

[Latham & Watkins Environment, Land & Resources and Energy Regulatory & Markets Practices](#)

June 29, 2017 | Number 2166

## Federal and State Regulation of the Safety of Pipelines and Underground Natural Gas Storage Facilities

This White Paper provides general background on the regulation of natural gas pipelines with special emphasis on underground storage, as context for recent and ongoing developments in this area by the Pipeline and Hazardous Materials Safety Administration as well as state regulators.

### Role and Purpose of PHMSA

Congress provided the Pipeline and Hazardous Materials Safety Administration (PHMSA), an arm of the Department of Transportation (DOT), with the authority to prescribe minimum safety standards for pipeline transportation and for pipeline facilities. See 49 U.S.C. § 60102(a). Importantly, the federal minimum pipeline safety standards apply broadly to both *inter-* and *intra-*state pipeline facilities, meaning that PHMSA's jurisdiction is not limited to pipelines operating in interstate commerce (as would be, for example, the Federal Energy Regulatory Commission's jurisdiction under the Natural Gas Act). Yet PHMSA works closely with states (and other federal entities) in exercise of that authority. In particular, states can become the "certified" regulator of certain facilities, or regulate on PHMSA's behalf, subject to PHMSA oversight and monitoring powers. See *generally* 49 U.S.C. §§ 60105-06.

The principal regulatory scheme here is set forth at Title 49 of the C.F.R., Parts 190 through 199. Part 192 (for natural gas pipelines) and Part 195 (for hazardous liquid pipelines), and other provisions in Parts 191, 194, and 199, prescribe detailed safety requirements for US oil, gas, products, and liquids pipelines. These include provisions associated with the design, strength, and testing of pipelines; record keeping requirements; maintenance and inspection requirements; reporting requirements; public awareness programs; drug testing and operator qualification requirements; and — for certain facilities — detailed integrity management, operator control room, and damage prevention programs. Failure to comply with the pipeline safety laws carries significant PHMSA enforcement and civil penalty exposure.

### Pipeline Safety and Cooperative Federalism

While PHMSA retains exclusive authority under the pipeline safety laws to regulate interstate pipelines, it may allow a state to act as its agent for purposes of oversight and inspections, retaining enforcement authority if state inspectors identify violations requiring enforcement. PHMSA also is required to terminate an agency arrangement "if the Secretary finds that ... continued participation by the State authority in the oversight of interstate pipeline transportation would not promote pipeline safety." 49 C.F.R. § 60106(e)(2). With regard to *intrastate* pipelines, in partial contrast, the law allows states much more control. Almost every state has elected to become a "certified" regulator of its own intrastate pipelines pursuant to 49 U.S.C. § 60105(a), which automatically grants a state jurisdiction over intrastate pipelines where the state

can certify that its standards, inspection ability, and enforcement powers meet the federal standards. States are also permitted to adopt and enforce standards more stringent than the federal minimum standards. State pipeline safety laws and regulations are typically implemented and enforced, then, by the state's public utility commission (or equivalent thereof).

PHMSA “accepts” such certifications by merely declining to act. PHMSA “may reject [a certification]” “[i]f the Secretary decides the state is not enforcing satisfactorily compliance with applicable safety standards” 49 U.S.C. § 60105(f), and may also “make an agreement with a State authority” to assist in enforcing pipeline safety standards. *Id.* § 60106(a). If a state has not self-certified, or if PHMSA has rejected a state certification, and no agreement has been reached, PHMSA assumes direct responsibility for intrastate pipeline inspections and enforcement (often referred to as PHMSA’s “backstop” authority). In addition, state certification programs apply only to federal standards already in place at the time a state certifies; PHMSA can adopt new regulations or amend existing regulations after a state has certified, and in that event the new federal rule applies unless and until a state reviews its own regulations and updates its certification.

The pipeline safety laws also allow PHMSA to grant significant funding to states that assume jurisdiction under § 60105. Funding up to 80% of the costs reasonably required to carry out a state safety program is allowed, 49 U.S.C. § 60107(a), provided that the state ensures that it will cover the remaining costs of the program. *Id.* § 60107(b). PHMSA determines funding amounts pursuant to metrics that seek to assess (and score) the effectiveness and performance of the state’s regulatory program. See 49 C.F.R. § 198.13(b). PHMSA may withhold payment if a state is not carrying out a safety program satisfactorily.

This form of cooperative federalism allows regulators flexibility to determine “who regulates” and “who pays.” This balancing was designed in part to protect state authority, but also to address the practical necessity of PHMSA’s enormous regulatory task, on the one hand, and its size and resources, on the other hand. PHMSA has fewer than 300 employees, less than half of which are inspectors, and a budget of roughly US\$150 million.

## **The PIPES Act and Regulation of Underground Natural Gas Storage**

In recent years, a series of pipeline and storage accidents revealed potential gaps in safety regulation, and exposed some weaknesses in the cooperative federalism approach. It was unclear, for example, whether PHMSA’s broad authority to set minimum standards for “pipeline facilities” extended all the way to the storage injection and withdrawal wells at the nation’s approximately 400 underground natural storage facilities. And if so, it was even less clear where this jurisdiction would stop (for example would it extend “downhole” into the storage field itself?) and who might be responsible for regulation and enforcement (the states or PHMSA?).

