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What Does It Mean To 'Consider' Pipeline Risk Factors?

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Law360, New York (August 29, 2017, 11:24 AM EDT) --
The increasing usage of hydraulic fracturing for oil and natural gas extraction has opened more parts of the country to exploration and drilling. As more unconventional wells are located in areas lacking the infrastructure to bring the oil and natural gas to market, constructors and operators of pipelines are racing in to fill the need.


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Advancements in horizontal directional drilling have allowed pipeline drillers to minimize aboveground disturbance, no longer having to zig and zag open trenches to avoid populated areas, navigable waterways or environmentally sensitive areas. Accordingly, more miles of pipeline are located underneath “high consequence areas,” exposing pipeline operators to more public scrutiny and a suite of more burdensome regulatory requirements.

The recent ruling in ExxonMobil Pipeline Company v. U.S. Department of Transportation underscores the importance of compliance with the Pipeline Hazardous Materials Safety Administration’s (PHMSA) pipeline and safety regulations prior to a pipeline release in high consequence areas. On Aug. 14th, 2017, the Court of Appeals of the Fifth Circuit vacated, in part, a final order issued by PHMSA to ExxonMobil, which found that ExxonMobil failed to properly consider the susceptibility of certain portions of its Pegasus Pipeline to seam failure, and assessed a civil penalty of $2.6 million.

The court determined that, despite an oil leak from the pipeline, ExxonMobil was not in violation of PHMSA regulations requiring it to “consider” all risk factors that reflected the risk conditions on a certain pipeline segment, because ExxonMobil “carefully [underwent] an informed decision-making process in good faith, reasonably taking into account all relevant risk factors in reaching a decision” that the pipeline was not at risk of seam failure. 2017 U.S. App. LEXIS 15144 (5th Cir. Aug. 14, 2017).

In March 2013, the 859-mile long Pegasus Pipeline, transporting crude oil from Patoka, Illinois, to Nederland, Texas, ruptured, spilling several thousand barrels of oil near Mayflower, Arkansas. Subsequent to its investigation, PHMSA issued a final order finding ExxonMobil violated several pipeline safety regulations, including failing to consider all risk factors in establishing an assessment schedule for its integrity management program (IMP) in its high consequence areas of the Pegasus Pipeline. 49 C.F.R. § 195.452(e).

The Pipeline Safety Act and PHMSA regulations require pipeline operators to create an IMP for all pipelines that could affect a high consequence area, which include highly populated and environmentally sensitive areas. The pipeline integrity regulations set forth certain assessment methods available to operators with pipelines in high consequence areas, and include additional requirements for pipelines constructed with low-frequency electric resistance welded steel (LF-ERW) because of a higher rate of seam failure.

The regulations include no specific method for operators to determine whether LF-ERW pipe is susceptible to longitudinal seam failure, but PHMSA commissioned and published a third-party report which provides a methodology of determining seam-failure susceptibility. Because the Pegasus Pipeline contained LF-ERW pipe, ExxonMobil was subject to those additional regulatory requirements.

PHMSA's final order included four violations based on ExxonMobil's alleged failure to "consider" all risk factors in its pipeline assessment schedule. The central issue before the court, then, was interpreting the definition of "consider" in the context of 49 C.F.R. § 195(452)(e)(1). PHMSA cited past occurrences of seam failure as the basis for concluding that ExxonMobil erroneously concluded that the pipeline was not susceptible to seam failure and that it did not properly assess the pipeline's integrity.

In its appeal of the final order, ExxonMobil referred to a number of seam evaluations it conducted beginning in late 2004. Each of those evaluations applied the methodology published by PHMSA for LF-ERW pipe, with expert testimony establishing that ExxonMobil properly followed the methodology in its consideration of risk factors and its conclusion that the pipeline was not susceptible to seam failure despite the leak in 2013.

The court agreed with ExxonMobil, finding PHMSA acted arbitrarily and capriciously with respect to five of its violations in the final order. The regulation on which four of the violations were based, 49 C.F.R. § 195.452(e)(1), is a process-based regulation and does not compel a certain outcome, but rather leaves it up to the operator to make the decision on seam failure susceptibly.

Specifically, the court held that the use of "consider" in the regulation meant that the pipeline operator had to "carefully undergo an informed decision-making process in good faith, reasonably taking into account all relevant risk factors in reaching a decision." The fact that the release occurred, the court said, "did not necessarily mean that ExxonMobil failed to abide by the pipeline integrity regulations in considering the appropriate risk factors."

Because the court found that ExxonMobil conducted its seam-failure evaluations properly in accordance with the PHMSA-published report, ExxonMobil had sufficiently established that it considered all relevant risk factors in accordance with the regulations. Accordingly, the court vacated the final order and penalty amount with respect to those violations based on the consideration of risk factors.

The court's distinction between a "process-based" regulation and an "outcome-based" (strict liability) regulation is a useful lens through which to view other regulations applicable to pipeline safety. In the face of a significant pipeline leak, establishing evidence of fulfilling the minimum standards of the relevant pipeline inspection processes may act as a shield to limit a pipeline operator's exposure to regulatory violations. Indeed, the determination of whether a pipeline even falls within a high consequence area — not central to the ExxonMobil Pipeline opinion but nevertheless a precursor to establishing the requirement to develop an IMP — is based in part on process.

Although the rules delineating which areas fall within an area of high consequence are at times

prescriptive (see Appendix C to C.F.R. Part 195), PHMSA guidance has hinted that performing a good-faith search for areas of high consequence may be enough to satisfy the intent of the regulations and protect against PHMSA enforcement action, even if the search failed to identify all areas of high consequence. 68 FR 42458, 42459 (Jul. 17, 2003).[1]

More broadly, the holding in ExxonMobil Pipeline may be another marker indicating a new reluctance to grant deference to regulatory agencies. The court in ExxonMobil swiftly dispatched with PHMSA's assertion that the use of "consider" in the regulation was ambiguous and therefore entitled PHMSA to Auer deference. Without any deference owed, the court only needed to determine whether ExxonMobil "reasonably applied" the regulation requiring the consideration of all relevant risk factors.

The court was unwilling find fault with the implementation and results of ExxonMobil's consideration process, even with PHMSA charging that results of ExxonMobil's assessment were flawed. Once again, and perhaps even more if Chevron and Auer start losing their judicial teeth, a pipeline operator's compliance with process-based regulations is critical in its defense after a spill occurs.

To be sure, courts will have more opportunities to interpret other PHMSA regulations as old pipelines age and new pipelines continue to be constructed. But ExxonMobil Pipeline stands for an important line of defense for today's pipeline operators protecting against tomorrow's unforeseen releases: a pipeline release is not always indicative of regulatory violations where the results of past pipeline assessments were properly considered.

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[1] Advisory Bulletin (ADB-03-03) was addressed to operators of gas transmission pipelines, who have similar IMP requirements.
