

**Memorandum of Law**  
**Kevin J. Moody, General Counsel**  
**Pennsylvania Independent Oil & Gas Association (PIOGA)**

**House Consumer Affairs Committee Hearing on HB 284**  
**PA One Call Law reauthorization bill**  
**June 5, 2017**

This memorandum of law addresses the requirements of the federal pipeline safety laws and regulations that are applicable to the issues raised by HB 284.

The existing PA One Call Law coordinates mandatory participation in the PA One Call System (POCS) for natural gas and crude oil production and gathering lines and facilities with the requirements of the federal pipeline safety laws and regulations. The Pa One Call Law's existing exclusion for these lines and facilities is set forth in the definition of "line or facility":

"Line" or "facility" means an underground conductor or underground pipe or structure used in providing electric or communication service, or an underground pipe used in carrying, gathering, transporting or providing natural or artificial gas, petroleum, propane, oil or petroleum and production product, sewage, water or other service to one or more transportation carriers, consumers or customers of such service and the appurtenances thereto, regardless of whether such line or structure is located on land owned by a person or public agency or whether it is located within an easement or right-of-way. The term shall include unexposed storm drainage and traffic loops that are not clearly visible. **The term shall not include crude oil or natural gas production and gathering lines or facilities unless the line or facility is a regulated onshore gathering line as defined in regulations promulgated after January 1, 2006, by the United States Department of Transportation pursuant to the Pipeline Safety Act of 1992 (Public Law 102-508, 49 U.S.C. § 60101 et seq.), if the regulated gathering line is subject to the damage prevention program requirements of 49 CFR § 192.614.**

The emphasized language incorporates the federal pipeline safety laws and regulations, which have never applied to production lines and facilities, or to all gathering lines and facilities.

So under the existing federal pipeline safety laws and regulations, natural gas gathering lines in Class 2, 3 and 4 locations (49 CFR § 192.5) are subject to regulation as “regulated onshore gathering lines.” The rules for oil gathering lines are more complex, but basically oil gathering lines located in a rural area that do not meet the requirements for “regulated rural gathering lines” (49 CFR §§ 195.1, 195.11) are not regulated under the federal pipeline safety laws and regulations. However, the emphasized language above is incomplete because it refers only to federal damage prevention program requirements for natural gas gathering lines and facilities (49 CFR § 192.614) and not to the federal damage prevention program requirements for oil gathering lines and facilities (49 CFR § 195.442). But that is a “housekeeping” matter and does not render inapplicable the PA One Call Law exclusion for oil gathering lines.

The federal pipeline safety laws and regulations are also incorporated into Pennsylvania’s Gas and Hazardous Liquids Pipelines Act, which is known as the “Pipeline Act” or “Act 127 of 2011.”

Section 302. Adoption of Federal pipeline safety laws.

(a) General rule.--The safety standards and regulations for pipeline operators shall be those issued under the Federal pipeline safety laws as implemented in 49 CFR Subtitle B Ch. I Subch. D (relating to pipeline safety).

(b) Amendments to Federal law.--

(1) Amendments to Federal pipeline safety laws shall have the effect of amending or modifying the safety standards and regulations for the transportation of gas and hazardous liquids in this Commonwealth.

(2) An amendment or modification under paragraph (1) shall take effect 60 days after its effective date.

Both laws also automatically incorporate changes in the federal pipeline safety law and regulations.

### **Production facilities**

The 1968 Natural Gas Pipeline Safety Act applied to facilities used for the transmission and distribution of natural gas, as well as a *limited* group of gathering lines (those in nonrural areas):

(3) “Transportation of gas” means the gathering, transmission or distribution of gas by pipeline or its storage in or affecting interstate or foreign commerce except that it shall not include the gathering of gas in those rural locations which lie outside the limits of any incorporated or unincorporated city, town, or village, or any other designated residential or commercial area such as a subdivision, a business or shopping center, a community development, or any similar populated area that the Secretary of Transportation may define as a nonrural area . . . .  
49 U.S.C. App. 1671(3).

