. But where the language of the statute will bear that construction, courts, as a general rule, seem disposed to leave the fee in the landowner.<sup>70</sup>

57. The Nebraska Legislature has made delegations of the power of eminent domain; it includes pipeline companies. One Nebraska statute mentions pipeline companies as delegees of Legislative authority to exercise the power of eminent domain in Nebraska. It provides:

Any person engaged in, and any company, corporation, or association formed or created for the purpose of transporting or conveying crude oil, petroleum, gases, or other products thereof in interstate commerce through, or across the State of Nebraska, or intrastate within the State of Nebraska, and desiring or requiring a right-of-way or other interest in real estate, and being unable to agree with the owner or lessee of any land, lot, right-of-way or other property for the amount of compensation for the use and occupancy of so much of any lot, land, real estate, right-of-way or other property as may be reasonably necessary for the laying, relaying, operation and maintenance of any such pipeline or the location of any plant or equipment necessary to operate such pipeline, shall have the right to acquire the same for such purpose through the exercise of the power of eminent domain. The procedure to condemn property shall be exercised in the manner set forth in sections 76-704 to 76-724.<sup>71</sup>

58. Delegees of the power of eminent domain must abide by the rules laid down by the Legislature:

The power of eminent domain may be delegated by the Legislature. *Van Patten v. City of Omaha*, 167 Neb 741, 94 NW2d 664 (1959). Although railroads are private corporations, they have been given the statutory authority to acquire land through eminent domain. See NebRevStat § 74-308 (Reissue 1996). See, also, *Gustin v. Scheele*, 250 Neb 269, 549 NW2d 135 (1996). We have stated that “[p]roceedings to subject the property of another for public use under the doctrine of eminent domain must be conducted in the manner prescribed by the statute delegating the power.” *Spencer v. Village of Wallace*, 153 Neb 536, 544, 45 NW2d 473, 477

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<sup>70</sup> *Burnett v. Cent. Neb Pub. Power & Irr. Dist.*, 147 Neb 458, 465-66, 23 NW2d 661, 666-67 (1946).

<sup>71</sup> *Neb Rev Stat* § 57-1101.



(1951). See, *SID No. 1 v. Nebraska Pub. Power Dist.*, *supra*; *Engelhaupt v. Village of Butte*, 248 Neb 827, 539 NW2d 430 (1995). Pursuant to § 74-308, railroads are required to exercise their eminent domain power in accordance with Nebraska's general eminent domain statutes. See § 76-701 et seq.<sup>72</sup>

59. Nebraska's Constitution, statutes, regulations, and ultimately its courts have clear, present, and well defined roles in the legal processes involved in the movement of a pipeline through the State by an interstate carrier. The eminent domain process is one of the areas in which State law controls over federal rules.

60. The power of eminent domain could be withdrawn from pipelines, or oil pipelines, by the Legislature. Instead of the current grant of this power, the Legislature could reasonably constrain the eminent domain authority to oil pipelines so it could be used only where takings are to occur in locations, and on terms, consistent with the State's reasonable siting criteria.

61. For example, the Legislature could find that the Ogallala's Aquifer's value to the State and nation are transcendent, and that water which, as the Nebraska Constitution recognizes, is a natural want,<sup>73</sup> requires oil pipelines be placed in locations where they do not intersect the Aquifer, or where the intersection over the Aquifer is controlled.

62. Similarly, the power of eminent domain could be constrained to limit the geography in which oil pipelines built for interstate transmission, or primarily interstate transmission of oil, may be located. Existing corridors could be required to be used unless the pipeline company can demonstrate, by clear and convincing evidence, that it cannot use the existing pipeline for reasons associated with a need for compliance with the federal oil pipeline safety laws.

63. The Legislature could withhold the power of eminent domain from an oil pipeline company seeking a route solely because its proposed site for an interstate oil transmission line is economically beneficial to the company, or it would simply be cheaper to route the line across a convenient route, rather than build it across one consistent with Nebraska's land use policy.

64. These general approaches to effectively constraining the use of eminent domain, or otherwise regulating oil pipeline siting, are consistent with the State's manifest interest in regulating its land use and do not burden interstate commerce. They permit an interstate oil pipeline company to build a pipeline, indeed several, across

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<sup>72</sup> *Burlington N. & Santa Fe Ry. Co. v. Chaulk*, 262 Neb 235, 241-42, 631 NW2d 131, 137 (2001).

<sup>73</sup> *Neb Const Art XV § 4*; *Neb Rev Stat § 46-201*.

Nebraska, but they prevent the pipeline from crossing the State in multiple locations at diverse points, instead of reasonably consolidating pipeline construction into a localized corridor.

### **Nebraska's Control of Pipeline *Siting* is Not Inconsistent With Federal Control of Pipeline *Safety***

65. State regulation of oil pipeline siting within Nebraska can be achieved on terms entirely consistent with federal regulation of oil pipeline safety. Safety criteria promulgated by the federal government include specifications for pipe steel, strength, structure integrity, valve quality, couplers and coupler quality, and joint supports, among many other things. These criteria apply regardless of the pipeline's site. The flanges necessary to connect two pipes and be compliant with federal law are the same whether the pipeline enters Nebraska in Keya Paha County or Cedar County. There is no federal distinction in the safety regulations based on where within Nebraska, or any other State, an oil pipeline is located.

66. Nebraska can, therefore, regulate oil pipeline siting without interfering, or legislating on terms inconsistent with, federal pipeline safety standards. This point can be readily understood by inspecting a recent federal Order compelling TransCanada to take corrective action to prevent and halt oil spills from its existing interstate pipeline across Nebraska. The US Department of Transportation Pipeline & Hazardous Materials Safety Administration ("PHMSA"), the federal agency responsible for pipeline safety, monitoring, and regulatory enforcement, dealt with TransCanada recently.

67. TransCanada experienced a series of spills or leaks from its existing pipeline across Nebraska, principally outside of the State prior to June 2011. As a result, mandatory information submissions were made to PHMSA. It issued a corrective Order as a result. PHMSA found, in its Order issued against TransCanada on June 3, 2011 that its authority under 49 *USC* § 60112 was invoked. This statute "provides for the issuance of a corrective Order without prior opportunity for notice and hearing upon a finding that failure to issue the Order expeditiously will result in likely serious harm to life, property, or the environment." In the Order issued against TransCanada this specific safety-related finding was made by US DOT PHMSA:

**...I find that the continued operation of the pipeline without corrective measures would be hazardous to life, property and the environment. Additionally, after considering the circumstances surrounding the May 7 and May 29, 2011 failures, the proximity of the pipeline to populated areas, water bodies, public roadways and high consequence areas, the hazardous nature of the product the pipeline transports, the**

**ongoing investigation to determine the cause of the failures, and the potential for the conditions causing the failures to be present elsewhere on the pipeline, I find that a failure to issue this Order expeditiously to require immediate corrective action would result in likely serious harm to life, property and the environment. Accordingly, this Corrective Action Order mandating immediate corrective action is issued without prior notice and opportunity for hearing.**

68. The PHMSA official who signed the June 3 Order made its terms effective immediately.<sup>74</sup> Analysis of the terms disclose both the nature and scope of federal oil pipeline safety regulation, and helps to distinguish pipeline *safety* from pipeline *siting* concerns. When sited in locations approved by the State as appropriate to the State's overall land use and growth plan, the pipeline must be built and operated safely. Safety and siting are different concerns. The PHMSA safety-related Order issued to TransCanada in 2011 due to spills from its existing line clearly applied without concern about the pipeline's site or location. The Order required<sup>75</sup>:

68.1 TransCanada to submit a written re-start plan or approval before re-energizing the line.

68.2 The re-start plan had to include at least these steps and provide adequate staffing, monitoring, and patrolling during restart to ensure no leaks or failures at any pumping station.

68.3 Prior to re-start, TransCanada had to complete required mechanical and metallurgical testing and failure analysis of failed pipe components. Within sixty (60) days after issuance of the Order, a review of Keystone facilities is required. It must contain this extensive data:

68.3.1 It was required to compile all available data on previous failures of similar small diameter piping and components.

68.3.2 It was ordered to compare a list by location that includes all sizes of pipes, sizes of components, etc.

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<sup>74</sup> Order, June 3, 2011, PHMSA, available at <http://www.phmsa.dot.gov/staticfiles/PHMSA/DownloadableFiles/Keystone%20CAO%20and%20Restart%20Approval.pdf>

<sup>75</sup> *Id.*

68.4 Within forty-five (45) days of the Order, an automated tracking system called Issues and Incident Tracker, was required to disclose by location previous difficulties.

68.5 The company was ordered to compile all media data or other documents to support its version of what went wrong.

69. Obviously, the PHMSA Order was not dependent on the whereabouts of TransCanada's pipeline. The Order was about the pipeline's structural integrity, construction, and maintenance. The corrective Order could have been issued if the pipeline was located in central Nebraska, or eastern Nebraska, when it entered the State, and whether it exited, in its southbound route, in Jefferson County or Richardson County.

70. State regulation dealing with where the pipeline should go does not interfere with federal regulation of pipeline safety. Further, while some Nebraskans might be vitally interested in protecting against pipeline spills that could taint the Aquifer or damage the Sandhills, these are land use issues, not pipeline safety issues like those regulated by PHMSA and the Department of Transportation. Protective land use regulations are not at variance with the regulatory scheme of the DOT and its PHMSA.

### **Pipeline *Safety* Is Preempted by Federal Law, but *Siting* Is Not Preempted**

71. Oil pipeline siting is not federally preempted. Oil pipeline safety is preempted. Virtually everyone except TransCanada's lawyers hired to write papers for the company's public relations use in Nebraska have so concluded. Those reaching this conclusion include State agencies,<sup>76</sup> scholars,<sup>77</sup> scholarly think-tanks,<sup>78</sup> and federal agency researchers.<sup>79</sup>

72. Congressional researchers have reached the same conclusion.<sup>80</sup> In view of the uniform results of studies conducted for the US Congress, this conclusion is inescapable about oil pipelines because it is accurate:

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<sup>76</sup> Briefing Paper #1: *Regulatory Aspects of CO2 Pipeline Infrastructure Development*, Colorado Dept of Natural Resources, available at

<http://dnr.state.co.us/SiteCollectionDocuments/CCS%20DOCS/CO2PipelineInfrastructure.pdf>

<sup>77</sup> J Bernhardt, *Is Natural Gas Pipeline Regulation Worth the Fuss?*, 40 *Stan L Rev* 753, 756 (1988).

<sup>78</sup> M.A. de Figueriredo, H.J. Herzog, P.L. Joskow, K.A. Oye & D.M. Reiner, *Regulating CO2 Capture and Storage*, 2 (Center for Energy and Environmental Policy Research, Working paper, April 2007), available at <http://web.mit.edu/ceepr/www/publications/workingpapers.html>.

<sup>79</sup> National Commission on Energy Policy, *Siting Critical Energy Infrastructure: An Overview of Needs and Challenges*. (Washington, DC: June 2006): 9.

<sup>80</sup> Congressional Research Service, *Carbon Dioxide (CO2) Pipelines for Carbon Sequestration: Emerging Policy Issues* (Updated 1-17-08).

**Siting Authority.** A company seeking to construct a CO2 pipeline must secure siting approval from the relevant regulatory authorities and must subsequently secure rights of way from landowners along the pipeline right by purchasing easements or by eminent domain. However, since federal agencies claim no regulatory authority with respect to CO2 pipeline construction, potential builders of new CO2 pipelines do not require, and could not obtain, federal approval to construct new pipelines. Likewise, federal regulators claim no eminent domain authority for pipeline construction, and so cannot ensure that pipeline companies can secure rights of way to construct new pipelines. By contrast, companies seeking to build interstate *natural gas* pipelines must first obtain certificates of public convenience and necessity from FERC under the Natural Gas Act (15 USC §§ 717, et seq.). Such certification may include safety and security provisions with respect to pipeline routing, safety standards and other factors.<sup>36</sup> A certificate of public convenience and necessity granted by FERC (15 USC § 717f(h)) confers eminent domain authority.<sup>81</sup>

73. Nebraska's State government is empowered to act in the area of oil pipeline siting, or routing, through the State. It cannot regulate safety, but can regulate land use within the State. State interests must be expressed reasonably and be weighed responsibly against competing interests impacting interstate commerce.

### **Nebraska State Interests Weighed**

74. As is demonstrated above, Nebraska's interests in regulating land use is substantial. This area of government is one in which the principal of federalism is generally aggressively observed, and deference to the State interest in controlling its land is given unless overt federal preemption is present. As is demonstrated above, the federal interest in oil pipeline safety and federal interests in interstate commerce can be accommodated by reasonable State land use regulations. They can include either (a) a construction permit system that compels pipelines to build in defined corridors and not in irregular patchwork across the State, or (b) limits a pipeline company's authority to use the power of eminent domain to compel pipelines to consolidate their routes into reasonable corridors, and prevents them from building in multiple spots at odd angles or in otherwise irregular, redundant, unreasonable, or obstructive locations.

75. Nebraska's vital interests in its land use are especially pronounced where its most pristine natural resources must be protected. The Sandhills and the Ogallala Aquifer, as well as the State's scenic and economically important rivers and lakes, all require and justify land use protection.

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<sup>81</sup> *Id.* at CRS-10. Available at [http://assets.opencrs.com/rpts/RL33971\\_20080117.pdf](http://assets.opencrs.com/rpts/RL33971_20080117.pdf)

76. First the Sandhills are unique... so much so that it has been the subject of Presidential investigations.<sup>82</sup> What they hold as answers to questions residing deep within the minds of people is a matter of ongoing revelation.<sup>83</sup>

77. Second, the Ogallala Aquifer is one of the world's largest aquifers, it covers an area of approximately 174,000 miles.<sup>84</sup> It supplies 70% of all water used in the State of Kansas.<sup>85</sup> This is only a small fraction of total dependence on the Ogallala Aquifer, which serves as a prime water source for the States of North Dakota, South Dakota, Nebraska, Kansas, Oklahoma, Texas, Colorado, New Mexico, and Wyoming.<sup>86</sup>

78. Third, scientists now know that ground and surface water should be treated as a single hydrological system because that is the way they behave in nature.<sup>87</sup> Nebraska possesses the most valuable portion of the eight-state High Plains Aquifer—by far the deepest, cleanest and largest share, a nearly unbelievable two-thirds of the whole.<sup>88</sup> Above most of this water is a sea of sandy soils, the Sandhills, where in many places the water table outcrops into wetlands, rivers or is not far below.<sup>89</sup>

79. The TransCanada company wants to install a large-diameter high-pressure crude oil pipeline—the XL—through 110 miles of this sensitive, water-rich area, where (because of the soils' porosity and the close proximity of the water table) both ground

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<sup>82</sup> See, Axel Rydberg, *Flora of the Sandhills of Nebraska*, (Harvard Press 1893) and III US National Herbarium No. 3 (1895). See also, Mangan et al, *Response of Nebraska Sandhills*, 63 *Climate Change* Nos 1-2, 49-90 US Dept of Interior (2004).

