



*AOPL Business Conference
Newport Beach, California
September 18, 2013*

STRATEGY ROUNDTABLE SESSION

Topic 2

STATUS OF EVOLVING PHMSA PENALTY POLICY

PHMSA has no established penalty policy, and the lack of information about how the Agency proposes and/or computes penalties becomes a concern as the amount of proposed penalties increases. Virtually all other federal agencies with penalty authority (like EPA, Corps of Engineers, etc.) have penalty policies.

DISCUSSION BY PANELISTS BOB HOGFOSS AND CATHERINE LITTLE:

The Pipeline Safety Act (PSA) establishes civil penalties that are available for violations of the statute or regulations. 49 U.S.C. § 60122. As revised effective January 3, 2012, violations of the PSA or PHMSA regulations may be subject to penalties of up to \$200,000 per day per violation, with a maximum for “a related series of violations” of \$2 million. *Id. at (a)(1)*. In determining the amount of a civil penalty, the Agency is required to consider a number of factors, including (1) the nature, circumstances, and gravity of the violation, including adverse impact on the environment; (2) the degree of culpability of the alleged violator, any history of prior violations, and any effect on ability to continue doing business; and (3) good faith in attempting to comply. *Id. at (b)(1)*. The Agency also has the discretion to consider (1) the economic benefit gained from the violation without any reduction because of subsequent damages; and (2) other matters that justice requires. *Id. at (b)(2)*. These same considerations are codified in the regulations at 49 C.F.R. Part 190.225.

Despite the apparent simplicity of the statutory language, there are significant issues that lie in PHMSA’s assessment of a civil penalty. First, the Agency has no

established penalty policy that clearly explains how the Agency calculates a proposed penalty. Second, there is precious little guidance as to the application of the \$2M cap for “a related series of violations.” With enforcement and proposed penalties on the rise, this issue is only going to become more significant.

Calculation of a Penalty

The federal Administrative Procedure Act requires federal agencies to provide respondents with a clear understanding of ‘the matters of fact and law asserted’ in an enforcement proceeding. PHMSA does not have an established Penalty Policy, and typically only shares internal draft documents on penalty considerations in the enforcement context, as part of the Pipeline Safety Violation Report (PSVR).

PSVRs are prepared as part of the Agency’s enforcement process. They are considered ‘confidential enforcement information’ and protected from disclosure to third parties under FOIA. PSVRs are only provided to an operator in the event an operator challenges an enforcement action by requesting a hearing (and even then only upon an express request for the PSVR by the operator). In our experience, the amount of information included in a PSVR regarding the alleged violations and proposed penalties vary widely, and some do not even contain information regarding penalties at all. The information that is provided rarely (if ever) includes any sort of rationale as to the basis for a proposed penalty.

While the Agency has, on occasion, provided a copy of an internal “Civil Penalty Summary” that was last revised in September 2012, it does not amount to a penalty policy and expressly states that it “does not attempt to provide a specific method for calculating civil penalties. Accordingly, it cannot be used, by itself, as a basis for determining an appropriate penalty in a specific action.” Further, neither the PSVR nor the Civil Penalty Summary have typically been made publicly available nor are they widely distributed to the regulated community.

“Related Series of Violations”

In addition to not clearly communicating with the regulated community as to how the Agency determines penalties, PHMSA also has not clearly communicated how it interprets the Pipeline Safety Act’s limit on civil penalties for any “related series of violations.” There is very limited legislative history regarding this statutory limit from back in 2000, between Senators Kerry and Hollings, both of whom tangentially discussed that it was the intent of Congress that the penalty cap for a ‘related series of violations’ apply to “*a single incident.*” “*Pipeline Safety Improvement Act,*” *Congressional Record 146:103 (Sept. 7, 2000), p. S8235.*

PHMSA regulations repeat this statutory penalty cap language, but the Agency has never issued any penalty policy or guidance to explain its methodology for applying this requirement. The issue has also not presented itself frequently as it is only recently that PHMSA has even assessed civil penalties in excess of the statutory cap. The first Agency interpretation of this requirement appeared in a 2009 Final Order, *Colorado Interstate Gas Co., CPF 5-2008-1005 (Nov. 23, 2009) (CIG)*, in which PHMSA stated that the ‘related series of violations’ should only limit the amount of penalty for “a series of daily violations” for the same regulatory requirement and not apply to an entire incident, contrary to the plain language of the statute and the limited Congressional record. The *CIG* decision also held, however, that where alleged violations in a NOPV are “*so closely related*” and share the same evidentiary basis, then “*they are not separate and should be considered one violation.*” *CIG, p. 12.*

In considering whether a more formal penalty policy would be useful to the industry, we should note that these documents as issued by other agencies in the federal family are typically not issued as rules and are not presented as binding agency policy. They are considered guidance, but they are heavily vetted, usually uniformly followed, made publicly available, and are introduced as evidence in legal proceedings in any event.

DISCUSSION TOPICS WITH AUDIENCE

1. Familiarity with EPA penalty or enforcement policies, and whether something similar would be useful with PHMSA.
2. Consideration of impacts on settlement negotiations with PHMSA.
3. Whether a penalty policy could improve ability to argue for a reduction in penalty, or improve Agency consistency and uniformity in issuing penalties.
4. Variability in PSVRs that are issued by PHMSA if a hearing is requested.
5. Ideas on how best to approach the concept with the Agency.

For more information on these topics and the discussion that occurred at the session, feel free to contact
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