

2021 AOPL Annual Business Conference

Trends and Insights into PHMSA Inspections and Enforcement

Moderator: Catherine Little, Troutman Pepper

Presenters:

- Annie Cook, Troutman Pepper
- Jim Curry, Babst, Calland, Clements and Zomnir, P.C.
- Brianne Kurdock, Babst, Calland, Clements and Zomnir, P.C.
- Vince Murchison, Murchison Law Firm, PLLC

troutman
pepper

Babst | Calland
Attorneys at Law

troutman
pepper



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LAW FIRM, PLLC
The Pipeline & Energy Authority

Agenda

1. **Inspection Trends** – PHMSA inspection trends, best practices on how to prepare for and manage PHMSA inspections, both during and afterwards.
2. **Internal Audits** – Experiences with internal audits and how they can serve to avoid enforcement or, at a minimum, better prepare your company for future interaction with PHMSA.
3. **PIPES Act of 2020** – Address significant changes related to PHMSA enforcement in light of passage of the PIPES Act of 2020.
4. **PHMSA Enforcement** – Trends in enforcement cases, administrative hearings, and post-hearing best practices.



Course Description

Moderator: Catherine Little, Troutman Pepper

Presenters: Annie Cook, Troutman Pepper; James Curry, Babst, Calland, Clements and Zomnir, P.C.; Brianne Kurdock, Babst, Calland, Clements and Zomnir; Vince Murchison, Murchison Law Firm, PLLC.

Overview: This presentation will focus primarily on PHMSA pipeline safety inspections and enforcement. We will look at PHMSA inspection trends, and discuss best practices on how to prepare for and manage PHMSA inspections, both during and afterwards. We will also share our experiences with internal audits and how they can serve to avoid enforcement or, at a minimum, better prepare your company for future interaction with PHMSA. On the enforcement front, you will also hear about trends in enforcement cases, administrative hearings, and post-hearing best practices. Lastly, we will address significant changes related to PHMSA enforcement in light of passage of the PIPES Act of 2020.

Course Objective: To provide you with additional tools to manage the PHMSA relationship, whether during inspection, enforcement or hearings.

Credits/Level: Legal – All Levels – 60 CLE Minutes

Disclaimer

The materials contained in this presentation are not legal advice and are for informational purposes only. The views herein are views of the authors only and not necessarily of their law firms or clients.

Inspection Trends

Annie Cook, Troutman Pepper

Inspection Trends

PHMSA's Inspection Process

Who is inspected and by whom?

How does PHMSA schedule inspections?

What is reviewed or covered?



Preparing for an Inspection

Participate in Screening Interview – For integrated inspections, PHMSA will typically conduct a screening activity with the operator to inform its inspection plan and focus, among other things.

Gather Intel from PHMSA – PHMSA should provide a summary of the areas and locations that an inspection will cover.

Review PHMSA Inspection Protocols/Checklists – Review relevant Agency inspection protocol forms (publicly available).

Review Incident and Enforcement History – Review Company's incident and enforcement history, safety-related condition reports, and where relevant construction and/or integrity management notifications.

Designate a Primary Point of Contact – Designate a point of contact and/or audit team to assist the PHMSA during the inspection, typically a person(s) with relevant subject matter expertise and experience interfacing with regulators during audits.

Inspection Trends

Managing an Inspection

Be Cooperative – Be forthcoming and cooperative.

Participate in Introductory and Exit Meetings – During the introductory meeting, discuss proposed document sharing protocol for sharing documents that are confidential and protected under FOIA. Exit meeting should flag any issues noted during the inspection.

Respond to Questions – Limit responses to the questions asked and to subject matter for which have knowledge.

Maintain Detailed Summary of Interviews/Questions/Documents – Designate a note taker, and consider whether to maintain internal summaries of the inspection, whether daily, weekly or by inspection. Also maintain a “document log” to include a record of what and when documents are requested.

Coordinate with Legal as appropriate.



Inspection Trends

Inspection Follow-up

Additional Requests for Information – Anticipate follow up from PHMSA, including verbal, email or more formal written requests for additional information.

Post-Inspection Briefings – required within 30 days of the inspection and, to the extent practicable, required to provide written preliminary findings of the inspection within 90 days.

Addressing Endless Data Requests and Bringing an Audit to Closure – patience, documentation, and convene meetings with Region (including Region Director) as appropriate.

