

# Planning, Zoning and Hazardous Liquids Pipelines<sup>1</sup>

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One question that has been asked by a number of local governmental officials in Kentucky counties where a hazardous liquids pipeline intended to transport natural gas liquids from the Marcellus and Utica shale formations to the Gulf has been proposed, is the extent to which local governments may, pursuant to their planning and zoning powers, regulate the location of such pipelines in order to assure compatibility of that land use with other uses of land.

## **Does federal law preempt local governments from applying zoning ordinances to interstate hazardous liquids pipelines?**

The short answer is no, providing that the zoning ordinance is not attempting to regulate matters that are preempted by the Pipeline Safety Act and safety standards developed by the U.S. Department of Transportation's Pipeline and Hazardous Materials Safety Administration.

Congress has expressly preempted state law with respect to pipeline **safety** in this manner:

A State authority that has submitted a current certification under section 60105(a) of this title may adopt additional or more stringent safety standards for intrastate pipeline transportation only if those standards are compatible with the minimum standards prescribed under this chapter. A State authority may not adopt or continue in force safety standards for interstate pipeline facilities or interstate pipeline transportation[.]

49 U.S.C. 60104(c).

In the case of *Texas Midstream Gas Services LLC v. City of Grand Prairie*, 608 F.3d 200 (5<sup>th</sup> Cir. 2010), the Fifth Circuit Court of Appeals was asked to determine whether an amendment to a city development code adopted after Texas Midstream Gas Services (TMGS) announced plans to construct a natural gas pipeline and compressor station to clean and compress natural gas for interstate transport, was preempted by the Pipeline Safety Act. The amended code required a setback from roads, a security fence, enclosed building for the compressor station, paved road, and noise controls.

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<sup>1</sup> Authored by Tom FitzGerald, Director, Kentucky Resources Council, Inc. [www.kyrc.org](http://www.kyrc.org)

The Court reviewed the history of the Pipeline Safety Act of 1994, (which combined and recodified without change the 1968 Natural Gas Pipeline Safety Act and the 1979 Hazardous Liquids Pipeline Safety Act), which set as its goal that of providing “adequate protection against risks to life and property posed by pipeline transportation and pipeline facilities.” Noting that the Act expressly preempts state “safety standards for interstate pipeline facilities or interstate pipeline transportation,” at 49 U.S.C. 60104(c), the Court turned to TMGS’s claim that federal regulation addressed the location of compressor stations and pipeline setbacks, thus preempting the City standards.

The Court noted that Congress may preempt state or local law expressly, or by conflict preemption (directly conflicting with it) or field preemption (occupying a field so pervasively as to exclude state regulation). In the case of the PSA, because Congress had expressly preempted state safety standards, the Court would not imply any further preemption. Since the setback requirement was motivated not out of safety concerns but to preserve neighborhood cohesion, avoid eyesores and diminished property values, the Court would not void the city ordinance *even though* there was a federal regulation addressing setbacks for compressor stations with respect to fire risk, since “a local rule may incidentally affect safety, so long as the effect is not ‘direct and substantial.’ Although the local setback might require a greater distance to adjacent buildings than would the federal regulation at 49 C.F.R. 192.163, “this incidental salutary effect on fire safety does not undermine Congress’ intent in promulgating the PSA as it is neither direct nor substantial.” *Id.* at 211.

The District Court had apparently decided that the security fence requirement was a safety requirement preempted by the PSA, and TMGS argued that all of the remaining portions of the amended ordinance, addressing building materials, roofing, noise levels, and landscaping, were connected and should also be struck. The Court of Appeals rejected this, noting that the remaining portions were capable of being separately applied and were severable.

Other federal cases that help to illuminate the boundary between permissive local regulation and preempted activity include *United Gas Pipeline Co. v. Terrebone Parish Police Jury*, 319 F. Supp. 1138 (E.D. La 1970), in which an ordinance regulating the construction, installation, and operation of gas or liquid petroleum pipelines or canals in the parish, and provided for specifications, reports, permits, insurance, fees, and providing penalties for violation thereof, was found to be preempted. In a *per curiam*<sup>2</sup> decision affirming the District Court decision, the Court of Appeals for the 5<sup>th</sup> Circuit noted that “we do not hold that the Parish Police Jury cannot enact a valid ordinance requiring permits with reasonable conditions.” 445 F.2d 301, 302 (5<sup>th</sup> Cir. 1971).

