



U.S. Department
of Transportation
**Pipeline and Hazardous
Materials Safety
Administration**

1200 New Jersey Avenue, SE
Washington, DC 20590

March 22, 2023

Mr. Adam D. Young
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Dear Mr. Young:

In a letter to the Pipeline and Hazardous Materials Safety Administration (PHMSA), dated November 09, 2021, you requested, on behalf of the Pennsylvania Public Utility Commission's (PA PUC) Law Bureau, an interpretation regarding whether a proposed amendment to the PA PUC's regulations is inconsistent with or preempted by the federal pipeline safety regulations in 49 Code of Federal Regulations (CFR) Part 195.

You explained that Pennsylvania participates as a certified state in the federal pipeline safety program administered by PHMSA under 49 U.S.C. § 60105(a) and has incorporated 49 CFR Part 195 in its regulations for intrastate pipelines, in part, to comport with PHMSA's requirements for state programs. You acknowledged that participating certified states must adopt the minimum federal pipeline safety standards but are permitted to adopt "additional or more stringent" regulations pursuant to § 60104(c), so long as they are "compatible" with the minimum federal pipeline safety standards.

You stated that the PA PUC has existing regulations which require electric, natural gas, and water public utilities to file service life study reports every five years; however, hazardous liquid transportation pipeline utilities are presently exempted from this regulation. *See*, 52 Pa. Code § 73.5. You explained that the PA PUC, in the interest of public safety, proposed to amend the service life study reporting regulation to remove the exemption, thereby making hazardous liquid transportation pipeline utilities subject to the same reporting requirement. You stated that the PA PUC believes that the service life study reports can indicate whether aging infrastructure will affect a utility's ability to continue providing safe, efficient, and adequate service.

During the Notice of Proposed Rulemaking for this amendment, as you indicated, some commenters asserted that mandating reoccurring service life study reporting requirements for hazardous liquid transportation pipeline utilities would be inconsistent with PHMSA's regulations in 49 CFR Part 195, specifically Integrity Management (§§ 195.450 and 195.452)

and Corrosion Control (§§ 195.551 - 195.589).¹ You stated that those commenters objected to the service life study reporting requirement because it would require operators to average and estimate service life or average remaining life of utility facilities and commenters asserted “the concept that a pipeline has a finite life is wholly inconsistent with the federal statutory and regulatory scheme.”²

In response to these comments, the PA PUC adopted a motion to seek PHMSA’s guidance regarding the concerns of the commenters. To aid in PHMSA’s review of the proposed regulation, you also provided the following: a list of the type of information that the PA PUC intends to require service life study reports to include; explanation that operators would need to include a list of the next year’s planned preventative and mitigative actions (such as system improvements) and a list of integrity enhancements that were performed on the pipeline the prior year, as required by and consistent with the applicable 49 CFR Part 195 requirements; and statement that the proposed service life study reports would be confidential but operators would also need to file a public version of the report.

On May 5 and May 6, 2022, PHMSA sought clarification from the PA PUC’s Law Bureau regarding the meaning of certain terms used in the current PA PUC’s service life study reporting regulation, 52 Pa. Code § 73.5, including “gas service,” and “gas and petroleum transportation pipeline companies.” On August 1, 2022, PHMSA requested additional information concerning how the service life study reports are currently utilized. You explained that they were used during rate proceedings, but moving forward, the intent is to use the hazardous liquid transportation pipeline utilities service life study reports for pipeline safety purposes.

Statement of the Law

The purpose of the Pipeline Safety Act (PSA) is to “provide adequate protection against risks to life and property posed by pipeline transportation and pipeline facilities” by empowering the Secretary of Transportation to “prescribe minimum safety standards for pipeline transportation and for pipeline facilities.” 49 U.S.C. § 60102(a)(1)-(2). These minimum federal safety standards apply to both interstate and intrastate pipeline facilities; however, the Secretary “may not prescribe or enforce safety standards and practices for an intrastate pipeline facility or intrastate pipeline transportation to the extent that the safety standards and practices are regulated by a [s]tate authority ... that submits to the Secretary annually a certification for the facilities and transportation.”³ § 60105(a). For intrastate pipelines, the PSA further provides an express preemption provision, stating:

¹ On February 23, 2022, PHMSA received *Comments of the Association of Oil Pipe Lines, American Petroleum Institute and American Fuel & Petrochemical Manufacturers in Response to Pennsylvania Public Utility Commission Request for Written Regulatory Interpretation from PHMSA*, which reiterated and elaborated upon commenter arguments in opposition to the PA PUC’s proposal to expand the service life study reporting requirement to hazardous liquid transportation pipeline utilities.

