

## SUBCHAPTER D—PIPELINE SAFETY

### PARTS 186–189 [RESERVED]

### PART 190—PIPELINE SAFETY ENFORCEMENT AND REGULATORY PROCEDURES

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AUTHORITY: 33 U.S.C. 1321(b); 49 U.S.C. 60101 *et seq.*

SOURCE: 45 FR 20413, Mar. 27, 1980, unless otherwise noted.

EDITORIAL NOTE: Nomenclature changes to part 190 appear at 78 FR 58908, Sept. 25, 2013.

#### Subpart A—General

##### § 190.1 Purpose and scope.

(a) This part prescribes procedures used by the Pipeline and Hazardous Materials Safety Administration in carrying out duties regarding pipeline safety under 49 U.S.C. 60101 *et seq.* (the pipeline safety laws) and 33 U.S.C. 1321 (the water pollution control laws).

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(b) This subpart defines certain terms and prescribes procedures that are applicable to each proceeding described in this part.

[45 FR 20413, Mar. 27, 1980, as amended by Amdt. 190–6, 61 FR 18512, Apr. 26, 1996; 70 FR 11137, Mar. 8, 2005; Amdt. 190–16, 78 FR 58908, Sept. 25, 2013]

### § 190.3 Definitions.

As used in this part:

*Administrator* means the Administrator, Pipeline and Hazardous Materials Safety Administration or his or her delegate.

*Associate Administrator* means the Associate Administrator for Pipeline Safety, or his or her delegate.

*Chief Counsel* means the Chief Counsel of PHMSA.

*Day* means a 24-hour period ending at 11:59 p.m. Unless otherwise specified, a day refers to a calendar day.

*Emergency order* means a written order issued in response to an imminent hazard imposing restrictions, prohibitions, or safety measures on owners and operators of gas or hazardous liquid pipeline facilities, without prior notice or an opportunity for a hearing.

*Formal hearing* means a formal review in accordance with 5 U.S.C. 554, conducted by an administrative law judge.

*Hearing* means an informal conference or a proceeding for oral presentation. Unless otherwise specifically prescribed in this part, the use of “hearing” is not intended to require a hearing on the record in accordance with section 554 of title 5, U.S.C.

*Imminent hazard* means the existence of a condition relating to a gas or hazardous liquid pipeline facility that presents a substantial likelihood that death, serious illness, severe personal injury, or a substantial endangerment to health, property, or the environment may occur before the reasonably foreseeable completion date of a formal proceeding begun to lessen the risk of such death, illness, injury or endangerment.

*New and novel technologies* means any products, designs, materials, testing, construction, inspection, or operational procedures that are not addressed in 49 CFR parts 192, 193, or 195, due to technology or design advances and innovation for new construction.

Technologies that are addressed in consensus standards that are incorporated by reference into parts 192, 193, and 195 are not “new or novel technologies.”

*OPS* means the Office of Pipeline Safety, which is part of the Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation.

*Operator* means any owner or operator.

*Person* means any individual, firm, joint venture, partnership, corporation, association, State, municipality, cooperative association, or joint stock association, and includes any trustee, receiver, assignee, or personal representative thereof.

*Presiding Official* means the person who conducts any hearing relating to civil penalty assessments, compliance orders, orders directing amendment, safety orders, or corrective action orders and who has the duties and powers set forth in § 190.212.

*Regional Director* means the head of any one of the Regional Offices of the Office of Pipeline Safety, or a designee appointed by the Regional Director. Regional Offices are located in Trenton, NJ (Eastern Region); Atlanta, Georgia (Southern Region); Kansas City, Missouri (Central Region); Houston, Texas (Southwest Region); and Lakewood, Colorado (Western Region).

*Respondent* means a person upon whom OPS has served an enforcement action described in this part.

*PHMSA* means the Pipeline and Hazardous Materials Safety Administration of the United States Department of Transportation.

*State* means a State of the United States, the District of Columbia and the Commonwealth of Puerto Rico.

[Amdt. 190–6, 61 FR 18513, Apr. 26, 1996, as amended at 68 FR 11749, Mar. 12, 2003; 70 FR 11137, Mar. 8, 2005; Amdt. 190–15, 74 FR 62505, Nov. 30, 2009; Amdt. 190–16, 78 FR 58908, Sept. 25, 2013; Amdt. 190–18, 81 FR 70985, Oct. 14, 2016; Amdt. 190–19, 82 FR 7995, Jan. 23, 2017; Amdt. 190–21, 84 FR 52026, Oct. 1, 2019]

### § 190.5 Service.

(a) Each order, notice, or other document required to be served under this part, will be served personally, by certified mail, overnight courier, or electronic transmission by facsimile or

other electronic means that includes reliable acknowledgement of actual receipt.

(b) Service upon a person's duly authorized representative or agent constitutes service upon that person.

(c) Service by certified mail or overnight courier is complete upon mailing. Service by electronic transmission is complete upon transmission and acknowledgement of receipt. An official receipt for the mailing from the U.S. Postal Service or overnight courier, or a facsimile or other electronic transmission confirmation, constitutes prima facie evidence of service.

[45 FR 20413, Mar. 27, 1980, as amended at 73 FR 16567, Mar. 28, 2008; Amdt. 190-16, 78 FR 58909, Sept. 25, 2013; Amdt. 190-18, 81 FR 70985, Oct. 14, 2016; Amdt. 190-21, 84 FR 52026, Oct. 1, 2019]

#### § 190.7 Subpoenas; witness fees.

(a) The Administrator, Chief Counsel, or the official designated by the Administrator to preside over a hearing convened in accordance with this part, may sign and issue subpoenas individually on his or her own initiative at any time, including pursuant to an inspection or investigation, or upon request and adequate showing by a participant to an enforcement proceeding that the information sought will materially advance the proceeding.

(b) A subpoena may require the attendance of a witness, or the production of documentary or other tangible evidence in the possession or under the control of person served, or both.

(c) A subpoena may be served personally by any person who is not an interested person and is not less than 18 years of age, or by certified mail.

(d) Service of a subpoena upon the person named in the subpoena is achieved by delivering a copy of the subpoena to the person and by paying the fees for one day's attendance and mileage, as specified by paragraph (g) of this section. When a subpoena is issued at the instance of any officer or agency of the United States, fees and mileage need not be tendered at the time of service. Delivery of a copy of a subpoena and tender of the fees to a natural person may be made by handing them to the person, leaving them at the person's office with a person in

charge, leaving them at the person's residence with a person of suitable age and discretion residing there, by mailing them by certified mail to the person at the last known address, or by any method whereby actual notice is given to the person and the fees are made available prior to the return date.

(e) When the person to be served is not a natural person, delivery of a copy of the subpoena and tender of the fees may be achieved by handing them to a designated agent or representative for service, or to any officer, director, or agent in charge of any office of the person, or by mailing them by certified mail to that agent or representative and the fees are made available prior to the return date.

(f) The original subpoena bearing a certificate of service shall be filed with the official having responsibility for the proceeding in connection with which the subpoena was issued.

(g) A subpoenaed witness shall be paid the same fees and mileage as would be paid to a witness in a proceeding in the district courts of the United States. The witness fees and mileage shall be paid by the person at whose instance the subpoena was issued.

(h) Notwithstanding the provisions of paragraph (g) of this section, and upon request, the witness fees and mileage may be paid by the PHMSA if the official who issued the subpoena determines on the basis of good cause shown, that:

(1) The presence of the subpoenaed witness will materially advance the proceeding; and

(2) The person at whose instance the subpoena was issued would suffer a serious hardship if required to pay the witness fees and mileage.

(i) Any person to whom a subpoena is directed may, prior to the time specified therein for compliance, but in no event more than 10 days after the date of service of such subpoena, apply to the official who issued the subpoena, or if the person is unavailable, to the Administrator to quash or modify the subpoena. The application shall contain a brief statement of the reasons relied upon in support of the action sought therein. The Administrator, or

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this issuing official, as the case may be, may:

- (1) Deny the application;
- (2) Quash or modify the subpoena; or
- (3) Condition a grant or denial of the application to quash or modify the subpoena upon the satisfaction of certain just and reasonable requirements. The denial may be summary.

(j) Upon refusal to obey a subpoena served upon any person under the provisions of this section, the PHMSA may request the Attorney General to seek the aid of the U. S. District Court for any District in which the person is found to compel that person, after notice, to appear and give testimony, or to appear and produce the subpoenaed documents before the PHMSA, or both.

[45 FR 20413, Mar. 27, 1980, as amended by Amdt. 190-6, 61 FR 18513, Apr. 26, 1996; Amdt. 190-7, 63 FR 7722, Feb. 17, 1998; 70 FR 11137, Mar. 8, 2005; Amdt. 190-16, 78 FR 58909, Sept. 25, 2013]

### § 190.9 Petitions for finding or approval.

(a) In circumstances where a rule contained in parts 192, 193 and 195 of this chapter authorizes the Administrator to make a finding or approval, an operator may petition the Administrator for such a finding or approval.

(b) Each petition must refer to the rule authorizing the action sought and contain information or arguments that justify the action. Unless otherwise specified, no public proceeding is held on a petition before it is granted or denied. After a petition is received, the Administrator or participating state agency notifies the petitioner of the disposition of the petition or, if the request requires more extensive consideration or additional information or comments are requested and delay is expected, of the date by which action will be taken.

(1) For operators seeking a finding or approval involving intrastate pipeline transportation, petitions must be sent to:

(i) The State agency certified to participate under 49 U.S.C. 60105.

(ii) Where there is no state agency certified to participate, the Administrator, Pipeline and Hazardous Materials Safety Administration, 1200 New

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Jersey Avenue, SE, Washington, DC 20590.

(2) For operators seeking a finding or approval involving interstate pipeline transportation, petitions must be sent to the Administrator, Pipeline and Hazardous Materials Safety Administration, 1200 New Jersey Avenue, SE, Washington, DC 20590.

(c) All petitions must be received at least 90 days prior to the date by which the operator requests the finding or approval to be made.

(d) The Administrator will make all findings or approvals of petitions initiated under this section. A participating state agency receiving petitions initiated under this section shall provide the Administrator a written recommendation as to the disposition of any petition received by them. Where the Administrator does not reverse or modify a recommendation made by a state agency within 10 business days of its receipt, the recommended disposition shall constitute the Administrator's decision on the petition.

[Amdt. 190-5, 59 FR 17280, Apr. 12, 1994, as amended by Amdt. 190-6, 61 FR 18513, Apr. 26, 1996; 70 FR 11137, Mar. 8, 2005; 73 FR 16566, Mar. 28, 2008]

### § 190.11 Availability of informal guidance and interpretive assistance.

(a) *Availability of telephonic and Internet assistance.* PHMSA has established a Web site and a telephone line to OPS headquarters where information on and advice about compliance with the pipeline safety regulations specified in 49 CFR parts 190-199 is available. The Web site and telephone line are staffed by personnel from PHMSA's OPS from 9:00 a.m. through 5:00 p.m., Eastern Time, Monday through Friday, with the exception of Federal holidays. When the lines are not staffed, individuals may leave a recorded voicemail message or post a message on the OPS Web site. The telephone number for the OPS information line is (202) 366-4595 and the OPS Web site can be accessed via the Internet at <http://phmsa.dot.gov/pipeline>.

(b) *Availability of written interpretations.* A written regulatory interpretation, response to a question, or an opinion concerning a pipeline safety issue may be obtained by submitting a

written request to the Office of Pipeline Safety (PHP-30), PHMSA, U.S. Department of Transportation, 1200 New Jersey Avenue SE., Washington, DC 20590-0001. The requestor must include his or her return address and should also include a daytime telephone number. Written requests should be submitted at least 120 days before the time the requestor needs a response.

