



Three Perspectives on Pipeline Transportation

John E. Anderson, Sr.

Foreign terrorism dominates the news today while the concern of domestic terrorism is on the minds of many. The nation’s pipeline system is of critical importance and is a potential target for terrorists intent on producing great harm to the United States through mass casualties, significant economic destruction and environmental tragedies. Earlier in 2015, the Surface Transportation Committee of the FBA’s Transportation and Transportation Security Law Section presented a program titled “Pipeline Transportation: Perspectives on Safety, Security and Economics.” Panelists included Vanessa Sutherland, Chief Counsel, U.S. DOT’s Pipeline and Hazardous Material Safety Administration (PHMSA); Jack Fox, Pipeline Industry Engagement Manager, Transportation Security Administration (TSA), and Nils Nichols, Director, Division of Pipeline Regulation, the Federal Energy Regulatory Commission (FERC). The program was moderated by Kathryn Gainey, co-chair of the Surface Transportation Committee.

Jack Fox spoke first for the panel. Mr. Fox is a Pipeline Industry Engagement Manager at TSA. Initially he provided a background on the TSA, explaining that the TSA was founded following the September 11, 2001 tragedy. Originally, the TSA was part of the U.S. Department of Transportation (DOT). In March 2003,

the Department of Homeland Security (DHS) was formed, and TSA was moved from the DOT to the DHS.

Fox explained that the United States has over 2.5 million miles of pipelines for transporting hazardous liquids and natural gas that are operated by over 3,000 companies. He stated that 85% of all energy is moved through pipelines operated by 100 companies and that it is the goal of the TSA to work with the “top 100” companies, although any of the 3,000 companies that ask for assistance will receive assistance from TSA.

Fox discussed two significant programs of the TSA. First, the Pipeline Corporate Security Review (PSCR) program conducts on-site security review of pipeline companies. These reviews help establish working relationships with key security representatives in the pipeline industry. Additionally the reviews provide the TSA with a general understanding of a pipeline operator’s security planning and implementation. Fox described the reviews as no-fault reviews. Following each review, the TSA will make recommendations or suggestions on how to improve the company’s operations. Second, the Critical Facility Security Review program was passed in 2007. In this program, the TSA conducts on-site visits to pipeline critical facilities and collects site-specific information from facility operators relating to facility

policies, procedures and physical security measures. Following these site-specific inspections, the TSA makes recommendations and subsequently conducts re-inspections within eighteen (18) months of the initial inspections to ensure compliance with the TSA recommendations.

Finally, Fox described the relationship between the TSA and the pipeline industry as one of a partnership marked by a spirit of cooperation. He described the partnership relationship as a friendly relationship as opposed to a more adversarial regulatory relationship. He noted that the partnership concept has worked out well with the TSA, commenting that it is less burdensome on the companies, and it results in resolution of issues much quicker than a regulatory relationship.

Vanessa Sutherland was Chief Counsel of PHMSA¹. PHMSA is a United States Department of Transportation agency whose mission is to protect people and the environment from the risks of transportation of hazardous materials by pipeline and other modes of transportation. PHMSA establishes national policy, sets and enforces standards, and educates and conducts research to prevent incidents. Also it prepares the public and first responders to reduce consequences if an incident does occur. Its goals are to

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Managing Editor: Yanissa Pérez de León

Chair's Corner

Alice Koethe, Chair of the Transportation and Transportation Security Law Section

I am honored to take over as Chair of the Transportation and Transportation Security Law Section of the Federal Bar Association. Immediate Past Chair Tom Lehrich did a great job, and I hope to continue to this legacy of strong and informative legal programming.

We are dedicated to building connections and knowledge in the fields of transportation and transportation security law. Every year, we also take the opportunity to honor excellence in the field with the Transportation Lawyer of the Year and the Transportation Security Lawyer of the Year. In October, I was honored to help present these awards to two illustri-

ous awardees: Thomas Holian (most recently Deputy Chief Counsel of the Federal Highway Administration), and Linda Kent (Assistant Chief Counsel at the Transportation Security Administration). Tom and Linda have tremendous legal acumen, combined with leadership skills and dedication to their respective fields.

