

INSIGHTS

Pipeline Safety Settlements: Time to Take a Page from Hazmat?

May 15, 2019

By: [Catherine D. Little](#), [Annie Cook](#) and [Mandi Moroz](#)

With an increased interest in the resolving disputes efficiently and avoiding litigation where possible, the time may be right for the Pipeline and Hazardous Materials Safety Administration (PHMSA) to clarify the process for settlement of pipeline safety compliance issues, whether through new rules or a written settlement policy. On the hazardous materials regulatory front, PHMSA has historically engaged in settlements that are guided by an express allowance for settlement under the regulations. The Agency has also engaged in settlements in at least some pipeline safety cases over the years and more so in the last year. Without specific rules or a written settlement policy in place, however, settlements of pipeline safety matters in practice may not be consistently implemented.

Many federal agencies have settlement policies that encourage parties in enforcement actions to discuss issues before progressing to full administrative hearings. Such policies offer the possibility of narrowing, if not resolving, legal disputes, which can benefit all parties by realizing efficiencies and avoiding the cost of protracted disputes. These efforts are analogous to pre-trial conferences in federal courts, where a court may ask the parties to discuss whether issues can be narrowed or resolved without full adjudication, in order to 'expedite disposition of the action' and 'facilitate settlement' (see Fed.R.Civ.Proc. 16(a)).

PHMSA is charged with the implementation of two primary statutes: the Pipeline Safety Act (PSA) and the Hazardous Materials Transportation Act (HMTA). PHMSA is comprised of two sections: the Office of Pipeline Safety (OPS) and the Office of Hazardous Materials (HAZMAT). The Agency's Chief Counsel is responsible for both the OPS and HAZMAT sections. Neither OPS nor HAZMAT currently have published settlement policies, but the HAZMAT regulations do address settlement in some detail. Since the 1980s, there has been a provision in the HAZMAT regulations titled "Compromise and Settlement" (see 49 C.F.R. Part 107.327). That provision allows either the Agency or a respondent to propose settlement of either or both a proposed penalty or a proposed compliance order. The Agency made clear in issuing the [Final Rule](#) containing this provision that a party could settle claims without admission. The provision was further defined by subsequent [regulatory amendment](#) to clarify its intent "*to expedite and facilitate compromise and settlement of HMTA enforcement cases...*". Significantly, that amendment clarified that under Part 107.327 ("Settlement and Compromise") either PHMSA or a respondent can seek to settle an enforcement case, without the approval of the Administrative Law Judge (ALJ), noting that option exists "*even when the case is pending before an ALJ.*"

As noted in the preambles to the HAZMAT settlement and compromise regulations, the Agency has settled cases over the years through Consent Agreements or modifications of claims, without express reliance on settlement authority. That has also occurred in the OPS section of PHMSA. Without express provisions regarding settlement, however, either in regulations or in a written settlement policy, the availability of settlement negotiations has been unclear and not consistently applied on the OPS side of the Agency. This issue was presented to PHMSA over the past year, and the **Chief Counsel welcomed** the opportunity to have parties voluntarily engage in meetings that could narrow or resolve OPS issues as efficiently as possible. Among other things, settlements can result in much more effective and efficient resolution of enforcement matters, including the correction of facts, more efficiently than through administrative hearings; more contemporaneous exchanges of views on new or novel legal claims or defenses; more tailored proposed compliance orders aligned with the facts and issues; and offers of compromise on penalty amounts.

With the experience of the HAZMAT express allowance for settlement, and the benefit of years of OPS precedent in finding ground for settlement in at least some cases, the time may be ripe for PHMSA to either amend its Part 190 (OPS procedural) regulations, or issue a written settlement policy that could apply to both the OPS and HAZMAT sections. In either approach, the Agency should clarify a few issues that have arisen in recent years in the course of settlement discussions with OPS.

The first issue questions the procedural steps required if a settlement is reached after a Hearing Request has been filed. *Can the Respondent simply withdraw its Hearing Request and enter into a Consent Agreement with the Region, or must the parties present their settlement agreement to the Hearing Officer, who will then prepare and recommend a Final Order to the Associate Administrator?* The second issue concerns civil administrative penalties. *If the Region agrees through negotiation to withdraw some (but not all) allegations in a given claim, how is the proposed penalty adjusted?* In various instances it has been suggested that the Region could make such modifications, while in other cases the Agency representatives have preferred to let the Hearing Officer make adjustments in issuing a recommended Final Order. Further, the settlement process in different Regions and before different presiding officials has not been consistent due to the lack of a clear path towards settlement and specific procedural steps.

If PHMSA decides to promulgate 'settlement and compromise' regulations for OPS under Part 190, similar to the Part 107 regulations for HAZMAT, such procedural action would arguably not **require prior notice**, pursuant to 5 U.S.C. Section 553. Further, any rules could be deemed deregulatory since they are intended for the purpose of resolving disputes and increasing efficiencies. Settlements are subject to public inspection, however, whether accomplished through consent agreements or final orders.

Providing the regulated community with clear guidelines on the opportunities for settlement of enforcement actions would benefit all parties.