



BEFORE THE ARIZONA CORPORATIO.

IN THE MATTER OF THE NOTICE OF)
PROPOSED RULEMAKING REGARDING THE)
TRANSPORTATION OF NATURAL GAS, OTHER)
GASES AND HAZARDOUS LIQUIDS BY PIPELINES)

Docket No. RG-00000A-04-0169

COMMENTS OF SOUTHWEST GAS CORPORATION

Southwest Gas Corporation ("Southwest") respectfully submits comments to proposed A.A.C. R14-5-202(S) (the "proposed rule") in the above captioned matter. Southwest is an interested party in this matter inasmuch as it owns, operates and maintains approximately 750 miles of intrastate natural gas transmission pipelines and approximately 26,000 miles of intrastate distribution mains and services within the State of Arizona.

Southwest notes that as a result of the hearing of July 19, 2004 on this matter, Southwest believes it better understands the policy rationale in support of the proposed regulation, yet it is concerned that the proposed rule as drafted will expose the Commission to unintended liabilities, will add unintended complexities into future Commission proceedings, and may frustrate the Commission's future efforts to enforce compliance with pipeline safety regulations. Accordingly, by and through this filing, Southwest proposes language to the proposed rule that strives to meet the Commission's goals while simultaneously minimizing the Commission's exposure to civil liability, minimizing the likelihood that future Commission proceedings will be encumbered by complex legal rulings, and minimizing the likelihood that the Commission's future efforts to enforce operator compliance will be frustrated.

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Arizona Corporation Commission

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1 **I. The Commission’s Proposed Rule Exposes the OPS to Civil Liability.**

2 Simply stated, if the Office of Pipeline Safety (OPS) dictates the means and methods of a
3 material investigation, it assumes ownership of that quintessentially operational function. This
4 ownership carries with it new powers and new obligations – including civil liability if these newfound
5 powers are negligently performed.
6

7 The proposed rule empowers the OPS to select a qualified laboratory, determine the number and
8 type of material tests to be performed, and supervise the performance of those tests, *yet these are*
9 *functions that have long been recognized as being intimately associated with the operation and*
10 *maintenance of a pipeline system. See* 49 C.F.R. § 192.617 (1970) (“The **operator** shall establish
11 procedures for analyzing accidents and failures, including the selection of samples of the failed facility
12 or equipment for laboratory examination, where appropriate, for determining the cause of the failure and
13 minimizing the possibility of a recurrence”); A.S.M.E., USA Standard Code for Pressure Piping, Gas
14 Transmission And Distribution Piping Systems, USAS B31.8-1968 (1968),¹ Introduction (“The Code
15 for Pressure Piping sets forth engineering standards deemed necessary for safe design and construction
16 of piping systems” ... “Provisions of this Code shall be applicable to operating and maintenance
17 procedures of existing installations...”); Id., § 850.7 (“Each operating company shall establish
18 procedures to analyze all failures and accidents for the purpose of determining the cause and to avoid
19 recurrence”). Properly understood, the OPS’s functions contemplated by the proposed rule will be
20 operational in nature and **will** expose the OPS to suit for civil liability for such functions.
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23 Southwest understands 49 C.F.R. § 192.617 and/or common law requires **a pipeline operator** to
24 identify which evidence must be preserved following a pipeline failure for analysis, to collect and
25 preserve the evidence, to employ qualified personnel to perform an analysis, to perform a competent
26 root cause analysis, and to apply the knowledge gained from the analysis to minimize the possibility of a
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28 _____
¹ Referenced sections of this construction safety code are included as Attachment 1.

1 recurrence.² An operator is currently exposed to suit for civil liability to persons injured as a result of
2 the operator's negligent failure to comply with any of these legal requirements.

3 The following is a listing of how the proposed rule will expose the OPS to suit for civil liability
4 to injured persons:

- 5 1. The OPS obtains civil liability as an operator if its *selection of a laboratory* is
6 negligently performed and an injury proximately results from that selection.
- 7 2. The OPS obtains civil liability if an injury proximately results from the OPS's
8 *negligent failure to select a laboratory* in deference to the operator's decision.
- 9 3. The OPS obtains civil liability as an operator if the OPS's laboratory negligently
10 analyzes a properly performed test and an injury proximately results from that
11 analysis.
- 12 4. The OPS obtains civil liability as an operator if the OPS laboratory negligently
13 performs any testing and an injury proximately results from that testing.
- 14 5. The OPS obtains civil liability as an operator if its *selection* of the number and type of
15 tests was negligently performed and an injury proximately results from that selection.
- 16 6. The OPS obtains civil liability as an operator if the OPS laboratory negligently
17 misplaces or destroys any retrieved evidence (say, in a fire or flood) and an injury
18 proximately results from that misplacement or destruction.

19 As Southwest noted at the July 19, 2004 hearing, allowing the operator to witness the testing
20 **may** minimize the likelihood that injuries can proximately result from the OPS's negligent selection of a
21 laboratory,³ inasmuch as the operator can choose to discount the OPS's erroneous laboratory analysis
22 provided the correct testing was properly performed (see bullet no. 3, above). In that instance, the
23 operator may be able to ground its maintenance decisions – to minimize the likelihood of recurrence of a
24 similar failure – upon the operator's own observations at the OPS's laboratory.

25 However, allowing the operator to witness the testing **will not** minimize the likelihood that
26 injuries can proximately result from OPS's other negligent conduct, inasmuch as witnessing the wrong

27 ² The latter obligation was referred to by Southwest's representative at the July 19, 2004 hearing as operational
28 "judgments of maintenance." Transcript at 25:25 to 26:4.

³ Transcript at 26:4 to 26:9.

1 testing, incompetent testing, or no testing at all will deprive the operator of meaningful observations at
2 the OPS's laboratory. Without meaningful observations, the operator has no competent information
3 with which it can minimize the likelihood of recurrence of a similar failure. If there is a recurrence, then
4 the fault, if any, will be borne solely by the OPS.