[Amdt. 190-16, 78 FR 58909, Sept. 25, 2013]

### Subpart B—Enforcement

#### § 190.201 Purpose and scope.

(a) This subpart describes the enforcement authority and sanctions exercised by the Associate Administrator for achieving and maintaining pipeline safety and compliance under 49 U.S.C. 60101 *et seq.*, 33 U.S.C. 1321(j), and any regulation or order issued thereunder. It also prescribes the procedures governing the exercise of that authority and the imposition of those sanctions.

(b) A person who is the subject of action pursuant to this subpart may be represented by legal counsel at all stages of the proceeding.

[45 FR 20413, Mar. 27, 1980, as amended by Amdt. 190-6, 61 FR 18513, Apr. 26, 1996; Amdt. 190-16, 78 FR 58909, Sept. 25, 2013]

#### § 190.203 Inspections and investigations.

(a) Officers, employees, or agents authorized by the Associate Administrator for Pipeline Safety, PHMSA, upon presenting appropriate credentials, are authorized to enter upon, inspect, and examine, at reasonable times and in a reasonable manner, the records and properties of persons to the extent such records and properties are relevant to determining the compliance of such persons with the requirements of 49 U.S.C. 60101 *et seq.*, or regulations or orders issued thereunder.

(b) Inspections are ordinarily conducted pursuant to one of the following:

(1) Routine scheduling by the Regional Director of the Region in which the facility is located;

(2) A complaint received from a member of the public;

(3) Information obtained from a previous inspection;

(4) Report from a State Agency participating in the Federal Program under 49 U.S.C. 60105;

(5) Pipeline accident or incident; or

(6) Whenever deemed appropriate by the Associate Administrator.

(c) If the Associate Administrator or Regional Director believes that further information is needed to determine appropriate action, the Associate Administrator or Regional Director may notify the pipeline operator in writing that the operator is required to provide specific information within 30 days from the time the notification is received by the operator, unless otherwise specified in the notification. The notification must provide a reasonable description of the specific information required. An operator may request an extension of time to respond by providing a written justification as to why such an extension is necessary and proposing an alternative submission date. A request for an extension may ask for the deadline to be stayed while the extension is considered. General statements of hardship are not acceptable bases for requesting an extension.

(d) To the extent necessary to carry out the responsibilities under 49 U.S.C. 60101 *et seq.*, the Administrator, or the Associate Administrator, may require testing of portions of pipeline facilities that have been involved in, or affected by, an accident. However, before exercising this authority, the Administrator, or the Associate Administrator, shall make every effort to negotiate a mutually acceptable plan with the owner of those facilities and, where appropriate, the National Transportation Safety Board for performing the testing.

(e) If a representative of the U.S. Department of Transportation inspects or investigates an accident or incident involving a pipeline facility, the operator must make available to the representative all records and information that pertain to the event in any way, including integrity management plans and test results. The operator must provide all reasonable assistance in the investigation. Any person who obstructs an inspection or investigation by taking actions that were known or reasonably should have been known to

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prevent, hinder, or impede an investigation without good cause will be subject to administrative civil penalties under this subpart.

(f) When OPS determines that the information obtained from an inspection or from other appropriate sources warrants further action, OPS may initiate one or more of the enforcement proceedings prescribed in this subpart.

[45 FR 20413, Mar. 27, 1980, as amended by Amdt. 190–3, 56 FR 31090, July 9, 1991; Amdt. 190–6, 61 FR 18513, Apr. 26, 1996; Amdt. 190–7, 61 FR 27792, June 3, 1996; Amdt. 190–7, 63 FR 7722, Feb. 17, 1998; 70 FR 11137, Mar. 8, 2005; Amdt. 190–16, 78 FR 58909, Sept. 25, 2013]

### § 190.205 Warnings.

Upon determining that a probable violation of 49 U.S.C. 60101 *et seq.*, 33 U.S.C. 1321(j), or any regulation or order issued thereunder has occurred, the Associate Administrator or a Regional Director may issue a written warning notifying the operator of the probable violation and advising the operator to correct it or be subject to potential enforcement action in the future. The operator may submit a response to a warning, but is not required to. An adjudication under this subpart to determine whether a violation occurred is not conducted for warnings.

[Amdt. 190–16, 78 FR 58909, Sept. 25, 2013]

### § 190.206 Amendment of plans or procedures.

(a) A Regional Director begins a proceeding to determine whether an operator's plans or procedures required under parts 192, 193, 195, and 199 of this subchapter are inadequate to assure safe operation of a pipeline facility by issuing a notice of amendment. The notice will specify the alleged inadequacies and the proposed revisions of the plans or procedures and provide an opportunity to respond. The notice will allow the operator 30 days following receipt of the notice to submit written comments, revised procedures, or a request for a hearing under § 190.211.

(b) After considering all material presented in writing or at the hearing, if applicable, the Associate Administrator determines whether the plans or procedures are inadequate as alleged. The Associate Administrator issues an order directing amendment of the plans

or procedures if they are inadequate, or withdraws the notice if they are not. In determining the adequacy of an operator's plans or procedures, the Associate Administrator may consider:

- (1) Relevant pipeline safety data;
- (2) Whether the plans or procedures are appropriate for the particular type of pipeline transportation or facility, and for the location of the facility;
- (3) The reasonableness of the plans or procedures; and
- (4) The extent to which the plans or procedures contribute to public safety.

(c) An order directing amendment of an operator's plans or procedures prescribed in this section may be in addition to, or in conjunction with, other appropriate enforcement actions prescribed in this subpart.

[Amdt. 190–16, 78 FR 58910, Sept. 25, 2013]

### § 190.207 Notice of probable violation.

(a) Except as otherwise provided by this subpart, a Regional Director begins an enforcement proceeding by serving a notice of probable violation on a person charging that person with a probable violation of 49 U.S.C. 60101 *et seq.*, 33 U.S.C. 1321(j), or any regulation or order issued thereunder.

(b) A notice of probable violation issued under this section shall include:

- (1) Statement of the provisions of the laws, regulations or orders which the respondent is alleged to have violated and a statement of the evidence upon which the allegations are based;
- (2) Notice of response options available to the respondent under § 190.208;
- (3) If a civil penalty is proposed under § 190.221, the amount of the proposed civil penalty and the maximum civil penalty for which respondent is liable under law; and
- (4) If a compliance order is proposed under § 190.217, a statement of the remedial action being sought in the form of a proposed compliance order.

(c) The Regional Director may amend a notice of probable violation at any time prior to issuance of a final order under § 190.213. If an amendment includes any new material allegations of fact, proposes an increased civil penalty amount, or proposes new or additional remedial action under § 190.217,

the respondent will have the opportunity to respond under § 190.208.

[45 FR 20413, Mar. 27, 1980, as amended by Amdt. 190-6, 61 FR 18513, Apr. 26, 1996; Amdt. 190-16, 78 FR 58910, Sept. 25, 2013]

#### § 190.208 Response options.

Within 30 days of receipt of a notice of probable violation, the respondent must answer the Regional Director who issued the notice in the following manner:

(a) When the notice contains a proposed civil penalty—

(1) If the respondent is not contesting an allegation of probable violation, pay the proposed civil penalty as provided in § 190.227 and advise the Regional Director of the payment. The payment authorizes the Associate Administrator to make a finding of violation and to issue a final order under § 190.213;

(2) If the respondent is not contesting an allegation of probable violation but wishes to submit a written explanation, information, or other materials the respondent believes may warrant mitigation or elimination of the proposed civil penalty, the respondent may submit such materials. This authorizes the Associate Administrator to make a finding of violation and to issue a final order under § 190.213;

(3) If the respondent is contesting one or more allegations of probable violation but is not requesting a hearing under § 190.211, the respondent may submit a written response in answer to the allegations; or

(4) The respondent may request a hearing under § 190.211.

(b) When the notice contains a proposed compliance order—

(1) If the respondent is not contesting an allegation of probable violation, agree to the proposed compliance order. This authorizes the Associate Administrator to make a finding of violation and to issue a final order under § 190.213;

(2) Request the execution of a consent order under § 190.219;

(3) If the respondent is contesting one or more of the allegations of probable violation or compliance terms, but is not requesting a hearing under § 190.211, the respondent may object to the proposed compliance order and submit written explanations, information, or

other materials in answer to the allegations in the notice of probable violation; or

(4) The respondent may request a hearing under § 190.211.

(c) Before or after responding in accordance with paragraph (a) of this section or, when applicable paragraph (b) of this section, the respondent may request a copy of the violation report from the Regional Director as set forth in § 190.209. The Regional Director will provide the violation report to the respondent within five business days of receiving a request.

(d) Failure to respond in accordance with paragraph (a) of this section or, when applicable paragraph (b) of this section, constitutes a waiver of the right to contest the allegations in the notice of probable violation and authorizes the Associate Administrator, without further notice to the respondent, to find the facts as alleged in the notice of probable violation and to issue a final order under § 190.213.

(e) All materials submitted by operators in response to enforcement actions may be placed on publicly accessible Web sites. A respondent seeking confidential treatment under 5 U.S.C. 552(b) for any portion of its responsive materials must provide a second copy of such materials along with the complete original document. A respondent may redact the portions it believes qualify for confidential treatment in the second copy but must provide a written explanation for each redaction.

[Amdt. 190-16, 78 FR 58910, Sept. 25, 2013]

#### § 190.209 Case file.

(a) The case file, as defined in this section, is available to the respondent in all enforcement proceedings conducted under this subpart.

(b) The case file of an enforcement proceeding consists of the following:

(1) In cases commenced under § 190.206, the notice of amendment and the relevant procedures;

(2) In cases commenced under § 190.207, the notice of probable violation and the violation report;

(3) In cases commenced under § 190.233, the corrective action order or notice of proposed corrective action order and the data report, if one is prepared;

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(4) In cases commenced under § 190.239, the notice of proposed safety order;

(5) Any documents and other material submitted by the respondent in response to the enforcement action;

(6) In cases involving a hearing, any material submitted during and after the hearing as set forth in § 190.211; and

(7) The Regional Director's written evaluation of response material submitted by the respondent and recommendation for final action, if one is prepared.

[Amdt. 190-16, 78 FR 58910, Sept. 25, 2013]

## § 190.210 Separation of functions.

(a) *General.* An agency employee who assists in the investigation or prosecution of an enforcement case may not participate in the decision of that case or a factually related one, but may participate as a witness or counsel at a hearing as set forth in this subpart. Likewise, an agency employee who prepares a decision in an enforcement case may not have served in an investigative or prosecutorial capacity in that case or a factually related one.

(b) *Prohibition on ex parte communications.* A party to an enforcement proceeding, including the respondent, its representative, or an agency employee having served in an investigative or prosecutorial capacity in the proceeding, may not communicate privately with the Associate Administrator, Presiding Official, or attorney drafting the recommended decision concerning information that is relevant to the questions to be decided in the proceeding. A party may communicate with the Presiding Official regarding administrative or procedural issues, such as for scheduling a hearing.

[Amdt. 190-16, 78 FR 58911, Sept. 25, 2013]

## § 190.211 Hearing.

(a) *General.* This section applies to hearings conducted under this part relating to civil penalty assessments, compliance orders, orders directing amendment, safety orders, and corrective action orders. The Presiding Official will convene hearings conducted under this section.

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(b) *Hearing request and statement of issues.* A request for a hearing must be accompanied by a statement of the issues that the respondent intends to raise at the hearing. The issues may relate to the allegations in the notice, the proposed corrective action, or the proposed civil penalty amount. A respondent's failure to specify an issue may result in waiver of the respondent's right to raise that issue at the hearing. The respondent's request must also indicate whether or not the respondent will be represented by counsel at the hearing. The respondent may withdraw a request for a hearing in writing and provide a written response.

(c) *Telephonic and in-person hearings.* A telephone hearing will be held if the amount of the proposed civil penalty or the cost of the proposed corrective action is less than \$25,000, unless the respondent or OPS submits a written request for an in-person hearing. In-person hearings will normally be held at the office of the appropriate OPS Region. Hearings may be held by video teleconference if the necessary equipment is available to all parties.

