

MEMORANDUM

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CC: Kathleen Campbell

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Subject: Analysis of County Level Land Use Regulatory Authority Over CO2 Pipelines

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You asked us to analyze the county level land use authority over CO2 sequestration and transmission pipelines and how that regulation may determine pipeline routes. The following is an overview of the relevant federal and state law and an analysis of the zoning authority of a county in an interstate application for pipeline construction.

I. Executive Summary

- The two federal regulatory agencies that generally have jurisdiction over interstate pipeline rate and capacity allocation matters appear to have rejected explicit jurisdiction over CO2 siting and rates. As a result of this regulatory gap, individual states have oversight and authority of carbon dioxide pipelines.
- The Pipeline Hazardous Material Safety Administration Act (“**PHMSA**”) establishes the regulatory and federal agency oversight concerning the safety and design of CO2 pipelines which includes the depth of the pipeline. PHMSA has the final word on the safety, inspection and design standards of CO2 pipelines and counties cannot regulate this area of CO2 pipeline construction.
- PHMSA’s regulations encompass the depth of cover for a CO2 pipeline. However, PHMSA is silent on setbacks.
- Individual states are responsible for the approval of the carbon dioxide pipeline applications which regulate the siting of intrastate/interstate hazardous liquid pipelines. In Illinois, the body that is responsible for this regulation is the Illinois Commerce Commission (“**ICC**”) which operates under the authority of the Carbon Dioxide and Transportation and Sequestration Act, 22 ILCS 75, *et seq.* (“**Act**”).

- A CO2 pipeline owner seeking to operate a pipeline in Illinois whether interstate or intrastate must receive a certificate of authority from the ICC. In determining whether to issue a certificate of authority, the ICC is specifically legislated to consider whether the proposed pipeline is consistent with the public interest and public benefit and the ICC may consider the effect of the pipeline upon the economy, infrastructure, and public safety presented by local governmental units that will be affected by the proposed pipeline route.
- A final order of the ICC granting a certificate of authority shall be conditioned upon the applicant obtaining all required permits or approvals from the PHMSA, U.S. Army Corps of Engineers, and Illinois Department of Agriculture, in addition to all other permits and approvals necessary for the construction and operation of the pipeline prior to the start of any construction.”¹
- PHMSA is undertaking a rulemaking process which is expected to be complete in October of 2024. The rulemaking is focused on implementing new measures to strengthen its safety and oversight of CO2 pipelines around the country. Among other things, these regulations are expected to address emergency preparedness and response, civil penalties and efforts to mitigate risks related to land-movements and geohazards that put the integrity of pipelines at risk.
- A county or municipality has the power to enact an ordinance enforcing a moratorium on CO2 pipeline construction while the PHMSA rulemaking process is underway. Therefore, a county may want to enact a moratorium on CO2 pipeline construction through November 1, 2024 (reflecting the date of the anticipated rule.) In order to enact a moratorium, a county will need to hold a public hearing and adopt an ordinance.
- The action by a county to enact a moratorium will make an impactful statement to the ICC, who is statutorily required to listen and consider the effect of the pipeline on the economy, infrastructure and public safety.
- A county cannot use its zoning authority to prohibit CO2 pipelines within the county.
- A county can use its zoning authority to make a CO2 pipeline a special use, thereby allowing for CO2 pipelines in certain zoning districts. As a special use, all CO2 pipeline owners would be required to apply for a special use and participate in public hearing that allows for community input. An ordinance creating a special use for CO2 pipelines should establish the conditions related to the use.
- A county without a comprehensive zoning plan can also adopt an ordinance regulating CO2 pipelines similar to wind turbines and solar panels.
- A county can also adopt an ordinance regulating the setbacks for CO2 pipelines.

¹ 220 ILCS 75/20(g).

- Because the ultimate authority to approve a certificate of authority rests with the ICC, it is possible that the ICC may preempt a county's ordinance.

II. Federal Regulatory Background

Congress first required the Department of Transportation to regulate carbon dioxide transported by pipelines in 1988 following an event in Lake Nyos, Cameroon which killed over 1,700 people. In 1992 a final rule was promulgated that added CO₂ to existing federal minimum hazardous liquid pipeline safety regulations of the Department of Transportation ("**USDOT**"). In 2004, PHMSA was created as an agency within the USDOT. PHMSA is responsible for developing and enforcing safety regulations for the safe and environmentally sound operation of the pipeline transportation in the United States.