As is apparent, this definition did not include, and thus excluded, facilities used to transport natural gas during production operations. This has been the federal pipeline safety agency’s understanding for a long time.<sup>1</sup> This exclusion is reflected in PHMSA’s regulation at 49 CFR § 192.8 and the American Petroleum Institute (API) Recommended Practice (RP) 80 (“Guidelines for the Definition of Onshore Gas Gathering Lines”):

§ 192.8 How are onshore gathering lines and regulated onshore gathering lines determined?

(a) An operator must use **API RP 80** (incorporated by reference, see §192.7), to determine if an onshore pipeline (or part of a connected series of pipelines) is an onshore gathering line. The determination is subject to the limitations listed below. . .

(1) The **beginning of gathering**, under section 2.2(a)(1) of API RP 80, **may not extend beyond the furthestmost downstream point in a production operation as defined in section 2.3 of API RP 80**. This furthestmost downstream point does not include equipment that can be used in either production or transportation, such as separators or dehydrators, **unless** that equipment is involved in the processes of “production and preparation for transportation or delivery of hydrocarbon gas” within the meaning of “**production operation.**” (Emphasis added).

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<sup>1</sup> See, e.g., Office of Pipeline Safety Interpretation Letter from Cesar DeLeon, Director, Regulatory Programs, to Lance Fellhoalter, OXY USA, Inc. (Oct. 8, 1993), <http://www.phmsa.dot.gov/portal/site/PHMSA/menuitem.ebdc7a8a7e39f2e55cf2031050248a0c/?vgnextoid=f9a111a0f8f6b110VgnVCM1000009ed07898RCRD&vgnnextchannel=9574d7dcb2588110VgnVCM1000009ed07898RCRD&vgnnextfmt=print>; Office of Pipeline Safety Interpretation Letter from Cesar DeLeon, Director, Regulatory Programs, to Edward M. Steele, Gas Pipeline Safety Section, The Public Utilities Commission of Ohio (Mar. 12, 1992), <http://www.phmsa.dot.gov/portal/site/PHMSA/menuitem.ebdc7a8a7e39f2e55cf2031050248a0c/?vgnextoid=daf63ec78f95b110VgnVCM1000009ed07898RCRD&vgnnextchannel=9574d7dcb2588110VgnVCM1000009ed07898RCRD&vgnnextfmt=print>.

Despite numerous amendments to the federal Pipeline Safety Act, the exclusion for production operations has not been changed.<sup>2</sup>

*As stated above, the current definition of “line or facility” in the PA One Call law incorporates this federal exclusion. The Pennsylvania Pipeline Act (Act 127) also incorporates this federal exclusion because it is limited to pipelines and facilities “regulated under the Federal pipeline safety laws.”*

### **Natural Gas Gathering lines and facilities**<sup>3</sup>

As stated above, the 1968 Natural Gas Pipeline Safety Act applied only to a limited group of gathering lines – those located in *nonrural* areas. In the 1992 Pipeline Safety Act, Congress began the change from the prescriptive “command and control” regulatory model for federal pipeline safety regulation to a model based upon the use of risk management concepts by requiring the Department of Transportation to define the term “gathering line” and then to define a subclass of “regulated gathering lines” that would be subject to federal pipeline safety standards based upon an assessment of actual risk of harm from gathering operations, rather than be exempt only because of their rural nature:

H.R. 1489 requires DOT finally to define the term “gathering line,” to develop an inventory of these lines, and to define a class of “regulated gathering lines” that warrant some safety regulation. DOT is given a great deal of discretion to implement this section based on the information it receives as it proceeds. **If DOT finds that none of these lines poses a hazard to people, property, or the environment, none of them will be regulated.**<sup>4</sup> (Emphasis added)

Again in 1996, Congress directed PHMSA to determine which rural gathering lines, if any, needed to be regulated based on the specific physical safety risks that the lines presented, thus completing the shift to the use of risk management concepts for pipeline safety:

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<sup>2</sup> 49 U.S.C. §§ 60101(a)(3), (18), (19) and (21).

