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# Reauthorized PHMSA Seems Set for Renewed Environmental Emphasis Under President Biden

*By Michael K. Friedberg, Jameson B. Rice, and Shemario O. Winfrey\**

*The Pipeline and Hazardous Material Safety Administration reauthorization was enacted as part of the large omnibus spending bill, the Consolidated Appropriations Act, 2021. The authors of this article discuss the bill, which authorizes funding of the Administration through 2023 and includes many more technical changes that are common in reauthorization bills.*

The Pipeline and Hazardous Material Safety Administration (“PHMSA”) states that its mission<sup>1</sup> “is to protect people and the environment by advancing the safe transportation of energy and other hazardous materials that are essential to our daily lives.” Previous Congresses and administrations have passed laws and promulgated rules with this dual mission of protecting people and the environment in mind, but typically PHMSA looks at near-term environmental effects when it comes to safety.

Some Democrats want to use PHMSA as part of their broader environmental goals to have less carbon in general, and the recent PHMSA reauthorization especially emphasizes the environmental aspect of PHMSA’s mission. The Biden administration will undoubtedly place a renewed emphasis on environmental issues, but it remains to be seen whether it will go so far as to make pipeline safety a true environmental focus.

PHMSA reauthorization was enacted on December 28, 2020, as part of the large omnibus spending bill, the Consolidated Appropriations Act, 2021. The bill authorizes funding of PHMSA through 2023. The new law specifically requires that the environment and safety benefits be considered in a proposed regulations’ cost benefit analysis. According to Republican staff, this provision does not change current procedures related to determining whether a rule’s

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<sup>1</sup> <https://www.phmsa.dot.gov/about-phmsa/phmsas-mission>.

benefits exceeds its costs. Considering this statement is consistent with PHMSA's mission, this seems accurate. However, it may not be the words but rather the emphasis that is telling. The environment and safety are given equal footing.

In addition to this potentially large change in emphasis, the law includes many more technical changes that are common in reauthorization bills, and the bill authorizes the Secretary of the U.S. Department of Transportation and the PHMSA administrator to promulgate significant rules and regulations impacting the national pipeline infrastructure.

While perhaps not as attention-grabbing as the environmental emphasis, these new rules are the “blocking and tackling” of the agency that are likely to make a substantial difference for the industry and all impacted by its regulations. The law includes the following key provisions:

#### **NEW REQUIREMENTS FOR GAS PIPELINE LEAK DETECTION AND REPAIR**

Within one year of the enactment of the bill, the Secretary is required to promulgate a final regulation that requires operators of regulated gathering lines in a Class 2—Class 4 location, operators of new and existing gas transmission pipeline facilities, and operators of new and existing gas distribution pipeline facilities to conduct leak detection and repair programs. The final regulation must require:

- (1) The use of advanced leak detection technologies and practices;
- (2) Identify any scenarios where operators may use leak detection practices that depend on human senses; and
- (3) Include a schedule for repairing or replacing each leaking pipe, except a pipe with a leak so small that it poses no potential hazard.

Further, the final regulation must include minimum performance standards that reflect the capabilities of commercially available advance technologies that are appropriate for such pipelines. While not exclusive, the bill provides a descriptive list of “advanced lead detection technologies” which include equipment capable of continuous monitoring on or along the pipelines, and periodic surveys with handheld equipment, equipment mounted on mobile platforms or other means using commercially available technology.

#### **PRIORITIZATION OF RULEMAKING FOR GAS TRANSMISSION AND GATHERING PIPELINES**

The legislation requires that the Secretary issue a final rule on Gas Transmission and Gathering Pipelines within 90 days of enactment. This rule has been in the works since April 2016 and there is frustration among some in Congress that this delay is political.

## **DEVELOPMENT OF SAFETY-ENHANCING TECHNOLOGIES AND TESTING ENHANCEMENT STUDY**

The bill provides for the establishment and implementation of limited safety-enhancing testing programs to evaluate new technologies and operational practices in the operation of natural gas pipeline facilities and hazardous liquid pipelines facilities. The purpose of this provision is to allow PHMSA to test for methods of improving reliability, accuracy, durability or certainty of pipeline safety technologies, techniques, and methods. The bill allows the testing program to continue for up to three years and requires that the Secretary provide information about such testing programs on the Department of Transportation's website.

The bill also requires the Secretary to provide a report to Congress that outlines the agency's testing capabilities in accordance with the Pipeline Safety Improvement Act of 2002. Further, the agency must also provide a report that determines whether it deems it necessary to create an independent pipeline safety testing facility, the cost and benefits of developing such a facility, and whether the agency could instead use testing facilities of other federal agencies, or federally funded research and development centers.

