

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF PUBLIC SAFETY
OFFICE OF PIPELINE SAFETY

In the Matter of the Proposed
Rule of the State Department of
Public Safety Adopting a Model
JUDGE
Setback Ordinance.

REPORT OF THE
ADMINISTRATIVE LAW

The above-entitled matter came on for hearing before Administrative Law Judge Steve M. Mihalchick on Tuesday, March 12, 1991 commencing at 9:00 a.m. in Room 116B, Administration Building, 50 Sherburne Avenue, in the City of St. Paul, Minnesota.

This Report is a part of a rule hearing proceeding held pursuant to Minn. Stat. 14.131 - 14.20, to determine whether the Department of Public Safety has fulfilled all relevant substantive and procedural requirements of law, to determine whether the proposed rules are needed and reasonable, to determine whether the Department has statutory authority to adopt the rules and to determine whether or not the rules, if modified, are substantially different from those originally proposed.

Members of the agency panel appearing at the hearing included: Lee Tischler, Acting Director of the Office of Pipeline Safety, Brian Pierzina, Senior Engineer, David Orren, Management Analyst, Paul W. Norgren, and Joan M. Archer, members of the Land Use Measures to Improve Pipeline Safety Task Force (LUMTIPS), and Nancy Bode, Assistant Attorney General.

Approximately 12 persons attended the hearing and eleven signed the registration sheet. The Department submitted 20 written exhibits. Three written comments were submitted by members of the public.

This Report must be available for review to all affected individuals upon request for at least five working days before the agency takes any further action on the rule(s). The Department may then adopt a final rule or modify or withdraw its proposed rule. If the Department makes changes in the rule other than those recommended in this report, it must submit the rule with the complete hearing record to the Chief Administrative Law Judge for a review of the changes prior to final adoption. Upon adoption of a final rule, the agency must submit it to the Revisor of Statutes for a review of the form of the rule. The agency must also give notice to all persons who requested to be informed when the rule is adopted and filed with the Secretary of State.

Based upon all the testimony, exhibits, and written comments, the

Administrative Law Judge makes the following:

FINDINGS OF FACT

Procedural Requirements

1. On January 17, 1991, the Department filed the following documents with the Chief Administrative Law Judge pursuant to Minn. Rules pt. 1400.0300, subp. 1:

- (a) A copy of the proposed rules approved by the Revisor of Statutes. (Ex. A).
- (b) An Order for Hearing. (Ex. B).
- (c) A proposed Notice of Hearing. (Ex. C).
- (d) A Statement of Need and Reasonableness. (Ex. D).
- (e) A Statement of the number of persons expected to attend the hearing, the time needed for an agency presentation, and a Statement of Additional Public Notice. (Ex. E).

2. On February 4, 1991, the notice of hearing and the proposed rules were published at 15 State Register 1722. (Ex. L).

3. On January 31, 1991, the Department mailed the Notice of Hearing to all persons and associations who had registered their names with the Department for the purpose of receiving such notice. (Ex. H).

4. On February 6, 1991, the Department filed the following documents with the Administrative Law Judge:

- (a) The Affidavit of Mailing the rule and Statement of Need and Reasonableness to the Legislative Commission to Review Administrative Rules. (Ex. F).
- (b) The agency's certification that its mailing list was accurate and complete. (Ex. G).
- (c) The Affidavit of Mailing the Notice of Hearing to all persons on the agency's mailing list. (Ex. H).
- (d) The Affidavit of Mailing discretionary notice of the hearing. (Ex. I).
- (e) An Affidavit of Service of Notice of the Hearing to the Board members of the Real Property Section of the Minnesota State Bar Association. (Ex. J).
- (f) The Notice of Intent to Solicit Outside Opinion regarding the proposed rules published October 31, 1988 together with the comments received. (Ex. K).
- (g) A copy of the State Register containing the Notice of Hearing and proposed rules. (Ex. L).
- (h) A copy of a publication entitled Pipelines and Public Safety

National prepared by the Transportation Research Board of the
Research Council , as well as other reference materials used by
the members of LUMTIPS. (Ex. M).

- (i) A Statement of the agency personnel who would appear at the hearing. (Ex. N).

5. On February 29, 1991 the Department submitted a revised Statement
of the members of the agency panel at the hearing. (Ex. O).

The documents were available for inspection at the Office of Administrative Hearings from the date of filing to the date of the hearing.

6. At the hearing on March 12, 1991 the Department submitted the following documents:

- (a) An Affidavit of Mailing notice of the date of hearing to persons submitting a request for a hearing. (Ex. P).
- (b) A copy of comments received by the Department from the public since February 4, 1991. (Ex. Q).
- (c) The members of the 1991 LUMTIPS Task Force (Ex. R).
- (d) A proposed modification to the proposed rules. (Ex. S).