² Pennsylvania Public Utility Commission, *Request for Written Regulatory Interpretation of 49 CFR § 195.452 Related to Pipeline Integrity Management Reporting*, dated November 9, 2021, page 2 of 4.

³ The authority of the Secretary has been delegated to PHMSA. 49 CFR § 1.97.

A State authority that has submitted a current certification under section 60105(a) of this title may adopt additional or more stringent safety standards for intrastate pipeline facilities and intrastate pipeline transportation only if those standards are compatible with the minimum standards prescribed under this chapter. *Id.* at § 60104(c).

Therefore, a state authority may regulate intrastate pipelines and impose safety requirements in addition to the minimum federal standards only if: the state authority has a current certification pursuant to § 60105; and the additional safety standard is compatible with the federal standards.

Prior Legal Decisions

In order to provide a roadmap to answer your question, PHMSA has reviewed applicable decisions by courts analyzing preemption under the Pipeline Safety Act. While courts have not often dealt with the application of the PSA’s preemption provision to intrastate pipeline facilities, the following cases provide insight into how to apply the preemption provision to intrastate pipeline facilities.

The first case, *Olympic Pipeline Co. v. City of Seattle*, 437 F.3d 872 (9th Cir. 2006), confirmed that only states with a current § 60105(a) certificate are permitted to adopt additional or more stringent safety standards for intrastate pipelines. This case involved a hazardous liquid pipeline operator seeking a declaration that the city of Seattle was preempted from imposing additional safety requirements on its pipeline. Following a pipeline accident in Bellingham, Washington, Seattle declined to renew Olympic’s franchise agreement for the Seattle Lateral Segment until Olympic complied with its list of pipeline safety demands. The U.S. Court of Appeals for the Ninth Circuit held that Seattle’s pipeline safety demands were expressly preempted by the PSA because the city did not have a certification with the U.S. Department of Transportation (DOT) to regulate the safety of hazardous liquid pipelines. *Id.* at 880. The court found that Washington Utilities and Transportation Commission (WUTC), which had a § 60105(a) certification with the DOT, was the only authority in the state with jurisdiction over intrastate operators subject to the PSA. *Id.* at 879. The court held that even “[a]ssuming arguendo that municipalities can seek agreements under § 60105(a) and § 60106(a) as they relate to hazardous liquid pipelines, Seattle did not seek any such agreement. Further, the City has not been delegated authority by DOT to conduct inspections of pipeline operators and facilities... Rather, the DOT delegated this authority to the WUTC...”⁴ *Id.* at 879-880. Therefore, only states with a current § 60105(a) certificate are permitted to adopt additional or more stringent safety standards for intrastate pipelines.

The second case, *Washington Gas Light Co. v. Prince George’s County Council*, 711 F.3d. 412 (4th Cir. 2013), discussed safety standards and conflict preemption⁵, which is helpful for

⁴ Because the Ninth Circuit concluded that Seattle’s actions were preempted if the pipeline was either an interstate or an intrastate pipeline, it did not decide whether the Seattle Lateral segment of the Olympic pipeline system should be considered an interstate or intrastate pipeline under the PSA.

⁵ Conflict preemption exists where a state statute “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Chi. & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317, 101 S.Ct. 1124, 67 L.Ed.2d 258 (1981).

understanding what it means for a state regulation to be compatible or incompatible with federal standards. The case involved an operator challenging a county’s denial of zoning approval for natural gas substation expansion. Washington Gas sought to expand its natural gas substation by adding a liquefied natural gas (LNG) storage tank, but its request was denied by the county based on its zoning plans. Washington Gas argued that the county’s zoning plan, which prohibited the siting of an LNG facility and other industrial uses at its preferred location, was preempted by the PSA expressly, impliedly, and by conflict. The Fourth Circuit disagreed on all accounts. The court held that the zoning plans were land use regulations designed to foster transit-oriented development; they were not safety regulations. *Id.* at 420-21. In addition, the court found that the zoning plan was not in conflict with or an obstacle to the PSA because the operator could comply with the PSA and the County Zoning Plans simultaneously, by selecting another, albeit more costly, location than its preferred location. *Id.* at 422. Therefore, the zoning plan was not preempted.⁶

