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Senate Passes Reauthorization Bill for PHMSA; House Begins Consideration

By Michael K. Friedberg and David C. Whitestone*

The authors of this article discuss the U.S. Senate's passing of the Securing America's Future Energy: Protecting our Infrastructure of Pipelines and Enhancing Safety Act, reauthorizing the Pipeline and Hazardous Materials Safety Administration ("PHMSA"), the House Energy and Commerce Committee's legislation to reauthorize the PHMSA, and PHMSA's Notice of Proposed Rulemaking, that would significantly broaden the agency's regulatory scope with respect to gas pipelines.

A flurry of activity has surrounded the pipeline industry recently, including reauthorization legislation announcements in both houses of Congress and a Notice of Proposed Rulemaking from the Pipeline and Hazardous Materials Safety Administration.

SENATE LEGISLATION

The U.S. Senate passed S. 2276, the Securing America's Future Energy: Protecting our Infrastructure of Pipelines and Enhancing Safety Act ("SAFE PIPES Act") on March 3, 2016.

The SAFE PIPES Act would reauthorize PHMSA from fiscal year ("FY") 2016 through FY 2019. The bill focuses on completing outstanding mandates from the 2011 reauthorization bill (the Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011). Stakeholders have advocated for a limited bill because PHMSA has been so delayed in promulgating the 42 congressional mandates included in the 2011 pipeline safety bill. To date, PHMSA has completed only 26 of the 42 mandates. The Senate bill requires PHMSA to issue many other important rulemakings required by the 2011 Act, including a major natural gas rulemaking.

OUTSTANDING MANDATES

Important outstanding mandates in the 2011 Act include:

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Automatic and Remote-Controlled Shut-Off Valves for New Transmission Pipelines

Section 4 of the 2011 Act directs the Secretary of Transportation, if appropriate, to require by regulation the use of automatic or remote-controlled shut-off valves, or equivalent technology, where economically, technically and operationally feasible on transmission pipeline facilities constructed or entirely replaced after the date on which the Secretary issues the final rule. This would likely have huge costs with very few safety benefits to the industry.

Maximum Allowable Operating Pressure ("MAOP")

Section 23 of the 2011 Act directs the Secretary to require each pipeline owner or operator of an interstate and intrastate gas transmission pipeline in high consequence areas ("HCA")—including those with populations of 50,000 or more, environmentally sensitive areas and commercially navigable waterways, or within close proximity of homes, buildings or an area that is frequently occupied—to:

(1) verify the physical and operational standards of each pipeline segment;

(2) identify and submit documentation to the Secretary on the MAOP of each pipeline segment; and

(3) report any exceedances of MAOP within five days of when the exceedance occurs.

The 2011 Act also requires the Secretary to issue regulations for testing the material strength of previously untested gas transmission pipelines in HCAs. PHMSA has issued three advisory bulletins to industry on the establishing and reporting of MAOP and verification of records. A rulemaking is still under consideration.

Integrity Management

Currently, owners or operators of gas and hazardous liquid pipelines are required to develop and implement written integrity management programs to ensure the integrity of their pipelines in HCAs and to reduce risk of injuries and property damage from pipeline failures. These programs must include procedures and three processes to identify HCAs, determine likely threats to a pipeline within a HCA, evaluate the physical integrity of a pipe within a HCA, and repair or remediate any pipeline defects found.

Section 5 of the 2011 Act requires the Secretary to transmit a report to Congress evaluating: 1) whether gas and hazardous liquid pipeline integrity management programs should be expanded beyond HCAs, and 2) whether applying integrity management program requirements to additional areas

would mitigate the need for class location requirements (with respect to gas transmission pipeline facilities). Additionally, the 2011 Act directs the Secretary to issue final regulations, if the Secretary finds, in the report, that integrity management requirements should be expanded beyond HCAs. Though the congressionally mandated deadline for the report was January 3, 2014, the report has not been completed.

Leak Detection

Section 8 of the 2011 Act required the Secretary to study and transmit a report to Congress on leak-detection systems utilized by operators of hazardous liquid pipelines and transportation-related flow lines to detect ruptures and small leaks. In conducting the study, the Secretary must analyze the technical limitations of current leak-detection systems and consider the practicability of requiring technical, operational and economically feasible leak-detection standards for operators.

The Secretary completed the study, submitted the report and found that it was practicable to establish such standards, and therefore the Obama Administration plans to issue final regulations to require operators to use leak-detection systems where practicable and establish standards for the capability of such systems to detect leaks. PHMSA says that a rule is currently under agency review.

HOUSE LEGISLATION

On March 16, the House Energy and Commerce ("E&C") Committee's Subcommittee on Energy and Power unanimously passed a discussion draft of a reauthorization bill for PHMSA. This is the first step in the process for the House to pass its version of PHMSA reauthorization, with a floor vote expected later this spring or summer. It is similar to the Senate bill and did not include a previous circulated version with a controversial provision (Actions by Private Persons).

