

INSIGHTS

Evolution of PHMSA Hearings: Response to Interest in Public Participation and Pre-Hearing Conferences

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In a [letter issued to the Reporters Committee for Freedom of the Press \(RCFP\) and E&E News](#) last week, PHMSA's new Chief Counsel Paul Roberti announced its intention to publicly post advance notice of hearings requested by operators. As reported by [E&E News](#) and reflected in the letter, PHMSA will now post hearing scheduling letters to the [enforcement activity page on its website](#). To the extent the press (and presumably the public) is interested in attending, PHMSA asks that a request be submitted in advance for consideration. This decision potentially brings the Agency and the industry one step closer to opening hearings to the public.

Just a few months ago, PHMSA approved a request from the media (E&E News) to attend a hearing in the Agency's Southwest Region offices as reported [in our prior post](#) of March 22, 2018. This marked the first time that a PHMSA administrative hearing was opened to the public, even if only partially (it was closed following a break). As we noted at that time, "[While this does not likely signal an official policy change on behalf of the Agency, it nonetheless suggests that PHMSA could make the decision to open administrative enforcement hearings to the public in the future, on a case by case basis.](#)" The decision to post hearing scheduling letters is in keeping with that prior observation, and does not constitute a blanket grant of public access to all hearings.

Requests for hearings are filed in response to administrative enforcement actions issued by PHMSA to address issues of fact and law, including in response to Notices of Probable Violations, Corrective Action Orders, Emergency Orders and Proposed Safety Orders. PHMSA hearings are, by regulation, "informal." 49 C.F.R. Part 190.211(e). As a result, the rules of evidence do not apply and the hearings are, in effect, formal meetings (there is no express language in the Pipeline Safety Act or its implementing regulations that governs public participation in the enforcement context). The purpose of that approach is to facilitate a frank discussion of the issues and to encourage the possibility of resolution, within the context of applicable law. Consistent with that purpose, and following recent discussions with us, PHMSA's Office of Chief Counsel recently confirmed its willingness to engage in pre-hearing discussions to explore settlement of some or all issues in advance of a hearing (in a [letter issued the same day](#) as the letter to RCFP and E&E). That approach is similar to pre-trial conferences that are required by federal and most state laws in litigation. Notably, pre-trial conferences are not open to the public.

Even if opened for public attendance, administrative enforcement hearings are not ‘public hearings.’ There is no allowance for public participation in the form of questions or statements. The purpose of the hearing is for the parties to explain and argue their respective positions on questions of fact and law, as moderated by a Hearing Officer. PHMSA enforcement hearings are held in Agency offices, with limited space. A request by third parties to attend hearings could present logistical challenges and potentially interfere with PHMSA’s obligation to ensure public safety where hearings are addressing imminent safety issues. Delays in scheduling of hearings due to the need to post hearing scheduling letters and handle requests for public attendance, and arrange logistics for hearing space, could affect the Agency’s ability to address safety issues in an efficient manner.

The public has a right to know what federal agencies do, and that right is given effect through the Freedom of Information Act (FOIA), which was relied upon as the basis to allow public attendance at the PHMSA hearing in March. Information presented in advance of and during a hearing is frequently subject to protection from disclosure under FOIA, however, as enforcement or settlement confidential, security sensitive or protection of confidential commercial information. That consideration could add further complexity to logistics planning for a hearing.

We will continue to monitor these developments closely.