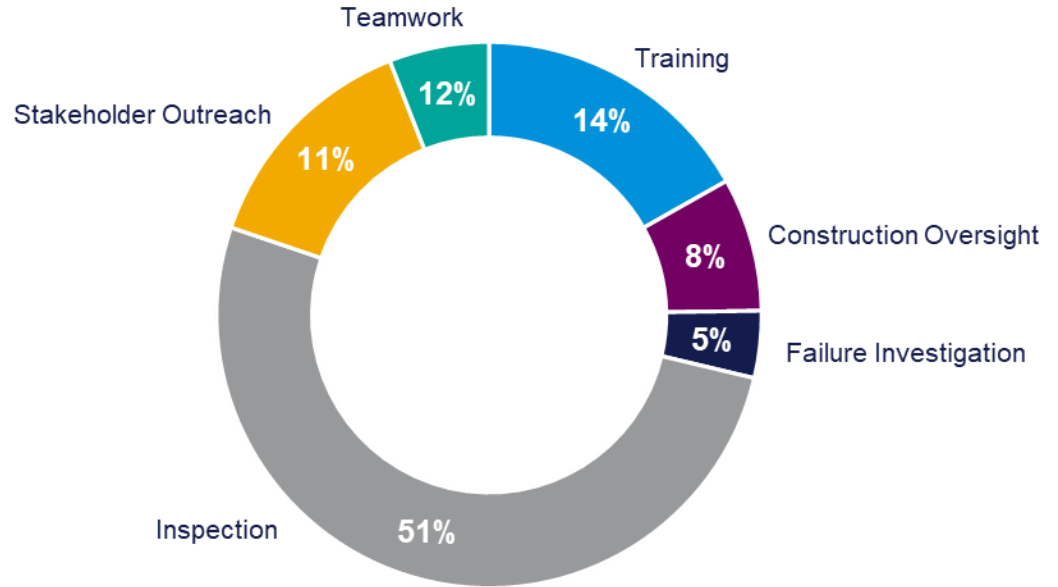


Inspection Trends

Current Inspection Trends

- Integrity Management
- Leak detection
- Records
- Operator Qualification
- CRM
- Facilities
- Construction/compliance with construction standards

Federal Effort Allocation (as of 4/29/21)



Internal Audits

Jim Curry, Babst, Calland, Clements and Zomnir, P.C.

Roadmap

- **Why do an internal audit**
- **Benefits & risks**
- **Audit types**
- **Maintaining privilege**
- **Practical challenges**
- **What next**

Internal Audits

Why do an internal audit?

- Suspected compliance issue, facility acquisition, normal-course
- Employee or contractor complaint
- Characterize risks, avoid surprise, maintain control, protect the process
- Corporate policy

Internal Audits

Benefits

- Understand and mitigate exposure
- Identify before your regulator
- Maintain control of remedial efforts & timing
- Demonstrate good faith
- Obtain enforcement credit
- Support safety culture

Internal Audits

Risks

- Sensitive documents
- Privilege waiver
- Identify issues, then fail to act
- Findings more substantial than anticipated
- SEC disclosure obligations
- Corporate policy implications
- Ready for Upjohn warnings?



Internal Audits

What is involved?

- Internal evaluation of compliance
- Access to documents
- Discussions with personnel
- Critical role of attorney client privilege (ACP)
- Handling audit materials
- Remediation, internal & external communication

Internal Audits

Audit Types

- Formal initiation, under ACP, direction of counsel, for the purpose of providing legal advice, dedicated team, clear guidance on protecting ACP, secure communication and file management
- Ordinary-course, non-ACP, conducted by compliance staff, discoverable business record
- Switching from one to the other?

Internal Audits

Maintaining ACP

- Attaches to communications with counsel, for the purpose of obtaining legal advice
- Clearly initiate, in writing, sometimes stronger with outside counsel
- Audit team, privilege guidance
- Document markings – ACP, every page
- Communications - “To”... not “cc”, calls versus emails
- ACP waiver is easy to do
- Is there also an attorney work product claim?

Internal Audits

Practical considerations

- Does this fit with company culture?
- How to communicate to staff?
- Understanding ACP and what can happen if it is waived
- Document management, protection
- Electronic platforms: Teams, SharePoint, Slack
- Picking the right team
- Prepared to address what you might find?
- When to consult with criminal counsel

Internal Audits

What next?

