

Oil and Natural Gas Pipeline Setbacks

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I. Introduction

Thanks to the development of the Marcellus Shale, oil and gas production in Pennsylvania has skyrocketed in recent years.¹ In 2014 Pennsylvania's gross natural gas production was greater than 4 billion cubic feet, double what production was just two years earlier in 2012.² Pennsylvania is now the second largest producer of natural gas in the United States.³ With such rapid development of the Marcellus Shale, Pennsylvania has run into the problem of finding a fast and efficient way to transport the increased volume of natural gas to market.⁴ In the past using pipelines to transport oil and natural gas has solved the transportation problem.⁵ Pipelines are often the solution as they are the safest and most efficient mode of transporting energy fuels.⁶ John Quigley, secretary of the Pennsylvania Department of Environmental Protection estimates that over the next decade the state could see construction of more than 25,000 miles of gathering pipelines and 5,000 miles of transmission pipelines in order to solve the transportation problem.⁷

¹ Michelle O' Brien, *Natural Gas Pipelines in Pennsylvania*, in *Hot Topics in Oil and Gas Law* 39, 40 (Pennsylvania Bar Institute, 2015)

² U.S. Energy Information Administration, *Pennsylvania: State Overview* (May 21, 2015), <http://www.eia.gov/state/?sid=PA#tabs-3>

³ *Id.*

⁴ O'Brien, *supra* note 1.

⁵ Transportation Research Board, *Special Report 281: Transmission Pipelines and Land Use; A Risk Informed Approach* 1, 2 (2004), available at <http://onlinepubs.trb.org/onlinepubs/sr/sr281.pdf>

⁶ *Id.*

⁷ O'Brien, *supra* note 1.

The increase in pipelines will pose interesting zoning problems for municipalities as people begin living and working in close proximity to pipelines. One such problem is the distance that buildings or other structures are located from pipelines.⁸ This problem has traditionally been addressed through zoning setbacks. A set back is, “a line established by local government ordinance, within a property, defining the minimum distance between any building or structure or portion thereof to be erected or altered, and an adjacent right-of-way, street or property line.”⁹ Traditionally, setbacks have been created using fixed distances to determine the location of development near a pipeline.¹⁰ However, a more holistic approach to setbacks exists; instead of fixed distance setbacks municipalities can create risk informed setbacks. Risk informed setbacks take into account factors specific to the particular pipeline from which the proposed construction will be setback.¹¹ This more holistic approach to setbacks allows municipalities to develop sustainably. Risk informed setbacks promote safety by reducing the economic and social impacts of a catastrophic pipeline failure, should one occur.¹²

This paper will address 1) the problems that municipalities are encountering when managing new development near oil and gas pipelines; 2) how municipalities can address those problems through risk informed setbacks and the law that gives them the authority to do so; 3) how risk informed setbacks have worked in other municipalities; and 4) key policy issues

⁸ Pipelines and Informed Planning Alliance, *Partnering to Further Enhance Pipeline Safety In Communities Through Risk-Informed Land Use Planning* Final Report of Recommended Practices (2010), available at <http://primis.phmsa.dot.gov/comm/publications/pipa/pipa-report-final-20101117.pdf> [Hereinafter, Pipelines].

⁹ *Id.* at vi.

¹⁰ *Id.* at 1.

¹¹ *Id.*

¹² Jim Doherty, *Setbacks and Zoning for Natural Gas and Hazardous Liquid Transmission Pipelines* 1, 7-8 (2004), available at <http://mrsc.org/getmedia/321384AC-DB51-448E-B4FD-5A8EC4EBF7B1/jdsetbacks.aspx>

surrounding the creation and implementation of risk informed setbacks. A draft model ordinance addressing these issues is attached.

II. Problem/Opportunity

The increase in the number of pipelines in the state has created a problem; many pipelines now run through or close to heavily populated areas.¹³ The possibility of pipeline failures creates a risk to the public located near the pipeline right-of-way.¹⁴ Currently, some municipalities, the state, and federal government have addressed this problem by creating zoning ordinances that establish fixed distance building setbacks for development projects located near pipelines.¹⁵

Fixed distance ordinances don't do enough to ensure safe and sustainable municipal development. Fixed distance ordinances fail to consider the risks of a specific pipeline or the characteristics of its location.¹⁶ Individual pipelines can vary in size, material, pressure, and contents, all of which contribute to the level of devastation should an accident occur.¹⁷ Additionally, population density can vary greatly depending on where a pipeline is located.¹⁸ Fixed distance setbacks are often arbitrary because they ignore the individual characteristics and location of a pipeline. By ignoring the individual characteristics and location of a pipeline setback distances may appear to be safe, when they are in fact not.