There are several federal regulations that apply to the construction of pipelines. Specifically, the Natural Gas Act ("**NGA**")², the Natural Gas Pipeline Safety Act ("**NGPSA**")³ and PHMSA. However, both the NGA and NGPSA apply only to the regulation of natural gas pipelines.

The NGA, which imposes rules for the sale and transportation of natural gas in interstate commerce, grants broad regulatory authority to the Federal Energy Regulatory Commission ("**FERC**"). In December of 1978, the Cortez Pipeline Company sought a declaratory order from FERC that the construction and operation of a proposed interstate pipeline transporting gas comprised of 98% CO₂ and 2% methane gas would not fall within FERC's jurisdiction. Cortez argued that the gas in question was not "natural gas" as the term is defined in Section 2(5) of the NGA, so a proposed pipeline to transport this gas was not under FERC's NGA jurisdiction. FERC agreed with Cortez and issued a declaratory order disclaiming jurisdiction over the pipeline.⁴ FERC pointed to the goals and purposes of the NGA, which are primarily to regulate a specific "natural gas" industry. As a result, FERC held that the proposed Cortez Pipeline was not within the NGA jurisdiction of the Commission. As it stands, FERC has no jurisdiction over CO₂ pipelines.

In 1980, after FERC issued its CO₂ ruling, the owners of the Cortez Pipeline went to the now defunct federal Interstate Commerce Commission to seek a similar declaratory order that the pipeline would also not be subject to the Interstate Commerce Commission's jurisdiction. The statute and previous case law plainly state that the Interstate Commerce Commission has no pipeline siting jurisdiction whatsoever.⁵ The Interstate Commerce Commission recognized that its initial ruling in this matter, in concert with the FERC's order disavowing jurisdiction over the proposed Cortez Pipeline, created a regulatory gap. Although the Interstate Commerce Commission found in its initial decision that it likely did not have jurisdiction over CO₂ pipelines, it concluded that "the issue is important enough to institute a proceeding and accept comments on

² 15 U.S.C.S. §717 *et seq.*

³ 49 U.S.C.S. § 60101 *et seq.*

⁴ Cortez Pipeline, 7 FERC ¶ 61,024 (1979).

⁵ Cortez Pipeline Company – Petition for Declaratory Order – Commission Jurisdiction Over Transportation of Carbon Dioxide by Pipeline, 45 Fed. Reg. 85177 (December 24, 1980).

the petition and our view on it.”⁶ However, after the comment period, the Interstate Commerce Commission confirmed its view that CO2 pipelines were excluded from the Interstate Commerce Commission’s jurisdiction. Absent federal authority, CO2 pipelines are regulated to varying degrees by the states.

PHMSA is the federal regulatory agency that is responsible for regulating and ensuring the safety and secure movement of hazardous materials to industry and consumers by all modes of transportation, including pipelines. PHMSA controls design and performance standards for the installation, operation and spacing of rupture mitigation valves or alternative equivalent technologies on most new or entirely replaced on shore, large diameter, gas transmission, Type A⁷ gas gathering and hazardous liquid pipelines. PHMSA set the standards for the safety and design control for pipelines that carry carbon dioxide. However, the approval of CO2 routes and often the inspection process of these pipelines is left to the states.

In May of 2022, PHMSA issued a notice of a new rulemaking stating that it intends to include requirements related to emergency preparedness and response, issue a notice of civil penalties, and continue investigative efforts focused on mitigating risks related to land-movements and geohazards that can put the integrity of pipelines at risk. The final rule is not anticipated until October of 2024.

In light of this pending rulemaking, California recently enacted a moratorium on the approval of any new CO2 pipelines. While the ultimate authority to issue a certificate of authority to build a CO2 pipeline in Illinois rests with the ICC, there is nothing that prevents a local county or municipality from passing an ordinance enacting a moratorium on the construction of CO2 pipelines until PHMSA issues its final rule.