Our work encompasses all modes of transportation. Recent events have addressed a wide range of issues from transportation security, to pipeline oversight, to motor carriers and aviation enforcement, to aviation. We will continue to offer a wide array of programming, including coverage of new

and emerging legal issues.

For 2016, we will continue to provide legal education and networking opportunities for our membership. If you have a program idea, please do not hesitate to reach out to me or any of the Board members! ♦

Cheers,
Alice Koethe
Chair, Transportation and
Transportation Security Law Section



Message from the Editor

Steven L. Osit

I am thrilled to take the reins of your *TransLaw* newsletter from John Wood, who has done a fantastic job over the past year of ensuring high-quality content covering a wide range of emerging issues in transportation and transportation security law, all while acclimating to his new role as father of a beautiful baby girl (congratulations, John!).

This issue features a number of articles that highlight the Transportation and Transportation Security Law Section's programming in 2015, and set the stage for what is sure to be another exciting and successful year under Alice Koethe's leadership. John Wood, an attorney in the Legislation Branch of the Federal Aviation Administration's Office of the Chief Counsel, provides an overview of a flurry of legislative activity toward the close of 2015, including the reauthorization of surface transportation programs, commercial space, and the Surface Transportation Board, and introduces several of

the topics that are sure to define the upcoming debate over reauthorization of the Federal Aviation Administration. Tom Lehrich writes about the Section's first event in Boston, Massachusetts, a panel discussing the very latest developments in the rapidly-developing world of Unmanned Aircraft Systems. Tom, along with fellow past-Chair of the Section, David Rifkind, also provide an abstract of their upcoming feature article in the American Bar Association's Administrative Law Journal on Unmanned Aircraft Systems and the FAA's most recent regulatory initiatives. Finally, John Anderson, Co-Chair of the Section's Surface Transportation Committee, summarizes a fascinating panel discussion with three regulators of pipeline transportation that the Section sponsored last year.

This will be an exciting year for Transportation and Transportation Security Law, featuring the FAA's promulgation of final rules govern-

ing the commercial operation of small unmanned aircraft systems, the implementation of the FAST Act's many significant reforms, the upcoming reauthorization of the FAA, railroad's ongoing implementation of positive train control systems, and many more. We look forward to providing the Section's members with quality, insightful materials through *TransLaw* to help you navigate what is sure to be a very busy year.

If you are interested in contributing an article to *TransLaw*, please contact me at sosit@kaplankirsch.com, or at 202.955.5600. ♦

Abstract: Regulating Small Unmanned Aircraft Systems—A Regulatory Process Struggles to Keep Pace with Technology

Thomas Lehrich and David F. Rifkind

(To be published in the American Bar Association Administrative Law Journal)

In the first Star Wars movie trilogy decades ago, the Empire used drones as probes to find the planet where the alliance was hiding and we had no idea at that time the path unmanned aerial systems (UAS) would take in our own airspace. We are in the midst of a revolution in the use of UAS, commonly referred to as "drones." Several regulatory initiatives are ongoing with the goals of protecting the safety and security of the national air space, addressing privacy concerns, and promoting the development and use of new drone technologies. The FAA faces significant administrative law challenges as the need for new regulations and new procedures far outpace the regulatory rulemaking process. The FAA has authority to regulate drones. See 49 U.S.C. § 40103(b)(1) and (2), and 49 U.S.C. § 44701(a)(5). The Small UAS rulemaking was promulgated under the authority described in the FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95 (Feb. 14, 2012). Section 333 of Public Law 112-95 directs the Secretary of Transportation to determine whether "certain unmanned aircraft systems may operate safely in the national airspace system." The proposed Small UAS Rules seek to fulfill this mandate and would apply to non-governmental users and non-recreational activities. As the FAA took on the path of commercial drone use, its authority came under challenge.