<sup>83</sup> See, Sullivan, Janet. 1994. Nebraska Sandhills Prairie. In: Fire Effects Information System, [Online]. U.S. Department of Agriculture, Forest Service, Rocky Mountain Research Station, Fire Sciences Laboratory (Producer). <http://www.fs.fed.us/database/feis/> [2011, May 30].

<sup>84</sup> Dennehy, K.F. (2000). *"High Plains regional ground-water study: U.S. Geological Survey Fact Sheet FS-091-00"*. USGS Retrieved 2008-05-07.

<sup>85</sup> Kansas Geological Survey Public Information Circular No 18, <http://www.kgs.ku.edu/Publications/pic18/index.html>

<sup>86</sup> Gutendag, Geohydrology of the High Plains Aquifer in parts of Colorado, Kansas, Nebraska, New Mexico, Oklahoma, South Dakota, Texas, and Wyoming, USGS Numbered Paper 13454.

<sup>87</sup> "Traditionally, management of water resources has focused on surface water or ground water as if they were separate entities. As development of land and water resources increases, it is apparent that development of either of these resources affects the quantity and quality of the other. Nearly all surface-water features (streams, lakes, reservoirs, wetlands, and estuaries) interact with ground water...Thus, effective land and water management requires a clear understanding of the linkages between ground water and surface water as it applies to any given hydrologic setting." —Robert M. Hirsch, chief hydrologist, USGS, [pubs.usgs.gov/circ/circ1139/#pdf](http://pubs.usgs.gov/circ/circ1139/#pdf).

<sup>88</sup> "In the entire High Plains Aquifer, the place where the water is deepest is beneath the Sandhills. The key to that water volume...is that sand is highly permeable; water flows through it easily..." U.S. Water News Online, December 1996, "Nebraska's Sandhills Conceal Massive Aquifer," [www.uswaternews.com/archives/arcsupply/6nebsan.html](http://www.uswaternews.com/archives/arcsupply/6nebsan.html).

<sup>89</sup> L. Kent Wolgamott, "Future Control of Water Resources," published in "Flat Water: A History of Nebraska and Its Water," Resource Report No. 12, Conservation and Survey Division, Institute of Agriculture and Natural Resources, UNL, March 1993, p. 251.



and surface water are particularly vulnerable to widespread, rather than localized, contamination. It is also an area easily harmed by “clean-up” activities, where “natural remediation” of toxins over the course of many decades is likely to produce a dramatic detrimental impact on the environment. University of Nebraska Water Center Professor, Dr. John Gates testified under oath at a hearing on the TransCanada pipeline crossing the Sandhills, in the Nebraska Legislature, “It is known that surface waters in the Sandhills region, including rivers, wetlands, and lakes, are extensively fed by groundwater. ....[T]he time scale of flow from shallow groundwater to surface water can be very short in the Sandhills. Under these conditions, an oil release to groundwater that is near to a surface water body would be difficult to remediate before it is transmitted to surface.

80. The case for land use regulation of oil pipelines by the State is clear. The methods available are equally clear. A permit system can be enacted or, perhaps more simply, the power of eminent domain can be restricted, to assure that oil pipelines respect Nebraska’s land use priorities, build their assets in controlled corridors, and comply with reasonable land use criteria, just like other industrial users of Nebraska’s land must. No special burden will be imposed upon oil pipelines from any such legislation. Pipeline commerce and interstate benefits will be preserved. No intrastate preference for local pipelines will be created, and wise land use will be achieved.

81. Importantly, Nebraska’s land use priorities can be achieved while accommodating interstate commerce reasonably. A pipeline company seeking passage through the State must expect to accommodate the law of each jurisdiction through which it works, including those laws that impact land use, taxes, permit requirements, notifications, disclosures, or siting. Matters of local importance must be respected and protected. This may require adjustments to routes, changes in plans and even some adjustments to schedules. But, so long as they accommodate interstate interests reasonably, the State laws will be enforced and command respect.

### **III. What Authority Authorizes Immediate Action By Executive & Legislative Branches of Nebraska’s State Government?**

#### **How May Nebraska Act?**

82. Nebraska’s right to regulate land use is derived from the reservation of State powers in the US Constitution. Simply,

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.<sup>90</sup>

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<sup>90</sup> *US Const* Amend 10.

The 10<sup>th</sup> Amendment does not empower States not nullify federal laws or regulations or federal judicial decisions.<sup>91</sup>

83. Nebraska's power to act is implemented in the State's Constitution conferring lawmaking authority on the Legislature,<sup>92</sup> and the separation of powers including duties to execute laws passed by the Legislature.<sup>93</sup> Executive departments must not exceed delegated powers or encroach upon legislative mandates in the implementation of statutes.<sup>94</sup> And, the power to make laws may not be delegated by the Legislature to the Executive Branch.<sup>95</sup> In fact, the Legislature cannot delegate its law making authority to the United States either.<sup>96</sup>

84. Rule making authority can be delegated with adequate legislative standards.<sup>97</sup> The policy purposes for the delegation of authority and the boundaries for action must be established by the Legislature with the Executive agency's power being confined to implementation.<sup>98</sup>

85. These background rules and the discussion of federal preemption and State authority above, provide legal background for the alternatives available to the Nebraska Legislature as it deals with pipeline regulatory issues. These options are discussed throughout this Green Paper, but collected, below.

#### IV. What are Nebraska's Options for Action?

86. Nebraska's land use regulatory authority appears to authorize action to regulate oil pipelines in these categories or of these general types:

86.1 State law can, and should define what constitutes a *pipeline*. The federal definition quoted above at ¶ 26 is suggested.<sup>99</sup>

86.2 State law can define a "pipeline *company*" and should do so to include affiliates, related parties, commonly owned entities, joint ventures, etc.

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<sup>91</sup> *Cooper v Aaron*, 358 US 1 (1958).

<sup>92</sup> *Neb Const* Art III Sec 1.

<sup>93</sup> *Neb Const* Art II Sec 1

<sup>94</sup> *Mann v. Wayne County Board of Equalization*, 186 Neb 752, 186 NW2d 729 (1971).

<sup>95</sup> *In re Petition of Nebraska Community Corr. Council*, 274 Neb 225, 738 NW2d 850 (2007).

<sup>96</sup> *Anderson v. Tiemann*, 182 Neb 393, 155 NW2d 322 (1967); *Smithberger v. Banning*, 129 Neb 651, 262 NW 492 (1935).

<sup>97</sup> *School Dist. No. 39 of Washington County v. Decker*, 159 Neb 693, 68 NW2d 354 (1955).

<sup>98</sup> A statute regulating the size of loaf of bread, authorizing Secretary of Agriculture to fix reasonable excess tolerances, is not invalid as a delegation of legislative power. *Petersen Baking Co. v. Bryan*, 124 Neb 464, 247 NW 39 (1933), affirmed, 290 US 570 (1934).

<sup>99</sup> The federal definition is found at 49 *CFR* § 195.2. Definitions.



86.3 State law can prohibit exercise of the power of eminent domain, or the ownership or operation of a pipeline in Nebraska by a company or organization with interests inimical to the United States as identified by the US Department of State or the US Department of Defense or any other agency authorized by the President of the United States to publish a list of nation states or organizations with interests inimical to those of the United States.

86.4 State law can be amended to limit or even eliminate the delegation of the power of eminent domain to oil pipeline companies, though tempering the use of the power is preferable to its elimination.

86.5 State law can require that pipeline companies build within defined corridors through the State, which corridors are defined on terms consistent with legislatively expressed state land use criteria.

86.6 State law can require that pipeline companies build in existing easements or rights-of-way held by the company proposing construction, or in alternative compatible rights of way.

86.7 State law can require that pipeline companies build additional pipelines in easements or rights-of-way held by the company and can limit the power of eminent domain to expansion of existing easements only, if necessary.

86.8 State law can limit the power of eminent domain to construction in pre-approved corridors or existing easements or rights of way.

86.9 State law can require application and an approval process for a pipeline construction and / or operating permit as a condition precedent to exercise of the power of eminent domain.

86.10 State law can require that just compensation include severance damages where easements or rights-of-way, or partial takings, affect remainder interests or properties of nearby landowners.

86.11 State law can commit pipeline siting issues to either an administrative agency, in which case rule making would be required and lobbying and political influence could be wielded, or to the judiciary for adjudication of actual cases and controversies where such influence is minimized.

86.12 State law can regulate the ownership of pipelines by requiring prior approval before transfer to a successor as it does with State chartered banks, privately owned utilities, and common carriers.

86.13 State law can criminalize fraudulent efforts to secure title to land or easements through false representations of the right to use the power of eminent domain.

86.14 State law can criminalize intentional or willful operations of a pipeline under unsafe conditions in violation of federal pipeline safety standards. It can provide for the right of the State to take over operations of a pipeline declared unsafe and to remediate the unsafe conditions at the expense of the power, and provide civil penalties assessed daily and payable to the State.

86.15 State law can provide both compensatory and punitive damages, with funds for the latter to be paid to a designated State fund, where an offending pipeline violates the law of Nebraska, constitutes a public or private nuisance, or proximately causes losses to persons or property through operations that violate federal safety standards.

86.16 State law can require a remediation plan be filed and approved as a condition precedent to an operating permit, and it can require periodic (perhaps decennial) updates for the remediation plan as a condition precedent to permit renewal at periodic intervals.

86.17 State law can include a pipeline tax imposed as an *ad valorem* tax based on a formula that may include, among other possible factors, length, diameter, quantity and type of product transmitted, and other proper factors.

86.18 State law can be amended to repeal existing pipeline condemnation authority and replace that authority with an appropriate new methodology.

87. This list of options is not exclusive. It is illustrative.

### **When Does Nebraska Lose the Right to Act?**

88. Once a pipeline company acquires property rights under an easement, right-of-way, condemnation or deed, it owns interests in real estate. Those interests are property of the pipeline company; it is entitled to just compensation if the government takes the property from it, just as does any other American citizen or any company with interests here. Property of foreign nations may be taken only for just compensation and

public purposes permitted by the Fifth Amendment.<sup>100</sup> Such takings for non-public purposes or without just compensation violate federal<sup>101</sup> and international law.<sup>102</sup>

89. The State must act before land is acquired by a pipeline company or it is likely to lose the right to exercise its sovereign powers. This means the deadline for State action is before the pipeline route is acquired from Nebraskans.

### **Is Nebraska Vulnerable to Suit If it Exercises Its Sovereignty?**

90. Fear of efforts at reprisal by large companies against the State exist. Oil pipeline owners are often among the largest companies in the world, with resources and personnel greater than those of Nebraska and most States. But, Nebraska has an important protection that should not be dismissed lightly or overlooked. As a sovereign, Nebraska is immune from suit except where it waives its immunity.

“The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”<sup>103</sup>

91. The Supreme Court has explained the Eleventh Amendments immunity recently:

Although the text of the Amendment would appear to restrict only the Article III diversity jurisdiction of the federal courts, “we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition ... which it confirms.” *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779, 111 S.Ct. 2578, 2581, 115 L.Ed.2d 686 (1991). That presupposition, first observed over a century ago in *Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890), has two parts: first, that each State is a sovereign entity in our federal system; and second, that “[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent,” *id.*, at 13, 10 S.Ct., at 506 (emphasis deleted), quoting *The Federalist* No. 81, p. 487 (C. Rossiter ed. 1961) (A. Hamilton). See also *Puerto Rico Aqueduct and Sewer Authority, supra*, at 146 (“The Amendment is rooted in a recognition that the States, although a union, maintain certain attributes of sovereignty, including sovereign immunity”). For over a century we have reaffirmed that federal jurisdiction over suits against unconsenting States “was not contemplated by the

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<sup>100</sup> *Crist v Republic of Turkey*, 995 F Supp 5 (D DC 1998).

<sup>101</sup> 28 USC 1605(a). *Siderman de Blake v Republic of Argentina*, 965 F2d 699 (9<sup>th</sup> Cir 2003).

<sup>102</sup> *Restatement (Third) of Foreign Relations Law of the US* § 712 (ALI 1987).

<sup>103</sup> *US Const* Amend XI

Constitution when establishing the judicial power of the United States.” *Hans*, *supra*, at 15, 10 S.Ct., at 507.<sup>104</sup>

92. Nebraska officials can be enjoined from enforcing an unconstitutional law,<sup>105</sup> but the State is not liable for damages unless it assents to be sued.<sup>106</sup>

### **Conclusion**

93. Nebraska’s government is empowered to protect the State’s vital land use interests and natural resources. Available options are plentiful and reasonable. A long range view of solutions for all foreseeable pipeline issues, and not a simplistic answer to a single pressing problem, is respectfully urged.

October 26, 2011  
Corrected October 28, 2011

David A Domina  
Brian E Jorde  
Domina Law Group pc llo

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<sup>104</sup> *Seminole Tribe of Florida v. Florida*, 517 US 44, 54 (1996).

<sup>105</sup> *Bernbeck v Gale*, 2011 WL 3841602 (D Neb 2011) (enjoined enforcement of initiative & referendum laws).

<sup>106</sup> *Dover Elevator Co v Arkansas State Univ*, 64 F3d 442, 447 (8<sup>th</sup> Cir 1995); *Andrews v Nebraska*, 2011 WL 50337187.

## Appendix I. Alternate Route Maps

Fig 1.