<sup>3</sup> As stated above, the rules for oil gathering lines and facilities are more complex than for natural gas gathering lines and will not be addressed here because the point is that oil gathering lines that do not meet the requirements for “regulated rural gathering lines” (49 CFR §§ 195.1, 195.11) are *not* regulated under the federal pipeline safety laws and regulations and, therefore, are within the PA One Call Law’s exclusion that depends upon federal law.

<sup>4</sup> Pub.L. No. 102-508, § 109(b); 1992 U.S. Code Cong. & Admin. News 2642 at 2652-53.

Not later than October 24, 1995, the Secretary, if appropriate, shall prescribe standards defining the term “regulated gathering line.” In defining the term, the Secretary shall consider factors such as location, length of line from the well site, operating pressure, throughput, and the composition of the transported gas or hazardous liquid, as appropriate, in deciding on the types of lines that functionally are gathering but should be regulated under this chapter because of specific physical characteristics. 49 U.S.C. § 60101(b)(2)(A).

Under existing federal law, gathering lines in Class 1 locations (the most rural) are exempt from the pipeline safety standards. The term “regulated onshore gathering line” – used in the PA One Call definition of “line or facility” emphasized above – is a defined term under the PHMSA regulations at 49 CFR § 192.8(b), and means an “onshore gathering line” that is regulated by PHMSA per 49 CFR §§ 192.8(b) and 192.9 – *i.e.*, an “onshore gathering line” in Class 2, 3 or 4 locations, which are defined in 49 CFR § 192.5.<sup>5</sup> PHMSA’s regulations expressly state that the Part 192 safety requirements apply only to “regulated onshore gathering pipelines”:

**§ 192.1 What is the scope of this part?**

(a) This part [192] prescribes minimum safety requirements for pipeline facilities and the transportation of gas, including pipeline facilities and the transportation of gas within the limits of the outer continental shelf as that term is defined in the Outer Continental Shelf Lands Act (43 U.S.C. 1331).

(b) This part does not apply to—

....

(4) Onshore gathering of gas—

....

(ii) Through a pipeline that is not a regulated onshore gathering line (as determined in §192.8); . . . (Emphasis added)

PHMSA’s written comments in the PUC’s Marcellus Shale *en banc* investigation a few years ago confirmed that gathering lines in Class 1 locations are exempt from the pipeline

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<sup>5</sup> As shown above, gathering lines used in a production operation are excluded from characterization as “onshore gathering lines” and, thus, excluded from characterization as “regulated onshore gathering lines”.

safety standards: “Currently, gathering lines in a Class 1 [location] are exempt from PHMSA regulations.”<sup>6</sup>

*As stated above, the existing definition of “line or facility” in the PA One Call Law incorporates existing federal pipeline safety treatment of gathering facilities, as does the Pennsylvania Pipeline Act (Act 127) by its limitation to pipelines and facilities “regulated under the Federal pipeline safety laws.”*

### **Potential loss of federal grant funds for pipeline safety/damage prevention programs**

Eliminating the exclusion in the current PA One Call Law is unquestionably *not* necessary to avoid the loss of federal grant funds for pipeline safety or damage prevention (one call) programs.

As stated above, more effective enforcement of the PA One Call law and elimination of the exemptions for municipalities and state agencies and their subcontractors are the two changes that are necessary to avoid the loss of federal grant funds for pipeline safety or one call programs. This is clear from the federal statute [49 USC § 6103(a)(1)(A) and § 6103(a)(2)] and PHMSA’s regulations concerning grants to aid State pipeline safety programs, including one call programs [49 CFR Part 198.3]

### **§ 6103. Minimum standards for State one-call notification programs**

(a) Minimum Standards.-

- (1) In general.-In order to qualify for a grant under section 6106, a State one-call notification program, at a minimum, shall provide for-
  - (A) **appropriate participation by all underground facility operators**, including all government operators;
  - (B) appropriate participation by all excavators, including all government and contract excavators; and
  - (C) flexible and effective enforcement under State law with respect to participation in, and use of, one-call notification systems.