¹³ Pipelines and Informed Planning Alliance, *supra* note 8, at 1

¹⁴ Pipelines and Informed Planning Alliance, *Partnering to Further Enhance Pipeline Safety In Communities Through Risk-Informed Land Use Planning* Final Report of Recommended Practices (2010). (A right of way is a strip of land, on which, a pipeline operator has the right to construct, operate, and maintain a pipeline)

¹⁵ *Id.*

¹⁶ *Id.* at 15.

¹⁷ *Id.*

¹⁸ *Id.*

There is a solution to the problem posed by fixed distance setbacks; it is risk informed land use development.¹⁹ Pipelines have many stakeholders all of whom are knowledgeable about the risks surrounding a particular pipeline.²⁰ These stakeholders should be consulted before new construction occurs near a pipeline. Consultation with stakeholders will provide a better guidance when creating a setback for a new development project.²¹ Municipalities have the opportunity to pursue risk informed land use development when determining setbacks by implementing “consultation zone” ordinances in lieu of fixed distance setbacks ordinances.²²

A consultation zone is a set area determined by a municipality that extends a certain distance on either side of a pipeline.²³ If a proposed development plan falls within the consultation zone, members of local government, the developer, and pipeline operator must meet and discuss the proposed land use, pipeline risks, and other factors in order to ensure the best location for the proposed development.²⁴

Consultation zones offer a more holistic, risk informed approach to planning because through collaboration with stakeholders the proposed development can be placed in the safest and most well thought out location.²⁵ This approach differs from fixed distance setbacks as municipalities using the consultation zone approach can account for a variety of factors such as the size of the pipeline and the population density of the area.²⁶ Furthermore, with the

¹⁹ Doherty, *supra* note 12, at 3.

²⁰ Doherty, *supra* note 12, at 6.

²¹ Doherty, *supra* note 12, at 6.

²² Pipelines, *supra* note 8, at 1.

²³ Pipelines, *supra* note 8, at i.

²⁴ Pipelines, *supra* note 8, at 26-9.

²⁵ Pipelines, *supra* note 8, at 26-9.

²⁶ Pipelines, *supra* note 8, at 26-9.

knowledge gained from the consultation developers and municipalities have the knowledge they need to create a specific setback for the proposed development.²⁷

Through risk informed land use development strategies like consultation zones, municipalities have an opportunity to fix the problems caused by the increasing number of pipelines in Pennsylvania.

III. Why Risk Informed Setbacks?

Existing Pennsylvania law governing zoning and sub division ordinances of oil and gas activities can be difficult to understand. Municipalities may regulate some oil and gas activities relating to intrastate pipelines, but they are very limited in regulating interstate pipelines. The best approach for municipalities is to regulate safety near a pipeline through local zoning ordinances. There are three different governing bodies that regulate oil and gas pipelines in the state of Pennsylvania in addition to local governments, they are: 1) the federal government acting under the authority of FERC and PHMSA, 2) the Pennsylvania Public Utility Commission, 3) The Pennsylvania Department of Environmental Protection.²⁸

The Federal Energy Regulatory Commission (FERC) regulates large transmission interstate pipelines.²⁹ FERC draws its authority to regulate pipelines from The National Gas Act, The National Gas Policy Act, and series of regulations contained in the federal administrative code.³⁰ Before an interstate pipeline can be constructed FERC must approve the proposed

²⁷ Pipelines, *supra* note 8, at 26-9.

²⁸ O'Brien, *supra* note 1 at, 43,

²⁹ Michelle O' Brien, *Natural Gas Pipelines in Pennsylvania* at 43. (an interstate pipeline extends to more than one state, this is why interstate pipelines are regulated by the federal government).

