



This document is scheduled to be published in the Federal Register on 06/21/2012 and available online at <http://federalregister.gov/a/2012-15102>, and on FDsys.gov

Billing Code: 4910-60-W

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

[Docket ID PHMSA-2012-0142]

Pipeline Safety: Notice of Public Workshop to Discuss Implementing Incorporation by Reference Requirements of Section 24 of the Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: Request for Information and Notice of Public Workshop

SUMMARY: This notice is to advise interested and affected persons that PHMSA will conduct a public workshop to discuss Section 24 of the recently-passed Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011 (Act) and PHMSA's implementation challenges with Section 24. Section 24 of the Act requires, within one year of enactment (January 2013), that PHMSA no longer incorporate, in whole or in part, voluntary consensus standards by reference into its regulations unless those standards have been made available free of charge to the public on the internet. The workshop will provide interested persons with an opportunity to submit written and oral comments and participate in discussions concerning the legal, financial, policy, practical and other challenges with implementing Section 24 by January 2013.

DATES: The public workshop will be held on July 13, 2012.

ADDRESSES: The public workshop will be held from 8:00 a.m. to 3:00 p.m. EDT in the West Building, Oklahoma Room of the U.S. Department of Transportation, 1200 New Jersey Avenue, SE, Washington, DC 20590, Phone: 202-366-4400, Fax: 202-366-7041. Please visit <http://phmsa.dot.gov> and click on this public workshop to register. There is no registration fee to attend the public workshop. Name badge pickup and onsite registration will be available starting at 7:30 a.m. Refer to the meeting website for updated information, agenda, and times at <http://phmsa.dot.gov>.

The public workshop will include an overview of the issue in the morning, and a panel discussion by various experts and stakeholders who are affected by regulations promulgated by PHMSA. After the discussion, time will be allotted for the general public to speak. All requests from the public to speak at the workshop must include a description of what will be said, contact information to be used to notify the requestor of the status of his/her request (phone number on which a message may be left, or e-mail), and the subject/attention line (or on the envelope if by mail): "Implementing Incorporation by Reference (IBR) Requirements of Section 24." Each participant will be allotted five minutes to speak. Please contact Jewel Smith, Office of Chief Counsel, to request to speak at the public workshop at 202-366-4400, or e-mail at jewel.smith@dot.gov.

Members of the public may submit written comments. Comments should reference Docket No. PHMSA-2012-0142. Comments may be submitted in the following ways:

- E-Gov Web Site: <http://www.regulations.gov>. This site allows the public to enter comments on any Federal Register notice issued by any agency. Follow the instructions for submitting comments.
- Fax: 1-202-493-2251.
- Mail: Docket Management System, U.S. Department of Transportation (DOT), 1200 New Jersey Avenue, SE, Room W12-140, Washington, DC 20590.
- Hand Delivery: DOT, Docket Management System, Room W12-140, on the ground floor of the West Building, 1200 New Jersey Avenue, SE, Washington, DC between 9:00 a.m. and 5:00 p.m., Monday through Friday, except Federal holidays.

Instructions: Identify Docket No. PHMSA-2012-0142 at the beginning of your comments. If you submit your comments by mail, submit two copies. If you wish to receive confirmation that PHMSA has received your comments, include a self-addressed stamped postcard. Internet users may submit comments at <http://www.regulations.gov>. Note: Comments will be posted without changes or edits to <http://www.regulations.gov> including any personal information provided. Please see the Privacy Act statement immediately following for additional information.

Privacy Act Statement: Anyone may search the electronic form of all comments received for any of our dockets. You may review DOT's complete Privacy Act Statement in the Federal Register published April 11, 2000 (65 FR 19477).

Information on Services for Individuals with Disabilities: For information on facilities or services for individuals with disabilities or to request special assistance during the

workshop, please contact Jewel Smith at 202-366-4400, or by e-mail at jewel.smith@dot.gov.

Copies of the presentations will be available on the public workshop website and in the docket PHMSA-2012-0142 at <http://www.regulations.gov>, within 30 days following the workshop.

Webcasting: The public workshop will be webcast. Please refer to this public workshop at <http://phmsa.dot.gov> for more information and the link to the webcast.

FOR FURTHER INFORMATION CONTACT: Jewel Smith at 202-366-4400, or by e-mail at jewel.smith@dot.gov.

SUPPLEMENTARY INFORMATION:

On January 3, 2012, President Obama signed the Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011, Public Law 112-90 (Act). Section 24 of the Act requires, within one year of enactment (January 2013), that PHMSA no longer incorporate, in whole or in part, voluntary consensus standards by reference into its regulations unless those standards have been made available free of charge to the public on the Internet. Section 24 states “Section 60102, as amended by this Act, is further amended by adding at the end the following: ‘(p) Limitation on Incorporation of Documents by Reference. – Beginning 1 year after the date of enactment of this subsection, the Secretary may not issue guidance or a regulation pursuant to this chapter that incorporates by reference any

documents or portions thereof unless the documents or portions thereof are made available to the public, free of charge, on an Internet Web site.””

