

2019 AOPL Annual Business Conference

PHMSA Update: Inspections & Enforcement

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The Pipeline & Energy Authority

Agenda: PHMSA Update

Introductions

PHMSA Inspections

Internal Audits

Enforcement

Recent Experiences

Potential PSA Reauthorization Impacts



Inspections

PHMSA's Inspection Process

Who is inspected and by whom?

How does PHMSA schedule inspections?

What is reviewed or covered?



Preparing for an Inspection

[Gather Intel from PHMSA](#) – PHMSA should provide a summary of the areas and locations that an inspection will cover.

[Review PHMSA Inspection Protocols/Checklists](#) – Review relevant Agency inspection protocol forms (publicly available).

[Review Incident and Enforcement History](#) – Review Company's incident and enforcement history, safety-related condition reports, and where relevant construction and/or integrity management notifications.

[Designate a Primary Point of Contact](#) – Designate a point of contact and/or audit team to assist the PHMSA during the inspection. Typically is a person(s) with relevant subject matter expertise and experience interfacing with regulators during audits.



Inspections

Managing an Inspection

Be Cooperative – Be forthcoming and cooperative.

Participate in Introductory and Exit Meetings – During the introductory meeting, discuss proposed document sharing protocol for sharing documents that are confidential and protected under FOIA. Exit meeting should flag any issues noted during the inspection.

Respond to Questions – Limit their responses to the questions asked and to subject matter for which they are knowledgeable.

Maintain Detailed Summary of Interviews/Questions /Documents – Designate a note taker, and consider whether to maintain internal summaries of the inspection, whether daily, weekly or by inspection. Also maintain a “document log” to include a record of what and when documents are requested.

Coordinate with Legal as appropriate.



Inspections

Inspection Follow-up

Additional Requests for Information – Anticipate follow up from PHMSA, including verbal, email or more formal written requests for additional information.

Post-Inspection Briefings – required within 30 days of the inspection and, to the extent practicable, required to provide written preliminary findings of the inspection within 90 days.

Addressing Endless Data Requests and Bringing an Audit to Closure – patience, documentation, and convene meetings with Region (including Region Director) as appropriate.



Inspections

Current Inspection Trends

Jurisdictional issues

Facilities (LNG plants, underground storage, breakout tanks, etc.)

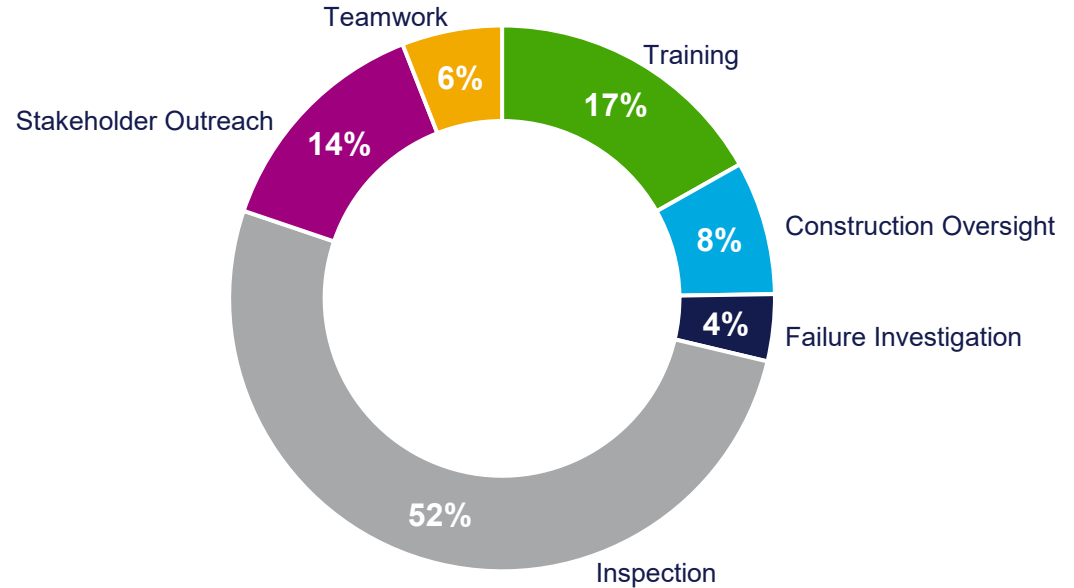
New construction/compliance with construction standards