5
6 This enumeration of new OPS activities that would result in exposure to suit for civil liability if
7 negligently performed (or negligently not performed) is not intended to be an exhaustive list, as the
8 creativity of the trial lawyers that represent injured persons in civil litigation will likely result in a more
9 expansive listing. Southwest has seen such attorneys routinely allege that the operator's functions are
10 non-delegable, meaning that the operator – in this case the OPS – is vicariously and fully liable for the
11 negligence of its contractors, including testing laboratories. Finally, Southwest has seen these trial
12 lawyers routinely allege that the operator's functions – here the OPS functions – are of such importance
13 that public policy mandates the imposition of *strict liability* whenever an injury proximately results from
14 the operator's activities, meaning that civil liability will attach even if the damage was caused by the
15 OPS's *non-negligent* act or omission but was simply the result of an unavoidable accident.

16
17 In contrast, if a Commission administrative law judge (ALJ) affirms or rejects the operator's
18 selection of the laboratory or the number and types of tests to be performed, and that adjudication is
19 made to resolve a *discovery dispute* pursuant to the Commission's Rules of Practice and Procedure, the
20 Commission will likely be insulated from civil liability to injured persons because some form of judicial
21 immunity will probably apply to this quintessentially judicial function. See Fidelity Security Life Ins.
22 Co. v. State, 191 Ariz. 222, 225, 954 P.2d 580, 583 (1998) (“[U]nder A.R.S. § 12-820.01, public entities
23 are protected by absolute immunity when the process involves legislative or **judicial decision making**
24 within the respective powers granted to the legislature and the judiciary, but entities are entitled to
25 immunity for administrative action only to the extent such action involves the determination of
26 fundamental governmental policy”); Evans v. Copins, 26 Ariz. App. 96, 97, 546 P.2d 365, 366 (1976)
27 (judges have immunity from civil liability for acts done in judicial capacity).
28

1 At worst, an ALJ's erroneous adjudication of a discovery dispute would be subject to qualified
2 immunity under A.R.S. § 12-820.02.05,⁴ meaning the Commission would be liable for injury
3 proximately resulting from the ALJ's erroneous order only if the ALJ's order was shown to be the
4 product of an intention to inflict injury or was the product of gross negligence. In contrast, no immunity
5 will apply to insulate the OPS from civil liability for its new powers because the OPS will be exercising
6 operational functions, and does not issue orders adjudicating discovery disputes pursuant to the
7 Commission's Rules of Practice and Procedure.⁵ Importantly, these proposed operational functions are
8 not subject to *any* immunity from civil liability provided by A.R.S. § 12-820.01 (absolute immunity) or
9 A.R.S. § 12-820.02 (qualified immunity).
10

11 Southwest believes that if the proposed rule is interpreted to empower the OPS to make
12 determinations that expose the OPS to suit for civil liability, then this exposure is not properly
13 accounted for in the economic impact statement prepared in support of the proposed rule.
14

15 Rather than promulgate a rule that, when executed, will expose the OPS to suit for civil liability,
16 Southwest urges the Commission to amend the proposed rule to grant the OPS new investigatory
17 authority to require an operator to conduct an independent laboratory analysis, and to further amend the
18 rule to clearly affirm that the operator determines the identity of the independent laboratory and the
19 manner of testing, and finally clearly affirm that disputes between the operator and the OPS over testing
20 methods are governed by the rules provided in the Commission's Rules of Practice and Procedure.
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23 ⁴ A.R.S. § 12-820.02, Qualified Immunity, provides in relevant part and with added emphasis:

24 A. Unless a public employee acting within the scope of the public
25 employee's employment intended to cause injury or was grossly negligent,
neither a public entity nor a public employee is liable for:

26 ...

27 5. **The issuance of** or failure to revoke or suspend **any** permit, license,
certificate, approval, **order** or similar authorization for which absolute immunity
is not provided pursuant to A.R.S. § 12- 820.01.

28 ⁵ A.A.C. R14-3-101(A) (Neither the Rules of Practice and Procedure "nor the Rules of Civil Procedure shall apply to any investigation by the Commission, any of its divisions or by its staff.")

1 **II. Southwest Urges Changes To The Proposed Regulations That Both Meet the**
2 **Commission's Goals And Minimize the OPS's Exposure to Civil Liability.**

3 Southwest notes that as a result of the hearing of July 19, 2004 on this matter, Southwest
4 believes it better understands the policy rationale in support of the proposed regulation and has strived to
5 propose amendments that fully meet the goals of those policies while minimizing the OPS's exposure to
6 civil liability. The current version of the proposed rule is attached as Attachment 2 and Southwest's
7 suggested language for that rule is attached as Attachment 3.

8 Southwest agrees with the policy goal of employing independent laboratories to conduct material
9 testing for significant incidents. Southwest notes that the current practices employed by Southwest and
10 the OPS nearly achieve those goals, and proposes amendments to codify the OPS's current investigatory
11 powers and to enhance those powers where necessary to meet those goals.

12 Southwest has historically maintained the testing equipment and personnel resources needed to
13 analyze most material failures in pipelines and pipeline components in order to determine the root cause
14 of failure, and does so to comply with the mandates of 49 C.F.R. § 192.617. Notwithstanding its native
15 abilities, Southwest has routinely employed the services of independent laboratories following
16 significant incidents. In such incidents, the laboratory is consulted in determining the number and type
17 of tests, and the laboratories then conduct the testing and report the results of such testing in writing.
18 This is consistent with the current Guide for Gas Transmission and Distribution Piping Systems
19 (GPTC), which provides in pertinent part:

20 The number of specimens needed to be collected at the failure site may vary
21 depending upon the type and number of tests anticipated. **A series of**
22 **independent or destructive tests may require multiple specimens.** If there is
23 a need to confirm the pipe materials specifications, then additional pipe
24 specimens should be obtained near the failure, but in an area of the piping where
25 the physical properties and characteristics are unaffected by the failure itself.
26 Other investigatory procedures may be utilized to confirm pipe material
27 specifications.⁶

28 ⁶ A.G.A., Guide for Gas Transmission and Distribution Piping Systems, ANSI/GPTC Z380.1-
2003, page 214 (2003) (Emphasis added).