According to the FAA, in 2014, there were 238 sightings by pilots of drones near airports. In 2015, that number has increased to over 650. According to researchers at Virginia Tech, a small drone ingested into a jet engine can cause a cata-

strophic failure. Most significantly, on February 15, 2015, the Federal Aviation Administration (FAA) proposed regulations addressing the operation of small unmanned aircraft systems, certification of their operators, registration, and display of registration markings (the "Small UAS Rules"). The NPRM proposes eliminating the need for an airworthiness certification, and it prohibits drones from posing a danger to the National Airspace System (NAS).

While in the midst of the rulemaking, and with an increasing number of pilots reporting drones near airports, the FAA accelerated its plans to register drones. On October 19, 2015, the FAA announced that it would establish a registration task force, the Unmanned Aircraft Systems Registration Task Force Aviation Rulemaking Committee (the "Task Force") to "develop recommendations for the creation of a registration process." On October 22, 2015, the FAA issued a clarification that statutory aircraft registration requirements apply to recreational and hobby-use drones, formally announced the Task Force formation, and requested public comment. Less than a month later, the Task Force issued its recommendations which were accepted by the FAA on November 23, 2015.

Recently, the original Luke Skywalker, while filming the new Star Wars movie, reportedly was stopped by a production assistant and told that he must keep a robe on in between scenes to keep the surprise of our plot. "Who would be watching?" the older Skywalker asked. "Drones are up there," the assistant remarked as he pointed to the sky.

The FAA, with all the wisdom and experience in airspace together with the work in commercial space can be the agency to be the launch pad of this industry. The new rules will need to incorporate a wide range of flexibility and will require the FAA to continue to be nimble. ♦

Thomas Lehrich is the Deputy Inspector General and Counsel for the Architect of the Capitol. Mr. Lehrich spent ten years at the Department of Transportation serving as the Chief Counsel to the DOT Inspector General and held senior legal posts with the Transportation Security Administration and the Federal Maritime Commission. Mr. Lehrich is the immediate past Chair of the Federal Bar Association, Transportation and Transportation Security Law Section.

David F. Rifkind is a partner in the Washington, DC office of Stinson Leonard Street, a member of the ABA Air and Space Law Forum, former President of the Association of Transportation Law Professionals and former Chair of the Federal Bar Association, Transportation and Transportation Security Law Section.

Legislative Update

John C. Wood

Congress passed several significant pieces of transportation legislation in the final months of 2015. This led to commercial space, surface transportation, and surface transportation board (STB) reauthorizations each being signed into law by year-end.

In mid-December, the President signed the Consolidated Appropriations Act, 2016 (the Omnibus), Pub. L. No. 114-113, funding the federal government, including transportation programs, through September 30, 2016. The Omnibus included \$18.65 billion in discretionary appropriations for the Department of Transportation, \$847 million above FY2015 levels and \$2.7 billion below the President's budget request. The Omnibus made available approximately \$42 billion from the Highway Trust Fund for highway programs authorized in the surface transportation reauthorization (discussed below).

Authorities extended in the last Federal Aviation Administration (FAA) authorization- the FAA Modernization and Reform Act of 2012- that would have expired upon 2015 fiscal year-end were extended by a clean six-month extension in late September. The September extension will require Congress to revisit Federal Aviation Administration reauthorization before April 2016.

U.S. Commercial Space Launch Competitiveness Act

The U.S. Commercial Space Launch Competitiveness Act, Pub. L. No. 114-90 (Nov. 25, 2015) (Space Act) is the first comprehensive commercial space reauthorization since 2004. The bill passed each the House and the Senate unanimously with the goal of facilitating a "pro-growth environment for developing the commercial space industry by encouraging private sector investment and creating a more stable and predictable regulatory conditions"¹ The Space Act facilitated increased certainty for commercial space resource explora-

tion startups through the establishment of property rights under federal law for U.S. citizens who obtain space resources legally, including in accordance with international obligations of the United States. Additionally, the Space Act extended the following non-permanent provisions:

- the limitation on the FAA's authority to issue occupant safety regulations for commercial launch and reentry vehicles until September 30, 2025;
- the applicability of United States Government indemnification of third party claims up to a certain amount above insurance requirements of the licensee resulting from launch or reentry activities under an FAA license issued before October 1, 2025; and
- the statutory policy requiring U.S. support for full and complete utilization of the International Space Station through at least 2024.