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<sup>2</sup> “Per curiam” decisions are typically short decisions issued in the name of the entire Court rather than specific judges.

In the recent case of *Washington Gas Light Co. v Prince George's County Council* 711 F3d 412 (4<sup>th</sup> Cir. 2013), the Court of Appeals for the Fourth Circuit rejected the argument that county zoning plans came within the express preemption provision of 49 USC 60104(c). Washington Gas Light Company ("Washington Gas") operated a natural gas substation in Prince George's County, Maryland ("Chillum Site"), and sought to expand that substation with the addition of a liquefied natural gas ("LNG") storage tank. When Prince George's County denied the request based on recently enacted county zoning plans, the company appealed, claiming that the ordinance was preempted by the PSA.

The county zoning plans that the company objected to, were an overlay zone and transit development plan aimed at maximizing "transit-oriented development" in the area around the West Hyattsville Metro Center, and prohibiting all industrial usage in the area that included the substation.

Noting that the county zoning plans were designed to foster transit-oriented development, to assure that all new development was pedestrian-oriented, and to enhance and protect the environment by protecting environmentally sensitive areas and minimizing the impacts of development, the Court concluded that "in light of these goals, it is clear that the County Zoning Plans are primarily local land use regulations as opposed to safety regulations." *Id.* at. 421.

Rejecting a claim that the PSA had preemptive effect beyond the express preemption provision, the Court noted that even *if* it agreed with the argument, it would yet not conclude that Congress intended the PSA to occupy the field of natural gas facility siting, because

Specifically, the PSA expressly circumscribes the Secretary of Transportation's role in this area, indicating, "[t]his chapter does not authorize the Secretary of Transportation to prescribe the location or routing of a pipeline facility." 49 U.S.C. 60104(e) (2006).

*Id.* at 422.

These decisions are consistent with the jurisprudence in other federal District and Circuit Courts with respect to state and local enactments. Safety ordinances and state laws attempting to govern construction, installation, inspection, and depth of interstate natural gas pipelines have been held to be preempted by the PSA's predecessor statutes, but the PSA has not been held to have preempted local zoning ordinances with respect to hazardous liquids pipelines.

### **Does state law preempt local government planning and zoning with respect to pipeline and related facility location?**

Each state's law will differ regarding the authority that local governments have with respect to the routing and location of hazardous liquids pipelines and related facilities.

In Kentucky, for example, the General Assembly has authorized local governments to adopt comprehensive land use plans and zoning ordinances pursuant to KRS Chapter 100.

Some states will expressly preempt local ordinances affecting oil and gas pipelines. For example, KRS 353.500(2) expresses a legislative intent that “governmental responsibility for regulating all aspects of oil and gas exploration, production, development, gathering, and transmission rests with state government” and preempts all other non-state entities from doing so “except as provided in KRS Chapter 100.”

### **Does the state law exempt natural gas liquids pipelines and other hazardous liquids pipelines from the jurisdiction of planning commissions and boards of adjustment?**

Local regulation of **some** transmission pipelines (i.e. those owned by regulated utilities) may be exempted under state law. For example, under KRS 100.324 exempts public utilities that are regulated by the state Public Service Commission or by FERC, from compliance with local zoning and planning.

The Bluegrass Pipeline Partners, LLC, for example, is **not** a public utility regulated by the state Public Service Commission or the Federal Energy Regulatory Commission, nor is the routing of the proposed natural gas liquids pipeline under the PSC’s or the FERC’s jurisdiction. Thus, approval of the planning unit for the location or relocation for all service facilities would be required.

### **What approaches are available under planning and zoning powers for assuring that pipeline routing is consistent with locally adopted plans and codes?**

Initially, under the applicable code, is the construction and operation of a pipeline a regulated use of or activity on land to which the zoning code potentially applies?

In Kentucky, for example, “structures” may be regulated, and KRS 100.111(21), defines structure as “**anything** constructed or made, the use of which required **permanent location in or on** the ground or attachment to something having a permanent location in or on the ground, including buildings and signs[.]”