1 In practice, before material testing occurs, the OPS has routinely asked Southwest which
2 independent laboratory will be employed and what testing is proposed, and Southwest has routinely
3 provided OPS with the requested information before testing commences. Also, the OPS has routinely
4 requested laboratory test reports and Southwest has always provided such reports. While the OPS has
5 never objected to Southwest's selection of a laboratory nor has it objected to Southwest's proposed tests,
6 Southwest would promptly entertain any such objections inasmuch as a contrary approach could result
7 in a discovery dispute with the OPS.
8

9 Under the long established rules of this Commission, the OPS is the agency responsible for the
10 safety of intrastate pipelines and as such has always had the ability to enforce an operator's compliance
11 with pipeline safety codes, including the material investigation mandates of 49 C.F.R. § 192.617. The
12 OPS currently has the power to investigate incidents, and as such is currently entitled to advance
13 notification of all evidence removal and all testing if notification is requested, and pursuant to its
14 investigatory powers, the OPS may observe and record the removal of evidence and testing. The OPS
15 may employ any combination of its employees and consultants to perform these functions. Further, if
16 the OPS has an objection to the number and type of tests proposed by an operator, the OPS currently has
17 the ability to commence a proceeding before the Commission prior to the commencement of the
18 operator's testing and file an expedited motion to compel alternative or additional tests. Such a motion
19 may allege that the testing proposed by the operator amounts to spoliation of evidence that would hinder
20 the OPS's investigation.
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23 Thus, while the operator currently has the power and obligation under 49 C.F.R. § 192.617 to
24 decide which laboratory will examine the failed material, the current regulations provide a mechanism
25 for the OPS to challenge the operator's decision before testing commences. A Commission ALJ
26 already has the authority to order such matters as the number and type of tests, the location of tests, the
27 identity of the individuals performing the test, the parties' right to observe and record the tests, and the
28 allocation of costs associated with the tests. While an evidentiary hearing may be required to resolve the

1 dispute if substantial rights of the parties are implicated, in most instances the constitutional due process
2 requirements will permit the ALJ to adjudicate the dispute based solely upon the parties' briefings and
3 without an evidentiary hearing.
4

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6 **III. The Commission's Proposed Rule Jeopardizes the OPS's Federal Certification and
Participation in the Federal Grant-In-Aid Program.**

7 Southwest believes that when the OPS acts as an operator pursuant to the powers granted by the
8 proposed rule, these activities will have the effect of preventing the operator from performing those
9 operational functions, and this in turn jeopardizes the OPS's federal certification for gas or hazardous
10 liquid under 49 U.S.C. § 60105(a). Under such certification, the OPS assumes safety responsibility with
11 respect to intrastate facilities over which it has jurisdiction under state law and is eligible to apply for
12 federal grant-in-aid funds to provide reimbursement for costs incurred by OPS personnel in pipeline
13 safety enforcement. However, 49 U.S.C. § 60104(c) provides, "A state authority that has submitted a
14 current certification under section 60105(a) of this title *may adopt additional or more stringent safety*
15 *standards* for intrastate pipeline facilities and intrastate pipeline transportation *only if those standards*
16 *are compatible with the minimum standards prescribed*" in the Code of Federal Regulations. (Emphasis
17 added).
18
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20 Southwest believes that relieving the operator of some of its obligations provided under 49
21 C.F.R. § 192.617 and reposing those obligations on the OPS is contrary to the requirements of 49 U.S.C.
22 § 60104(c). In effect, each time the OPS exercises its new powers to determine the means and methods
23 of material investigation, it will be endangering the OPS's certification under 49 U.S.C. § 60105(a).
24

25 Southwest believes that if the proposed rule is interpreted to empower the OPS to make
26 determinations that enable the OPS to assume operator functions and thereby relieve the operator of its
27 obligations under 49 C.F.R. § 192.617, then the potential loss of federal grant-in-aid funds is not
28 properly accounted for in the economic impact statement prepared in support of the proposed rule.

1 Rather than promulgate a rule that, when executed, will expose the OPS to a loss of its federal
2 grant-in-aid funds, Southwest urges the Commission to amend the proposed rule to clearly affirm that
3 the operator retains the obligation of determining the identity of an independent laboratory and the
4 manner of testing.
5

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7 **IV. If the Proposed Rule Allows The OPS and Not an ALJ to Have the Final Word In A**
8 **Dispute With the Operator Over Any Aspect of the Independent Testing, The Resultant**
9 **Laboratory Test Report May Not Be Admissible Against The Operator In An**
10 **Enforcement Action.**

11 If the OPS is the final arbiter of the dispute between it and the operator over the manner of
12 testing and resolves those disputes in its own favor, and then the OPS assumes a prosecutorial role in an
13 enforcement action in which the OPS advocates the imposition of penalties against the operator, then the
14 operator may allege that its constitutional due process rights have been abridged by the OPS's summary
15 edicts and that the testing ordered by OPS resulted in the destruction of evidence. In that event, the
16 operator will allege that it is entitled to a proper remedy, which may include the preclusion of the test
17 results in any enforcement action and even outright dismissal of the enforcement action.

18 There is a well developed body of law dealing with the destruction of evidence (a.k.a. spoliation
19 of evidence) in civil proceedings which is applicable to the OPS and the operator in the event an
20 evidentiary dispute arises in a subsequent enforcement action. "Litigants have a duty to preserve
21 evidence which they know, or reasonably should know, is relevant in [a proceeding], is reasonably
22 calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during
23 discovery and/or is the subject of a pending discovery request." Souza v. Fred Carries Contracts, Inc.,
24 191 Ariz. 247, 250, 955 P.2d 3, 6 (App. 1997) (internal citations and quotations omitted). "Issues
25 concerning destruction of evidence and appropriate sanctions ... should be decided on a case-by-case
26 basis, considering all relevant factors." Id. Sanctions may include dismissal or default judgment against
27 the spoliator, the creation of a rebuttable presumption that the lost evidence, if available, would have
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1 been unfavorable to the spoliator, and exclusion of expert or other witness testimony regarding either the
2 spoliated evidence or other evidence. Koesel et al, Spoliation of Evidence, Sanctions and Remedies for
3 Destruction of Evidence in Civil Litigation, 35–47 (published by American Bar Association, Tort and
4 Insurance Practice Section, 2000).

