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Local Authority: What's Allowed, What's Preempted

Why all the confusion?



Source of Preemption Doctrine

- U.S. Constitution, Article VI, clause 2:

This Constitution, and the Laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

Pipeline Preemption types

- Express:
 - Congress says so
 - 49 USC 60104 (c): A State authority may not adopt or continue in force safety standards for interstate pipeline facilities or interstate pipeline transportation.
- State law conflicts with federal
 - Impossible to comply with both
 - NGA § 7 – FERC jurisdiction over interstate gas facility routing, siting, etc.

Not Preempted

- Routing and location of pipelines other than interstate gas [PHMSA expressly not granted authority to regulate (49 USC 60104(e))]
- OPA 1990: State and local authority expressly preserved over liability and any removal activities from a discharge

So where's the confusion?

- What's a “safety standard”?
 - Setbacks?
 - Zoning requirements?



- Wetlands, steep slopes buffers?
- Noise? Fencing? Visual Screening? HDD stream crossing?
- Financial guarantees/bonding?
- What about siting rules motivated by safety concerns?



Federal law meets federal law: What then?

- Implementation of Clean Air Act and the Coastal Zone Management Act rely on state plans.
- Clatsop County land use case and CZMA consistency
- Maryland CAA case



Need for new Model – or why the uncertainty matters

- Pipeline construction continues
- Legitimate interests on both sides
 - State and local governments trying to protect their communities from financial, environmental and public safety risks, limitations on future development
 - Continuing need for siting of new pipelines

Need for New Model

- Litigation is expensive for everyone, but...
- Uncertainty favors those with deep pockets, because threat of legal challenge is enough to dissuade small local governments from acting
- Maybe for zoning questions, Adams County, CO provides model
- For others? What degree of certainty does industry need to discontinue current model?

Thanks for listening and for your
interest in pipeline safety



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