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<sup>6</sup> *Jurisdictional and Pipeline Safety Issues Related to the Marcellus Shale*, Docket No. I- 2010-2163461, April 15, 2010 letter, Jeffrey D. Wiese, Associate Administrator for Pipeline Safety, PHMSA, U.S. Department of Transportation, at 3, [http://www.puc.state.pa.us/naturalgas/pdf/MarcellusShale/MS\\_Comments-DOT.pdf](http://www.puc.state.pa.us/naturalgas/pdf/MarcellusShale/MS_Comments-DOT.pdf).

- (2) **Exemptions prohibited.**-In order to qualify for a grant under section 6106, a State one-call notification program may not exempt municipalities, State agencies, or their contractors from the one-call notification system requirements of the program.
- (b) **Appropriate Participation.**-In determining the appropriate extent of participation required for types of underground facilities or excavators under subsection (a), a State shall assess, rank, and take into consideration the risks to the public safety, the environment, excavators, and vital public services associated with-
- (1) damage to types of underground facilities; and
  - (2) activities of types of excavators.
- (c) **Implementation.**-A State one-call notification program also shall, at a minimum, provide for and document-
- (1) consideration of the ranking of risks under subsection (b) in the enforcement of its provisions;
  - (2) **a reasonable relationship between the benefits of one-call notification and the cost of implementing and complying with the requirements of the State one-call notification program;** and
  - (3) **voluntary participation where the State determines that a type of underground facility or an activity of a type of excavator poses a de minimis risk to public safety or the environment.**
- (d) **Penalties.**-To the extent the State determines appropriate and necessary to achieve the purposes of this chapter, a State one-call notification program shall, at a minimum, provide for-
- (1) administrative or civil penalties commensurate with the seriousness of a violation by an excavator or facility owner of a State one-call notification program;
  - (2) increased penalties for parties that repeatedly damage underground facilities because they fail to use one-call notification systems or for parties that repeatedly fail to provide timely and accurate marking after the required call has been made to a one-call notification system;
  - (3) reduced or waived penalties for a violation of a requirement of a State one-call notification program that results in, or could result in, damage that is promptly reported by the violator;
  - (4) equitable relief; and
  - (5) citation of violations.

PHMSA regulation's at 49 CFR Part 198.3 states: *Underground pipeline facilities* means buried pipeline facilities used in the transportation of gas or hazardous liquid subject to the pipeline safety laws ( 49 U.S.C. 60101et seq.).”

Accordingly, the phrase “all underground facility operators” in 49 USC § 6103(a)(1)(A) is limited by PHMSA’s regulation at 49 CFR Part 198.3 to operators of “underground pipeline facilities” that are subject to the federal pipeline safety laws, which do not include production lines and facilities and natural gas gathering lines and facilities in Class 1 locations.

In addition, 49 CFR § 198.13(c)(7) requires “State adoption of applicable federal pipeline safety standards.” The Public Utility Code does this for public utilities regulated by the PUC, while Pennsylvania’s Act 127 has done this for non-public utilities. And as stated above, the existing PA One Call Law definition of “line or facility” incorporates the federal pipeline safety standards.

