

## SAFEGUARDING THE ENERGY PIPELINE TRANSPORTATION SYSTEM & THE PIPES ACT OF 2006

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### I. PIPELINES ARE CRUCIAL TO THE U.S. ECONOMY

Whether heating our homes and businesses or providing the energy supplies for cars, trucks, trains, and airplanes, the transportation of energy products via natural gas and liquid pipelines is critical to our way of life. During the Third Annual Legal Issues and Policy Roundtable, which was held in Annapolis, Maryland in July of 2005 and attended by pipeline CEOs, then-U.S. Transportation Secretary Norman Y. Mineta singled out pipelines as the “unsung heroes of our economy.”<sup>2</sup> Since that time, numerous administrative and congressional officials have come to better understand the critical role played by our nation’s pipeline infrastructure. In many respects, the pipeline infrastructure fulfills the same role for energy products as the Eisenhower Interstate Highway System fulfills for commercial motor vehicles. True, the development of the pipeline infrastructure was not the result of a government program, but these “energy highways” crisscross the nation and to a casual observer appear very similar to the interstate highway system. In fact, more than one confused observer has asked why the federal agency responsible for regulating pipelines would have maps of the interstate highway system on their walls.

Pipelines are the “arteries of the Nation’s energy infrastructure, as well as the safest and least costly ways to transport energy products . . . [and] provide the resources needed for national defense, to heat and cool our homes, generate power for business, and fuel an unparalleled transportation system.”<sup>3</sup> Products transported through the more than 2.3 million miles of regulated lines account for approximately sixty-four percent of the total energy products consumed in the United States each year.<sup>4</sup>

2. Honorable Norman Y. Mineta, U.S. Secretary of Transportation, to the Association of Oil Pipe Lines, Remarks at the American Petroleum Institute and Hunton & Williams’ Third Annual Legal Issues and Policy Roundtable (July 28, 2005).

3. H.R. REP. NO. 109-717, at 5 (2006).

4. *Pipeline Safety Q & A*, PHMSA, March 15, 2007, [http://www.phmsa.dot.gov/media/pipeline\\_qa.html](http://www.phmsa.dot.gov/media/pipeline_qa.html); *Oversight Hearing on Discussion Draft of the Pipeline Safety and Reliability Improvement Act of 2006 Before the H. Subcomm. on Energy and Air Quality of the H. Comm. on Energy and Commerce*, 109th Cong. (2006) (statement of Thomas J. Barrett, Administrator, PHMSA), available at

When one considers the sheer volume of shipments transported safely each day by pipelines, it is easy to see why for over fifty years this mode of transportation has provided our nation with the safest, most cost-effective, and most reliable mode of transportation for large volume energy shipments. An energy transportation system devoid of these pipelines would make the transportation of these products a daunting logistical challenge. For example, a single pipeline transporting 150,000 barrels per day moves a volume equivalent to 750 tanker trucks, or a train of seventy-five rail tank cars.<sup>5</sup> Recent news regarding the security of energy transportation and storage in and near airports highlights the vital role of pipelines. For example, consider a single major international airport in the U.S. Northeast. In order to supply this airport with the necessary refined petroleum products needed to sustain airport operations, over 1,500 dedicated eighteen-wheel tanker trucks would be required in order to provide the capability for two tankers to offload supplies every hour, on the hour, twenty-four hours a day, and seven days a week, covering a round trip of over 2,800 miles.

Additionally, according to the Bureau of Transportation Statistics 2001 Annual Report, sixteen pipeline transportation fatalities occurred in 2000.<sup>6</sup> By contrast, other modes of transportation incurred significantly higher fatalities for goods shipped, especially when analyzed for deaths per billion tons shipped.

	<u>Truck</u>	<u>Rail</u>	<u>Water</u>	<u>Pipeline</u>
<i>Deaths</i>	5,282	937	119	16
<i>Ton-Miles (Billions)</i>	1,249	1,546	646	853
<i>Deaths/ Billion Ton</i>	4.229	0.606	0.135	0.018

Given the capacity constraints facing our national highway and rail systems, coupled with the prohibitive costs and higher risk of transporting such massive shipments of flammable gases and liquids, it is easy to see why the national pipeline system is critical to our economy.

Pipelines carry two major types of energy sources: gas and hazardous liquids. Although natural gas and refined petroleum products account for the vast majority of ton-miles, other products such as hydrogen, carbon

[http://www.phmsa.dot.gov/staticfiles/PHMSA/DownloadableFiles/Files/Testimony%20Files/HO USEnergy-Barrett07-27-06.pdf](http://www.phmsa.dot.gov/staticfiles/PHMSA/DownloadableFiles/Files/Testimony%20Files/HO%20USEnergy-Barrett07-27-06.pdf). [hereinafter Barrett, *Written Statement Before Subcommittee on Energy and Air Quality*]

5. TRANSMISSION PIPELINES AND LAND USE: A RISK-INFORMED APPROACH 20 (Transp. Research Bd. ed., 2004), available at <http://onlinepubs.trb.org/onlinepubs/sr/sr281.pdf>.

6. BUREAU OF TRANSP. STATISTICS, TRANSP. STATISTICS ANNUAL REPORT 142, 159, 174 (2001), available at [http://www.bts.gov/publications/transportation\\_statistics\\_annual\\_report/2001/pdf/entire.pdf](http://www.bts.gov/publications/transportation_statistics_annual_report/2001/pdf/entire.pdf).

dioxide, and ethanol are also routinely shipped via pipeline. Pipeline nomenclature varies somewhat depending upon whether it is a liquid or gas line, but all pipelines can be generally grouped into gathering, transmission, and distribution categories based upon their particular function. For instance, pipelines that collect the product from the sources, either from wells on land, wells offshore, or from shipping, are gathering lines. Transmission lines transport the products to power plants, large industrial customers, and to municipalities and distant markets, such as to airports or tank storage at fuel terminals, for further distribution. Distribution lines transport natural gas to industrial customers, which then deliver the gas to businesses and homes. More recently, pipelines have been in the news as potential targets for terrorists, further amplifying the vital role they play to the U.S. economy.<sup>7</sup>

## II. FEDERAL GOVERNMENT OVERSIGHT OF THE PIPELINE INDUSTRY

On December 29, 2006, following months of intense negotiations between the George W. Bush Administration (Bush Administration) and numerous congressional committees, the President signed into law the Pipeline Inspection, Protection, Enforcement, and Safety Act of 2006 (commonly referred to as the "PIPES Act"). The PIPES Act reauthorizes the Pipeline and Hazardous Materials Safety Administration (PHMSA) through 2010.<sup>8</sup> This article will analyze the PIPES Act and preceding legislation that has formed the pipeline oversight program in place today. In order to place the PIPES Act in its proper context, the article will also discuss the history and role of federal oversight of the pipeline industry.

PHMSA<sup>9</sup> is responsible for overseeing the safety of approximately 2.3 million miles of interstate liquid and gas pipelines. To many, PHMSA is a new agency within the United States Department of Transportation (DOT), but in reality, it has been around for a very long time, albeit under different names. Today's organization was created in 2004 following passage of the "Norman Y. Mineta Research and Special Programs Improvement Act."<sup>10</sup>

Since its creation in 1966, the DOT has been responsible for coordinating all transportation activities and policy within the country. The Department consists of various policy and administrative offices within the Office of the Secretary as well as numerous operating modal

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7. See, e.g., Katharine Q. Seelye, *Oil Industry Seeks Federal Help Against Terror*, N.Y. TIMES, Nov. 5, 2001.

8. See Pipeline Inspection, Protection, Enforcement, and Safety Act of 2006, Pub. L. No. 109-468, § 5, 120 Stat. 3486, 3496 (2006).