- Develop remedial action plan
- Track implementation
- Is a self-report advantageous?
 - A fact-sensitive question
 - Scope of non-compliance
 - Duration of non-compliance
 - Time necessary to resolve
 - Level of safety risk
 - Enforcement considerations



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PIPES Act of 2020

Vince Murchison, Murchison Law Firm, PLLC

Protecting our Infrastructure of Pipelines and Enhancing Safety Act of 2020

“PIPES Act of 2020”

- **Agency / Rulemaking-Related**
- **Enforcement-Related**
- **Technology Development**
- **Miscellaneous**
- **Pipeline Safety Management Systems – A Heads Up**

All as Relevant to Hazardous Liquid Pipelines

Agency/Rulemaking-Related

- **Purpose & General Authority (§ 118): Secretarial Decision-making**
 - A reg’s benefits must justify the costs; now...
 - Insert “including safety and environmental benefits” after “benefits”
- **PHMSA Workforce Development (§ 102)**
- **Rulemaking Updates (§ 106)**
- **Pipeline Operating Status (§ 109)**
 - Ceased normal ops; 180 days min; isolated; purged; inert, nonflammable gas
- **Gathering Lines – GAO Report (§ 112(b))**
- **Expansion of USAs (§ 120)**
- **Automatic and Remote-Controlled Valves – NAS Study (§ 119)**

Enforcement-Related

- **Self-Reporting of Violations (§ 107)**

- Penalty Assessment Considerations
- “self-disclosure and correction of violations, or actions to correct a violation, prior to discovery by” PHMSA
- How Will We Know?

- **Due Process Protections in Enforcement Proceedings (§ 108)**

- Settlements
- Contents of the “Case File”
- Expedited Proceedings
- Burden of Proof



- **PHMSA Orders: Findings of Fact and Conclusions of Law**
 - Region Recommendations
 - Orders on Petition for Reconsideration
 - Declaratory Orders
 - Respondent Responses to Agency Post-Hearing Submissions
 - Hearings Open to the Public?!
- **Enforcement Transparency & GAO Report**

Technology Development

- **Pipeline Safety Enhancement Programs (§ 104; new PSA § 60142)**
 - Evaluate innovative technologies and operational practices
 - Limitations: Mileages; Prohibited Areas
 - Testing Hazardous Liquids Pipelines in HCAs – A Report!
 - Duration
 - Safety Standards: Safety measures tested must be “designed to achieve a level of safety that is greater than the level of safety required by this chapter”
- **Report to Congress – The Elliott Project (§ 105)**

- **Whistleblower Protection (§ 116)**
- **Drug & Alcohol Program Oversight (§ 117)**
- **Safety Related Condition Reporting (§ 121)**
 - The Secretary
 - If no “appropriate State authority,” the Governor of said State
 - The “appropriate Tribe” where the SRC “occurred”
 - Emergency Response Orgs: Upon request to State authority or Governor

