

INSIGHTS

PHMSA Releases Civil Penalty Policy Framework, Sets its Sight on Higher Penalties “Across the Board”

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This week, the Pipeline and Hazardous Materials Safety Administration (PHMSA) released a [General Policy Statement](#) announcing its intent to make available to the public a Civil Penalty Policy Framework. Previously only available by request, the civil penalty framework provides insight into the factors PHMSA considers and the ranges of proposed penalties that the agency might issue in civil enforcement cases. Now, PHMSA will maintain the penalty framework on the agency’s website in an effort to provide “greater transparency” to operators and the public during the civil enforcement process. Notably, the General Policy Statement provides that, as appropriate, PHMSA will seek “higher penalties across the board for any violation of Federal pipeline safety standards” as a deterrent and in order to drive down the risk of incidents.

PHMSA Civil Penalty Process

If PHMSA uncovers a potential violation during an inspection or investigation of a pipeline facility, the agency may determine that a civil penalty is warranted. In such cases, PHMSA will review the data collected during the inspection or investigation in light of the civil penalty assessment factors in 49 C.F.R. § 190.225. PHMSA will consider the following factors:

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; and*
5. *The effect on the respondent's ability to continue in business.*

PHMSA may also consider: (1) the economic benefit gained from violation, if readily ascertainable, without any reduction because of subsequent damages; and (2) other matters as justice may require.

In this latest General Policy Statement, PHMSA lays out the Civil Penalty Policy Framework in [a helpful table](#) that covers the factors from § 190.225 above. For each factor, PHMSA provides a range of conduct along with a corresponding range of penalty. PHMSA determines the civil penalty for a single violation by combining the dollar amounts assigned for each factor.

PHMSA confirmed that it will give greater weight to certain factors for:

1. Violations that cause incidents or that increase the severity of incidents, including those involving smaller hazardous liquid spills or resulting in methane releases;
2. Violations that are “repeat offenses” or violations of the same safety standard over a five year period; and
3. Multiple instances of the same violation.

Higher Penalties “Across the Board”

The Pipeline Safety Act of 2011 increased the maximum civil penalty PHMSA could issue to \$200,000 for each violation per day up to \$2,000,000 for a related series of violations. PHMSA announced in this latest General Policy Statement that it intends to exercise its current authority, as appropriate, to issue higher penalties across the board for any violation of Federal pipeline safety standards. PHMSA believes this is a justified deterrent that will drive down incident risk.

PHMSA may already be implementing its “higher penalties” approach. As of October 3, 2016, PHMSA has opened 29 civil enforcement cases, proposing a total of \$7,752,000 in penalties. While the facts and circumstances surrounding a civil enforcement action may vary matter to matter and year to year, so far, 2016 has the highest average proposed penalty per case opened since 2008, and the second highest over the past 14 years.

PHMSA Civil Penalty Cases Initiated: 2002-2016

Year Opened	Cases Opened	Total Penalties Proposed
2002	46	\$1,758,950
2003	33	\$1,025,000
2004	64	\$2,240,800
2005	80	\$4,557,950
2006	34	\$3,331,800
2007	44	\$4,162,800
2008	25	\$8,813,600
2009	38	\$6,468,800

2010	34	\$4,537,800
2011	56	\$3,670,400
2012	58	\$8,766,900
2013	63	\$9,775,400
2014	25	\$2,671,200
2015	37	\$3,074,600
YTD 2016	YTD 29	YTD \$7,752,500
Totals	666	\$72,608,500

PHMSA's decision to make the Civil Penalty Policy Framework available to the public provides some insight into the agency's thinking with respect to civil violations. However, PHMSA reiterates that it maintains "broad discretion in its evaluation of the assessment considerations outlined in its regulations." Operators involved in enforcement actions will benefit from seeing the detailed civil penalty calculation based on the facts of their particular case.