9. Pronounced "Fim·Sá."

10. Pub. L. No. 108-426, 118 Stat. 2423 (2004).

administrations charged with carrying out the regulatory and operational oversight of the transportation industry. During the first term of the Bush Administration (2000-2004), those semi-autonomous modal administrations included:

- Federal Aviation Administration (FAA);<sup>11</sup>
- Federal Highway Administration (FHWA);
- Federal Motor Carrier Safety Administration (FMCSA);<sup>12</sup>
- Federal Railroad Administration (FRA);
- Federal Transit Administration (FTA);
- Maritime Administration (MARAD);<sup>13</sup>
- National Highway Traffic Safety Administration (NHTSA);
- Research and Special Projects Administration (RSPA);
- Saint Lawrence Seaway Development Corporation;<sup>14</sup> and
- United States Coast Guard (USCG).<sup>15</sup>

By mid-2004, Transportation Secretary Mineta announced that a reorganization of RSPA and its offices was required in order to increase the effectiveness of these programs.<sup>16</sup> The reorganization proposal submitted to Congress divided RSPA into two distinct operating administrations, the Research and Innovative Technologies Administration (RITA) and the Pipeline and Hazardous Materials Safety Administration (PHMSA).<sup>17</sup>

PHMSA itself contains several sub-offices, but the two most recognizable are the Office of Hazardous Materials Safety (OHMS) and the Office of Pipeline Safety (OPS). The offices work together to oversee the secure movement of hazardous materials by pipelines, with OPS leading the effort in establishing pipeline safety policy and enforcing the various pipeline-specific congressional mandates. This now allows a single entity to concentrate on transportation of dangerous good by all modes of transportation.

### III. A STEPPING STONE TO THE PIPES ACT: PIPELINE SAFETY IMPROVEMENT ACT 2002

Although there has been much legislation affecting pipelines over the

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11. Formally the "Civil Aeronautics Board," an independent agency.

12. Created in 2000; formally the "Office of Motor Carriers" (OMC) of the Federal Highway Administration.

13. Includes the United States Merchant Marine.

14. U.S. component of U.S.-Canadian joint venture corporation.

15. Transferred to the Department of Homeland Security.

16. These offices include the Volpe Research Center, the Office of Hazardous Materials Safety (OHMS), the Office of Pipeline Safety (OPS), Transportation Safety Institute (TSI), and the Office of Emergency Transportation (OET).

17. § 2, 118 Stat. at 2423.

years, perhaps none was as far reaching as the Pipeline Safety Improvement Act of 2002 (PSIA). Signed into law on December 17, 2002, PSIA reauthorized the pipeline safety program from 2002-2006.<sup>18</sup> To many however, PSIA wasn't simply the most recent in a long string of pipeline authorization; it was a piece of legislation with sweeping mandates and impacts upon the industry. Moreover, the final language was only reached after contentious, and at some points heated, debate. Nonetheless, PSIA is now seen as the vehicle by which pipeline safety oversight came of age. According to Vice-Admiral Thomas J. Barrett, USCG (Ret.), the current Administrator of PHMSA, PSIA was a "most important milestone... [because] it set the stage in law for a systems approach to managing and reducing pipeline risks."<sup>19</sup> For the first time, legislation was proposed and enacted that adopted a systematic, risk-based, management approach to the pipeline safety program. PSIA started what is today the centerpiece of PHMSA's regulatory programs, using scientific data to quantify and address the inherent risks and resulting potential consequences associated with transporting large quantities of energy products through pipelines. PSIA remains the foundation upon which PHMSA's programs, and the resulting PIPES legislation, are based. This section discusses the key PHMSA programs established by PSIA.

#### A. Integrity Management Programs

Under PSIA, PHMSA was entrusted with issuing regulations prescribing standards for implementation of an integrity management program. At a minimum, the integrity management program had to include a baseline integrity assessment, sometimes also known as a risk-based plan, to be completed in most areas affecting High Consequence Areas (HCAs) by December 17, 2007. Shortly after the passage of the Act, PHMSA complied with PSIA requirements and promulgated regulations setting forth the baseline standards for integrity management programs for pipelines in HCAs and the elements of the integrity management program.<sup>20</sup>

For the first time, pipeline operators were required to prepare and implement "integrity management programs" for gas and liquid pipelines in HCAs.<sup>21</sup> This law, still in effect today, requires each operator of a pipeline facility to assess gas transmission pipeline segments in

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18. See Pipeline Safety Improvement Act of 2002, Pub. L. No. 107-355, § 2, 116 Stat. 2985, 3002-3005 (2002).

19. Barrett, *Written Statement Before Subcommittee on Energy and Air Quality*, *supra* note 4.

20. Pipeline Integrity Management in High Consequence Areas, 68 Fed. Reg. 18, 4278 (proposed Jan. 28, 2003) (to be codified at 49 C.F.R. pt. 192) [hereinafter Proposed Rule].

21. § 14, 116 Stat. at 3002-3005.

approximately 20,000 miles of highly populated areas for safety threats, such as incorrect operation and corrosion, and implement a written integrity management program to reduce the risks.<sup>22</sup> Specifically, an integrity management program is a “set of safety management, analytical, operations, and maintenance processes that are implemented in an integrated and rigorous manner to assure operators provide protection for HCAs.”<sup>23</sup> According to PHMSA, this program has four objectives: 1) to perform integrity assessments of pipelines in locations where a pipeline failure could have adverse consequences; 2) to improve operator management, analytical, and operational processes to manage pipeline integrity; 3) to increase the government’s role in the oversight of operator integrity management programs and activities; and 4) to improve public confidence and safety.<sup>24</sup>

The integrity management rules for natural gas differ slightly from the integrity management rules for hazardous liquids due to significant variations in consequence management arising from the different properties of each type of line. For example, a natural gas pipeline rupture usually results in vertical venting of product into the atmosphere, whereas a liquid pipeline rupture generally results in the product runoff conforming to the topography of the surrounding earth. Thus, the definitions of HCAs for natural gas and hazardous liquid pipelines differ based on the potential safety concerns each pose. HCAs for natural gas pipelines are defined as those highly populated and condensed areas or those areas that lie within 100 yards of a building or well defined outside area, such as a park or outdoor theatre.<sup>25</sup> For liquid pipelines, HCAs include commercially navigable waterways; high population areas<sup>26</sup> with 50,000 or more people or a population density of at least 1,000 people per square mile; other populated areas, with a concentrated population as defined by the Census Bureau; and Unusually Sensitive Areas (USA).<sup>27</sup> A USA is an ecological resource or drinking water area that is unusually sensitive to environmental damage from a hazardous liquid pipeline release.<sup>28</sup> Examples of USAs include the water intake for a community water system, a migratory waterbird concentration area, or an area containing an imperiled, threatened, or endangered species or imperiled ecological community where the species is considered to be one of the most viable, highest quality, or in the best condition.<sup>29</sup>

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22. *Id.*

23. PHMSA Pipeline Safety Program; Stakeholder Communications: Briefing: Integrity Management, <http://primis.phmsa.dot.gov/comm/IM.htm> (last visited November 15, 2007).

24. *Id.*

25. See 49 C.F.R. § 195.450 (2007).

26. High population area means an urbanized area as defined by the Census Bureau.

27. 49 C.F.R. § 195.450.

28. 49 C.F.R. § 195.2.

29. 49 C.F.R. § 195.6.

