

## INSIGHTS

## DOT Issues Pipeline Safety Act Reauthorization Proposal

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The Department of Transportation (DOT) released a [legislative proposal](#) to Congress on June 3, 2019, to reauthorize the federal Pipeline Safety Act (PSA or the Act) and continue funding the federal agency charged with implementing it, the Pipeline and Hazardous Materials Safety Administration (PHMSA). DOT's [press release](#) states that the proposal, *Protecting our Infrastructure of Pipelines and Enhancing Safety Act of 2019*, will embrace innovation, clarify certain regulatory requirements to prevent incidents, "modernize" certain data collection, and enhance support for new liquefied natural gas (LNG) facilities. Proposals target a broad array of topics including pipeline construction review, permitting, and reporting, criminal penalties, updating certain reporting thresholds, industry collaboration, and the scope of federal and state pipeline partnerships.

Many of these proposals are in line with industry trade group recommendations. This includes, among other proposals, a plan to expand the conduct that can be criminally prosecuted under the Act, efforts to expedite certain construction permitting reviews, authorizing pipeline safety "incentives" and "safety pilot" programs, and an increase of the property damage threshold for incident reporting (from \$50,000 to over \$100,000). Other provisions could potentially expand existing regulatory obligations in certain areas such as operator qualification (which could "if appropriate" be expanded to new construction) and certain notification obligations for operators (e.g., design review threshold while still discretionary would be lowered to projects costing \$250 million and PHMSA could impose construction reporting). These proposals largely provide PHMSA with discretion to issue rules "as appropriate" or establish new programs.

This is the second pipeline safety legislative proposal to be issued in 2019 and it varies significantly in tone and substance from [Senator Ed Markey's \(D-Mass.\) proposal](#) earlier this year. The Markey proposal was largely directed at distribution pipelines but also proposed to multiply PHMSA penalties available under the PSA by a factor of 100. The House and the Senate Committees responsible for drafting PSA reauthorization legislation could use DOT's legislative proposal as a starting point for their own legislation, ignore it, or draft their own proposals. Odds are not likely, however, that DOT's proposal will succeed in all aspects in the Democrat controlled House of Representatives.

Relevant House and Senate Committees have convened three PSA reauthorization [hearings](#) to date and Democrats in particular were critical of PHMSA and of the industry. Representatives pressed the Agency on its growing backlog of unsatisfied rulemaking mandates in prior Congressional amendments and unsatisfied NTSB and GAO recommendations. None of those

outstanding mandates or recommendations are addressed in DOT's proposal. A spokesperson for Representative Pallone, Chair of the House Energy and Commerce Committee noted that the criminal liability provision (aimed at creating new liabilities for individuals who vandalize or threaten pipeline facilities) "will not make it past the Committee." Meanwhile, Senator Markey, who serves on the Senate Commerce Committee, [\*criticized\*](#) that same provision and noted generally that the proposal "fails to address all the key issues around safety and accountability."

The House and Senate Committees considering PSA reauthorization are expected to generate their own proposed legislation later this year, which will likely include at least some of the elements of DOT's proposal. Industry trade groups have announced their support of DOT's [\*legislative proposal\*](#), while the Pipeline Safety Trust [\*characterized\*](#) the proposal as "smoke and mirrors." The proposed elements contained in DOT's *Protecting our Infrastructure of Pipelines and Enhancing Safety Act of 2019* are included below organized by topic.

### **Criminal Penalties**

1. (Section 18) In addition to the knowing and willful damage and destruction of a pipeline or pipeline facility covered under the current PSA, this provision would establish new felony criminal liability for knowing and willful "vandalism, tampering with, or impeding, disrupting, or inhibiting the operation of a pipeline facility." It would also specify that pipeline facilities under construction are included within the scope of the existing provisions in addition to pipeline facilities in operation. Criminal conduct under the PSA can be subject to 20 years in prison, a fine, or both.