³⁰ *Id.* at 43, 15 U.S.C. §717 *et seq*, 15 U.S.C. Chapter 60, 18 C.F.R. 284

location.³¹ After the location has been approved by FERC the pipeline is built.³² Following construction of the pipeline the Pipeline and Hazardous Materials Safety Administration (PHMSA) –an agency within the Department of Transportation- takes over regulation of the pipeline maintenance and safety.³³

Since the federal government acting under FERC decides the location of interstate pipelines, and grants pipeline companies eminent domain powers, it can sometimes be difficult for municipalities to have a say in pipeline placement.³⁴ Additionally, another federal organization, the PHMSA regulates pipeline operation and safety. Therefore, municipalities are often preempted by federal law from imposing ordinances on the operation of oil and natural gas pipelines.³⁵ Due to the legal difficulties that surround municipal regulation of interstate pipelines, a local government’s best option may be to manage new development near pipelines through risk informed ordinances, rather than fighting the federal government on a pipeline’s location.³⁶

The other two governing bodies that regulate oil and gas law in Pennsylvania are state entities, the Pennsylvania Public Utility Commission (PUC) and the Pennsylvania Department of Environmental Protection (DEP).³⁷

The PUC has authority to regulate the interstate pipeline safety in Pennsylvania due to the Gas and Hazardous Liquids Pipeline Act.³⁸ The Gas and Hazardous Liquids Pipeline Act

³¹ O’Brien, *supra* note 1, at 44.

³² O’Brien, *supra* note 1, at 44.

³³ Curtis Stambaugh, *Overview of Pipeline Regulatory Framework, in 6th Annual Oil and Gas Law Colloquium* 545, 550 (Pennsylvania Bar Institute, 2015)

³⁴ O’Brien, *supra* note 1, at 44.

³⁵ O’Brien, *supra* note 1, at 44, Stambaugh, *supra* note 33, at 551.

³⁶ Pipelines, *supra* note 8, at 6.

³⁷ O’Brien, *supra* note 1, at 43.

³⁸ 2011 Pa. ALS 127, 2011 Pa. Laws 127, 2011 Pa. HB 344 (LexisNexis 2015).

empowers the PUC to enforce federal PHMSA regulations and requires that gas and hazardous liquid transmission pipelines be registered with the state.³⁹ The PUC preempts local governments on issues regarding pipeline safety and maintenance as they are enforcing federal regulations.

The PUC and the DEP have authority, although it is not absolute, to regulate midstream intrastate pipelines and gathering lines in Pennsylvania due to the passing of Act 13 in 2012.⁴⁰ Midstream and gathering lines are pipelines located solely in Pennsylvania. Therefore, the state government has the authority to regulate those pipelines as they see fit. Act 13 gave the DEP authority to be involved in regulation and oversight of pipelines when they cross environmentally sensitive areas such as waterways, wetlands, and areas with endangered species.⁴¹ Additionally, Act 13 created state wide zoning ordinances that superseded all local government ordinances, and gave the PUC the job of enforcing the act's provisions.⁴²

Act 13 severely limited any remaining power that local governments had in regards to the zoning of oil and natural gas activities in their municipalities.⁴³ Soon after its implementation, the zoning provisions of Act 13 specifically sections 3304 and 3303 were challenged in the State Commonwealth Court and then in the State Supreme Court.⁴⁴ In ruling on the constitutionality of Act 13 the state court struck down the provisions of sections 3304 and 3303.⁴⁵

³⁹ Stambaugh, *supra* note 33, at 551.

⁴⁰ State Impact Pennsylvania, *Calling the balls and Strikes*, <https://stateimpact.npr.org/pennsylvania/tag/public-utility-commission/> (last visited Sept. 28, 2015), [Hereinafter, State Impact Pennsylvania].

⁴¹ O'Brien, *supra* note 1, at 44.

⁴² State Impact Pennsylvania, *supra* note 40.

⁴³ Michael Venum, *Municipal Land Use: Oil and Gas Development*, in *Hot Topics in Oil and Gas Law* 59, 78 (Pennsylvania Bar Institute, 2014)

⁴⁴ *Id.* at 70-5.

⁴⁵ Robinson Twp. v. Commonwealth, 623 Pa. 564, 83 A.3d 901 (2013).