Under PSIA, PHMSA was entrusted with issuing regulations prescribing standards for implementation of an integrity management program. At a minimum, the integrity management program had to include a baseline integrity assessment, or a risk-based plan, for each of the operator's facilities, with at least fifty percent of pipelines affecting HCAs assessed by December 17, 2007.<sup>30</sup> As required by PSIA, shortly after the passage of the Act, PHMSA promulgated regulations setting forth the baseline standards for integrity management programs for pipelines in HCAs and the elements of the integrity management program.<sup>31</sup>

Specifically, the regulations identified and described four acceptable baseline assessment methods to assess the integrity of the pipelines:

- (1) internal inspection, also known as inline inspection or ILI, and pig testing;<sup>32</sup>
- (2) hydrostatic pressure testing;
- (3) external direct assessment, which includes data gathering, analysis, and post assessment evaluation; and
- (4) any other method that can provide an equivalent understanding of the pipe's condition.<sup>33</sup>

The integrity management program elements, contained in 49 C.F.R. § 195 must, at a minimum, include the following:

- (1) identify all HCAs;
- (2) develop a baseline assessment plan that identifies the potential threats to the pipeline by using the above described methods;
- (3) integrate assessment results with other relevant information to improve understanding of the pipe's condition;
- (4) repair pipeline defects found by the assessment results within certain deadlines;
- (5) conduct periodic baseline reassessments;
- (6) take measures to prevent and mitigate threats to the HCAs such as reducing third party damage; and
- (7) maintain records that document compliance with the program.<sup>34</sup>

Assessments of all pipelines *that can affect* HCAs must be completed by December 17, 2012.<sup>35</sup> Note the specific use of the words "that can affect" is intentionally broad. Additionally, PSIA requires periodic

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30. § 14, 116 Stat. at 3002-3005.

31. Proposed Rule, *supra* note 19, at 4280.

32. A pig is a device which is inserted inside the pipeline for the purpose of cleaning, dimensioning, or inspecting the integrity of the line.

33. Proposed Rule, *supra* note 19, at 4280.

34. See 49 C.F.R. § 192.911 (2007).

35. § 14, 116 Stat. at 3002-3005.

reassessments of the pipelines within seven years.<sup>36</sup> The seven-year interval was picked as a compromise, without regard to a technical or safety basis, between various factions which had argued for shorter or longer timeframes. This reassessment interval, which will be discussed further in Sections IV(H)-(I) *infra*, is significant as the current arbitrary interval requirement runs counter to established public policy requiring regulatory development to occur against the backdrop of a risk-management perspective based upon scientifically quantifiable data.<sup>37</sup> By applying such criteria, the frequency of reassessment should be based on the risks presented by each segment, not on a one-size-fits-all approach or merely on the integrity assessment. Risk is determined by factors such as the previous integrity assessments of the pipe condition, leak history, stress levels, operating and maintenance practices, population density, and presence of drinking water sources.<sup>38</sup>

In addition to reassessment of the pipes, operators must implement preventive or mitigative measures to address the most significant threats identified by the risk analysis.<sup>39</sup> These measures include improving corrosion control monitoring; enhancing control center operator training; installing automatic shut-off valves; improving leak detection system capability; conducting emergency drills with local emergency responders; and replacing pipe segments with pipe of heavier wall thickness.<sup>40</sup>

### B. Operator Qualification Programs

PSIA also required pipeline facilities to develop and implement qualification programs for individuals performing sensitive tasks.<sup>41</sup> After receiving input from industry leaders and state and federal regulators, PHMSA set forth regulations for operator qualification requirements. Operator qualification (OQ) programs apply to individuals who perform “covered tasks,” which are defined as those operations or maintenance tasks that affect the operation or integrity of the pipeline.<sup>42</sup> The operator must evaluate and assess whether an individual can perform the covered tasks as well as recognize and react to abnormal operating conditions.<sup>43</sup> An evaluation can consist of a written examination, oral examination, work performance history review, or observation during performance on the job, on the job training, or simulations.<sup>44</sup> An operator must document

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36. *Id.*

37. See 49 C.F.R. §§ 192.939, 192.943.

38. PHMSA Pipeline Safety Program; Stakeholder Communications: Briefing: Integrity Management, <http://primis.phmsa.dot.gov/comm/IM.htm> (last visited November 20, 2007).

39. 49 C.F.R. § 192.935.

40. *Id.*

41. § 13, 116 Stat. at 2999-3002.

42. 49 C.F.R. § 195.501.

43. 49 C.F.R. §§ 195.503, 195.505.

44. 49 C.F.R. § 195.503.

the qualification methods and the individuals who are qualified, the tasks they are qualified to perform, and the dates of current qualification.<sup>45</sup> It falls to the federal and state pipeline inspectors to ensure operators are evaluating their employees and contractors.<sup>46</sup> PHMSA established an OQ form organized around nine elements in order to assist inspectors in examining an operator's OQ program.<sup>47</sup> These nine elements are further subdivided into protocol and protocol questions to guide inspectors through the inspection process. Inspectors are instructed to examine the following nine elements of an operator's OQ plan:

- (1) assess the application of the document program plan, implementation procedures, and qualification criteria;
- (2) identify covered tasks and related evaluation methods;
- (3) identify individuals performing covered tasks;
- (4) evaluate and qualify individuals performing covered tasks;
- (5) assess the continued evaluation of individuals performing covered tasks;
- (6) determine how the operator monitors program performance to seek improvement opportunities;
- (7) determine whether the operator maintains program records;
- (8) assess the management of change; and
- (9) assess the field verification.

If the inspections reveal violations of the OQ requirements, enforcement actions will be taken pursuant to current agency policy.<sup>48</sup>

### *C. Public Awareness Programs*

Pipeline operators must conduct public awareness programs to educate the public on various issues, including the use of the "One-Call" system prior to excavation and other damage prevention activities, the hazards associated with unintended releases from the pipeline facility, the physical indications that such a release may have occurred, the steps to be taken for public safety in the event of a release, and how to report an event.<sup>49</sup> The One-Call law requires at least 48-hour advance notification to the state One-Call center prior to any excavation in order to minimize excavation damage of gas, electric, and other utility lines.<sup>50</sup> The program must be implemented in accordance with the American Petroleum

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45. 49 C.F.R. § 195.507.

46. *See* 49 C.F.R. § 195.509.

47. DEPT OF TRANSP., PROTOCOL QUESTIONS, <http://primis.phmsa.dot.gov/oq/protocols.htm> (last visited November 20, 2007).

48. *Id.*

49. § 5, 116 Stat. at 2988-89.

50. *See id.*

Institute's (API) Recommended Practice (RP) 1162.<sup>51</sup> Developed by industry representatives, federal and state pipeline safety regulators, and the public, API RP 1162 provides guidance and recommendations for the development of a public awareness program. For instance, it delineates the intended audience, messages to be communicated, frequency of the message, and the best delivery method.<sup>52</sup>

In this continuing education program, operators must include ways to advise affected municipalities, school districts, businesses, and residents of pipeline facility locations.<sup>53</sup> Additionally, operators must review their programs for effectiveness and modify the program as necessary.<sup>54</sup> In June 2006, PHMSA issued an advisory opinion to inform operators how to submit their written public awareness programs to PHMSA for review.<sup>55</sup>

#### *D. PSIA's Impact*

PSIA impacted pipeline safety in numerous other ways. For instance, penalties for violations of safety standards increased by 400 percent from \$25,000 to \$100,000.<sup>56</sup> Agencies are required to work together to formulate a program of research, development, demonstration, and standardization to enhance the integrity of pipeline facilities.<sup>57</sup> Employees are protected from discrimination if they provide information to an employer or the government about a violation of pipeline safety.<sup>58</sup> Operators must provide the Secretary with a map of pipelines for use in creating a national pipeline mapping system.<sup>59</sup> Additionally, the law established a toll-free telephone number to be used by the One-Call notification programs previously discussed above.<sup>60</sup>

Thanks to the regulations established by PSIA and PHMSA's oversight, pipeline failures and accidents have declined over the last five years. From 1996-2000, an average of sixty-two serious incidents was recorded.<sup>61</sup> This number declined to an average of forty-five incidents

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51. 49 C.F.R. § 192.616.

52. AM. PETROLEUM INST., PUBLIC AWARENESS PROGRAMS FOR PIPELINE OPERATORS, API RECOMMENDED PRACTICE 1162, p. 19-23 (1st ed. 2003), available at <http://committees.api.org/pipeline/standards/docs/1162nonprintable.pdf>.