Records

OQ

Idled pipelines

Federal Effort Allocation



Inspections

Current Inspection Issues / Concerns

Consistency

Inspection time/resources

Joint inspections

Preemption

Post-inspection briefings

Risk ranking methodology has been criticized by GAO



Internal Audits: Purpose

- Understand compliance risk
- An opportunity to manage risk, instead of someone else managing it for you
- Avoid or mitigate enforcement
- Reduce uncertainty
- Credibility & goodwill with regulators, shareholders & the public



Internal Audits: Considerations

- Post acquisition & routine audits
- Are you prepared to fix what you find?
- Timing is everything
- Protecting findings – Attorney client privilege, attorney work product, state audit privilege laws, FOIA
- Successor liability



Internal Audits: PHMSA Policy

- No formal policy
- Policy set out through enforcement
- Audit assets upon acquisition
- Remedy non-compliance quickly
- Accountable for prior operator's knowledge, if you know or have reason to know
- Prior compliance orders carry forward
- Inspection intervals not reset by acquisition



Internal Audits: Recommended Approach

- Scope
- Decide on privilege
- Team
- Privilege and communications guidance
- Facility visits and document review
- Interviews with company personnel
- Evaluate potential compliance issues
- Report and dissemination



Internal Audits: Managing the Results

- Develop remediation plan
- Track progress, avoid loose ends
- Consider self-report
 - Carefully
 - Region & DC
 - In person & in writing
 - Appropriate markings
- Corporate governance & reporting



Enforcement: Options for Responding

NOPVs with Penalties and/or Compliance Order –
Two or Three Parts – They Go Hand in Hand – Sorta

- Alleged Violations – the Substantive
- Proposed Civil Penalties
- Proposed Compliance Order



Enforcement: Options for Responding

Regulatory Options – 49 C.F.R Part 190

- Do Nothing – Inadvisable
- Give In – Don't Contest – One or More Actions Follow:
 - Pay the Penalty which Authorizes Finding(s) of Violation and/or
 - Implement the Compliance Order – Report to the Director, Etc.
 - You're Done
- Respond in Writing: Argue Against the Alleged Violations, the Civil Penalties, and/or the Compliance Order – But Is Anybody Listening?
- Request a Hearing: Argue Against the Alleged Violations, the Civil Penalties, and/or the Compliance Order



“Other” Regulatory Options

- Seek Settlement – Entry into a “Consent Agreement and Order” (Part 190 calls it a “consent order”; but PHMSA does not ... ?!)
- Is PHMSA/OPS Willing?

Some Practical Steps

- Get the Case File
- Request a Hearing (unless the case is a dud)
- Decide What Matters Most

Enforcement: Options for Responding

Get the Case File

- You Are Entitled (49 C.F.R. §§ 190.209, 208)
- You Should Not Hesitate
- Nor Waste a Moment
- Because You NEVER Know What You'll Find – or Be Amazed NOT to Find
- Greatly Informative to Initial Decision-Making
- Almost Always – That's the Agency's Case, and they Ain't Got Nothin' Else



Enforcement: Options for Responding

Decide What Matters Most in These Areas –

- Safety – What's Your PSMS Telling You About This Situation?
- Principles
- Economics
- Agency Wrong-Ness (Looks and Acts a Lot Like a Matter of Principle)
- Corporate Policy / Social Standing – Perception Has Value



Consent order (190.219) – The Reg *Sounds* Easier Than the Reality

At any time before issuance of Compliance Order, Corrective Action Order, or Safety Order, the Region Director and Respondent may agree to resolve the case

Environment Is Better than Before: Hogfoss – Roberti Exchange

Enforcement: Settlements

A Multitude of Factors

Timing Matters

Is Anybody Listening?

