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PHMSA increases civil penalties and commits to providing detailed calculations in individual cases

The following first appeared as a Pipeline Safety Alert issued by law firm Babst Calland.

On October 17, the Pipeline and Hazardous Materials Safety Administration (PHMSA) published a General Policy Statement on Civil Penalties in the Federal Register. Representing the most recent step in the evolution of PHMSA's enforcement process, the policy statement is significant for several reasons.

First, PHMSA is making a public commitment to release its proposed civil penalty calculation for individual enforcement cases. While standard practice for many other federal agencies, PHMSA has not historically provided the regulated community with its methodology for calculating proposed civil penalty amounts. Second, PHMSA is acknowledging the adoption of a Civil Penalty Framework as the agency's policy for calculating proposed penalties, and will publish that Civil Penalty Framework on its website. Under PHMSA's previous policy, operators received that document only upon request. Finally, and perhaps most significantly, the policy statement confirms that PHMSA will be assessing higher civil penalties (within the statutory maximums) in future enforcement cases, and that greater weight will be afforded to certain factors in determining penalty amounts.

The statutory framework

The pipeline safety laws require PHMSA to consider several factors in determining the amount of any civil penalty assessed for a particular violation. Three mandatory factors must be considered in all cases: (1) the nature, circumstances and gravity of the violation, including adverse impact on the environment; (2) the degree of the violator's culpability, any history of prior violations and any effect on ability to continue doing business; and (3) the violator's good faith in attempting to comply. Two other factors may be considered as a matter of discretion: (1) the economic benefit gained from the violation without any reduction because of subsequent damages, and (2) any other matters that justice requires. As recently adjusted for inflation under the Federal Civil Penalties Inflation Adjustment Act of 2015, PHMSA's administrative civil penalties are capped at \$205,638 per violation per day, not to exceed \$2,056,380 million for any related series of violations. PHMSA has



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repeatedly held that a violation is not part of a related series for purposes of the statutory cap if it requires proof of an additional fact or has its own evidentiary basis.

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Recent scrutiny of the enforcement process

PHMSA's enforcement process has come under increased scrutiny in recent years. Pursuant to a congressional mandate in the Pipeline Safety Improvement Act of 2002, the Government Accountability Office (GAO) issued a report in 2004 on the effectiveness of PHMSA's enforcement process and its use of civil penalties in enforcement cases. GAO recommended that PHMSA strengthen its enforcement process by establishing clear program goals, a well-defined strategy for achieving those goals and appropriate performance measures. GAO also recommended that PHMSA take certain actions to improve the management and collection of civil penalties and increase the public availability of information about PHMSA's enforcement actions. In the Pipeline Safety, Regulatory Certainty and Job Creation Act of 2011 (2011 Act), Congress required PHMSA to make further reforms to its enforcement process. Responding to fairness concerns, Congress required that PHMSA convene enforcement hearings before a dedicated "presiding official," expedite review of corrective action orders, maintain a separation of functions between PHMSA enforcement personnel and employees responsible for deciding enforcement cases, and prohibit ex parte communications in such proceedings. PHMSA implemented these important fairness changes in a 2011 policy statement and a 2013 rule.

The policy statement

PHMSA's policy statement on civil penalties is the latest step in the evolution of its enforcement process. Unlike many other federal agencies, PHMSA has not traditionally provided detailed information on the methodology used to calculate civil penalties in pipeline safety enforcement proceedings. The absence of that information served as an obstacle for

respondents in individual cases and raised questions about PHMSA's enforcement priorities within the regulated community. The policy statement seeks to address these concerns by offering a general overview of PHMSA's civil penalty process, and acknowledging that PHMSA will provide pipeline operators with "a more detailed proposed civil penalty calculation upon request" in individual enforcement cases. The policy statement further notes that "PHMSA 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."

Other related developments

PHMSA's decision to permit greater access to civil penalty calculations is particularly relevant as the agency continues to increase penalty amounts. According to the agency's most recent enforcement statistics, PHMSA proposed a total of \$2,671,200 and \$3,074,600 in civil penalties in 2014 and 2015, ranging from \$4,500 to \$270,600 per case and \$5,600 to \$364,200, respectively. By comparison, PHMSA has proposed \$7,752,500 in total civil penalties in 2016, ranging from \$11,500 to \$1,600,000 in 2016. PHMSA has also shown a greater willingness to assess large civil penalty amounts in specific cases this year. The agency has proposed civil penalties that exceed \$1 million in three proceedings, the same number that PHMSA initiated over the entire preceding four-year period from 2012 to 2015. While not discussed in the policy statement, PHMSA has made several noteworthy changes to the Civil Penalty Framework in recent years. PHMSA modified the culpability factors to account for corrective actions taken by operators prior to the agency's discovery of the violation. PHMSA may also apply a credit if the company fails to comply with a procedure that otherwise exceeds the applicable regulatory requirements. These changes should have a positive long-term impact on the regulated community from a compliance perspective, creating an incentive to initiate corrective measures at the earliest possible opportunity and encouraging companies to adopt practices and procedures that go above and beyond PHMSA's threshold requirements.

Looking ahead

In considering these important policy changes, companies may wish to consider whether they can request a copy of the detailed calculation in an individual case if (1) a hearing has occurred, but the agency has yet to issue a final order; (2) a final order has been issued, but the agency is still considering a petition for reconsideration; or (3) the enforcement matter is closed, but the company had requested and was denied access to the agency's calculation in the course of the enforcement proceeding.