



**MURCHISON**  
LAW FIRM, PLLC

## **Revisions to PHMSA Procedural Regulations What's Changing and What It Could Mean**

**API Pipeline Conference  
Coronado, California**

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# The Pipeline & Energy Authority



# **Introduction – Subjects to Cover**



## Introduction – Subjects to Cover

- Background
- Overview
- Investigation
- Prosecution
- Specific Relief
- Expectations
- Helpful Hints



The background of the slide features a photograph of several large, cylindrical industrial storage tanks. Each tank is equipped with a metal staircase on its side and a walkway with a railing at the top. The image is overlaid with a semi-transparent blue gradient that fades from the top to the bottom. A solid blue vertical bar is positioned on the far left edge of the slide.

# Background



# Background



- Context
  - PSA Reauthorization
  - “Comments”
- Pipeline Safety Act of 2011
  - Development of Statutory Language
  - PHMSA “Preemption” – July 2011 Policy Statement
  - PSA 2011 Directives
- Codifying Practice



# Overview



## Overview

- Investigation
  - Requests for Information
  - Obstruction
- Enforcement
  - Penalties – Maximums Increased
  - Clean Water Act – OPA '90
  - Criminal Penalties

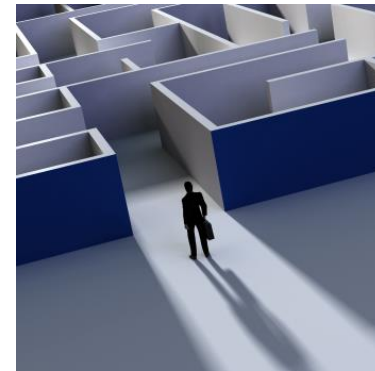






# Overview

- Prosecution
  - Separation of Functions – Investigation / Prosecution vs Decision-Making
  - Hearings
  - Evidentiary Material
  - Presiding Official
- Specific Relief
  - Corrective Action Orders
- Orders and Appeals
  - Petitions for Reconsideration





# Prosecution





## Prosecution

- Separation of Functions
  - Investigation/Prosecution vs. Decision-Making
- Evidentiary Materials
  - Proposed – Upon Request, OPS will Provide Evidence in Advance of Hearing...To the Extent Practicable...
  - Proposed – Respondent must submit all Evidence at Least 10 Days in Advance (failure could mean waiver of right to introduce)
  - Does That Work for Everybody?



## Prosecution

- Presiding Official
  - Proposed –
    - Not Engaged in Investigative or Prosecutorial Functions
    - If Unavailable, Delegate to Another Attorney with No Prior Involvement
- Industry Says...
  - Any Substitute Presiding Official Must Satisfy PSA 2011 Requirement – Not Engaged in Investigative or Prosecutorial Functions
  - Therefore, Amend the Proposal to Set That Standard
- With Whom Does the Presiding Official Consult?



# Specific Relief



## Specific Relief

- Corrective Action Orders – Expedited Review
  - Proposed –
    - Expedited Review Means: The process for Making a Prompt Determination...Whether the Order Should Remain in Effect or Be Terminated
    - Expedited Review Will be Complete Upon Issuance of Such Determination
    - Where's the Beef?
  - Industry Says...This Is Too Important!
    - Hearing Within 15 Days of Order
    - Decision Within 15 Days of Hearing
    - Retain 48-Hour Rule for Presiding Official's Recommendation
    - Provide Clear and Expeditious Timeline





# Orders and Appeals



## Orders and Appeals

- Petitions for Reconsideration
  - Proposed –
    - Response Time Increased from 20 to 30 Days
    - Penalties Stayed, but Order (Compliance) **Is Not Stayed**
    - Decision on Reconsideration is Final Agency Action (Thou Now Mayest Appeal)
  - So?
    - As Proposed, Requires Reconsideration, Yet Order Remains Effective – Does That Work for Everybody?
    - APA Says...Cannot Be Subject to Order that Is Not Yet Final for Court Review
  - The Order Must Be Stayed Pending Reconsideration – So Say The Supremes



# Expectations for Final Rule





## Expectations for Final Rule

- Increased Penalty Authority Will NOT be Retroactive (as proposed)
- Status: “we are making good progress on it...”
- Draft Final Rule for DOT Concurrence “in the near future”
- But No Predictions on Issuance of the Final Rule
- Aside – Would a Penalty Policy Work for Everyone?
- Aside – PHMSA’s OQ Position Clarified
  - *In the Matter of Enterprise Products Operating, LLC*, Final Order, CPF No. 3-2009-5022, Aug. 14, 2012



# Helpful Hints



## Helpful Hints

- Timing and Deadlines – Be Meticulous
- The Record – Create One That You Can Reconstruct
  - Hearing Transcript
  - Document Numbering
  - Document Logs
  - Be Clear in Your Expectations – Collaborate
- Remember the Kindergarten Rules





**Thank You**

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