Analysis

Based on PHMSA’s review of the law and relevant decisions concerning the statutory preemption provision, PHMSA advises that the PA PUC should employ the following analysis to determine whether or not its proposed state regulations would be preempted as incompatible with federal pipeline safety standards. With regard to the proposed standard, PA PUC should evaluate:

1) Does the PA PUC service life study reporting requirement apply to interstate pipelines or intrastate pipelines?

Your letter indicated that the PA PUC intends the service life study reporting requirement to apply to hazardous liquid transportation pipeline utilities, which are intrastate pipelines. As noted above, a state authority may regulate intrastate pipelines and impose safety standards in addition to the minimum federal standards only if the state authority has a current certification pursuant to § 60105 and the additional safety standard is compatible with the federal standards. Since the service life study reporting requirement only applies to intrastate pipelines, the PA PUC should proceed to the next steps.

2) Does PA PUC have a current § 60105(a) certification?

Yes, PA PUC has a current § 60105(a) certification. As noted above, only a state with a current § 60105(a) certification is permitted to adopt additional or more stringent safety standards. *See*, § 60104(c). *See also*, *Olympic Pipeline Co. v. City of Seattle*. If the PA PUC did not have a

⁶ *See also*, *Texas Midstream Gas Servs., LLC v. Grand Prairie*, 608 F.3d 200, 211 (5th Cir. 2010) (holding, in part, that a municipal setback requirement that applied to an intrastate compressor station was not a “safety standard” under the PSA because the city’s primary motivation in adopting the regulation was to preserve neighborhood visual cohesion, it was not impossible to comply with city setback requirement and federal regulations, and the incidental effect on safety was not “direct and substantial”) and *Portland Pipeline Corp. v. S. Portland*, 288 F.Supp.3d 321, 430 (D. Maine 2017) (finding a local ordinance was not preempted, in part, because it was not impossible for the interstate pipeline operator to comply with both the ordinance and the PSA and because the local ordinance was not an obstacle to the goals of the PSA).

current § 60105(a) certification, it would not be permitted to adopt or enforce pipeline safety standards. The PA PUC should proceed to step three of the analysis.

3) Is the PA PUC service life study reporting requirement a safety standard?

If the PA PUC service life study reporting requirement is *not* a safety standard, it is not preempted by § 60104(c). *See, Washington Gas Light Co. v. Prince George's County Council*. The PSA preempts safety standards that meet certain conditions. The PSA does not preempt rules or regulations that are not related to pipeline safety (for example, zoning regulations designed to promote transit-oriented development). If the PA PUC service life study reporting requirement is a safety standard, the PA PUC should proceed to the next step.

4) If the service life study reporting requirement is a safety standard, is it an additional safety standard or a more stringent safety standard than the minimum federal pipeline safety regulations?

If the service life study reporting requirement is a safety standard, then it would be considered an additional safety standard or more stringent safety standard, because the minimum federal pipeline safety standards do not require service life study reporting. States with a § 60105(a) certification may adopt additional safety standards or safety standards that are *more stringent* than the minimum federal pipeline safety standards. *See* § 60104(c). In this case PA PUC would proceed to the final step.

5) Is the service life study reporting requirement compatible with the federal pipeline safety standards?