(d) *Pre-hearing submissions.* If OPS or the respondent intends to introduce material, including records, documents, and other exhibits not already in the case file, the material must be submitted to the Presiding Official and the other party at least 10 days prior to the date of the hearing, unless the Presiding Official sets a different deadline or waives the deadline for good cause.

(e) *Conduct of the hearing.* The hearing is conducted informally without strict adherence to rules of evidence. The Presiding Official regulates the course of the hearing and gives each party an opportunity to offer facts, statements, explanations, documents, testimony or other evidence that is relevant and material to the issues under consideration. The parties may call witnesses on their own behalf and examine the evidence and witnesses presented by the other party. After the evidence in the case has been presented, the Presiding Official will permit reasonable discussion of the issues under consideration.

(f) *Written transcripts.* If a respondent elects to transcribe a hearing, the respondent must make arrangements



with a court reporter at cost to the respondent and submit a complete copy of the transcript for the case file. The respondent must notify the Presiding Official in advance if it intends to transcribe a hearing.

(g) *Post-hearing submission.* The respondent and OPS may request an opportunity to submit further written material after the hearing for inclusion in the record. The Presiding Official will allow a reasonable time for the submission of the material and will specify the submission date. If the material is not submitted within the time prescribed, the case will proceed to final action without the material.

(h) *Preparation of decision.* After consideration of the case file, the Presiding Official prepares a recommended decision in the case, which is then forwarded to the Associate Administrator for issuance of a final order.

[Amdt. 190-16, 78 FR 58911, Sept. 25, 2013]

**§ 190.212 Presiding official, powers, and duties.**

(a) *General.* The Presiding Official for a hearing conducted under § 190.211 is an attorney on the staff of the Deputy Chief Counsel who is not engaged in any investigative or prosecutorial functions, such as the issuance of notices under this subpart. If the designated Presiding Official is unavailable, the Deputy Chief Counsel may delegate the powers and duties specified in this section to another attorney in the Office of Chief Counsel who is not engaged in any investigative or prosecutorial functions under this subpart.

(b) *Time and place of the hearing.* The Presiding Official will set the date, time and location of the hearing. To the extent practicable, the Presiding Official will accommodate the parties' schedules when setting the hearing. Reasonable notice of the hearing will be provided to all parties.

(c) *Powers and duties of Presiding Official.* The Presiding Official will conduct a fair and impartial hearing and take all action necessary to avoid delay in the disposition of the proceeding and maintain order. The Presiding Official has all powers necessary to achieve those ends, including, but not limited to the power to:

(1) Regulate the course of the hearing and conduct of the parties and their counsel;

(2) Receive evidence and inquire into the relevant and material facts;

(3) Require the submission of documents and other information;

(4) Direct that documents or briefs relate to issues raised during the course of the hearing;

(5) Set the date for filing documents, briefs, and other items;

(6) Prepare a recommended decision; and

(7) Exercise the authority necessary to carry out the responsibilities of the Presiding Official under this subpart.

[Amdt. 190-16, 78 FR 58911, Sept. 25, 2013]

**§ 190.213 Final order.**

(a) In an enforcement proceeding commenced under § 190.207, an attorney from the Office of Chief Counsel prepares a recommended decision after expiration of the 30-day response period prescribed in § 190.208. If a hearing is held, the Presiding Official prepares the recommended decision as set forth in § 190.211. The recommended decision is forwarded to the Associate Administrator who considers the case file and issues a final order. The final order includes—

(1) A statement of findings and determinations on all material issues, including a determination as to whether each alleged violation has been proved;

(2) If a civil penalty is assessed, the amount of the penalty and the procedures for payment of the penalty, provided that the assessed civil penalty may not exceed the penalty proposed in the notice of probable violation; and

(3) If a compliance order is issued, a statement of the actions required to be taken by the respondent and the time by which such actions must be accomplished.

(b) In cases where a substantial delay is expected in the issuance of a final order, notice of that fact and the date by which it is expected that action will be taken is provided to the respondent upon request and whenever practicable.

[Amdt. 190-16, 78 FR 58911, Sept. 25, 2013]

## § 190.215

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### § 190.215 [Reserved]

#### COMPLIANCE ORDERS

### § 190.217 Compliance orders generally.

When a Regional Director has reason to believe that a person is engaging in conduct that violates 49 U.S.C. 60101 *et seq.*, 33 U.S.C. 1321(j), or any regulation or order issued thereunder, and if the nature of the violation and the public interest so warrant, the Regional Director may initiate proceedings under §§ 190.207 through 190.213 to determine the nature and extent of the violations and for the issuance of an order directing compliance.

[Amdt. 190–16, 78 FR 58912, Sept. 25, 2013]

### § 190.219 Consent order.

(a) At any time prior to the issuance of a compliance order under § 190.217, a corrective action order under § 190.233, or a safety order under § 190.239, the Regional Director and the respondent may agree to resolve the case by execution of a consent agreement and order, which may be jointly executed by the parties and issued by the Associate Administrator. Upon execution, the consent order is considered a final order under § 190.213.

(b) A consent order executed under paragraph (a) of this section shall include:

(1) An admission by the respondent of all jurisdictional facts;

(2) An express waiver of further procedural steps and of all right to seek judicial review or otherwise challenge or contest the validity of that order;

(3) An acknowledgement that the notice of probable violation may be used to construe the terms of the consent order; and

(4) A statement of the actions required of the respondent and the time by which such actions shall be accomplished.

(c) Prior to the execution of a consent agreement and order arising out of a corrective action order under § 190.233, the Associate Administrator will notify any appropriate State offi-

cial in accordance with 49 U.S.C. 60112(c).

[45 FR 20413, Mar. 27, 1980, as amended by Amdt. 190–6, 61 FR 18514, Apr. 26, 1996; Amdt. 190–16, 78 FR 58912, Sept. 25, 2013]

#### CIVIL PENALTIES

### § 190.221 Civil penalties generally.

When a Regional Director has reason to believe that a person has committed an act violating 49 U.S.C. 60101 *et seq.*, 33 U.S.C. 1321(j), or any regulation or order issued thereunder, the Regional Director may initiate proceedings under §§ 190.207 through 190.213 to determine the nature and extent of the violations and appropriate civil penalty.

[Amdt. 190–16, 78 FR 58912, Sept. 25, 2013]

### § 190.223 Maximum penalties.

(a) Any person found to have violated a provision of 49 U.S.C. 60101, *et seq.*, or any regulation or order issued thereunder, is subject to an administrative civil penalty not to exceed \$218,647 for each violation for each day the violation continues, with a maximum administrative civil penalty not to exceed \$2,186,465 for any related series of violations.

(b) Any person found to have violated a provision of 33 U.S.C. 1321(j), or any regulation or order issued thereunder, is subject to an administrative civil penalty under 33 U.S.C. 1321(b)(6), as adjusted by 40 CFR 19.4.

(c) Any person found to have violated any standard or order under 49 U.S.C. 60103 is subject to an administrative civil penalty not to exceed \$79,875, which may be in addition to other penalties to which such person may be subject under paragraph (a) of this section.

(d) Any person who is determined to have violated any standard or order under 49 U.S.C. 60129 is subject to an administrative civil penalty not to exceed \$1,270, which may be in addition to other penalties to which such person may be subject under paragraph (a) of this section.

(e) Separate penalties for violating a regulation prescribed under this subchapter and for violating an order issued under §§ 190.206, 190.213, 190.233, or 190.239 may not be imposed under

this section if both violations are based on the same act.

[Amdt. 190-16, 78 FR 58912, Sept. 25, 2013, as amended at 81 FR 42566, June 30, 2016; Amdt. 190-17, 82 FR 19328, Apr. 27, 2017; 84 FR 37071, July 31, 2019]

**§ 190.225 Assessment considerations.**

In determining the amount of a civil penalty under this part,

(a) The Associate Administrator will consider:

(1) The nature, circumstances and gravity of the violation, including adverse impact on the environment;

(2) The degree of the respondent's culpability;

(3) The respondent's history of prior offenses;

(4) Any good faith by the respondent in attempting to achieve compliance;

(5) The effect on the respondent's ability to continue in business; and

(b) The Associate Administrator may consider:

(1) The economic benefit gained from violation, if readily ascertainable, without any reduction because of subsequent damages; and

(2) Such other matters as justice may require.

[Amdt. 190-16, 78 FR 58912, Sept. 25, 2013]

**§ 190.227 Payment of penalty.**

(a) Except for payments exceeding \$10,000, payment of a civil penalty proposed or assessed under this subpart may be made by certified check or money order (containing the CPF Number for the case), payable to "U.S. Department of Transportation," to the Federal Aviation Administration, Mike Monroney Aeronautical Center, Financial Operations Division (AMZ-341), P.O. Box 25770, Oklahoma City, OK 73125, or by wire transfer through the Federal Reserve Communications System (Fedwire) to the account of the U.S. Treasury, or via <https://www.pay.gov>. Payments exceeding \$10,000 must be made by wire transfer.

(b) Payment of a civil penalty assessed in a final order issued under § 190.213 or affirmed in a decision on a petition for reconsideration must be made within 20 days after receipt of the final order or decision. Failure to do so will result in the initiation of collection action, including the accrual of in-

terest and penalties, in accordance with 31 U.S.C. 3717 and 49 CFR part 89.

[Amdt. 190-7, 61 FR 27792, June 3, 1996, as amended at 70 FR 11138, Mar. 8, 2005; 73 FR 16567, Mar. 28, 2008; Amdt. 190-16, 78 FR 58912, Sept. 25, 2013]

**§§ 190.229-190.231 [Reserved]**

**SPECIFIC RELIEF**

**§ 190.233 Corrective action orders.**

(a) *Generally.* Except as provided by paragraph (b) of this section, if the Associate Administrator finds, after reasonable notice and opportunity for hearing in accord with paragraph (c) of this section, a particular pipeline facility is or would be hazardous to life, property, or the environment, the Associate Administrator may issue an order pursuant to this section requiring the operator of the facility to take corrective action. Corrective action may include suspended or restricted use of the facility, physical inspection, testing, repair, replacement, or other appropriate action.

(b) *Waiver of notice and expedited review.* The Associate Administrator may waive the requirement for notice and opportunity for hearing under paragraph (a) of this section before issuing an order whenever the Associate Administrator determines that the failure to do so would result in the likelihood of serious harm to life, property, or the environment. When an order is issued under this paragraph, a respondent that contests the order may obtain expedited review of the order either by answering in writing to the order within 10 days of receipt or requesting a hearing under § 190.211 to be held as soon as practicable in accordance with paragraph (c)(2) of this section. For purposes of this section, the term "expedited review" is defined as the process for making a prompt determination of whether the order should remain in effect or be amended or terminated. The expedited review of an order issued under this paragraph will be complete upon issuance of such determination.

(c) *Notice and hearing:*

(1) Written notice that OPS intends to issue an order under this section will be served upon the owner or operator of an alleged hazardous facility in

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accordance with §190.5. The notice must allege the existence of a hazardous facility and state the facts and circumstances supporting the issuance of a corrective action order. The notice must provide the owner or operator with an opportunity to respond within 10 days of receipt.

(2) An owner or operator that elects to exercise its opportunity for a hearing under this section must notify the Associate Administrator of that election in writing within 10 days of receipt of the notice provided under paragraph (c)(1) of this section, or the order under paragraph (b) of this section when applicable. The absence of such written notification waives an owner or operator's opportunity for a hearing.

(3) At any time after issuance of a notice or order under this section, the respondent may request a copy of the case file as set forth in §190.209.

(4) A hearing under this section is conducted pursuant to §190.211. The hearing should be held within 15 days of receipt of the respondent's request for a hearing.

