

INSIGHTS

PHMSA Updates its Latest Enforcement Tool: Emergency Order Final Rule

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On October 1, 2019, the Pipeline and Hazardous Materials Safety Administration (PHMSA or the Agency) issued [three long awaited final rules](#). This post addresses the Agency's final rule on [Emergency Orders](#), a significant new tool in PHMSA's pipeline safety enforcement tool box that can be issued to the entire industry or portion of the industry. Alerts on the other two rulemakings are forthcoming (i.e., the first of three final rules regarding natural gas pipelines and amendments to the liquid pipeline rules).

Congress mandated in 2016 that PHMSA promulgate rules to create an enforcement tool for [Emergency Orders](#), patterned off a similar enforcement tool that has been part of PHMSA's Hazardous Materials regulations since 2011. Emergency Orders are intended to give the Agency authority to address time sensitive safety conditions that create an "imminent hazard," and can be directed to multiple operators or the entire industry. They are meant to address more urgent and potentially widespread conditions that could not otherwise be addressed by Corrective Action Orders (CAOs) or Notices of Proposed Safety Orders (NOPSOs) which address a single operator or a single incident.

On October 14, 2016, PHMSA issued an Interim Final Rule (IFR) to establish temporary rules for Emergency Orders and also requested public comments on the IFR. Almost three years later, the Agency has finalized and revised the IFR in a final rule on Emergency Order authority. PHMSA has not exercised its Emergency Order authority since it issued the IFR in 2016. The final rule makes it more likely PHMSA may issue Emergency Orders, however, and since the rule makes a number of changes to the IFR, it is all the more important for operators to be aware of the scope and procedures associated with PHMSA's Emergency Order authority.

Pipeline Safety Emergency Order Authority

The threshold requirement for PHMSA to issue an Emergency Order is a determination by the Associate Administrator that an "imminent hazard" exists. An imminent hazard is defined as an unsafe condition(s) or practice(s) 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 complete date of a formal proceeding to less the risk (49 C.F.R. Parts 190.3; 190.236).

In the rulemaking preamble, PHMSA references the following circumstances under which an Emergency Orders may be appropriate:

- (1) natural disasters affecting a geographic region;
- (2) manufacturing flaws affecting large sections of the industry;
- (3) identification of unsafe industry practices; or
- (4) other undefined situations that may present an imminent hazard beyond a single operator or specific incident.

An Emergency Order may impose “restrictions,” “prohibitions” or “safety measures.” Such measures are not without limit as the text of the rule and the final rule clarify that an Emergency Order must be “tailored to abate the imminent hazard” and PHMSA must abide by the due process procedures set forth in the Pipeline Safety Act Emergency Order provision.

Options for Responding to an Emergency Order

Like both CAOs and NOPSOs, Emergency Orders may be issued without prior notice or opportunity for a hearing. An operator subject to an Emergency Order can file a petition for review with PHMSA’s Associate Administrator, seeking to rescind or modify the Order. There is no set timeframe for filing a petition for review, but once a petition is filed the timeframes are very compressed – all of which should be complete in 30 days – given the urgent or imminent nature of the proceeding. As compared to the IFR, the final rule added specifics regarding service of an Emergency Order (they will be sent directly to each operator expected to be affected by it as well as posted in the Federal Register), rescission and expiration of an Emergency Order, burden of proof in challenging an order, and modification of a Petition for Review among other changes.

Petition for Review

1. Request for formal administrative hearing (Part 190.237(d) (1)):

Operators have the option of requesting a formal administrative hearing under the Administrative Procedure Act (5 U.S.C. 554), with an Administrative Law Judge (ALJ) assigned by DOT.

- a. Within 3 days of filing: Petition for review must be assigned to an ALJ.
- b. Within 5 days of receipt: PHMSA counsel may file response.
- c. No later than 25 days after receipt: ALJ decision on a Petition for Review of an Emergency Order must issue a decision.
- d. Petition for Reconsideration due within 2-5 days (Part 190.237(j)): Operator can file a Petition for Reconsideration of an ALJ decision with PHMSA Associate Administrator (timeframe depends on speed of ALJ decision).
- e. PHMSA Decision on Petition for Reconsideration due within 30 days of receipt of Petition for Review: The Associate Administrator must issue a decision on a Petition for Reconsideration of the ALJ report which becomes final agency action subject to judicial review.

2. No request for formal ALJ hearing (Part 190.237(d) (2)):

If an operator's petition for review of an Emergency Order does not request a formal hearing before an ALJ, PHMSA Office of Chief Counsel may file a response within 5 days of receipt and the Agency has 30 days to issue a decision on the challenge. That decision constitutes final agency action subject to judicial review.

3. Consolidation or de-consolidation of Multiple Petitions (Part 190.237(d)):

At PHMSA's discretion, multiple petitions for review of an Emergency Order may be consolidated. This may be done any time before a formal ALJ referral is made, and the Agency may consolidate petitions even if only one requests a formal ALJ proceeding. PHMSA may also de-consolidate petitions for review if substantially similar issues arise, or if one or more operators achieve compliance with the Order sooner than others.

4. Judicial Review (Part 190.237(k)):

Unlike all other PHMSA enforcement actions, judicial challenges to Emergency Orders are to be filed with federal District Courts, rather than U.S. Circuit Courts of Appeal. Judicial challenges do not stay the requirements of an Emergency Order.

Expiration of Emergency Order

If PHMSA does not render a decision on a petition for review within 30 days of receipt, the Emergency Order will cease to be effective unless the Administrator determines in writing that the hazard continues to exist (Part 190.237(l)(3)). Significantly, if no petition for review of an Emergency Order is filed, then the Order remains in effect until PHMSA formally determines in writing that the hazard no longer exists, or a court declares the Order terminated (Part 190.237(l)(1)). Of even more significance, if an Emergency Order remains in effect for more than 365 days without being rescinded or a new finding made, then PHMSA must withdraw the Order and initiate rulemaking to address the issues "as soon as practicable" (Part 190.236(e)).

Summary

An Emergency Order could have a significant effect on both individual operators and the industry, and because the times to respond are compressed when such Orders are issued, operators are encouraged to become familiar with this area of the law before they become subject to them.