

May 25, 2001

Edward A. Brigham
Acting Deputy Director
Research and Special Programs Administration
U.S. Department of Transportation
Room PL-401
400 Seventh Street, S.W.
Washington, DC 20590-0001

Re: Pipeline Safety: Pipeline Integrity Management in High Consequence Areas (Hazardous Liquid Operators with Less Than 500 Miles of Pipelines); 66 Fed. Reg. 15821; Docket No. RSPA-01-7408

Dear Mr. Brigham:

On March 21, 2001, the Research and Special Programs Administration (RSPA) published a Notice of Proposed Rulemaking (NPRM) on Pipeline Integrity Management in High Consequence Areas. The RSPA proposal would extend the requirements for protection of populated areas, commercially navigable waterways, and areas unusually sensitive to environmental damage from hazardous liquid pipeline spills to those regulated hazardous liquid pipeline operators who own or operate less than 500 miles of pipeline.

The Office of the Chief Counsel for Advocacy of the U.S. Small Business Administration (SBA) was created in 1976 to represent the views and interests of small businesses in Federal policy making activities.¹ The Chief Counsel participates in rulemakings when she deems it necessary to ensure proper representation of small business interests. In addition to these responsibilities the Chief Counsel monitors compliance with the Regulatory Flexibility Act (RFA), and works with Federal agencies to ensure that their rulemakings analyze and substantiate the impact that their decisions will have on small businesses.

A review of RSPA's Regulatory Flexibility Act (RFA) certification contained in the Pipeline Integrity Management proposal has uncovered a deficiency that should be corrected in the final rule. Additional information is needed so that the public may ascertain the validity of RSPA's certification of no significant impact upon a substantial number of small entities. In order to comply with the RFA, it is important that RSPA include the following information in the final rule.

Need for the Regulation

¹ Regulatory Flexibility Act, 5 U.S.C. § 601, as amended by the Small Business Regulatory Flexibility Act, Pub. L. No. 104-121, 110 Stat. 866 (1996).

In its proposal RSPA has not sufficiently clarified the need for regulating those operators operating less than 500 miles of pipeline. The proposal states:

This action is necessary because on December 01, 2000, RSPA's Office of Pipeline Safety (OPS) issued a final rule to establish new requirements for the protection of these areas. However, the published final rule applied only to hazardous liquid pipeline operators who own or operate 500 or more miles of pipeline. After further review, it was determined that the same requirements should be extended to the remaining regulated hazardous liquid pipeline operators.²

RSPA further states that industry comments on the previous regulation, covering larger liquid operations, urged that the same requirements apply to all operators regardless of the total mileage that they operate. Unlike the present proposal, the final rule covering the larger liquid operators included a rationale for the rule, i.e. the need to have integrity management programs in place for this category of operators based upon inspections, accident investigations and the National Transportation Safety Board's analysis of several pipeline ruptures.

No such information was provided in this proposal demonstrating that a significant problem exists for the smaller liquid operators. Have there been frequent accidents with this smaller category of operators? Do they have a lower safety rating? Have they failed to install recommended safety changes within their operations? There is no indication that these pipeline operators are not already performing adequate planning and management or taking the appropriate steps to address any pipeline problems in a timely manner. RSPA stated that it "does not know how many operators currently have leak detection systems or how many will be installed or upgraded as a result of this proposed rule."³ The agency's statement further acknowledges RSPA's lack of data on this segment of the industry. More information is needed to justify extending the prior regulation to the smaller liquid operators. RSPA should provide the public with information that there is a significant problem in sensitive areas and that the small operators' current response is not adequate to address any such problems.

Factual Basis for the Certification

The RFA generally requires Federal agencies to perform an initial analysis of the small business impacts associated with its proposal and identify flexibility alternatives. The agency need not meet this requirement if the agency head can certify that the rule will not have a significant economic impact on a substantial number of small entities. However, there must be a factual basis for the certification.⁴ RSPA proposes to certify the rule, but it is not clear that there is a credible factual basis for a certification.