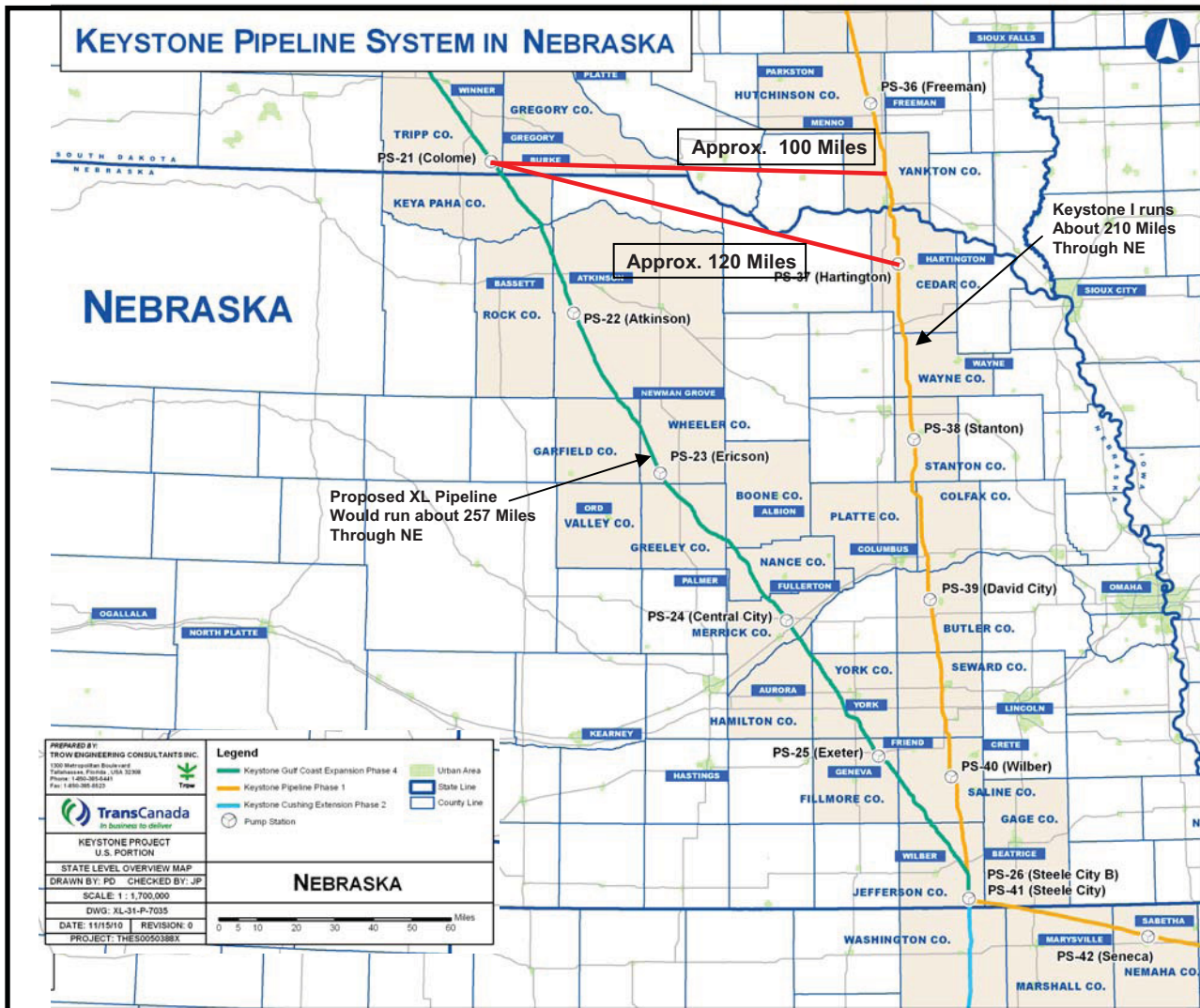
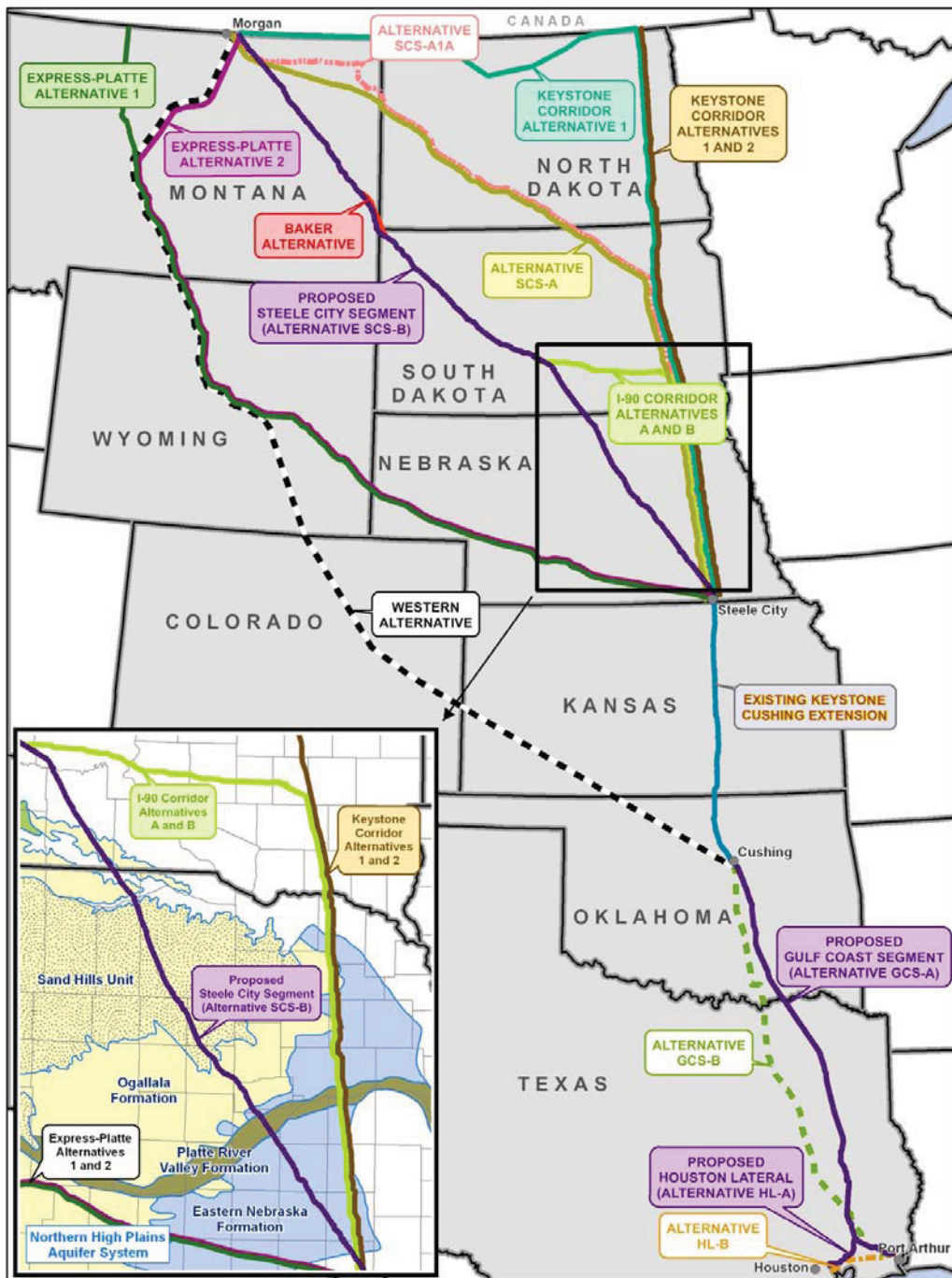




Fig. 2





ORDINANCE NO. 2136

AN ORDINANCE OF THE CITY OF REDMOND, WASHINGTON, AMENDING THE REDMOND MUNICIPAL CODE AND THE REDMOND COMMUNITY DEVELOPMENT GUIDE TO ADOPT POLICIES RELATED TO HAZARDOUS LIQUID PIPELINES, DGA 02-005, AND ESTABLISHING AN EFFECTIVE DATE.

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WHEREAS, two hazardous liquid pipelines extend through the western portion of Redmond carrying gasoline, diesel and aviation fuel; and

WHEREAS, these pipeline facilities, if ruptured or damaged, can pose a significant risk to public safety and the environment due to the high operating pressure and the highly flammable, explosive and toxic properties of the products transported; and

WHEREAS, the City of Redmond desires to adopt policies and regulations intended to reduce the likelihood of accidental damage to the hazardous liquid pipelines and to help reduce adverse impacts in the event of a pipeline failure; and

WHEREAS, the Planning Commission has conducted a public hearing to receive public comments on the proposed policies and regulations; and

WHEREAS, a SEPA Checklist was prepared and a Determination of Non-Significance was issued June 6, 2002, for the proposed policies and regulations; and

WHEREAS, the City Council of the City of Redmond acknowledges that the proposed policies and regulations are for the benefit of the public health, safety, and welfare,  
NOW, THEREFORE,

THE CITY COUNCIL OF THE CITY OF REDMOND, WASHINGTON,  
DOES ORDAIN AS FOLLOWS:



Section 1. Findings and Conclusions. After carefully reviewing the record and considering the evidence and arguments in the record and at public meetings, the City Council hereby adopts the findings, analysis and conclusions in the Planning Commission Report dated August 30, 2002.

Section 2. Amendment of Redmond Comprehensive Plan Utilities Chapter. The Utilities Chapter of the Redmond Comprehensive Plan is hereby amended to add the text, policies and other provisions as set forth in Exhibit 1, incorporated herein by this reference as if set forth in full.

Section 3. Severability. If any policy, section, sentence, clause, or phrase of this ordinance, or any policy adopted or amended hereby, should be held to be invalid or unconstitutional by a court of competent jurisdiction, such invalidity or unconstitutionality shall not affect the validity of any other policy, section, sentence, clause, or phrase of this ordinance or any policy adopted or amended hereby.

Section 4. Effective Date. This ordinance, being an exercise of a power specifically delegated to the city legislative body, is not subject to referendum, and shall take effect five days after passage and publication of an approved summary thereof consisting of the title.

CITY OF REDMOND

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ROSEMARIE IVES, MAYOR

ATTEST/AUTHENTICATED:

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BONNIE MATTSON, CITY CLERK

APPROVED AS TO FORM:  
OFFICE OF THE CITY ATTORNEY:

By: \_\_\_\_\_

FILED WITH THE CITY CLERK:	September 23, 2002
PASSED BY THE CITY COUNCIL:	October 1, 2002
SIGNED BY THE MAYOR:	October 1, 2002
PUBLISHED:	October 5, 2002
EFFECTIVE DATE:	October 10, 2002
ORDINANCE NO.: <u>2136</u>	

## EXHIBIT 1: Recommended Amendment to Comprehensive Plan Utilities Element

### Organization of this Chapter (Amended)

The Utilities Chapter is divided into the following sections:

**The Introduction** describes the intent of the Utilities Chapter and its relationship to Redmond's vision of the future and other chapters.

**The Planning Context** summarizes how this chapter responds to the requirements of the Growth Management Act and the Countywide Planning Policies and describes how the proposed policies relate to other laws, policies, commissions and local needs.

**The Utilities Policies** are divided into the following areas:

- A. **General Utility Policies** address provision of utilities in general, including issues of adequacy, phasing, economic and environmental considerations.
- B. **Facility Plans, City-Managed Utilities** incorporate functional facility plans into the Development Guide by reference.
- C. **Water Policies** provide an inventory of facilities, addresses source of supply and discusses facility design and level of service criteria.
- D. **Sewer Policies** include an inventory of facilities and policies relating to design and level of service criteria.
- E. **Stormwater Policies** provide an inventory of facilities and policies relating to design and level of service criteria.
- F. **Solid Waste Policies** include an inventory of conditions and policies concerning recycling and waste management.
- G. **Non-City-Owned Utilities Policies** encourage an adequate infrastructure to provide a wide range of utility choices, energy conservation, and environmental protection.
- H. **Electric Policies** provide an inventory of facilities and policies relating to the siting of such facilities.
- I. **Natural Gas Policies** relate to the provision of natural gas and includes a brief description of the existing system and capacity.
- J. **Telecommunications Policies** provide a brief description of the existing system and capacity and address new technologies.
- K. **Hazardous Liquid Pipeline Policies** provide a brief description of the existing system and include policies intended to minimize the likelihood of pipeline damage, address land use compatibility, and promote continued improvement in safety measures.

(Ord. 1847)

## **K. Hazardous Liquid Pipelines (New)**

### **Facilities, Inventory of Conditions and Future Needs**

The Olympic Pipe Line Company operates a 400-mile long petroleum pipeline system from Ferndale, Washington to Portland, Oregon. Two parallel lines, 16-inch and 20-inch, pass through the west portion of Redmond generally along the Puget Sound Energy easement. The pipelines carry gasoline, diesel, and aviation fuel. Delivery lines carry products from this mainline to bulk terminals at Sea-Tac International Airport; Seattle, Tacoma, Olympia and Vancouver, Washington; and Linnton and Portland, Oregon.

The pipelines are hazardous liquid pipelines, as defined by RCW 81.88.040 and WAC 480-93-005. Liquid pipelines provide an important service transporting petroleum products much more efficiently than possible by truck. Pipeline facilities, if ruptured or damaged, can pose a significant risk to public safety and the environment due to the high operating pressure and the highly flammable, explosive, and toxic properties of the transported products.

The Federal Office of Pipeline Safety (OPS) is responsible for regulation of interstate pipeline facilities. OPS regulations and other risk management approaches address safety in design, construction, testing, operation, maintenance, and emergency response for pipeline facilities. Through passage of the Washington Pipeline Safety Act of 2000 (E2SHB 2420), the state legislature significantly enhanced the local pipeline safety program. As part of this legislation, the Washington State Utilities and Transportation Commission (UTC) was directed and obtained the authority to inspect interstate pipelines from the Federal Office of Pipeline Safety (OPS). By being an agent for OPS, the UTC is able to dedicate more resources to inspections and preventive safety measures.

In 2000, Redmond's fire department established a response plan in the event of a pipeline failure. The Olympic Pipeline Response Plan includes technical information about the pipeline, potential hazards, a guide to hazardous-materials scene management, emergency response and evacuation plans, and contacts and other resources.

The policies below supplement existing regulations and risk management/response plans by focusing primarily on land use measures that help minimize and prevent unnecessary risk to the public due to hazardous liquid pipelines, recognizing it is impossible to eliminate risk entirely. The primary purpose of these policies is to:

- Minimize the likelihood of damage to hazardous liquid pipelines due to external forces such as construction equipment, the leading cause of pipeline accidents.
- Avoid exposing land uses with high on-site populations that are difficult to evacuate, emergency facilities, and similar high consequence land uses to risk of injury in the event of a pipeline failure.

- Facilitate early detection of potential pipeline damage or failures through adequate maintenance of the hazardous liquid pipeline corridor and neighborhood education.
- Continue to work with other governments and industry representatives to seek improvements in safety measures for hazardous liquid pipelines.