The PIPES Act of 2016 was passed, in part, to address these issues. The Act clarified that “downhole” portions of a *storage facility* — including the wells, wellbore tubing, casing, and related features — are indeed subject to federal regulation.<sup>1</sup> Further, Section 12 of the Act ordered PHMSA to issue regulations for underground gas storage facilities within two years from the date of enactment, 49 U.S.C. § 60141, and to develop such safety standards by taking into account both the recommendations of a PIPES Act task force, the “Interagency Task Force on Natural Gas Storage Safety, co-chaired by the Department of Energy and PHMSA,” as well as consensus industry standards.<sup>2</sup>

### **The Interim Final Storage Rule**

As contemplated by the PIPES Act, then, PHMSA last December issued an “interim final” rule (IFR) governing underground storage, which became effective on January 18, 2017. “Pipeline Safety: Safety of

Underground Natural Gas Storage Facilities,” 81 Fed. Reg. 91,860 (Dec. 19, 2016). The IFR incorporates by reference, and requires as mandatory, compliance with American Petroleum Institute (API) Recommended Practices (RPs) 1170 and 1171 relating to the Design and Operation of Solution-mined Caverns Used for Natural Gas Storage and the Functional Integrity of Natural Gas Storage in Depleted Hydrocarbon Reservoirs and Aquifer Reservoirs, respectively, notwithstanding the fact that the RPs by their own terms contain some provisions intended to be mandatory (“shall”), and other provisions that are recommended but not intended as mandatory (“should”). PHMSA’s IFR requires operators of natural gas storage facilities to implement both types of recommendations within one year of the effective date of the IFR, January 18, 2017.<sup>3</sup>

At the same time PHMSA issued the IFR it also solicited comments to “further evaluate the need for any additional regulatory requirements for underground storage facilities,” noting that it “may modify aspects” of the interim rule after reviewing public comments “as well as any other relevant documents.” Comments were filed by operators, trade associations, and stakeholders, including API, the State of Texas, Texas Railroad Commission (RRC), the American Gas Association (AGA), the Interstate Natural Gas Association of America (INGAA), and the American Public Gas Association, among others.

### **Challenges to the Interim Final Storage Rule**

On March 17, 2017 and March 20, 2017 the Texas RRC, AGA, and INGAA filed separate petitions for review of the IFR before the Fifth Circuit and D.C. Circuit courts, respectively.<sup>4</sup> The D.C. Circuit consolidated the AGA and INGAA petitions for review, which challenged as arbitrary and capricious PHMSA’s requirement to implement the IFR within one year of its effective date, the transformation of API’s RP 1170 and RP 1171 discretionary guidelines into mandatory requirements, and the procedures associated with obtaining a variance from the rules. PHMSA filed a motion to dismiss both petitions as premature, which was opposed by AGA and consented to by INGAA. On June 27, the D.C. Circuit granted PHMSA’s motion in a *per curiam* order.

In the Fifth Circuit case, the Texas RRC did not include a substantive summary of its arguments with its petition for review, but it is expected that the Texas RRC’s challenge will align with its comments on the IFR, which raise concerns about the IFR’s failure to recognize the role of state regulatory programs and state technical expertise. AGA and INGAA filed motions for leave to intervene in support of the Texas RRC in the Fifth Circuit proceeding, which were granted. The Texas RRC’s opening brief is currently due July 27, 2017.

### **PHMSA’s Partial Stay of Enforcement**

On June 20 PHMSA announced in the Federal Register a partial stay of enforcement of the IFR. That is, PHMSA has now determined that it should conduct a review of the petition for reconsideration of the IFR, stating that the agency “intends to address the issues raised by the petitioners in a final rule, which it expects to issue by January of 2018.”

PHMSA has further explained that, in the interim, the agency “will not issue any enforcement citations to operators for non-compliance” with any “non-mandatory provisions” of the two API RPs incorporated by reference into the IFR, until at least one year following publication of a final rule. During the same time period, PHMSA will not issue enforcement citations to operators for non-compliance with the requirement to justify and document deviations from the non-mandatory provisions. PHMSA states that it “does intend, however, to retain and enforce the *other* compliance deadlines in the IFR, including the requirement that operators of existing underground gas storage facilities develop, by January 18, 2018, policies and procedures to implement those sections of the RPs that are identified as mandatory in the actual RPs.”

Finally, PHMSA made clear that it has the authority to issue an emergency order or corrective action order if an underground gas storage facility is found to be an imminent hazard, or if facility operations would be hazardous to life, property, or the environment.

PHMSA's announcement does not rescind the interim rule — as a formal matter, the rule itself stands. But the agency has made clear it will not enforce certain of its provisions until a later date. Interestingly, because states with certified enforcement programs undertake inspection for intrastate facilities, as noted above, PHMSA's announcement does not mean states will necessarily refrain from inspecting storage facilities or refrain from assessing compliance with the interim final rule.

