Overview

Over the past week, the US Department of Transportation, Pipeline and Hazardous Materials Safety Administration (PHMSA) issued the following notices relevant to pipelines:

- **Civil Penalty Framework:** On October 11, PHMSA released a general policy statement advising pipeline owners and operators that PHMSA intends to impose “higher penalties across the board for any violation of Federal pipeline safety standards” in order to “apply stronger deterrence and drive down incident risk.” (emphasis added). In addition, PHMSA indicates that it will give greater weight to certain factors when assessing civil penalties, specifically for violations that: (1) are causal to incidents or that increase the severity of incidents, including those involving smaller hazardous liquid spills or resulting in methane releases; (2) are “repeat offenses” or violations of the same safety standard in the past five years; and (3) involve multiple instances of the same violation.

The policy statement makes the framework PHMSA uses for calculating civil penalties in pipeline enforcement available on its website. In the past, PHMSA has provided this civil penalty framework to operators only upon request. The framework is now publicly-available and is intended to assist the operators in understanding PHMSA’s civil penalty calculations by: (i) identifying the specific factors that PHMSA assesses in identifying a penalty amount; (ii) the range of potential conduct that was observed by PHMSA in connection with those factors, including examples of activities; and (iii) the civil penalty range. The total civil penalty per violation is calculated based on these considerations and adjusted for the applicable daily and series limits. This past summer, pursuant to the requirements of Section 701 of the “Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015” (Pub. L.114–72), PHMSA increased the maximum civil penalty limits to $205,638 per day and $2,056,380 for a related series of violations. See PHMSA Interim Final Rule (81 Fed. Reg. 42564, June 30, 2016).

PHMSA indicates in the policy statement that it will provide its civil penalty calculations pertaining to an enforcement case to each respondent. Until now, PHMSA’s general policy has been to refuse to provide such calculations to a respondent; PHMSA will, however, make a more detailed civil penalty calculation available upon request to the operator, along with the Violation Report and the case file, to allow the operator to assess the proposed penalty in light of PHMSA’s framework.

The policy statement emphasizes that, despite the increased transparency that the release of these civil penalty documents will provide to the regulated community, PHMSA retains broad discretion in calculating penalty amounts, and that higher penalties should be expected by pipeline operators in the future. The policy will become effective upon publication of the notice in the Federal Register, which is expected to occur on October 17.
Interim Final Rule Regarding Enhanced Emergency Order Procedures  In accordance with the mandate set forth under the “Protecting our Infrastructure of Pipelines and Enhancing Safety Act of 2016” (Public Law 114-183) (PIPES Act), PHMSA has promulgated interim regulations that establish procedures for the issuance of emergency orders that will be used to address an unsafe condition or practice, or combination of unsafe conditions or practices, that pose an imminent hazard to public health and safety or the environment.

The new rules give PHMSA sweeping new powers to order pipelines closed or take other aggressive actions to address an imminent hazard, after taking into account a variety of factors, including the effect of an emergency order on the economy and national security; on public health and safety; on the pipeline owner/operator’s ability to serve customers; and the views of state and local authorities, among others. If PHMSA were to issue an order, the affected pipeline operator could then seek agency review and a hearing to challenge the order on an expedited basis, and judicial review if the operator fails to persuade the agency.

Comments on these interim rules (which are now effective following their formal publication in the Federal Register on October 14) are due by December 13. See https://www.gpo.gov/fdsys/pkg/FR-2016-10-14/pdf/2016-24788.pdf. PHMSA did not seek advance comments on the rules because Congress directed it to adopt rules within 60 days of the enactment of the PIPES Act, a deadline that passed in August. PHMSA anticipates that it will issue final rules by March 19, 2017, if it adheres to the deadline set by Congress.