(5) After conclusion of a hearing under this section, the Presiding Official submits a recommended decision to the Associate Administrator as to whether or not the facility is or would be hazardous to life, property, or the environment, and if necessary, requiring expeditious corrective action. If a notice or order is contested in writing without a hearing, an attorney from the Office of Chief Counsel prepares the recommended decision. The recommended decision should be submitted to the Associate Administrator within five business days after conclusion of the hearing or after receipt of the respondent's written objection if no hearing is held. Upon receipt of the recommendation, the Associate Administrator will proceed in accordance with paragraphs (d) through (h) of this section. If the Associate Administrator finds the facility is or would be hazardous to life, property, or the environment, the Associate Administrator issues a corrective action order in accordance with this section, or confirms (or amends) the corrective action order issued under paragraph (b) of this section. If the Associate Administrator does not find the facility is or would be

hazardous to life, property, or the environment, the Associate Administrator withdraws the notice or terminates the order issued under paragraph (b) of this section, and promptly notifies the operator in writing by service as prescribed in §190.5.

(d) The Associate Administrator may find a pipeline facility to be hazardous under paragraph (a) of this section:

(1) If under the facts and circumstances the Associate Administrator determines the particular facility is hazardous to life, property, or the environment; or

(2) If the pipeline facility or a component thereof has been constructed or operated with any equipment, material, or technique which the Associate Administrator determines is hazardous to life, property, or the environment, unless the operator involved demonstrates to the satisfaction of the Associate Administrator that, under the particular facts and circumstances involved, such equipment, material, or technique is not hazardous.

(e) In making a determination under paragraph (d) of this section, the Associate Administrator shall consider, if relevant:

(1) The characteristics of the pipe and other equipment used in the pipeline facility involved, including its age, manufacturer, physical properties (including its resistance to corrosion and deterioration), and the method of its manufacture, construction or assembly;

(2) The nature of the materials transported by such facility (including their corrosive and deteriorative qualities), the sequence in which such materials are transported, and the pressure required for such transportation;

(3) The characteristics of the geographical areas in which the pipeline facility is located, in particular the climatic and geologic conditions (including soil characteristics) associated with such areas, and the population density and population and growth patterns of such areas;

(4) Any recommendation of the National Transportation Safety Board issued in connection with any investigation conducted by the Board; and

(5) Such other factors as the Associate Administrator may consider appropriate.

(f) A corrective action order shall contain the following information:

(1) A finding that the pipeline facility is or would be hazardous to life, property, or the environment.

(2) The relevant facts which form the basis of that finding.

(3) The legal basis for the order.

(4) The nature and description of any particular corrective action required of the respondent.

(5) The date by which the required corrective action must be taken or completed and, where appropriate, the duration of the order.

(6) If the opportunity for a hearing was waived pursuant to paragraph (b) of this section, a statement that an opportunity for a hearing will be available at a particular time and location after issuance of the order.

(g) The Associate Administrator will terminate a corrective action order whenever the Associate Administrator determines that the facility is no longer hazardous to life, property, or the environment. If appropriate, however, a notice of probable violation may be issued under § 190.207.

(h) At any time after a corrective action order issued under this section has become effective, the Associate Administrator may request the Attorney General to bring an action for appropriate relief in accordance with § 190.235.

(i) Upon petition by the Attorney General, the District Courts of the United States shall have jurisdiction to enforce orders issued under this section by appropriate means.

[70 FR 11138, Mar. 8, 2005, as amended by Amdt. 190-16, 78 FR 58912, Sept. 25, 2013]

#### § 190.235 Civil actions generally.

Whenever it appears to the Associate Administrator that a person has engaged, is engaged, or is about to engage in any act or practice constituting a violation of any provision of 49 U.S.C. 60101 *et seq.*, or any regulations issued thereunder, the Administrator, or the person to whom the authority has been delegated, may request the Attorney General to bring an action in the appropriate U.S. District Court for such

relief as is necessary or appropriate, including mandatory or prohibitive injunctive relief, interim equitable relief, civil penalties, and punitive damages as provided under 49 U.S.C. 60120 and 49 U.S.C. 5123.

[70 FR 11139, Mar. 8, 2005]

#### § 190.236 Emergency orders: Procedures for issuance and rescission.

(a) *Determination of imminent hazard.* When the Administrator determines that an unsafe condition or practice, or a combination of unsafe conditions and practices, constitutes or is causing an imminent hazard, as defined in § 190.3, the Administrator may issue or impose an emergency order, without advance notice or an opportunity for a hearing, but only to the extent necessary to abate the imminent hazard. The order will contain a written description of:

(1) The violation, condition, or practice that constitutes or is causing the imminent hazard;

(2) Those entities subject to the order;

(3) The restrictions, prohibitions, or safety measures imposed;

(4) The standards and procedures for obtaining relief from the order;

(5) How the order is tailored to abate the imminent hazard and the reasons the authorities under 49 U.S.C. 60112 and 60117(l) are insufficient to do so; and

(6) How the considerations listed in paragraph (c) of this section were taken into account.

(b) *Consultation.* In considering the factors under paragraph (c) of this section, the Administrator shall consult, as the Administrator determines appropriate, with appropriate Federal agencies, State agencies, and other entities knowledgeable in pipeline safety or operations.

(c) *Considerations.* Prior to issuing an emergency order, the Administrator shall consider the following, as appropriate:

(1) The impact of the emergency order on public health and safety;

(2) The impact, if any, of the emergency order on the national or regional economy or national security;

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(3) The impact of the emergency order on the ability of owners and operators of pipeline facilities to maintain reliability and continuity of service to customers; and

(4) The results of any consultations with appropriate Federal agencies, State agencies, and other entities knowledgeable in pipeline safety or operations.

(d) *Service.* The Administrator will provide service of emergency orders in accordance with §190.5 to all operators of gas and hazardous liquid pipeline facilities that the Administrator reasonably expects to be affected by the emergency order. In addition, the Administrator will publish emergency orders in the FEDERAL REGISTER and post them on the PHMSA website as soon as practicable upon issuance. Publication in the FEDERAL REGISTER will serve as general notice of an emergency order. Each emergency order must contain information specifying how pipeline operators and owners may respond to the emergency order, filing procedures, and service requirements, including the address of DOT Docket Operations and the names and addresses of all persons to be served if a petition for review is filed.

(e) *Rescission.* If an emergency order has been in effect for more than 365 days, the Administrator will make an assessment regarding whether the unsafe condition or practice, or combination of unsafe conditions and practices, constituting or causing an imminent hazard, as defined in §190.3, continues to exist. If the imminent hazard does not continue to exist, the Administrator will rescind the emergency order and follow the service procedures set forth in §190.236(d). If the imminent hazard underlying the emergency order continues to exist, PHMSA will initiate a rulemaking action as soon as practicable.

[Amdt. 190–21, 84 FR 52027, Oct. 1, 2019]

**§ 190.237 Emergency orders: Petitions for review.**

(a) *Requirements.* A pipeline owner or operator that is subject to and aggrieved by an emergency order may petition the Administrator for review to determine whether the order will re-

main in place, be modified, or be terminated. A petition for review must:

(1) Be in writing;

(2) State with particularity each part of the emergency order that is sought to be modified or terminated and include all information, evidence and arguments in support thereof;

(3) State whether the petitioner requests a formal hearing in accordance with 5 U.S.C. 554, and, if so, any material facts in dispute; and,

(4) Be filed and served in accordance with paragraph (h) of this section.

(b) *Modification of petitions.* A petitioner may modify its petition for review to provide new information that materially affects the review proceeding and that is timely submitted. Where the petitioner has not requested a formal hearing, the Associate Administrator will make the determination whether to accept the new information. Where a case has been assigned for a formal hearing, the presiding administrative law judge will determine whether to accept the new information.

(c) *Response to the petition for review.* An attorney designated by the Office of Chief Counsel may file and serve, in accordance with paragraph (h) of this section, a response to the petition, including appropriate pleadings, within five calendar days of receipt of the petition by the Chief Counsel.

(d) *Associate Administrator's responsibilities.*—(1) *Formal hearing requested.* Upon receipt of a petition for review that includes a formal hearing request under this section, the Associate Administrator will, within three days after receipt of the petition, assign the petition to the Office of Hearings, DOT, for a formal hearing.

(2) *No formal hearing requested.* Upon receipt of a petition for review that does not include a formal hearing request, the Associate Administrator will issue an administrative decision on the merits within 30 days of receipt of the petition for review. The Associate Administrator's decision constitutes the agency's final decision.

(3) *Consolidation.* If the Associate Administrator receives more than one petition for review and they share common issues of law or fact, the Associate Administrator may consolidate the petitions for the purpose of complying

with this section, provided such consolidation occurs prior to the commencement of a formal hearing. The Associate Administrator may reassign a petition that does not request a formal hearing to the Office of Hearings, DOT, provided the petition otherwise meets the requirements for consolidation. If the Associate Administrator has consolidated multiple petitions that do not request a formal hearing, he may de-consolidate such petitions if there has been a change in circumstances that, in his discretion, warrant separation for the purpose of rendering a final decision.

(e) *Formal Hearings.* Formal hearings must be conducted by an administrative law judge assigned by the chief administrative law judge of the Office of Hearings, DOT. The administrative law judge may:

- (1) Administer oaths and affirmations;
- (2) Issue subpoenas as provided by the appropriate statutes and agency regulations (e.g., 49 U.S.C. 60117 and 49 CFR 190.7);
- (3) Adopt the relevant Federal Rules of Civil Procedure for the United States District Courts for the procedures governing the hearings, when appropriate;
- (4) Adopt the relevant Federal Rules of Evidence for United States Courts and Magistrates for the submission of evidence, when appropriate;
- (5) Take or cause depositions to be taken;
- (6) Examine witnesses at the hearing;
- (7) Rule on offers of proof and receive relevant evidence;
- (8) Convene, recess, adjourn or otherwise regulate the course of the hearing;
- (9) Hold conferences for settlement, simplification of the issues, or any other proper purpose; and
- (10) Take any other action authorized by or consistent with the provisions of this part and permitted by law that may expedite the hearing or aid in the disposition of an issue raised.

(f) *Parties.* The petitioner may appear and be heard in person or by an authorized representative. PHMSA will be represented by an attorney designated by the Office of Chief Counsel.

(g) *Burden of proof.* Except in the case of an affirmative defense, PHMSA shall

bear the burden of proving, by a preponderance of the evidence, the validity of an emergency order in a proceeding under this section by a preponderance of the evidence. A party asserting an affirmative defense shall bear the burden of proving, by a preponderance of the evidence, the affirmative defense in a proceeding under this section.

(h) *Filing and service.* (1) Each petition, pleading, motion, notice, order, or other document submitted in connection with an emergency order issued under this section must be filed (commercially delivered or submitted electronically) with: U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue SE, Washington, DC 20590. All documents filed will be published on the Department's docket management website, <http://www.regulations.gov>. The emergency order must state the above filing requirements and the address of DOT Docket Operations.

(2) Each document filed in accordance with paragraph (h)(1) of this section must be concurrently served upon the following persons:

(i) Associate Administrator for Pipeline Safety, OPS, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, 1200 New Jersey Avenue SE, East Building, Washington, DC 20590;

(ii) Chief Counsel, PHC, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, 1200 New Jersey Avenue SE, East Building, Washington, DC 20590 (facsimile: 202-366-7041); and

(iii) If the petition for review requests a formal hearing, the Chief Administrative Law Judge, U.S. Department of Transportation, Office of Hearings, 1200 New Jersey Ave SE, c/o Mail Center (E11-310), Washington, DC 20590 (facsimile: 202-366-7536).

(3) Service must be made in accordance with §190.5 of this part. The emergency order must state all relevant service requirements and list the persons to be served and may be updated as necessary.

(4) *Certificate of service.* Each order, pleading, motion, notice, or other document must be accompanied by a certificate of service specifying the manner in which and the date on which service was made.