Following the ruling on Act 13 local municipalities also have some authority to regulate oil and gas activities, and thus midstream and gathering pipelines within their borders.⁴⁶ In the current post *Robinson Township* era municipalities must revert to pre *Robinson Township* standards for creating and enforcing zoning and land use ordinances.⁴⁷ Pre *Robinson Township* standards for creating and enforcing zoning and land use ordinances on oil and gas pipelines are governed by a series of cases that have produced a blurry convoluted rule.⁴⁸ In the line of cases preceding *Robinson* the court has determined that local ordinances are valid if they relate to the location of oil and gas wells within a zoning district by merely enforcing traditional zoning regulations, but precluded municipalities from creating ordinances that prohibit “technical” aspects of oil and gas activities.⁴⁹

Noting the existing law and its complicated state it may be best to move away from ordinances that strictly regulate oil and gas locations, as there is a greater chance they may be struck down under the current case law.⁵⁰ In order to develop municipalities more sustainably, the best practice available is to enact local ordinances that bring all parties to the table.⁵¹ In the post *Robinson* era municipalities have the power to create zoning setback ordinances.⁵² Furthermore, a collaborative approach such as one that involves the creation of risk informed

⁴⁶ Venum, *supra* note 43 at 72-3.

⁴⁷ Venum, *supra* note 43 at 72-3.

⁴⁸ Venum, *supra* note 43 at 59-75.

⁴⁹ Range Resources-Appalachia, LLC v. Salem Twp., 964 A.2d 869, 872 (P.a. 2009) ; *citing* Huntley and Huntley, Inc. v. Oakmont Borough, 929 A.2d 1252 (Pa. Commw. Ct. 2007) (en banc).

⁵⁰ Venum, *supra* note 43 at 70-8.

⁵¹ Pipelines, *supra* note 8, at 26-9.

⁵² 53 P.S. § 10101 (2015).

ordinances like consultation zones will help to provide justification for setbacks that are greater than those in prescribed by Act 13, such as larger setbacks to protect high consequence areas.⁵³

By enacting risk informed ordinances like consultation zones, municipalities will be better protected from the potential harms of pipeline failure.⁵⁴ Pipeline failure can result in loss of life, personal injury, property damage, and environmental damage.⁵⁵ Over the past twenty years pipeline incidents have resulted in a yearly average of nineteen [19] fatalities, seventy [70] hospitalizations, and \$318,16130.00 in property damage.⁵⁶ Pipeline incidents are caused in many ways such as, “pipeline failures, including construction errors, material defects, internal and external corrosion, operational errors, malfunctions of control systems or relief equipment, and outside force damage (e.g., by third parties during excavation)”⁵⁷

Enacting risk informed ordinances like consultation zones help to reduce the number of pipeline incidents.⁵⁸ Through collaboration and information sharing risk informed ordinances allow developers and third parties to be better informed of pipeline locations, thus reducing possible incidents via outside damage.⁵⁹ Furthermore, risk informed ordinances could help municipalities create more appropriate setbacks in areas of high consequence, such as school and hospitals, thus helping to prevent loss of life in the event of a pipeline failure.⁶⁰ Lastly, risk informed ordinances could help to reduce the economic costs of replacing damaged property and

⁵³ *Id.* at iii, 58 Pa. Con Stat. §§ 2301 – 3504. (Act 13 requires that setbacks from pipelines be 750’ unless there is justification for a larger or smaller setback. Here, a High consequence area is an area or building with a large population, thus a larger setback would be justified.)

⁵⁴ Doherty, *supra* note 12, at 3-4.

⁵⁵ Doherty, *supra* note 12, at 3-4.

⁵⁶ U.S. D.O.T. Pipeline and Hazardous Materials Safety Administration, *PHMSA Pipeline Incidents 1995-2014* <https://hip.phmsa.dot.gov/analyticsSOAP/saw.dll?Portalpages> (last visited Sept. 28, 2015).

⁵⁷ Doherty, *supra* note 12, at 3-4.

⁵⁸ Doherty, *supra* note 12, at 1-9.

⁵⁹ Pipelines, *supra* note 8, at 26-9.

⁶⁰ Pipelines, *supra* note 8, at iii.; 58 Pa. Con Stat. §§ 2301 – 3504.

restoring environmental degradation caused by pipeline failure, costs that developers are particularly concerned with.⁶¹ Risk informed ordinances like consultation zones reduce the social, economic, and environmental impacts of pipelines in municipalities.