When Federal agencies write regulations, the National Technology Transfer and Advancement Act (NTTAA) of 1995 (Pub. L. 104-113; March 7, 1996) and Office of Management and Budget (OMB) Circular No. A-119 titled “Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities” directs them to use voluntary consensus standards, except when an agency determines that such use “is inconsistent with applicable law or otherwise impractical.” Voluntary consensus standards are technical standards that are developed, published and adopted by domestic and international organizations, which have collaborated to agree upon best technical practices. Generally, these standards are updated approximately every three to five years to reflect improvements to previous technology or practices. The standards, which are often hundreds or thousands of pages, are incorporated by reference into a regulation in whole or in part, saving the government money and shortening the length of the regulatory process by incorporating existing standards instead of creating government-unique standards. Incorporation by reference allows the voluntary consensus standards to be treated as if they were written into the regulations and treated as if they were published in the Federal Register and the Code of Federal Regulations. Thus, these standards have the effect of law and can be enforced accordingly.

The policies in the Circular and the statutory language of the NTTA were intended to reduce to a minimum the reliance by agencies on government-unique standards and to rely on voluntary consensus standards (VCS), whenever possible, as well as keep the

time and costs to write and issue standards reasonable on behalf of the Federal government. Federal agencies also received guidance from the Circular regarding agencies' participation in the various governmental and private sector bodies that develop consensus standards, which are referred to as standards developing organizations (SDOs).

SDOs normally have a copyright or other intellectual property interest in the standards they develop, and therefore often charge a fee for access. Those who are governed by the regulations currently purchase the standards, in the instances where they are not made available for free. Without paying a fee, those who are affected by a regulation that incorporates a standard but are not regulated by it, may not have access to the laws that affect them. In some instances, a regulation may only incorporate a section, a chapter or other portion of the VCS; yet, an interested party must buy the entire VCS to access the incorporated text.

Currently, PHMSA incorporates approximately 60 VCS by reference into 49 CFR Part 192 – Transportation of Natural and Other Gas by Pipeline: Minimum Federal Safety Standards; 49 CFR Part 193 – Liquefied Natural Gas Facilities: Federal Safety Standards; and 49 CFR Part 195 – Transportation of Hazardous Liquids by Pipeline. These VCS, in turn, incorporate by reference additional consensus standards. Therefore, purchasing all relevant standards could be significantly expensive for a small business, a non-profit organization or a public citizen.

PHMSA has received correspondence regarding the implementation of Section 24 from stakeholders, including SDOs, regulated entities and public safety groups. Based on the

correspondence and on PHMSA's operational capacity, budget and analyses, Section 24, at a minimum, would have the following effects.

Financial

- Costs to government to purchase incorporated standards for free public access would increase substantially.
- Impact to some SDOs for making their standards available without compensation would be substantial and immediate.
- Costs to government would increase dramatically and immediately if PHMSA must write its own standards or purchase the right to freely publish standards from SDOs.

Practical

- Volume and complexity of regulations would increase if the government wrote its own standards.
- There is a lack of government resources and technical expertise to draft standards technically equivalent to those available through existing SDOs.
- Time frames to write and promulgate rules would increase significantly if the government created its own standards.
- Government regulations with government-unique standards would not be likely to keep pace with technological and safety advancements made in the private sector.

- SDOs standards may get more candid input, and broader involvement, from stakeholders as standards are being developed in the current model than would be true under a government-unique standards process.

Legal

- Small businesses would likely look to the Small Business Regulatory Enforcement Fairness Act, or other laws, to address any adverse impact to them arising from either the availability of standards, cost of standards, or increased time to promulgate regulations following PHMSA's implementation of Section 24.
- The NTTAA and OMB Circular A-119 should be analyzed further for reconciliation with the requirements of Section 24. Intellectual property laws play a critical role for both in the relationship between the government and the SDOs and in the relationship between the SDOs and its licensors or licensees.

Policy

- Likely inconsistency of U.S. and international standards would arise due to inability to incorporate VCS and difficulty in harmonizing government-unique standards. This inconsistency would be detrimental to safety, businesses and trade, and promote increased reliance on international standards.

- Safety, compliance and enforcement could be compromised if the regulations become too unwieldy because government would be required to write its own standards, or if a regulated entity does not have access to free standards.
- Transparency in government requires that citizens have access to the laws that govern and affect them.
- Meeting Section 508 requirements that govern the accessibility of government documents for people with disabilities is also a consideration.

PHMSA and stakeholders must continue to strive to reach a reasonable and feasible solution. Consequently, PHMSA will hold a public workshop to provide an open forum for exchanging information on the challenges associated with implementing the requirement of Section 24. Specifically, this public workshop will facilitate a discussion among stakeholders to share their respective recommendations related to the following objectives:

1. Provide an overview to the public, regulated entities, other Federal and state regulatory agencies, legislators in Congress, advocacy groups, public safety professionals, the international community and the standards developing organizations about the legal, practical, financial and policy considerations involved with implementing Section 24.
2. Identify constraints, related costs and issues with implementing Section 24 by January 2013.

3. Collect public input that will help guide PHMSA and DOT to a reasonable, efficient, and sound implementation strategy and plan.

Preliminary Agenda for the Public Workshop

- Event Objectives/Summary of Ongoing Activities
- Panel 1 - What is IBR? (Overview of the NTTAA, OMB Circular A119, Section 24 of the Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011, and Current Issues Related to Implementing Section 24)
- Panel 2 - Overview of PHMSA's IBR Usage and its Impact on Safety and Costs
- Panel 3 - Facilitated Discussion Among Participants

Please note that there are objectives for each panel and that they are posted on the meeting website at <http://phmsa.dot.gov>.

Issued in Washington, DC on June 15, 2012.

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Linda Daugherty
Deputy Associate Administrator for Policy and P...

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[FR Doc. 2012-15102 Filed 06/20/2012 at 8:45 am; Publication Date: 06/21/2012]