(5) If applicable, service upon a person's duly authorized representative, agent for service, or an organization's president or chief executive officer constitutes service upon that person.

(i) *Report and recommendation.* The administrative law judge must issue a report and recommendation to the Associate Administrator at the close of the record. The report and recommendation must:

(1) Contain findings of fact and conclusions of law and the grounds for the decision, based on the material issues of fact or law presented on the record;

(2) Be served on the parties to the proceeding; and

(3) Be issued no later than 25 days after receipt of the petition for review by the Associate Administrator.

(j) *Petition for reconsideration.* (1) A petitioner aggrieved by the administrative law judge's report and recommendation may file a petition for reconsideration with the Associate Administrator. The petition for reconsideration must be filed:

(i) Not more than five days after the administrative law judge has issued a report and recommendation under paragraph (i) of this section, provided such report and recommendation is issued 20 days or less after the petition for review was filed with PHMSA; or

(ii) Not more than two days after the administrative law judge has issued his or her report and recommendation under paragraph (h) of this section, where such report and recommendation are issued more than 20 days after the petition for review was filed with PHMSA.

(2) The Associate Administrator must issue a decision on a petition for reconsideration no later than 30 days after receipt of the petition for review. Such decision constitutes final agency action on a petition for review.

(k) *Judicial review.* (1) After the issuance of a final agency decision pursuant to paragraphs (d)(2) or (j)(2) of this section, or the issuance of a written determination by the Adminis-

trator pursuant to paragraph (1) of this section, a pipeline owner or operator subject to and aggrieved by an emergency order issued under § 190.236 may seek judicial review of the order in the appropriate district court of the United States. The filing of an action seeking judicial review does not stay or modify the force and effect of the agency's final decision under paragraphs (d)(2) or (j)(3) of this section, or the written determination under paragraph (1) of this section, unless stayed or modified by the Administrator.

(1) *Expiration of order.* (1) *No petition for review filed:* If no petition for review is filed challenging the emergency order, then the emergency order shall remain in effect until PHMSA determines, in writing, that the imminent hazard no longer exists or the order is terminated by a court of competent jurisdiction.

(2) *Petition for review filed and decision rendered within 30 days.* If the Associate Administrator renders a final decision upon a petition for review within 30 days of its receipt by PHMSA, any elements of the emergency order upheld or modified by the decision shall remain in effect until PHMSA determines, in writing, that the imminent hazard no longer exists or the order is terminated by a court of competent jurisdiction.

(3) *Petition for review filed but no decision rendered within 30 days.* If the Associate Administrator has not reached a decision on the petition for review within 30 days of receipt of the petition for review, the emergency order will cease to be effective unless the Administrator determines, in writing, that the imminent hazard providing a basis for the emergency order continues to exist.

(m) *Time.* In computing any period of time prescribed by this section or an order or report and recommendation issued by an administrative law judge under this section, the day of filing of a petition for review or of any other act, event or default from which the designated period of time begins to run will not be included. The last day of the period so computed will be included, unless it is a Saturday, Sunday, or Federal holiday, in which event the period runs until end of the next day



which is not one of the aforementioned days.

[Amdt. 190–21, 84 FR 52027, Oct. 1, 2019]

**§ 190.239 Safety orders.**

(a) *When may PHMSA issue a safety order?* If the Associate Administrator finds, after notice and an opportunity for hearing under paragraph (b) of this section, that a particular pipeline facility has a condition or conditions that pose a pipeline integrity risk to public safety, property, or the environment, the Associate Administrator may issue an order requiring the operator of the facility to take necessary corrective action. Such action may include physical inspection, testing, repair or other appropriate action to remedy the identified risk condition.

(b) *How is an operator notified of the proposed issuance of a safety order and what are its responses options?* (1) *Notice of proposed safety order.* PHMSA will serve written notice of a proposed safety order under §190.5 to an operator of the pipeline facility. The notice will allege the existence of a condition that poses a pipeline integrity risk to public safety, property, or the environment, and state the facts and circumstances that support issuing a safety order for the specified pipeline or portion thereof. The notice will also specify proposed testing, evaluations, integrity assessment, or other actions to be taken by the operator and may propose that the operator submit a work plan and schedule to address the conditions identified in the notice. The notice will also provide the operator with its response options, including procedures for requesting informal consultation and a hearing. An operator receiving a notice will have 30 days to respond to the PHMSA official who issued the notice.

(2) *Informal consultation.* Upon timely request by the operator, PHMSA will provide an opportunity for informal consultation concerning the proposed safety order. Such informal consultation shall commence within 30 days, provided that PHMSA may extend this time by request or otherwise for good cause. Informal consultation provides an opportunity for the respondent to explain the circumstances associated with the risk condition(s) identified in

the notice and, where appropriate, to present a proposal for corrective action, without prejudice to the operator's position in any subsequent hearing. If the respondent and Regional Director agree within 30 days of the informal consultation on a plan for the operator to address each risk condition, they may enter into a written consent agreement and the Associate Administrator may issue a consent order incorporating the terms of the agreement. If a consent agreement is reached, no further hearing will be provided in the matter and any pending hearing request will be considered withdrawn. If a consent agreement is not reached within 30 days of the informal consultation (or if informal consultation is not requested), the Associate Administrator may proceed under paragraphs (b)(3) through (5) of this section. If PHMSA subsequently determines that an operator has failed to comply with the terms of a consent order, PHMSA may obtain any administrative or judicial remedies available under 49 U.S.C. 60101 *et seq.* and this part. If a consent agreement is not reached, any admissions made by the operator during the informal consultation shall be excluded from the record in any subsequent hearing. Nothing in this paragraph (b) precludes PHMSA from terminating the informal consultation process if it has reason to believe that the operator is not engaging in good faith discussions or otherwise concludes that further consultation would not be productive or in the public interest.

(3) *Hearing.* An operator receiving a notice of proposed safety order may contest the notice, or any portion thereof, by filing a written request for a hearing within 30 days following receipt of the notice or within 10 days following the conclusion of informal consultation that did not result in a consent agreement, as applicable. In the absence of a timely request for a hearing, the Associate Administrator may issue a safety order in the form of the proposed order in accordance with paragraphs (c) through (g) of this section.

(4) *Conduct of hearing.* An attorney from the Office of Chief Counsel, will serve as the Presiding Official in a hearing under this section. The hearing

will be conducted informally, without strict adherence to formal rules of evidence in accordance with §190.211. The respondent may submit any relevant information or materials, call witnesses, and present arguments on the issue of whether a safety order should be issued to address the alleged presence of a condition that poses a pipeline integrity risk to public safety, property, or the environment.

(5) *Post-hearing action.* Following a hearing under this section, the Presiding Official will submit a recommendation to the Associate Administrator concerning issuance of a final safety order. Upon receipt of the recommendation, the Associate Administrator may proceed under paragraphs (c) through (g) of this section. If the Associate Administrator finds the facility to have a condition that poses a pipeline integrity risk to public safety, property, or the environment, the Associate Administrator will issue a safety order under this section. If the Associate Administrator does not find that the facility has such a condition, or concludes that a safety order is otherwise not warranted, the Associate Administrator will withdraw the notice and promptly notify the operator in writing by service as prescribed in §190.5. Nothing in this subsection precludes PHMSA and the operator from entering into a consent agreement at any time before a safety order is issued.

(6) *Termination of safety order.* Once all remedial actions set forth in the safety order and associated work plans are completed, as determined by PHMSA, the Associate Administrator will notify the operator that the safety order has been lifted. The Associate Administrator shall suspend or terminate a safety order whenever the Associate Administrator determines that the pipeline facility no longer has a condition or conditions that pose a pipeline integrity risk to public safety, property, or the environment.

(c) *How is the determination made that a pipeline facility has a condition that poses an integrity risk?* The Associate Administrator may find a pipeline facility to have a condition that poses a pipeline integrity risk to public safety,

property, or the environment under paragraph (a) of this section:

(1) If under the facts and circumstances the Associate Administrator determines the particular facility has such a condition; or

(2) If the pipeline facility or a component thereof has been constructed or operated with any equipment, material, or technique with a history of being susceptible to failure when used in pipeline service, unless the operator involved demonstrates that such equipment, material, or technique is not susceptible to failure given the manner it is being used for a particular facility.

(d) *What factors must PHMSA consider in making a determination that a risk condition is present?* In making a determination under paragraph (c) of this section, the Associate Administrator shall consider, if relevant:

(1) The characteristics of the pipe and other equipment used in the pipeline facility involved, including its age, manufacturer, physical properties (including its resistance to corrosion and deterioration), and the method of its manufacture, construction or assembly;

(2) The nature of the materials transported by such facility (including their corrosive and deteriorative qualities), the sequence in which such materials are transported, and the pressure required for such transportation;

(3) The characteristics of the geographical areas where the pipeline facility is located, in particular the climatic and geologic conditions (including soil characteristics) associated with such areas;

(4) For hazardous liquid pipelines, the proximity of the pipeline to an unusually sensitive area;

(5) The population density and growth patterns of the area in which the pipeline facility is located;

(6) Any relevant recommendation of the National Transportation Safety Board issued in connection with any investigation conducted by the Board;

(7) The likelihood that the condition will impair the serviceability of the pipeline;

(8) The likelihood that the condition will worsen over time; and

(9) The likelihood that the condition is present or could develop on other areas of the pipeline.

(e) *What information will be included in a safety order?* A safety order shall contain the following:

(1) A finding that the pipeline facility has a condition that poses a pipeline integrity risk to public safety, property, or the environment;

(2) The relevant facts which form the basis of that finding;

(3) The legal basis for the order;

(4) The nature and description of any particular corrective actions to be required of the operator; and

(5) The date(s) by which the required corrective actions must be taken or completed and, where appropriate, the duration of the order.

(f) *Can PHMSA take other enforcement actions on the affected facilities?* Nothing in this section precludes PHMSA from issuing a Notice of Probable Violation under §190.207 or taking other enforcement action if noncompliance is identified at the facilities that are the subject of a safety order proceeding.

(g) *May I petition for reconsideration of a safety order?* Yes, a petition for reconsideration may be submitted in accordance with §190.243.

[73 FR 16567, Mar. 28, 2008, as amended at 74 FR 2893, Jan. 16, 2009; Amdt. 190-16, 78 FR 58913, Sept. 25, 2013]

#### § 190.241 Finality.

Except as otherwise provided by §190.243, an order directing amendment issued under §190.206, a final order issued under §190.213, a corrective action order issued under §190.233, or a safety order issued under §190.239 is considered final administrative action on that enforcement proceeding.

[Amdt. 190-16, 78 FR 58913, Sept. 25, 2013]

#### § 190.243 Petitions for reconsideration.

(a) A respondent may petition the Associate Administrator for reconsideration of an order directing amendment of plans or procedures issued under §190.206, a final order issued under §190.213, or a safety order issued under §190.239. The written petition must be received no later than 20 days after receipt of the order by the respondent. A copy of the petition must

be provided to the Chief Counsel of the Pipeline and Hazardous Materials Safety Administration, East Building, 2nd Floor, Mail Stop E26-105, 1200 New Jersey Ave. SE., Washington, DC 20590 or by email to *phmsachiefcounsel@dot.gov*. Petitions received after that time will not be considered. The petition must contain a brief statement of the complaint and an explanation as to why the order should be reconsidered.

(b) If the respondent requests the consideration of additional facts or arguments, the respondent must submit the reasons why they were not presented prior to issuance of the final order.

(c) The filing of a petition under this section stays the payment of any civil penalty assessed. However, unless the Associate Administrator otherwise provides, the order, including any required corrective action, is not stayed.

(d) The Associate Administrator may grant or deny, in whole or in part, any petition for reconsideration without further proceedings. If the Associate Administrator reconsiders an order under this section, a final decision on reconsideration may be issued without further proceedings, or, in the alternative, additional information, data, and comment may be requested by the Associate Administrator, as deemed appropriate.

