

What To Know About PHMSA's New Emergency Authority Rule

Law360, New York (October 24, 2016, 11:47 AM EDT) -- On Oct. 14, 2016, the Pipeline and Hazardous Materials Safety Administration published an interim final rule (IFR) establishing procedures to implement new imminent hazard authority created by the Protecting Our Infrastructure of Pipelines and Enhancing Safety Act of 2016 (the PIPES Act). (The rule is published at 81 FR 70980.)

The PIPES Act and PHMSA's new rule give the agency the authority — for the first time — to issue emergency orders to all or a segment of owners and operators of gas or hazardous liquid pipelines to abate an imminent hazard. This new tool is intended to augment PHMSA's existing authorities by giving the agency the ability to respond swiftly to conditions that pose a substantial threat to health and safety, like the recent natural gas leak at Aliso Canyon in California.

The IFR took effect immediately upon publication in the Federal Register; however, the public may submit comments on the IFR to PHMSA through Dec. 13, 2016.

What's Notable About the PIPES Act?

President Barack Obama signed the PIPES Act into law on June 22, 2016.

The PIPES Act reauthorizes PHMSA's gas and hazardous materials pipeline program and is most notable for Section 16, which amends 49 U.S.C. § 60117 to provide PHMSA with new emergency authority to act immediately to abate an imminent hazard. Prior to the enactment of Section 16, PHMSA's authority to respond to pipeline incidents was limited to issuing (1) binding corrective action orders or safety orders to a specific pipeline facility or (2) nonbinding safety advisories to relevant portions of the pipeline industry.

PHMSA had no imminent hazard authority and no ability to take action to prevent conditions or practices that affect or pertain to more than one pipeline owner or operator. This stood in stark contrast to PHMSA's emergency authority to address imminent threats involving the transportation of hazardous



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materials in other modes of transportation, which PHMSA recently used to address threats posed by the shipment of large volumes of crude oil by rail. The lack of such authority also constrained PHMSA's ability to take aggressive and appropriate action to protect human health and safety in the pipeline sector in response to urgent threats.

Although Section 16 gives PHMSA important new authority, it reflects a carefully crafted compromise between members of Congress who wanted to provide PHMSA with emergency hazard authority to respond to incidents like Aliso Canyon and members who were concerned that PHMSA might not use such authority appropriately. The compromise language enacted into law gives PHMSA imminent hazard authority for pipeline facilities and operations, but it also ensures that PHMSA must act reasonably and judiciously.

Among other requirements in Section 16, PHMSA must consider three factors in determining whether to issue an emergency order: (1) "[t]he impact ... on public health and safety"; (2) "[t]he impact, if any, on the national or regional economy or national security"; and (3) "[t]he impact ... on the ability of owners and operators of pipeline facilities to maintain reliability and continuity of services to customers." PIPES Act Section 16, 49 U.S.C § 60117(o). The PIPES Act further requires PHMSA to consult with relevant federal and state agencies and "other entities knowledgeable in pipeline safety or operations" in considering the three factors set out above. *Id.*

In addition, the PIPES Act requires that the emergency order must be in writing and that the order will cease to be effective if PHMSA fails to respond to an administrative petition for review within 30 days of its filing. *Id.* Finally, the PIPES Act provides for "expedited" judicial review in federal district court. *Id.* All of these provisions are intended to ensure that PHMSA engages with relevant stakeholders before issuing an order, reasonably justifies an emergency order, and narrowly tailors the order to abate only the imminent threat at hand.

Why is the Rule Necessary?

According to PHMSA, the IFR is necessary because the PIPES Act directed the agency to issue temporary regulations within 60 days of enactment of the legislation and final rules no later than 270 days after enactment. As a practical matter, the IFR largely mirrors the statutory mandates. But the IFR gives PHMSA the opportunity to explain why it believes new authority was needed:

This new enforcement tool will allow the administrator to issue an emergency order either prohibiting an unsafe condition or practice or imposing an affirmative requirement when an unsafe condition, practice or other activity in the transportation of natural gas or hazardous liquids poses a threat to life or significant harm to property or the environment ... [It] is intended to serve as a flexible enforcement tool that can be used to address time-sensitive, safety conditions affecting multiple owners/operators, facilities or systems that pose a threat ...

81 FR at 70982.

PHMSA justifies the issuance of the IFR rather than a proposed rule based on good cause. The agency asserts that the statutory mandate to issue temporary rules within 60 days of the passage of the PIPES Act makes notice and comments on a proposed rule impracticable. It also maintains that the IFR “results in no additional burden or compliance costs to industry.” 81 FR at 70980.

The significant aspects of the IFR are twofold. First, PHMSA lays out the procedures it intends to follow in exercising its new authority and considering administrative petitions for review of emergency orders. The procedures build upon pre-existing procedures that PHMSA established for exercising comparable emergency order authority under its hazardous materials program. See 49 C.F.R. Part 109, Subpart C. To the extent there are differences between the two procedural approaches, they merely reflect unique aspects of the PIPES Act. Stakeholders should consider whether procedures set out in the IFR sufficiently protect their due process rights and, if not, submit comments to PHMSA suggesting appropriate changes.

Second, and more importantly, the PIPES Act requires the PHMSA administrator to consider specific factors in determining whether to issue an emergency order. It also directs the administrator to consult generally with “entities knowledgeable in pipeline safety or operations.” Congress added these provisions to the statute to ensure that PHMSA would exercise its authority responsibly and judiciously. Yet the IFR is silent regarding how PHMSA intends to interpret and apply these key elements that circumscribe its new authority.

For instance, what criteria or analytical approach, if any, will PHMSA use to evaluate the “considerations” prescribed by statute? How will PHMSA determine which federal agencies, state agencies and “other entities knowledgeable in pipeline safety operations” are necessary to satisfy the purposes of its consultation requirements? What does “consultation” mean in practice? What process, if any, will PHMSA use to conduct consultation? While PHMSA will likely want to retain maximum discretion to respond to imminent hazards, these are critical issues that should be fleshed out in a proposed rulemaking, not an IFR.

What’s Next?

The IFR takes effect immediately, but PHMSA is seeking comments to inform a final rule, which it intends to issue by March 19, 2017. PHMSA has asked for comments by no later than Dec. 13, 2016.

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