The provisions of this section are intended to protect the health, safety and welfare of the general public and are not intended to protect any particular individual, class of individuals, or organization.

## **Policies to Minimize Pipeline Damage**

The corridor for the hazardous liquid pipeline system through Redmond varies, but is typically about 50 feet wide and contains the pipelines and right-of way or easements. The depth and location of the pipelines within the corridor also varies, although the lines are typically buried at a depth of 3 to 4 feet. The depth of cover over the pipelines may also change over time due to erosion or other reasons.

The following policies concern development review and construction for projects in the vicinity of the pipelines, including coordination between Redmond and the pipeline operator, Olympic Pipe Line Company, or its successor. Identifying the location of the pipeline corridor on site plans and plats and using the one-call locator service are important first steps in avoiding accidental damage, particularly during construction on adjacent properties. Depending on the type and location of project work, pipeline locations may need to be physically verified to minimize the likelihood of damage. Land disturbance close to the pipelines needs to be monitored by the pipeline operator or their representative.

UT-108            Site plans for proposed developments shall show the location of hazardous liquid pipeline corridors.

**UT-109    Redmond shall require applicants and designees for private and public development to use the one-call service to locate pipelines before undertaking land disturbance or other significant work along the pipeline corridor.**

UT-110            Redmond shall notify the pipeline operator of proposed development projects located within one-quarter mile of a hazardous liquid pipeline corridor. This notice should include general information about the project such as location, project contact, number of residences or size, site plan, and whether the project is likely to affect surface water flow patterns.

UT-111 To minimize the likelihood of accidental damage during construction, the pipeline operator, in response to notification of a proposed project, shall determine if additional measures, above the normal locating process, are necessary to physically verify pipeline locations.

UT-112 Redmond should seek the pipeline operator's participation in pre-construction meetings for projects located within 150 feet of a hazardous liquid pipeline corridor.

UT-113 Redmond shall seek monitoring by the pipeline operator of permitted development that involves land disturbance or other significant work within the pipeline corridor, or within 30 feet of a pipeline, whichever is greater.

If not properly directed, on- or off-site stormwater discharge can erode soil cover over the pipelines. This is particularly a concern where the pipeline is located in areas of steep slope, such as the Willows/Rose Hill Neighborhood.

UT-114 During review of development, Redmond shall seek to identify existing or potential erosion problems over pipelines associated with stormwater discharge.

The Office of Pipeline Safety (OPS) keeps statistics on pipeline accidents, including cause and commodity involved. External forces are the leading cause of reported pipeline releases, accounting for 31 percent. Damage from external forces such as construction equipment could produce an immediate release or a scratch on a coated-steel pipeline that leads to accelerated corrosion and failure at a later time. Ensuring that new or expanded structures and other significant land disturbance are set back from the hazardous liquid pipelines helps reduce the likelihood of accidental damage.

UT-115 New or expanded structures and other significant land disturbance shall be setback from hazardous liquid pipelines to minimize the likelihood of accidental damage to the pipelines. Required setbacks shall not deny all reasonable economic use of property.

UT-116          During development project design and construction, minimize the likelihood of pipeline damage through techniques such as site design, use of signs to clearly identify pipeline locations, and fences.

### **Policies on Land Use Compatibility**

Redmond can help reduce the risk of injury in the event of a pipeline failure by not allowing certain land uses to locate near hazardous liquid pipelines. Land uses with high-density on-site populations that cannot be readily evacuated or protected in the event of a pipeline failure are considered “high consequence land uses”. Examples include but are not limited to schools or multi-family housing exclusively for elderly or handicapped people. These types of uses are not appropriate near pipelines due to the risk and potential consequences in the event of a pipeline failure. Facilities that serve critical “lifeline” or emergency functions, such as fire and police facilities or utilities that provide regional service, are also considered “high consequence land uses”.

There are many other developments located in the vicinity of the hazardous liquid pipelines that because of this location warrant special consideration due to the number of occupants, characteristics of the development, or other factors. Examples include the businesses located along Willows Road and multi-family development in the Grass Lawn and Willows/Rose Hill Neighborhoods. It is important that these types of developments have appropriate emergency procedures in place, such as an emergency guide or plan. New or expanded developments need to use measures such as site planning that reflects anticipated flow paths for leaking hazardous materials and emergency procedures to help reduce the likelihood of fire and injury in the event of a pipeline failure.

UT-117          Locating new high consequence land uses near a hazardous liquid pipeline corridor represents an unusually high risk and shall not be allowed. Proposed expansions to high consequence land uses located near pipeline corridors shall at a minimum be designed to avoid increasing the level of risk in the event of a pipeline failure, and where feasible, reduce the risk.

**UT-118      Commercial, industrial, multi-family or other development which, because of proximity to a hazardous liquid pipeline corridor, poses safety concerns due to characteristics of the occupants, development or site, shall use appropriate mitigation measures to help reduce adverse impacts in the event of a pipeline failure.**



## **Policies to Facilitate Detection of Pipeline Failures and Improve Pipeline Safety**

The pipeline operator can help reduce the likelihood of accidental damage by adequately maintaining the pipeline corridor. Dense vegetation such as blackberry bushes can impede visibility and access. The pipeline corridor should be properly maintained with grass or other low growing vegetation that enables easy inspection while preventing erosion. Ensuring that the pipeline locations are marked and that missing markers are replaced is also important, as is periodic aerial inspection of the pipeline corridor to detect potential problems.

**UT-119    The pipeline operator shall adequately maintain their corridor area. Maintenance includes but is not limited to:**

- **Maintaining vegetation to enable visibility and access for inspection while avoiding soil erosion,**
- **Ensuring that above and below grade pipeline markers containing information such as operator name and number and facility type are in place,**
- **Periodic visual inspections of the corridor.**

People who live, own property, or work near the pipelines can play an important part in avoiding pipeline damage and identifying potential problems early on. Redmond and Olympic Pipe Line Company or its successor can promote public safety through periodic neighborhood mailings and meetings. Important information should include facts about the pipelines, how to avoid damage, potential problems to watch out for such as unusual smells or suspicious construction activities, and how to respond in the event of a failure or other problem.

**UT-120    Redmond, in cooperation with the pipeline operator, should establish neighborhood programs to educate the public about pipeline safety. The education programs should be held every two years at a minimum for people who live or work within one-quarter mile of the hazardous liquid pipeline corridor.**

In 2000, Redmond joined the Washington City and County Pipeline Safety Consortium. The consortium purpose is to take a unified approach in addressing pipeline safety issues with particular emphasis on operation of the pipeline system. The consortium is not a permanent organization. Among the issues to be addressed include: developing a model franchise agreement, reviewing the pipeline operator's safety action plan to identify any deficiencies, and advocacy of city and county concerns regarding pipeline safety regulations.

UT-121       Redmond should continue to work with other jurisdictions, state and federal governments, and the pipeline operator to seek improvements in safety measures for hazardous liquid pipelines.



ORDINANCE NO. 4237

AN ORDINANCE OF THE CITY OF ST. PETERS, MISSOURI AMENDING SECTIONS 405.100, 405.595 AND 405.620 OF THE ST. PETERS CITY CODE, AND PROVIDING FOR MINIMUM REQUIREMENTS FOR LOT LINE DISTANCES FROM GAS AND/OR HAZARDOUS LIQUID PIPELINES IN RESIDENTIAL DISTRICTS

WHEREAS, numerous gas and/or hazardous liquid pipelines extend through portions of the City of St. Peters; and

WHEREAS, these pipeline facilities, if ruptured or damaged, may pose a significant risk to public safety and the environment due to the high operating pressure and the highly flammable, explosive and toxic properties of the products transported; and

WHEREAS, the National Transportation Safety Board has recognized that third-party damage and pipeline right-of-way encroachment are the biggest threats to pipeline safety; and

WHEREAS, the Board of Aldermen of the City of St. Peters wishes to protect its citizens from the dangers inherent with gas and hazardous liquid pipelines; and

WHEREAS, the City of St. Peters is preempted from regulating the location of interstate pipelines by Federal law, *see Kinley Corp. v. Iowa Utilities Board*, 999 F.2d 354 (8<sup>th</sup> Cir. 1993); and

WHEREAS, the City of St. Peters desires to adopt policies and regulations intended to reduce the likelihood of accidental damage to the gas and hazardous liquid pipelines and to help reduce adverse impacts in the event of a pipeline failure; and

WHEREAS, the Board of Aldermen of the City of St. Peters, Missouri did refer the proposed amendments to the St. Peters City Code to the City's Planning and Zoning Commission; and

WHEREAS, the Planning and Zoning Commission of the City held a Public Hearing on these proposed amendments to the City Code; and

WHEREAS, at the Public Hearing, all interested persons and citizens were given an opportunity to be heard on these proposed amendments to the City Code; and

WHEREAS, the Planning and Zoning Commission considered the amendments and made a recommendation to the Board of Aldermen; and

WHEREAS, the Board of Aldermen and did hold a Public Hearing on the proposed amendments to the City Code; and

WHEREAS, at the Public Hearing, all interested persons and citizens were given an opportunity to be heard on the proposed amendments to the City Code; and

WHEREAS, the Board of Aldermen of the City of St. Peters now finds and determines that the regulation of future platting of residential property in the proximity of gas and/or hazardous liquid pipelines is desirable to preserve the aesthetic quality and value of the homes near such pipelines in the City of St. Peters; and

WHEREAS, the Board of Aldermen now finds and determines that policies and regulations providing for minimum lot line distance requirements from gas and/or hazardous liquid pipelines in newly platted subdivisions in residentially zoned districts are necessary to enhance the public health, safety and welfare.

**NOW THEREFORE, BE IT ORDAINED BY THE BOARD OF ALDERMEN OF THE CITY OF ST. PETERS, MISSOURI, AS FOLLOWS:**

**SECTION 1.** That Section 405.100 of the St. Peters City Code shall be and is hereby amended by adding the following definitions:

GAS PIPELINE means a pipeline designed for the transmission of a "gas" or "petroleum gas", except a "service line", as those terms are defined by Title 49, Code of Federal Regulations, Section 192.3.

HAZARDOUS LIQUID PIPELINE means a pipeline designed for the transmission of a "hazardous liquid", as defined by Title 49, Code of Federal Regulations, Section 195.2.

PIPELINE means the same as is defined by Title 49, Code of Federal Regulations, Sections 195.2 and 192.3.

PIPELINE FACILITY means the same as is defined by Title 49, Code of Federal Regulations, Sections 195.2 and 192.3.

**SECTION 2.** That Section 405.595 of the St. Peters City Code shall be and is hereby amended by adding Subsection 12 thereto, which Subsection shall read as follows:

12. The plat must provide a note that all existing gas and/or hazardous liquid pipelines or pipeline facilities through the subdivision have been shown, or that there are no such existing pipeline facilities within the limits of the subdivision.

**SECTION 3.** That Section 405.620 of the St. Peters City Code shall be and is hereby amended by adding Subsection 9 thereto, which Subsection shall read as follows:



9. Pipeline setback. All lot lines depicted on plats for residentially zoned districts shall be a minimum of twenty-five (25) feet from the nearest existing gas pipeline and/or hazardous liquid pipeline, as built, measured parallel to and from the center of such pipeline.

**SECTION 4. Severability.** If any term, condition, or provision of this Ordinance shall, to any extent, be held to be invalid or unenforceable, the remainder hereof shall be valid in all other respects and continue to be effective and each and every remaining provision hereof shall be valid and shall be enforced to the fullest extent permitted by law, it being the intent of the Board of Aldermen that it would have enacted this Ordinance without the invalid or unenforceable provisions. In the event of a subsequent change in applicable law so that the provision which had been held invalid is no longer invalid, said provision shall thereupon return to full force and effect without further action by the City and shall thereafter be binding.

**SECTION 5. Effective Date.** This Ordinance shall be in full force and take effect from and after the date of its final passage and approval.

**SECTION 6. Savings.** Nothing contained herein shall in any manner be deemed or construed to alter, modify, supersede, supplant or otherwise nullify any other Ordinance of the City or the requirements thereof whether or not relating to or in any manner connected with the subject matter hereof, unless expressly set forth herein.

Read two times and passed this 10th day of March, 2005.

  
\_\_\_\_\_  
As Presiding Officer and as Mayor

Attest:   
City Clerk

Approved this \_\_\_\_\_ day of \_\_\_\_\_, 2005.

\_\_\_\_\_  
Mayor

Attest: \_\_\_\_\_  
City Clerk



## **Proposed Pipeline Safety & Development Changes**

### **Docket #ZON2007-00014**

#### **Purpose.**

The purpose of this section is to help prevent and minimize unnecessary risk to the public health, safety, and welfare due to hazardous liquid and gas transmission pipelines. Recognizing it is impossible to eliminate risk entirely, this section is intended to:

- (1) Minimize the likelihood of accidental damage to hazardous liquid and gas transmission pipelines due to external forces, such as construction equipment.
- (2) Avoid exposing land uses with high on-site populations that are difficult to evacuate and land uses that serve emergency functions to risk of injury or damage in the event of a pipeline failure.
- (3) Help reduce adverse impacts in the event of a pipeline failure.
- (4) Supplement existing federal and state regulations related to hazardous liquid and gas transmission pipeline corridor management.

The provisions of this section are intended to protect the health, safety and welfare of the general public and are not intended to protect any particular individual, class of individuals, or organization.

#### **Development Application Submittal Requirements.**

- (1) Applicants shall show hazardous liquid and gas transmission pipeline corridors and applicable setbacks on site plans and subdivision plats when proposed development is located within 660 feet of the pipeline corridor. Minor modifications to existing structures that do not involve significant land disturbance on-site or changes to off-site improvements are exempt from this requirement.
- (2) Consultation Zone along hazardous liquid and gas transmission pipeline corridors
  - (A) Consultation Zone Distance. The consultation requirement applies to development permits involving any parcel that is within 660 feet of the centerline of a hazardous liquid and gas transmission pipeline corridor. The 660 foot consultation zone distance may be lessened for certain development activities if the distance changes are first reviewed with the pipeline operator(s) and found to be consistent with prudent pipeline operation given the local conditions, such as terrain, soil types, etc. There must be written documentation from the pipeline operator(s) showing their agreement to any lessening of the consultation zone distance for certain types of development permits. The intent of this section is to provide flexibility and to avoid unnecessary paperwork and delays in the permitting process while also making sure that all activities that may impact the integrity of a hazardous liquid or gas transmission pipeline are thoroughly reviewed.
  - (B) Consultation Zone Notification  
Whenever any individual applies for a development permit within the consultation zone established for hazardous liquid and gas transmission pipelines, the staff at the permit counter shall notify the individual that they are within the consultation zone, explain the



relevant application procedures, and provide contact information for the applicable pipeline operator(s). This same procedure shall be followed whenever an individual inquires about development regulations or zoning restrictions for property within the consultation zone.

