



PIPELINE SAFETY: PHMSA ADOPTS IMPORTANT BUT LIMITED UPDATES TO ITS ENFORCEMENT AND HEARING PROCEDURES

Effective October 25, the Pipeline and Hazardous Materials Safety Administration (“PHMSA”), which is part of the U.S. Department of Transportation, implemented new regulations (i) increasing the maximum civil penalty for violations of its substantive pipeline safety regulations, and (ii) making its decision-making process more transparent.¹ The new regulations implement several specific requirements of the Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011 (the “2011 Pipeline Safety Act” or “Act”).² The Act, which was passed in large part in response to a safety incident in San Bruno, California that occurred on September 9, 2010,³ imposes more rigorous safety requirements on the owners and operators of natural gas pipeline facilities and hazardous material pipelines (including oil pipelines). The Act also required PHMSA to adopt specific changes to its administrative procedures to make them more transparent and even-handed.

In its final rule issuing the administrative procedures regulations, PHMSA adopted the changes mandated by Congress but rejected most requests by commenters to further clarify its procedures.⁴ The final rule revises many of the regulations included in Title 49, Part 190 of the Code of Federal Regulations effective as of October 25. A [redline](#) identifying each change to PHMSA’s Part 190 regulations is included as an attachment to this *Commentary*.

INCREASE IN MAXIMUM CIVIL PENALTY FOR PIPELINE SAFETY VIOLATIONS

In the 2011 Pipeline Safety Act, Congress increased PHMSA’s authority to impose administrative civil penalties from \$100,000 to \$200,000 for a single violation of the pipeline safety statutes or regulations, and from \$1 million to \$2 million for a related series of violations.⁵ PHMSA implemented these amendments and clarified that the new maximum penalties

would apply only to violations that occurred after January 3, 2012, the date that the 2011 Pipeline Safety Act was signed into law.⁶ PHMSA also added a provision stating that a person who obstructs an inspection or investigation by “taking actions that were known or reasonably should have been known to prevent, hinder, or impede an investigation without good cause will be subject to administrative civil penalties[.]”⁷

AGENCY ENFORCEMENT OPTIONS AND THE RESPONSE OPTIONS AVAILABLE TO PIPELINE OPERATORS

PHMSA is authorized to conduct inspections and investigations to determine whether pipeline operators are in compliance with the federal pipeline safety laws.⁸ The preexisting regulations gave PHMSA the authority to issue a “Request for Specific Information” only after an inspection. PHMSA revised its regulations so that the agency can issue such a request “at any time, rather than only pursuant to an inspection[.]”⁹ PHMSA also shortened the deadline for the pipeline operator to respond to a Request for Specific Information from 45 days to 30 days but specified certain limited grounds on which a pipeline operator can request an extension of that deadline.

PHMSA uses “Warnings” to notify a pipeline operator of a probable violation of the federal pipelines safety rules where PHMSA has decided to take no further enforcement action at the time of the Warning. PHMSA clarified that a Warning notifies the pipeline operator that PHMSA has identified “a potential issue, which if found in a future inspection, may subject the operator to future enforcement action.”¹⁰ PHMSA’s new regulations allow a pipeline operator to respond to a Warning, but the final rule states that Warnings are final when issued. Thus, Warnings are not subject to further factual findings as to whether the Warning item was proven by record evidence.¹¹

Another PHMSA enforcement option is to issue a Notice of Proposed Violation (“NOPV”). PHMSA clarified that a pipeline operator may contest an NOPV with or without requesting

a hearing. PHMSA rejected a request that the deadline for responding to an NOPV be set at 30 days after the respondent receives “all evidentiary material” that supports the NOPV. However, PHMSA will provide the “violation report” underlying the NOPV but will do so only upon a request from the respondent.¹² A respondent may request a copy of the violation report at any time, even in matters where no hearing is requested, and the agency must provide a copy of the report within five days of receiving such a request.¹³

If PHMSA finds, after reasonable notice and an opportunity for a hearing, that a particular pipeline facility “is or would be hazardous to life, property, or the environment,” PHMSA may issue a Corrective Action Order (“CAO”) requiring the pipeline operator to take corrective action, which may include “suspended or restricted use of the facility, physical inspection, testing, repair, replacement, or other appropriate action.”¹⁴ The Associate Administrator is authorized to issue a CAO without providing the respondent advance notice and an opportunity for a hearing if the Associate Administrator determines that such notice and hearing procedures “would result in the likelihood of serious harm to life, property or the environment.”¹⁵ The final rule defined in greater detail the separate procedures that then apply to the CAO, which allow the agency to take prompt action while giving the respondent the ability subsequently to contest the CAO on an expedited basis.¹⁶

THE AGENCY CASE FILE AND THE SEPARATION OF AGENCY FUNCTIONS

In response to comments on its proposed rule, PHMSA expanded the concept of its “case file.” These are the materials that are to be considered by the Associate Administrator when issuing a final order. Under the preexisting regulations, the case file included the relevant enforcement orders (such as an NOPV), the underlying violation report, any responsive materials submitted by the respondent, and if the matter goes to hearing, any material submitted during or after the hearing.¹⁷ The revised rules provide that the Regional Director’s “written evaluation of response materials submitted by respondent and recommendation for

final action, if one is prepared” will be available to respondents in all cases.¹⁸ However, PHMSA refused to include the Presiding Official’s recommended decision in the case file. According to the agency, the Presiding Official’s decision will not be available to the respondent because it is “an internal and deliberative communication or ‘draft decision.’”¹⁹

