

# The PHMSA Letter on State and Local Jurisdiction to Regulate Pipeline Safety – And Next Steps

# Federal Preemption Applies Equally to State and Local Governments

- If a federal law does not preempt state agency consideration of safety issues, then it also does not preempt county consideration
- If the SDPUC, MNPUC, NDPSC, etc. may consider safety in their decisions, then so may counties
- Good for the goose, good for the gander

# Preemption Under the Pipeline Safety Act

Pipeline Safety Act, 49 USC § 60104(c):

A State authority may not adopt or continue in force safety standards for interstate pipeline facilities or interstate pipeline transportation.

Notice that the term “pipeline safety” is not used by Congress in defining the scope of federal preemption  
Congress limited federal preemption to a prohibition on adopting or enforcing “safety standards” for good reason

# What Are Safety Standards?

- “Safety Standards” as defined by 49 U.S.C. § 60102(a)(2):
  - apply only to permitted and operating pipelines, not to pipelines permanently removed from service
  - apply exclusively to “owners or operators” of pipelines, not other entities
  - apply to the design, installation, inspection, emergency plans and procedures, testing, construction, extension, operation, replacement, and maintenance of pipeline facilities
- Think of “safety standards” as a **building code** for pipeline companies

# The Pipeline Safety Act Prohibits PHMSA from Determining the Location or Route of a Pipeline

Pipeline Safety Act, 49 USC § 60104(e):

This chapter does not authorize the Secretary of Transportation to prescribe the location or routing of a pipeline facility.

## State and Local Governments May Regulate Pipeline Route

- Since the feds have no power under the PSA to locate or route CO<sub>2</sub> pipelines, many states do (e.g., IL, IA, MN, ND)
- There is utterly no disagreement that states may locate or route CO<sub>2</sub> pipelines
- County right to locate or route pipelines depends on state law, e.g., SD: Yes, MN: No

## 2023 PHMSA Letter on Location and Routing

“PHMSA cannot prescribe the location or routing of a pipeline and cannot prohibit the construction of non-pipeline buildings in proximity to a pipeline. Local governments have traditionally exercised broad powers to regulate land use, including setback distances and property development that includes development in the vicinity of pipelines. Nothing in the federal pipeline safety law impinges on these traditional prerogatives of local—or state— government, so long as officials do not attempt to regulate the field of pipeline safety preempted by federal law.”

## 2014 PHMSA Letter on Location and Routing

“While the Federal Energy Regulatory Commission (FERC) has exclusive authority to regulate the siting of interstate gas transmission pipelines, no federal agency has the power to determine the siting of oil pipelines. Therefore, the responsibility for siting new interstate oil pipelines such as Keystone XL rests largely with the individual states through which the lines will operate and is governed by state law.”



**Does the PSA Preempt  
State and Local Consideration of  
Safety  
in Location and Routing?**

# State and Local Governments May and Have Considered Safety in Routing and Siting

- The PHMSA letters do not address this issue directly; if PHMSA regulated safety in location and routing, it would say so
- In its Navigator case, the SDPUC accepted a large amount of expert testimony related to pipeline safety (risk of rupture, dispersion modeling, emergency response)
- In its Line 3 case, the MNPUC accepted a huge amount of safety-related expert witness testimony and routed Line 3 based on a decision to avoid the risk of oil spills to Big Sandy Lake (a safety concern)

# Federal Court Decisions on State and local Consideration of Safety in Routing

- Three federal courts have fully considered this question: the *Washington Gas Light* (4<sup>th</sup> Circuit/Maryland), *South Portland* (Maine), and *Bad River Band* (Wisconsin) decisions
- All three held that consideration of safety as a factor in a location decision is not a safety standard
- 4<sup>th</sup> Circuit Court of Appeals: The field of pipeline safety is separate from the field of pipeline routing

## The *Washington Gas Light* Decision

- *Washington Gas Light Co. v Prince George's County Council* (4<sup>th</sup> Circuit 2013): Based on its general plan, Prince George's County Maryland rejected an application to build an LNG tank. Its decision turned in part on safety. The company appealed and claimed that because the LNG tank was regulated under the PSA, the county could not consider safety to any degree. The court held that Congress did not intend to occupy the field of facility siting, which is distinct from the field of pipeline safety, and that even assuming safety concerns played some part in the county decision, such consideration was incidental and did not convert the County decision into a safety regulation.

## The South Portland Decision

- *Portland Pipe Line Corp. v City of South Portland* (District Maine 2017): The City of South Portland passed an ordinance that prohibited construction of a crude oil pipeline facility that would allow it to pump oil in the opposite direction. The company argued that the City's consideration of safety when it passed the ordinance meant that the ordinance was preempted by the PSA. The court rejected the pipeline company's arguments and held that (a) a prohibition on a facility is not a "safety standard;" (b) the prohibition did not establish any safety requirements; (c) an outright ban did not frustrate the purposes of the PSA; (d) the prohibition on federal routing in the PSA meant that the PSA did not restrict the City's discretion to approve or disapprove of the facility.

## The *Bad River Band* Decision

- *Bad River Band v Enbridge Energy* (Northern District of Wisconsin 2022): The Bad River Band of Chippewa Indians decided to not renew a right-of-way permit for the Enbridge Line 5 pipeline based to a substantial degree on the risk of an oil spill. Enbridge sued and claimed that the decision not to route a pipeline through the Tribes reservation due to safety concerns was a “safety standard” under the PSA. The court held that “while the Band’s refusal to consent to easements may be based in part on safety concerns . . . , it is *not* based on the imposition of safety *standards*.”