## Near-Term Implications

Because the interim rule stands, judicial challenges to it are not necessarily moot. Exactly how PHMSA's announcement may affect the pending litigation remains to be seen. An extension of the briefing schedule in the Fifth Circuit proceeding was recently sought because, among other reasons, "counsel for PHMSA has indicated that it intends to release an amendment to the rule very soon, which will likely affect this litigation" (according to the Texas RRC's unopposed motion). But PHMSA may seek to stay this litigation given its announcement while it develops the final rule. It is also possible that the Texas RRC would oppose a stay because PHMSA does, as it has stated, intend to enforce certain provisions of the IFR and retains discretion to issue emergency orders or corrective action under the rule, which may extend to the so-called "non-mandatory" provisions. PHMSA's partial stay of enforcement of the IFR is likely to factor into any decisions by current or potential future litigants, who may seek judicial relief or choose to wait until further action by PHMSA on the final rule.

Supporters of the IFR conceivably might initiate their own litigation in response to the agency's announcement, or seek to affect the pending litigation, though the strength of any such challenge may depend crucially on how it is framed. In the longer term, it warrants emphasis that PHMSA is not bound to issue a final rule that resembles the IFR; PHMSA sought comment on the IFR and is considering changes to it. A final rule less strict than the IFR also could be subject to judicial challenge. By the same token, some stakeholders may well challenge the final rule instead on the grounds that it goes too far. The strength of any such challenge will of course depend on the final shape of the rule and the factual record underlying it.

## Conclusion

Whether PHMSA's announcement signals anything definitive about how the agency will approach the final rule is unclear, though a reasonable expectation would be that the final rule will not simply mirror the IFR in every respect. It may be unlikely, in other words, that PHMSA ultimately finalizes the IFR wholesale, having now announced the agency's non-enforcement of certain provisions. In any event, stakeholders, investors, lenders, and owners and operators of natural gas storage facilities should consider the potential for liability in the interim, and continue monitoring the pending litigation, PHMSA's rulemaking and enforcement activities related to the IFR, and the development of the ultimate final rule.

---

A markup of changes to PHMSA's regulations may be obtained by contacting any of the authors listed below. If you have questions about this *Client Alert*, please contact one of the authors listed below or the Latham lawyer with whom you normally consult.

**Steven Croley**

steven.croley@lw.com  
+1.202.637.3328  
Washington, D.C.

**Gene Elrod**

eugene.elrod@lw.com  
+1.202.637.3373  
Washington, D.C.

**J. Patrick Nevins**

patrick.nevins@lw.com  
+1.202.637.3363  
Washington, D.C.

**Janna Chesno**

janna.chesno@lw.com  
+1.202.637.3352  
Washington, D.C.

**Bridget Reineking**

bridget.reineking@lw.com  
+1.202.637.1015  
Washington, D.C.

**You Might Also Be Interested In**

[Webcast: Outlook for Oil and Gas Law and Regulation in the Trump Administration](#)

[US Environmental Regulations Face Rollbacks, but Reform Will Likely Be Tempered by Legal Barriers](#)

---

*Client Alert* is published by Latham & Watkins as a news reporting service to clients and other friends. The information contained in this publication should not be construed as legal advice. Should further analysis or explanation of the subject matter be required, please contact the lawyer with whom you normally consult. The invitation to contact is not a solicitation for legal work under the laws of any jurisdiction in which Latham lawyers are not authorized to practice. A complete list of Latham's *Client Alerts* can be found at [www.lw.com](http://www.lw.com). If you wish to update your contact details or customize the information you receive from Latham & Watkins, visit <http://events.lw.com/reaction/subscriptionpage.html> to subscribe to the firm's global client mailings program.

**Endnotes**

---

<sup>1</sup> While our discussion here focuses in particular on storage, we are monitoring developments with respect to state and federal regulation over upstream activities, and will provide further analysis on those issues in the future.

---

<sup>2</sup> Author Steven Croley assisted the Interagency Task Force as General Counsel of the Department of Energy.

<sup>3</sup> 81 Fed. Reg. 91,861. In the Interim Final Rule, PHMSA requires that existing underground natural gas storage facilities using a solution-mined salt cavern for storage meet the requirements of API RP 1170, sections 9, 10, and 11, by January 18, 2018. 49 C.F.R. § 192.12(b). Similarly, PHMSA requires that existing underground natural gas storage facilities using a depleted hydrocarbon reservoir or an aquifer reservoir for gas storage meet the requirements of API RP 1171, sections 8, 9, 10, and 11, by January, 18, 2018. 49 C.F.R. § 192.12(d).

<sup>4</sup> See *State of Texas v. U.S. Dep't of Transportation (PHMSA)* (No. 17-60189) (5th Cir.); *AGA v. U.S. Dep't of Transportation (PHMSA)* (No. 17-1095) (D.C. Cir.); and *INGAA v. U.S. Dep't of Transportation (PHMSA)* (No. 17-1096) (D.C. Cir.).