The Space Act also provided insight into areas of future focus of the congressional committees of jurisdiction. The act requires several reports to be produced by various executive branch agencies, most notably on the topics of streamlining and coordinating commercial space activities across federal government agencies, new authorities appropriate for the United States to continue to meet international obligations, space situational awareness information sharing, and orbital traffic management. It will be interesting to see whether these topics become part of FAA reauthorization discussions.

Fixing America's Surface Transportation Act

Last December, following nearly a decade of short-term extensions, the Fixing America's Surface Transportation

Act, Pub. L. No. 114-94 (Dec. 4, 2015) (FAST Act), a five-year, \$305 billion surface transportation reauthorization, was signed into law.

Figuring out how to pay for transportation infrastructure programs that are funded out of the Highway Trust Fund (HTF) was critical to the FAST Act's passage. In recent years, the HTF has neared insolvency. The primary permanent source of funding for the HTF is the federal gas tax that was last increased nearly 30 years ago. Uncertainty of the Trust Fund contributes to uncertainty in planning for states and local entities that rely on funds for funding much needed infrastructure projects.

The FAST Act represents an increase in funding of 11 percent over fiscal years 2016 to 2020. In comparison, the Administration's proposal, the GROW America Act, included an increase of funding of 45 percent. To pay for the legislation, the FAST Act transferred \$70 from the general fund to the HTF. This amount is primarily offset through what is described as a Federal Reserve surplus account.

The nearly 500-page FAST Act includes safety provisions and reforms to transportation policy and financing programs including permitting process streamlining and the establishment of a grant programs for freight movement. The FAST Act included a comprehensive rail title, which is usually addressed in stand-alone legislation. The title reauthorized Amtrak and included rail safety and financing provisions. Of note, an October short-term surface transportation extension extended the deadline for the rail industry to comply with statutory requirements for the implementation of Positive Train Control (PTC), a safety technology that would automatically stop a train before certain accidents would occur. The October law extended the PTC deadline by three years until December 31, 2018. The FAST Act included approximately \$200 million in contract authority in fiscal year 2017 to

support PTC deployment.

Surface Transportation Board Reauthorization Act

The Surface Transportation Board Reauthorization Act of 2015, Pub. L. No. 114-110 (Dec. 18, 2015) (STB Act) is the first STB reauthorization in 20 years. The legislation includes significant structural reforms to the STB that is responsible for economic oversight of the U.S. freight rail system.

The STB Act removed the STB from under the U.S. Department of Transportation (DOT) administrative umbrella making it an independent U.S. Government agency. The DOT Inspector General will, however, have authority to review certain activities of the STB to determine compliance with federal law. The STB Act increased the number of board commissioners from three five who, under certain circumstances, may now hold closed meetings to discuss official business with subsequent public disclosure. The Act also imposed time limits for the STB to review rail rate reasonableness cases and establish a voluntary binding arbitration process to resolve rate and practice disputes.

Federal Aviation Administration Reauthorization

Congress will need to revisit FAA Reauthorization in early 2016 as non-permanent authorities will expire after March 31 of that year. There are big ideas being considered for FAA reauthorization including potential significant changes to FAA governance. In light of the uncertain environment resulting from the 23 short-term FAA extensions prior to passage of the four-year FAA Modernization and Reform Act of 2012,

there is general awareness that short-term extensions are disruptive to the FAA and planning. Will Congress move a comprehensive FAA bill in 2016? How will the political environment of a presidential election year play into the movement of major legislation?

