

PHMSA Issues Interim Final Rule on Underground Natural Gas Storage

On December 14, the Pipeline and Hazardous Materials Safety Administration (PHMSA) released a pre-publication version of an interim final rule (IFR) establishing minimum federal safety standards for underground natural gas storage facilities. The IFR **takes effect 30 days** from publication in the Federal Register. Since this rule is styled as an IFR, PHMSA will **not** be providing a public comment period before the rule takes effect.

Comments on the IFR are due **60 days** from the date of publication. PHMSA may consider making changes to the rule based on the comments filed. Comments on the new PHMSA information collection request contained in the IFR (related to new reporting requirements for storage) are on a shorter timeframe and are due **30 days** from publication.

What's Changing?

- **Downhole Regulation:** PHMSA will regulate the downhole portions (wells and reservoirs) of underground gas storage facilities for the first time. Although PHMSA has had statutory authority to regulate storage since 1968, the agency declined to use that authority for policy reasons. The 2015 Aliso Canyon natural gas storage leak prompted changes to the Pipeline Safety Laws earlier this year, and those changes require PHMSA to regulate storage.
- **Incorporation of API Recommended Practices (API RP):** PHMSA will incorporate by reference the API recommended practices for underground natural gas storage (RP 1170 for salt caverns and RP 1171 for depleted reservoirs) covering reservoir and well design, integrity and monitoring, risk management, recordkeeping, integrity verification, site security and safety, emergencies, procedures, training and other subjects. Notably, the IFR mandates compliance with the “should” statements and other permissively worded provisions in the API RPs.
- **Reporting:** PHMSA will require storage operators to file annual, incident and safety-related condition reports, and file 60-day notices for certain construction activities (new storage facilities, new wells, well workovers) and other changes (acquisitions, divestitures, changes in the responsible operating entity).
- **Timing:** Existing storage facilities must meet the operations and integrity provisions of the applicable API RP within one year of publication. New storage facilities, built more than six months after publication, must comply with all of the applicable provisions in the API RPs, upon commencement of operations. Reporting obligations will take effect sooner – 30 days from publication of the IFR. Operators must file initial annual reports within six months of the effective date of the IFR.



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Why Now?

- **Protecting Our Infrastructure of Pipelines and Enhancing Safety Act of 2016 (PIPES Act):** As discussed in our [June Client Alert](#), Section 12 of the PIPES Act directed PHMSA to regulate underground gas storage facilities by June 22, 2018. Congress added this mandate largely in response to a significant gas leak from the Aliso Canyon storage facility in California. The mandate requires PHMSA to consider certain factors in developing storage regulations, including the use of consensus standards, the economic impact on individual gas customers and end users, and the recommendations of the Aliso Canyon task force that Congress authorized in section 31 of the PIPES Act.
- **Good Cause Exception:** Citing the good cause exception in the Administrative Procedure Act (APA), PHMSA issued the IFR without prior notice or the opportunity to comment. PHMSA stated that good cause exists to dispense with the notice and comment process because the lack of enforceable federal safety standards for underground gas storage facilities “presents an immediate threat to safety, public health, and the environment.” PHMSA also noted that incidents at underground natural gas storage facilities can be costly and interrupt the supply of natural gas to consumers.

What's Next?

- **Additional Regulations:** The IFR is the first step in PHMSA's storage rulemaking plan. PHMSA may or may not make changes to the IFR based on comments received after it is issued. Beyond the IFR, PHMSA has indicated that it may adopt additional, and potentially more stringent, regulations for storage. PHMSA has established a dedicated [storage website](#) with a library of relevant documents.
- **PHMSA Inspection and Enforcement:** PHMSA has stated it will begin inspections and enforcement once the IFR goes into effect. PHMSA has numerous enforcement tools, including compliance orders and other injunctive tools, and civil penalties (\$200,000 per day, per violation, not to exceed \$2 million for any related series of violations, as adjusted for inflation).
- **State Partners:** PHMSA will apply to storage the same federal state cooperative oversight model it uses for pipelines. A state authority must have a certification or agreement with PHMSA to regulate intrastate gas storage facilities. The state must adopt the minimum federal standards, and may apply additional or more stringent requirements, if they are compatible with federal requirements. Many state agencies that currently regulate intrastate underground gas storage safety do not participate in the federal program. These states will need to establish certificates or agreements with PHMSA. Participating states may also need to make changes to their safety standards to make them consistent with the new federal regulations.
- **User Fees:** PHMSA issued a [separate notice](#) in November of its intention to begin collecting user fees from storage operators to fund the agency's oversight program, and method of allocating fees among storage operators. Comments are due on that important notice on **January 6, 2017**.

Seven Questions on the IFR

Babst Calland's Pipeline and HazMat Safety team have reviewed the IFR and poses some initial questions that industry stakeholders may consider as they plan ahead.

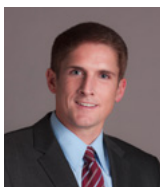
- *Did PHMSA appropriately analyze the impacts of converting permissive recommendations in the API RPs to requirements?* While many operators support the use of industry consensus standards for underground storage, how will operators be affected by PHMSA's decision to convert the permissive “should” provisions into requirements?

- *Does PHMSA's conversion of "should" statements to mandatory requirements remove some of the flexibility incorporated into the API RP to cover different storage facility designs and vintages, local geology, different risks and operational configurations? Will operators have sufficient flexibility to address integrity issues based on risk?*
- *Are the implementation timeframes reasonable and practicable?* The one-year implementation timeframes may be aggressive. Even if an operator was already following the API RPs, PHMSA's conversion of the "should" provisions to mandatory requirements could result in significant changes to an operator's program.
- *Is there sufficient information in the record that there is an emergency situation that supports PHMSA's use of the good cause exception?* PHMSA issued this rule using the IFR mechanism, with near immediate effect and without notice and comment, citing to the good cause exception in the Administrative Procedure Act. Does the evidence support the existence of a national emergency?
- *Has PHMSA analyzed the factors it must consider under the general rulemaking provisions and the separate underground storage provisions in the Pipeline Safety Laws?* 49 U.S.C. §§ 60102 and 60141.
- *Is PHMSA's Regulatory Impact Analysis for the IFR based on accurate assumptions about the actual costs and benefits of the rule?* In particular, does PHMSA address the potentially significant costs of converting the flexible "should" provisions in the API RPs to mandatory requirements in the IFR?
- *Will existing state regulations for intrastate storage facilities be immediately preempted in those states where the storage regulator does not have a certification or agreement with PHMSA?* If so, will PHMSA conduct inspection and enforcement in those states, at least until State storage regulators can obtain certifications or agreements from PHMSA?

Please contact one of the members of our Pipeline and HazMat Safety team to obtain more information about the implications of PHMSA's IFR.



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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.