Most land use moratoriums cite among its authority the protection of public health, safety, and welfare. The regulation must be enacted pursuant to a lawfully delegated authority and a presumption of validity attaches to a validly enacted regulation, placing the burden of showing the regulation’s invalidity on the challenger. The moratorium must be enacted by an ordinance following a public hearing. The enactment of a moratorium is a legislative act, subject to rational basis review by the courts. In Illinois, there are several counties that have successfully enacted moratoriums on wind turbines and distances for setbacks over the years. However, because the power to issue a certificate of authority has been granted to the state, not the county, it is important to recall that state authority may preempt a county moratorium.

III. Illinois Regulatory Authority

A. Carbon Dioxide and Transportation and Sequestration Act, 22 ILCS 75

In Illinois, the ICC has the authority to regulate the route of CO2 pipeline. The ICC is guided by the statutory power in the Carbon Dioxide and Sequestration Act, *infra*. The Act requires that the

⁶ Id. at 85178.

⁷ Type A lines are located in Class 2, 3 and 4 locations and operate at relatively higher stress levels. Type B are lower-stress pipelines in Class 3, 4 and certain Class 2 locations.

safety of the construction of a pipeline, including maintenance and operation must comply with federal regulations.

The ICC must approve of a certificate of authority prior to the construction of a CO2 pipeline in Illinois. However, there is nothing in the Act that expressly preempts a local body, specifically a county, from implementing an ordinance related to the regulations of CO2 pipelines.

Although the ICC is given the authority to set the route of a pipeline, the ICC is specifically legislated to consider whether the proposed pipeline is consistent with the public interest and public benefit. Section 75/20(b)(8) of the Act states that the ICC may consider any evidence of the effect of the pipeline upon the economy, infrastructure, and public safety presented by local governmental units that will be affected by the proposed pipeline route. Additionally, “a final order of the Commission granting a certificate of authority shall be conditioned upon the applicant obtaining all required permits or approvals from PHMSA, U.S. Army Corps of Engineers, and Illinois Department of Agriculture, in addition to all other permits and approvals necessary for the construction and operation of the pipeline prior to the start of any construction.”⁸ Therefore, a county ordinance that specifically addresses setbacks is not specifically preempted by the current regulatory scheme.

B. County Zoning Authority

Counties in Illinois, although not granted home rule powers, do have zoning authority as outlined in 55 ILCS 5-12 *et seq.* As such, counties can, under their broad grant of zoning authority:

- regulate and restrict the location and use of structures for the purpose of promoting the public health, safety, and welfare,
- conserve the values for property throughout the county,
- lessen or avoid congestion in the public streets and highways,
- lessen or avoid the hazards to persons and damage to property resulting from the accumulation of runoff or storm or property resulting from the accumulation of runoff,
- regulate and restrict the location and use of buildings, structures and use of land for trade, industry, residence and other uses which may be specified to regulate
- restrict the intensity of such uses,
- establish building and setback lines on or along any street, trafficway, drive, parkway or storm or floodwater runoff channel or basin outside the limits of cities, villages and incorporated towns which have in effect municipal zoning ordinances, and
- prohibit uses, buildings or structures incompatible with the character of such districts respectively.

Under this broad grant of authority, a county can—since a pipeline is a “structure”—utilize its zoning authority to regulate CO2 pipelines. An example of a county’s ability to regulate CO2 pipelines would be to make a CO2 pipeline a special use, thereby not only restricting the use to specific zoning districts, but also conditioning the special use to mitigate negative external impacts on the pipeline on surrounding properties. Regardless of whether a pipeline is a special use or a

⁸ 220 ILCS 75/20(g).

by right use in a zoning district, a county, under its broad zoning authority can control which zoning districts it wants to allow for the CO2 pipelines based on compatible zoning uses. For example, CO2 pipelines may be considered a compatible zoning use in commercial and industrial zoned areas, however, CO2 pipelines would not be compatible in residential and park zoned areas based on safety risks. An application for a special use permit requires a public hearing on the proposed use which allows for community input. The ICC, which has authority to regulate siting may, retains, as noted, authority to preempt the county's local zoning authority.

For counties that do not have comprehensive zoning plans, there is authority to adopt an ordinance that regulates CO2 pipeline setbacks through an ordinance similar to wind turbines and solar panels. Federal regulations are currently silent in this area.