(C) Complete Application for Development Permit within Consultation Zone.

A complete application for any development permit within the designated consultation zone must include written verification from the applicant that:

- (i) The applicant has contacted the pipeline operator(s) and has provided the pipeline operator(s) with documentation detailing the proposed development activity and where the activity is to take place; and
- (ii) The pipeline operator(s) has reviewed the documents for compatibility with continued safe operation of the hazardous liquid or gas transmission pipeline (s).
- (iii) The written verification required by this section can be in any form acceptable to the county, including electronic communications, so long as it is clear that the pipeline operator(s) has received and reviewed documentation showing the proposed activity and its location.

(3) A SEPA checklist submitted by an applicant for a development permit involving any parcel that is within 660 feet of the centerline of a hazardous liquid or gas transmission pipeline easement must reference the transmission pipeline(s) and provide information concerning any impact the activity will have upon the integrity of the hazardous liquid or gas transmission pipeline (s).

(4) All other applicable development application submittal requirements apply.

**Pipeline Corridor Protection Requirements.**

(1) Hazardous Liquid and Gas Transmission Pipeline Corridor. No significant land disturbance or construction or expansion of structures is allowed within hazardous liquid or gas transmission pipelines corridors.

(2) Exemptions. Streets, utilities, trails and similar uses shall be exempt from requirements (1).

(3) Pipeline Corridors shall be identified and protected during construction by placement of a temporary barricade and on-site notices. Barricades and on-site notices are subject to review by the Code Administrator.

(4) Reasonable Use Provision.

(A) The required pipeline corridor protection requirements from hazardous liquid and gas transmission pipeline corridors shall not deny all reasonable economic use of property. If an applicant demonstrates to the satisfaction of the Hearing Examiner that strict application of these requirements are greater than any legal easement requirements, and would deny all reasonable economic use of the property, the requirements may be lessened subject to appropriate conditions.

(B) An applicant for relief from strict application of the requirements shall demonstrate

the following:

- (i) No reasonable economic use of the applicant's property can be made if the requirements are strictly applied; and
- (ii) The proposed use on the corridor is the minimum necessary to provide the applicant with a reasonable economic use of the property; and
- (iii) All reasonable mitigation measures have or will be implemented or assured; and
- (iv) The inability to derive any reasonable economic use is not the result of the applicant's actions or those of the applicant's predecessors in title; and
- (v) The pipeline corridor protection requirements are greater than any legal easement or right-of-way requirements for the corridor; and
- (vi) The pipeline location has been definitively determined.

(C) As a condition of any relief granted under this section, the applicant shall be required to record an instrument against the title of the property notifying all subsequent purchasers of the fact that a lesser requirement on the pipeline corridor has been approved and of any and all conditions placed on the grant of relief.

#### **Requirements for Land Use Compatibility.**

(1) High Consequence Land Uses.

(A) New high consequence land uses proposed for location within 500 feet of a hazardous liquid or gas transmission pipeline corridor are prohibited.

(B) Proposed expansions to existing high consequence land uses located within 500 feet of a hazardous liquid or gas transmission pipeline corridor shall at a minimum be designed to avoid increasing the level of risk in the event of a pipeline failure, and where feasible, reduce the risk compared to the existing development. Potential techniques to minimize or reduce risk include but are not limited to:

- (i) Site design features, such as maintaining or increasing the distance between occupied structures, or structures that provide critical lifeline functions, and the hazardous liquid or gas transmission pipeline and anticipated blast zones or flow paths for leaking hazardous materials.
- (ii) Building features, such as design to avoid a significant increase in on-site population or to expedite evacuation.
- (iii) Technological features, such as accelerated notice of a pipeline failure to the high consequence land use to facilitate evacuation or features that help to avoid damage in the event of a pipeline failure.
- (iv) Operational features, such as emergency plans and education programs for occupants and employees concerning pipeline safety, developed in accordance with the procedures in (2)(B)(ii).

Minor modifications to existing buildings are exempt from this requirement.

(2) Other Development.

(A) Applicants for the following types of new or expanded development shall use appropriate mitigation measures to help reduce adverse impacts in the event of a pipeline failure:

(i) Commercial or industrial.

(ii) Multi-family.

(iii) Religious facilities.

(iv) Other developments as required by the Code Administrator that, because of proximity to a hazardous liquid or gas transmission pipeline corridor, pose a safety concern due to characteristics of the occupants, development, or site.

(B) Mitigation measures intended to reduce risk and minimize impact in the event of a pipeline failure include but are not limited to:

(i) Site and building design techniques such as maximizing the distance between new or expanded development and anticipated blast zones or flow paths for leaking hazardous materials and controlling ignition sources.

(ii) Emergency procedures such as emergency plans and guides, employee training and drills, and education programs for occupants and employees concerning pipeline safety, such as what to be aware of and how to respond in the event of a problem.

(a) Applicants shall consult with the Fire Marshal regarding the level of emergency planning and procedures appropriate for the proposed development. Based on the nature, occupancy, or location of a proposed development, the Fire Marshal may require emergency plans and procedures for any occupancy classifications.

(b) Emergency plans and procedures shall be consistent with the Fire Code and shall be approved by the Fire Marshal.

## **Definitions**

**Gas Transmission Pipeline** means a “transmission line” as defined in 49 CFR § 192.3

**Hazardous Liquid Pipeline** means a “pipeline” as defined in 49 CFR § 195.2

**High Consequence Land Use** means a land use that if located in the vicinity of a hazardous liquid or gas transmission pipeline represents an unusually high risk in the event of a pipeline failure due to characteristics of the inhabitants or functions of the use. High consequence land uses include:

(1) Land uses that involve a high-density on-site population that are more difficult to evacuate. These uses include schools (through grade 12), hospitals, clinics, multi-family housing or other facilities exclusively for elderly or handicapped, stadiums or arenas, and day care centers, and does not extend to family day care or adult family homes.

(2) Land uses that serve critical “lifeline” or emergency functions, such as fire and police facilities, utilities providing regional service, or water supplies if exposed to a significant risk that will curtail its lifeline function for a critical period of time.

(3) Uses with similar characteristics as determined by the Code Administrator.

**Pipeline Corridor** means the pipeline pathway defined by rights-of-way and easements in which the pipelines and facilities of a hazardous liquid or gas transmission pipeline operator are located, including rights-of-way and easements over and through public or private property.



## **Holt County Nebraska Zoning**

### **ARTICLE 6**

#### **PIPELINE CONSTRUCTION, INSTALLATION, LOCATION, AND MAINTENANCE ABOVE GROUND AND BELOW GROUND IN HOLT COUNTY APPROVED 10/15/2010**

##### **Section 1. Definitions.**

- (1) Applicant. As used herein, "Applicant" shall mean any entity that applies for a Pipeline Construction Permit and shall include any successor, employee, agent, representative, assignee, contractor, lessee, or sublessee, Applicant, licensee, invitee, guest, or permittee of Applicant, or any other person or entity that has obtained or hereafter obtains rights or interests from Applicant, or Property Owner to Property Owner's land.
- (2) Property Owner. Property Owner, as used herein, shall mean the owner of the land over which or through which, the pipeline will ultimately go, together with his, her, or its heirs, successors and/or assigns,
- (3) Pipeline. "Pipeline" means a pipe with a nominal diameter of eight inches or more, located in the county, that is used to transport all petroleum products, natural gas or water, but does not include a pipe used to transport or store petroleum products, natural gas or water within a refining, storage, or manufacturing facility.
- (4) Pipeline, Permitted Uses. The following uses are permitted in Holt County and are exempt from the provisions of this Ordinance:
  - (a) Pipeline within a Property Owner's property lines, for personal and/or agricultural use.
  - (b) New, or replacement, sewer and/or water lines located and installed by a public utility or municipality in conformance with state approved sewer and/or water guidelines.
  - (c) New sewer and/or water lines whose principal function is to provide service to a new development that is approved either by the State of Nebraska, County of Holt or local municipality.
  - (d) New sewer and/or water lines for the purpose of addressing a health emergency documented by the State or County Health Officer.

##### **Section 2. Pipeline Construction Permit.**

###### **Section 2.1. Pre-Construction Filing Requirements.**

- (1) Applicant must file with the Planning and Zoning Committee the Pipeline

Construction Permit Form including all associated plans of the proposed Pipeline, including the Construction, Mitigation and Reclamation Plan, and submit property owners names and addresses, for acquired easements or leases, State approval documentation, if any, proposed County Road crossings, proposed County haul routes and voluntary submittal of other information that would assist the Planning and Zoning Committee in evaluation of the proposed Pipeline project as Pre-Construction Requirements.

(2) Applicant shall further file with the Planning and Zoning Committee the location of the Pipeline right-of-way or easement area by recording a "Notice of Location" referring to the right-of-way and setting forth the legal description of the right-of-way and the location of the pipeline contained therein, which description shall be set forth by map attached to the Notice of Location. A copy of the Notice of Location shall promptly be delivered to the Property Owner. No construction or installation of the Pipeline shall occur until the Notice of Location has been filed with the Planning and Zoning Committee and delivered to the Property Owner. Prior to construction, Property Owner will be contacted by Applicant's project manager or designated agent to review the timing of construction and discuss site-specific issues and implementation of mitigation and reclamation measures.

(3) Each Pipeline Construction Permit application shall be accompanied by at least two (2) sets of plans showing dimension and locations of the Pipeline, related items or facilities within the subject right-of-way or easement, and all proposed lift stations, pumps or other service structures related to such Pipeline, and the location, type and size of all existing utilities, drainage, right-of-way, and roadway improvements. Also required for submittal are:

(a) Cross-section drawings for all public street right-of-way and easement crossings;

(b) The maximum design capacity of the proposed transmission facility;

(c) Changes in flow in the transmission facilities connected to the proposed facility; and

(d) The proposed maximum operating pressure, expressed in pounds per square inch gauge (psig), not to exceed the manufacturer's recommended operating pressure.

## Section 2.2. Hearings.

(1) Appearance before the Planning and Zoning Committee is required for the Pipeline project. The Planning and Zoning Committee will review the permit information and will recommend approval or denial, and require any modifications and/or conditions, to the Holt County Board of Supervisors. The Pipeline Construction Permit must be reviewed by the Holt County Board of Supervisors in any case at their next scheduled meeting following the Planning and Zoning Committee's decision.

(2) After a review of the Pipeline Construction Permit along with accompanying documents and maps, a Public Hearing date will be set by the Holt County Board of

Supervisors. Two (2) weeks prior to the Public Hearing date, a notice shall be published in a legal newspaper of the County and written notification of the hearing shall be mailed to all affected Property Owners, at a cost to the Applicant.

(a) The Applicant must have the public notice approved by the Holt County Board of Supervisors or its designee prior to publishing said notice.

(b) An affidavit of publication must be presented during the Public Hearing.

(3) The Applicant has the burden of proof to establish that the proposed Pipeline complies with all applicable ordinances along with applicable laws and regulations;

### Section 2.3. One Pipeline.

No more than one pipeline may be placed, installed or constructed upon or in the Pipeline right-of-way or easement area without an easement for same.-

### Section 2.4. Topsoil.

Applicant at its own expense shall, unless otherwise requested by Property Owner, abide by all guidelines and recommendations of the local or regional field office of the United States Natural Resources Conservation Service or the Construction, Mitigation and Reclamation Plan, whichever is more stringent, regarding the removal, storage, and replacement of top soil.

(1) At a minimum, the applicant shall strip the topsoil from the ditch line in the Pipeline right-of-way or easement area and segregate all topsoil from the other excavated soil material, prior to construction and installation of any section of the Pipeline placed in the Pipeline right-of-way or easement area. Following the construction and installation of each section of the Pipeline, the top soil shall be replaced, to the extent feasible, as near as practicable to its original location and condition. Topsoil deficiency shall be mitigated with imported topsoil that is consistent with the quality of topsoil on the Property. In areas where the topsoil was stripped, soil decompaction shall be conducted prior to topsoil replacement in accordance with recommendations of the United States Natural Resources Conservation Service.

### Section 2.5. Trash Cleanup.

Construction related debris and material which is not an integral part of the Pipeline will be promptly removed from the Property Owner's property at Applicant's expense. Such material to be removed includes all litter generated by Applicant's employees, agents, contractors, or invitees, including construction crews. Following the completion of Applicant's construction activities on the Property Owner's property, Applicant shall keep the Property Owner's property clean and free of all trash and litter which may have been produced or caused by Applicant or its employees, agents, contractors or invitees or its operations on the property. Under no circumstances will Applicant bury or burn any trash, debris or foreign material of any nature on the Property Owner's property.



#### Section 2.6. Pipeline Depth.

Except for above-ground piping facilities, such as mainline block valves, pump stations, etc., the Pipeline will be installed and maintained at a depth of no less than four (4) feet below surface to top of the pipe.

#### Section 2.7. Location of Pipeline.

If the Pipeline passes within a distance of two hundred and fifty (250) feet or less from a residence, then Applicant shall implement the following protections:

- (a) To the extent feasible, Applicant shall coordinate construction work schedules with affected residential owners prior to the start of construction in the area of the residences.
- (b) Applicant shall maintain access to all residences at all times, except for periods when it is infeasible to do so or except as otherwise agreed between Applicant and the occupant. Such periods shall be restricted to the minimum duration possible and shall be coordinated with affected residential owners and occupants, to the extent possible.
- (c) Applicant shall install temporary safety fencing, when reasonably requested by the owner or occupant, to control access and minimize hazards associated with an open trench and heavy equipment in a residential area.
- (d) Applicant shall notify affected residents in advance of any scheduled disruption of utilities and limit the duration of such disruption.
- (e) Applicant shall separate topsoil from subsoil and restore all areas disturbed by construction to at least their preconstruction condition.
- (f) Except where practicably infeasible, final grading and topsoil replacement, installation of permanent erosion control structures and repair of fencing and other structures shall be completed in residential areas within ten (10) days after backfilling the trench. In the event that seasonal or other weather conditions, extenuating circumstances, or unforeseen developments beyond Applicant's control prevent compliance with this time frame, temporary erosion controls and appropriate mitigating measures shall be maintained until conditions allow completion of cleanup and reclamation.
- (g) Should a water well, or water supply, be damaged (diminishment in quantity or quality) by pipeline installation or operations, a comparable water supply will be immediately provided to the owner of the well and the water well shall be restored or replaced at Applicant's expense.