A state with a § 60105(a) certification may only adopt additional or more stringent safety standards if those standards are “compatible” with the minimum Federal standards. PHMSA interprets “compatible” consistent with the explanation in *Washington Gas Light Co. v. Prince George's County Council*, discussed above. In other words, if an operator can comply with both the state regulation and the federal pipeline safety standards, then the state regulation is likely compatible. But if an operator cannot comply with both, or if the state regulation is an obstacle to compliance with the federal safety standard, the state regulation is likely not compatible and would be preempted.⁷

⁷ *See, e.g., Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 299 (1988) (“even where Congress has not entirely displaced state regulation in a particular field, state law is pre-empted when it actually conflicts with federal law. Such a conflict will be found ‘when it is impossible to comply with both state and federal law’” (citing, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–143 (1963))). *See also Kinley Corp. v. Iowa Utilities Bd.*, 999 F.2d 354, 358 (8th Cir. 1993) (discussing that “a conflict arises when ‘compliance with both federal and state regulation is a physical impossibility,’ or when state law ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’”) (citing *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713 (1985)), and *Panhandle Eastern Pipe Line Co. v. Madison County Drainage Bd.*, 898 F.Supp. 1302, 1314 (S.D. Ind. 1995) (discussing that because Panhandle could comply with both federal and state law, there was no federal preemption).

PHMSA advises the PA PUC to employ the above roadmap to determine if its proposed hazardous liquid transportation pipeline utilities service life study reporting requirement would likely be preempted by the PSA, taking into consideration, as appropriate, any comments from relevant stakeholders. Please note, this interpretation is applicable only to facilities determined to be intrastate pipelines in accordance with Appendix A to 49 CFR Part 195.

If we can be of further assistance, please contact Tewabe Asebe at 202-366-5523.

Sincerely,

John A. Gale
Director, Office of Standards
and Rulemaking



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
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November 09, 2021

Via Electronic Mail

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Re: Request for Written Regulatory Interpretation of 49 CFR § 195.452
Related to Pipeline Integrity Management Reporting

Dear Mr. Gale:

This letter represents a request from the Pennsylvania Public Utility Commission's (Commission) Law Bureau, pursuant to 49 C.F.R. § 190.11(b), for a written regulatory interpretation of the Pipeline and Hazardous Materials Safety Administration (PHMSA) regulations at 49 CFR Part 195, Subpart F (specifically §§195.450 and 452) (related to pipeline integrity management reporting requirements in high consequence areas) and Subpart H (Corrosion Control), and their applicability to a proposed Commission regulation regarding service life study reporting.

The Commission participates as a certified state in the federal pipeline safety program administered by PHMSA under 49 U.S.C. § 60105(a). The Commission has incorporated 49 CFR Part 195 in its regulations, in part, to comport with the requirements of PHMSA's pipeline safety program. Participating certified states must adopt the minimum federal pipeline safety standards and are permitted to adopt additional, more stringent regulations, so long as they are compatible with the minimum federal pipeline safety standards. We recognize that the Commission does not have the authority to promulgate regulations for hazardous liquid pipelines that are inconsistent, or incompatible, with federal law or regulations. State or local pipeline safety laws that are inconsistent with the Pipeline Safety Act or regulations are uniformly held to be preempted. *See e.g., Olympic Pipe Line Co. v. City of Seattle*, 437 F.3d 872 (9th Cir. 2006).

The Commission's existing regulations require electric, natural gas and water public utilities to file service life study reports every five years. *See* 52 Pa. Code § 73.5. Gas and petroleum transportation pipeline companies are exempted under this regulation. The Commission had originally proposed to amend its regulations at Chapter 73 to

include service life study reporting for gas and petroleum transportation pipeline companies. In response to the Commission's Notice of Proposed Rulemaking (NOPR), however, several stakeholders have asserted that mandating reoccurring service life study reporting requirements for all pipelines would be inconsistent with PHMSA's regulations at 49 CFR Part 195, Subparts F and H, and would, therefore, be preempted.

Commenters suggested that the proposed service life study report requirement as applied to the hazardous liquid transportation pipeline utilities goes beyond mere "reporting" and instead would require such utilities to analyze their infrastructure in a way that is wholly inconsistent with federal pipeline safety law and regulations. More specifically, commenters state that requiring hazardous liquid transportation pipeline utilities to create and file service life study reports as specified in 52 Pa. Code § 73.5, is inconsistent with the federally mandated requirements for the safe operation, maintenance, inspection, replacement, testing, monitoring and repair that hazardous liquid transportation pipeline utilities apply to their facilities. Specifically, commenters suggested that because the proposed service life study report would require the utility to average and estimate service life or average remaining life of utility facilities, the concept that a pipeline has a finite life is wholly inconsistent with the federal statutory and regulatory scheme. Instead, commenters suggest that federal law and regulations require that pipelines operate, inspect, maintain and repair their pipelines, including through integrity management programs. This entails ongoing monitoring, inspection, and evaluation of facilities to determine what repairs are necessary on what timeline and which to prioritize to keep facilities safe and fit for service, potentially infinitely.

