



New Regulations Authorize PHMSA to Issue Emergency Orders to Address Imminent Hazards

Other Pipeline Safety Developments Issued

On October 3, 2016, as required by the PIPES Act of 2016 (“PIPES Act”),¹ the U.S. Department of Transportation’s (“DOT”) Pipeline and Hazardous Materials Safety Administration (“PHMSA”) issued interim regulations authorizing the agency to issue emergency orders to address imminent hazards to pipeline safety.² On October 11, 2016, PHMSA issued a policy statement describing how PHMSA calculates civil penalties for violations of pipeline safety requirements.³ And on October 18, 2016, the Interagency Task Force on Natural Gas Storage Safety issued its final report analyzing the Aliso Canyon natural gas storage leak and submitting related recommendations to enhance the safety and reliability of underground natural gas storage.⁴

Emergency Order Authority

Section 16 of the PIPES Act gives DOT the authority to issue emergency orders to address an imminent safety hazard and requires DOT to issue interim regulations implementing this authority no later than August 22, 2016.⁵ The Interim Rule fulfills this requirement. The new interim regulations became effective October 14, 2016.

Under the interim procedures, PHMSA may issue an emergency order to one or more pipeline owners if it determines that “a violation of a provision of the Federal pipeline safety laws, or a regulation or order prescribed under those laws, an unsafe condition or practice, or a combination of unsafe conditions and practices, constitutes or is causing an imminent hazard.”⁶ PHMSA may issue an emergency order without prior notice and without an opportunity for an advance hearing. An “imminent hazard” is “the existence of a condition relating to a gas or hazardous liquid pipeline facility that presents a substantial likelihood that death, serious illness, severe personal injury, or a substantial endangerment to health, property, or the environment may occur before the reasonably foreseeable completion date of a formal administrative proceeding begun to lessen the risk of such death, illness, injury or endangerment.”⁷

An emergency order “may impose restrictions, prohibitions, and safety measures on owners and operators of gas or hazardous liquid pipeline facilities”⁸ to the extent necessary to abate the imminent hazard. In each emergency order, PHMSA must address the order’s impact on public health and safety, economic

or national security, and reliability and continuity of service to pipeline customers. The order also must address the results of any consultations by PHMSA with federal agencies, state agencies, and “other entities” knowledgeable in pipeline safety or operations.⁹

The interim procedures also address: petitioning for review of an emergency order; requesting and holding a hearing following the issuance of an emergency order; issuing a final agency order; petitioning for reconsideration; issuing the post-hearing report and recommendation; and seeking judicial review.¹⁰ Public comments on the Interim Rule are due by December 13, 2016. In response to comments, PHMSA will, “if appropriate, make changes” to the Interim Rule before issuing a final rule. Under the PIPES Act, PHMSA must issue a final rule no later than March 19, 2017.

Policy Statement on Calculating Civil Penalties

In its civil penalty policy statement, PHMSA announces the public release of its framework for calculating civil penalties. Going forward, this framework will be available on PHMSA’s website. PHMSA also explained that, upon request, PHMSA enforcement will provide a respondent in a PHMSA enforcement matter “a more detailed proposed civil penalty calculation.”¹¹

The Pipeline Safety Act of 2011 increased the maximum civil penalty PHMSA may impose for a violation of the federal pipeline safety laws or regulations.¹² For violations occurring on or after August 1, 2016, PHMSA may impose a maximum civil penalty of \$205,638 per day per violation and a maximum of \$2,056,380 for a related series of violations.¹³ Intending to “apply stronger deterrence and drive down incident risk,” PHMSA announced that it plans to exercise this increased authority to issue penalties, “which will result in higher penalties across the board” for any particular violation of federal pipeline safety standards.¹⁴ PHMSA will give “greater weight” to certain factors when considering violations that: (i) are “causal to incidents or that increase the severity of incidents”; (ii) are violations of the same safety standard in the past five years; or (iii) involve “multiple instances of the same violation.”¹⁵

PHMSA’s civil penalty framework identifies nine civil penalty assessment considerations: the nature of the offense; the circumstances; the gravity of the offense; the respondent’s

culpability; the respondent’s history of prior offenses; the respondent’s good faith; other matters “required by justice”; economic benefit to the respondent; and the respondent’s ability to pay.¹⁶ For each consideration, the framework lists types of conduct, from least to most severe, along with increasing penalty levels associated with each type of conduct.