53. § 5, 116 Stat. at 2988-89.

54. *Id.*

55. Pipeline Safety: Submission of Public Awareness Programs, Notice, 71 Fed. Reg. 116 (June 16, 2006).

56. § 8, 116 Stat. at 2993.

57. § 12, 116 Stat. at 2997-2999.

58. § 6, 116 Stat. at 2989-2993.

59. § 15, 116 Stat. at 3006.

60. § 17, 116 Stat. at 3008.

61. See PHMSA Stakeholder Communications: Serious Pipeline Incidents, <http://primis.phmsa.dot.gov/comm/reports/safety/SerPSI.html> (last visited November 20, 2007).

from 2001-2006.<sup>62</sup> The success of PSIA belies the extremely high level of concern and, at times, outright opposition against the bill as it progressed through Congress. At the end of the day, however, all agree that PSIA worked and worked well. As declared by Representative Petri (R-WI), the “2002 safety bill was an overwhelming success.”<sup>63</sup> Against this backdrop, PHMSA began drafting the next reauthorization bill during the summer of 2005 for congressional consideration prior to the expiration of PSIA on September 30, 2005.

#### IV. THE PIPES ACT

Internal drafting of a new reauthorization bill to carry PHMSA forward (2006-2010) was suddenly and unexpectedly interrupted by Hurricanes Katrina and Rita. Although beyond the scope of this paper, the Bush Administration’s reauthorization proposal was delayed by almost six months while the agency was consumed with facilitating, and in many cases, directly supervising and directing critical pipeline infrastructure repair and hazardous materials transportation into and out of the affected areas in the storms’ aftermath. While the hurricanes may have delayed the submission of the proposed legislation, they provided the agency and the Bush Administration with an opportunity to modify the proposed legislation, taking into account many lessons learned during the intervening period.

The PIPES Act widens previous legislative requirements by placing more emphasis on damage prevention, enhancing state programs’ oversight of pipelines, and clarifying PHMSA’s responsibilities during natural disasters.<sup>64</sup> As stated by Representative Don Young (R-AK), it “keeps us moving in the same positive direction as the 2002 pipeline bill.”<sup>65</sup> The bill was first introduced in the House of Representatives on July 13, 2006 by Representative Young, then-Chairman of the powerful House Transportation and Infrastructure Committee, and Representative Thomas Petri, then-Chairman of the House Subcommittee on Railroads, Pipelines and Hazardous Materials.<sup>66</sup>

The new draft legislation would not, however, be a replay of the contentious 2002 PSIA. Instead, the bill quickly navigated the various committees and was passed by voice vote in the House on December 6, 2006. It was unanimously passed by the Senate on December 7, 2006, and President Bush signed the Act into law on December 29, 2006.

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62. *Id.*

63. 152 CONG. REC. H8,839 (daily ed. Dec. 6, 2006) (statement of Rep. Petri).

64. Barrett, *Written Statement Before Subcommittee on Energy and Air Quality*, *supra* note 4, at 4.

65. 152 CONG. REC. H8,839 (daily ed. Dec. 6, 2006) (statement of Rep. Young).

66. 152 CONG. REC. H5,222 (daily ed. Dec. 6, 2006).

In considering the Bush Administration's proposal, Congress quickly adopted most of its major provisions and avoided potentially controversial provisions, instead focusing on all the "hard work and remarkable progress that occurred at PHMSA over the past four years."<sup>67</sup> While the bill does contain compromises, Representative Young is certain that compromises reached will not "take away from the impact of the bill."<sup>68</sup>

#### A. Executive Confirmation

One far-reaching and perhaps the least understood impact of the PIPES Act on pipeline operators is the new requirement that companies submit a statement by a senior company executive attesting to the accuracy of annual and semi-annual pipeline integrity management program performance reports.<sup>69</sup> Although PHMSA has not yet emphasized the importance of this requirement, the law requires the executive to attest to PHMSA that they have personally reviewed the report and, to the best of the executive's knowledge, the report is true and complete.<sup>70</sup> According to Admiral Barrett, PHMSA "needs to increase management's accountability and place additional attention on the importance of having more precise information to target safety risks."<sup>71</sup> Considered by some to be a "Sarbanes-Oxley lite" for pipelines, the agency's intent is to ensure executive accountability over integrity management programs without the need to increase the agency's enforcement resources in light of several instances where senior company executives had not provided sufficient oversight of their company's programs.

#### B. Damage Prevention

The PIPES Act focuses on damage prevention from construction activities. According to PHMSA, construction related damages have increased at a rate of fifty percent from 1996 to 2005.<sup>72</sup> Virginia and Minnesota already have strong damage prevention programs in place and have seen a fifty percent reduction in construction damage.<sup>73</sup> By

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67. 152 CONG. REC. H8,839 (daily ed. Dec. 6, 2006) (statement of Rep. Young).

68. *Id.*

69. *See* Pub. L. No. 109-468, § 16, 120 Stat. 3486, 3496 (2006).

70. *Id.*

71. *Oversight Hearing on Discussion Draft of the Pipeline Safety and Reliability Improvement Act of 2006 Before S. Comm. on Commerce, Sci., and Transp.*, 109th Cong. 4 (Nov. 16, 2006) (statement of Thomas J. Barrett, Adm'r., PHMSA), available at <http://www.phmsa.dot.gov/staticfiles/PHMSA/DownloadableFiles/Files/Speech%20Files/SENA%20Commerce-Barrett11-16-06WrittenTestimonyPSReauth.pdf>. [hereinafter Barrett, *Written Statement Before Committee on Commerce, Science, and Transportation*]

72. *Id.* at 1.

73. *Id.* at 2.

enforcing the practice of calling before digging, both of these states have fewer than three damages per one thousand one-call tickets.<sup>74</sup> The success of these state programs influenced many of the third party damage prevention provisions adopted in the PIPES Act.

Section 2 of the PIPES Act provides for significant additional protocols and authorizes the assessment of a civil penalty by state agencies in order to address incidents arising from damage caused by construction-related activities.<sup>75</sup> A person who engages in demolition, excavation, tunneling, or construction in the vicinity of a natural gas or hazardous liquid pipeline must first use the state's One-Call system to establish the location of the underground pipeline.<sup>76</sup> The person cannot disregard the markings established by a pipeline operator, and is required to promptly report pipeline damage.<sup>77</sup> Any pipeline operator who fails to respond to a location request to prevent damage or fails to take reasonable steps to ensure accurate marking is subject to civil penalties for One-Call violations.<sup>78</sup> By expanding what PSIA first began in 2002, the new law, applicable to excavators and operators alike, seeks to reduce the number of One-Call violations and, in turn, reverse the increasing trend of excavation incidents. Although the program is designed to address third-party damage, operators must also continue to pay close attention to these new requirements in order to avoid an enforcement action.

As a part of this new national program, the Common Ground Alliance<sup>79</sup> (CGA) and PHMSA obtained a national three digit number from the Federal Trade Commission to facilitate ease of use. Launched by CGA and Secretary of Transportation Mary Peters on May 1, 2007 during a public event on the National Mall in Washington, DC, "811" went live across the country, thereby replacing numerous toll free "800" numbers which varied from state to state.

The PIPES Act also contains incentives in the form of grants for states to implement damage prevention programs to reduce excavation damage to pipelines. States, which oversee ninety percent of operator compliance, had complained that ever-increasing federal oversight and

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74. *Id.* at 2.

75. *See* § 2, 120 Stat. at 3486-89.

