

TransCanada Pipeline Proposed to Cross Nebraska Sand Hills & State

The United State's oil dependency is served by approximately 170,000 miles of oil pipeline. They carry three-quarters of the nation's crude oil and about six-tenths of its refined petroleum products.¹ Two hundred or more interstate oil pipelines are involved in about 80% of the nation's total pipeline linkage and transported volume.² Despite these numbers, a distinction between pipeline safety and locating construction sites for pipelines exists in the law. Pipeline safety is a national priority. Pipeline construction siting routes remain the responsibility of the states.

Pipeline Safety

The United States Department of Transportation has responsibility for pipeline and hazardous materials safety. The Hazardous Liquid Pipeline Act of 1979 confers this authority. It empowers the Secretary of Transportation primary authority to regulate key aspects of interstate pipeline safety. These aspects include design, construction, operation, maintenance and spill response planning. As a result of this authorization, the United States Department of Transportation Pipelines & Hazardous Materials Safety Administration (PHMSA) was developed.³ Within PHMSA, the Office of Pipeline Safety provides key regulatory control. *Id.*

While PHMSA regulates safety through a variety of means, there are no regulations relating to pipeline pre-pipeline construction siting, or the process of locating where new pipelines will be built. Even the 2002 Pipeline Safety Improvement Act,⁴ which strengthened federal pipeline safety programs, and authorized the Department of Transportation to order safety actions for pipelines with potential problems and increase penalties for infractions, the ultimate level of control may not yet be fully explored.

(more)

¹ Pipeline & Hazard Materials Safety Administration, "Natural Gas Transmission, Gas Distribution and Hazardous Liquid Pipeline Annual Mileage," Web Table, 1-12-10, www.phmsa.dot.gov/pipeline/library/data-stats

² Rabinow, "The liquid pipeline industry of the United States: Where It's Been, Where It's Going," Presented to Association of Oil Pipeline's April 2004 p4

³ For information about PHMSA, see its website at phmsa.dot.gov

⁴ PL107-355

Oil Pipeline Citing Authority

Unlike the federal government's control of pipeline safety, the United States lacks authority to regulate, prescribe, or proscribe sites or routes for proposed pipelines, even if they are interstate lines. This deficit concerning oil pipelines contrasts with national authority over natural gas pipelines.

Federal control over such pipelines is found in the Natural Gas Act, 15 *USC* §§ 717 *et seq.* While certificates of public convenience and necessity are required to operate gas pipelines, no similar requirement requires oil pipeline owners or operators to obtain certification from FERC or any other federal agency.

The federal government simply has not preempted the states from passing on pipeline siting issues within a state. Where the federal government has not acted, the states may.

Though Nebraska has the power to regulate locations at which pipelines will be placed, it has not exercised this power. Nebraska is without a statute designing how a proposed route should be submitted for approval is to be handled. Simply, Nebraska has no statute pertaining to any permitting requirements that apply specifically to construction or operation of oil pipelines.

The value, or if you will, cost of Nebraska land taken or proposed to be taken by any contending authority of this time, is substantial. Land prices have moved up quickly recently. This is because margins from farming are quite good.

Nebraska has legal control over the route that must be used by the TransCanada pipeline, TransCanada's II pipeline across the state. The Legislature can require TransCanada to use its existing corridor against eastern Nebraska.

But, to exercise this power, the Legislature must enact a statute and the governor must approve it. This must, for the most practical of reasons, occur and be accomplished by the end of 2011. Nebraska has no pipeline siting statute, presently. It does have an eminent domain statute that permits pipelines to exercise the power of eminent domain. *Neb Rev Stat* § 57-1101. If Nebraska's Legislature meets and enacts a statute governing pipeline siting, it is likely the statute will be valid and enforceable against TransCanada.

Nebraska's siting authority may be theoretical than real if it delays action. Once the United States State Department issues a permit authorizing construction of the pipeline

and the route across Montana and South Dakota is finalized, it will be difficult to compel TransCanada to move its proposed pipeline eastward to its existing corridor.

The time for action, if any is to be taken for Nebraska, is now.⁵

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⁵ These conclusions are consistent with an opinion of the Congressional Research Service written by Paul Parfomak, Specialist in Energy & Infrastructure Policy and issued to Honorable Lee Terry September 20, 2010.