## **RULES FOR IDLED PIPELINES**

The bill requires that the Secretary promulgate regulations prescribing the applicability of the pipeline safety requirements to idled pipelines. The bill further requires PHMSA or other state agencies to inspect each idled pipeline and verify that such pipeline has been purged of combustibles and hazardous materials.

Further, the Secretary is required to prescribe requirements for the periodic reinspection of idled pipelines and impose testing requirements as a condition for idled pipelines to resume operation.

## **ENHANCED DUE PROCESS PROTECTIONS IN ENFORCEMENT PROCEEDING**

The bill also strengthens due process protections in agency enforcement proceedings. The bill specifically requires that the Secretary shall allow respondents to request the use of consent agreements and orders to resolve any matter of fact or law asserted.

Further, the bill also stipulates that the Secretary shall require the enforcing agency to have the burden of proof, presentation and persuasion in any enforcement matter.

Similarly, the bill requires the Secretary to provide a method for allowing respondents to request expedited enforcement hearings. The bill also allows a



respondent to request that an issue of controversy or uncertainty be addressed through a declaratory order.

### **MODIFICATIONS TO PIPELINE INSPECTIONS AND MAINTENANCE PLAN REQUIREMENTS UNDER 49 U.S.C § 60108**

The bill also amends certain sections of the existing pipeline inspection and maintenance requirements under 49 U.S. Code § 60108. The bill requires that the Secretary or relevant state authority, within two years of the enactment, shall review each pipeline inspection and maintenance plan.

In addition to the existing requirements for such plans, the Secretary is further required to review those plans and consider whether they adequately:

- Address the elimination of hazardous leaks;
- Minimize releases of natural gas from pipeline facilities; and
- Whether such plans address the replacement or remediation of pipelines that are known to leak based on material, design or past operating and maintenance history of the pipeline.

Pipeline operators are required to update their inspection and maintenance plans in accordance with the above considerations. The bill also mandates that each plan shall be reviewed at least once every five years thereafter. If the Secretary or relevant state authority determines that such plan does not comply with the regulations, has not been adequately implemented, is inadequate for the safe operation of a pipeline facility, or is otherwise inadequate, the Secretary is authorized to conduct enforcement proceedings.

### **REVIEW OF PIPELINE CLASS LOCATION CHANGES**

The bill requires that the PHMSA administrator, within one year of enactment, shall review all comments submitted in response to the advance notice of proposed rulemaking entitled “Pipeline Safety: Class Location Change Requirements.”<sup>2</sup> The advanced notice of rulemaking was issued in response to pipeline operators’ suggestion that performing integrity management measures on pipelines where class locations have changed due to population increases would be an equally safe but less costly alternative to the current requirements to either reducing pressure, pressure testing or replace pipe.

After such review, the agency is required to make a determination on the merits of the proposed rule and then move forward accordingly.

### **STUDY ON AUTOMATIC AND REMOTE-CONTROLLED SHUT-OFF VALVES ON EXISTING PIPELINES**

The bill authorizes the Secretary to enter into an arrangement with the National Academy of Sciences (“NAS”) to conduct a study of potential

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<sup>2</sup> See 83 Fed. Reg. 36861 (July 31, 2018).

methodologies and standards for the installation of automatic or remote-controlled shut-off valves in on existing pipelines in high consequence areas for gas transmission pipeline facilities, and commercially navigable waterways or unusually sensitive areas for hazardous liquid pipeline facilities.

The bill mandates that NAS consider, among other things, to the extent practical, methodologies and standards that are compatible with existing regulations relating to the installation of automatic and remote-controlled shutoff valves. NAS is further required to consider methodologies that maximize safety and environmental benefits and the economic, technical, and operational feasibility of installing such valves on existing pipelines. NAS is required to submit a report of its findings to Congress within two years after the date of enactment.

## **TITLE II: LEONEL RONDON PIPELINE SAFETY ACT**

The Leonel Rondon Pipeline Safety Act further requires the Secretary to implement regulations that address natural gas pipeline safety. The law stipulates that the Secretary require each distribution integrity plan developed by an operator of gas distribution pipelines to include risks associated with cast iron pipes and mains in the distribution system, and risks that may result from the operation of a pipeline above its maximum allowable operating pressure.

Further, the Secretary must, within two years of enactment, require that each operator of a distribution system make available to the Secretary or relevant state authority, a copy of its distribution integrity management plan, its emergency response plan, and its procedural manual for operations, maintenance, and emergencies.

The Secretary or relevant state authority is also required to review all plans and documents within two years of the promulgation of the regulations and at least once every five years thereafter. If the Secretary determines that a program is inadequate, the Secretary is empowered to initiate proceedings under the law.