



New Construction Inspection & Enforcement Where is it Leading Us?

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Introduction

::: We Will Talk About

- Background Info
- History of Agency Authority to Inspect New Construction
- Relevant Statutory Authorities
- Regulatory Enforcement Mechanisms
- When Does Agency Jurisdiction Arise?*
- Notice Under the One Rule
- Where We Could Be Headed
- Appreciate Assistance by PHMSA and Operating Companies

SCOPE: Interstate Hazardous Liquids Pipelines

Background: 2007-2009 Heavy Agency Inspection



::: Impetus

- ❑ Ramp-Up of New Construction
- ❑ Purpose: Preclude long term issues perceived to be rooted in construction practices
 - Coating – materials, methods
 - Welding – materials, methods
 - Excavation
 - NDT
 - Material – Quality / Conformance to Spec
- ❑ Not Limited to New Lay - Significant Replacements Also Inspected
- ❑ Biggest Issues
 - Failure to follow procedures
 - Lack of quality control
 - Inattention to detail

Background: 2007-2009 Heavy Agency Inspection



::: Enforcement . . . Thus Far

Enforcement Mechanisms	Employed?
Warning Letter	Yes
NOA	Yes
NOPV	Yes
Safety Order	Not Yet
Corrective Action Order	Yes

Background: 2007-2009 Heavy Agency Inspection



::: Lessons Learned?

- Quality Management Systems
 - PHMSA: “OQ won’t solve it all”
 - Ensure quality
 - Demonstrate a process in place (and use it)
- Inspect Your Inspectors
 - Company employee in the field
 - NOT in the project trailer!
- Field Liaison – Quality Liaison – Knowledgeable
 - Construction
 - Pipeline integrity implications
 - Pipeline regulations and standards
- Right People Involved Early If Problems Arise

History of Agency Authority to Inspect MTB and RSPA and PHMSA:



::: Super-Quick Legislative History

- Natural Gas Pipeline Safety Act of 1968 – As the Name Implies ...
Natural Gas Only

- Pipeline Safety Act of 1979
 - Natural Gas Pipeline Safety Act of 1979 – Amended NGPSA of 1968
 - Hazardous Liquids Pipeline Safety Act of 1979 (HLPSA) – Modeled on NGPSA

- 1994 Recodification: NGPSA and HLPSA Combined into the Pipeline Safety Act

- Multiple Reauthorizations

Natural Gas Pipeline Safety Act of 1968 – Scope of Jurisdiction



The Secretary [of DOT] shall ... establish minimum Federal safety standards for the transportation of gas.... Such standards may apply to the **design, installation, inspection, testing, construction, extension, operation, replacement,** and maintenance of pipeline facilities.

Pipeline Safety Act of 1979



- ❑ Natural Gas Pipeline Safety Act of 1979 – Primary Purpose to improve the protection afforded the public against risks associated with the transportation of hazardous commodities by pipeline.
- ❑ The NGPSA and the TOEA do not provide all the necessary tools for a sensible and effective Federal pipeline safety program.... the NGPSA does not provide adequate enforcement tools
- ❑ S. 411, therefore, is primarily intended to provide DOT with adequate means to enforce the safety regulations [and] provide DOT with the same enforcement authority for pipeline safety as it already possesses for the safety of all other modes of transportation.
- ❑ Clarify that safety standards applicable only to new pipeline facilities (e.g., ***those relating to design and construction***) can be made applicable to existing facilities that are considered hazardous to life and property.



::: Purposes of HLSPA

- Repeal the Transportation of Explosives Act (18 U.S.C. 831-835) [criminal penalties only]
- Establish regulatory authority over the transportation and storage of hazardous liquids which move by pipeline ... parallel to that of the NGPSA
- Give the Secretary authority to promulgate safety standards and assure compliance of covered facilities with the standards
- Establish a State enforcement program
- Provide the same inspection, recordkeeping, administrative and judicial remedies as NGPSA.
- Consider the implications of the following committee report excerpts

Source: Congressional committee reports

Pipeline Safety Act of 1979



the bill [as sponsored] specifically provides the Secretary of Transportation with authority for preconstruction design approval for pipeline facilities

Source: Congressional committee reports

Pipeline Safety Act of 1979



the administration *intended to clarify DOT's existing authority to assure compliance with its design and construction standards before a facility becomes operational*, at which point it might be impracticable to enforce these standards

Source: Congressional committee reports

Pipeline Safety Act of 1979



DOT and industry representatives agree that this authority is already implied by the terms of the NGPSA, which authorizes the DOT to develop and enforce these standards.