5
6 Rather than promulgate rules that could inject complicated constitutional or evidentiary issues
7 into subsequent proceedings before the Commission or in another forum, Southwest urges the
8 Commission to amend the proposed rule to clearly reaffirm that the rules promulgated in the
9 Commission’s Rules of Practice and Procedure will govern *all* disputes arising under the proposed
10 regulation, and that such rules preclude the OPS from unilaterally resolving such disputes in its favor.

11
12 **V. The Statutory and Regulatory Mandates of the National Transportation and Safety**
13 **Board and the Federal Aviation Authority To Investigate Accidents Are Contrary to**
the Rule Proposed by the Commission.

14 Importantly, *unlike the OPS*, the National Transportation and Safety Board (“NTSB”) and the
15 Federal Aviation Authority (“FAA”) enjoy federal sovereign immunity that will insulate them from civil
16 liability for damages caused by their ordinary negligence, subject to the narrow exceptions of common
17 law and those exceptions enumerated in the Federal Tort Claims Act. Thus, if either of these regulatory
18 agencies undertake testing activities, their status as instruments of the federal government will likely
19 insulate them from civil liability in most instances should they negligently exercise those functions. In
20 contrast, “liability of public servants is the rule in Arizona and immunity is the exception.” Fidelity
21 Security Life Ins. Co., 191 Ariz. at 225, 954 P.2d at 583. Arizona has abrogated its sovereign immunity
22 for instruments of the state government in all instances unless the state’s activity falls within the narrow
23 exceptions listed in A.R.S. § 12-820 to A.R.S. § 12-826. Thus, while a federal agency may be immune
24 for its negligent determination of the means and methods of a material investigation,⁷ if that same
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28 ⁷ To the extent liability would be imposed upon federal agencies by operation of Arizona law, that liability will
be negated by operation of the Supremacy Clause in the federal constitution if the federal sovereign immunity law
differs from Arizona’s sovereign immunity law. U.S. Const. art. IV, cl. 2.

1 activity is undertaken by the OPS in connection with intrastate pipelines, the OPS will not be immune to
2 civil liability.

3 Nonetheless, the airline industry is an appropriate industry to evaluate when attempting a
4 comparative regulatory analysis for promulgating pipeline safety rulemaking. Both industries are
5 regulated at some level by the United States Code and by the U.S. Department of Transportation (“US
6 DOT”), and both are subject to the investigatory powers of the National Transportation and Safety
7 Board (“NTSB”). Air carriers are regulated by the regulations promulgated by the Federal Aviation
8 Administration of the US DOT, and the pipeline operators are regulated by the regulations promulgated
9 by the Research and Special Programs Administration of the US DOT.
10

11 The Administrator for the FAA and its delegates have the power to conduct investigations to
12 investigate alleged violations of the pertinent federal statutes and regulations governing air carriers. 49
13 U.S.C. § 40113 (a); 14 C.F.R. § 13.3. The Administrator and its delegate may hold hearings, issue
14 subpoenas, require the production of relevant documents, records, and property, and take evidence and
15 depositions. 14 C.F.R. § 13.3. The Administrator has delegated its investigation powers so that
16 investigations are conducted by a Presiding Officer. 14 C.F.R. § 13.103. Enforcement actions for civil
17 penalties under \$50,000⁸ are governed by the Rules of Practice In FAA Civil Penalty Actions⁹ and the
18 Administrator has empowered its administrative law judges to issue procedural orders,¹⁰ resolve
19 discovery disputes,¹¹ and issue discovery sanctions.¹² A diligent review of the regulations failed to
20 reveal that the Presiding Officer or any other enforcement agent of the FAA Administrator has the
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24 ⁸ United States district courts have exclusive jurisdiction of any civil penalty action which involves an amount in
controversy in excess of \$50,000. 13 C.F.R. 13.201(c).

25 ⁹ 14 C.F.R. § 13.201(a).

26 ¹⁰ 14 C.F.R. § 13.205(a)(6).

27 ¹¹ 14 C.F.R. § 13.217(e).

28 ¹² 14 C.F.R. § 13.217(f).

1 power to dictate the means and methods of material testing as part of an accident investigation.¹³

2 The NTSB is an independent establishment of the United States Government. 49 U.S.C. §
3 1111(a). It is charged with the duty of investigating the probable cause of civil aviation accidents¹⁴ and
4 significant pipeline accidents.¹⁵ It issues recommendations to the Secretary of Transportation (and
5 others), and the Secretary may refuse to carry out the NTSB's recommendations. 49 U.S.C. §
6 1135(a)(3). The NTSB does not regulate transportation equipment, personnel, or operations, and it does
7 not initiate enforcement actions.¹⁶ No part of an NTSB accident investigation report may be used in a
8 civil action for damages resulting from a matter mentioned in the report. 49 U.S.C. § 1154(b).

9 The NTSB may enter any accident site to inspect and "do anything necessary to conduct an
10 investigation." 49 U.S.C. § 1134(a). In exercising this power, the NTSB may test any pipeline
11 component, but "the examination or test shall be conducted in a way that ... to the maximum extent
12 feasible, preserves evidence related to the accident, consistent with the needs of the investigation and
13 with the cooperation of that owner or operator." 49 U.S.C. § 1134(c). The pipeline operator has the
14 right to participate in an NTSB investigation. 49 C.F.R. § 831.11(a).

15 The Commission's proposed rule, if implemented, would disturb the division of investigatory
16 powers currently established by Congress and its rulemaking agencies. Congress has given the NTSB
17 the authority to enter an aviation or pipeline accident investigation site, assume total control over the
18 accident investigation, and apparently can overrule the objections of an air carrier and pipeline operator
19 over testing methodologies in limited circumstances, but the NTSB has these powers because it does not
20 commence enforcement proceedings but instead carries out a fact finding function with the goal of
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25 ¹³ The undersigned was also unable to find any regulation compelling an air carrier to conduct failure
26 investigations, although the undersigned understands that the air carriers and airplane manufacturers routinely
investigate the root cause of civil aircraft accidents.

27 ¹⁴ 49 U.S.C. § 1132(a).

28 ¹⁵ 49 U.S.C. § 1131(a)(1)(D).

¹⁶ NTSB website, "History and Mission," www.nts.gov/Abt_NTSB/history.htm.