### **What types of zoning processes have been adopted?**

A 2004 Special Report published by the Transportation Research Board of the National Academies, titled *Transmission Pipelines and Land Use: A Risk-Informed Approach*, noted that

Most local governments do not address pipeline issues. For those that do, there are few or no standards on which to base zoning ordinances and other development regulations. Some communities that have experienced pipeline incidents are implementing ordinances and other policies

to reduce the perceived risks attributable to transmission pipelines, but these proposed ordinances do not appear to be based on a systematic assessment of risks and costs.

Id. at p. 4.

The Special Report noted that

Rational land use decisions that provide appropriate physical separation between people and pipelines could reduce the risk associated with the increasing numbers of people in proximity to transmission pipelines. Possible land use techniques include, for example, establishing setbacks; regulating or prohibiting certain types of structures (such as schools, hospitals, and apartment buildings) and uses near transmission pipelines; and encouraging, through site and community planning, other types of activities and facilities (e.g., linear parks, recreational paths) within or in the vicinity of pipeline rights-of-way.

The Special Report recommended that the Office of Pipeline Safety “develop risk-informed land use guidance for application by stakeholders. The guidance should address:

- Land use policies affecting the siting, width, and other characteristics of new pipeline corridors;
- The range of appropriate land uses, structures, and human activities compatible with pipeline rights-of-way;
- Setbacks and other measures that could be adopted to protect structures that are built and maintained near pipelines; and
- Model local zoning ordinances, subdivision regulations, and planning policies and model state legislation that could be adopted for land uses near pipelines.”

In response to the report, the PHMSA in 2007 helped initiate a multi-stakeholder initiative, the Pipelines and Informed Planning Alliance (PIPA), [www.pipa-info.com](http://www.pipa-info.com), which produced a guidance document, titled *Partnering to Further Enhance Pipeline Safety In Communities Through Risk-Informed Land Use Planning: Final Report of Recommended Practices* (November 2010).

PIPA's recommended practices, summarized here at [http://primis.phmsa.dot.gov/comm/pipa/pipa\\_audience\\_local\\_government.htm?nocache=263](http://primis.phmsa.dot.gov/comm/pipa/pipa_audience_local_government.htm?nocache=263), are focused on how to manage new development near existing pipelines rather than on routing of new pipelines so as to minimize adverse impacts on other development, other existing and projected land uses, and natural resources. Similarly, communities such as Austin, Texas have adopted zoning setbacks for new development near hazardous liquids pipelines, but do not have comparable setbacks or standards for routing of new pipelines.

The Office of Pipeline Safety has published *Building Safe Communities: Pipeline Risk and its Application To Local Development Decisions* (October 2010). The report notes that:

As additional homes, businesses, and schools are constructed and other development occurs, more people will be living, working, and shopping in the vicinity of transmission pipelines. Similarly, with increasing demand for energy, it is likely that new transmission pipelines will be constructed in areas of existing development. Because of these expected trends, local governments are increasingly required to make decisions concerning land use planning and development in the vicinity of transmission pipelines.

The federal government, along with its state partner agencies, regulates the safe construction, testing, operation, and maintenance of the nation's transmission pipelines. In addition, federal pipeline safety regulations include targeted regulations for inspecting and managing the integrity of pipeline segments that have the potential to impact populated and developed areas.

Permitting and routing of interstate natural gas pipelines are approved by the Federal Energy Regulatory Commission (FERC). State agencies (e.g. Public Utility Commissions) approve the permitting and routing of intrastate natural gas pipelines and hazardous liquid transmission pipelines.

Unfortunately, the assumption that a state agency exists in each state to review the routing of hazardous liquids transmission pipelines is mistaken. While some other states, such as Minnesota, have siting requirements for such pipelines, Kentucky has not as of this writing.

### **Regulating Hazardous Liquids Pipelines Through Conditional Use Permitting**

One approach to routing regulation, which has been adopted in Adams County, Colorado, is to require that pipelines obtain a conditional use permit (CUP). If you visit the county's website at <http://www.adcogov.org/index.aspx?NID=1246> and scroll down to Case # RCU2013-00034 - Front Range Pipeline, you can see the various documents, including the application and decision document, under this approach.