7. The period for submission of written comment and statements from the public remained open through March 19, 1991 at 4:30 p.m., five working days after the hearing. The record remained open for an additional three working days through March 22, 1991 for responses to earlier submissions.

Statutory Authority

8. The Department states that statutory authority for the proposed rules is set out at Minn. Stat. 299J.05. That statute provides as follows:

- (a) The commissioner shall adopt, by December 31, 1990, a model ordinance under chapter 14 requiring a setback from pipelines in areas where residential or other development is allowed. The model ordinance must apply only to new development and not to development that has occurred, or for which development permits have been issued, before the effective date of the ordinance.
- (b) By August 1, 1991, each statutory or home rule charter city, town, or county that has planning and zoning authority under sections 366.10 to 366.19, 394.21 to 394.37, or 462.351 to 462.365, and in which a pipeline is located, shall adopt a pipeline setback ordinance that meets or exceeds the minimum standards of the model ordinance and is approved by the commissioner. The model ordinance applies in a jurisdiction where the local government unit does not adopt a setback ordinance that is approved by the commissioner by August 1, 1991.

Additionally, Minn. Stat. 299J.04, subd. 1(4) provides that the Commissioner shall adopt rules to implement 299J.01 to 299J.17. The Department has demonstrated its general statutory authority to adopt the proposed rules.

Nature of the Proposed Rule

9. As the statute cited above indicates, this rule contains a model

ordinance for adoption by cities, towns, or counties which establishes a

setback from pipeline sites where residential or other development may occur.
The rule as originally proposed provided definitions, guidelines for adoption of the ordinance by political subdivisions and the model setback ordinance itself which provided a setback from a pipeline "equal to or greater than the pipeline easement boundaries."

Other Rulemaking Requirements

10. The adoption of the rule will not require the expenditure of public money by local public bodies within the meaning of Minn. Stat. 14.11, subd. 1, beyond that required by the legislature in mandating adoption of the model ordinance by political subdivisions. See also, Findings of Fact No. 14. The rule does not fix any fees. Neither does the rule affect small business within the meaning of Minn. Stat. 14.115.

Substantive Provisions of the Proposed Rules

11. The portions of the proposed rules which were subject to comment or presented problems, are discussed below. Any rule or rule subpart not discussed is found to be needed and reasonable and in compliance with all relevant substantive and procedural requirements of law or rule.

Minn. Rule 7535.0100 -- Definitions

12. Minn. Rule 7535.0100, subp. 2 defines "building". "Building" is defined in part as "a structure designed primarily for human use or occupancy including the businesses, offices, educational facilities, medical facilities, residences and institutions." Williams Pipeline Company commented that the phrase "human use" is open to interpretation and suggested further definition in order to avoid litigation over whether storage buildings, garages, sheds, stables, barns, ponds, playground equipment, above-ground swimming pools or hockey rinks would be included. (Ex. W, p. 4). The Department commented that storage buildings, sheds, stables, barns, and similar structures are generally not considered designed for human use or occupancy. It felt that swimming pools, however, would appear to meet the definition of building as proposed. It further stated that utility and communication transmission lines, as well as structures housing utility and communications equipment would not be within the definition since if human use or occupancy is incidental to the purpose of the building, the building would be permitted under the model setback rules.

(Ex. X, p. 12). The Department therefore does not believe that any modification or addition to the definition is necessary. The definition is not so vague or ambiguous as to be legally deficient. The definition is needed and reasonable as proposed.

13. Minn._Rule 7535.0100. subp. 6 defines "pipeline easement" as "the existing easement or the negotiated easement resulting from a blanket easement." Williams Pipeline Company argued that the only bona fide easement is one which is filed of record. It suggested that the following definition be used:

"Pipeline easement" means the easements that is recorded with the Registrar of Titles or Recorder of Deeds on the subject property.

Williams suggests that the existing definition might cause someone to have the false impression that something other than an easement of record could be used to describe the terms and location of the easement. (Ex. W, p. 2). The Department stated in its post-hearing comments that it does not believe that this modification of the definition would be appropriate. It appears that it is the practice of pipeline companies to record every easement since it is in their best interest. However, in the event that an easement is not recorded, it is still necessary to require an application of this rule. The Department also seeks to use the definition to encourage the negotiation of specific easements from blanket easements after installation of the pipeline. The Department did suggest that the definition could be clarified as follows:

Subp. 6. Pipeline easement. "Pipeline easement" means the existing easement or a subsequent easement resulting from the negotiation of a change in the boundaries of the existing easement.