At its Public Meeting on October 7, 2021, the Commission adopted a Motion by Vice Chairman John F. Coleman, Jr. that essentially closed the NOPR, sought guidance from PHMSA regarding the concerns of the commenters expressed above, and, if not preempted by federal law, incorporates a service life study reporting requirement proposal into an ongoing Commission rulemaking at Docket No. L-2019-3010267. Thus, in the interest of public safety, the Commission seeks to expand the service life study reporting requirement to include gas and petroleum transportation pipeline companies but intends to do so by adding a more robust service life study reporting requirement to its gas and pipeline safety regulations at 52 Pa. Code, Chapter 59.¹ Such reporting can indicate whether aging infrastructure will affect a utility's ability to continue providing safe, efficient, and adequate service. Before proceeding with a service life study reporting proposal, however, the Commission seeks the guidance of PHMSA to ensure that such a requirement is not inconsistent with or preempted by federal regulations.

¹ Rulemaking Regarding Hazardous Liquid Public Utility Safety Standards at 52 Pa. Code Chapter 59, PUC Docket No. L-2019-3010267.

While not an exhaustive list, the Commission intends for the Service Life Study proposal to include the following:

- Corrosion growth rate based on the most recent In-Line-Inspection run, sectionalized as appropriate;
- Supporting documentation to demonstrate the corrosion growth rate. This may include a graph estimating corrosion growth from installation of the pipeline to the present time;
- Retirement thickness calculations that consider: (1) pressure design thickness; and (2) minimum structural thickness;
- Remaining life calculations by: (1) segment; (2) age; (3) coating type; and (4) soil conditions;
- A schedule identifying portions of the pipeline to be replaced or remediated over the next five (5) years;
- A summary of the portions of the pipeline that were previously retired with an explanation of the characteristics of the pipeline sections that led to the replacements;
- A listing and description of threats specific to the pipeline, with a summary of how each threat and the associated risks are mitigated;
- A summary of the top ten (10) highest risks identified on the pipeline with an explanation as to how the risks are mitigated;
- An explanation of how anomalies, dents and ovalities are formed on the pipeline and addressed by mitigative measures;
- A summary of the leak history on each pipeline including a description of the size of each leak;
- A discussion of the history of the pipeline, including when cathodic protection was installed, when coating was applied, and the various measures performed by the pipeline operator, including the implementation of new procedures; and
- A discussion to illustrate how managing integrity lengthens pipeline life.

The proposed report would also include a list of the next year's planned preventative and mitigative actions (such as system improvements) and a list of integrity enhancements that were performed on the pipeline the prior year, as required by and consistent with the applicable 49 C.F.R. Part 195 requirements. The Commission intends for the proposed service life study reports to be confidential but will also require a public version of the report, which will not contain information that is proprietary or contain information subject to The Public Utility Confidential Security Information Disclosure Protection Act, 35 P.S. §§ 2141.1 to 2141.6, and the PUC's regulations implementing such Act at 52 Pa. Code §§ 102.1 -102.4.

PHMSA regulations at 49 CFR §195.452 outline the framework for integrity management reporting, including guidance (49 CFR § 195.452(e)) and elements (49 CFR § 195.452(f)) of an integrity management program. PHMSA regulations at 49 CFR Part 195, Subpart H outlines corrosion control requirements. Through expansion of its current regulation, the Commission seeks to gain insight into whether aging infrastructure carrying hazardous liquids will affect a utility's ability to continue providing safe, efficient, and adequate service.

Therefore, pursuant to 49 C.F.R. § 190.11(b), the Commission seeks a written interpretation from PHMSA regarding whether the proposed amendment to the Commission's regulations is inconsistent with or preempted by PHMSA's integrity management and corrosion control regulations at 49 CFR Part 195, Subparts F and H.

Thank you for your consideration in this matter. Should you have any questions or seek further clarification or details with respect to this request, please do not hesitate to contact the undersigned.

Sincerely,

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