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## Recently Enacted Pipeline Safety Act Will Increase Federal Oversight of Oil and Gas Pipelines

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On January 3, 2012, President Obama signed the Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011 (the "Act") into law. The Act, which reauthorizes federal pipeline safety programs through fiscal year 2015, provides for enhanced safety, reliability and environmental protection in the transportation of energy products by pipeline. The Act increases federal enforcement authority, grants the federal government expanded authority over pipeline safety, provides for new safety regulations and standards, and authorizes or requires the completion of several pipeline safety-related studies.

### Enforcement

The Act increases potential federal civil penalties for pipeline owners, operators, and entities whose activities have implications for pipeline safety (such as excavators). Under the Act, an increased number of violations are subject to a penalty of up to \$200,000 per violation, and up to \$2 million for series of violations:

- Failure to accurately mark the location of pipelines near proposed demolition, excavation, tunneling or construction activities.
- Failure to meet state one-call notification system requirements.
- Failure to promptly report serious damage to pipelines.
- Failure to comply with applicable safety standards and requirements relating to inspections, maintenance, risk analysis, and integrity management programs.

The Act also:

- Eliminates an entity's "ability to pay" from consideration in determining the amount of a civil penalty.
- Requires pipeline operators to assist with investigations into accidents or incidents, and provides separate penalties for "obstruction" of investigations.
- Removes the \$2 million cap on civil penalties for administrative enforcement actions regarding pipeline safety.

- Eliminates the right to seek judicial review of a denial of waivers of certain safety requirements.

### **New Regulations and Standards**

The Act requires US Department of Transportation (DOT) to issue new regulations regarding enforcement hearings and incident reporting. Additional regulations regarding integrity management programs, shut-off valves, leak detection systems, and excess flow valves could be proposed as DOT completes the numerous studies that are required by the Act. Specifically, the Act:

- Requires DOT to issue regulations regarding administrative enforcement hearings (related to civil penalty assessments, compliance orders, safety orders, and corrective action orders), and which allow for expedited review in emergency cases.
- Requires DOT to pass regulations (within 18 months) requiring that notice of pipeline accidents and incidents be provided to DOT and the National Response Center (NRC) not later than one hour after a confirmed discovery; revising procedures (as appropriate) for pipeline owners and operators and the NRC to coordinate notice of incidents and accidents with relevant state and local officials; and requiring that updated notices with appropriate information be provided as new information becomes available.
- Requires DOT to evaluate whether integrity management programs should be expanded beyond high-consequence areas, and determine if the expansion of these programs would mitigate the need for class location requirements for gas pipelines. A report on this evaluation must be issued by DOT within two years, and DOT cannot promulgate any related regulations until one year after that report, unless it determines that an imminent hazard exists.
- Authorizes DOT to promulgate regulations requiring the use of automatic and remote-controlled shut-off valves for new or replaced transmission pipelines. DOT has the discretion to determine whether such regulations are required within two years after the enactment of the Act, depending on DOT's assessment of several factors, including available relevant information, appropriateness, reasonableness, costs and benefits, public comments, and recommendations from technical committees.
- Requires DOT to prepare a report on pipeline leak detection systems, which may then be used by DOT as a basis for regulations which require the installation of and establish standards for such systems. This report is due within one year, and regulations can be promulgated by DOT one year thereafter.
- Requires DOT to promulgate regulations requiring the use of excess flow valves in certain applications, where feasible. This requirement would apply to distribution branch services, multifamily facilities, and small commercial facilities. If DOT determines, based on its review of recommendations provided by the National Transportation Safety Board (NTSB), that these regulations are "appropriate," DOT is required to enact these within two years.

### **Expansions of Federal Oversight**

In addition to authorizing or requiring new regulations, the Act expands federal oversight over

pipeline safety in several ways. The Act authorizes DOT to:

- Recover its costs in reviewing, inspecting, and overseeing proposed gas, hazardous liquid, or LNG pipeline construction, expansion, and operation projects that either use new technologies (to be defined in forthcoming DOT guidance) or have a total cost exceeding \$2.5 billion.
- Hire additional pipeline inspection and enforcement personnel.
- Regulate biofuel pipelines.
- Require transportation-related onshore facilities to comply with recordkeeping and inspection requirements under the Clean Water Act.
- Analyze risks associated with pipeline transportation of non-petroleum hazardous liquids, such as chlorine.
- Waive requirements for states to contribute to pipeline safety programs in cases of economic hardship beginning in FY 2014 (for FY 2012 and 2013, DOT *must* grant such waivers).
- Provide pipeline safety training to state and local officials.
- Collect geospatial or technical data from pipeline operators, including data on regulated and unregulated transportation-related oil flow lines.

The Act also requires DOT to:

- Undertake a public education and awareness program, including mapping of high-consequence areas and providing guidance for pipeline owners and operators on emergency response measures.
- Establish a file system that contains pipeline owners' and operators' most recent response plans.
- Establish a process for pipeline owners and operators to verify maximum allowable operating pressure and report any exceedances.
- Develop and implement a protocol for tribal consultation on pipeline projects.

### **Additional New Requirements**

The Act expressly requires pipeline operators to consider seismicity in their ongoing assessments of pipeline integrity under existing federal regulations (49 CFR §§ 192 and 195). In addition, the Act sets minimum standards for state one-call notification systems, which require calls (to 8-1-1) before excavation activities can commence. The Act eliminates funding for states that allow public entities (including municipalities, states and their contractors) to be exempt from these one-call notification system requirements. These provisions take effect two years after enactment of the Act.

### **Study Requirements**

The Act requires or authorizes a number of studies within the next one or two years. Under the Act, DOT must conduct:

- A study on the impact of third-party excavation damage on pipeline safety.

- A study on the ability of pipeline operators to respond to releases in "high-consequence areas."
- A biennial survey of pipeline owners and operators on their efforts to replace cast-iron gas pipelines.
- A study of hazardous liquid pipeline incidents at crossings of certain inland water bodies to assess whether current requirements for depth of cover over buried pipelines are sufficient.
- A report on the inspection and enforcement resource needs of US Department of Transportation Pipeline and Hazardous Materials Safety Administration (PHMSA).
- A study of the sufficiency of existing regulations relating to the transportation of diluted bitumen.
- A review of existing regulations for gas and hazardous liquid gathering lines (onshore and offshore), and a report of related recommendations.

The Act also requires the Comptroller General to:

- Determine whether pipelines should be reassessed for safety threats based on risk, rather than at specific seven-year intervals.
- Assess the extent to which minority-owned, woman-owned and disadvantaged businesses participate in the construction and operation of pipelines in the United States.
- Conduct a study on the permitting process (state and federal) for pipeline construction projects, and develop recommendations to improve that process.
- Submit reports to Congress on the above within one to two years (depending on the study required).

Although the Act does not expressly authorize further action following these studies, the findings may eventually result in further legislative or agency action.

## Conclusion

Pipeline owners and operators should carefully monitor regulatory developments at DOT after the enactment of the Act. DOT is required to promulgate a number of new regulatory requirements, and has been provided with enhanced federal inspection and enforcement capabilities, as well as authority to impose stiffer potential penalties for violations. Many of the studies and reports required or authorized by the Act also may eventually lead to further regulatory or statutory requirements.

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## *Authors*



**Thomas L.  
Strickland**

**PARTNER**

 [thomas.strickland@wilmerhale.com](mailto:thomas.strickland@wilmerhale.com)

 +1 202 663 6925



**H. David Gold**

**SPECIAL COUNSEL**

 [david.gold@wilmerhale.com](mailto:david.gold@wilmerhale.com)

 +1 617 526 6425