1 issuing recommendations that may result in rulemaking by the affected agency. Enforcement
2 proceedings are commenced by the FAA's Presiding Officer or by the Administrator of Office of
3 Pipeline Safety, but these persons apparently do not have the authority to unilaterally overrule an air
4 carrier's or a pipeline operator's objections over the testing methodologies. Instead, these prosecutorial
5 bodies must obtain an order from a hearing officer or ALJ in connection with the resolution of a
6 discovery dispute.
7

8 The existing federal statutory and regulatory regime may reflect the recognition by Congress and
9 by the rulemaking agencies that constitutional limitations preclude an enforcement body from
10 unilaterally overruling an operator in undertaking any testing. In other words, Congress may have
11 determined that no prosecutor has the unilateral power to adjudicate discovery disputes when it is a
12 party to that dispute.
13

14 **VI. The Proposed Rule Should Be Amended to Eliminate the Cost Shifting Obligations In**
15 **Order to Comply With State and Federal Law.**

16 Subsection 3(b)(v) of the currently proposed rule requires an operator to pay for the OPS's
17 materials testing in the absence of a finding by any adjudicatory body that there has been a violation of a
18 rule of pipeline safety by the operator or that there is a nexus between the testing and that violation.
19 Instead, the rule effectively penalizes the operator with part of the cost of an OPS investigation in the
20 absence of *any* findings by any adjudicatory body. This rule is especially problematic in those instances
21 where an operator contests the testing and/or analysis of the OPS selected laboratory, and that dispute
22 becomes central to an enforcement proceeding prosecuted by the Staff against the operator. In such an
23 event, the OPS laboratory will become the Staff's proffered expert witness and the operator will proffer
24 its own independent expert witness in rebuttal, yet the proposed rule would have the operator bear the
25 penalty of paying the Staff's expert witness before there is even a hearing on the alleged violation.
26

27 Notwithstanding the due process problems associated with penalizing an operator in the absence
28 of any finding of fault by that operator, the proposed rule violates the Arizona requirement that penalties

1 assessed by the Commission be deposited in the State's general fund. A.R.S. § 40-442(C). This statute
2 prohibits the Commission from shifting the costs of its own investigations onto the operator as a penalty,
3 yet that is precisely what is accomplished by the cost shifting component of the proposed rule.

4 Southwest is unaware of any authority that allows the Commission to shift the cost of its
5 functions onto an operator. The Supreme Court of Arizona has confirmed on several occasions that the
6 "Commission has no implied powers and its powers do not exceed those to be derived from a strict
7 construction of the Constitution and implementing statutes." Commercial Life Insurance Co. v. Wright,
8 64 Ariz. 129, 166 P.2d 943, 949 (1946). The quoted language was reemphasized by the Court in 1992
9 in Arizona Corporation Commission v. Woods, 171 Ariz. 286, 830 P.2d 807, 814 (1992).

10
11 Southwest believes that the economic impact statement prepared in support of the proposed rule
12 fails to account for the substantial likelihood that the cost shifting portion of the proposed rule will be
13 invalidated when challenged before a tribunal or court of competent jurisdiction.

14
15 Rather than promulgate a rule that is contrary to Arizona law and that likely violates minimal
16 due process requirements, Southwest urges the Commission to amend the proposed rule to eliminate the
17 cost shifting requirement of subsection 3(b)(v).

18
19 **VII. The Proposed Rule Should Be Amended to Mirror Current Reporting Obligations In**
20 **Order to Reduce the Reporting Burden On The Operator and The OPS.**

21 The currently proposed rule requires an operator to notify the OPS whenever a failed pipeline
22 segment is removed and the failure is not clearly the result of third party damage or corrosion. While
23 the Staff does not advocate an expansive interpretation of this proposed rule,¹⁷ Southwest believes that
24 operators will over-report to the OPS to avoid an allegation of non-compliance, and this in turn will
25 result in a crushing burden on the operator and on the OPS that is not properly accounted for in the
26 economic impact statement prepared in support of the proposed rule. Further, the expansive definition
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¹⁷ Transcript at 19:19 to 20:15.

1 contained in the text of the proposed rule coupled with the OPS's stated belief that the rule should not be
2 expansively interpreted could have the unintended result of creating a hostile regulatory environment
3 where the operator perceives an arbitrary enforcement when the OPS attempts to enforce the proposed
4 rule with subjective good faith.

5
6 Southwest proposes amending the proposed rule to impose a notification duty upon the operator
7 consistent with the current requirements of a written reportable incident as defined in A.A.C. R14-5-
8 203. The State of Arizona, through this Commission, has already determined which incidents are
9 important enough to require an operator to report to the OPS. In adopting A.A.C. R14-5-203, this
10 Commission has defined which incidents are reportable and in doing so has expanded the operator's
11 reporting requirements well beyond the minimum requirements of the federal regulations. See 49 C.F.R.
12 § 191.5 and 49 C.F.R. § 191.9. The Commission should reaffirm its existing policy and incorporate the
13 existing reporting rules with the adoption of these new reporting requirements. The pre-existing
14 regulations have the benefit of being modeled upon the federal rules and are clearly defined. As such,
15 the OPS and the operators have a long and common history of interpreting these rules. Such an
16 amendment would completely eliminate the possibility of a perceived hostile regulatory environment.

17
18 Southwest has proposed referencing the reporting rules of A.A.C. R14-5-203, Pipeline Incident
19 Reports and Investigations. Specifically, Southwest has proposed incorporation of a reference to the
20 regulatory definition of incidents that require a written notification, which provides in pertinent part:
21

22 C. Require written incident report:

23 1. Operators of an intrastate pipeline transporting natural gas, LNG
24 or other gases will file a written incident report when an incident occurs
25 involving a natural gas or other gas pipeline that results in any of the
26 following:

- 27 a. An explosion or fire not intentionally set by the operator.
- 28 b. Injury to a person that results in 1 or more of the following:
 - i. Death.
 - ii. Loss of consciousness.
 - iii. Need for medical treatment requiring hospitalization.
- c. Property damage, including the value of the lost gas, estimated
in excess of \$5,000.
- d. Emergency transmission pipeline shutdown.