The Department suggests that this more clearly state its intent. (Ex. X, p. 7). The change would not be a substantial one but is merely a clarification. So modified, subpart 6 has been shown to be needed and reasonable.

Hipp, Rule 7535.0400 ---Adoption of Setback Ordinance

14. 7535.0400 Subp. 1 requires each jurisdiction to adopt and approve a setback ordinance meeting or exceeding the minimum standards set out in these rules by August 1, 1991. A number of cities and counties expressed concern about the cost to them of adopting an ordinance and enforcing the ordinance. The Department noted that the Legislature dealt with this concern in the statute by providing that the model setback ordinance applies automatically to a local government unit that does not adopt and approve the ordinance by August 1, 1991. It also noted that the Legislature assigned the administration and enforcement of setback ordinances to local government and stated that the incremental increase in policy and procedures necessary to carry this out should not be significant. The Department noted that it had no authority to specify fees or fixed costs regarding the administration or enforcement. (Ex. X, p. 10). The subpart is needed and reasonable as proposed.

Minn. Rule-7535.0500 - Model Setback Ordinance

15. Minn. Rule 7535.0500, subp. 3 as first proposed provided that "buildings and places of public assembly subject to this ordinance must be designed to accommodate a setback from the pipeline equal to or greater than the pipeline easement boundaries." A large number of commentators found this language to be ambiguous. The Department agreed. It stated that when it proposed the subpart it intended that the setback boundaries would be identical to the easement boundaries. It therefore proposes to adopt the following modification:

Subp. 3. Setback. Buildings and places of public assembly subject to this ordinance shall not be constructed closer to the pipeline than the boundary of the pipeline easement.

The Department states that this change would clarify the dimensions of the setback and minimize the potential for misinterpretation. (Ex. S). A large number of commentors supported this modification. It does not constitute a substantial change since it merely clarifies the original intent behind the rule.

16. Williams Pipeline Company supported a specified setback distance from the pipeline rather than the proposal which equates the setback distance with the easement boundaries. It argued that a specified distance would provide a uniform and consistent distance throughout the State of Minnesota and the boundary could be determined without the need of a survey. It stated that the rule as proposed and modified does not provide a reasonable setback for pipelines on narrow easements and would not provide for a setback from pipelines located by virtue of licenses or permits such as most railroad properties, public lands, and U.S. government lands. (Ex. W, pp. 2-3; see also, Ex. T, p. 1). One commentor suggested a fixed distance of fifty feet from the pipeline for the easement while another suggested 75 feet. In its Statement of Need and Reasonableness the Department noted that a safe distance

from a pipeline in the event of an incident is dependent on a number of wide ranging factors including the size of the pipe, pressure, material carried, depth of cover, climate and character of terrain. Additionally, the costs and benefits associated with imposing a setback distance will vary greatly among jurisdictions. (Ex. D, p. 8). The Department also noted that the LUMTIPS Task Force rejected a set distance for a setback because it was unworkable as a statewide requirement. The LUMTIPS Task Force was made up of 42 people representing pipeline operators, industrial and commercial developers, builders association, municipal representatives, and others. The participants

could not conclude that a specific distance increased the margin of safety expected, at a cost that was not unreasonable. The Task Force suggested that a variance procedure could provide for the mitigation of undue hardships created by unique local circumstances. At the hearing it was noted that the Transportation Research Board had concluded that it was difficult to set specific distances for setbacks because of the many factors involved at different locations. See also, Ex. D, pp. 2-3. The modified rule subpart did

receive widespread support from commentors including the Builders Association of Minnesota, Northern Natural Gas and the Lakehead Pipeline Company. It has been shown to be needed and reasonable. The rule and the statute do permit local jurisdictions to adopt an ordinance with a greater setback if local conditions make that desirable. Setting a specific setback distance at this point would likely be a substantial change.

17. A number of commentors expressed concern about how the rule would apply in the case of blanket easements in which the easement may extend to an entire parcel of land rather than a defined area surrounding the pipeline. Williams Pipeline Company argued that blanket easements are lawful real estate interests and suggested that the rules should not attempt to defeat them. (Ex. W, p. 2). The Mid-Minnesota Development Commission suggested that blanket easements be dealt with by stating that where a blanket construction

easement exists the easement would be 50 feet on either side of the existing

pipeline. It suggested that this would save landowners and governmental jurisdictions from having to hold public hearings to grant variances. It would save the expense of renegotiating and redefining pipeline easements. (Ex. V). Carver County argued that where only blanket easements exist the pipeline companies should be required to survey and redefine that easement. (Ex. U).