#### Section 2.8. Reclamation Obligations.

Following the completion of the Pipeline construction, or upon removal of the Pipeline at the expiration, termination, or surrender of the Pipeline, Applicant will restore the area disturbed by construction as best as practicable to its original preconstruction topsoil, vegetation, elevation, and contour.

#### Section 2.9. Abandonment of Pipeline.

Abandonment of the Pipeline in Holt County shall occur if Applicant ceases to operate the Pipeline for the transportation of petroleum products, natural gas, or water, for a period of ten (10) years. Upon the abandonment of the Pipeline, Applicant, at its option shall:

- (1) Remove the Pipeline from the lands, with full reclamation of the property; or
- (2) Surrender to the Property Owner the right-of-way or easement area with the written consent of the Property Owner.

#### Section 2.10. Change of Location of Pipeline.

Property Owner and Applicant acknowledge that the actual location of the Pipeline right-of-way or easement area may change because of various engineering factors, and Property Owner agrees to execute and deliver to Applicant, without additional compensation, and, where necessary, in recordable form, any additional documents needed to correct the legal description of the right-of-way to conform with the actual location of the Pipeline. Applicant does not need Property Owner's permission to alter the location of the Pipeline so long as the change of the right-of-way or easement area is less than twenty-five (25) feet in any direction. In the event the Pipeline right-of-way or easement area will be moved more than twenty-five (25) feet in any direction, Applicant must obtain written approval from the Property Owner and give written notice to the Planning and Zoning Committee, and shall amend the Pipeline Construction Permit application to reflect such changes. Said document and amendments to the Pipeline Construction Permit, as required, will be prepared by Applicant at its expense. Once installation of the Pipeline is complete, Applicant will deliver to the Planning and Zoning Committee within six (6) months of completion, an "as-built" map that will show exactly where the Pipeline is located, in addition to any other improvements or facilities, whether located above-ground or below-ground, and further to include any modifications to any improvements or facilities owned by Property Owner, such as waterlines or fences.

#### Section 3. Indemnification.

The pipeline owner(s) and/or operator(s) shall indemnify, defend and hold harmless Holt County and any Property Owners from any and all liability, loss, damage, cost, expense, and claim of any kind, including reasonable attorneys' and experts' fees incurred by Holt County and/or the Property Owner in defense thereof, arising out of or related to, directly or indirectly, the installation, construction, operation, use, location, testing, repair, maintenance, removal, or abandonment of the pipeline and/or related facilities, and the products contained in, transferred through, released or escaped from said pipeline and appurtenant facilities, including the reasonable costs of assessing such damages and any liability for costs of investigation, abatement, correction, cleanup, fines, penalties, or other damages arising under any law, including all applicable environmental laws. This shall be true in all instances except for those individuals or companies who intentionally, or by negligence, damage the Pipeline or related facility. No Property Owner or tenant thereof will be held responsible for a Pipeline leak that occurs as a result of his/her normal farming practices over the top of or near the Pipeline, provided no tillage or other agricultural method is used which penetrates the soil by more than two (2) feet from the undisturbed surface and they do not physically strike or impact the surface structures such as valves, etc. with machinery, equipment or other objects. This shall in no way relieve any Property Owner or tenant, agent or contractor of such Property Owner from their obligation to

comply with the Nebraska One-Call Notification System Act and any amendments thereto (See Revised Reissued Statutes of Nebraska Sections 76-2301 to 76-2330), or relieve them of liability for their failure to do so. As between the Pipeline operator, the Property Owner or its tenant, a Pipeline leak which is not caused by a violation of the above provisions or other tortious conduct by Property Owner or its tenant shall not be the responsibility of said Property Owner or tenant, as the case may be.

#### **Section 4. Protection of Proprietary Information.**

Holt County will keep detailed information filed (not including the plans or Pipeline Construction Permit) restricted from public access for security purposes, to protect proprietary information, and to protect the commercial interests of the Applicant.

#### **Section 5. Compliance with Applicable Laws.**

Pipeline owners, operators and/or contractors, and their employees, agents, contractors, and invitees, must comply with all applicable local, state and federal laws and regulations in construction and operation of the Pipeline.

#### **Section 6. Variances.**

##### **Section 6.1. Hardship.**

Where the Planning and Zoning Committee finds that extraordinary hardships, due to unusual topographic or other conditions, beyond the control of the Applicant, may result from strict compliance with these regulations, they may vary the regulations so that substantial justice may be done and the public interest secured; provided that such variation will not have the effect of nullifying the intent or purpose of the Pipeline Construction Permit, and will not be detrimental to the public health, safety or welfare or injurious to other property in the territory in which Pipeline is situated.

##### **Section 6.2. Application Required.**

(1) The Holt County Planning and Zoning Committee shall hear and decide appeals and requests for variances from the terms of this Ordinance. The Planning and Zoning Committee shall base their determination on technical justifications, and has the right to attach such conditions to variances as they deem necessary to further the purposes and objectives of this Ordinance. Applications for any such variance shall be submitted in writing by the Applicant at the time the Pre-Construction Requirements are filed with the Planning and Zoning Committee, and shall state fully and clearly all facts relied upon by the Applicant and shall be supplemented with maps, plans or other additional data which may aid the Planning and Zoning Committee in the analysis of the proposed project.

(2) Applications for the variance shall be considered with the Pipeline Construction Permit application, and the Planning and Zoning Committee will render their decision on the applied-for variance no later than thirty (30) days after the meeting at which the proposed Pipeline project application and request for variance was submitted.

##### **Section 6.3. Conditions.**

(1) In granting any variance, modification, and approvals, the Planning and Zoning Committee may require such conditions as will, in their judgment, secure substantially the objectives or the standards and requirements so varied, modified, or approved. In granting any variance, the Planning and Zoning Committee shall prescribe only conditions that they deem necessary to, or desirable for, the public interest. These conditions may include, without being limited to personal, surety, performance, or maintenance bonds, or other legal instruments.

(2) In making their findings, as required herein, the Planning and Zoning Committee shall take into account the nature of the existing use of the land in the vicinity of the Pipeline right-of-way or easement area, and any probable effects of the proposed Pipeline on the health, safety and welfare of the surrounding residents and environment.

(3) The Planning and Zoning Committee must ensure the preservation and enjoyment of the property rights of the Property Owner.

#### **Section 6.4. Requirements for Granting a Variance.**

The Board of Supervisors shall have the final authority to grant or deny a variance under this section. For each variance application, the Planning and Zoning Committee shall report to the Holt County Board of Supervisors their findings and recommendations. The Holt County Board of Supervisors, in conjunction with their regularly scheduled monthly meetings, shall set aside time for a public hearing on all proposed variances under this Section.

#### **Section 7. Severability and Separability.**

Should any portion of this act be deemed unlawful for any reason or conflict with any existing state or federal law, that fact shall not affect any other portion or section of this act and any unaffected sections or portions of this act shall stand in effect.

#### **Section 8. Effective Date.**

This Ordinance shall take effect and be in force from and after the date of adoption by the Holt County Board of Supervisors.





# **COUNTY OF SANTA BARBARA INLAND ZONING ORDINANCE**

## **ARTICLE III OF CHAPTER 35**

### **Division 8 - Energy Facilities And Related Ordinances**

#### **SANTA BARBARA COUNTY CODE**

**Republished: January 2005**

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## **ABANDONMENT OF OIL/GAS LEASES**

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### **Sec. 35-323. Abandonment of Certain Oil/Gas Land Uses.**

*(Added by Ord. 4551, 9/21/04)*

#### ***Sec. 35-323.1. Purpose and Intent.***

This section establishes procedures to achieve the timely abandonment of applicable land uses, and following such abandonment, the timely and proper removal of applicable oil and gas facilities, reclamation of host sites, and final disposition of pipelines, in compliance with applicable laws and permits. Such procedures ensure appropriate due process in differentiating idled from abandoned facilities and protect the vested rights of permittees while also ensuring that facilities with no reasonable expectation of restarting are removed, pursuant to the intent of enabling development permits. Timely abandonment provides a public benefit by avoiding unnecessary delays in remediating any residual contamination that may result during operations, and providing an effective means of mitigating several significant environmental and socioeconomic effects, including aesthetics, compatibility with surrounding land uses, and risk of default on demolition and reclamation obligations by the permittee.

#### ***Sec. 35-323.2. Applicability.***

Section 35-323 shall apply to the following land uses within the unincorporated area of the County:

1. All permitted uses defined in Sections 35-296 and 35-298 of this Chapter that handle, or at one time handled, oil, natural gas, natural gas liquids, produced water, or waste water that originated from an offshore reservoir, regardless of whether these uses were permitted in accordance with this Chapter or any preceding ordinance.
2. All permitted uses defined in Section 35-297 of this Chapter, regardless of whether these uses were permitted in accordance with this Chapter or any preceding ordinance.
3. All pipeline systems defined in Section 35-290, except for public utility natural gas transmission and distribution systems such as The Gas Company, that transport, or at one time transported, oil, natural gas, produced water, or waste water that originated from an offshore reservoir, regardless of whether these uses were permitted in accordance with this Chapter or any preceding zoning ordinance.
4. Unless specifically stated otherwise, reclamation of sites and corridors used to support any of the operations identified in 35-323.2.1, 2 or 3, above.

#### ***Sec. 35-323.3. Requirement to File an Application.***

1. The permittee of a permitted land use shall submit an application to the Director for a Demolition & Reclamation Permit (ref. Sec. 35-323.9 *et seq.*) upon intentional abandonment of a permitted land use, or an independent business function thereof.

## **ABANDONMENT OF OIL/GAS LEASES**

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2. The permittee of a permitted land use shall submit an application to the Director either to defer abandonment (ref: Section 35-323.4 *et seq.*) or to obtain a Demolition & Reclamation Permit (ref: Section 35-323.9 *et seq.*) upon the occurrence of either of the following:
  - a. Any event designated in an existing County permit that would require consideration of abandonment; or
  - b. The permitted land use or an independent business function of a permitted land use has become idle.

### ***Sec. 35-323.4. Filing an Application to Defer Abandonment.***

Any permittee subject to the requirements of Section 323.3.2 may file an application to defer abandonment, which shall be considered by the Director. The application shall be filed no later than 90 days after an event specified in Section 323.3.2 has occurred.

### ***Sec. 35-323.5. Contents of Application to Defer Abandonment.***

The application to defer abandonment shall be in a form and content specified by the Director and this chapter. Such applications shall contain the following:

1. Name, address, and contact information for permittee;
2. Name, address, and general description of the permitted land use
3. Date when permitted land use first became idle.
4. Reason for idle status.
5. Status of upstream production facilities, where applicable.
6. Listing of facility equipment that has been identified on a plan (submitted in satisfaction of a County, Fire, or APCD permit) and has been either removed from the site or is not currently in operational condition. Include an explanation of the affect this missing or inoperable equipment has on ability to restart operations and run all processes. Also explain measures necessary to bring inoperable equipment back into operational condition.
7. Plans and schedule to restart operations and identification of any facility components that would remain inactive after restart.
8. Identification of reasonable circumstances that may hinder the restart of operations according to plan and schedule.
9. Any other information deemed necessary by the Director.

### ***Sec. 35-323.6. Processing of Application to Defer Abandonment.***



## **ABANDONMENT OF OIL/GAS LEASES**

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The Director shall determine the completeness of any application and issue a completeness letter within 30 days of receipt. If the application is deemed incomplete, the Director shall specify in detail the deficiencies in the application.

1. The applicant shall submit information in response to an incompleteness letter within 60 days of receipt or, if it is not practicable to respond within a 60-day period, shall request an extension, not to exceed 60 additional days (total of 120 days to respond), within which to provide the required information.
2. The Director may choose, at his or her discretion, to conduct a public hearing to consider any application to defer abandonment. The public shall be given all reasonable opportunity to review the Director's recommended decision no less than ten days prior to conducting a public hearing on any application to defer abandonment in accordance with applicable noticing procedures specified in Sec. 35-326.
3. The Director shall refer an application to defer abandonment to the Fire Department and Air Pollution Control District for review and comment.

### ***Sec. 35-323.7. Decision on Application to Defer Abandonment.***

1. Decisions for Idle Facilities. The Director shall grant the application unless the evidence shows that an idle facility has no reasonable possibility of being restarted or the owner has no intent of restarting the facility within a reasonable period of time. Notwithstanding the above, the Director shall approve the application for any pipeline subject to the jurisdiction of the Federal Energy Regulatory Commission if that Commission has determined that abandonment is not appropriate. The Director shall consider all relevant evidence in determining if a permitted land use has been abandoned, including whether any of the following have occurred:
  - a. The oil and gas leases that have supplied the permitted land use with product have terminated.
  - b. The oil and gas operations that have supplied the permitted land use with product have been abandoned.
  - c. For oil/gas land uses designated as consolidated facilities and sites under the zoning code, there are no other existing offshore leases that may reasonably be expected to use the consolidated facility or site in the next 10 years.
  - d. Major and essential components of a land use, or an independent business function thereof, have been removed from the site or have fallen into such disrepair that they are no longer functional.

## **ABANDONMENT OF OIL/GAS LEASES**

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- e. Permits or other entitlements for the land use, such as permits from the Air Pollution Control District, have been surrendered, expired, revoked or otherwise rendered invalid and no intent has been demonstrated to renew or reacquire such permits.
  - f. The Fire Department has issued an order requiring abandonment.
  - g. Any other evidence that shows clear intent to abandon.
2. Decisions for Consideration of Abandonment under Permit Conditions. The Director shall grant the application unless:
- a. The Director finds under the applicable existing permit condition that abandonment of the permitted land use or independent business function thereof is required without further delay; and
  - b. The permittee no longer has a vested right to continue operation.
3. The Director's decision shall be transmitted by a public notice pursuant to applicable provisions of Section 35-326.
4. The Director's decision may be appealed to the Planning Commission within 30 days of noticing such decision. The Director's decision shall be final upon conclusion with the 30-day appeal period if no appeals have been filed. All appeals shall follow procedures specified in Section 35-327.