### **New Infrastructure Projects**

1. *Operator Qualification (OQ)* (Section 16)- Proposes expansion of OQ over new construction for oil and gas pipelines, "if appropriate." This proposal was included a rulemaking several years back and was removed from the final PHMSA rule.
2. *Permits for Pipelines Issued by Other Agencies* (Section 13)- Provides that DOT has exclusive authority to prescribe federal requirements for pipeline safety, including through pipeline safety conditions contained in permits issued by other Federal agencies regarding design, construction, operation or maintenance. This provision would also limit federal agencies (except FERC) from imposing requirements that "vary" from federal pipeline safety regulations on any pipeline with respect to permitting.
3. *Design Review* (Section 12)- Proposes to lower the current design review threshold from \$2.5 billion to \$250 million, although the decision to invoke design review would remain in PHMSA's discretion. Also would allow PHMSA to collect a fee in advance for the cost to conduct a review to determine compliance with Part 193 for LNG facilities.
4. *Pipeline Construction Project Data Collection* (Section 4) – If DOT determines that it would advance pipeline safety, it may require reporting of "relevant information" on pipeline construction projects and the shutdown of construction projects.
5. *Public Awareness* (Section 10) – This would revise the statute to specify that PHMSA may participate in public meetings and other permitting authority meetings for energy

infrastructure project approvals to better educate the public.

6. *LNG Project Reviews* (Section 11) – Authorizes PHMSA to provide a determination on whether location standards would be met by a given project proposal while maintaining that FERC remains responsible for formal approvals and permits.

#### **Proposals Related to Merrimack Valley Pipeline Incident**

1. *Overpressure Protection* (OPP) (Section 14) – Proposes to *require* gas distribution pipeline facility operators to provide “a secondary or back-up means of OPP for regulator stations serving low pressure distribution systems and that employ the primary and monitor regulator design”
2. *Management of Change for Pipeline* (MOC) *Tie-in Operations* (Section 15)- Directs PHMSA, if appropriate, to issue regulations requiring all pipeline operators to prepare and implement a detailed set of energy control procedures to use when performing “pipeline tie-in operations.”

#### **Voluntary Incentives**

1. *Safety incentives program* (Section 3) – Authorizes PHMSA and certified states to implement potential programs that enhance pipeline safety performance by providing recognition or other non-financial incentives for operators who voluntarily exceed the min federal pipeline safety regulations.
2. *Pipeline Safety Pilot Programs* (Section 6) – Pilot program would be defined broadly and as authorized by DOT may include exemptions from regulations if it provides an “equivalent level of safety” for a period of no longer than 7 years. Enforcement of any provisions that conflict with or are inconsistent with a pilot program or exemption by a state authority is preempted (specific to the person operating under the exemption or participating in the program). This provision sounds like a more flexible and less burdensome Special Permit process under Part 190.341.

#### **Industry Collaboration**

1. *Voluntary Information Sharing (VIS) System* (Section 5) – Authorizes PHMSA to establish a “confidential and non-punitive voluntary” VIS system, as a follow up to PIPES 2016 VIS provisions, to encourage collaborative efforts to improve integrity risk analysis information as well as lessons learned from accidents and near misses as well as process improvements. Records would generally be exempt from disclosure under FOIA if provided voluntarily or made available for inspection for purposes of the VIS system (with some exceptions).

#### **Incident Reporting**

1. *Property Damage Threshold* (Section 8)– Within 18 months of the bill’s passage, the property damage threshold for reporting incidents would be \$118,000 to account for inflation. Biennial updates of this threshold would be required to adjust for inflation.

#### **Federal/State Partnerships**

1. *State Pipeline Safety Program Grants* (Section 7) – DOT may consider expenses incurred by one state rendering aid to another state with pipeline inspection or program assistance in aftermath of natural disaster or major pipeline incident.
2. *Joint Inspection and Oversight* (Section 19) – Would require a state authority upon request by the DOT to provide records of a pipeline safety inspection or investigation it conducts and provides that a state must allow PHMSA to participate in the inspection or investigation upon request.

#### **Other Clarifications**

1. *Inactive Pipeline* (Section 9) – Would add definitions to the PSA for “pre-commissioned,” “active/in-service,” inactive/out-of-service,” and “abandoned” pipelines. The proposal would also *require* PHMSA to issue regulations outlining the applicable pipeline safety activities or records required for each status category, “based on commensurate risk that the pipeline status poses” and should consider the use of industry standards in doing so. API is finalizing a Recommended Practice on this topic, API RP 1181, Pipeline Operational Status Determination, which would likely guide this initiative.
2. *Timely Incorporation by Reference* (Section 17) – Would require PHMSA to periodically review incorporated industry standards and those that are the subject of a petition for rulemaking and update them as necessary and appropriate. Where DOT does not incorporate or only partially incorporates a standard, it would be required to issue a public statement explaining its rationale.
3. *Underground Natural Gas Storage User Fees* (Section 20) – Building off the PIPES 2016 authorization of the collection of user fees, this would allow the collection of an additional 5% to confirm to pipeline safety under fee collection.