Source: Congressional committee reports

Pipeline Safety Act of 1979



Since there is no disagreement that the Department already has the authority made explicit by the administration's suggested modification, the Committee deleted the provision.

It should be stressed, however, that by deleting this provision, the Committee does not intend to affect DOT's now existing authority to assure compliance with its standards prior to a facility's becoming operational.

Source: Congressional committee reports

Pipeline Safety Act of 1979



However, during the 6 days of hearings held on S. 411 and related issues, ***most witnesses concurred that DOT already had such preconstruction approval for the facilities.***

Source: Congressional committee reports

Pipeline Safety Act of 1979



Furthermore, ***industry representatives strongly objected to an additional approval requirement in a permitting process which is already extremely burdensome.***

Source: Congressional committee reports

Pipeline Safety Act of 1979



Since the Department already has adequate tools to assure the safety of these projects, ***the Committee determined that the "Preconstruction Approval" provision was unnecessary and therefore deleted the subsection.***



Source: Congressional committee reports

Pipeline Safety Act of 1979



During the hearings, the Committee became concerned with the critical importance of enforcement in monitoring of construction, as well as in operation and maintenance. The Committee intends that DOT shall take these responsibilities seriously and carry out fully its responsibilities under the NGPSA and the hazardous liquids title.

Source: Congressional committee reports



::: Compliance

- Operators must comply with standards; allow inspection; maintain records. 49 USC 60118(a)
- The Secretary may issue compliance orders. 49 USC 60118(b)



::: Inspection

- ❑ Secretary ... may conduct investigations, ... conduct hearings, ... require the production of records, 49 USC 60117(a)
- ❑ Secretary shall inspect . . . a pipeline facility subject to this chapter. 49 USC 60108(b)(1)
- ❑ An officer, employee, or agent of the Department of Transportation ... may enter premises to inspect the records and property ... to decide whether a person is complying with this chapter and standards prescribed or orders issued under this chapter. 49 USC 60117(c)



::: Corrective Action Orders

If the Secretary decides under subsection (a) of this section that a pipeline facility **is or would be hazardous**, the Secretary shall order the operator of the facility to take necessary corrective action, including suspended or restricted use of the facility, physical inspection, testing, repair, replacement, or other appropriate action. 49 USC 60112 (d)

::: Waiver of Notice and Hearing in Emergency

The Secretary may **waive the requirements for notice and an opportunity for a hearing** under this section and issue expeditiously an order under this section if the Secretary decides **failure to issue the order expeditiously will result in likely serious harm to life, property, or the environment**. An order under this subsection shall provide an opportunity for a hearing as soon as practicable after the order is issued. 49 USC 60112 (e)



::: Safety Orders

- Secretary shall issue regulations providing that, after notice and opportunity for hearing, if Secretary determines that a pipeline facility has ***a condition that poses a pipeline integrity risk to public safety, property, or the environment, the Secretary may order the operator to take necessary corrective action, including physical inspection, testing, repair, or other appropriate action.*** 49 USC 60117(1)(1)



::: Civil Penalties

- Up to \$100,000 for each violation and each day
- Maximum \$1,000,000 for a related series of violations

::: Criminal Penalties

- Fines determined under Federal Sentencing Guidelines (Title 18 United States Code)
- Imprisonment for not more than 5 years
- Or Both Fines AND Penalties 49 USC 60123(a)