### ***Sec. 35-323.8. Deferral Period and Extensions of Approval to Defer Abandonment.***

The Director may approve an abandonment deferral for a period not to exceed 24 months from the occurrence of an event defined in Sec. 35-323.3.2.a or b. The Director may extend this period for one-year increments upon timely application by the operator. Applications for extensions shall be filed 90 days prior to the end of the approved abandonment-deferral period and shall contain the information specified in section 35-323.5, above. Deferrals and extensions shall not be granted if another County agency, such as the Fire Department, has properly denied the deferral or extension.

### ***Section 35-323.9. Filing an Application for a Demolition & Reclamation Permit.***

Any permittee of a permitted land use that has not filed an application to defer abandonment pursuant to Section 35-323.4, or who has filed and that application has been denied, shall file an application for a Demolition & Reclamation Permit. The application for a Demolition & Reclamation Permit shall be filed no later than 180 days after an application to defer abandonment has been denied and all administrative appeals have been exhausted. If no application to defer abandonment has been filed, an application for a Demolition & Reclamation

## **ABANDONMENT OF OIL/GAS LEASES**

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Permit shall be filed no later than 180 days after an event in Section 35-323.3.1 or 35-323.3.2 has occurred. The Director may grant extensions of time for good cause.

### ***Section 35-323.10. Content of Application for a Demolition & Reclamation Permit.***

The application for a Demolition & Reclamation Permit shall contain the following.

1. Name, address, and contact information for permittee.
2. Name, address, and general description of the permitted land use.
3. Gross and net acreage and boundaries of the property.
4. Location of all structures, above and underground, proposed to be removed.
5. Location of all structures, above and underground, proposed to remain in-place.
6. Location of all utilities on the property.
7. Location of all easements on or adjacent to the property that may be affected by demolition or reclamation.
8. To the extent known, the type and extent of all contamination and proposed remedial actions to the level of detail that can be assessed through environmental review. This information does not require a new or modified Phase 2 site assessment in advance of any such requirement by the Fire Department or State agencies with regulatory oversight of site assessments.
9. Location of areas of geologic, seismic, flood, and other hazards.
10. Location of areas of prime scenic quality, habitat resources, archeological sites, water bodies and significant existing vegetation.
11. Location and use of all buildings and structures within 50 feet of the boundaries of the property.
12. A proposed decommissioning plan that details the activities involved in removing structures from the site, including the following details: estimated number of workers required on site to decommission facilities and structures, disposition of equipment and structures proposed for decommissioning, projected method of transporting equipment, structures, and estimated debris from the site to the place of disposition as well as number of trips required, and an estimated schedule for decommissioning facilities.
13. A proposed waste-management plan to maximize recycling and minimize wastes.
14. Other permit applications as may be required by the Santa Barbara County Code to retain any existing structures, roadways, and other improvements to the property that were ancillary to the oil or gas operations and are proposed to be retained to support other

existing or proposed uses of the property following abandonment of the oil and gas operations.

15. A proposed grading and drainage plan.
16. A proposed plan to convert site to natural condition or convert to another proposed land use, including a detailed schedule for restoring the site. In the latter case, include other applicable permit applications required, if any, for the proposed land use.
17. A statement of intent as to the disposition of utilities that served the oil and gas operations, including water, power, sewage disposal, fire protection, and transportation.
18. Measures proposed to be used to prevent or reduce nuisance effects, such as noise, dust, odor, smoke, fumes, vibration, glare, traffic congestion, and to prevent danger to life and property.
19. Any other information deemed necessary by the Director to address site-specific factors.

***Section 35-323.11. Processing of Demolition & Reclamation Permit.***

1. The Planning and Development Department shall process applications for Demolition & Reclamation Permits through environmental review after determining such applications to be complete.
2. The Planning and Development Department shall process complete applications for Demolition & Reclamation Permits independently of any other permit applications to develop the site in question. However, Demolition & Reclamation Permits may be processed concurrently with development permits, provided that long delays in securing approval of development permits do not unduly hinder timely demolition of facilities and reclamation of host sites.
3. The Director's decision shall be transmitted by a public notice pursuant to applicable provisions of Section 35-326.
4. The Director's decision may be appealed to the Planning Commission within 30 days of noticing such decision. The Director's decision shall be final upon conclusion with the 30-day appeal period if no appeals have been filed. All appeals shall follow procedures specified in Section 35-327.
5. Upon approval of the Demolition & Reclamation Permit or upon abandonment of operations, whichever occurs later, the Demolition & Reclamation Permit shall supersede any discretionary use permit issued for construction and operation of the facilities.

***Section 35-323.12. Findings Required for Approval of a Demolition & Reclamation Permit.***

## **ABANDONMENT OF OIL/GAS LEASES**

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A Demolition & Reclamation Permit shall only be approved if all of the following findings are made:

1. That significant adverse impacts to the environment due to demolition and reclamation are mitigated to a level of insignificance or, where impacts cannot feasibly be mitigated to insignificance, they are mitigated to the maximum extent feasible.
2. That, where applicable, streets and highways are adequate and properly designed to carry the type and quantity of traffic generated by the proposed demolition and reclamation.
3. That any conditions placed upon the operator or responsible party for assessment or remediation of soil or water contamination fully conform with the permitting process and requirements of the Regional Water Quality Control Board and the Santa Barbara County Fire Department.
4. That the proposed reclamation will not be detrimental to the health, safety, comfort, convenience, and general welfare of the neighborhood, and will not be incompatible with the surrounding area.
5. That the site will be restored to natural conditions unless any of the following conditions apply:
  - a. Areas within the site are subject to approved development, in which case restoration and landscaping of these areas will conform to the newly permitted development. In cases where development is proposed but not yet permitted, restoration of affected areas to natural conditions may be waived, provided that such development is permitted within five years and the permittee has posted financial assurances acceptable to the Director to assure restoration to natural conditions if the proposed development is not permitted.
  - b. Areas within the site are subject to agricultural uses that do not require a County permit, in which case the restoration will conform to conditions appropriate for such agricultural uses where they occur.

For purposes of this finding, the Director may allow abandonment in-place of specific improvements such as retaining walls or emergency access roads if the Director finds that their removal would be detrimental to the health, safety or welfare of the public or the environment (e.g., undesired destabilization of slopes due to removal of a retaining wall).

6. That any retention of improvements to land has been duly permitted in accordance with the County Code where permits are required.

## **ABANDONMENT OF OIL/GAS LEASES**

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7. That the proposed reclamation will leave the site in a condition that is compatible with any existing easements or dedications for public access through, or public use of a portion of the property.
8. That the permit conditions contain specific enforceable requirements to ensure the timely closure of the host site and completion of post-closure activities.

### ***Section 35-323.13. Performance Standards for Demolition & Reclamation Permits.***

1. All equipment shall be cleaned of oil or other contaminants prior to dismantlement in order to reduce any risk of contamination of soils or water during demolition of the facility to the maximum extent feasible. Where applicable, the permittee shall prepare and submit a Spill Contingency Plan to the Fire Department. This plan shall identify measures to prevent and contain spills during dismantling and removal of facilities, as well as how spills will be cleaned up once they have occurred.
2. The permittee shall obtain all other necessary permits from other agencies and, where applicable, submit proof of permits issued by the California Division of Oil, Gas, and Geothermal Resources to plug and abandon wells or to inject waste water for purposes of disposal into any State oil and gas field prior to issuance of the Demolition & Reclamation Permit.
3. The demolition and reclamation shall be adequately monitored by a qualified individual, funded by the permittee and retained by the County, to ensure compliance with those conditions designed to mitigate anticipated significant, adverse effects on the environment, and to provide recommendation instances where effects were not anticipated or mitigated by the conditions in the permit. Pre- and post-reclamation surveys of sensitive resources shall be employed as appropriate to measure compliance.
4. Topsoil shall be stockpiled, covered, and saved for use as topsoil when excavated areas are backfilled, unless such soil is treated onsite or removed for offsite disposal due to contamination.
5. If appropriate, truck traffic transporting materials to and from the site shall avoid arriving or departing the site during the peak traffic hours of 7:00 a.m. to 9:00 a.m. and 4:00 p.m. to 6:00 p.m. weekdays (or other peak-hour periods applicable to the location of the traffic).
6. Adequacy of sight distance, ingress/egress and emergency access shall be verified by the Public Works Department and Fire Department.

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7. Measures shall be implemented to inhibit dust generation, where appropriate. Unavoidable generation of dust shall be kept to a minimum through effective controls.
8. The permittee implements a viable recycling plan that meets County approval and includes provisions to maximize recycling of equipment, asphalt, and concrete, and to minimize disposal of wastes into hazardous waste and solid waste management facilities to the maximum extent feasible.
9. Contouring of the land shall be compatible with the surrounding natural topography, unless otherwise approved to accommodate another permitted use or required drainages.
10. Appropriate measures shall be implemented to control erosion both during and after site closure.
11. Establishment of vegetation shall be in conformance with an approved revegetation plan and the following standards:
  - a. In accordance with the County's Fire Plan, as implemented by the County Fire Department, all disturbed areas identified for vegetation shall be disked or ripped to an appropriate depth to eliminate compaction and establish a suitable root zone in preparation for planting, except where such requirement poses a significant adverse environmental impact.
  - b. Native seeds and plants shall be used when returning the area to natural conditions. The Director shall define an acceptable geographic area from which genetically compatible, native –seed stocks may be selected for site restoration in order to protect the genetic integrity and the habitat value of the site and its surrounding area. Other seeds, such a pasture mix, shall be allowed in areas designated for such use.
12. Subsurface segments of inter-facility pipelines may be abandoned in-place except under the following circumstances:
  - a. Presence of the pipeline would inhibit future land uses proposed in an active development application.
  - b. Modeling approved by the U.S. Army Corp. of Engineers or U.S. Bureau of Reclamation indicates that segments of the pipeline in erosive locations would become exposed at some time during the next 100 years, and environmental review determines that impacts from exposure and subsequent removal during inclement weather are more significant than removal at the time of abandonment.

13. Appropriate notification has been recorded with the County Clerk-Recorder to update, supersede, or release the recorded rights-of-way where a subsurface pipeline is abandoned in-place. This notice shall describe the presence and location of the abandoned pipeline, any material placed in the pipeline for abandonment, and the operator and owner of the pipeline prior to abandonment.
14. The site shall be assessed for previously unidentified contamination. Any discovery of contamination shall be reported to the Director and the Fire Department. The permittee shall diligently seek all necessary permit approvals, including revisions to the Demolition & Reclamation Permit, if any are required in order to remediate the contamination.
15. The Director, in consultation with other County agencies, may impose other appropriate and reasonable conditions or require any changes to the project as deemed necessary to protect the health, safety, and welfare of the public, protect property, preserve the character, natural resources, or scenic quality of the area, or implement the purpose of this Chapter or any other chapter of the County Code.
16. In the case of an Independent Business function of a Permitted Land Use, the Director shall have discretion to determine the timing and extent of the requirements of the Demolition & Reclamation Permit. Factors that the Director may consider include:
  - a. Whether removal of the Independent Business function would substantially reduce the overall footprint of the Permitted Land Use, reduce any significant visual impact, or reduce any significant risk to public safety.
  - b. Whether site restoration is feasible at the time the Independent Business function is removed, compared to deferring site restoration to such time that the entire Permitted Land Use is removed.
17. Appropriate notification has been recorded with the County Clerk-Recorder to describe the presence and location of any contamination left in place under the authority of the Fire Department.

***Sec. 35-323.14. Revocation of Entitlement to Land Use.***

1. All entitlements provided in any use permits issued under this ordinance, or under any preceding zoning ordinance, to use the facilities shall be automatically revoked and no longer effective upon the County's denial of an application to defer abandonment and exhaustion of available administrative remedies. Requirements of use permits necessary to ensure continued protection of public and environmental health, safety and welfare shall continue in full force and effect, including:



## **ABANDONMENT OF OIL/GAS LEASES**

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- a. Conditions that specify liability of the owner, operator, and other persons.
- b. Conditions that specify payment of County fees and costs.
- c. Conditions that indemnify the County.
- d. Where applicable, conditions that specify the County's authority to require abatement of public nuisances or require mitigation of environmental impacts that may occur prior to issuance of a Demolition & Reclamation Permit.
- e. Where applicable, conditions that require oil spill prevention, preparedness, and response.
- f. Where applicable, conditions that require emergency preparedness and response.
- g. Where applicable, conditions that require safety inspections, maintenance, and quality assurance.
- h. Where applicable, conditions that require site security.
- i. Where applicable, conditions that require fire prevention, preparedness, protection and response.
- j. Where applicable, conditions that require payment of fees, including fees that provide mitigation for ongoing impacts to the environment (e.g., payments to the Coastal Resource Enhancement Fund).
- k. Substantive conditions that address abandonment; however procedural requirements for abandonment, demolition, and reclamation shall conform to Section 35-323 of this Chapter.

Upon revocation of entitlements in a use permit, the Director shall notify the owner or operator and include a list of permit conditions that remain in full or partial force.

- 2. All use permits issued under this ordinance, or under any preceding zoning ordinance, shall be automatically revised to remove any entitlement to continue the use of any independent business function of a permitted land use determined to be abandoned in accordance with Section 35-323. However, permit conditions necessary to ensure continued protection of public and environmental health, safety and welfare, such as those identified in Sec. 35-323.14.1, shall continue in full force and effect.
- 3. The permittee shall have a grace period of two years from the date of revocation of entitlements in use permits in order to secure a Demolition & Reclamation Permit. The Director may extend the grace period no more than one year, cumulatively, for good cause, or for longer periods for delays attributable to circumstances beyond the permittee's control.

4. Upon completion of the grace period, the abandoned land use or independent business function shall be treated as a deserted and illegal land use until such time that the permittee secures approval of a Demolition & Reclamation Permit.

***Sec. 35-323.15. Expiration of a Demolition & Reclamation Permit.***

1. Requirements. The permittee shall complete all requirements of the Demolition & Reclamation Permit prior to the expiration of the permit, including any extensions thereof. Failure to do so shall constitute a violation of this Article.
2. Term. Demolition & Reclamation Permits shall expire upon issuance of a “Reclamation Complete” letter by the Director, which shall be issued upon the satisfactory completion of the required work, or seven years after the date of issuance, whichever occurs sooner. Director’s “Reclamation Complete” letter shall certify completion of all required work except for remediation of contamination, which is certified by other agencies.
3. Extensions. The Director may extend the expiration date of the permit without penalty if the closure or re-vegetation of the site was delayed by circumstances reasonably beyond the permittee’s control. Otherwise, Director may extend the expiration date of the permit with penalties, pursuant to Section 35-330 of this Article, in order to realize completion of all site closure and post-closure requirements. If the permittee requests a time extension for this project, the Director may revise the Demolition & Reclamation Permit to revise conditions and mitigating measures or to add new conditions and mitigating measures, which reflect changed circumstances, including newly identified impacts.

