

## PHMSA Finalizes Procedures for Safety Orders and Special Permits

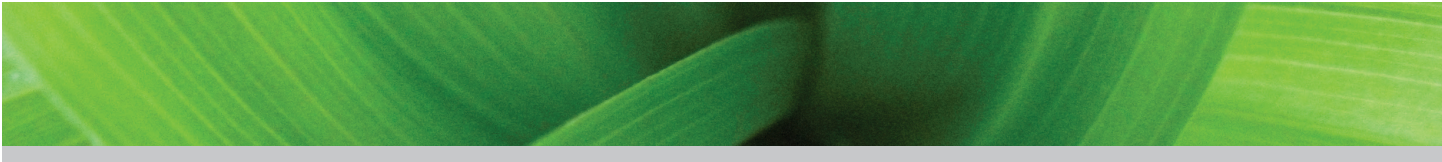
On January 16, 2009, the Department of Transportation's Pipeline and Hazardous Materials Safety Administration (PHMSA) issued a final rule that establishes procedures for issuing Safety Orders and submitting requests for emergency and non-emergency Special Permits. The final rule adopts, with minor modifications and technical corrections, an interim final rule issued in March 2008. *(For more information see the April 2, 2008 Alert, "PHMSA Issues Interim Final Rule Establishing Procedures for Safety Orders and Special Permits," at <http://www.vnf.com/news-alerts-252.html>.)*

### SAFETY ORDERS

The Pipeline Inspection, Protection, Enforcement, and Safety Act of 2006 (PIPES Act) directed PHMSA to issue regulations governing the issuance of a Safety Order when PHMSA determines, after notice and an opportunity for a hearing, that a particular pipeline facility has a condition posing a pipeline integrity risk to public safety, property, or the environment. The PIPES Act authorizes PHMSA to issue a Safety Order requiring a pipeline to take a range of corrective measures to address the condition, including physical inspection, testing, repair, and other appropriate actions. The statute also sets forth the factors PHMSA must consider when determining if a condition presents an integrity risk.

In an interim final rule issued in March 2008, PHMSA set forth procedures that apply when it considers whether to issue a Safety Order. The interim final rule stated that PHMSA may initiate a Safety Order proceeding to address pipeline integrity risks that may not present a hazardous condition requiring immediate corrective action, but should be addressed over time to prevent failures. The interim rule also stated that PHMSA would consider all relevant information, including nine factors set forth in the PIPES Act, when determining whether a pipeline poses an integrity risk, and identified a range of remedial measures that PHMSA may include in a Safety Order. In addition to those measures identified in the PIPES Act, the interim rule stated that PHMSA could require an operator to develop procedures for continuous monitoring of pipeline conditions, enhancing its data integration process, and improving information management systems. The interim final rule also described the administrative enforcement procedures applicable to Safety Order proceedings.

In response to comments expressing concern that the interim final rule includes corrective actions not authorized by the PIPES Act, PHMSA agreed to remove from the regulatory text language identifying "risk assessment," "risk control," and "data integration," as corrective actions that may be prescribed in a Safety Order. Although PHMSA stated that the statute's language authorizing PHMSA to require "other appropriate action to remedy the identified risk condition" is broad enough to cover these remedies, PHMSA agreed to modify the regulatory text to minimize unnecessary concern over the exercise of its new authority. Nevertheless, PHMSA stated that it will address the scope of its statutory authority to prescribe remedial action in the context of specific enforcement actions.



In addition, PHMSA rejected the suggestion that a notice of a proposed Safety Order should not identify proposed remedial measures, stating that process considerations require that the notice specify corrective measures and that this limits the initial actions that PHMSA may order unilaterally in the event that the operator does not respond to the notice or if a consent agreement is not reached. PHMSA also rejected the suggestion that it coordinate with industry or advisory committees to establish detailed criteria for using safety orders. PHMSA reiterated that it intends to consider using Safety Order proceedings when necessary to address identified long-term risks before they become acute and result in a hazardous condition or imminent failure. In addition, PHMSA stated that Safety Orders will be highly case-specific and are not conducive to generic discussions about when they are appropriate. PHMSA also rejected a request to provide for the transcription of hearings at the agency's expense, but stated that any participant may pay to arrange for a hearing to be transcribed. Finally, PHMSA denied a request to prohibit hearing officers from having any prior involvement in the case.

## SPECIAL PERMITS

The PIPES Act also clarified PHMSA's authority to issue emergency and non-emergency waivers of compliance with a pipeline safety regulation. Such waivers are referred to as Special Permits. The interim final rule set forth PHMSA's process for requesting Special Permits, and specified procedures and standards governing revocation, suspension or modification of a Special Permit.

In the final rule, PHMSA clarified that it will not modify or revoke a Special Permit without prior notice and hearing except to address a true safety problem or emergency. In addition, PHMSA stated that will not revoke or modify a Special Permit for immaterial or frivolous reasons. PHMSA refused, however, to adopt a blanket prohibition on its exercise of enforcement authority in circumstances where an operator is not in compliance with a regulation pending consideration of a Special Permit application. PHMSA noted, however, that "forbearance" of enforcement action while an application for a Special Permit is pending may be appropriate, particularly where the operator has implemented alternative safety controls and where strict compliance with a regulatory requirement would be unduly burdensome or unreasonable. PHMSA cautioned, however, that non-compliance is not a reason for seeking a Special Permit and exposes an operator to the risk of enforcement.

## FOR ADDITIONAL INFORMATION

Van Ness Feldman regularly counsels clients on issues related to pipeline construction, permitting, safety, and operation. Specifically, the firm has in-depth experience counseling clients on compliance with pipeline safety statutes and regulations. If you are interested in additional information regarding PHMSA's final rule, or any other energy-related federal activity, please contact Susan Olenchuk or Emily Pitlick in our Washington, DC office at (202) 298-1800, or Pam Anderson in our Seattle office at (206) 623-9372, or any member of the firm's Natural Gas or Oil and Products Pipeline practice groups.

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