The Actions by Private Persons provision, which some call a "sue and settle" provision, would have allowed the public to take PHMSA to court over alleged regulatory inaction. It was opposed by most industry groups, including the Association of Oil Pipe Lines, The American Gas Association, and the Interstate Natural Gas Association of America.

E&C Committee members have stated that they are working closely with the House Transportation and Infrastructure ("T&I") Committee and expect committee votes this spring. T&I staff members have indicated that they will have their own draft and are currently sharing relevant portions with stakeholders.

PHMSA PROPOSED GAS PIPELINE RULE

Continuing a busy month of March, the PHMSA issued an extensive, 549-page Notice of Proposed Rulemaking on March 17 that would significantly broaden the agency's regulatory scope with respect to gas pipelines.

The impetus for the rulemaking was the 2010 pipeline incident in San Bruno, California, which killed eight people and injured more than 50, while destroying 38 homes. An Advanced Notice of Proposed Rulemaking ("ANPRM") followed in 2011, along with National Transportation Safety Board ("NTSB") recommendations, statutory requirements via the Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011, and a Government Accountability Office ("GAO") recommendation, all of which factored into the proposed rule. However, some of the issues raised by Congress and the administration—and emphasized in the SAFE PIPES Act—were left out of the proposed rule. Notably, automatic or remote-controlled shut-off valves were omitted, with PHMSA stating that it will address this and other issued in a separate rulemaking.

One of the most substantial changes proposed by PHMSA is the creation of a new category: Moderate Consequence Areas ("MCAs"), which would require integrity assessments and safety protections in each "onshore area that is within a potential impact circle . . . containing five (5) or more buildings intended for human occupancy, an occupied site, or a right-of-way for a designated interstate, freeway, expressway, and other principal 4-lane arterial roadway." The agency elected to create the MCA category rather than expand the definition of High Consequence Areas ("HCAs"). Another substantial proposed change is to require that pipelines that were constructed before 1970 be pressure tested. Those pipelines, which were already in place when the applicable regulation went into effect, have thus far been grandfathered and escaped PHMSA-mandated testing.

Other notable regulatory changes proposed by PHMSA include:

- modifying repair criteria for pipelines in HCAs and requiring similar repair criteria in the newly created MCAs, but with more relaxed deadlines for non-immediate conditions;
- adding regulations that require and establish standards for the inspection and repair of onshore transmission pipelines and rights-of-way for "other factors affecting safety and operation" following an extreme weather event, such as hurricanes, floods, earthquakes and other natural disasters, or other similar events that have the likelihood of damage to infrastructure;
- requiring that maximum allowing operating pressure be verified, that

the records used to establish MAOP are reliable, traceable, verifiable and complete, and that operators report when MAOP has been exceeded;

- requiring that certain onshore, steel, gas transmission pipelines confirm and record the physical and operational characteristics of pipelines that lack adequate records;
- establishing certain pipeline attributes that must be included in pipeline data analysis, and requiring that such information be verified, validated and integrated;
- allowing "spike" hydrostatic pressure testing, guided wave ultrasonic testing, and excavation and direct examination, but allowing direct assessment only when internal inspection is impossible;
- adding specificity to models used to assess pipeline risks;
- requiring that knowledge gained from integrity management be applied to the analysis of interacting threats, potential failures and worst-case incident scenarios;
- providing more detailed guidance for the selection of assessment methods, and requiring that an operator using an internal inspection tool consider uncertainties in reported results when identifying anomalies;
- requiring each operator of an onshore gas transmission pipeline to develop and follow a management of change process in accordance with existing national standards;
- allowing a six-month extension of the seven-year reassessment of operators if the operator submits written notice to the Secretary of Transportation, with sufficient justification of the need for the extension, so long as that justification does not pose a safety risk;
- codifying by regulation the portion of the Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011 that requires an operator of a pipeline facility to consider the seismicity of the area when identifying and evaluating all potential threats to each pipeline segment;
- incorporating industry standards for assessing the physical condition of in-service pipelines using in-line inspection, internal corrosion direct assessment and stress corrosion cracking direct assessment; and
- adding explicit requirements for safety features on launchers and receivers associated with in-line inspection, scraper, and sphere facilities.

INDUSTRY CONSIDERATIONS

Comments on the PHMSA rulemaking will be due within 60 days of publication in the Federal Register, which has not yet occurred.

A chart detailing PHMSA's progress in meeting the mandates of the 2011 Act is available from the PHMSA. Many of these rules have been delayed because the costs are greater than the benefits, which is needed by law. Thus, industry should analyze these regulations carefully to determine future legal requirements and whether they are overly burdensome.

As Congress finalizes legislation on these issues, it is seeking industry comments on the effects of these rules, especially the ones that will be issued this spring. Past experiences have shown that Congress will respond to overly burdensome regulations, but only if industry properly explains why the executive branch has gone too far.