76. *Id.*

77. *Id.*

78. *Id.*

79. The Common Ground Alliance (CGA) is a member-driven group committed to ensuring public safety, environmental protection, and integrity of services through promotion of effective damage prevention practices. The CGA was formed in 2000 as a continuation of the efforts embodied by the Common Ground Study. Completed in 1999, the U.S. Department of Transportation-sponsored study is the result of the collaborative work of 160 industry professionals who identified best practices relating to damage prevention. For more information see: <http://www.commongroundalliance.com>.

regulatory responsibilities were unfairly requiring them to absorb cost increases associated with carrying out the program.<sup>80</sup> So, the PIPES Act increased the federal share in grants for state programs from fifty percent to eighty percent.<sup>81</sup>

In order to be eligible to receive grants, states must have or demonstrate that they have made substantial progress toward establishing an annual pipeline safety program certification and a qualified damage prevention program.<sup>82</sup> The PIPES Act also offers states incentives to leverage technology in order to prevent incidents and lower the call-out rates for operators.

Section 3 of the Act makes a grant available to the appropriate entity to promote public education and awareness of the One-Call national excavation damage prevention phone number, 811.<sup>83</sup> The Secretary is entrusted with the authority to choose the appropriate entity and is authorized to spend one million dollars through September 30, 2008.<sup>84</sup>

### C. Low-Stress Pipelines

In February 2006, approximately 270,000 gallons of oil leaked into Alaska's Prudhoe Bay, the largest spill in the region's history.<sup>85</sup> In response to the Prudhoe Bay incident, Section 4 of the PIPES Act provides for new federal oversight of previously unregulated low-stress (i.e., low-pressure) hazardous liquid pipelines.<sup>86</sup> The cause of the spill was a quarter-inch hole in a corroded low-stress pipe, which some believe was caused by inadequate operating and maintenance procedures by the operator of the pipeline.<sup>87</sup> Due to the winter climate and the small size of the leak, the event went undetected for five days before a field worker smelled the crude oil, which resulted in damage to over two acres of land.<sup>88</sup> To make matters worse, additional pipe defects were uncovered by the operator following new inspections mandated by PHMSA.<sup>89</sup> Shortly thereafter, rumors of other long-standing operating claims of

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80. See Barrett, *Written Statement Before Subcommittee on Energy and Air Quality*, *supra* note 4, at 6.

81. § 2, 120 Stat. at 3486-3489.

82. *See id.*

83. § 3, 120 Stat. at 3489-90.

84. *Id.*

85. John Roach, *Alaska Oil Spill Fuels Concerns Over Artic Wildlife, Future Drilling*, NAT'L GEOGRAPHIC NEWS, Mar. 20, 2006, available at [http://news.nationalgeographic.com/news/2006/03/0320\\_060320\\_alaska\\_oil.html](http://news.nationalgeographic.com/news/2006/03/0320_060320_alaska_oil.html).

86. § 4, 120 Stat. at 3490.

87. Roach, *supra* note 83.

88. *Id.*

89. *Oversight Hearing on BP Pipeline Failure Before S. Comm. on Energy and Natural Res.*, 109th Cong. 5 (Sept. 12, 2006) (statement of Thomas J. Barrett, Adm'r, PHMSA), available at <http://www.phmsa.dot.gov/staticfiles/PHMSA/DownloadableFiles/Speeches/SENATEEnergy-BarrettSept12.pdf>. [hereinafter Barrett, *Written Statement Before Committee on Energy and Natural Resources*]

previous government civil and criminal probes surfaced. As a result, congressional pressure was immense and the proposed language was replaced by much more stringent language which mandates coverage of *all* low-stress lines. Previously, the agency had exempted lines, regardless of size, operating at less than eighty percent of maximum operating pressure (MAOP) because they had low probability for a major safety accident. Before the passage of the PIPES Act, PHMSA had already proposed expanding the new safety requirements in order to cover additional miles of lines operating in or near environmentally sensitive areas. The agency's formal public proposal, initiated in 2004 and made public in August 2006, advocated safety requirements addressing the most common threats to the integrity of the low-stress rural lines: corrosion and third-party damage.<sup>90</sup> The proposal did not, however, cover smaller lines in rural areas away from environmentally sensitive areas where risks were considered minimal.<sup>91</sup> The PIPES Act now requires PHMSA to complete the rulemaking and issue regulations by December 31, 2007.<sup>92</sup> Perhaps one fact lost in the ensuing public outcry is that most low stress lines are very small in diameter and short in distance and thus, any leak would not approach the amount of crude oil released by the thirty-four inch line on Alaska's North Slope. Requiring all lines to adhere to the full spectrum of regulatory oversight may prove counterproductive to overall production capabilities as many smaller operators may find marginal lines are no longer profitable. Additionally, Congress gave PHMSA the specific authority to drop current exemptions for lines operating under U.S. Coast Guard authority, as well as for those gathering lines less than one mile in length and contained wholly within a facility.

#### *D. Transparency*

Section 6 of the PIPES Act ensures the transparency of pipeline safety enforcement.<sup>93</sup> By December 31, 2007, PHMSA must provide to the public a monthly updated summary of all pipeline enforcement actions taken.<sup>94</sup> This monthly report will give the public "valuable insight into areas where problems exist, and [give] pipeline operators a forum to demonstrate they have been corrected."<sup>95</sup>

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90. *Id.* at 5; Notice of Proposed Rulemaking, 71 Fed. Reg. 52504, 52504-05 (Sept. 6, 2006).

91. Notice of Proposed Rulemaking, *supra* note 88, at 52508.

92. § 13, 120 Stat. at 3495.

93. § 6, 120 Stat. at 3491.

94. *Id.*

95. 152 CONG. REC. H8,844 (daily ed. Dec. 6, 2006) (statement of Rep. Dingell).

### *E. Excess Flow Valves*

Another important aspect of the PIPES Act is Section 9's requirement for PHMSA to prescribe minimum standards for integrity management programs for distribution pipelines.<sup>96</sup> The minimum standards require operators of natural gas distribution systems to install excess flow valves (EFVs) and report annually on the number of EFVs installed on single family residence service lines connected to natural gas distribution systems.<sup>97</sup> EFVs are designed to prevent explosions by shutting off gas flow when a service line ruptures. The agency vigorously opposed this prescriptive requirement as misguided and argued that, while EFVs appear to work in certain cases, they do not represent a major breakthrough in safety technology and in some cases may cause more harm than good. EFVs are designed to close a one-way check valve when a massive leak is detected, in theory shutting off the flow of gas to a residence. While the valve is effective against a guillotine break in a line close to the foundation of a residence, such as may occur from excavation, the valves are wholly ineffective against most common leaks, such as occurs when a pilot light is extinguished or when a leak occurs from a breach of the pipe. In these cases the residence will still fill with gas and the EFVs may provide a false sense of security. Moreover, the quality and impurities commonly found in natural gas in various geographic locations around the country may render installation of EFVs futile. Finally, the valves will not generally work if installed on master meter and liquefied petroleum gas systems. Despite the PIPES Act's language, which allows the agency to decide through rulemaking which lines will be exempted,<sup>98</sup> the agency has already hinted in a letter to Senator Lautenberg (D-NJ)<sup>99</sup> that it has decided to cover all lines except for those mentioned above. It will be incumbent for those interested in this issue to present comments during the notice and comment period as agency discretion is still very much in play for many aspects of the rule.

### *F. Human Factors Management Plan*

The Act directs PHMSA to develop standards to reduce risks associated with human factors, including fatigue, in pipeline control centers.<sup>100</sup> By June 1, 2008, the PHMSA must issue regulations to require pipeline operators to develop, implement, and submit for approval a human factors management plan to reduce risks in control centers.<sup>101</sup> The

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96. § 9, 120 Stat. at 3493.

97. *Id.*

98. 152 CONG. REC. S11,535 (daily ed. Dec. 7, 2006) (statement of Sen. Lautenberg).

99. The letter from PHMSA was reprinted in the Congressional Record. *See id.*

100. § 12, 120 Stat. at 3494-95.