Who Do You Trust? Region vs. Washington HQ

Exactly What Is an Agency Order? [49 U.S.C. § 60119(a)]



Process – NOPVs with Penalties and/or Compliance Order

- NOPV is Served – Request the Case File Immediately
- Respond within 30 Days – Extensions Generally Available
- Set Hearing – Differing Styles Among Presiding Officials
- Prepare!
- Pre-Hearing Submissions – Either Party or Both – Materials to be Introduced but Which Are Not in Case File
- Hearing – See Below

Enforcement: Hearing and Post-Hearing Process and Best Practices

- Post-Hearing
 - Post-Hearing “Submissions” –
 - Respondent’s Brief and ...
 - Agency Crickets
 - Region Recommendation – The Region’s “Response” – Who Writes Those?
 - Respondent’s Response to the Region Recommendation – Must Request
 - Presiding Official’s Recommended Decision.....???



Enforcement: Hearing and Post-Hearing Process and Best Practices

Best Practices – A Few, Anyway

- Engage in Dialogue with Agency Before Any Agency Action – Maintain Relationships with Your Regulator
- Request a Hearing
 - Should Give You Time to Evaluate the Case
 - All You Need is a Statement of Issues (which you can change)
 - You Always Can Withdraw
 - Should Allow Time for Potential Options to Develop
- Thoroughly Investigate and Research
- Prepare, Prepare, Prepare



Enforcement: Hearing and Post-Hearing Process and Best Practices

- Hearing Considerations
 - What's the Case File Look Like?
 - If the Agency Lacks Evidence – Do Ya Really Wanna Bring that Witness?
 - Generally, Better Outcomes with Better Records
 - Rebuttal Evidence
 - Formalize the Informal
 - *Remember Where the Burdens Lie*

Enforcement: Hearing and Post-Hearing Process and Best Practices

- If Possible and Desired, Strategically Angle Toward Settlement (Consent)
- Request the Region Recommendation and the Opportunity to Respond (then do it)
- Request the Presiding Official's Recommended Decision and the Opportunity to Respond – But Don't Get Your Hopes Up...

Recent Experiences: Region Recommendations

Not always provided (tied to request for case file)

Lack of timeliness in issuance

Scope expansion concerns

Exercise ability to respond

Recent Experiences: Fair Notice

“Notice reasonably calculated to inform the regulated party of the nature of the action being taken to allow an opportunity to challenge the action” (DOT Memo, S. Bradbury, Feb. 15, 2019, at 7)

Does PHMSA/OPS Clear the Threshold?

The agency must have “state[d] with *ascertainable certainty* what is meant by the standards [it] has promulgated.” *EMPCo vs. DOT*, quoting *Diamond Roofing*, 2017 (emphasis supplied).

Recent Experiences: Fair Notice

“Agency regulations that ‘allow monetary penalties against those who violate them ... must give [a party] *fair warning of the conduct it prohibits or requires*, and it must provide a reasonably clear standard of culpability to circumscribe the discretion of the enforcing authority and its agents.’” *Id.* (emphasis supplied).

Where Should You Look? The Regs? Final Rules and Preambles?
Interpretations? Agency Guidance Docs?

Ohio River Valley Pipeline

Recent Experiences: Burden of Proof

- PHMSA bears the burden of proof in an enforcement case
- This includes burdens of persuasion & production
- PHMSA must show by a preponderance of the evidence that violation occurred (more than 50%)
- If respondent can demonstrate evidence that outweighs PHMSA, then no violation can stand
- If the evidence is closely balanced, PHMSA has not met the burden

Recent Experiences: Burden of Proof

- Request the casefile
- Advantages of developing the record
 - Take a broad view of what could show compliance
 - Consider using expert reports
- Demonstrates the importance of day-to-day compliance documentation

Recent Experiences: Duke Energy

- PHMSA asserts jurisdiction down-hole at an underground liquids storage facility
- Contrary to past guidance
- Potential factual distinctions, but...
- What is next?



Any Questions?



Thank You!

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