



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

STRATEGY ROUNDTABLE SESSION

Topic 4

NEW JUDICIAL CHALLENGES TO PHMSA AUTHORITY

Like all administrative agencies, PHMSA is subject to legal challenge. Unlike most administrative agencies, however, PHMSA has seldom been brought to court. That is starting to change; in the last two to three years, we have seen more frequent challenges, ranging from the failure to act to acting beyond the Agency's authority.

DISCUSSION BY PANELISTS BOB HOGFOSS AND CATHERINE LITTLE:

The Pipeline Safety Act (PSA) has always allowed for any person to request a rulemaking or to challenge an Agency action or inaction. Under the PSA, any person can (1) petition for a rulemaking (49 U.S.C. § 60119(a), in the Court of Appeals); (2) challenge an Agency action or inaction (49 U.S.C. § 60121, in District Court); or (3) seek judicial review of a "final agency action" (49 U.S.C. § 60119(b), in the Court of Appeals).

The PSA amendments that became effective in 2012 clarified that challenges to PHMSA 'final agency action' must be taken to the U.S. Courts of Appeal within 89 days. In contrast, the PSA citizen suit provision must be brought in "an appropriate district court of the United States" for an injunction only after providing 60 day prior notice to DOT (or the appropriate state authority) and to the person alleged to have committed the violation.

Despite the fact that the ability to take legal steps to prompt PHMSA to take action or to seek review of PHMSA's action has always been permissible, historically

those provisions have been rarely invoked. That is starting to change, evidenced by this list of actions that have been filed in the past few years:

1. Alyeska (2010) – sought review of a Final Order issued by PHMSA in District Court (ultimately settled). [note: this was the only the second time an operator has sought judicial review of an Agency action; the first was in 1997 by ExxonMobil in Eastern District Court of Washington State].
2. City and County of San Francisco (2012) – following the PGE San Bruno incident, San Francisco challenged PHMSA in a citizen suit action in federal district court asserting that the Agency had “abjectly failed” to enforce federal gas pipeline safety standards in California. The Northern District of California dismissed the initial suit in late 2012, but granted leave to amend to bring a claim under the Administrative Procedures Act. In February 2013, the court dismissed the amended complaint under APA. The City and County appealed the dismissal to the 9th Circuit in May of 2013, with briefing is now set for early October.
3. ONEOK (2012) – ONEOK sought an injunction against PHMSA, challenging the Agency’s authority to inspect a facility under 28 USC 1331, the PSA, the APA, and the Declaratory Judgment Act. The Northern District Oklahoma federal court dismissed the Complaint for lack of subject matter jurisdiction in April 2013, and PHMSA recommenced its inspection of the facility in question.
4. ONEOK (2013) – also filed a separate but related action in February of this year in the D.C. Circuit Court of Appeals seeking judicial review of several “final agency actions.” The actions at issue include three letters from PHMSA with regard to the jurisdictional status of a facility (natural gas liquid fractionation plant). The case was held in abeyance pending settlement of the District Court case, and was removed from abeyance in August. In the interim, PHMSA has issued several NOPVs to ONEOK following its inspection in Spring 2013. Various court filings were due last week.
5. Bridger Pipeline (2013) – Bridger filed a petition for review in the 10th Circuit Court of Appeals seeking judicial review of a Final Order.

Bridger was most recently granted its sixth request for extension of time to file an opening brief which is now due later this month.

6. PEER (2013) – challenged PHMSA under the Freedom of Information Act in the D.C. District Court, citing to PHMSA’s lack of review of Facility Response Plans and failure to conduct safety exercises.

Given these cases, coupled with the fact that PHMSA enforcement actions have sought increasingly larger penalties in recent years, several of which have exceeded \$1M, it is likely that that the Agency (and certified states) will be subject to further challenge and more judicial review in the coming years. In particular, increasing penalty amounts are likely to prompt operators to challenge Final Orders. Third parties such as the City/County of San Francisco and PEER are also more likely to challenge the lack of oversight following large scale incidents.

In considering whether to challenge PHMSA Final Orders (NOPVs, penalty issues, etc.), operators should recognize that these challenges are made in the federal courts of appeal. Those courts do *not* develop facts (District Courts and trial courts do that); they *only review legal issues*. In order to prepare for a possible judicial appeal of Agency action, operators must therefore anticipate how to create a complete record as part of the administrative hearing process. This may involve recording the hearing, submitting all briefs allowed with all necessary exhibits, etc. But the best approach is to be mindful of the need for a record in any activity potentially subject to challenge (*e.g.*, making written documentation of PHMSA statements or inspection requests, etc.).

Finally, we should note that an additional outcome of the increased scrutiny on both operators and agencies that regulate them is the effect of these often costly challenges on **certified** states. With limited budgets, criticism from citizen groups, Congress and media alike, some states have suggested that they may give their pipeline programs back to PHMSA. This may only make PHMSA even more vulnerable to citizen scrutiny and litigation.

DISCUSSION TOPICS WITH AUDIENCE

1. Frequency that industry members consider considered challenging PHMSA, either seeking judicial review of a Final Order or petition for rulemaking.
2. Whether an operator is more likely to consider that now as compared to ten years ago.
3. Importance of creating and preserving a complete administrative record, in preparation for a possible judicial appeal, and suggested approaches.
4. Views on citizen suits prompting action by PHMSA.

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