1 e. Overpressure of a pipeline system where a pipeline operating at
2 less than 12 PSIG exceeds MAOP by 50%, where a pipeline operating
3 between 12 PSIG and 60 PSIG exceeds MAOP by 6 PSIG or where a
4 pipeline operating over 60 PSIG exceeds MAOP plus 10%.

f. Emergency shutdown of a LNG process or storage facility.

* * * *

5 3. Operators of an intrastate pipeline transporting hazardous liquid
6 will make a written incident report on DOT Form 7000-1, incorporated by
7 reference and on file with the Office of the Secretary of State, and copies
8 available from the Commission Office of Pipeline Safety, 1200 West
9 Washington, Phoenix Arizona 85007, when there is a release of hazardous
10 liquid which results in any of the following:

a. An explosion or fire not intentionally set by the operator.

b. Injury to a person that results in 1 or more of the following:

i. Death.

ii. Loss of consciousness.

iii. Inability to leave the scene of the incident unassisted.

iv. Need for medical treatment.

v. Disability which interferes with a person's normal daily
11 activities beyond the date of the incident.

12 c. The loss of 50 or more barrels of hazardous liquid or carbon
13 dioxide.

14 d. The escape of more than five barrels a day of highly volatile
15 liquids into the atmosphere.

e. Property damage estimated in excess of \$5,000.

f. News media inquiry.

16 In application, an operator would simply report additional information to the OPS for certain
17 incidents that it must already report upon. In contrast, if the proposed regulation is not amended,
18 operators may be required to report hundreds of minor leaks per year that would not otherwise be
19 reportable because they meet the proposed regulation's notification requirements. This figure does not
20 include other non-pipe related failures, such as failures of regulators or other pipeline appurtenances that
21 do not meet the current reporting requirements.
22

23 **VIII. Conclusion.**

24 Southwest appreciates the opportunity to file these post-hearing comments. Southwest supports
25 the Commission's efforts to formalize the procedure involving laboratory testing of materials involved
26 in significant incidents.
27
28

1 Southwest believes that the suggested language in Attachment 3 meets the Commission's goals
2 of employing independent laboratories to conduct material investigations, to repose in the OPS the
3 power to compel an operator to employ an independent laboratory, to affirm that the OPS may receive
4 advance notice of the identity of the independent laboratory and of the testing methodology, to affirm
5 that the OPS may object to these matters before testing commences and may obtain a timely resolution
6 of the dispute, and to affirm that the OPS and its independent consultants may observe and record any
7 testing at the independent laboratory. Southwest believes that the suggested language in Attachment 3
8 meets those goals while simultaneously minimizing the Commission's exposure to unintended liabilities
9 and other encumbrances.
10
11
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13

14 Respectfully submitted this 2^d day of August, 2004.

15
16 SOUTHWEST GAS CORPORATION

17
18 

19 Craig R. Roecks
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28

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I have this day served the foregoing **COMMENTS OF SOUTHWEST**
3 **GAS CORPORATION** by mailing a copy, properly addressed, with postage prepaid, to each of the
4 following individuals:

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Dated at this 2 day of August, 2004.



An employee of
SOUTHWEST GAS CORPORATION

ATTACHMENT 1

U S A S T A N D A R D
C O D E F O R P R E S S U R E P I P I N G

Gas Transmission and Distribution Piping Systems

USAS B31.8-1968

Sponsor

The American Society of Mechanical Engineers

Published by

THE AMERICAN SOCIETY OF MECHANICAL ENGINEERS

United Engineering Center 345 East 47th Street New York, N. Y. 10017

This USA Standard will be one of nearly 3000 standards approved as American Standards by the American Standards Association. On August 24, 1966, the ASA was reconstituted as the United States of America Standards Institute. Standards approved as American Standards are now designated USA Standards. There is no change in their index identification or technical content.

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Introduction

The Code for Pressure Piping (USAS B31) consists of a number of Sections, which collectively constitute the Code. Hereinafter in this introduction and in the text of this Code Section B31.8, when the word "Code" is used without identification to another specific Code Section it means this Code Section.

The Code for Pressure Piping sets forth engineering requirements deemed necessary for safe design and construction of piping systems. While safety is the basic consideration of this Code, other factors may impose additional requirements on the final specifications for any pressure piping system. The designer is cautioned that the Code is not a design handbook. The Code does not do away with the need for the engineer or competent engineering judgment.

The Code contains basic reference data and formulas necessary for design. It is intended to state these requirements in terms of basic design principles to the fullest possible extent, supplemented with specific requirements where necessary to obtain uniform interpretation of principle. It contains prohibitions in areas where practices or designs are known to be unsafe. In other areas the Code contains warnings or "flags" where caution is known to be necessary, but where it is felt that a direct prohibition would be unwise.

The Code includes:

- (1) Standards and material specifications which have been accepted for Code usage.
- (2) The designation of proper dimensional standards for the elements comprising piping systems.
- (3) Requirements for the design of component parts and assembled units, including necessary supports.
- (4) Requirements for the evaluation and limitation of stresses, reactions and movements associated with pressure, temperature, and external forces.
- (5) Requirements for the fabrication, assembly and erection of piping systems.
- (6) Requirements for testing and inspecting of elements before assembly or erection and of the completed systems after erection.

The components of piping systems should, as far as practical, comply with the Specifications and Standards listed in the Code.

Compliance with this Code requires that fundamental principles be followed and that materials or practices not specifically approved

under this Code, but which are not prohibited by the Code, be qualified for use as set forth in the applicable chapters of the Code.

The specific design requirements of the Code usually revolve around a simplified engineering approach to a subject. It is intended that a designer capable of applying more complete and rigorous analysis to special or unusual problems shall have latitude in the development of such designs and the evaluation of complex or combined stresses. In such cases the designer is responsible for demonstrating the validity of his approach.

It is not intended that this Code be applied retroactively to existing installations insofar as design, fabrication, installation, established operating pressure (accept as provided for in Chap. V), and testing are concerned. It is intended, however, that the provisions of this Code shall be applicable to the operation, maintenance, and up-rating of existing installations.

Provisions of this Code shall be applicable to operating and maintenance procedures of existing installations, and when existing installations are up-rated.

The Code is under the direction of Standards Committee B31 organized under the procedures of the USA Standards Institute and is under the administrative sponsorship of The American Society of Mechanical Engineers.