The new “separation of functions” regulation bars a PHMSA employee who assists in the investigation or prosecution of an enforcement case from participating in “the decision of that case or a factually related case.”²⁰ In addition, a party that participates in an enforcement proceeding, including an agency employee who served “in an investigative or prosecutorial capacity in the proceeding,” may not “communicate privately” with the Associate Administrator, the Presiding Official, or the attorney drafting the recommended decision “concerning information that is relevant to the questions to be decided in the proceeding.”²¹

The new rules require that the Presiding Official be an attorney on the staff of the Deputy Chief Counsel “who is not engaged in any investigative or prosecutorial function[.]”²² The final rule clarified that, if the dedicated hearing officer was not available, a substitute Presiding Officer also would be one who is not involved in enforcement functions. PHMSA refused to add a formal process by which respondents could request recusal of a particular Presiding Official.²³ Finally, PHMSA explained that, under its new separation of function regulations, PHMSA prohibits the Presiding Official’s recommended decision from being “viewed by, shared with, or otherwise commented on by Regional Directors, other PHMSA staff attorneys, or other PHMSA employees who are involved in the investigation or prosecution of the case.”²⁴

One commenter requested that complex matters with the potential for high civil penalties be set for hearing before an administrative law judge. PHMSA rejected this request on the grounds that its informal hearing process is effective and that a more formal process would delay the resolution of pipeline safety matters.

HEARING PROCEDURES

The revised regulation clarifies that a hearing may be requested in response to civil penalty assessments, compliance orders, orders directing amendment, safety orders, and corrective action orders.²⁵ As part of the hearing process, both the agency and the respondent must submit to the Presiding Official and serve on the other party all material that the party intends to introduce during the hearing, including records, documents, and other exhibits that are not already in the case file.²⁶ That submission must be made 10 days before the date of the hearing, unless the Presiding Official sets a different deadline or waives the deadline for good cause. Respondents may arrange and pay for a transcript to be made of the hearing, but they must notify the Presiding Official of their intent to do so and must submit a complete copy of the transcript for the case file.²⁷

RECONSIDERATION PROCESS

Where no petition for reconsideration is filed, an order directing amendment under Section 190.206, a final order under Section 190.213, a corrective action order under Section 190.233, or a safety order issued under Section 190.239 constitutes the agency’s “final administrative action.”²⁸ A petition for reconsideration cannot be filed with respect to a corrective action order but may be filed for the other types of orders within 20 days after respondent’s receipt of the order. If a petition for reconsideration is filed, the Associate Administrator’s order on the reconsideration request is the agency’s “final administrative action.”²⁹ An application for judicial review must be filed no later than 89 days after issuance of the decision. PHMSA’s decisions are subject to the standards of review set forth in 5 U.S.C. § 706.³⁰

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ENDNOTES

- 1 Pipeline Safety: Administrative Procedures; Updates and Technical Corrections, Final Rule, 78 Fed. Reg. 58,897 (Sept. 25, 2013).
- 2 Pub. L. No. 112-90, 125 Stat. 1904 (Jan. 3, 2012).
- 3 National Transportation Safety Board, *Pipeline Accident Report, Pacific Gas and Electric Company, Natural Gas Transmission Pipeline Rupture and Fire, San Bruno, California*, September 9, 2010 at x (Aug. 30, 2011), <http://www.nts.gov/doclib/reports/2011/PAR1101.pdf>.
- 4 PHMSA published a proposed administrative procedures rule on August 13, 2012. Pipeline Safety: Administrative Procedures; Updates and Technical Corrections, Notice of Proposed Rulemaking, 77 Fed. Reg. 48,112 (Aug. 13, 2012). PHMSA published the final rule on September 25, 2013.
- 5 Pipeline Safety Act § 2(a)(1) (amending 49 U.S.C. § 60122).
- 6 78 Fed. Reg. at 58,904; see also revised 49 C.F.R. § 190.223.
- 7 Revised 49 C.F.R. § 190.203(e).
- 8 49 C.F.R. § 190.201 (2012).
- 9 78 Fed. Reg. at 58,899; see also revised 49 C.F.R. § 190.203(c).
- 10 78 Fed. Reg. at 58,900; see also revised 49 C.F.R. § 190.205.
- 11 78 Fed. Reg. at 58,900.
- 12 78 Fed. Reg. at 58,900.
- 13 78 Fed. Reg. at 58,900; see also new 49 C.F.R. § 190.208(c).
- 14 Revised 49 C.F.R. § 190.233(a).
- 15 Revised 49 C.F.R. § 190.233(b).
- 16 Revised 49 C.F.R. § 190.233(b).
- 17 49 C.F.R. § 190.213(b) (2012).
- 18 Revised 49 C.F.R. § 190.209(b)(7).
- 19 78 Fed. Reg. at 58,901.
- 20 New 49 C.F.R. § 190.210(a).
- 21 New 49 C.F.R. § 190.210(b).
- 22 New 49 C.F.R. § 190.212(a).
- 23 78 Fed. Reg. at 58,903.
- 24 78 Fed. Reg. at 58,903.
- 25 Revised 49 C.F.R. § 190.211(a).
- 26 Revised 49 C.F.R. § 190.211(d).
- 27 Revised 49 C.F.R. § 190.211(f).
- 28 New 49 C.F.R. § 190.241.
- 29 New 49 C.F.R. § 190.243.
- 30 New 49 C.F.R. § 190.243(h).

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