Moreover, 49 CFR § 198.37(a) is replete with references to “underground pipeline facilities” that, as shown above, is limited to this subject to the federal pipeline safety laws, which do not include production lines and facilities and natural gas gathering lines and facilities in Class 1 locations requires that “[e]ach area of the State that contains **underground pipeline facilities** must be covered by a one-call notification system” and § 198.37(e) requires that “[e]xcept with respect to interstate transmission facilities as defined in the pipeline safety laws (49 U.S.C. 60101 et seq. ), operators of **underground pipeline facilities** must be required to participate in the one-call notification systems that cover the areas of the State in which those pipeline facilities are located.” (Emphasis added) As 49 CFR Part 198 defines “underground pipeline facilities” as “buried pipeline facilities used in the transportation of gas or hazardous liquid **subject to the pipeline safety laws** (49 U.S.C. 60101 et seq. ),” the current PA One Call law definition of “line or facility” incorporates reflects the applicable federal pipeline safety standards, thereby satisfying this requirement.

Accordingly, while there may be policy reasons for the eliminating the existing PA One Call Law exclusion for certain production and gathering facilities (addressed below) – which exclusion is consistent with existing federal pipeline safety law and regulations – the potential loss of federal grant funds for pipeline safety or one call programs is not one *under existing federal law*.

I also note the provisions of 49 USC § 6103(c)(2) and (3), which have not been addressed by the PUC or POCS. These provisions support PIOGA’s position that the treatment of

conventional oil and natural gas production and gathering lines and facilities in the PA One Call Law comply with federal law and should be retained.

### **Policy changes**

There may be changes to the existing federal pipeline safety regulation of gathering lines and facilities. In August 2011 PHMSA issued a Notice of Proposed Rulemaking seeking public comment on, among other subjects, several aspects of the existing federal framework for regulating natural gas gathering lines, suggesting that this framework may no longer be appropriate due to: (i) the recent expansion of natural gas development from shale formations, and (ii) the claim that “enforcement of the current requirements has been hampered by the conflicting and ambiguous language of API RP 80.”<sup>7</sup> The 2011 federal Pipeline Safety Act amendments also require PHMSA studies and potential rulemakings concerning safety regulation of gathering facilities.<sup>8</sup>

However, changes based on these federal initiatives are years away, and also more likely to affect pipelines gathering shale (unconventional) gas rather than conventional gas, because the shale gas development is stated as the primary driver of the federal studies. And any changes – if any – may or may not reflect current positions contrary to existing law that may be expressed informally by PHMSA staff, the PUC and POCS. *Significantly, the sentence proposed to be deleted from the PA One Call definition of “line or facility” to eliminate the exclusion for production and gathering facilities already expressly incorporates changes in federal pipeline safety regulation of these facilities.*

Accordingly, mandatory participation of production and gathering facilities in PA One Call is currently based on the risk management concepts applied to federal pipeline safety regulation. The exemption in the current PA One Call law for these facilities incorporates these concepts as applied in the existing federal pipeline safety laws and regulations.

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<sup>7</sup> 76 Fed. Reg. 53086, 53101 (Aug. 25, 2011).

<sup>8</sup> Subsections 21(a), (b).

**From:** [ ]  
**Sent:** Tuesday, September 27, 2016 3:53 PM

**Subject:** Amendment to SB 1235

I'm not sure if this is helpful to you, but wanted to share it with you and others.

We are getting questions about the Hutchinson amendment to SB 1235. People are confusing it thinking it just exempts Class 1 lines, but it DOES NOT.

The amendment doesn't say anything about Class 1 lines. The Classes of pipelines, 1-4, depend on population with Class 1 locations in the least populated areas. **The amendment covers all conventional oil and gas well production lines, including those currently regulated, and the Commission opposes exempting any of them.**

Also, Class 1 are lines not presently regulated by PHMSA (or PA) because they are in rural areas. Production and gathering lines (largely synonymous terms, but production is assumed to be closer to the well than gathering) ) are often located in rural areas, but can be located in more populated areas - Classes 2, 3 & 4. When the production/gathering lines are in Class 2, 3 or 4 areas, they are presently regulated by PHMSA (and Act 127) and included in One Call.

**The proposed amendment would actually take some of these regulated lines out of One Call despite the fact they are currently "regulated gathering lines".** Again, we oppose this.

[ ]