Regulatory Enforcement Mechanisms

- ❑ Warning Letter: Correct probable violation or face enforcement. 49 CFR 190.205
- ❑ Notice of Amendment: Directive to remedy deficiencies in plans and procedures. 49 CFR 190.237
- ❑ Notice of Probable Violation: Probable violation exists; probable civil penalties; possible compliance order. 49 CFR 190.207
- ❑ Compliance Order: Directive to comply with safety standards, etc. 49 CFR 190.217

Regulatory Enforcement Mechanisms



- ❑ Safety Order: OPS finds, after notice and opportunity for a hearing, that a pipeline facility has a condition or conditions that pose a *pipeline integrity risk* to public safety, property, or the environment; take necessary corrective action such as inspection, testing, repair, risk assessment, risk control, ... or other appropriate action to remedy the condition. 49 CFR 190.239

- ❑ Corrective Action Order: When OPS finds, after reasonable notice and opportunity for hearing, a pipeline facility to be hazardous to life, property, or the environment, may order corrective action, including suspended or restricted use of the facility or physical inspection, testing, repair, replacement, or other appropriate action; may waive hearing when there is a likelihood of serious harm to life, property or the environment. 49 CFR 190.233

Hazardous Facility Orders / Corrective Action Orders – the Future-Looking Change



- ❑ Prior to 2002: “General Authority – After notice and an opportunity for a hearing, the Secretary ... may decide a pipeline facility **is hazardous** if the Secretary decides the facility **is** ...
 - “hazardous to life, property or the environment . . .
 - “constructed or operated, . . .with equipment, material, or a technique the Secretary decides is hazardous to life, property, or the environment.” 49 USC 60112(a)

- ❑ Pipeline Safety Improvement Act of 2002 Clarified Scope of Hazardous Facility Authority – Would Be: “General Authority – After notice and an opportunity for a hearing, the Secretary ... may decide a pipeline facility **is hazardous** if the Secretary decides that –
 - operation of the facility **is or would be** hazardous to life, property or the environment
 - the facility **is or would be** constructed or operated, ...with equipment, material, or a technique the Secretary decides is hazardous to life, property, or the environment. 49 USC 60112(a)

Hazardous Facility Orders / Corrective Action Orders – the Future-Looking Change



- ❑ Key change is that express scope became “is or would be constructed or operated”. . Point is more express future jurisdiction/scope - ***that which could come to pass***
- ❑ Query: How certain must Agency be today of the future hazard?
 - Proven causal relationship?
 - What set of present factors must exist?
 - Within what range must present factors reside?
 - 90% confidence?
 - Agency judgment?
- ❑ Administrative Procedure Act
 - Arbitrary capricious?
 - Abuse of discretion?
 - Otherwise not in accordance with the law
- ❑ Courts Defer to Agency Judgment

When Does Agency Jurisdiction Arise?



- ❑ Initially [1979 HLPESA]: “pipeline facilities include, without limitation, new and existing pipe, rights-of-way, and any equipment, facility, or building ***used or intended for use in the transportation of hazardous liquids***. . . .” See Legis Hist HLPESA of 1978 at 2000

- ❑ Today: 49 USC 60112: Object is the “pipeline facility”
 - Pipeline Facility: A gas pipeline facility and “a hazardous liquid pipeline facility”.
 - Hazardous Liquid Pipeline Facility: includes
 - A pipeline, a right-of-way, a facility, a building, or equipment
 - ***Used or intended to be used***
 - ***In transporting a hazardous liquid***



::: At What Point Does a Piece of Pipe Become Subject to PHMSA Jurisdiction?

- Publication - Press Releases?
- Open Season?
- Notice per One-Rule?
- Eminent Domain?
- Local Permit - e.g. Road Crossing?
- Expressions and/or Manifestations of Intent



When Does Agency Jurisdiction Arise?



::: How Does the Agency Identify Projects “*Intended to Be Used*”?