Final Report of the Interagency Task Force on Natural Gas Storage Safety

As directed by Section 31 of the PIPES Act, the final report of the Interagency Task Force on Natural Gas Storage Safety addresses a range of topics, including: (i) analysis of the cause and contributing factors of the Aliso Canyon natural gas leak; (ii) analysis of measures taken to stop the Aliso Canyon leak; (iii) assessment of the impacts of the leak on health, safety, and the environment, wholesale and retail electricity prices, and the reliability of the bulk-power system; (iv) assessment of the potential for similar leaks at other underground natural gas storage facilities; (v) recommendations on how to prevent any future natural gas leaks, including recommendations addressing the integrity of natural gas storage wells; and (vi) recommendations to mitigate the effects of future leaks, including recommendations addressing health and safety and electric reliability.¹⁷

The report includes a primer on the nature, importance, and regulation of natural gas storage. It then analyzes the causes of the Aliso Canyon leak, which is the largest methane leak from a natural gas storage facility in United States history. The analysis of the Aliso Canyon incident also addresses efforts to stop the leak, the response to the leak by the facility’s owner and by governmental agencies, and the leak’s effect on health and the environment and on the reliability of gas service and electric service.

The report includes 44 specific recommendations addressing three topics: ensuring the integrity of natural gas wells at storage facilities; addressing the public health and environmental effects of natural gas leaks; and addressing the energy reliability effects of such leaks. With respect to the integrity of natural gas storage wells, the report’s recommendations include:

- Storage operators should phase out “single point of failure” designs, “except under limited circumstances;”

- Operators should develop risk management plans that include elements such as analysis of well condition and proximity to population centers, testing programs, plans for well remediation, continuous monitoring, and emergency operations in the event of a breach;
- Operators should prepare timelines for remediation of substandard wells, with measures to ensure monitoring of risks during the transition, and should publish data on storage well integrity; and
- PHMSA should consider incorporating into its gas pipeline safety regulations existing industry-recommended practices, specifically American Petroleum Institute (“API”) Recommended Practice 1170, “Design and Operation of Solution-mined Salt Caverns Used for Natural Gas Storage,” and API RP 1171, “Functional Integrity of Natural Gas Storage in Depleted Hydrocarbon Reservoirs and Aquifer Reservoirs,” and these standards should be “adopted in a manner that can be enforced” and “supplemented with reporting and recordkeeping requirements as necessary.”¹⁸

Section 12 of the PIPES Act requires DOT to issue minimum standards for natural gas storage facilities no later than June 22, 2018.¹⁹ Section 12 directs DOT to take certain factors into account when issuing these regulations, including consideration of the Task Force’s recommendations.²⁰

Lawyer Contacts

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Endnotes

- 1 Protecting our Infrastructure of Pipelines and Enhancing Safety (“PIPES”) Act of 2016, Pub. L. No. 114-183, 130 Stat. 514.
- 2 Pipeline Safety: Enhanced Emergency Order Procedures, 81 Fed. Reg. 70,980 (Oct. 14, 2016) (“Interim Rule”).
- 3 Pipeline Safety: General Policy Statement; Civil Penalties, 81 Fed. Reg. 71,566 (Oct. 17, 2016).
- 4 Interagency Task Force on Natural Gas Storage Safety, Ensuring Safe and Reliable Underground Natural Gas Storage, *Final Report* (Oct. 2016).
- 5 PIPES Act § 16, 49 U.S.C. § 60117(o)(7).
- 6 49 C.F.R. § 190.236.
- 7 49 C.F.R. § 190.3.
- 8 Interim Rule, 81 Fed. Reg. at 70,981.
- 9 49 C.F.R. § 190.236(b).
- 10 49 C.F.R. § 190.237.
- 11 81 Fed. Reg. at 71,566.
- 12 Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011, Pub. L. No. 112-90, § 2, 125 Stat. 1904, 1905 (Jan. 3, 2012) (increasing per violation penalties from \$100,000 to \$200,000 and maximum penalties from \$1 million to \$2 million).
- 13 The Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Pub. L. No. 114-74, § 701, 129 Stat. 599, 28 U.S.C. § 2461 note, requires that the head of each federal agency will “adjust each civil monetary penalty provided by law within the jurisdiction of the Federal agency . . . by the inflation adjustment described under section 5 of this Act.” PHMSA implemented this requirement on June 30, 2016. Pipeline Safety: Inflation Adjustment of Maximum Civil Penalties, 81 Fed. Reg. 42,564 (June 30, 2016).
- 14 81 Fed. Reg. at 71,566.
- 15 *Id.*
- 16 *Id.* at 71,567-69.
- 17 PIPES Act § 31(c)(2), 130 Stat. 534-35.
- 18 Interagency Task Force on Natural Gas Storage Safety, Ensuring Safe and Reliable Underground Natural Gas Storage, *Final Report* at 64.
- 19 PIPES Act § 12(b), 49 U.S.C. § 60141(a).
- 20 *Id.* § 60141(b)(4).

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