

PART 190 - PIPELINE SAFETY PROGRAMS AND RULEMAKING PROCEDURES

NEW FORMAT

For future versions of this manual, changes to the regulations will show **highlights** for deletions and underline for additions.

AMENDMENT TABLE OF SECTION REVISIONS FOR THIS VERSION OF PART 190

PART 190 AMENDMENT NUMBER	EFFECTIVE DATE OF AMENDMENT	PARAGRAPH IMPACT	IN REFERENCE TO:
12	03/08/05	190.1, .3, .7, .9, .11, .203, .211, .213, .215, .223, .225, .227, .229, .233, .235, .301, .305, .307, .309	NOMENCLATURE CHANGE AND TECHNICAL AMENDMENTS
[13]*	04/28/08	190.5, .9, .11, .209, .227, .239, .305, .309, .341	ADMINISTRATIVE PROCEDURES, UPDATES AND TECHNICAL AMENDMENTS

*PHMSA quit numbering their new amendments. For the purposes of tracking, T&Q is maintaining a numbering system.

PART 190 - PIPELINE SAFETY PROGRAMS AND RULEMAKING PROCEDURES

Subpart A—General

Sec.

- 190.1 Purpose and scope.
- 190.3 Definitions.
- 190.5 Service.
- 190.7 Subpoenas; witness fees.
- 190.9 Petitions for finding or approval.
- 190.11 Availability of informal guidance and interpretive assistance.

Subpart B—Enforcement

- 190.201 Purpose and scope.
- 190.203 Inspections and investigations.
- 190.205 Warning letters.
- 190.207 Notice of probable violation.
- 190.209 Response options.
- 190.211 Hearing.
- 190.213 Final Order.
- 190.215 Petitions for reconsideration.

Compliance Orders

- 190.217 Compliance orders generally.
- 190.219 Consent order.

Civil Penalties

- 190.221 Civil penalties generally.
- 190.223 Maximum penalties.
- 190.225 Assessment considerations.
- 190.227 Payment of penalty.

Criminal Penalties

- 190.229 Criminal penalties generally.
- 190.231 Referral for prosecution.

Specific Relief

- 190.233 Hazardous facility orders.
- 190.235 Injunctive action.
- 190.237 Amendment of plans or procedures.
- 190.239 Safety Orders

Subpart C—Procedures for Adoption of Rules

- 190.301 Scope.
- 190.303 Delegations.
- 190.305 Regulatory dockets.
- 190.307 Records.
- 190.309 Where to file petitions.
- 190.311 General.
- 190.313 Initiation of rulemaking.
- 190.315 Contents of notices of proposal rulemaking.
- 190.317 Participation by interested persons.
- 190.319 Petitions for extension of time to comment.
- 190.321 Contents of written comments.
- 190.323 Consideration of comments received.
- 190.325 Additional rulemaking proceedings.
- 190.327 Hearings.
- 190.329 Adoption of final rules.
- 190.331 Petitions for rulemaking.
- 190.333 Processing of petition.
- 190.335 Petitions for reconsideration.
- 190.337 Proceedings on petitions for reconsideration.
- 190.338 Appeals.
- 190.339 Direct final rulemaking.
- 190.341 Special permits.

Authority: 33 U.S.C. 1321; 49 U.S.C. 5101-5127, 60101 *et seq.*; 49 CFR 1.53.

[Part 190 - Org., 45 FR 20413, Mar. 27, 1980 as amended by Amdt. 190-1, 53 FR 1633, Jan. 21, 1988; Amdt. 190-2, 54 FR 32342, Aug. 7, 1989; Amdt. 190-5, 59 FR 17275, Apr. 12, 1994; Amdt. 190-6, 61 FR 18512, Apr. 26, 1996; Amdt. 190-8, 61 FR 50907, Sept. 27, 1996; Amdt. 190-9, 62 FR 24055, May 2, 1997; Amdt. 190-12, 70 FR 11135, Mar. 8, 2005; Amdt. 190-[13], 73 FR 16562, Mar. 28, 2008]

PART 190 - PIPELINE SAFETY PROGRAMS AND RULEMAKING PROCEDURES

Subpart A—General

§190.1 Purpose and scope.

(a) This part prescribes procedures used by the **Research and Special Programs Administration Pipeline and Hazardous Materials Safety Administration** in carrying out their duties regarding pipeline safety under 49 U.S.C. 60101 *et seq.* (the pipeline safety laws) and 49 U.S.C. 5101 *et seq.* (the hazardous material transportation laws).

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

[Part 190 - Org., 45 FR 20413, Mar. 27, 1980 as amended by Amdt. 190-A, 50 FR 45721, Nov. 1, 1985; Amdt. 190-6, 61 FR 18512, Apr. 26, 1996; Amdt. 190-12, 70 FR 11135, Mar. 8, 2005]

§190.3 Definitions.

As used in this part:

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

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.