- NEPA - easy, e.g. Presidential Permit; agency involvement
- Publications, e.g., Mapsearch North American Pipeline Activity Report; OGJ; Pipe Line & Gas Journal; Etc.
- Voluntary Disclosure – Press Releases, Financial Disclosures
- Complaints - CATS (Community Inquiries; Landowner Inquiries)

NPRM: 60-Day Pre-Project Notice Proposal – the “One Rule”



- Projects Subject to Notice – As Proposed
 - Over \$5 million – Rehabilitation, Replacement, Modification, Upgrade, Uprate, or Update (Slight Differences between Gas and Liquids in Proposal)
 - New Construction of 10 Miles or More
 - Other Project over \$5 million – Involving Pipeline or Pipeline Facility (74 Fed.Reg. 31675, July 2, 2009)

- Final Rule Expected Late June

- New Construction / \$5 Million Project?
 - This will be smoothed out

- Advance Notice Will Remain



::: Project Time!

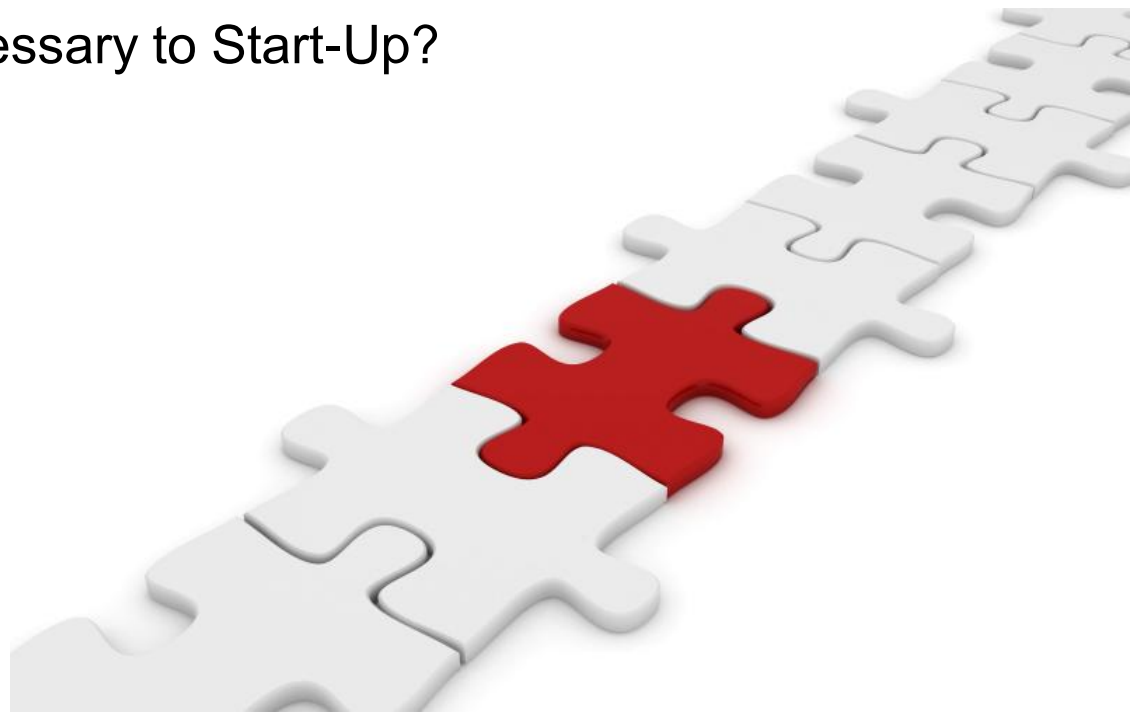
- Construction Inspection In the Field
- Perhaps Adjust Processes and/or Procedures
- Quality Field Liaison - The Right People
- Agency Constraint: “Due Process Makes Construction Enforcement Difficult”
- Operator Constraint: Standby vs. Schedule
- PHMSA Wants to be Effective – Will it Take Permitting?





::: Project Completion / Startup

- Startup in the Absence of Objection / Enforcement?
- Express “Approval” Necessary to Start-Up?





::: When Does NEPA Enter the Equation?

- National Environmental Policy Act - Major Federal Action
- Review of Significance of Project Impacts
- Climate Change Entering the Equation
- Where Along the Continuum is 'Major Federal Action'?
- When is NEPA Potentially Implicated?





::: Permit Regime

- Who Wants It?
- Who Does Not?
- New Projects?
- Major Replacements?





Questions



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