

PHMSA Opens Enforcement Hearing to the Public

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In a surprising turn of events this week, PHMSA approved a request from the media to attend a hearing in the Agency's Southwest Region offices in Houston yesterday. An environmental reporting service (E&E News) submitted a request to PHMSA last week to attend a hearing requested by Cheniere, in response to an enforcement action related to an incident at that company's LNG export facility, and threatened legal action after receiving no response to their request. [See [E&E News March 16, 2018 article E&E News seeks open PHMSA hearing on Cheniere leaks](#) and [E&E News March 21, 2018 article Pipeline regulators open Sabine Pass safety hearing](#).] In agreeing to the request just days before the Hearing, PHMSA's Associate Administrator for Pipeline Safety Alan Mayberry was quoted by E&E News as stating that "PHMSA has decided for purposes of this hearing to open the hearing to the press and to members of the public." Although the hearing yesterday was open to the public at the outset, it was later closed following a break. To date, PHMSA administrative enforcement hearings have been closed to the public. 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.

There are both legal and practical rationales for keeping hearings closed to the public. There is no express provision in the Pipeline Safety Act regarding administrative hearings and public participation. Further, PHMSA has no rules expressly allowing public participation in, or any obligation to allow public access to, enforcement hearings (although the Agency does allow and invite public participation in rulemaking proceedings, technical advisory committee meetings, etc.). Likewise, the Agency's procedural rules do not allow intervenors. In terms of the information being presented at a hearing, the Freedom of Information Act (FOIA) provides that some information overseen by federal agencies can be withheld from public access, including exemptions for matters that are still enforcement confidential and which may present national security issues.

At a practical level, PHMSA hearings are informal proceedings and most PHMSA Regions have only small conference rooms that cannot accommodate large numbers of people for an administrative hearing. In addition, the pleadings for an enforcement matter – the enforcement action issued by the Agency, and a respondent's response (request for hearing, written response, etc.) are made available on PHMSA's website. The purpose of a hearing is for the respondent to present its arguments or issues to the Agency for consideration and discussion, and they are not intended to receive public input. The presence of third parties would likely have a chilling effect on those discussions.

There have been requests by the media or citizen/environmental groups in the past to attend PHMSA hearings, but those requests have typically been rejected. While there is no express language in the Pipeline Safety Act or its implementing regulations that provides for public participation in the enforcement context, there is similarly no language that prohibits it. For all of these reasons, it is important to closely follow these requests to attend enforcement hearings and be prepared to address them as they arise, whether informally with Agency or in a judicial forum.