101. *Id.*

plan must include a maximum limit on the number of hours a controller in a control center can work.<sup>102</sup> Additionally, by December 31, 2007, PHMSA must issue regulations providing that, after a notice and an opportunity for a hearing, if the Secretary determines a pipeline has a condition posing a threat to safety, property, or the environment, the pipeline operator must take corrective action to remedy the condition.<sup>103</sup>

### *G. Increase in Grants and Personnel*

The PIPES Act also increases the emergency response management and training grants to state and local governments by four million dollars a year to a total of ten million a year.<sup>104</sup> States had expressed concern that the inclusion of various requirements since the enactment of PSIA needed to be offset by an increase in federal to state matching grant funds. The current formula requires states to match federal dollars 50/50.<sup>105</sup> The PIPES Act will, over a period of years, provide significant additional dollars to states by requiring them to only match twenty percent of federal grants.<sup>106</sup> It remains to be seen whether the states will continue to fund pipeline safety programs, moving forward as has been the case in the past, or whether their resolve will be undermined by other more pressing state budgetary priorities.

The PIPES Act requires training standards for emergency responders to ensure that they have the ability to protect nearby persons, property, and the environment from the effects of accidents involving pipelines.<sup>107</sup> The International Association of Firefighters strongly supports the PIPES Act's requirements of training standards for emergency responders and additional funding because the number of injuries resulting from gas and hazardous liquid accidents can be significantly reduced through appropriate training: "It is extremely important that emergency responders are not simply trained, but are trained at a level appropriate to their response."<sup>108</sup> The increase of funding will assure that the firefighters and emergency medical personnel are adequately trained to "contain any release from a safe distance, keep it from spreading, and prevent people, property and the environment from harmful exposures."<sup>109</sup>

In addition to ensuring that emergency responders are trained, the

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102. *Id.*

103. § 13, 120 Stat. at 3495-96.

104. § 18, 120 Stat. at 3497-98.

105. 49 U.S.C.S. § 60107 (2002), amended by Pub. L. No. 109-468, 120 Stat. 3486. (2006).

106. § 2, 120 Stat. at 3486-89.

107. § 18, 120 Stat. at 3497-98.

108. 152 CONG. REC. H8,841 (daily ed. Dec. 6, 2006) (letter from International Association of Fire Fighters).

109. *Id.*

PIPES Act ensures PHMSA will be able to carry out the Act's safety advances by increasing the number of positions for pipeline inspection and enforcement personnel from 100 in fiscal year 2007 to 135 by 2010.<sup>110</sup>

#### *H. Reassessment Inspections*

Most regrettably, Congress did not incorporate the Bush Administration's proposal to modify the seven-year reassessment interval for natural gas pipelines. As previously discussed, Representative Robin Hayes (R-NC) explained during the House debates that the seven-year reassessment period was a compromise between two versions of legislation and was not based on scientific standards.<sup>111</sup> Congress ordered the Government Accountability Office (GAO) to audit the program and determine the optimum period for conducting inspections. After interviewing fifty-two operators, GAO released its report in September 2006 with the conclusion that the seven-year requirement is too "conservative" because inspections to date have revealed few serious problems that would not have been discovered during other inspections, leading some to believe that serious pipeline incidents involving corrosion are rare.<sup>112</sup> The majority of the operators interviewed who calculated reassessment intervals believe that they could safely reassess their pipelines every ten, fifteen, or twenty years as prescribed by industry standards.<sup>113</sup> The GAO found that the seven-year requirement does not adequately address PSIA's safety objectives.<sup>114</sup> Instead of a "one-size-fits-all" approach, GAO recommends a risk-based approach for reassessment.<sup>115</sup> A risk-based approach that factors in the age, location, soil conditions, climate, metallurgy, and changing population near a pipeline would allow reassessments to be tailored to the corrosion threats faced by pipeline segments.<sup>116</sup>

In November 2006, Admiral Barrett informed the Committee on Commerce, Science, and Transportation that PHMSA strongly favored a "systems-based approach to assessing and managing safety related risk" and urged Congress to grant the Secretary broader authority to adjust the inspection intervals on the basis of risk factors.<sup>117</sup> According to Admiral

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110. § 18, 120 Stat. at 3497-98.

111. 152 CONG. REC. H8,842 (daily ed. Dec 6, 2006) (statement of Rep. Hayes).

112. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-945, NATURAL GAS PIPELINE SAFETY: RISK-BASED STANDARDS SHOULD ALLOW OPERATORS TO BETTER TAILOR REASSESSMENTS TO PIPELINE THREATS 11 (Sept. 2006), available at <http://www.gao.gov/new.items/d06945.pdf> [hereinafter RISK-BASED STANDARDS].

113. *Id.* at 5.

114. *Id.* at 24.

115. Barrett, *Written Statement Before Committee on Energy and Natural Resources*, *supra* note 88, at 6.

116. 152 CONG. REC. H8,842; see RISK-BASED STANDARDS, *supra* note 110, at 24.

117. Barrett, *Written Statement Before Committee on Commerce, Science, and Transportation*, *supra* note 69, at 4.

Barrett:

For integrity management programs to be effective, operators must be free to focus on making the best use of information as it becomes available . . . reliance on prescribed seven year retest intervals as established in current law goes against this process. It seems a disincentive to the continuous evaluation and readjustment of a dynamic systems approach that is a basic element of an ongoing “whole-health” review of a pipeline system. The goal is to regularly and systematically utilize the most current information about the pipeline system so that it may be maintained to operate safely in the best condition for the longest amount of time.<sup>118</sup>

Wishing to avoid potential controversy by repealing the fixed reassessment interval, Congress did not implement GAO’s findings or PHMSA’s wishes to permit pipeline operators to reassess pipeline segments on a risk-based approach. Instead, Congress extended the pre-existing federal mandate and requested that PHMSA review GAO’s findings and submit further legislative recommendations to Congress within sixty days of the PIPES Act’s passage.<sup>119</sup> In other words, it dodged the issue altogether. However, at a recent congressional hearing, PHMSA testified it has the authority to waive the seven-year reassessment interval on a case-by-case basis.<sup>120</sup> There is no established agency procedure to consider or grant specific waiver requests, although the agency has been consulting with the industry on waiver protocols since last October. Affected pipeline companies would be wise not only to work closely with PHMSA officials to understand the mechanism and protocols to be used for obtaining relief, but also should be proactive in doing so as the agency formulates new regulatory language to comply with the Congressional mandate. It is unclear whether many operators will choose to seek a waiver given the potential for significant legal liability should an incident occur while operating on the waiver.

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118. *Id.*

119. § 25, 120 Stat. at 3500.

120. Barrett, *Written Statement Before Committee on Commerce, Science, and Transportation*, *supra* note 69, at 6.

### *I. Integrity Management and GAO's Recommendations*

The PIPES Act also directs PHMSA to take into consideration the recommendations from GAO's report on Integrity Management released in September 2006, around the same time as their report on the reassessment period.<sup>121</sup> PHMSA must review incident reporting requirements and modify reporting criteria by December 31, 2007.<sup>122</sup> As part of the PSIA, Congress had directed GAO to assess the integrity management program's effects on public safety. The GAO interviewed fifty-one gas pipeline operators, surveyed all state pipeline agencies, and interviewed agency officials, pipeline safety advocacy groups, and state pipeline agencies.<sup>123</sup> The GAO found that as of December 31, 2005, operators had assessed thirty-three percent of pipelines in HCAs and completed over 2,000 repairs.<sup>124</sup> Up to sixty-eight percent of the population that live near gas transmission pipelines is expected to benefit from improved pipeline safety.<sup>125</sup> The integrity management program is costly however, and most operators were required to dedicate additional resources in order to hire additional staff or contractors to fulfill the program's assessment and documentation requirements. PHMSA developed tools to help inspectors, but GAO found that operators had still not done enough in properly documenting their policies and procedures.<sup>126</sup> Additionally, the incident reporting requirements may impact PHMSA's ability to determine the program's impact over time. For instance, because the incident reporting requirements do not include an adjustment for the price of natural gas, the change in the number of incidents reported reflects a change in the price of gas rather than a change in safety. Thus, GAO's recommendations include revisions to the current definitions of a reportable incident to consider changes in the price of natural gas and establishing consistent categories of causes for incidents and leaks on all gas pipeline reports.