(e) It is the policy of the Associate Administrator to expeditiously issue notice of the action taken on a petition for reconsideration. In cases where a substantial delay is expected, notice of that fact and the date by which it is expected that action will be taken is provided to the respondent upon request and whenever practicable.

(f) If the Associate Administrator reconsiders an order under this section, the decision on reconsideration is the final administrative action on that enforcement proceeding.

(g) Any application for judicial review must be filed no later than 89 days after the issuance of the decision in accordance with 49 U.S.C. 60119(a).

(h) Judicial review of agency action under 49 U.S.C. 60119(a) will apply the standards of review established in 5 U.S.C. 706.

[Amdt. 190-16, 78 FR 58913, Sept. 25, 2013]

**Subpart C—Criminal Enforcement**

SOURCE: Amdt. 190–16, 78 FR 58914, Sept. 25, 2013, unless otherwise noted.

**§ 190.291 Criminal penalties generally.**

(a) Any person who willfully and knowingly violates a provision of 49 U.S.C. 60101 *et seq.* or any regulation or order issued thereunder will upon conviction be subject to a fine under title 18, United States Code, and imprisonment for not more than five years, or both, for each offense.

(b) Any person who willfully and knowingly injures or destroys, or attempts to injure or destroy, any interstate transmission facility, any interstate pipeline facility, or any intrastate pipeline facility used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce (as those terms are defined in 49 U.S.C. 60101 *et seq.*) will, upon conviction, be subject to a fine under title 18, United States Code, imprisonment for a term not to exceed 20 years, or both, for each offense.

(c) Any person who willfully and knowingly defaces, damages, removes, or destroys any pipeline sign, right-of-way marker, or marine buoy required by 49 U.S.C. 60101 *et seq.* or any regulation or order issued thereunder will, upon conviction, be subject to a fine under title 18, United States Code, imprisonment for a term not to exceed 1 year, or both, for each offense.

(d) Any person who willfully and knowingly engages in excavation activity without first using an available one-call notification system to establish the location of underground facilities in the excavation area; or without considering location information or markings established by a pipeline facility operator; and

(1) Subsequently damages a pipeline facility resulting in death, serious bodily harm, or property damage exceeding \$50,000;

(2) Subsequently damages a pipeline facility and knows or has reason to know of the damage but fails to promptly report the damage to the operator and to the appropriate authorities; or

(3) Subsequently damages a hazardous liquid pipeline facility that re-

sults in the release of more than 50 barrels of product; will, upon conviction, be subject to a fine under title 18, United States Code, imprisonment for a term not to exceed 5 years, or both, for each offense.

(e) No person shall be subject to criminal penalties under paragraph (a) of this section for violation of any regulation and the violation of any order issued under §§ 190.217, 190.219 or 190.291 if both violations are based on the same act.

**§ 190.293 Referral for prosecution.**

If a PHMSA employee becomes aware of any actual or possible activity subject to criminal penalties under § 190.291, the employee reports it to the Office of Chief Counsel, Pipeline and Hazardous Materials Safety Administration, and to his or her supervisor. The Chief Counsel may refer the report to OPS for investigation. If appropriate, the Chief Counsel refers the report to the Department of Justice for criminal prosecution of the offender.

**Subpart D—Procedures for Adoption of Rules**

SOURCE: Amdt. 190–8, 61 FR 50909, Sept. 27, 1996, unless otherwise noted.

**§ 190.301 Scope.**

This subpart prescribes general rule-making procedures for the issue, amendment, and repeal of Pipeline Safety Program regulations of the Pipeline and Hazardous Materials Safety Administration of the Department of Transportation.

[Amdt. 190–8, 61 FR 50909, Sept. 27, 1996, as amended at 70 FR 11137, Mar. 8, 2005]

**§ 190.303 Delegations.**

For the purposes of this subpart, *Administrator* means the Administrator, Pipeline and Hazardous Materials Safety Administration, or his or her delegate.

[Amdt. 190–8, 61 FR 50909, Sept. 27, 1996, as amended at 70 FR 11137, Mar. 8, 2005]

**§ 190.305 Regulatory dockets.**

(a) Information and data considered relevant by the Administrator relating

to rulemaking actions, including notices of proposed rulemaking; comments received in response to notices; petitions for rulemaking and reconsideration; denials of petitions for rulemaking and reconsideration; records of additional rulemaking proceedings under §190.325; and final regulations are maintained by the Pipeline and Hazardous Materials Safety Administration at 1200 New Jersey Avenue, SE, Washington, D.C. 20590-0001.

(b) Once a public docket is established, docketed material may be accessed at <http://www.regulations.gov>. Public comments also may be submitted at <http://www.regulations.gov>. Comment submissions must identify the docket number. You may also examine public docket material at the offices of the Docket Operations Facility (M-30), U.S. Department of Transportation, West Building, First Floor, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC 20590. You may obtain a copy during normal business hours, excluding Federal holidays, for a fee, with the exception of material which the Administrator of PHMSA determines should be withheld from public disclosure under 5 U.S.C. 552(b) or any other applicable statutory provision.

[Amdt. 190-8, 61 FR 50909, Sept. 27, 1996, as amended at 70 FR 11137, 11139, Mar. 8, 2005; 73 FR 16566, Mar. 28, 2008; 73 FR 16568, Mar. 28, 2008]

#### § 190.307 Records.

Records of the Pipeline and Hazardous Materials Safety Administration relating to rulemaking proceedings are available for inspection as provided in section 552(b) of title 5, United States Code, and part 7 of the Regulations of the Office of the Secretary of Transportation (part 7 of this title).

[Amdt. 190-8, 61 FR 50909, Sept. 27, 1996, as amended at 70 FR 11137, Mar. 8, 2005]

#### § 190.309 Where to file petitions.

Petitions for extension of time to comment submitted under §190.319, petitions for hearings submitted under §190.327, petitions for rulemaking submitted under §190.331, and petitions for reconsideration submitted under §190.335 must be submitted to: Admin-

istrator, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, 1200 New Jersey Avenue, SE, Washington, D.C. 20590-0001.

[Amdt. 190-8, 61 FR 50909, Sept. 27, 1996, as amended at 70 FR 11137, Mar. 8, 2005; 73 FR 16566, Mar. 28, 2008]

#### § 190.311 General.

Unless the Administrator, for good cause, finds that notice is impracticable, unnecessary, or contrary to the public interest, and incorporates that finding and a brief statement of the reasons for it in the rule, a notice of proposed rulemaking is issued and interested persons are invited to participate in the rulemaking proceedings with respect to each substantive rule.

#### § 190.313 Initiation of rulemaking.

The Administrator initiates rulemaking on his or her own motion; however, in so doing, the Administrator may use discretion to consider the recommendations of other agencies of the United States or of other interested persons including those of any technical advisory body established by statute for that purpose.

#### § 190.315 Contents of notices of proposed rulemaking.

(a) Each notice of proposed rulemaking is published in the FEDERAL REGISTER, unless all persons subject to it are named and are personally served with a copy of it.

(b) Each notice, whether published in the FEDERAL REGISTER or personally served, includes:

(1) A statement of the time, place, and nature of the proposed rulemaking proceeding;

(2) A reference to the authority under which it is issued;

(3) A description of the subjects and issues involved or the substance and terms of the proposed regulation;

(4) A statement of the time within which written comments must be submitted; and

(5) A statement of how and to what extent interested persons may participate in the proceeding.

## § 190.317

### § 190.317 Participation by interested persons.

(a) Any interested person may participate in rulemaking proceedings by submitting comments in writing containing information, views or arguments in accordance with instructions for participation in the rulemaking document.

(b) The Administrator may invite any interested person to participate in the rulemaking proceedings described in § 190.325.

(c) For the purposes of this subpart, an interested person includes any Federal or State government agency or any political subdivision of a State.

### § 190.319 Petitions for extension of time to comment.

A petition for extension of the time to submit comments must be submitted to PHMSA in accordance with § 190.309 and received by PHMSA not later than 10 days before expiration of the time stated in the notice. The filing of the petition does not automatically extend the time for petitioner's comments. A petition is granted only if the petitioner shows good cause for the extension, and if the extension is consistent with the public interest. If an extension is granted, it is granted to all persons, and it is published in the FEDERAL REGISTER.

[Amdt. 190-16, 78 FR 58914, Sept. 25, 2013]

### § 190.321 Contents of written comments.

All written comments must be in English. Any interested person should submit as part of written comments all material considered relevant to any statement of fact. Incorporation of material by reference should be avoided; however, where necessary, such incorporated material must be identified by document title and page.

[Amdt. 190-16, 78 FR 58914, Sept. 25, 2013]

### § 190.323 Consideration of comments received.

All timely comments and the recommendations of any technical advisory body established by statute for the purpose of reviewing the proposed rule concerned are considered before final action is taken on a rulemaking

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proposal. Late filed comments are considered so far as practicable.

### § 190.325 Additional rulemaking proceedings.

The Administrator may initiate any further rulemaking proceedings that the Administrator finds necessary or desirable. For example, interested persons may be invited to make oral arguments, to participate in conferences between the Administrator or the Administrator's representative and interested persons, at which minutes of the conference are kept, to appear at informal hearings presided over by officials designated by the Administrator at which a transcript of minutes are kept, or participate in any other proceeding to assure informed administrative action and to protect the public interest.

### § 190.327 Hearings.

(a) If a notice of proposed rulemaking does not provide for a hearing, any interested person may petition the Administrator for an informal hearing. The petition must be received by the Administrator not later than 20 days before expiration of the time stated in the notice. The filing of the petition does not automatically result in the scheduling of a hearing. A petition is granted only if the petitioner shows good cause for a hearing. If a petition for a hearing is granted, notice of the hearing is published in the FEDERAL REGISTER.

(b) Sections 556 and 557 of title 5, United States Code, do not apply to hearings held under this subpart. Unless otherwise specified, hearings held under this subpart are informal, non-adversarial fact-finding proceedings, at which there are no formal pleadings or adverse parties. Any regulation issued in a case in which an informal hearing is held is not necessarily based exclusively on the record of the hearing.

(c) The Administrator designates a representative to conduct any hearing held under this subpart. The Chief Counsel designates a member of his or her staff to serve as legal officer at the hearing.

[Amdt. 190-8, 61 FR 50909, Sept. 27, 1996. Redesignated and amended by Amdt. 190-16, 78 FR 58914, Sept. 25, 2013]

**§ 190.329 Adoption of final rules.**

Final rules are prepared by representatives of the Office of Pipeline Safety and the Office of the Chief Counsel. The regulation is then submitted to the Administrator for consideration. If the Administrator adopts the regulation, it is published in the FEDERAL REGISTER, unless all persons subject to it are named and are personally served with a copy of it.

**§ 190.331 Petitions for rulemaking.**

(a) Any interested person may petition the Associate Administrator for Pipeline Safety to establish, amend, or repeal a substantive regulation, or may petition the Chief Counsel to establish, amend, or repeal a procedural regulation.

(b) Each petition filed under this section must—

(1) Summarize the proposed action and explain its purpose;

(2) State the text of the proposed rule or amendment, or specify the rule proposed to be repealed;

(3) Explain the petitioner's interest in the proposed action and the interest of any party the petitioner represents; and

(4) Provide information and arguments that support the proposed action, including relevant technical, scientific or other data as available to the petitioner, and any specific known cases that illustrate the need for the proposed action.

(c) If the potential impact of the proposed action is substantial, and information and data related to that impact are available to the petitioner, the Associate Administrator or the Chief Counsel may request the petitioner to provide—

(1) The costs and benefits to society and identifiable groups within society, quantifiable and otherwise;

(2) The direct effects (including pre-emption effects) of the proposed action on States, on the relationship between the Federal Government and the States, and on the distribution of power and responsibilities among the various levels of government;

(3) The regulatory burden on small businesses, small organizations and small governmental jurisdictions;

(4) The recordkeeping and reporting requirements and to whom they would apply; and

(5) Impacts on the quality of the natural and social environments.

