

INSIGHTS

Deregulation at DOT: Direction Unknown

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A year ago, the oil and natural gas industry was preparing comments and responses to several expansive proposed rules issued by the Department of Transportation's (DOT) Pipeline and Hazardous Materials Safety Administration (PHMSA). With the advent of the Trump Administration and its focus on deregulation, those pending rules have since been withdrawn and are being reevaluated (among hundreds of other administrative agency rules). In the first 100 days of this Administration, the White House issued [58 executive orders and memoranda](#), nearly a quarter of which affected the pipeline industry directly or indirectly. In the six months since, the President has continued to issue directives aimed at eliminating regulatory burdens and expediting energy infrastructure. While these directives were met with initial relief from the industry, they lack clear deadlines and details and it has fallen on the various administrative agencies to interpret and implement them. To complicate matters, the Administration has simultaneously issued budget cuts across the board and has been slow to appoint key leadership positions. For an industry that relies on regulatory certainty, much remains uncertain.

Across the federal government, the Trump Administration's deregulation initiative has already rolled back numerous rules and delayed others. Administrative agencies, including [DOT](#), have established regulatory review officers and regulatory reform task forces to identify regulations for potential repeal, replacement or modification. Four hundred sixty-nine (469) proposed regulations that had been placed on federal agency agendas in the fall of 2016 have already been [withdrawn](#) and are being reevaluated to comply with the Administration's executive directives. This includes PHMSA's draft final hazardous liquid pipeline rule, which had been submitted for publication in the *Federal Register* in the last weeks of the Obama administration and is being reevaluated (with a projected publication date of late April 2018). Two hundred and eighty two (282) regulatory actions have been [reclassified](#) as long term actions, which are not expected to issue in the next 12 months. This includes the Agency's gas mega rule which had previously been slated by PHMSA to be finalized before the end of 2017 but is now projected for August 2018. Several portions of these proposed rules were mandated by Congress in recent amendments to the Pipeline Safety Act. As compared to this time last year, the Trump Administration has issued 42% fewer significant final rules this year overall. As to enforcement, while PHMSA enforcement has continued under the Trump Administration it has included [more warning letters and notices of amendment](#), which do not carry proposed civil penalties or compliance orders (in contrast to NOPVs, CAOs, and Safety Orders).

Last month, PHMSA's new Administrator Skip Elliott was confirmed by the Senate and has now taken office. His Deputy Drue Pearce has also been installed at the Agency. While the Chief

Counsel position remains vacant as well as a Deputy Associate Administrator for Policy and Programs, these top appointments may signal the start of some movement within the Agency. During his confirmation hearing, Elliott explained how he would respond to the Agency's outstanding rulemaking mandates, "If I am confirmed, one of the top priorities will be to work with PHMSA staff and this committee to understand which of those mandates are most critical ... to ensure that those that have the greatest impact to safety can be completed." [E&E News, PHMSA nominee dodges pipeline questions \(Sept. 28, 2017\)](#). Based on recent comments from Pearce and Associate Administrator for Pipeline Safety Alan Mayberry, however, it is not likely that the new PHMSA leadership will result in many new rules in the near term (at least in the form that they had been proposed). It is more likely that it will include proposals of certain rules to rescind or revise (including modification of prior proposed rules) on grounds that they are not straightforward, clear or designed to minimize regulatory burdens. Last week, Deputy Administrator Pearce explained that the Agency is "constantly seeking ways to improve [its regulations] by eliminating unnecessary or overly burdensome requirements that distract from beneficial requirements." [E&E News, PHMSA leaders say rollbacks can improve safety \(Nov. 3, 2017\)](#). Mayberry remarked, "I think we have an opportunity here to make things better, to make regulations more effective." *Id.*

Along those lines, DOT issued a request for [regulatory review](#) in October for "existing regulations and other agency actions that are good candidates for repeal, replacement or modification" with a deadline of December 1 for comments across all modes (the initial Nov. 1 deadline was extended to Dec. 1 in late October). Specific to PHMSA regulations and guidance, certain [commenters](#) have already offered the following proposed rules, existing rules and related guidance up for consideration and candidates for repeal:

1. Certain aspects of the gas mega rule and liquid rule that impact gas gathering lines (reporting, recordkeeping, etc.);
2. Substantiating MOP and MAOP (e.g., (the gas proposed rule's expansion beyond the Congressional statutory directive, its proposed retroactive application, lack of clarity under Part 192 on whether a valid pressure test by itself is sufficient, etc.);
3. Recordkeeping (general duty clause implementing a life of pipe requirement);
4. Underground natural gas storage Interim Final Rule (the portion that makes industry voluntary recommendations mandatory and enforcement for which has been put on hold in response to Petitions for Review);
5. Reporting requirements (increasing the property damage threshold);
6. Requirements when class locations increase (192.611);
7. Elimination of the grandfather clause for pre-1970 natural gas pipelines (192.619(c)).

While this is an industry that relies on certainty and predictability, it is premature to determine which, if any, of these will be selected for repeal, replacement or modification. The Administration has presented the industry with several opportunities to make the Agency's rules more clear, practical, and effective and to comment on other burdensome actions such as guidance, proposed rules, etc. Lack of clear direction regarding those changes and strained resources could lead to balkanization of the various PHMSA Regions who might set their own

priorities and regulatory interpretations and enforcement thresholds as well as disconnects between PHMSA Headquarters in DC and inspectors in the field. As DOT continues to implement the Presidential directives on deregulation and revaluation of pending proposed rules—with Technical Advisory Committee meetings scheduled in December for both oil and gas—industry must continue to demonstrate compliance with existing rules (and interpretations), pending final actions, and prepare for implementation of portions of proposed rules which are expressly required by the Pipeline Safety Act. Further, even if a rule is ultimately removed or suspended, it could nevertheless be argued by plaintiffs or other third parties as establishing a reasonable standard of care that industry may be expected to adhere to regardless of any deregulatory action.