

## INSIGHTS

## PHMSA Implements New Emergency Safety Authority Effective Immediately

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On October 3, 2016, the Pipeline and Hazardous Materials Safety Administration (PHMSA) announced an Interim Final Rule (IFR) establishing when and how it will issue Emergency Orders to address imminent safety hazards across the oil and gas pipeline industry. [See \*Pipeline Safety: Enhanced Emergency Order Procedures \(Docket No. PHMSA-2016-0091\)\*](#). The new procedure allows PHMSA to impose restrictions, prohibitions, and safety measures without prior notice or an opportunity for a hearing. These measures can apply through all or part of the industry, not just to individual facilities or operators. By classifying this rulemaking as “interim final,” the regulations will be effective immediately upon publication in the Federal Register, likely in late October 2016.

This is just the latest rulemaking in what has been a very active period for PHMSA. Over the past 18 months, PHMSA has proposed new safety regulations for natural gas transmission pipelines ([proposed May 13, 2016](#)) and hazardous liquid pipelines ([October 13, 2015](#)) as well as more stringent accident and incident reporting requirements ([July 10, 2015](#)). PHMSA is also expected to release, within the next quarter, an IFR establishing safety regulations applicable to underground storage reservoirs for natural gas in light of the Aliso Canyon incident. [See also PHMSA Advisory Bulletin ADB-2016-02, Pipeline Safety: Safe Operations of Underground Storage Facilities for Natural Gas.](#)

### PHMSA Authority Before the Pipes Act of 2016

Historically, PHMSA’s authority to address safety hazards was limited to issuance of Corrective Action Orders (CAOs), Notices of Proposed Safety Orders, or Advisory Bulletins. PHMSA can issue a CAO to a single owner, operator, or pipeline facility after considering a variety of factors, e.g., characteristics of the pipe, the material being transported, surrounding population density, recommendations of the National Transportation Safety Board (NTSB). For the most part, CAO’s require notice and an opportunity for a public hearing prior to issuance. Like CAOs, Notices of Proposed Safety Orders may only be issued to a single owner or operator and address specific risks at a particular pipeline. While Advisory Bulletins can be addressed to a wider audience, they lack a meaningful enforcement trigger as they skew towards recommendations versus mandates.

On June 22, 2016, President Obama signed into law [S.2276, Protecting our Infrastructure of Pipelines and Enhancing Safety \(PIPES\) Act of 2016](#). The Pipes Act of 2016 not only reauthorized PHMSA through 2019, it also established a new “Emergency Order Authority” at 49 U.S.C. 60117. New Section 60117 authorizes PHMSA to issue Emergency Orders “imposing

emergency restrictions, prohibitions, and safety measures on owners and operators of gas or hazardous liquid pipeline facilities without prior notice or an opportunity for a hearing, but only to the extent necessary to abate the imminent hazard.” Unlike PHMSA’s previous authority (which in the case of CAOs applied to a “facility”) Emergency Orders can be directed at multiple “entities” and do not require prior notice or an opportunity for hearing. The Pipes Act of 2016 mandated that PHMSA promulgate temporary regulations, i.e., an IFR, within 60 days of enactment and a final rule within 270 days of enactment.

#### **Conditions for Issuing an Emergency Order**

PHMSA believes Emergency Orders are needed to abate circumstances that pose a risk to the environment, health and safety on an expedited track, before completion of a formal proceeding, especially where the concern is not limited to a single facility or operator.

Under new Section 190.236, PHMSA can issue an Emergency Order when 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.” PHMSA must provide in writing the basis for its determination that an Emergency Order is necessary, including a description of:

- (1) The violation, condition, or practice that constitutes or is causing the imminent hazard;
- (2) Those subject to the order;
- (3) The restrictions, prohibitions, or safety measures imposed;
- (4) The standards and procedures for obtaining relief from the order;
- (5) How the order is tailored to abate the imminent hazard and the reasons why a CAO or Notice of Proposed Safety Order would be insufficient to do so; and
- (6) How PHMSA has taken into account certain required considerations.

With respect to what exactly PHMSA must consider, subsection (c) outlines the following:

- (1) The impact of the emergency order on public health and safety;
- (2) The impact, if any, of the emergency order on the national or regional economy or national security;
- (3) The impact of the emergency order on the ability of owners and operators of pipeline facilities to maintain reliability and continuity of service to customers; and
- (4) The result of consultations with appropriate Federal agencies, State agencies, and other entities knowledgeable in pipeline safety or operations.

PHMSA is required to publish all Emergency Orders in the Federal Register.

#### **Challenging Emergency Orders**

As no prior notice or hearing is required prior to issuance, new Section 190.237 outlines the

process for filing a Petition for Review of Emergency Orders. Any entity “subject to and aggrieved by” an Emergency Order may petition the Administrator of the U.S. Department of Transportation for review to determine whether the order will remain in place, is subject to modification, or should be terminated. Petitioners may request an informal hearing or a formal hearing under Section 554 of the Administrative Procedures Act. For petitions that do not request a formal hearing, the Associate Administrator in the Office of Pipeline Safety must issue a decision on the merits within 30 days of receipt of the petition. If a formal hearing is requested, the petition is assigned to an Administrative Law Judge (ALJ) for an “on the record” hearing. The ALJ must issue a report and recommendation within 25 days of receipt of the petition for review. For either process, if a decision on the petition is not made within 30 days of receipt, subsection (j) provides that the Emergency Order will “cease to be effective,” unless PHMSA determines in writing that the imminent hazard persists.

If a petitioner disagrees with the ALJ’s report and recommendation, they may file a Petition for Reconsideration with the Associate Administrator of Pipeline Safety **within one day** of service of the report and recommendation. The Associate Administrator of Pipeline Safety must then issue a final agency decision within three days of receipt of the Petition for Reconsideration. A decision under subsection (j), the Associate Administrator’s decision after an informal hearing or after receiving the ALJ’s report and recommendation all constitute final agency action, reviewable in the appropriate District Court.

### **Conclusion**

Typically, federal agencies issue a proposed rule, followed by a public comment period, and eventual issuance of a final rule. Here, PHMSA determined there was “good cause” to bypass the notice-and-comment process and move directly to an IFR, chiefly citing the statutory deadline set forth in the Pipes Act of 2016. While a final rule typically may have a 30 or 60 day period after publication before it is effective, this IFR is effective immediately upon publication in the Federal Register, which we expect to occur in late October 2016. PHMSA considers this IFR a “temporary rule,” that in accordance with the Pipes Act of 2016 should expire March 19, 2017, at which time PHMSA is expected to issue final regulations. PHMSA will accept comments on the IFR up to 60 days after it is published in the Federal Register.