## But, What About the Iowa Federal Court Decision?

- The Federal District Court for the Southern District of Iowa issued a preliminary decision, not a final decision
- The court found that the Shelby County setbacks were preempted under state law, not federal law – op. at 22-23
- The court did not consider whether federal law preempted consideration of safety in establishing setbacks
- Under 8<sup>th</sup> Circuit precedent, if a matter is resolved on state law grounds, the district court may not also address federal grounds

## But, What About 49 CFR § 195.210, Pipeline Location?

PHMSA regulations at 49 CFR § 195.210 state:

(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



# 49 CFR § 195.210 Cannot Be Interpreted to Regulate Location

- This is an old agency regulation with origins in the 1960s which has been superseded by a newer act of Congress (49 USC § 60104(e))
- If a company failed to comply with § 195.210(a), PHMSA could not force the company to comply, because doing so would “prescribe” the location, making subpart (a) unenforceable
- § 195.210(b) is not a setback because it allows construction within 50 feet of structures; if PHMSA attempted to require a setback, it would violate § 60104(e)

# Practical Reasons Why State and Local Governments Should Consider Safety in Routing

- Since PHMSA cannot route pipelines under the PSA, it also cannot impose and in fact does not have “safety standards” related to routing, and it has no route permitting process in which to apply safety standards
- The Pipeline Safety Act applies only after a route is approved; if a route is not approved, the pipeline would never be constructed and safety standards would not be applied
- If a route is approved, the PHMSA safety standards would apply fully to the approved route regardless of the reasons for route selection
- If, as the industry argues, a state or county can’t select a route based on safety, yet PHMSA also cannot select a route based on safety (or for any other reason), then the practical result of this argument is that no agency at any level of government could consider safety in routing – an irrational result
- BUT, state and local governments may not use location or routing authority to leverage changes in pipeline design, construction, operation, or maintenance

# Does the PSA Preempt **State and Local Emergency Response** to Pipeline Ruptures?

# 2023 PHMSA Letter on Local Emergency Response Planning

The 2023 PHMSA letter states that it has “seen localities consider measures” such as:

- “Designing local emergency response plans and training with regulators and operators”
- “Improving emergency response and evacuation plans in the event of a pipeline release”

# 2023 PHMSA Letter on Local Emergency Response Planning

It also states:

“Sharing appropriate information with state or local governments and emergency planners, which may include dispersion models or emergency response plans, may help stakeholders make risk-informed decisions”

# PHMSA Regulates Only Pipeline Company Emergency Planning, Not Agency Planning

49 USC § 60102(a)(2) states in relevant part:

**(2) Minimum Safety Standards.** – The Secretary shall prescribe minimum safety standards for pipeline transportation and for pipeline facilities. The standards—

(A) apply to any or all of the owners or operators of pipeline facilities;

(B) may apply to the . . . emergency plans and procedures . . . of pipeline facilities . . .

# The PSA Does Not Regulate Local Emergency Response Agencies or Local Planning

- Since local agencies are not “owners or operators of pipeline facilities,” PHMSA has no power to impose “safety standards” on them or to regulate local agency emergency planning or response
- The PSA does not “federalize” local emergency response
- Local agencies need autonomy to protect their citizens
- PHMSA’s regulations require that pipeline operators coordinate with local response agencies, *e.g.*, 49 USC § 60102(d)(5)(B) and (C) and 49 CFR § 195.402(c)(12), thereby acknowledging local agency authority over agency response to pipeline ruptures

# Policy Arguments Related to Local Regulation of Agency Emergency Response Plans

- Keep these separate:
  - PHMSA regulates how company employees and contractors responds to a pipeline rupture through a company emergency response plan
  - State and local agencies regulate how agency personnel respond to a pipeline rupture through an agency emergency response plan
- Agency information requirements needed for making “risk-informed decisions” do not in anyway impact how a company complies with federal safety standards
- Emergency response in the US is based on local, state and federal cooperation
- Congress did not authorize PHMSA to approve local agency emergency response plans for the thousands of counties and municipalities with pipelines
- Local governments know their needs and territories better than the feds



# Summary of State and Local Jurisdiction to Regulate Pipeline Safety

# SUMMARY INTERSTATE PIPELINE PREEMPTION

Policy	Natural Gas Pipelines	Oil Pipelines	CO <sub>2</sub> Pipelines
Pipeline “Safety Standards”	Preempted by Pipeline Safety Act	Preempted by Pipeline Safety Act	Preempted by Pipeline Safety Act
Route, Location and Setbacks	Preempted by Natural Gas Act	Not Preempted 49 USC § 60104(e)	Not Preempted 49 USC § 60104(e)
Pipeline Operator Emergency Response	Preempted by Pipeline Safety Act	Not Preempted due to Oil Pollution Act	Preempted by Pipeline Safety Act
County Emergency Response	Not Preempted	Not Preempted	Not Preempted
Construction & Operation Mitigation	Preempted by Natural Gas Act	Not Preempted	Not Preempted
Depth of Cover	Preempted by Pipeline Safety Act 49 CFR § 195.327	State or county may define “level of cultivation” 49 CFR § 195.248	State or county may define “level of cultivation” 49 CFR § 195.248
Post-Abandonment Mitigation	Preempted by Natural Gas Act	Not Preempted	Not Preempted

# THREADING THE NEEDLE

- Under federal law, counties may regulate many aspects of interstate pipeline development, depending on what a pipeline transports
- However, federal laws and court decisions are complex so care is needed to avoid federal preemption
- Even if federal law allows state/county regulation, state law may preempt county regulation
- Seek legal advice before proposing an ordinance

**THANK YOU!**

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