(d) The Associate Administrator or Chief Counsel may return a petition that does not comply with the requirements of this section, accompanied by a written statement indicating the deficiencies in the petition.

**§ 190.333 Processing of petition.**

(a) *General.* Unless the Associate Administrator or the Chief Counsel otherwise specifies, no public hearing, argument, or other proceeding is held directly on a petition before its disposition under this section.

(b) *Grants.* If the Associate Administrator or the Chief Counsel determines that the petition contains adequate justification, he or she initiates rulemaking action under this subpart.

(c) *Denials.* If the Associate Administrator or the Chief Counsel determines that the petition does not justify rulemaking, the petition is denied.

(d) *Notification.* The Associate Administrator or the Chief Counsel will notify a petitioner, in writing, of the decision to grant or deny a petition for rulemaking.

**§ 190.335 Petitions for reconsideration.**

(a) Except as provided in § 190.339(d), any interested person may petition the Associate Administrator for reconsideration of any regulation issued under this subpart, or may petition the Chief Counsel for reconsideration of any procedural regulation issued under this subpart and contained in this subpart. The petition must be received not later than 30 days after publication of the rule in the FEDERAL REGISTER. Petitions filed after that time will be considered as petitions filed under § 190.331. The petition must contain a brief statement of the complaint and an explanation as to why compliance with the rule is not practicable, is unreasonable, or is not in the public interest.

(b) If the petitioner requests the consideration of additional facts, the petitioner must state the reason they were not presented to the Associate Administrator or the Chief Counsel within the prescribed time.

## § 190.337

(c) The Associate Administrator or the Chief Counsel does not consider repetitious petitions.

(d) Unless the Associate Administrator or the Chief Counsel otherwise provides, the filing of a petition under this section does not stay the effectiveness of the rule.

[Amdt. 190-8, 61 FR 50909, Sept. 27, 1996. Re-designated and amended by Amdt. 190-16, 78 FR 58914, Sept. 25, 2013]

### § 190.337 Proceedings on petitions for reconsideration.

(a) The Associate Administrator or the Chief Counsel may grant or deny, in whole or in part, any petition for reconsideration without further proceedings, except where a grant of the petition would result in issuance of a new final rule. In the event that the Associate Administrator or the Chief Counsel determines to reconsider any regulation, a final decision on reconsideration may be issued without further proceedings, or an opportunity to submit comment or information and data as deemed appropriate, may be provided. Whenever the Associate Administrator or the Chief Counsel determines that a petition should be granted or denied, the Office of the Chief Counsel prepares a notice of the grant or denial of a petition for reconsideration, for issuance to the petitioner, and the Associate Administrator or the Chief Counsel issues it to the petitioner. The Associate Administrator or the Chief Counsel may consolidate petitions relating to the same rules.

(b) It is the policy of the Associate Administrator or the Chief Counsel to issue notice of the action taken on a petition for reconsideration within 90 days after the date on which the regulation in question is published in the FEDERAL REGISTER, unless it is found impracticable to take action within that time. In cases where it is so found and the delay beyond that period is expected to be substantial, notice of that fact and the date by which it is expected that action will be taken is issued to the petitioner and published in the FEDERAL REGISTER.

### § 190.338 Appeals.

(a) Any interested person may appeal a denial of the Associate Administrator

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or the Chief Counsel, issued under § 190.333 or § 190.337, to the Administrator.

(b) An appeal must be received within 20 days of service of written notice to petitioner of the Associate Administrator's or the Chief Counsel's decision, or within 20 days from the date of publication of the decision in the FEDERAL REGISTER, and should set forth the contested aspects of the decision as well as any new arguments or information.

(c) Unless the Administrator otherwise provides, the filing of an appeal under this section does not stay the effectiveness of any rule.

[Amdt. 190-8, 61 FR 50909, Sept. 27, 1996. Re-designated and amended by Amdt. 190-16, 78 FR 58914, Sept. 25, 2013]

### § 190.339 Direct final rulemaking.

(a) Where practicable, the Administrator will use direct final rulemaking to issue the following types of rules:

(1) Minor, substantive changes to regulations;

(2) Incorporation by reference of the latest edition of technical or industry standards;

(3) Extensions of compliance dates; and

(4) Other noncontroversial rules where the Administrator determines that use of direct final rulemaking is in the public interest, and that a regulation is unlikely to result in adverse comment.

(b) The direct final rule will state an effective date. The direct final rule will also state that unless an adverse comment or notice of intent to file an adverse comment is received within the specified comment period, generally 60 days after publication of the direct final rule in the FEDERAL REGISTER, the Administrator will issue a confirmation document, generally within 15 days after the close of the comment period, advising the public that the direct final rule will either become effective on the date stated in the direct final rule or at least 30 days after the publication date of the confirmation document, whichever is later.

(c) For purposes of this section, an adverse comment is one which explains why the rule would be inappropriate, including a challenge to the rule's underlying premise or approach, or would



be ineffective or unacceptable without a change. Comments that are frivolous or insubstantial will not be considered adverse under this procedure. A comment recommending a rule change in addition to the rule will not be considered an adverse comment, unless the commenter states why the rule would be ineffective without the additional change.

(d) Only parties who filed comments to a direct final rule issued under this section may petition under § 190.335 for reconsideration of that direct final rule.

(e) If an adverse comment or notice of intent to file an adverse comment is received, a timely document will be published in the FEDERAL REGISTER advising the public and withdrawing the direct final rule in whole or in part. The Administrator may then incorporate the adverse comment into a subsequent direct final rule or may publish a notice of proposed rulemaking. A notice of proposed rulemaking will provide an opportunity for public comment, generally a minimum of 60 days, and will be processed in accordance with §§ 190.311–190.329.

#### § 190.341 Special permits.

(a) *What is a special permit?* A special permit is an order by which PHMSA waives compliance with one or more of the Federal pipeline safety regulations under the standards set forth in 49 U.S.C. 60118(c) and subject to conditions set forth in the order. A special permit is issued to a pipeline operator (or prospective operator) for specified facilities that are or, absent waiver, would be subject to the regulation.

(b) *How do I apply for a special permit?* Applications for special permits must be submitted at least 120 days before the requested effective date using any of the following methods:

(1) Direct fax to PHMSA at: 202-366-4566; or

(2) Mail, express mail, or overnight courier to the Associate Administrator for Pipeline Safety, Pipeline and Hazardous Materials Safety Administration, 1200 New Jersey Avenue, SE., East Building, Washington, DC 20590.

(c) *What information must be contained in the application?* Applications must contain the following information:

(1) The name, mailing address, and telephone number of the applicant and whether the applicant is an operator;

(2) A detailed description of the pipeline facilities for which the special permit is sought, including:

(i) The beginning and ending points of the pipeline mileage to be covered and the Counties and States in which it is located;

(ii) Whether the pipeline is interstate or intrastate and a general description of the right-of-way including proximity of the affected segments to populated areas and unusually sensitive areas;

(iii) Relevant pipeline design and construction information including the year of installation, the material, grade, diameter, wall thickness, and coating type; and

(iv) Relevant operating information including operating pressure, leak history, and most recent testing or assessment results;

(3) A list of the specific regulation(s) from which the applicant seeks relief;

(4) An explanation of the unique circumstances that the applicant believes make the applicability of that regulation or standard (or portion thereof) unnecessary or inappropriate for its facility;

(5) A description of any measures or activities the applicant proposes to undertake as an alternative to compliance with the relevant regulation, including an explanation of how such measures will mitigate any safety or environmental risks;

(6) A description of any positive or negative impacts on affected stakeholders and a statement indicating how operating the pipeline pursuant to a special permit would be in the public interest;

(7) A certification that operation of the applicant's pipeline under the requested special permit would not be inconsistent with pipeline safety;

(8) Any other information PHMSA may need to process the application including environmental analysis where necessary.

(d) *How does PHMSA handle special permit applications?*—(1) *Public notice.* Upon receipt of an application or renewal of a special permit, PHMSA will

provide notice to the public of its intent to consider the application and invite comment. In addition, PHMSA may consult with other Federal agencies before granting or denying an application or renewal on matters that PHMSA believes may have significance for proceedings under their areas of responsibility.

(2) *Grants, renewals, and denials.* If the Associate Administrator determines that the application complies with the requirements of this section and that the waiver of the relevant regulation or standard is not inconsistent with pipeline safety, the Associate Administrator may grant the application, in whole or in part, for a period of time from the date granted. Conditions may be imposed on the grant if the Associate Administrator concludes they are necessary to assure safety, environmental protection, or are otherwise in the public interest. If the Associate Administrator determines that the application does not comply with the requirements of this section or that a waiver is not justified, the application will be denied. Whenever the Associate Administrator grants or denies an application, notice of the decision will be provided to the applicant. PHMSA will post all special permits on its Web site at <http://www.phmsa.dot.gov/>.

(e) *How does PHMSA handle special permit renewals?* (1) The grantee of the special permit must apply for a renewal of the permit 180 days prior to the permit expiration.

(2) If, at least 180 days before an existing special permit expires the holder files an application for renewal that is complete and conforms to the requirements of this section, the special permit will not expire until final administrative action on the application for renewal has been taken:

(i) Direct fax to PHMSA at: 202-366-4566; or

(ii) Express mail, or overnight courier to the Associate Administrator for Pipeline Safety, Pipeline and Hazardous Materials Safety Administration, 1200 New Jersey Avenue SE., Washington, DC 20590.

(f) *What information must be included in the renewal application?* (1) The renewal application must include a copy of the original special permit, the

docket number on the special permit, and the following information as applicable:

(i) A summary report in accordance with the requirements of the original special permit including verification that the grantee's operations and maintenance plan (O&M Plan) is consistent with the conditions of the special permit;

(ii) Name, mailing address and telephone number of the special permit grantee;

(iii) Location of special permit—areas on the pipeline where the special permit is applicable including: Diameter, mile posts, county, and state;

(iv) Applicable usage of the special permit—original and future; and

(v) Data for the special permit segment and area identified in the special permit as needing additional inspections to include, as applicable:

(A) Pipe attributes: Pipe diameter, wall thickness, grade, seam type; and pipe coating including girth weld coating;

(B) Operating Pressure: Maximum allowable operating pressure (MAOP); class location (including boundaries on aerial photography);

(C) High Consequence Areas (HCAs): HCA boundaries on aerial photography;

(D) Material Properties: Pipeline material documentation for all pipe, fittings, flanges, and any other facilities included in the special permit. Material documentation must include: Yield strength, tensile strength, chemical composition, wall thickness, and seam type;

(E) Test Pressure: Hydrostatic test pressure and date including pressure and temperature charts and logs and any known test failures or leaks;

(F) In-line inspection (ILI): Summary of ILI survey results from all ILI tools used on the special permit segments during the previous five years or latest ILI survey result;

(G) Integrity Data and Integration: The following information, as applicable, for the past five (5) years: Hydrostatic test pressure including any known test failures or leaks; casings (any shorts); any in-service ruptures or leaks; close interval survey (CIS) surveys; depth of cover surveys; rectifier readings; test point survey

readings; alternating current/direct current (AC/DC) interference surveys; pipe coating surveys; pipe coating and anomaly evaluations from pipe excavations; stress corrosion cracking (SCC), selective seam weld corrosion (SSWC) and hard spot excavations and findings; and pipe exposures from encroachments;

(H) In-service: Any in-service ruptures or leaks including repair type and failure investigation findings; and

(I) Aerial Photography: Special permit segment and special permit inspection area, if applicable.

(2) PHMSA may request additional operational, integrity or environmental assessment information prior to granting any request for special permit renewal.

(3) The existing special permit will remain in effect until PHMSA acts on the application for renewal by granting or denying the request.