The Committee is a continuing one and is organized to keep the Code up to date in context and in step with the developments in materials, constructions and usage. Revisions are issued periodically. New editions are published at three to four year intervals depending on conditions.

USA Standards Committee B31 has established an orderly procedure to consider requests for interpretations and revisions of Code requirements. In order to receive consideration, inquiries shall be in writing and must give full particulars.

When an approved reply to an inquiry involves a change in Code requirements, the ruling is made public through the issuance of a "Case." This is published in *Mechanical Engineering*. A "Case Interpretation and Revision" service is maintained for the benefit of all who use the Code. Suggestions for revisions may originate within the committee itself or from anyone outside the committee.

All requests for interpretations or suggestions for revisions should be addressed to the Secretary, USA Standards Committee B31, in care of The American Society of Mechanical Engineers, United Engineering Center, 345 East 47th Street, New York, New York 10017.

GAS TRANSMISSION AND DISTRIBUTION PIPING SYSTEMS

Classes 2, 3 or 4 and such section is in satisfactory physical condition, the maximum allowable operating pressure of that section shall be confirmed or revised as follows:

(a) If the section involved has been previously tested in place to at least 90 per cent of its specified minimum yield strength for a period of not less than 8 hours, the maximum allowable operating pressure shall be confirmed or reduced so that the corresponding hoop stress will not exceed 72 per cent of specified minimum yield strength of the pipe in Class 2 Locations, 60 per cent of the specified minimum yield strength of the pipe in Class 3 Locations, or 50 per cent of the specified minimum yield strength in Class 4 Locations.

(b) If the section involved has not been previously tested in place as described in Paragraph 850.42 (a) above, the maximum allowable operating pressure shall be reduced so that the corresponding hoop stress will be equal to or less than that permitted in this Code for new pipelines or mains in the existing Location Class.

(c) If the provisions of 850.42 and its parts (a) or (b) above are not used to qualify the section involved for operation, then such section of pipeline or main shall be hydrostatically tested for a period of not less than 8 hours. The maximum allowable operating pressure shall then be established so as to be equal to or less than that shown in Table 850.421. The maximum allowable

operating pressure of a section of pipeline or main in accordance with 850.42 shall preclude the application of 845.23.

850.43 Where the maximum allowable operating pressure of a section of pipeline or main is revised in accordance with 850.42 and becomes less than the maximum allowable working pressure of the pipeline or main of which it is a part a suitable pressure relieving or pressure limiting device shall be installed in accordance with provisions of 845.1, 845.2 and 845.21.

850.5 Continuing Surveillance of Pipelines.

As a means of maintaining the integrity of its pipeline system each operating company shall have a procedure for continuing surveillance of its facilities. Studies shall be initiated and appropriate action taken when unusual operating and maintenance conditions occur such as failures, leakage history, drop in flow efficiency due to internal corrosion or substantial changes in cathodic protection requirements.

If such studies indicate that the facility is in unsatisfactory condition, but no imminent hazard exists requiring immediate action, a planned program to recondition or phase out such facility shall be initiated. If such facility cannot be reconditioned or phased out, the maximum allowable operating pressure shall be reduced commensurate with the requirements described in 845.22(c) of this Code.

850.6 Emergency Plan

Each operating company shall:

(a) Set up an emergency plan to be implemented in the event of facility failures or other emergencies.

(b) Acquaint appropriate maintenance and operating employees with the operation of the applicable portions of the plan.

(c) Establish liaison with appropriate public officials with respect to this plan.

850.7 Pipeline Failure Investigation

Each operating company shall establish procedures to analyze all failures and accidents for the purpose of determining the cause and to minimize the possibility of a recurrence. This plan shall include a procedure to select samples of the failed facility or equipment for laboratory examination when necessary.

851 PIPELINE MAINTENANCE

851.1 Pipeline Patrolling.

Each operating company shall maintain a periodic pipeline patrol program to observe surface conditions on and adjacent to the pipeline

Table 850.421

**Maximum Allowable Operating Pressures
After Requalification Test**

| Existing Location Class | Maximum Allowable Operating Pressure After Test |
|-------------------------|---|
| 2 | 0.8 times test pressure |
| 3 | 0.667 times test pressure |
| 4 | 0.555 times test pressure |

operating pressure confirmed or revised in accordance with 850.42 shall not exceed the maximum allowable operating pressure established under this Code, or previously established under applicable editions of the B31 Code, prior to the confirmation or revision, and the corresponding hoop stress shall not exceed 72 per cent of the specified minimum yield strength in Class 2 Locations, 60 per cent of the specified minimum yield strength of the pipe in Class 3 Locations, or 50 per cent of the specified minimum yield strength of the pipe in Class 4 Locations. No confirmation or revision of the maximum allowable

ATTACHMENT 2

- S. Laboratory testing of intrastate pipelines shall be conducted in accordance with the following:
1. If an operator of an intrastate natural gas, other gas or hazardous liquid pipeline removes a portion of a pipeline that failed for any reason other than observable external corrosion or third-party damage, the operator shall retain the portion that was removed and shall notify the Office of Pipeline Safety of the removal within two hours after the removal is completed. A notice made pursuant to this subsection shall include all of the following:
 - a. Identity of the failed pipeline.
 - b. Location of the failure.
 - c. Date and time of the removal.
 - d. Length of the removed portion.
 - e. Storage location of the removed portion.
 - f. The operator's opinion regarding the probable cause or causes of the failure.
 - g. Any additional information about the failure or the removal of the portion of the pipeline that failed that is requested by the Office of Pipeline Safety.
 2. Within forty-eight hours after notification pursuant to subsection (1), the Office of Pipeline Safety shall notify the operator either that:
 - a. The Office of Pipeline Safety is directing the operator to have the portion of the pipeline that was removed tested by a laboratory to determine the cause or causes of the failure.
 - b. The Office of Pipeline Safety is not directing laboratory testing and the operator may discard the portion of the pipeline that was removed.
 3. If the Office of Pipeline Safety directs laboratory testing pursuant to subsection (2)(a):
 - a. The Office of Pipeline Safety shall:
 - i. Determine the laboratory that will do the testing pursuant to subsection (4) and the period of time within which the testing is to be completed.
 - ii. Approve the number and types of tests to be performed.
 - iii. Notify the operator of its determinations pursuant to subsections (3)(a)(i) and (ii).
 - b. The operator shall:
 - i. Notify the Office of Pipeline Safety of the number and types of tests proposed by the operator.
 - ii. Notify the Office of Pipeline Safety of the date and time of any laboratory tests at least twenty days before the tests are done.
 - iii. At the request of the Office of Pipeline Safety, ensure that a representative of the Office of Pipeline Safety is permitted to observe any or all of the tests.