The House and Senate transportation authorizing committees each held hearings in 2015 addressing the topic of FAA governance reform. Representative Bill Shuster, Chairman of the House Committee on Transportation and Infrastructure sees a need for transformational change. In support of reform, Shuster points to the need to improve efforts to modernize the air transportation system and funding uncertainties faced by the FAA.² Shuster's proposal includes separating air traffic control operations from FAA safety regulatory functions. He believes a "federally chartered, fully independent, not-for-profit corporation to operate and modernize our ATC services" is needed.³ Recently, Senate Committee on Commerce, Science, and Transportation Chairman John Thune, was quoted saying about air traffic control reform: "We're open to looking at new models . . . I think the idea of creating some sort of new entity, whether that's a not-for-profit corporation or a private corporation . . . we're willing to take a look at those things."⁴

Other hot topics for FAA reauthorization include exploring ways that may improve FAA's certification process and facilitating the safe integration of unmanned aircraft systems into the national airspace system. Also of interest in the aviation sphere is the Pilot Bill of Rights 2 (PBR2), S. 571, that passed the Senate in mid-December. Sen. Jim Inhofe (R-Okla.) introduced PBR2 in February

2015 and general aviation groups support the bill. An identical bill, H.R. 1062, was introduced in the House by Rep. Sam Graves (R-MO) and has over 150 co-sponsors. Notably, PBR2 reforms FAA's medical certification process and provides pilots de novo review in U.S. District Court of certificate denials, suspensions, or revocations by the FAA that were subsequently upheld by the National Transportation Safety Board.

Stay tuned. ❖

John is TTSL Section Secretary and is an attorney in the Legislation Branch of the Federal Aviation Administration (FAA) Office of the Chief Counsel. He is also currently serving as Special Counsel to the FAA's Chief Counsel. Views expressed in this article are those of the author made in his personal capacity.

Endnotes

¹Pub. L. No. 114-90, Purpose Statement.

²Prepared Remarks of Rep. Bill Shuster, Aero Club of Washington, June 15, 2015, *available at* transportation.house.gov/uploadedfiles/aero_club_speech.pdf ; *see also* Summary of Principles of Aviation Reauthorization, U.S. House of Representatives Committee on Transportation and Infrastructure, *available at* transportation.house.gov/uploadedfiles/faa_bill_principles.pdf .

³*Id.*

⁴Heather Caygle, Politico Morning Transportation, excerpt from interview with Sen. John Thune, *available at* www.politico.com/tipsheets/morning-transportation/2015/12/thunes-high-hopes-for-quick-work-on-faa-reauthorization-211915.



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Developments in Unmanned Aerial Systems

Thomas Lehrich

On Sept. 25, 2015 the FBA's Transportation and Transportation Security Law Section together with the Massachusetts Chapter held a legal forum on Unmanned Aerial Systems in Boston, Massachusetts. The program was hosted at Foley & Lardner LLP and is the first legal forum the section organized outside of Washington, DC. Moderated by David Bannard the panel discussed the recent legal developments for UAS, the FAA's Notice of Proposed Rulemaking for Small UAS and the future for the skies.

The panel speakers included:

- Thomas Lehrich, Chair, Federal Bar Association Transportation and Transportation Security Law Section, and Deputy Inspector General and Counsel for the Architect of the Capitol
-
- Scott L. Jones, General Counsel and Vice President of Legal for Raytheon Missile Systems
-
- David Y. Bannard, Partner, Foley & Lardner LLP and member of the Board of the Federal Bar Association's Transportation & Transportation Security Law

Tom Lehrich kicked off the presentation and focused on the ways the FAA will manage to integrate UAS into the national airspace. He also discussed the business transformation aspects of drones. According to Lehrich, "UAS are the latest aircraft seeking to be integrated into the national airspace and we must think about the evolution of the NAS. It includes a wide variety of aircraft of different sizes and includes airspace from low altitude to the stratosphere." In covering the main framework of the FAA's NPRM, Tom identified the top challenges that UAS pose in terms



of integrating them into the NAS: they do not have a human pilot on board and the see and avoid principles to prevent a collision with another aircraft must be satisfied in other ways. And there is potential to lose control of the flight.

The panelist followed with a discussion that these challenges are obvious characteristics but cannot be overlooked in the inclusion of UAS or vehicles in the airspace.

