

Client Alert

Pipeline Safety and Hazardous Materials Transportation Practice Group

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PHMSA Targeting Pipeline Construction *Enforcement Focus on 60-Day Notification Requirement*

The Pipeline and Hazardous Materials Safety Administration has stepped up enforcement efforts concerning pipeline and LNG terminal construction. Construction-related inspections have resulted in a number of recent enforcement actions, and the agency plans to hire 100 or more safety inspectors this year. A PHMSA official recently confirmed at a King & Spalding webinar that construction is a 2015 enforcement priority area. In addition, EPA and DOJ are increasingly interested in PHMSA's enforcement matters, particularly to align PHMSA with the other agencies and U.S. Attorneys around the country who seek criminal penalties for willful violations.

Based on PHMSA's enforcement activities, it appears that at least some energy infrastructure developers do not realize that PHMSA's federal safety standards apply to the design, siting, and construction of new gas and liquids pipeline facilities and LNG terminals and to major modifications of those facilities (major modifications are typically defined as costing \$10 million or more). *See generally* 49 C.F.R. Parts 190-195.

Some developers also may have failed to note that PHMSA requires a *60-day pre-construction notification* for most new construction and major modifications. *See* 49 C.F.R. §§ 191.22(c) (regarding gas pipeline facilities and LNG terminals) and 195.64(c) (regarding hazardous liquids pipeline facilities). This notification is given electronically, through the National Registry of Pipeline and LNG Operators, at <http://opsweb.phmsa.dot.gov>. Developers should note that pipeline facilities and systems are defined broadly by regulation, as including: all related equipment, facilities, buildings, line pipe, valves, pumping units, breakout tanks, compressor units, metering and delivery stations, and other appurtenances involved in the delivery of gas or hazardous liquids. *See* 49 C.F.R. §§ 191.3 and 195.2.

PHMSA's enforcement actions suggest developers should assess carefully not only what projects require the notification, but also what activities start the 60-day clock. In September 2014, PHMSA issued an Advisory Bulletin in the Federal Register, which attempted to clarify the activities PHMSA believes will commence construction, for purposes of calculating the 60-day advance notification period: "PHMSA strongly encourages operators to provide the required construction-related notification(s) not later than 60 days prior to *whichever of the following activities occurs first*: Material

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purchasing and manufacturing; right-of-way acquisition; construction equipment move-in activities; onsite or offsite fabrications; or right-of-way clearing, grading and ditching.” See 79 Fed. Reg. 54777-78, at 54777 (Sept. 12, 2014) (emphasis added). Many of these activities typically are done well in advance of actual construction – for example, right-of-way acquisition and material purchasing.

While the Advisory Bulletin provides useful guidance, its definition of what activities commence construction was not subject to notice-and-comment rulemaking and as such, may not be enforceable, as even PHMSA seems to concede. See *id.* at 54778 (“... these activities may not necessarily represent the commencement of construction for purposes of triggering the minimum 60-day notice period ... *subject to enforcement* by PHMSA.”) (emphasis added). However, the underlying regulatory requirement to notify PHMSA 60 days prior to construction *remains enforceable*. Accordingly, the question is not whether to notify, but when to notify. In the Advisory Bulletin, PHMSA emphasized it is in a developer’s self-interest to provide PHMSA with the earliest notification possible, so the agency’s review does not delay the project. See *id.* (“PHMSA needs to be aware of certain construction-related events to have sufficient time to schedule reviews of pipeline construction plans and inspections. ... [T]imely construction plan reviews and inspections by PHMSA could help operators avoid costly modifications, repairs and/or additions to achieve compliance with the Federal pipeline safety regulations.”).

The current enforcement environment suggests developers should consider PHMSA’s “invitation” to notify early, as well as the applicable regulation’s text, when determining what notification is appropriate.

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