- iv. Ensure that the original laboratory test results are provided to the Office of Pipeline Safety within thirty days of the completion of the tests.
 - v. Pay for the laboratory testing.
 - 4. In determining a laboratory pursuant to subsection (3)(a)(i), the Office of Pipeline Safety shall:
 - a. Submit a written request to at least three different laboratories for bids to conduct the testing.
 - b. Consider the qualifications of the respondent laboratories to perform the testing, including:
 - i. Past experience in performing the required test or tests according to ASTM International standards.
 - ii. Any recognition that the laboratory may demonstrate with national or international laboratory accreditation bodies.
 - c. Select the laboratory that offers the optimum balance between cost and demonstrated ability to perform the required test or tests.
 - d. The Office of Pipeline Safety shall not select a laboratory pursuant to this subsection before either of the following, which ever occurs first:
 - i. The Office of Pipeline Safety has received written bids from at least three different laboratories.
 - ii. Thirty days from the date of the request for bids has passed.
-

ATTACHMENT 3

S. Laboratory testing of intrastate pipelines shall be conducted in accordance with the following:

1. If an operator of an intrastate natural gas, other gas or hazardous liquid pipeline removes a portion of a pipeline that failed for any reason other than observable external corrosion or third-party damage and results in an incident that meets the written reporting requirements of R14-5-203, then the operator shall retain the portion that was removed and shall telephonically notify the Office of Pipeline Safety of the removal within two hours after the removal is completed. A notice made pursuant to this subsection shall include all of the following:
 - a. Identity of the failed pipeline.
 - b. ~~[L]~~Description and location of the failure.
 - c. Date and time of the removal.
 - d. Length or quantity of the removed portion.
 - e. Storage location of the removed portion.
 - f. The operator's opinion regarding the probable cause or causes of the failure.
 - g. The operator's plan for examination of the removed portion.
 - h. Any additional information about the failure or the removal of the portion of the pipeline that failed that is requested by the Office of Pipeline Safety.
2. Within forty-eight hours after telephonic notification pursuant to subsection (1), the Office of Pipeline Safety shall notify the operator either that:
 - a. The Office of Pipeline Safety is directing the operator to have the portion of the pipeline that was removed tested by a third-party laboratory to determine the cause or causes of the failure~~[-];~~ or
 - b. The Office of Pipeline Safety is not directing the operator to conduct third-party laboratory testing and the operator may discard the portion of the pipeline that was removed.

The Office of Pipeline Safety shall confirm its notification in writing.
3. If the Office of Pipeline Safety directs third-party laboratory testing pursuant to subsection (2)(a):
 - a. The Office of Pipeline Safety shall:
 - i. ~~{Determine the laboratory that will do the testing pursuant to subsection (4) and the period of time within which the testing is to be completed.}~~
 - ii. ~~Approve the number and types of tests to be performed.~~
 - iii. ~~Notify the operator {of its determinations pursuant to subsections (3)(1)(i) and (ii).}~~ if additional or alternative tests are required.
 - ii. Notify the operator if representatives from the Office of Pipeline Safety and any of its consultants will observe or record any or all of the tests.
 - b. The operator shall:
 - i. Notify the Office of Pipeline Safety of the identity of the third-party laboratory. In choosing a third-party laboratory, the

operator shall consider the qualifications of the laboratory to perform the testing, including:

1. Past experience in performing the required test or tests according to ASTM International standards.
 2. Any recognition that the laboratory may demonstrate with national or international laboratory accreditation bodies.
- ~~ii.~~ Notify the Office of Pipeline Safety of the number and types of tests proposed by the operator.
- ~~iii.~~iii. Notify the Office of Pipeline Safety of the location, date and time of any third-party laboratory tests at least twenty days before the tests are done.
- iv. Respond to the Office of Pipeline Safety regarding any required alternative or additional tests pursuant to subsection (3)(a)(i).
- ~~iii.~~v. At the request of the Office of Pipeline Safety, ensure that ~~at~~ representatives of the Office of Pipeline Safety ~~is~~ and any of its consultants are permitted to observe and record any or all of the tests.
- ~~iv.~~vi. Ensure that the original third-party laboratory test ~~results are~~ report is provided to the Office of Pipeline Safety within thirty days of the ~~completion of the tests~~ operator's receipt of the report.
- ~~v.~~ Pay for the laboratory testing.]

4. ~~In determining a laboratory pursuant to subsection (3)(a)(i), the Office of Pipeline Safety shall:~~
- ~~a. Submit a written request to at least three different laboratories for bids to conduct the testing.~~
 - ~~b. Consider the qualifications of the respondent laboratories to perform the testing, including:~~
 - ~~i. Past experience in performing the required test or tests according to ASTM International standards.~~
 - ~~ii. Any recognition that the laboratory may demonstrate with national or international laboratory accreditation bodies.~~
 - ~~c. Select the laboratory that offers the optimum balance between cost and demonstrated ability to perform the required test or tests.~~
 - ~~d. The Office of Pipeline Safety shall not select a laboratory pursuant to this subsection before either of the following, which ever occurs first:~~
 - ~~i. The Office of Pipeline Safety has received written bids from at least three different laboratories.~~
 - ~~ii. Thirty days from the date of the request for bids has passed.]~~

The rules provided in A.A.C. R14-3-101 through A.A.C. R14-3-113 shall govern disputes between the operator and the Office of Pipeline Safety concerning the laboratory testing conducted in accordance with this section, including but not limited to the selection of the third-party laboratory, the number and type of tests, and the location and timing of such tests. Destructive testing shall not be conducted on any removed portion of a pipeline once a party receives written

notification from the other party that a dispute exists and is subject to resolution under this subsection.