



U.S. Department
of Transportation

**Pipeline and Hazardous
Materials Safety
Administration**

May 28, 2014

1200 New Jersey Avenue, SE
Washington, D.C. 20590

Mr. Russell K. Girling
President
TransCanada Corporation
450 - 1 Street SW
Calgary, Alberta, Canada
T2P 5H1

RE: Role of U.S. Local Governments in Pipeline Safety

Dear Mr. Girling:

Over the past few months, the Pipeline and Hazardous Materials Safety Administration (PHMSA) has received a number of inquiries regarding the rights of state and local governments to affect the siting, design, construction, operation and maintenance of interstate hazardous liquid pipelines, particularly in light of TransCanada's proposed Keystone Gulf Coast (Keystone XL) Pipeline. While such questions are a normal part of the run-up for any major pipeline project, I wanted you to be aware of the message being conveyed by PHMSA that all three levels of government – federal, state, and local – play an important role in ensuring that the Nation's pipeline system operates safely and efficiently to supply vital energy for the American economy.

As you know, Congress has invested the U.S. Department of Transportation (DOT) with the authority to regulate the design, construction, operation and maintenance of gas and hazardous liquid (primarily oil) pipelines and to protect life, property and the environment from hazards associated with pipeline operations. 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.

The Role of PHMSA

Under the Federal pipeline safety laws, PHMSA is the DOT agency charged with carrying out a nationwide program for regulating most of the country's oil and gas pipelines. PHMSA takes this responsibility seriously and has developed a regulatory scheme, embodied in 49 C.F.R. Parts 190-199, that sets standards for the design, construction, operation and maintenance of the Nation's 2.6 million miles of pipeline. PHMSA enforces these standards and regulations for interstate pipelines through a civil and criminal enforcement process.

The Role of State Pipeline Regulators

This national regulatory scheme relies heavily upon the efforts of our state partners, who employ roughly 67% of all pipeline inspectors and whose jurisdiction covers approximately 80% of the pipelines subject to minimum Federal standards. Federal law recognizes the right of states to adopt Federal safety standards and to inspect, regulate and take enforcement action against the operators of pipelines within their borders (i.e., intrastate pipelines). This includes the right to impose more stringent safety standards than the Federal minimums, provided the two are compatible.¹

With passage of the Federal pipeline safety laws, Congress has determined that pipeline safety is best promoted through PHMSA's development of a nationwide set of minimum Federal standards. To ensure compliance with these standards, the Federal pipeline safety laws (49 U.S.C. §§ 60101, *et seq.*) expressly provide that PHMSA and state regulators may share inspection and enforcement responsibilities, subject to PHMSA certification or agreement. Federal preemption of pipeline safety means that neither state nor local governments have any independent authority to regulate pipeline safety but must derive any such authority from federal law. In the case of local governments not subject to federal delegation, they may exercise other powers granted to them under state law but none affecting pipeline safety for those pipelines subject to federal jurisdiction.²

The Role of Local Governments

Despite Federal preemption of pipeline safety regulation, the role and powers of local authorities to affect pipeline safety is critical. Local governments have traditionally exercised broad powers to regulate land use and property development, including in the vicinity of pipelines.³ Nothing in Federal law impinges on these traditional prerogatives of local government, so long as local officials do not attempt to regulate the field of pipeline safety preempted by Federal law. In fact, PHMSA believes that pipeline safety is a responsibility shared by all three levels of government – federal, state, and local – as well as by pipeline operators, excavators, and property owners.

In recognition of this shared responsibility, in 2010 PHMSA launched the Pipelines and Informed Planning Alliance (PIPA) (<http://www.pipa-info.com>), an initiative to help all

¹ As of 2013, 14 states have hazardous liquid programs certified by PHMSA under 49 U.S.C. §60105(a) to regulate intrastate pipelines. In addition, PHMSA has approved five states to inspect interstate liquid pipelines within their borders as the agency's "interstate agents."

² *Texas Midstream Gas Services, LLC v. City of Grand Prairie*, 608 F.3d 200, 210-211 (5th Cir. 2010). See also, *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 299-300 (1988); *Hillsborough County v. Automated Medical Laboratories, Inc.* 471 U.S. 707, 712 (1985), citing *Gibbons v. Ogden*, 22 U.S. 1 (1824).

³ A number of local governments have enacted or are developing ordinances to regulate land use and development near transmission pipelines within their respective jurisdictions, including: St. Peters, Missouri; Edison Township, New Jersey; Austin, Texas; Olathe, Kansas; Redmond and Whatcom County, Washington; and Brookings County, South Dakota.

pipeline safety stakeholders define their respective roles related to land use practices near transmission pipelines and to develop best practices. I would encourage TransCanada, as well as other pipeline operators, to adopt these best practices in protecting their existing and proposed rights-of-way, and to engage all stakeholders in promoting the safety of interstate pipelines.⁴

Each community affected by an existing or proposed transmission pipeline faces unique risks, and the control and mitigation of such risks involves a combination of measures employed by facility operators, regulatory bodies, community groups and individual members of the community, in order to be optimally effective. As residences and businesses are increasingly located in close proximity to transmission pipelines, it is important for all stakeholders to carefully consider land use and development plans in order to make risk-informed choices that protect the best interests of both the general public and the individual parties involved.

Depending upon State law, local governments have contributed in many ways to ensuring pipeline safety for their citizens. We have seen localities consider various measures, including:

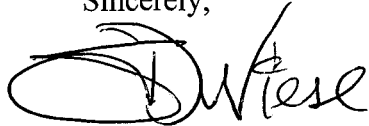
1. Controlling dangerous excavation activity near transmission pipelines;
2. Limiting certain land use activities along pipeline rights-of-way;
3. Restricting land use and development along transmission pipeline rights-of-way through zoning, setbacks and similar measures;
4. Requiring the consideration of transmission pipeline facilities in proposed local development plans;
5. Designing emergency response plans and training for regulators and operators;
6. Requiring specific building code design or construction standards near pipelines;
7. Improving emergency response and evacuation plans in the event of a transmission pipeline incident; and
8. Participating in Federal environmental studies conducted under the National Environmental Policy Act (NEPA) and similar State laws for new pipeline construction projects.

⁴ The portion of the PIPA website speaking directly to pipeline operators can be found at: <http://primis.phmsa.dot.gov/comm/Industry.htm>.

Each state treats these issues differently, so pipeline operators should be prepared to deal directly with each locality and state body interested in the siting and construction process. Bringing a pipeline into a community is often a complicated process that requires tremendous coordination and open communication among various stakeholders in order to be successful. We greatly value the efforts of pipeline operators who spend the time and energy to make sure the process goes smoothly and is responsive to all parties involved.

Thank you for your cooperation in this effort.

Sincerely,

A handwritten signature in black ink, appearing to read "J. Wiese". The signature is fluid and cursive, with a large initial "J" and "W".

Jeffrey D. Wiese
Associate Administrator
for Pipeline Safety