Dave brought a fascinating legal discussion on the use of UAS and, in particular, summarized FAA Modernization and Reform Act of 2012's direction to the FAA to integrate UAS into the National Airspace System "as soon as practicable but not later than September 30, 2015." He went through Section 333 of that Act that permits granting of exemptions for UAS and the data on the 1,000 § 333 permits have been issued. And the

plans to established program for six UAS test sites – including one in New York and Massachusetts. Most drone applications have been in the military, and the participants got a special treat by learning from the General Counsel for Raytheon Missile systems the latest business and manufacturing trends for commercial and military drones. Scott a pilot and experienced aviator gave his predictions on the trends in industry and the capabilities of Raytheon. ❖

Tom is the former Chair of the Federal Bar Association's Transportation and Transportation Security Law Section. He is the deputy inspector general and counsel for the Architect of the Capitol. Lehrich served for ten years with the Department of Transportation as Chief Counsel to the DOT IG and held senior legal posts with the TSA and Federal Maritime Commission.

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reduce the number of pipeline incidents involving death or major injury and to reduce the number of hazardous material incidents involving death or major injury.

Ms. Sutherland discussed new initiatives and programs of PHMSA, including the following.

1. **Research and development.** PHMSA has initiated projects to improve the safety and reliability of hazmat transportation by all transportation modes, including pipelines. The research and development program conducts and supports research to support regulatory and enforcement activities and to provide the technical and analytical foundation necessary for planning, evaluating and implementing the pipeline safety program.
2. **Outreach.** PHMSA has undertaken outreach programs including the "811 Call Before You Dig" hotline designed to create a public awareness of the presence of pipelines and the need to contact the appropriate authorities before beginning work involving digging. Additionally, PHMSA's website (www.PHMSA.gov) is another method of public out-

reach incorporated by the PHMSA.

3. **Enforcement.** PHMSA's Pipeline Safety Enforcement Program is designed to monitor and enforce compliance with pipeline safety regulations and confirm operators are meeting the agency's expectations for the safe and reliable operation of their facilities.
4. **Rulemaking.** PHMSA's Office of Pipeline Security periodically issues rulemaking documents that propose changes to the regulations or adopt final amendments. The public is invited to participate in this process by filing written comments on any rulemaking document that asks for comments, attending a public meeting or by filing a petition for rulemaking that asks PHMSA to add, amend or delete a regulation.
5. **Emergency response.** The purpose of PHMSA's emergency response program is to increase the abilities of emergency responders to safely and effectively plan and respond to pipeline emergencies. An important focus is establishing communication between the pipeline operators and emergency responders.

Finally, Nils Nichols, Director, Division of Pipeline Regulation of FERC addressed the audience. FERC is an independent federal agency, meaning that its activities "shall not be subject to further review by the Secretary (of Energy) or any officer or employee of the Department." As relevant to pipeline transportation, FERC has jurisdiction over interstate natural gas pipeline rates and services, and oil and product pipeline rates and services. FERC also reviews and authorizes liquefied natural gas import and export terminals, and interstate natural gas pipelines. FERC has statutory authority under the Natural Gas Act, the Federal Power Act, and the Interstate Commerce Act. FERC pays for its own operations by imposing annual charges and fees in the industries it regulates. ♦

John E. Anderson, Sr., is a Member of Dickinson Wright PLLC in Nashville, TN. He is Co-Chair of TTSL's Surface Transportation Committee. He can be reached at janderson@dickinsonwright.com or 615-620-1735.

Endnotes

¹Currently, Vanessa Sutherland is the Chairperson of the U.S. Chemical Safety Board.

SAVE THE DATE: RESPONDING TO INSIDER THREATS AND OPEN CARRY LAWS

Save the date for the Transportation and Transportation Security Law Section's presentation of "Responding to Insider Threats and Open Carry Laws." This free event will take place on April 11 from 1:30-4:30 p.m. at TSA Headquarters, 601 S. 12th St., Town Hall, Arlington, VA 20598. Please RSVP to Marcellus Howard, mhoward@fedbar.org, or (571) 481-9118, by April 10.