IV. Risk Informed Setbacks in Other Municipalities

Municipalities outside of the state of Pennsylvania have addressed pipeline safety through risk informed land development use and municipal ordinances. In 1999 a pipeline incident in Bellingham, Washington caused the death of three people and millions of dollars in damage to the municipality.⁶² The incident prompted legislators and citizens to call for the creation of model ordinances on pipeline safety so that local governments may use them when planning near pipelines.⁶³ Among other issues the model ordinance provided various setbacks for new development near pipelines. However, instead of implementing fixed distance setbacks the ordinance created a risk based setback equation, “consistent with the hazard area radius” for pipelines of various diameters and pressurization that were developed in a report for the Gas Research Institute.”⁶⁴ The model ordinance was one of the first of its kind to employ risk informed land use development, by employing clauses that forced stakeholders to collaborate in order to reduce the possibility of a pipeline incident.⁶⁵

In further response to the accident of 1999 community groups consisting of citizens and local governments formed in Washington in order to monitor pipeline activity.⁶⁶ The groups have created websites where they publish technical reports on pipeline safety that drive risk

⁶¹ Pipelines, *supra* note 8, at 6.

⁶² Pipelines, *supra* note 8, at 14

⁶³ Doherty, *supra* note 12, at 10.

⁶⁴ Doherty, *supra* note 12, at 10.

⁶⁵ Doherty, *supra* note 12, at 10.

⁶⁶ Doherty, *supra* note 12, at 10.

informed pipeline decision making in Washington.⁶⁷ The process in Washington has been effective in driving risk informed land use development of pipelines in Washington as is evidenced by frequent city work groups on pipeline safety ordinances.⁶⁸ Thanks to risk informed setback ordinances like the one used in Bellingham, Washington; there have only two pipeline incidents that occurred in 2014 where a developer or third party was responsible for the damage.⁶⁹

Another successful implementation of risk informed pipeline setbacks occurred in Austin, Texas, a city in a state that's known for its oil and natural gas production. In 2000 Longhorn Partners Pipeline LP proposed to repurpose an existing crude pipeline in Austin, Texas so that it could carry more dangerous refined oil through densely populated parts of the city.⁷⁰ As a reaction to that proposal the city of Austin created new zoning and subdivision ordinances based on risk informed land use development policies.⁷¹ In the new ordinances the city modeled setbacks based upon the possible fire hazards of existing pipelines, rather than making a standard fixed distance setback for all of the pipelines in the municipality.⁷² Furthermore high consequence structures such as hospitals and schools are prohibited from being built near existing pipelines unless they obtain a variance from the city council.⁷³

The Austin ordinance is more interesting in terms of how it relates to Pennsylvania law. In Pennsylvania municipalities have the ability to regulate activity around an existing pipeline.

⁶⁷ Doherty, *supra* note 12, at 10.

⁶⁸ City of Bellingham, Washington, *City Council Agenda Bill: Work Session on a Pipeline Safety Ordinance* (2011).

[http://www.cob.org/web/council.nsf/0/6BB1BE7B9C067C498825792F00577E0C/\\$File/24oct2011_AB19355.pdf?OpenElement](http://www.cob.org/web/council.nsf/0/6BB1BE7B9C067C498825792F00577E0C/$File/24oct2011_AB19355.pdf?OpenElement)

⁶⁹ Citizens Advisory Committee on Pipeline Safety, *2014 Pipeline Report*. (2015).

⁷⁰ Doherty, *supra* note 12, at 10-11.

⁷¹ Doherty, *supra* note 12, at 10-11.

⁷² Doherty, *supra* note 12, at 10-11.

⁷³ Doherty, *supra* note 12, at 10-11.

Similarly, the city of Austin also has the ability to regulate activity around an existing pipeline. In order to create a more sustainable development of the city, the ordinance was enacted to ensure new development was in the least risky areas in relation to the pipeline.⁷⁴ The ordinance in Austin has been effective as it is still in use today, and since its implementation in 2000 there has been only one pipeline incident caused by third party damage to a pipeline.⁷⁵

In general it is hard to measure the effects of risk informed land use development on pipelines; this is due to statistic being kept at the national level and not the local level. Taking note of that, since the increase of oil and gas production in 2008 and subsequently the existence of new pipelines, pipeline incidents have increased slightly.⁷⁶ Perhaps this further denotes the need for the risk informed approach.

V. Policy Issues

When adopting ordinances that include risk informed land use development there are a few policy considerations that a municipality must consider. First, any ordinance that imposes a setback may cause a “takings” problem. This is especially the case in areas of high consequence where setbacks would be larger.⁷⁷ By forcing a developer to use less of his land the courts may require the municipality to compensate the developer if they deem the land a “taking”.⁷⁸ Though the “takings” problem is a concern, other municipalities have not had many issues with risk

⁷⁴ Doherty, *supra* note 12, at 10-11.