What is a conditional use permit? “Conditional uses” are those uses which **may** be allowed within designated zones under certain conditions. A conditional use is a use “which is essential to or would promote the public health, safety, or welfare in one (1) or more zones, but which would impair the integrity and character of the zone in which it is located, unless restrictions on location, size, extent, and character of performance are imposed in addition to those imposed in the zoning regulation[.]” Jurisdiction for hearing applications for a conditional use permit rests typically with a Board of Zoning Adjustments. Approvals may be conditioned on such things as time limitations, requirements that one or more things be done before the request can be initiated, and conditions of a continuing nature.

On the plus side, the conditional use process is well-understood by communities and developers alike, and allows the planning unit to identify in advance which zones may be suitable for the conditional use, and which are not. Conditions could be tailored to address and mitigate the impacts of the project in order to make the use compatible with the zone in which it is proposed to be located, addressing concerns including:

- Noise and odor from aboveground pipeline operation and maintenance activities such as pump station machinery, start-up and shut-down activities, heat exchangers or other equipment emissions, relief valves, backup power generators, and other sources of noise or odor
- Impacts on existing and proposed roads and other infrastructure, including water and wastewater infrastructure
- Proximity to industrial areas where manufacturing processes involve storage of flammable liquids or gases, toxic chemicals, explosives, or other hazardous substances that could be compromised as a result of an accident
- Proximity to institutional facilities such as schools, daycare facilities, hospitals, nursing homes, jails and prisons, and other potentially difficult to evacuate facilities. The location of the proposed pipeline should also be routed to reduce the potential of interference of the transmission pipeline operations and maintenance with these facilities, since institutional facilities may be difficult to evacuate
- Proximity to public safety and emergency response facilities
- Proximity to current or planned places of mass public assembly
- Proximity to cultural, historic, and natural resources of significance

- Proximity to and impacts on prime or significant farmland

It also has the advantage of allowing the activity to be brought under regulation more quickly by amending the zoning regulations to include “hazardous liquids transportation by pipeline” among the conditional uses for which a permit is required.

The only drawback is that a community may prefer to have the matters decided at the planning commission and legislative body level, as would be the case with a rezoning.

### **Regulating New Pipeline Routing Through Adoption of Zoning Standards**

As an alternative to the use of conditional use permits, a community could amend the zoning code to identify in which zoning classifications a hazardous liquids pipeline is a permitted use with special conditions. This approach would provide less scrutiny than the conditional use process, since permitted uses with special standards typically require, at most, staff level review and approval.

The alternative that would provide the greatest level of local oversight would be to create a new “hazardous liquids pipeline corridor” zoning classification, requiring planning commission and legislative body approval for any proposed pipeline project. The corridor width could either be fixed by regulation or variable. The zoning classification could be limited to “hazardous liquids” or could include “intrastate natural gas pipelines” as well, since neither is subject to FERC jurisdiction with respect to the routing of a pipeline, or it could be limited to hazardous liquids pipelines, since there is a rational basis for distinguishing the two in terms of the risks posed to land and water resources from the latter as compared to the former.

That distinction is recognized by the federal Office of Pipeline Safety in a 2010 report on pipeline risk and local development planning, noting that the risks associated with hazardous liquids pipelines are different than the risks of natural gas pipelines, which the report characterizes as a “primarily acute hazard” that dissipates in the absence of an ignition source. Hazardous liquid pipelines transport a greater variety of products (including petroleum, petroleum products, natural gas liquids, anhydrous ammonia, and carbon dioxide), so the risks of hazardous liquid pipeline releases vary according to the commodity involved. Releases of some commodities transported in hazardous liquid pipelines, such as propane, pose primarily an acute hazard of fire or explosion, similar to natural gas. These commodities have a high vapor pressure and are in liquid form while transported under pressure in a pipeline. However, if they are released from the pipeline, they will convert to gas as the pressure is reduced. Some of these commodities have densities greater than air, so they have a stronger propensity to remain near the ground than natural gas, which disperses more readily. The behavior of these commodities

when released presents some different challenges for mitigation, compared to other hazardous liquids or natural gas.