### *J. Grants to Universities*

In Section 24 of the PIPES Act, Congress authorizes the Secretary to award competitive grants to universities with pipeline safety and security expertise to establish, along with PHMSA, a program to conduct pipeline

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121. § 15, 120. Stat. at 3496.

122. *Id.*

123. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-946, NATURAL GAS PIPELINE SAFETY: INTERGRITY MANAGEMENT BENEFITS PUBLIC SAFETY, BUT CONSISTENCY OF PERFORMANCE MEASURES SHOULD BE IMPROVED 1-2 (Sept. 2006), *available at* <http://www.gao.gov/new.items/d06946.pdf>.

124. *Id.* at 7.

125. *Id.*

126. *Id.* at 3.

safety and technical assistance programs.<sup>127</sup> The program can include courses in safety and security of pipeline systems, incident and risk management, integrity management, consequence modeling, detection of encroachments and monitoring of rights-of-way, and vulnerability assessment of the systems.<sup>128</sup>

#### *K. Miscellaneous Provisions*

Other provisions of the PIPES Act include bringing direct sales lateral pipelines under federal oversight by including them in the definition of a gas pipeline facility; restoring pipeline operations that have been or are anticipated to become disrupted by man-made or natural disasters; and reporting on the inadequacies of current leak detection systems.<sup>129</sup>

### V. ENFORCEMENT

PHMSA established an enforcement program designed to conduct inspections, investigations, and audits of operator compliance with pipeline safety regulations. The Enforcement Program currently employs seventy-five full-time inspectors who are geographically dispersed throughout five regions.<sup>130</sup> PHMSA generally makes certain operators aware of expectations with published forms and protocols, rule interpretations, public meetings and workshops, guidance manuals, advisory notices, and postings of final orders on its website.<sup>131</sup>

The Code of Federal Regulations (CFR) sets forth the enforcement procedures and sanctions exercised by PHMSA.<sup>132</sup> The CFR authorizes PHMSA employees to enter upon, inspect, and examine, at a reasonable time and in a reasonable manner, a pipeline's facility and its records to the extent that it is relevant to determine compliance with the applicable regulations.<sup>133</sup> Both civil and criminal penalties may be assessed.<sup>134</sup>

It should be noted though that approximately ninety percent of all pipeline inspections are actually performed by state inspectors certified by or acting as an agent for PHMSA.<sup>135</sup> If a state has a certified pipelines

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127. § 24, 120 Stat. at 3500.

128. *Id.*

129. §§ 10, 21, 24, 120 Stat. at 3494.

130. PHMSA Pipeline Safety Program, Stakeholder Communications: Inspection and Enforcement, <http://primis.phmsa.dot.gov/comm/InspectionEnforcement.htm> (last visited November 20, 2007).

131. PHMSA Pipeline Safety Program, Stakeholder Communications: Enforcement, <http://primis.phmsa.dot.gov/comm/reports/enforce/Enforcement.html> (last visited November 20, 2007).

132. 49 C.F.R. § 190.201-190.237 (2007).

133. 49 C.F.R. § 190.203.

134. 49 C.F.R. § 190.229.

135. PHMSA Pipeline Safety Program, Stakeholder Communications: Pipeline Safety Inspections, [http://primis.phmsa.dot.gov/comm/reports/enforce/Actions\\_opid\\_0.html](http://primis.phmsa.dot.gov/comm/reports/enforce/Actions_opid_0.html) (last visited November 20, 2007).

safety program, the state agency is responsible for conducting the inspections of intrastate pipelines. PHMSA inspectors conduct inspections for interstate pipelines or intrastate pipelines that do not have a certified pipeline safety program. Standard inspections occur every two to three years and include examination of an operator's records and field visits to assess pipeline equipment and observe personnel implementing required procedures and tests.<sup>136</sup> Inspectors will also assess whether a pipeline is adequately marked to make excavators and others aware of its presence.<sup>137</sup> Inspectors also assess an operator's operations and maintenance manual, operator qualification programs, and integrity management program.<sup>138</sup> If the inspection reveals that further action is warranted, PHMSA may take one of the following actions:

#### *A. Warning Letters*

PHMSA may issue a Warning Letter if it believes a violation exists.<sup>139</sup> Warning Letters notify the operator of the probable violation and advise the operator that if the violation is not corrected, more stringent actions could be taken. Warning Letters are not required before an enforcement action, and they are typically reserved for administrative violations not adversely affecting safety of the public or environment.<sup>140</sup>

#### *B. Notice of Probable Violation*

An enforcement action usually begins with the issuance of a Notice of Probable Violation ("NOPV").<sup>141</sup> An NOPV states the laws, regulations, or orders which the operator is alleged to have violated and the evidence upon which the allegations are based. It lists the amount of a civil penalty and/or a compliance order. A compliance order directs the operator to comply with the requirements of the regulations.<sup>142</sup> The NOPV also lists the operator's rights in responding, including the right to a hearing. For instance, within thirty days of receiving an NOPV that contains a proposed penalty, the operator can pay the penalty, submit written explanations, or request a hearing.<sup>143</sup> The PSIA Act increased the civil penalty to a maximum of \$1 million for a related series of violations.<sup>144</sup> If the NOPV contains a compliance order, the operator may agree to the

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136. *Id.*

137. *Id.*

138. *Id.*

139. 49 C.F.R. § 190.205.

140. PHMSA Pipeline Safety Program, Stakeholder Communications: Enforcement, available at <http://primis.phmsa.dot.gov/comm/Enforcement.htm>.

141. 49 C.F.R. § 190.209.

142. 49 C.F.R. § 190.217.

143. 49 C.F.R. § 190.209.

144. 49 C.F.R. § 190.223.

compliance order, request an execution of a consent order, object to the proposed compliance order, or request a hearing.<sup>145</sup>

### *C. Hearing*

A request for a hearing must be accompanied by the issues that will be raised in the hearing.<sup>146</sup> Hearings are informal and do not strictly adhere to the Federal Rules of Civil Procedure.<sup>147</sup> Interestingly, they are not required to conform to the Administrative Procedure Act (APA) and thus, hearings on the record are not required.<sup>148</sup> If the proposed civil penalty or proposed compliance order is less than \$10,000, the hearing will be conducted via telephone unless the respondent submits a written request for an in-person hearing.<sup>149</sup> The respondent may be represented by counsel and can offer facts, evidence, and call witnesses, but there is no formal cross-examination. PHMSA is usually represented by the Region Director and is allowed to rebut information presented by the operator. After the hearing, the presiding official, an attorney from PHMSA's Office of Chief Counsel, submits a written recommendation for the final action in the case. Although the attorney advocating the matter is not the same attorney serving as the hearing officer, the applicable statutes do not require a separation of functions between prosecutorial and hearing functions. PHMSA is unique, as administrative cases brought before other DOT modes, such as the FAA and FMCSA, are required by statute to conform to the safeguards afforded under the APA.

### *D. Final Order*

After a hearing or a thirty-day response period if no hearing has been held, the case is sent to the Associate Administrator for Pipeline Safety for review and issuance of a Final Order.<sup>150</sup> The Final Order must include a statement of findings and determinations on all material issues; the amount of the civil penalty and the procedures for payment, if applicable; and if a compliance order is issued, the actions required and timeline for completion.<sup>151</sup> If the Associate Administrator directs the operator to pay a civil penalty in the Final Order, the amount of the penalty is assessed from the following factors: nature, circumstances, and gravity of the violation; degree of operator's culpability; the operator's history of prior

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145. 49 C.F.R. § 190.209.

146. 49 C.F.R. § 190.211.

147. *Id.*

148. *See id.*

149. *Id.*

150. 49 C.F.R. § 190.213.