⁷⁵ City of Austin, Texas, *Development Near Hazardous Liquid Pipelines*, <http://austintexas.gov/departments/development-near-hazardous-liquids-pipelines> (last visited Sept. 28, 2015), PHMSA, *Flagged Incidents File*, (Dec 1, 2014). http://primis.phmsa.dot.gov/comm/reports/safety/IncDetSt_st_TX_flt_sig.html?nocache=8751

⁷⁶ U.S. D.O.T. Pipeline and Hazardous Materials Safety Administration, *PHMSA Pipeline Incidents 1995-2014* <https://hip.phmsa.dot.gov/analyticsSOAP/saw.dll?Portalpages> (last visited Sept. 28, 2015).

⁷⁷ Doherty, *supra* note 12, at 10-13.

⁷⁸ Doherty, *supra* note 12, at 10-13.

informed setbacks. Additionally, risk informed setback ordinances are more likely to withstand a legal challenge, as they do not completely bar an individual from using their land, the ordinance only limits what the individual can do with their land.

A second policy consideration is that of participation.⁷⁹ Risk informed land use development requires the input from various stakeholders.⁸⁰ Should an important party choose not to participate the process would be unsuccessful or at the very least difficult. However, it is likely that pipeline operators would participate although their participation is not required by the attached model ordinance. Pipeline operators are likely to participate in consultations about a setback because they have an investment to protect (the pipeline). It is in an operator's favor to have input in discussions regarding the setback of new development from their pipeline, in order to insure damage to the pipeline doesn't occur from a third party. Additionally, the consultation provides an opportunity for operators to work with the community, which can help to improve their public perception in the community.

Lastly, local governments tend to prefer ordinances that are easy to enforce, as they require less administrative function by the municipality and often less money.⁸¹ Creating ordinances based on risk informed land use development could be difficult to enforce and expensive if requirements are different for every structure along the same pipeline.⁸² However, in the model ordinance attached, the costs of implementing a risk informed setback ordinance is covered in a permit fee that developers would be required to obtain before development.

Although there are a few policy considerations to make note of, risk informed land use development is the best practice for ensuring sustainable development around existing pipelines.

⁷⁹ Doherty, *supra* note 12, at 10-13.

⁸⁰ Doherty, *supra* note 12, at 10-13.

⁸¹ Doherty, *supra* note 12, at 10-13.

⁸² Doherty, *supra* note 12, at 10-13.

VI. Conclusion

Instead of fixed distance setbacks municipalities can create risk informed setbacks or land use, which take into account factors specific to the particular pipeline from which the proposed construction will be setback. This more holistic approach to setbacks allows municipalities to develop sustainably and safely because it reduces the economic and social impacts in the event of a catastrophic pipeline incident. Taking note of the current state of municipal law in Pennsylvania, risk informed land use development is the most sustainable approach for development surrounding pipelines in Pennsylvania municipalities.

ATTACHMENT

RISK INFORMED PIPELINE SETBACK PERMIT ORDINANCE

_____ MUNICIPALITY, _____ COUNTY
ORDINANCE NO. _____

AN ORDINANCE OF _____ MUNICIPALITY, _____ COUNTY, ESTABLISHING PROCEDURES FOR THE CREATION OF RISK INFORMED SETBACKS FROM GATHERING AND TRANSMISSION PIPELINES PRIOR TO THE CONSTRUCTION OF NEW DEVELOPMENT THAT FALL WITHIN THE BOUNDS OF A PIPELINE'S CONSULTATION ZONE IN _____ MUNICIPALITY.

AND NOW, THEREFORE, BE IT ENACTED AND ORDAINED by the Board of _____ MUNICIPALITY, _____ County, Pennsylvania, AND IT IS HEREBY ENACTED AND ORDAINED by the authority of the same, as follows:

SECTION 1. Purposes.

The purpose of this ordinance is to establish the procedures for the creation and implementation of a risk informed setback for all new construction that falls within the consultation zone of a gathering or transmission pipeline within the bounds of _____ municipality. Acknowledging that it is impossible to eliminate all risk this ordinance is intended to do the following:

- (1) Minimize accidental damage to gathering and transmission pipelines due to damage caused by external forces.⁸³
- (2) Lower the risk to areas of high consequence in the event of building evacuation.⁸⁴
- (3) Help to decrease the impact of a catastrophic pipeline failure.