IV. Eminent Domain & the Supremacy Clause

As indicated in earlier sections, the possibility that a local ordinance that interferes with a state or federal regulatory authority may be preempted cannot entirely be ruled out. The Illinois Carbon Dioxide and Sequestration Act specifically reserves to the ICC the powers of condemnation and eminent domain. Specifically, Section 30 of the Act states

“that in as much as the regulation of the construction, maintenance, and operation of pipelines transporting carbon dioxide, whether interstate or intrastate, falls within the statutory and regulatory jurisdiction of PHMSA, each carbon dioxide pipelines owner shall construct, maintain, and operate all of its pipelines, related facilities, and equipment in [Illinois] in a manner that complies fully with all federal laws and regulations governing the construction, maintenance, and operation of pipelines transporting carbon dioxide as from time to time amended, and which poses no undue risk to its employees of the public. This Section shall not be interpreted to act in derogation of any such federal laws or regulations.”⁹

Additionally, the construction and safety of a carbon dioxide pipeline in itself may trigger the application of several other federal regulations. Some examples of a federal regulation that may be applicable to a natural gas application, and maybe applicable to a CO2 sequestration pipeline are the Clean Water Act, the National Environmental Policy Act (“*NEPA*”), the EPA's Greenhouse Gas Reporting Act, and the Safe Water Drinking Act.

Under the Supremacy Clause of the Constitution, a federal law can displace state law through express preemption, field preemption or conflict preemption. Express preemption exists where Congress enacts an explicit statutory demand that state law be displaced.^{10 11 12} Field preemption exists “where the federal regulatory scheme is so pervasive, or the federal interest is so dominant that it may be inferred that Congress intended to occupy the entire legislative field. Conflict preemption arises when state law conflicts with federal law to the extent that compliance with both

⁹ 220 ILCS 75/30.

¹⁰ *Wos v. E.M.A. ex. rel. Johnson*, 133 S. Ct. 1391 (2013).

¹¹ *Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2013 (1992).

¹² *Planned Parenthood of Indiana, Inc. v. Commissioner of Indiana State Dept. of Health*, 699 F. 3d 962, 984. (7th Cir. 2012).

federal and state regulations is a physical impossibility or the state law stands as an obstacle to the accomplishment and execution of the full purposes of Congress.”¹³ The difficulty in applying the precedents from related case law lies in the lack of clarification of the federal regulatory role in the construction of CO2 pipelines.

While there is an overwhelming amount of case law that addresses federal preemption of natural gas pipelines, especially as related to interstate commerce, there is no case law relative to federal preemption of carbon dioxide pipelines.

V. Analysis

The application that Navigator has submitted is for an interstate facility. Because PHMSA regulates the safety and design of CO2 pipelines, any county ordinance aimed at regulating the safety or design of a CO2 pipelines will be federally preempted pursuant to the Supremacy Clause. Likewise, a permanent moratorium of CO2 pipeline construction by a state or county will be held to be invalid and federally preempted.

A county can still implement an ordinance related to the regulations of pipelines as long as the ordinance does not seek to regulate an area that is already mandated by PHMSA. The ICC is given the authority to set the route of a pipeline. However, the ICC is specifically directed to consider, in a hearing for a certificate of authority, to consider whether the proposed pipeline is consistent with the public interest and public benefit. Section 75/20(b)(8) of the Act states that the Commission may consider any evidence of the effect of the pipeline upon the economy, infrastructure, and public safety presented by local governmental units that will be affected by the proposed pipeline route. Additionally, “a final order of the Commission granting a certificate of authority shall be conditioned upon the applicant obtaining all required permits or approvals from PHMSA, U.S. Army Corps of Engineers, and Illinois Department of Agriculture, in addition to all other permits and approvals necessary for the construction and operation of the pipeline prior to the start of any construction. Therefore, a county ordinance that specifically addresses setbacks is not preempted by the current regulatory framework.

The current regulatory gaps that exist in the area of CO2 pipelines allow for states to take a greater role in regulations not related to the safety or design control of pipelines. While a majority of the more progressive movements related to CO2 pipelines are being undertaken at the state level, such as South Dakota and California, there is nothing that explicitly prevents a county in Illinois from exercising its zoning powers to try to achieve the same.

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¹³ *Arizona v. United States*, 132 S. Ct. 2492 (2012).