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# County Regulation of Carbon Pipelines

# County Role in Light of Federal and State Law

- **Federal Pipeline Safety Act (PSA):** interstate supercritical CO<sub>2</sub> pipelines are subject to federal “safety standards;” CO<sub>2</sub> gas and liquid pipelines are within federal jurisdiction, but no federal standards yet exist for them
- **State law:** home rule, zoning, pipeline permitting, and judicial preemption doctrine; county authority depends on each state’s laws; counties in IL, IA, NE, SD, and ND have jurisdiction over interstate carbon pipelines to different degrees
- **Federal Natural Gas Act (NGA):** interstate natural gas pipelines are subject to comprehensive federal control over need and location/route; the NGA does not regulate petroleum or carbon pipelines

# Federal Pipeline Safety Act

- **Safety Standards** as defined in 49 USC § 60102(a) “for “the design, installation, inspection, emergency plans and procedures, testing, construction, extension, operation, replacement, and maintenance of pipeline facilities”
- **Federal Preemption** in 49 USC § 60104(c) states “A State authority may not adopt or continue in force safety standards for interstate pipeline facilities or interstate pipeline transportation”
- **Location and Routing** carve out in 49 USC § 60104(e) states “This chapter does not authorize the Secretary of Transportation to prescribe the location or routing of a pipeline facility.”

# Federal Safety Standards

- Safety standards for carbon pipelines are in 49 CFR Part 195
- Think of these standards as a **building code** for pipelines
- Standards for:
  - How a pipeline is designed, installed and constructed
  - How a pipeline is inspected and tested during construction and operation
  - How a pipeline is operated
  - How a pipeline is maintained, extended and replaced
  - How a pipeline operator responds to emergencies
- County regulation of these activities is preempted by federal law
- The PSA does not regulate all activities that are safety related; for example, it does not control local emergency planning and response

# Location and Routing

- The Pipeline Safety Act expressly states that it does not authorize federal jurisdiction over the “location or routing” of interstate pipelines
- State and local governments have zoning-type jurisdiction
- Where an interstate pipeline is constructed is not a federal issue
- Just as a building code may apply fully to any permitted location, the federal Pipeline Safety Act can apply fully to any location or route chosen by a state or county government for any reason
- Many states have expressly regulated routing for decades, including IL, IA, MN, ND, without any threats of litigation

# Setbacks

- A setback concerns the location of a pipeline. Therefore, the federal government has no jurisdiction to impose a setback
- Since states/counties have full authority to chose a route, a federal setback would interfere with this state/local jurisdiction
- It is illogical to agree that states/counties have authority to locate or route a pipeline and at the same time assert that the federal government preempts state and local setbacks
- The Fifth Circuit Court of Appeals in its *Texas Midstream* decision expressly considered this issue and upheld a city setback

# Confusion Resulting from Old Regulation

- The pipeline industry creates confusion about setbacks by citing 49 CFR § 195.210, which was adopted in 1981:
  - “(a) Pipeline right-of-way must be selected to avoid, as far as practicable, areas containing private dwellings, industrial buildings, and places of public assembly.”
  - “(b) No pipeline may be located within 50 feet (15 meters) of any private dwelling, or any industrial building or place of public assembly in which persons work, congregate, or assemble, unless it is provided with at least 12 inches (305 millimeters) of cover in addition to that prescribed in § 195.248.”
- The prohibition on federal determination of “location and routing” was adopted by Congress in 1994, and the federal bureaucrats have been too lazy to amend their regulations to conform to the will of Congress
- The *Texas Midstream* expressly states “A regulation promulgated by an administrative agency cannot expand the unambiguously expressed preemptive scope set by Congress.”
- Subsection (b) is not a setback, because it allows construction within 50 feet; instead, it is a depth of cover requirement and cannot be interpreted to be a setback as doing so would violate the prohibition on federal routing of pipelines