SECTION 2. Applicability.

- (a) Proposed pipelines. This ordinance applies to all proposed development along existing and certain proposed pipeline rights-of-way.⁸⁵

⁸³ Wyoming County, Pa., Ordinance 2011-1 (Dec. 27, 2007).

⁸⁴ Landscapes 2 Model Ordinance, *Surface Land Uses Affiliated with Transmission Pipelines* (Sept. 2014), <http://www.landscapes2.org/pipeline/pdf/GaadtSurfLandUse.pdf>.

⁸⁵ Tri-County Regional Planning Commission Model Ordinance, *Pipeline Safety* (2011), <http://www.tcrpc-pa.org/Documents/Pipeline%20Safety.pdf>.

(b) Existing pipeline. This ordinance applies to pipelines in existence prior to the effective date of this ordinance and pipelines to be constructed after the effective date of this ordinance.⁸⁶

(c) Maintenance. This ordinance is not applicable to a building or structure that relates to the operation and maintenance of a pipeline.

SECTION 3. Definitions.

As used in this Ordinance, the following terms shall have the meaning indicated, unless the context clearly indicates otherwise:

“Consultation zone” An area of land within ____ feet of a gathering or transmission pipeline right-of-way created to initiate communication between property developers and pipeline operators of nearby gathering and transmission pipelines when new land uses and property developments are being planned. The consultation zone distance shall be measured from the pipeline centerline and shall be based on specific pipeline characteristics and local conditions.⁸⁷

“Developer” Any person undertaking development as defined in this Section.⁸⁸

“Development” Activity that involves construction, demolition, grade modification, excavation, filling, blasting, land clearing, new and replacement septic systems, or the deposit of earth, rocks or other materials that places an additional load upon the soil or vibrations through the soil. Construction that involves work totally within an existing building footprint is not development.⁸⁹

“Gathering pipeline” Any a pipeline that transports gas from a current production facility to a transmission line or main.⁹⁰

“High consequence development” A building or structure with a high onsite population [population that determines whether or not a building or structure is of high consequence to be determined by municipality] near a transmission or gathering pipeline.

“Pipeline” All parts of those physical facilities through which gas moves in transportation, including pipe, valves and other appurtenance attached to pipe,

⁸⁶ *Id.*

⁸⁷ PIPA, *Partnering to Further Enhance Pipeline Safety In Communities Through Risk Informed Land Use Planning* (November, 2010).

⁸⁸ Roy City, WA., Code Chapter 39 Pipeline Consultation Zone (Dec. 12, 2011).

⁸⁹ *Id.*

⁹⁰ 49 CFR 192.3 (LexisNexis 2015).

compressor units, metering stations, regulator stations, delivery stations, holders and fabricated assemblies.⁹¹

“Pipeline operator” Any person that owns and partakes in the operation, planning, creation, or maintenance of a pipeline.

“Pipeline setback permit” A permit required by this ordinance before construction can begin on any new development within a consultation zone.

“Right-of-way” A defined strip of land on which a pipeline operator has the right to construct, operate, and maintain a pipeline. The operator may own the strip of land outright or an easement may be acquired for specific use.⁹²

“Transmission pipeline” A pipeline, other than a gathering line that: (1) transports gas from a gathering line or storage facility to a distribution center, storage facility or large volume customer that is not down-stream from a distribution center; (2) transports gas while operating at a hoop stress of 20% or more of specified minimum yield strength; or (3) transports gas within a storage field.⁹³

SECTION 4. Pipeline setback zones.

(a) Consultation zone. A development within ____ feet of a gathering or transmission pipeline right-of-way shall be deemed to be in the pipeline’s consultation zone.

(b) High consequence setback zone. A high consequence development located within a pipeline consultation zone shall have a minimum setback of ____ feet from the pipeline right-of-way.

(c) Minimum setback zone. No development within a consultation zone may be built within 100 feet of the gathering or transmission pipeline right-of-way.

SECTION 5. Pipeline setback permit.

Prior to development within a pipeline consultation zone a developer must obtain a pipeline setback permit from the [Municipality].

SECTION 6. Procedure for obtaining pipeline setback permit.

⁹¹ *Id.*

⁹² PIPA, *Supra* note 5.

⁹³ 49 CFR 192.3 (LexisNexis 2015).