18. In its post-hearing comments, the Department stated that as proposed the model ordinance prohibits development within a blanket easement. It stated that many pipeline companies have already implemented programs to eliminate their blanket easements by negotiating a specific easement which reflects their actual requirements. The Department believes that the proposed setback requirement would likely accelerate these programs and initiate new ones. It believes that this can only serve to better define pipeline locations and therefore reduce the potential dangers of excavation and construction near pipelines. The Department noted that under Minn. Stat. 300.045, a pipeline company acquiring an easement, except a temporary easement for construction, must "definitely and specifically describe the easement being acquired, and may not acquire an easement greater than the minimum necessary for the safe conduct of their business." The agency's decision to not provide an exception in the proposed rules for blanket easements has been shown to be needed and reasonable. The agency has articulated its policy judgment and made a reasoned determination. *Manufactured Housing Institute v. Pettersen*, 347 N.W.2d 238, 246 (Minn. 1984). This policy decision is rationally related to the end sought to be achieved by the statute. *Broen Memorial Home v. Minnesota Department of Human Services*, 364 N.W.2d 436 (Minn. Ct. App. 1985).

19. A number of commentators expressed the concern that the adoption of this ordinance by a local jurisdiction would result in the taking of land without compensation. (See, e.g., Ex. T, p. 1). *Williams Pipeline Company* noted that in Pennsylvania the setback rules were not effective for any parcel of property until the title is transferred from its present owner. (Ex. W, p. 5). The Department pointed out that a minimum setback equivalent to the pipeline easement boundary greatly minimizes any adverse condemnation concerns. It noted also that local jurisdictions had the ability to grant variances where undue hardship exists and the safety purpose of the ordinance will not be defeated. (Ex. X, p. 11). Given the specific legislative direction to adopt a model ordinance requiring a setback from pipelines, the model ordinance is needed and reasonable based upon this record. The Department may wish to consider the Pennsylvania approach.

20. Several commentators argued that the proposed rules should include an appeal provision to permit a variance from the ordinance. See, e.g. Ex. W, p. 3. The Department noted that under the statute the model setback ordinance becomes one of the local governmental units ordinances. The planning and zoning authority of each local governmental unit contains procedures governing

variances to local planning and zoning ordinances. The Department argues that it is reasonable for the model ordinance to use existing variance procedures because it will become a part of the existing zoning regulations. It argues that local control over variances is consistent with the position of the Department that costs, risks and benefits of more specific setback requirements can best be determined at the local level. Based on the public comments, however, the Department did suggest that the following language be

added to part 7535.0500, in order to clarify that a local unit of government would handle variances:

Subp. 4. Variances. Variance procedures adopted by the local unit of government under Minnesota Statutes, sections 366.10 to 366.19, 394.21 to 394.37, or 462.351 to 462.365 shall apply.

The change is not a substantial one since it merely clarifies the availability of variances and the procedures for seeking them. It has been shown to be needed and reasonable. The absence of a variance procedure within the model ordinance or the proposed rules does not render them unreasonable.

21. Williams Pipeline Company expressed concern about the interaction between the proposed rules and Minn. Stat. 116I.015 dealing with pipeline routing permits. That statute specifically references Minn. Stat. 299J.05. Williams was concerned that a route in conflict with an ordinance might not be granted a permit. (Ex. W, pp. 3-4). The Department noted that the Environmental Quality Board is responsible for the interpretation of Minn. Stat. 116I.015. However, the Department believes that the model setback ordinance does not govern construction of a pipeline in relation to existing buildings and would therefore have no direct effect on the routing of a pipeline. (Ex. X, p. 10).

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. That the Department gave proper notice of the hearing in this matter.
2. That the Department has fulfilled the procedural requirements of Minn. Stat. 14.14, and all other procedural requirements of law or rule.
3. That the Department has documented its statutory authority to adopt the proposed rules, and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. 14.05, subd. 1, 14.15, subd. 3 and 14.50 (i) and (ii).
4. That the Department has demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of facts in the record within the meaning of Minn. Stat. 14.14, subd. 2 and 14.50 (iii).
5. That the additions and amendments to the proposed rules which were suggested by the Department after publication of the proposed rules in the State Register do not result in rules which are substantially different from the proposed rules as published in the State Register within the meaning of Minn. Stat. 14.15, subd. 3, Minn. Rule 1400.1000, Subp. I and 1400.1100.
6. That any Findings which might properly be termed Conclusions and any Conclusions which might properly be termed Findings are hereby adopted as such .

7. That a finding or conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage the Department from further modification of the rules based upon an examination of the public comments, provided that no substantial change is made from the proposed rules as originally published, and provided that the rule finally adopted is based upon facts appearing in this rule hearing record.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

It is hereby recommended that the proposed rules be adopted consistent with the Findings and Conclusions made above.

Dated this day of April, 1991.

STEVE M. MIHALCHICK
Administrative Law Judge