# Federal Case Law

- *Washington Gas Light Co. v. Prince George's County Council*, 711 F.3d 412 (4<sup>th</sup> Cir. 2013): Found that the Pipeline Safety Act did not preempt local zoning: “it is clear that the County Zoning Plans are primarily local land use regulations as opposed to safety regulations.”
- *Texas Midstream Gas Servs. v. City of Grand Prairie*, 608 F.3d 200 (5<sup>th</sup> Cir. 2010): The Pipeline Safety Act did not preempt a variety of city zoning requirements, including a setback: “The question is whether the setback requirement is a ‘safety standard.’ It is not.”
- *Portland Pipe Line Corporation v. City of South Portland*, 288 F.Supp.3d 321 (Dist. Maine 2017): Consideration of safety “not sufficient to convert a ban on loading crude oil into a competing ‘safety standard’ preempted under the PSA.”



# Consideration of Safety in Routing

- The Pipeline Safety Act prohibits the federal government from selecting a route based on safety considerations or for any reason
- If states and counties cannot consider safety in routing, then no government agency can
- Federal pipeline safety standards can apply fully regardless of the route chosen or the reasons it was chosen
- Consideration of safety in routing is critical for carbon pipelines because of their unique risks: only a state or local government could consider this factor and avoid nursing homes, schools, etc.
- The federal district court *Portland Pipe Line Corporation* decision cleared the way for consideration of safety in routing

# Federal Law Does Not Preempt Mitigation

- States/counties may impose mitigation measures that do not interfere with how a pipeline is constructed
- Many, many examples of state regulation of mitigation requirements for interstate pipeline (IA, SD, MN)
- Many examples of mitigation for agriculture, aesthetic, noise, water and wetlands crossings, etc.
- The PSA does not regulate the kind of grass planted in a pipeline right-of-way; it does require clearing woody growth for inspections

# Pipeline Abandonment

- The Pipeline Safety Act regulates only pipelines that are “used or intended to be used in transporting hazardous liquid” 49 USC § 60101(a)(5)
- Therefore, federal regulations define the physical and administrative steps that a pipeline operator must take to formally show that it is no longer using and has no intention to use a pipeline to transport hazardous liquids 49 CFR § 195.59
- Once an operator takes these steps, the pipeline is no longer subject to the Pipeline Safety Act: it is no longer a federally regulated pipeline and instead is just rusting steel in the ground
- MN imposed abandonment requirements on both old and new Line 3, without any threat of litigation

# Federal Law Does Not Preempt Local Emergency Planning and Response

- Counties may regulate local emergency response consistent with state law and planning requirements
- Federal law does not regulate local emergency response
  - 49 USC § 60102(d)(5) and 49 CFR § 195.402(e) regulate how a pipeline operator responds in an emergency
  - 49 USC § 60102(d)(5)(B) and (C) and 49 CFR § 195.402(c)(12) require that pipeline operators notify and cooperate with local emergency response agencies, thereby recognizing that federal law does not regulate local emergency response
- Counties may require a pipeline operator to disclose safety information needed for local emergency planning and response, because such disclosure does not dictate how the operator responds in an emergency

# State Preemption of County Authority

- Depends on state law
  - Illinois: strong home rule state; local ordinances preempted only where the state legislation contains an express preemption provision
  - Iowa: county ordinances allowed but they must be consistent with and not in direct conflict with state law
  - Minnesota: state pipeline routing law expressly preempts local regulation
  - Nebraska: courts apply a preemption analysis, but since the state does not regulate carbon pipelines to any degree, county regulation is not preempted
  - North Dakota: counties retain permitting authority but the Public Service Commission may supersede “unreasonably restrictive” local regulation
  - South Dakota: counties retain permitting authority but the Public Utilities Commission may supersede “unreasonably restrictive” local regulation

# For Help with Specific Questions, Just Ask

- The Bold Alliance is happy to support counties with any questions related to federal and state preemption

# THANK YOU!

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