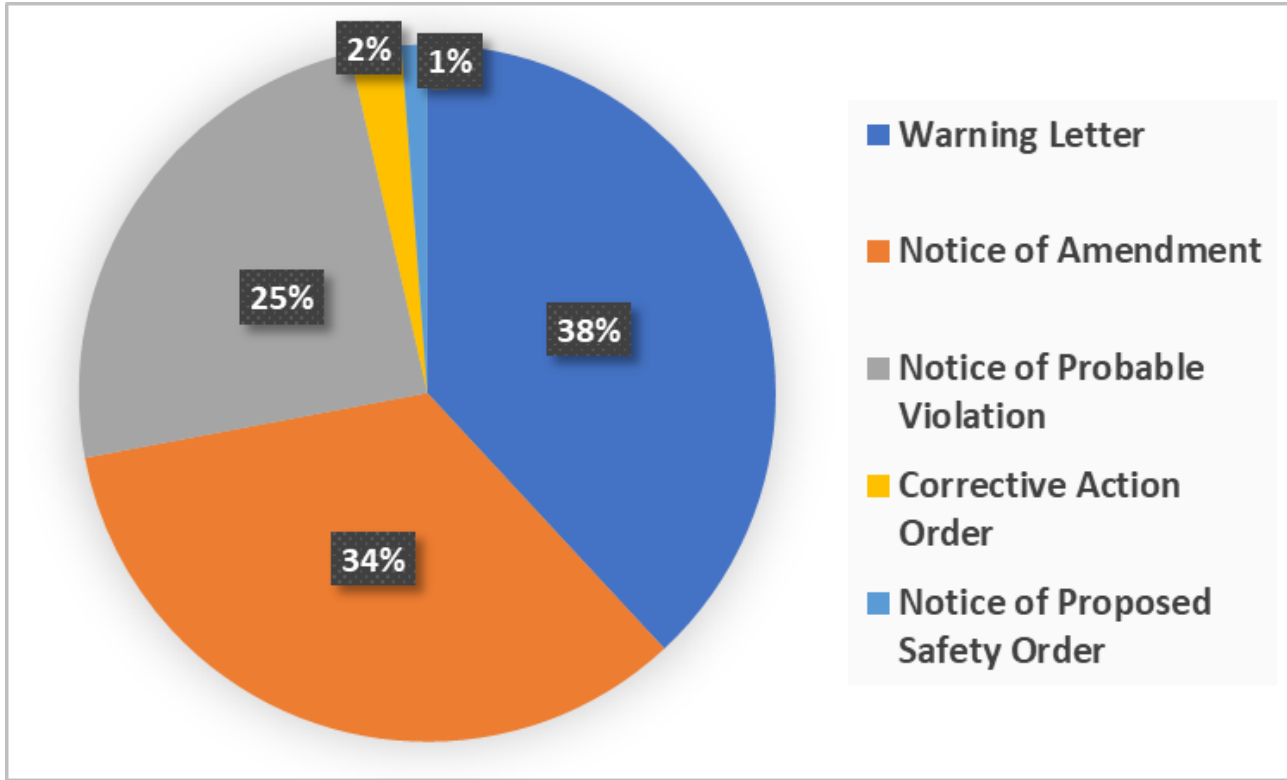
Pipeline Safety Management Systems – A Heads Up

- **Title II: Leonel Rondon Pipeline Safety Act (see § 205)**
 - Directed to Gas distribution; however, ...
 - PHMSA Report to Congress
 - Distribution operators that have implemented PSMS per API RP 1173
 - Progress with PSMS by Distribution operators
 - Feasibility of PSMS for Distribution operators: number of customers and volume of gas moved
 - “guidance or recommendations that would further the adoption” of PSMS
 - PHMSA and State programs shall “promote and assess PSMS frameworks” developed by Distribution operators
- **Who’s Next?**