151. *Id.*

offenses; the respondent's ability to pay; any good faith effort by the operator in attempting to achieve compliance; the effect on the operator's ability to continue in business; the economic benefit gained by the operator from the violation; and other matters as justice may require.<sup>152</sup> Final Orders may be found on the U.S. DOT's docket management system at: <http://dms.dot.gov>.

#### *E. Petition for Reconsideration*

While most Final Orders are the result of much wrangling, and thus are not generally in contention once issued, the regulations provide an opportunity for an operator to petition for reconsideration within twenty days of the Final Order being served.<sup>153</sup> Repetitious information or arguments that were already considered are not a legitimate reason to petition for reconsideration.<sup>154</sup> An operator may present additional information to support the petition, but the operator must explain why this information was not submitted prior to the issuance of the Final Order.<sup>155</sup> By filing a petition for reconsideration, the civil penalty is stayed; however, other actions issued by the Final Order are not stayed unless provided otherwise.<sup>156</sup> The Associate Administrator may grant or deny, in whole or in part, the petition for reconsideration. Unless impracticable, the Associate Administrator has twenty days to render a decision.<sup>157</sup>

#### *F. Corrective Action Orders*

If a pipeline represents a hazard to safety, the environment, or property, PHMSA may also issue a Corrective Action Order ("CAO") that directs the operator to perform specific actions.<sup>158</sup> CAOs can only be issued after notice and an opportunity for a hearing.<sup>159</sup> Through CAOs, PHMSA may suspend or restrict the use of a pipeline facility, require a physical inspection, testing, repair, replacement, or any other appropriate action if the Associate Administrator for Pipeline Safety determines a pipeline is hazardous based on the following considerations:

- (1) the characteristics of the pipe and other equipment, including its age, manufacturer, physical properties, and method of manufacture;
- (2) nature of the materials transported and the pressure required by transportation;

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152. 49 C.F.R. § 190.225.

153. 49 C.F.R. § 190.215.

154. *Id.*

155. *Id.*

156. *Id.*

157. *See id.*

158. 49 C.F.R. § 190.233.

159. *Id.*

(3) characteristics of the area surrounding the pipeline, such as the climatic and geological conditions and population density;

(4) any recommendations from the National Transportation Safety Board; and

(5) any other factors deemed important by the decision maker.<sup>160</sup>

CAOs must contain a finding that the pipeline facility is hazardous; relevant facts supporting the finding; the legal basis supporting the order; a description of the specific actions necessary; the date of completion; and if a hearing was waived, the opportunity for an operator to request a hearing.<sup>161</sup> Orders to enforce CAOs may be brought by the agency before any federal District Court of the United States.<sup>162</sup>

### G. Criminal Penalties

In addition to civil penalties, the CFR sets forth conditions whereby criminal penalties can be assessed.<sup>163</sup> For instance, if a person willfully and knowingly violates a pipeline safety requirement or a Final Order, the individual, if convicted, is subject to a maximum fine of \$25,000 for each offense, imprisonment for up to five years, or both.<sup>164</sup> Another example occurs when a person willfully and knowingly engages in excavation activity without first using an available One-Call notification system to establish the location of the pipes or does not consider location information and damages the facility resulting in death, serious bodily harm, or property damage exceeding \$50,000; damages a pipeline facility and has reason to know or should know of the damage but fails to report the damage; or damages a hazardous liquid pipeline facility that results in the release of more than fifty barrels of product is subject, upon conviction, to a fine of not more than \$5,000, per offense, imprisonment for up to five years, or both.<sup>165</sup>

### H. Sample Cases

Each year, PHMSA conducts hundreds of inspections and investigations, issuing numerous Final Orders. Many of its inspections reveal discrepancies in an operator's integrity management program and lead the operator to correct these discrepancies and avert future accidents. On February 6, 2007, PHMSA issued a Final Order for *In re Chevron USA, Inc.*<sup>166</sup> After conducting an on-site pipeline safety

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160. *Id.*

161. *Id.*

162. *Id.*

163. 49 C.F.R. § 190.229.

164. *Id.*

165. *Id.*

166. CPF No. 4-2006-7005, available at [http://ops.dot.gov/regions/southwest/2007/CPF\\_NO\\_4-2006-7005.pdf](http://ops.dot.gov/regions/southwest/2007/CPF_NO_4-2006-7005.pdf).

inspection of Chevron's integrity management program and procedures in June 2006, PHMSA issued an NOPV, Proposed Civil Penalty, and Proposed Compliance Order. Chevron violated numerous provisions, including failure to establish an integrity assessment schedule that prioritized pipeline segments for assessment based on risk factors; failure to update the risk model with the most accurate information; failure to develop sufficient processes for data integration and information analysis; failure to develop a process for identification of preventive and mitigative measures; and failure to establish intervals and prorates for continually assessing integrity based on the risk factors.<sup>167</sup> Chevron was assessed a penalty of \$10,000 for the violations and was required to comply with the proposed compliance order to ensure compliance with pipeline safety regulations that were violated.<sup>168</sup> Interestingly, Chevron did not contest the allegations, agreed to pay the penalty, and stated its intent to comply with the proposed civil penalty.

In a more contentious case, PHMSA issued a Final Order for Kinder Morgan Energy Partners, L.P. in June 2006.<sup>169</sup> PHMSA made findings of violation, assessed a civil penalty of \$325,000, and specified actions to be taken to comply with pipeline safety requirements. In April and June 2003, PHMSA conducted an inspection of Kinder Morgan's integrity management programs at two of its facilities. As a result of the inspection, PHMSA issued an NOPV, Proposed Civil Penalty, and Proposed Compliance. PHMSA found, among other things, that Kinder Morgan failed to include provisions in its baseline assessment plan to account for and address the susceptibility of its pre-1970 low-frequency pipeline to seam failures and the potential for stress corrosion cracking.<sup>170</sup> Kinder Morgan contested many of the allegations and requested a hearing. Kinder Morgan produced a memorandum that purported that it had replaced the low-frequency pipelines. The agency noted that Kinder Morgan only assessed and replaced about twenty-five percent of the pipelines and had failed to properly assess the remaining lines. As a result, the agency assessed a \$325,000 penalty.<sup>171</sup>

After receiving the Final Order, Kinder Morgan requested a petition for reconsideration. Kinder Morgan has sought an extension of the deadline to file a petition for reconsideration several times. Most recently, on December 16, 2006, PHMSA extended the deadline to file a petition for reconsideration for the fourth time because of Kinder Morgan's cooperation in resolving compliance issues.

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167. *Id.*

168. *Id.*

169. CPF No. 1-2004-5004, available at [http://ops.dot.gov/regions/eastern/CPF\\_NO\\_1\\_2004\\_5004.pdf](http://ops.dot.gov/regions/eastern/CPF_NO_1_2004_5004.pdf).

170. *Id.*

171. *Id.*

## VI. CONCLUSION

Almost every section of the PIPES Act requires action by PHMSA. Thus, before the regulations set forth in the PIPES Act are actually implemented, the Secretary must receive input from those affected by this law. The first public meeting to discuss new statutory requirements for low stress pipelines occurred on February 12, 2007.<sup>172</sup> PHMSA specifically requested information on how the regulations will impact the operators of low-stress pipelines, and the agency published a supplemental notice of proposed rulemaking in the Federal Register on May 18, 2007.<sup>173</sup>

The lesson for the interstate pipeline industry is clear: companies that stand to be affected by the newly enacted PIPES Act and upcoming interpretive rulemaking procedures at PHMSA, the U.S. DOT's Office of General Counsel, and the Office of Management and Budget would be prudent to weigh in with federal regulators at the earliest opportunity in order to protect their vital business interests.

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172. Meeting Notice, 72 Fed. Reg. 2727 (Jan. 11, 2007).

173. Supplemental Notice of Proposed Rulemaking, 72 Fed. Reg. 28008 (May 18, 2007).