- (a) Procedure. A completed application for a pipeline setback permit must be submitted by the developer to the [Municipality] zoning and planning authority⁹⁴ prior to new development within a pipeline consultation zone.
- (b) Complete application. A completed application for a pipeline setback permit shall include all of the following:
- (1) Written confirmation from the pipeline operator that the developer has provided the pipeline operator with documentation detailing the proposed development activity;⁹⁵
 - (2) A proposed setback for the proposed development based upon the developer's consultation with the pipeline operator, and a third party engineer to be hired by the developer;
 - (3) Contact information for both the developer and the pipeline operator for verification as deemed appropriate by the [Municipality];⁹⁶
 - (4) An application fee of \$__ to cover administrative expenses.
- (c) Application submission. Once a completed application is submitted the [Municipality] zoning and planning authority shall review the application and may either approve or deny the application based upon the proposed setback. An application shall be denied if it does not meet Federal and State setback regulations, or the proposed setback presents an unreasonable risk.
- (d) Approval. The [Municipality] zoning and planning authority will issue a pipeline setback permit valid for the duration⁹⁷ of the proposed development upon approval of the developer's application.
- (e) Denial and appeal. A developer whose application has been denied may amend its original application and reapply within ___ days of receipt of denial. If an application is denied after it has been amended, the developer must restart the application process.

SECTION 7. Enforcement.

- (a) Penalties. A developers who fails to obtain a pipeline setback permit prior to the new development shall be assessed a fine of \$__ to be paid to the

⁹⁴ Here, the municipalities zoning hearing board is most likely the best authority to handle the setback application review.

⁹⁵ Roy City, *Supra* note 6.

⁹⁶ *Id.*

⁹⁷ A municipality may choose to limit the duration of time that a specific permit is valid. In other words a municipality may require that an applicant reapply for a new permit or a continuance of an existing permit.

[Municipality]. The [Municipality] shall suspend any other existing permits granted to developer by the [municipality] zoning and planning authority and may pursue an action for an injunction to halt the development.

(b) Incentives. A developer that complies with the requirements of this ordinance and is issued a valid pipeline setback permit shall be entitled to a __% reduction in [Municipality] local service tax.⁹⁸

SECTION 8. Federal and state compliance.

The applicant shall comply with all applicable Federal and State pipeline setback regulations.

SECTION 9. Severability.

Each separate provision of this Ordinance shall be deemed independent of any other provision of this Ordinance, and if any provision, sentence, clause, section or part hereof is held to be illegal, invalid or unconstitutional or inapplicable to any person or circumstances, such illegality, invalidity, unconstitutionally or inapplicability shall not affect or impair any of the remaining provisions, sentences, clauses, sections or parts of this Ordinance or their application to other parts or circumstances. It is hereby declared to be the legislative intent that this Ordinance would have been enacted as if such illegal, invalid or unconstitutional provision, sentence, clause, section or part had not been included herein, and as if the person or circumstances to which this Ordinance, or any part hereof is inapplicable had been specifically exempted therefrom.⁹⁹

SECTION 10. Repeals.

Any ordinance or part thereof inconsistent with this ordinance is hereby repealed to the extent of such inconsistency. Nothing in this ordinance shall be construed to affect any suit or legal proceeding now pending in any court, or any rights accrued or liability incurred, or any cause of action accrued or existing under any ordinance hereby repealed; nor shall any right or remedy of any character be lost, impaired or affected.¹⁰⁰

SECTION 11. Exemption from liability.

[Municipality] and its agents, officials and representatives shall not be liable for damages caused to any person or property by reason of the issuance of any permit under

⁹⁸ A municipality may want to offer some sort of incentive in order to balance out the burden of the permit requirement. Here, I chose to offer tax break for local services or emergency services, based on the idea that the setbacks would create improve safety.

⁹⁹ PSATS, *Solid Waste Management Model Ordinance*, <https://lawschool.westlaw.com/DocForums/ViewSingleDocument.aspx?postingID=11906382&courseID=198844&forumDBID=955771>

¹⁰⁰ Tri-County Regional Planning Commission Model Ordinance, *Supra* note 3.

the provisions of this ordinance, or by reason of construction in compliance with the terms of this ordinance.¹⁰¹

SECTION 12. Effective date.

This ordinance shall become effective five days after enactment.

¹⁰¹ *Id.*