**Sec. 35-324. Reserved for Future Section.**

# Report

## Land Use Planning In Proximity to Natural Gas and Hazardous Liquid Transmission Pipelines in Washington State

June 2006

**Final**

# **LAND USE PLANNING IN PROXIMITY TO NATURAL GAS AND HAZARDOUS LIQUID TRANSMISSION PIPELINES**

## **FOREWORD**

Natural gas or hazardous liquid transmission pipelines run through 28 Washington counties and 119 cities. They lie buried at varying depths, carrying a range of volatile products and cross through a variety of land uses --from agriculture to urban centers.

The presence of a major pipeline forms a relationship between the pipeline operator, safety regulators, local government, property owners and developers. How this relationship is managed can affect directly the safe operation of the pipeline and consequently the public health and safety of the surrounding community.

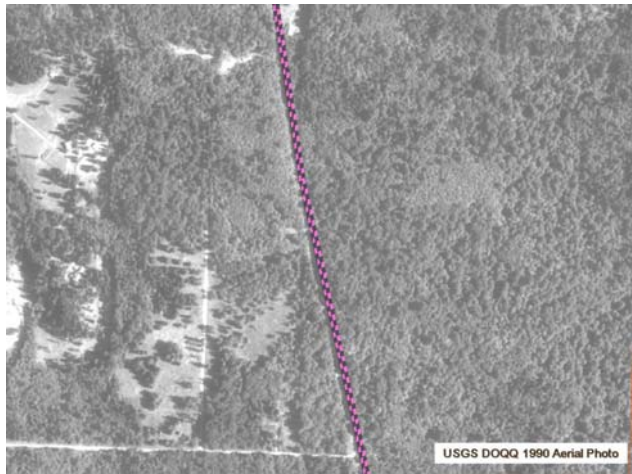
- Pipeline operators are required under federal and state law to adopt and follow safety procedures for maintenance and operation of their pipeline.
- The federal Office of Pipeline Safety and the Washington Utilities and Transportation Commission pipeline safety program monitor and enforce these safety regulations.
- Property owners with easements held by pipeline operators must abide by the easement agreement.
- Developers, along with everyone else, have an obligation under state law to contact the 'one-call' utility locating service before any excavation.
- Local governments may have franchise agreements with pipeline operators. They also issue permits for work the operator may need to do in the community.

None of these relationships, however, speaks directly to managing land use activities which can contribute to the occurrence of a pipeline incident and the exposure to harm of those living and working near a pipeline in the event of an incident. While pipeline safety involves a great many components and players, the procedural processes used to review proposed land use actions are the one area in which local governments can exert the most influence in protecting health and safety of its citizens.

Incidents involving hazardous liquid and transmission natural gas pipelines are rare but unfortunately do occur. These incidents can have a deadly and damaging effect as happened in Whatcom Creek when three young people were killed as a result of a petroleum pipeline leak. There have been nine other incidents involving hazardous liquid and natural gas transmission pipelines in Washington since the 1999 incident. While these more recent incidents did not result in injury or death, they caused roughly \$2.5 million in damage. Several of the incidents could have caused injury had they occurred in more densely populated areas.

Most of the over 3,200 miles of transmission pipelines in Washington were constructed in farmland bypassing urban areas. However, to accommodate population and economic growth,

land areas once considered rural are being absorbed into expanding urban growth areas and developed to urban uses. Nine of the state's 10 fastest growing counties are home to almost half of the state's major pipeline mileage. This growth means more and more people are working and living near major pipelines. Increases in population and land use activity expand the risks of pipeline damage and raise the stakes in the event of a pipeline incident. The pictures in Figures 1 and 2 below were taken of the same area in Washington State – 12 years apart.



**Figure 1 - 1990**



**Figure 2 - 2002**

Pipeline safety and environmental regulations have generally focused on the design, operation and maintenance of pipelines and incident response. They have not directed significant attention to the manner in which land use decisions in proximity to pipelines can affect public health and safety.

In 2004 and 2005, a group of city, county, state and industry representatives conducted a series of workshops throughout the state for local government officials, particularly staff from the planning, permitting and public works sections. The purpose of these workshops was to exchange ideas and explore the range of tools available to manage and make effective decisions concerning land use in proximity to transmission pipelines.

No “silver bullet” was found which can satisfy all the needs of our state's diverse set of communities. However, a common theme emerged along with a range of tools which can help local governments take an active role in pipeline safety. The common theme is straightforward but not necessarily easy: communication. More specifically, there is a demonstrated need to ensure that land use decisions and land development activities occurring within the vicinity of transmission pipelines are informed by early (i.e., pre-planning) consultation with pipeline operators, local government and developers.

Effective communication can result in decisions which reduce the probabilities and consequences of transmission pipeline incidents.

## **Who should read this report?**

This report is for local government decision-makers and administrators, especially those involved in land use planning and permitting. However, all parties affected by land use adjacent to pipelines should review this report. They include:

- Planners
- Elected and appointed officials
- Pipeline Operators
- Developers & Builders
- Public Works Directors
- Design professionals
- Emergency Management Department managers
- Health departments
- Community organizations
- Property owners

## **What's in and not in this report**

This report is focused on land use in proximity to existing pipelines. The appendices and reference documents associated with this report deal with the details of many of the issues and provide some thoughts on options that can be used in managing the relationships among stakeholders.

This report does not deal with issues related to the siting of new hazardous liquid and natural gas transmission pipelines though the principles of effective communication apply in siting as well. It also does not address the network of small-diameter natural gas distribution lines which serve individual customers.

*Additional information can be found in Special Report 281 of the Transportation Research Board,  
"Transmission Pipelines and Land Use: A Risk Informed Approach" 2004*

## **Contributors to this report**

This report is the result of a collaborative effort between state and local governments and the pipeline industry. The information contained within has been shared and discussed in stakeholders groups across the state. The consultation process was the subject of a series of five workshops with local governments in November 2005.

Sponsors of this initiative are:

- The Washington Utilities and Transportation Commission Pipeline Safety Program
- Municipal Research and Services Center
- Association of Washington Cities
- Washington State Association of Counties
- Pipeline Safety Trust

## **EARLY COMMUNICATION: AN EMPHASIS ON CONSULTATION**

As population grows and land becomes scarce, pressure increases for development of remaining open land. Planning and building departments have to juggle competing interests in a time-pressured environment when making their decisions. As with any involved process, the sooner land use issues are addressed the more effectively they can be resolved. For instance, a subdivision design which places a water retention pond precariously adjacent to a transmission pipeline will be hard to correct at a time when final permits are being issued. One answer is early consultation between planners, pipeline operators and developers.

Consultation can be as basic as ensuring that affected pipeline operators are aware of a proposed change in zoning or comprehensive plan to greater involvement such as requiring review and comment by pipeline operators for certain types of developments located adjacent to or near pipeline rights-of-way.

For consultation to be effective, all parties need to understand the following:

1. Location and type of major pipelines
2. Types of land use activities and developments of concern
3. Options for fostering and/or enforcing consultation
4. Roles & responsibilities

### **1. Awareness of location and type of pipeline**

Understanding the existence and location of hazardous liquid and natural gas transmission pipelines within a community is essential to protecting public health and safety. The communication required here is primarily between local government and the pipeline operator. Local government can foster this greater awareness by ensuring that all their maps, particularly those used for planning and building departments, indicate the location of all transmission pipelines.

The Washington UTC pipeline safety program can provide local governments with pipeline location data, in a form that is most useful to them. The pipeline safety program also can assist local governments in learning about the types and characteristics of the pipelines running through their jurisdiction as well as how to contact the operators.



**Figure 3 – Subdivision with Pipeline Location**

Planners should overlay the pipeline maps with their zoning maps and consider whether any action should be proactively taken. Consulting with the pipeline operator can help educate planners about the pipeline's contents, volatility, pipe pressure, depth and other characteristics. In doing so, planners can develop a better understanding of the consequences associated with a pipeline leak or rupture and determine the range of influence of the pipeline. For instance, a high-pressure natural gas pipeline rupture will have a range or zone of consequence that goes significantly beyond the pipeline's right-of-way.

A petroleum pipeline release also can affect an area wider than its right-of-way but the size and direction of the spill will be influenced by the topography.

Pipeline operators are obligated under new federal requirements to communicate with local governments on a wide range of issues, including the effect of land use measures on pipeline safety. However, the requirement mandates a schedule of communication that is likely not frequent enough to sustain the type of relationship necessary to build awareness. Local governments may want to institute a more formal way to maintain routine communication and consultation with operators. In particular, this communication should be timed to enlist operator participation in key decisions affecting land use in the vicinity of the pipeline.

*See Appendix A for additional information on pipeline regulators and pipeline locations in Washington*

## **2. Types of land use activities and developments of concern**

There are two ways to view land use and developments in relation to pipelines.

- Activities that can threaten the integrity of the pipeline
- Activities that can increase the consequence to the public in the event of an incident.



Activities of greatest threat to the pipeline are those that occur within the pipeline's right-of-way. The communication here is primarily between the pipeline operator and the property owner. These activities should be governed by an easement negotiated with individual property owners. The easement is held by the operator and includes the right to operate, maintain and repair the pipeline. These easements may not always be well defined but they should be recorded with the deed. While pipeline operators can always use assistance in educating landowners and identifying when easement rights are being violated, the job of enforcing easements rests with the operator.



**Figure 4 – Fence on pipeline easement**

*See Appendix B for additional discussion of Right of Way and easements*

In areas adjacent to or near the pipeline right-of-way, the types of activities that threaten the pipeline are those which can cause soil instability, through vibration, earth removal, water runoff or dewatering. These activities include:



**Figure 5 – Retention pond near easement**

- Land subdivision
- Commercial developments
- Water impoundments
- Public works projects such as roads & sewers
- Industrial activities such as quarrying, mining, and blasting.

Local government planners should require consultation with the pipeline operator early in the planning process before such activities are allowed.

Just as human activity can pose a risk to pipelines, a transmission pipeline can pose a risk to its surroundings. For example, a catastrophic failure of a high-pressure natural gas transmission pipeline could cause injury to people 100 feet or more away and the largest and highest pressure natural gas pipelines can cause injury out to 1,000 feet. This does not mean that no one should be allowed within 1,000 feet of a high-pressure pipeline. It does mean that careful thought should be given to how land adjacent to pipelines should be used.

When zoning land near pipelines, planners should consider the types of land uses which can limit the potential consequences of an incident. For instance, a local jurisdiction may decide to discourage construction of facilities which may be difficult to evacuate such as a high-rise development or nursing home. Similarly, siting emergency response services, such as fire stations and hospitals, should be avoided near pipelines. Zoning of areas near pipelines should favor lower density developments such as agriculture, industry, warehouse and single family housing.

While the focus of regulators and pipeline operators should be on assuring that pipelines are maintained and operated so that they do not rupture or leak, local governments play a vital role in public safety by making land use decisions which can limit the possibility and consequence of a pipeline rupture or leak.

### **3. Options for fostering and enforcing consultation**

The main objective of fostering consultation in land use planning is to limit the possibility and consequence of a pipeline incident—an objective which all parties involved in land use and development should share. However, to avoid conflicts between safety and property rights, the consultation process should begin at the earliest possible opportunity. Local jurisdictions with major pipelines running through their communities should consider employing the following options:

- 1) Include pipeline location on all zoning, building and public works maps
- 2) Request pipeline operator input in any comprehensive plan amendments or rezone
- 3) Require subdivision plans to be reviewed by affected pipeline operators
- 4) Include pipelines as part of the local jurisdiction's State Environmental Protection Act (SEPA) checklist
- 5) Require proof of utility locate call before issuing building/grading permits for parcels within some locally designated distance from the pipeline
- 6) Establish setbacks and modify site and building code specifications

Regarding setbacks, there is no analysis available to local governments which would allow them to establish standards beyond current practice. There is an effort on the national level, sponsored by the federal Office of Pipeline Safety, to consider establishing recommended practices and procedures for local governments which could provide a foundation for establishing setbacks. Such procedures, if done as planned, would be based on the expected risk at various distances from transmission pipelines depending on product type, pressurization and so forth. Since this tool will not be available in the near future, it's the recommendation of the report writers that local government devote their efforts more toward fostering consultation.

*See Appendix C for additional discussion of communications and management options for land use in proximity to pipelines.*

#### **4. Stakeholder roles & responsibilities**

Planners and developers need to be prepared to consult with operators of nearby major pipelines who, in turn, must be easily accessible and prompt in their review and comment. During consultation, both developers and pipeline operators may need to consider changing their plans or operations to accommodate one another and to address public safety concerns. Local government's role, as always, is to protect the health and safety of its citizens, which in this case includes ensuring that such consultation occurs when necessary.

**Every stakeholder** must be responsible for the following:

- a. Understand and make available accurate pipeline information, including pipeline location;
- b. Understand land use planning issues and processes;
- c. Initiate and sustain communication with other stakeholders early in any project;
- d. Awareness of existing site area conditions e.g., hydro-geologic, infrastructure

**Local authorities** have the following responsibilities:

- a. Implement land use controls that recognize and preserve the right-of-way; and
- b. Use ministerial or discretionary permit authority to ensure consultation between developer and pipeline operators.

**Property owners and developers** have the following responsibilities:

- a. Involve pipeline operator in early design;
- b. Design and construct consistent with safe pipeline operation.

**Pipeline operators** have the following responsibilities:

- a. Easy access to local governments and developers;
- b. Prompt review and comment on any land use decision or development design;
- c. Inclusion in planning authority notification processes regarding development by providing local government with up-to-date contact information; and
- d. Regular communication with local authorities about the importance of pipeline awareness and changes in operating characteristics such as pressure changes.

#### **APPENDICES**

- A. Pipeline Operators and Areas Served, Pipeline Contacts, Pipeline Regulators,
- B. Right of Way and Easements
- C. Options for Communications and Management of Land Use in Proximity to Pipelines
- D. Pipeline Resources
- E. Pipeline Typology and Glossary
- F. Acknowledgements