(g) *Can a special permit be requested on an emergency basis?* Yes. PHMSA may grant an application for an emergency special permit without notice and comment or hearing if the Associate Administrator determines that such action is in the public interest, is not inconsistent with pipeline safety, and is necessary to address an actual or impending emergency involving pipeline transportation. For purposes of this section, an emergency event may be local, regional, or national in scope and includes significant fuel supply disruptions and natural or manmade disasters such as hurricanes, floods, earthquakes, terrorist acts, biological outbreaks, releases of dangerous radiological, chemical, or biological materials, war-related activities, or other similar events. PHMSA will determine on a case-by-case basis what duration is necessary to address the emergency. However, as required by statute, no emergency special permit may be issued for a period of more than 60 days. Each emergency special permit will automatically expire on the date specified in the permit. Emergency special permits may be renewed upon application to PHMSA only after notice and opportunity for a hearing on the renewal.

(h) *How do I apply for an emergency special permit?* Applications for emer-

gency special permits may be submitted to PHMSA using any of the following methods:

(1) Direct fax to the Crisis Management Center at: 202-366-3768;

(2) Direct e-mail to PHMSA at: *phmsa.pipeline-emergencyspecpermit@dot.gov*; or

(3) Express mail/overnight courier to the Associate Administrator for Pipeline Safety, Pipeline and Hazardous Materials Safety Administration, 1200 New Jersey Avenue, SE., East Building, Washington, DC 20590.

(i) *What must be contained in an application for an emergency special permit?* In addition to the information required under paragraph (c) of this section, applications for emergency special permits must include:

(1) An explanation of the actual or impending emergency and how the applicant is affected;

(2) A citation of the regulations that are implicated and the specific reasons the permit is necessary to address the emergency (e.g., lack of accessibility, damaged equipment, insufficient manpower);

(3) A statement indicating how operating the pipeline pursuant to an emergency special permit is in the public interest (e.g., continuity of service, service restoration);

(4) A description of any proposed alternatives to compliance with the regulation (e.g., additional inspections and tests, shortened reassessment intervals); and

(5) A description of any measures to be taken after the emergency situation or permit expires—whichever comes first—to confirm long-term operational reliability of the pipeline facility.

NOTE TO PARAGRAPH (g): If PHMSA determines that handling of the application on an emergency basis is not warranted, PHMSA will notify the applicant and process the application under normal special permit procedures of this section.

(j) *In what circumstances will PHMSA revoke, suspend, or modify a special permit?* (1) PHMSA may revoke, suspend, or modify a special permit on a finding that:

(i) Intervening changes in Federal law mandate revocation, suspension, or modification of the special permit;

(ii) Based on a material change in conditions or circumstances, continued adherence to the terms of the special permit would be inconsistent with safety;

(iii) The application contained inaccurate or incomplete information, and the special permit would not have been granted had the application been accurate and complete;

(iv) The application contained deliberately inaccurate or incomplete information; or

(v) The holder has failed to comply with any material term or condition of the special permit.

(2) Except as provided in paragraph (h)(3) of this section, before a special permit is modified, suspended or revoked, PHMSA will notify the holder in writing of the proposed action and the reasons for it, and provide an opportunity to show cause why the proposed action should not be taken.

(i) The holder may file a written response that shows cause why the proposed action should not be taken within 30 days of receipt of notice of the proposed action.

(ii) After considering the holder's written response, or after 30 days have passed without response since receipt of the notice, PHMSA will notify the holder in writing of the final decision with a brief statement of reasons.

(3) If necessary to avoid a risk of significant harm to persons, property, or the environment, PHMSA may in the notification declare the proposed action immediately effective.

(4) Unless otherwise specified, the terms and conditions of a corrective action order, compliance order, or other order applicable to a pipeline facility covered by a special permit will take precedence over the terms of the special permit.

(5) A special permit holder may seek reconsideration of a decision under paragraph (h) of this section as provided in paragraph (i) of this section.

(k) *Can a denial of a request for a special permit or a revocation of an existing special permit be appealed?* Reconsideration of the denial of an application for a special permit or a revocation of an existing special permit may be sought by petition to the Associate Administrator. Petitions for reconsideration

must be received by PHMSA within 20 calendar days of the notice of the grant or denial and must contain a brief statement of the issue and an explanation of why the petitioner believes that the decision being appealed is not in the public interest. The Associate Administrator may grant or deny, in whole or in part, any petition for reconsideration without further proceedings. The Associate Administrator's decision is the final administrative action.

(l) *Are documents related to an application for a special permit available for public inspection?* Documents related to an application, including the application itself, are available for public inspection on regulations.gov or the Docket Operations Facility to the extent such documents do not include information exempt from public disclosure under 5 U.S.C. 552(b). Applicants may request confidential treatment under part 7 of this title.

(m) *Am I subject to enforcement action for non-compliance with the terms and conditions of a special permit?* Yes. PHMSA inspects for compliance with the terms and conditions of special permits and if a probable violation is identified, PHMSA will initiate one or more of the enforcement actions under subpart B of this part.

[73 FR 16568, Mar. 28, 2008, as amended at 74 FR 2893, Jan. 16, 2009; Amdt. 190–16, 78 FR 58914, Sept. 25, 2013; Amdt. 190–19, 82 FR 7995, Jan. 23, 2017]

**§ 190.343 Information made available to the public and request for protection of confidential commercial information.**

When you submit information to PHMSA during a rulemaking proceeding, as part of your application for special permit or renewal, or for any other reason, we may make that information publicly available unless you ask that we keep the information confidential.

(a) *Asking for protection of confidential commercial information.* You may ask us to give confidential treatment to information you give to the agency by taking the following steps:

(1) Mark “confidential” on each page of the original document you would like to keep confidential.

(2) Send us, along with the original document, a second copy of the original document with the confidential commercial information deleted.

(3) Explain why the information you are submitting is confidential commercial information.

(b) *PHMSA decision.* PHMSA will treat as confidential the information that you submitted in accordance with this section, unless we notify you otherwise. If PHMSA decides to disclose the information, PHMSA will review your request to protect confidential commercial information under the criteria set forth in the Freedom of Information Act (FOIA), 5 U.S.C. 552, including following the consultation procedures set out in the Departmental FOIA regulations, 49 CFR 7.29. If PHMSA decides to disclose the information over your objections, we will notify you in writing at least five business days before the intended disclosure date.

[Amdt. 190-19, 82 FR 7995, Jan. 23, 2017]

### Subpart E—Cost Recovery for Design Reviews

SOURCE: Amdt. 190-19, 82 FR 7996, Jan. 23, 2017, unless otherwise noted.

#### § 190.401 Scope.

If PHMSA conducts a facility design and/or construction safety review or inspection in connection with a proposal to construct, expand, or operate a gas, hazardous liquid or carbon dioxide pipeline facility, or a liquefied natural gas facility that meets the applicability requirements in § 190.403, PHMSA may require the applicant proposing the project to pay the costs incurred by PHMSA relating to such review, including the cost of design and construction safety reviews or inspections.

#### § 190.403 Applicability.

The following paragraph specifies which projects will be subject to the cost recovery requirements of this section.

(a) This section applies to any project that—

(1) Has design and construction costs totaling at least \$2,500,000,000, as periodically adjusted by PHMSA, to take

into account increases in the Consumer Price Index for all urban consumers published by the Department of Labor, based on—

(i) The cost estimate provided to the Federal Energy Regulatory Commission in an application for a certificate of public convenience and necessity for a gas pipeline facility or an application for authorization for a liquefied natural gas pipeline facility; or

(ii) A good faith estimate developed by the applicant proposing a hazardous liquid or carbon dioxide pipeline facility and submitted to the Associate Administrator. The good faith estimate for design and construction costs must include all of the applicable cost items contained in the Federal Energy Regulatory Commission application referenced in § 190.403(a)(1)(i) for a gas or LNG facility. In addition, an applicant must take into account all survey, design, material, permitting, right-of-way acquisition, construction, testing, commissioning, start-up, construction financing, environmental protection, inspection, material transportation, sales tax, project contingency, and all other applicable costs, including all segments, facilities, and multi-year phases of the project;

(2) Uses new or novel technologies or design, as defined in § 190.3.

(b) The Associate Administrator may not collect design safety review fees under this section and 49 U.S.C. 60301 for the same design safety review.

(c) The Associate Administrator, after receipt of the design specifications, construction plans and procedures, and related materials, determines if cost recovery is necessary. The Associate Administrator's determination is based on the amount of PHMSA resources needed to ensure safety and environmental protection.

#### § 190.405 Notification.

For any new pipeline facility construction project in which PHMSA will conduct a design review, the applicant proposing the project must notify PHMSA and provide the design specifications, construction plans and procedures, project schedule and related materials at least 120 days prior to the commencement of any of the following

## § 190.407

activities: Route surveys for construction, material manufacturing, offsite facility fabrications, construction equipment move-in activities, onsite or offsite fabrications, personnel support facility construction, and any offsite or onsite facility construction. To the maximum extent practicable, but not later than 90 days after receiving such design specifications, construction plans and procedures, and related materials, PHMSA will provide written comments, feedback, and guidance on the project.

### § 190.407 Master Agreement.

PHMSA and the applicant will enter into an agreement within 60 days after PHMSA received notification from the applicant provided in §190.405, outlining PHMSA's recovery of the costs associated with the facility design safety review.

(a) A Master Agreement, at a minimum, includes:

- (1) Itemized list of direct costs to be recovered by PHMSA;
  - (2) Scope of work for conducting the facility design safety review and an estimated total cost;
  - (3) Description of the method of periodic billing, payment, and auditing of cost recovery fees;
  - (4) Minimum account balance which the applicant must maintain with PHMSA at all times;
  - (5) Provisions for reconciling differences between total amount billed and the final cost of the design review, including provisions for returning any excess payments to the applicant at the conclusion of the project;
  - (6) A principal point of contact for both PHMSA and the applicant; and
  - (7) Provisions for terminating the agreement.
- (8) A project reimbursement cost schedule based upon the project timing and scope.

(b) [Reserved]

### § 190.409 Fee structure.

The fee charged is based on the direct costs that PHMSA incurs in conducting the facility design safety review (including construction review and inspections), and will be based only on costs necessary for conducting the facility design safety review. "Nec-

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essary for" means that but for the facility design safety review, the costs would not have been incurred and that the costs cover only those activities and items without which the facility design safety review cannot be completed.

(a) Costs qualifying for cost recovery include, but are not limited to—

- (1) Personnel costs based upon total cost to PHMSA;
  - (2) Travel, lodging and subsistence;
  - (3) Vehicle mileage;
  - (4) Other direct services, materials and supplies;
  - (5) Other direct costs as may be specified in the Master Agreement.
- (b) [Reserved]

### § 190.411 Procedures for billing and payment of fee.

All PHMSA cost calculations for billing purposes are determined from the best available PHMSA records.

(a) PHMSA bills an applicant for cost recovery fees as specified in the Master Agreement, but the applicant will not be billed more frequently than quarterly.

(1) PHMSA will itemize cost recovery bills in sufficient detail to allow independent verification of calculations.

(2) [Reserved]

(b) PHMSA will monitor the applicant's account balance. Should the account balance fall below the required minimum balance specified in the Master Agreement, PHMSA may request at any time the applicant submit payment within 30 days to maintain the minimum balance.

(c) PHMSA will provide an updated estimate of costs to the applicant on or near October 1st of each calendar year.

(d) Payment of cost recovery fees is due within 30 days of issuance of a bill for the fees. If payment is not made within 30 days, PHMSA may charge an annual rate of interest (as set by the Department of Treasury's Statutory Debt Collection Authorities) on any outstanding debt, as specified in the Master Agreement.

(e) Payment of the cost recovery fee by the applicant does not obligate or prevent PHMSA from taking any particular action during safety inspections on the project.