² 66 Fed. Reg. 15821.

³ Id.

⁴ Id. .605(b).

In the previous regulation on hazardous liquid pipeline operators who own or operate 500 or more miles of pipeline, RSPA admitted the need to gather additional information on smaller liquid operations prior to issuing this proposal. The findings provided in the proposal were not sufficient as a factual basis for an RFA certification statement.

“Information that we collected revealed that many owners and operators of less than 500 miles of pipelines are to a large extent, companies with sufficient capabilities and resources, and are able to handle the same requirements imposed on operators of 500 miles or more of pipeline. ...50% of such pipelines are capable of accommodating [rule requirements].”⁵

RSPA is missing the point. The issue is not whether some small operators can “handle” the requirements, but rather whether there is a disproportionate small-business impact. If the small operators’ pipelines tend not to be located in sensitive areas, and more than 50% of the large operators can meet the same requirements, there would not be a credible factual basis for certification. RSPA should provide the public with an estimate of the percent of large operators capable of meeting these requirements and the information necessary to determine whether small operators tend to be located in sensitive areas (e.g., pipeline location, location of sensitive areas, affected populations). Further, RSPA should examine the impact of this proposal on small entities relative to their profits, revenues, or some other factor which allows the agency to make a cost comparison. (See Cost discussion below). Failure to provide the factual basis, including the basis for its economic impact criterion, opens the rule to a valid charge of non-compliance with the RFA.

Size Standard

In order to determine the impact upon small businesses, RSPA must first determine how many small entities are affected by the proposed rule. The proposal states that 128 operators are impacted by this proposal and many of them are “companies with sufficient capabilities and resources.”⁶ How do these 128 operators relate to the U.S. Small Business Administration’s (SBA’s) size standard for the hazardous pipeline industry?⁷ Are any of them considered to be small businesses? RSPA appears to indicate in its proposal that the affected operators are considered to be large businesses and won’t be unduly burdened. Without a comparison to SBA’s size standard, the public is unable to determine the potential impact upon small business, if any, and whether RSPA properly certified this rule under the RFA.

Cost Analysis

The costs provided in the proposed rule, and the supporting economic analysis, includes only planning and management costs. Neither equipment nor maintenance costs have

⁵ 66 Fed. Reg 15821.

⁶ Id. at 15824.

⁷ See 13 CFR 121.201.

been included in the cost estimates. RSPA blames this lack of inclusion on the inability to estimate the total cost of installing the equipment. “OPS does not know how many operators will install them.”⁸ Additionally, RSPA explains that cost estimates were not made because “OPS does not know how many operators currently have leak detection systems or how many will be installed or upgraded as a result of this proposed rule. OPS was therefore also unable to estimate the total costs of the proposed lead detection requirements.”⁹

Clearly there are ways in which those costs can be estimated. By varying the number of potential operators that will install the required equipment (EFRDs), RSPA can provide the public with a range of cost scenarios. What will the cost be if 10% of the operators install EFRDs? 30%? 70%?

The same rationale would work for estimating the cost of the proposal’s leak detection requirements. RSPA can first assume a safe industry with many functional leak detection systems in place, say 75%. Then the agency can provide an estimate with a mid-line safety threshold and finally assuming a low end (10%?), with a large number of safety systems needing to be installed or upgraded. What would the associated costs be with these estimates? In this manner, RSPA would be able to provide the public with varying cost estimates and obtain feedback on which those estimates contained the most realistic cost alternative.

Conclusion

The errors in the certification of the proposed rule should be addressed by RSPA in the preamble to the final rule and additional clarification statements added to the cost analysis and RFA sections as noted above.

If you require additional information or any other assistance, feel free to contact Claudia Rodgers at 202-205-6533.

Sincerely,

Susan M. Walthall
Chief Counsel for Advocacy

Claudia Rayford Rodgers
Asst. Chief Counsel for Advocacy

⁸ 66 Fed. Reg. at 15823.

⁹ Id.