Releases of other hazardous liquids, such as gasoline and crude oil, have both acute and more long-term potential consequences, as the released product can spread over land and water, flowing into valleys, ravines, and waterways. This can result in harmful consequences to people and to the environment, including human injuries or fatalities from fire or explosion, as well as potential ecological damage and contamination of drinking water supplies occurring some distance from the point of initial release.

Setbacks could be required in order to assure compatibility of the proposed pipeline corridor with nearby land uses in such matters as noise, impact on water resources, and impact on nearby land use and development.

While some communities have established firm setbacks of X feet, the better approach would be to establish setbacks on a project-specific basis, using accepted hazard analysis software to identify the area of potential impact in the event of a pipeline spill. The applicant would be required to submit a hazard analysis considering the volume of liquid that might be released (based on flow rates, spill detection time, pipeline shutdown time, and drain down volume), and where the spilled liquid would go (considering overland flow based on flow resistance, seepage and retention in soil, direction and speed of flow, existing drainage systems, flow barriers and fluid properties).

The zoning regulations could identify those resources that could not be within the area of potential impact, such as private, semi-public or public surface or groundwater withdrawals, wellhead protection areas, wetlands, parks, wildlife management areas, cultural or historic resources, areas of unstable geology or geography, and other areas deemed to be incompatible based on the potential for a release of hazardous liquids from a pipeline.

The standards for the new zoning classification could also address many of the issues that are mentioned above in the context of the conditional use process.

### **Consultation Zones And Pre-Application Consultation**

A model ordinance that was developed by PIPA and has been adopted in several communities, creates a “consultation zone” within which, for proposed new land uses and developments, the property developer/owner is required to initiate consultation with the transmission pipeline operator in order to protect the transmission pipeline by promoting adequate consideration of the potential safety impacts of the proposed land use or property development on the pipeline; and to raise awareness of the potential safety impacts of the transmission pipeline on the proposed land

use or development so they can be taken into account during planning and design. PIPA Report p. 26. Absent site-specific information, a standard consultation zone distance, on either side of the pipeline centerline, of 660 to 1,000 feet is suggested for hazardous liquids transmission pipelines. However, it is recommended that communities develop and utilize site-specific distances for consultation zones, based on the unique characteristics for the pipeline and the area surrounding the pipeline, such as operating pressure, pipe diameter, type of product carried and local topography. The American Petroleum Institute Recommended Practice (API RP) 1162, Public Awareness Programs for Pipeline Operators, First Edition, December 2003, includes recommendations for collaboration among pipeline operators, property owners/developers and emergency response officials that may be helpful in developing criteria for a planning area. API RP 1162 applies within 660' of a hazardous liquid pipeline.

While the consultation zone is crafted to apply to new development near existing pipelines, a consultation requirement for new hazardous liquids pipelines could be adopted as part of a county's zoning regulations, requiring that, prior to filing an application for a conditional use permit or a rezoning, the applicant provide notice to all property owners within a set distance (for example, 660 feet from proposed pipe centerline) and conduct at least one pre-application meeting with those stakeholders in order to promote adequate consideration of the potential safety impacts of the proposed land use or property development from the proposed pipeline; and to raise awareness of the potential safety impacts of the transmission pipeline on the proposed land use or development so they can be taken into account during the pipeline planning and design.

### **Would The Acquisition of Easements For A Contemplated Pipeline Project Qualify As A Nonconforming Use?**

Typically not. The acquisition of an easement in anticipation of potentially constructing a pipeline would not make the use "existing" under the law of various states, including Kentucky. As the Court noted in *Perkins v. Joint City-Council Planning Commission, Ky.*, 480 S.W.2d 166 (1970):

The general rule is that for property to qualify as nonconforming use the use must have been actually demonstrated prior to the zoning ordinance. Mere contemplation of use of the property for a specific purpose is not sufficient to place it in a nonconforming-use status. *Smith v. Juillerat*, 161 Ohio St. 424, 119 N.E.2d 611 (1954). Nor is the purchase of the property accompanied by an intent to use it for a specific purpose sufficient. *Edelstein v. Dade County, Fla. App.*, 171 So.2d 611 (1965). An exception to the rule recognized by many jurisdictions is where substantial construction has been made on the property or substantial expenses incurred relating directly to the construction prior to the ordinance. *Id.* at 168.