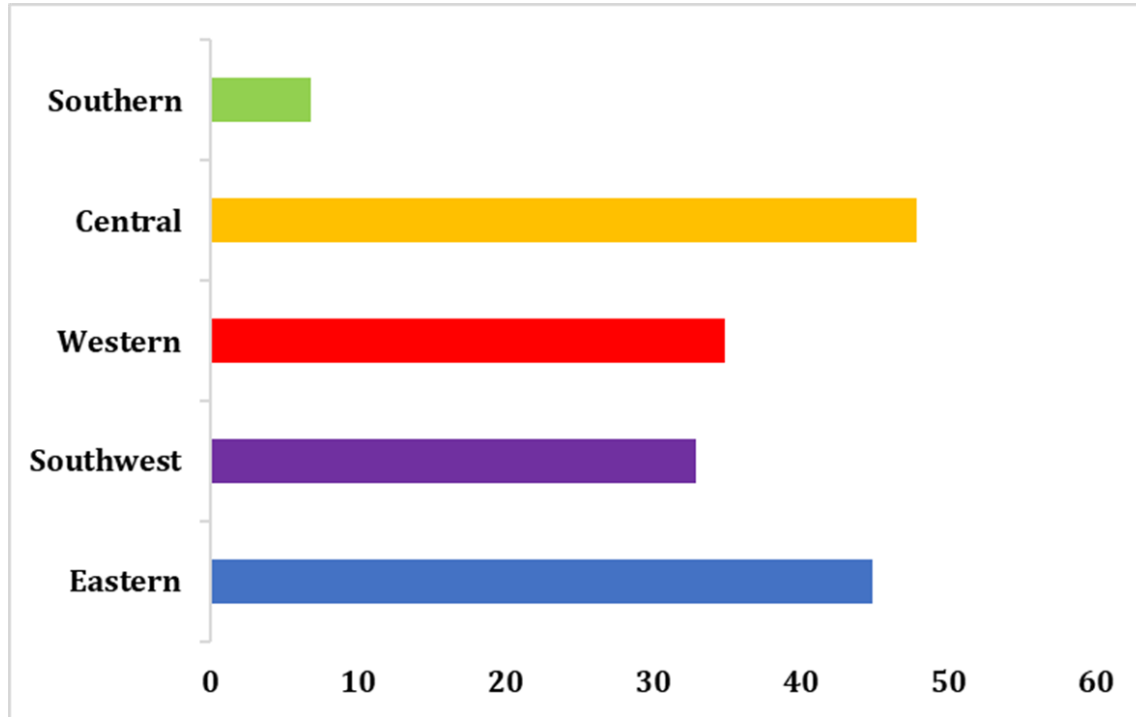
2021 PHMSA Enforcement Trends

Brianne Kurdock, Babst, Calland, Clements and Zomnir, P.C.

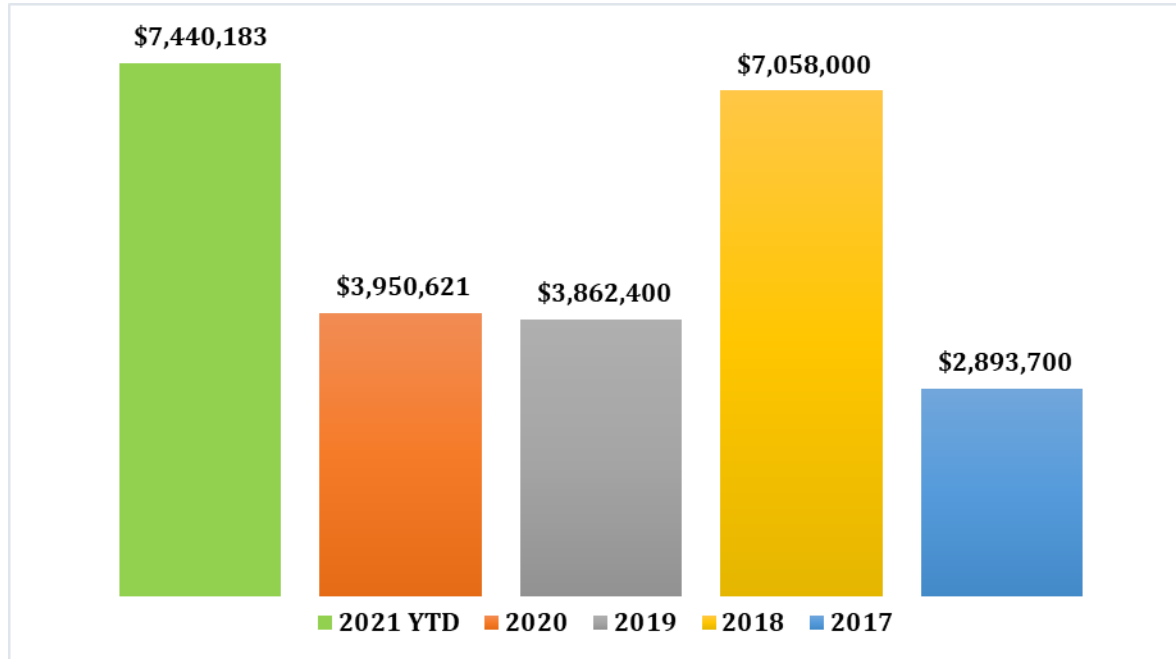
Total Enforcement Cases Initiated (as of August 31, 2021)



Enforcement Cases Initiated – by Region (2021)



Proposed Civil Penalties (Last 5 Years)



2021 Enforcement Trends

- 168 enforcement cases (to date)
- Hazardous liquid integrity management program remains a focus
- Control Room Management
- Effectiveness Reviews
- Use of settlement conferences



Questions



Thank you!

Annie Cook

Annie.Cook@troutman.com

Jim Curry

Jcurry@babstcalland.com

Brianne Kurdock

Bkurdock@babstcalland.com

Catherine Little

Catherine.Little@troutman.com

Vince Murchison

Vince.Murchison@pipelinelegal.com

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