

## PHMSA Releases Emergency Order Interim Final Rule

On October 4, the Pipeline & Hazardous Materials Safety Administration (PHMSA) issued a pre-publication Interim Final Rule (IFR) implementing the new emergency order authority that PHMSA received in the PIPES Act of 2016. The IFR will become effective on the date of its publication in the Federal Register, which is expected within days. PHMSA has provided a 60-day public comment period.

Federal agencies may issue IFRs without providing prior notice and comment under the good cause exception in the Administrative Procedure Act. The courts have emphasized that the good cause exception is to be narrowly construed, and that the existence of a statutory deadline does not, in and of itself, constitute good cause unless a delay would threaten real harm. PHMSA's justification for issuing the IFR is that the PIPES Act contains a 60-day deadline for establishing temporary emergency order regulations, making compliance with the notice and comment requirements in the APA impracticable and not in the public interest.

As required by the PIPES Act, the IFR contains administrative procedures that PHMSA must follow in determining if an imminent hazard exists, the factors that must be considered by PHMSA before issuing an emergency order, and the content of those orders, including a description of the persons subject to the restrictions, prohibitions, or safety measures and the standards and procedures for obtaining relief. The IFR also creates a process for administrative review of an emergency order that is largely patterned on the statutory text in 49 U.S.C. § 60117(o), including the referenced procedural rules for HazMat emergency orders in 49 C.F.R. § 109.19.

The process allows for the filing of a petition for review seeking a formal hearing before an Administrative Law Judge (ALJ), or an informal hearing before the Associate Administrator. In either scenario, the Associate Administrator is authorized to issue a final decision on PHMSA's behalf, and that decision must be issued within 30 days of receiving a petition or the emergency order automatically expires. The Administrator is allowed to extend the terms of an emergency order if the 30-day deadline is not met by determining, in writing, that the imminent hazard still exists. Expedited judicial review of an emergency order can be sought in federal district court.

Babst Calland's pipeline safety team has reviewed the IFR and has the following preliminary observations.

1. The IFR provides the Associate Administrator with the authority to deny a request for a formal hearing and decide the matter without the participation of an ALJ if a petition for review fails to identify "material facts" that are in dispute. What is a material fact in the context of an emergency order? What about purely legal questions? Should a petitioner who seeks a formal hearing be denied that right based solely on a determination by the Associate Administrator?



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2. One of the predicate findings for an emergency order is the existence of a violation. Would PHMSA need to find that a violation exists in the context of a specific enforcement proceeding before using that as the basis for issuing an emergency order? If not, what effect could a finding of violation in an emergency order have in a subsequent judicial or administrative proceedings?
3. Under the IFR, the Administrator would issue emergency orders in the first instance and the Associate Administrator would have interim and final decision making authority on a petition for review. Does this raise separation of function concerns?
4. PHMSA states that the IFR satisfies the good cause exception to the notice-and-comment requirements in the APA. Did Congress intend that result by including the 60-day deadline for issuing temporary regulations in the PIPES Act? What harm would result from allowing stakeholders to comment on the IFR before the temporary regulations become effective?
5. Would the terms of an emergency order apply to intrastate pipelines subject to safety regulation by a state regulator? If so, would that raise federalism issues?
6. Would the emergency order authority apply to pipelines and substances currently exempt from PHMSA's regulations?

For more information on the potential implications of the Interim Final Rule, please contact James Curry at 202.853.3461 or [jcurry@babstcalland.com](mailto:jcurry@babstcalland.com), Keith Coyle at 202.853.3460 or [kcoyle@babstcalland.com](mailto:kcoyle@babstcalland.com), or Brianne Kurdock at 202.853.3462 or [bkurdock@babstcalland.com](mailto:bkurdock@babstcalland.com).



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*Led by three former Pipeline and Hazardous Materials Safety Administration (PHMSA) attorneys, our Pipeline and Hazardous Materials Safety practice group counsels pipeline and midstream companies, gas utilities, terminal operators, investors, trade associations, and other stakeholders, throughout the United States. James Curry, Keith Coyle and Brianne Kurdock together have more than 25 years of experience with a multitude of pipeline safety issues. They partner with client engineering and legal personnel to address day-to-day compliance questions and develop business and regulatory strategies.*