OPS means the Office of Pipeline Safety, which is part of the **Research and Special Programs Administration Pipeline**

and Hazardous Materials Safety Administration, U.S. Department of Transportation.

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.

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

Presiding Official means the person who conducts any hearing relating to civil penalty assessments, compliance orders or hazardous facility orders.

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 Washington, DC (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 the OPS has served a notice of probable violation.

RSPA means the **Research and Special Programs 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.

[Part 190 - Org., 45 FR 20413, Mar. 27, 1980 as amended by Amdt. 190-A, 50 FR

PART 190 - PIPELINE SAFETY PROGRAMS AND RULEMAKING PROCEDURES

45721, Nov. 1, 1985; Amdt. 190-6, 61 FR 18512, Apr. 26, 1996; Amdt. 190-11, 68 FR 11748, Mar. 12, 2003; Amdt. 190-12, 70 FR 11135, Mar. 8, 2005]

§190.5 Service.

(a) Each order, notice, or other document required to be served under this part shall be served personally or by registered or certified mail. Each order, notice, or other document required to be served under this part shall be served personally, by registered or 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 registered or certified mail is complete upon mailing. An official U.S. Postal Service receipt from the registered or certified mailing constitutes prima facie evidence of service. Service by registered or 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.

[Part 190 - Org., 45 FR 20413, Mar. 27, 1980; Amdt. 190-[13], 73 FR 16562, Mar. 28, 2008.]

§190.7 Subpoenas; witness fees.

(a) The Administrator, RSPA PHMSA, the Chief Counsel, RSPA PHMSA, or the

official designated by the Administrator, RSPA PHMSA to preside over a hearing convened in accordance with this part, may sign and issue subpoenas either on their own initiative or, upon request and adequate showing by any person participating in the 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 or registered mail.

(d) Service of a subpoena upon the person named therein shall be made by delivering a copy of the subpoena to such person and by tendering 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 the person in charge thereof, leaving them at the person's dwelling place or usual place of abode with some person of suitable age and discretion then residing therein, by mailing them by registered or 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 effected by handing them to a designated agent or representative for service, or to any officer, director, or agent in charge of any

PART 190 - PIPELINE SAFETY PROGRAMS AND RULEMAKING PROCEDURES

office of the person, or by mailing them by registered or 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 **RSPA 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, **RSPA PHMSA** 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, **RSPA PHMSA**, or 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 **RSPA 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 **RSPA PHMSA**, or both.

[Part 190 - Org., 45 FR 20413, Mar. 27, 1980 as amended by Amdt. 190-A, 50 FR 45721, Nov. 1, 1985; Amdt. 190-6, 61 FR 18512, Apr. 26, 1996; Amdt. 190-10, 63 FR 7721, Feb. 17, 1998; Amdt. 190-12, 70 FR 11135, Mar. 8, 2005]

§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:

PART 190 - PIPELINE SAFETY PROGRAMS AND RULEMAKING PROCEDURES

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

(ii) Where there is no state agency certified to participate, the Research and Special Programs Administration Pipeline and Hazardous Materials Safety Administration, 400 7th Street, SW., Washington, DC 20590.

(2) For operators seeking a finding or approval involving interstate pipeline transportation, petitions must be sent to the Research and Special Programs Administration Pipeline and Hazardous Materials Safety Administration, 400 7th Street SW 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 17275, Apr. 12, 1994 as amended by Amdt. 190-6, 61 FR 18512, Apr. 26, 1996; Amdt. 190-12, 70 FR 11135, Mar. 8, 2005; Amdt. 190-[13], 73 FR 16562, Mar. 28, 2008]

§190.11 Availability of informal guidance and interpretive assistance.

(a) Availability of telephonic and Internet assistance. (1) RSPA PHMSA has established a website on the Internet and a telephone line at the Office of Pipeline Safety headquarters where small operators and others can obtain information on and advice about compliance with pipeline safety regulations, 49 CFR parts 190-199. The website and telephone line are staffed by personnel from RSPA PHMSA's Office of Pipeline Safety from 9:00 a.m. through 5:00 p.m., Eastern time, Monday through Friday, except Federal holidays. When the lines are not staffed, individuals may leave a recorded voicemail message, or post a message at the OPS website. All messages will receive a response by the following business day. The telephone number for the OPS information line is (202) 366-09184595 and the OPS website can be accessed via the Internet at <http://www.ops.dot.gov>.

(2) RSPA PHMSA's Office of the Chief Counsel (OCC) is available to answer questions concerning Federal pipeline safety law, 49 U.S.C. 60101 *et seq.* OCC may be contacted by telephone (202-366-4400) from 9:00 a.m. to 4:00 p.m. Eastern time, Monday through Friday, except Federal holidays. Information and guidance concerning Federal pipeline safety law may also be obtained by contacting OCC via the Internet at <http://rspa-attorney.gov>.

(b) Availability of Written Interpretations. (1) 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 (DPS-10PHP-30), RSPA PHMSA, U.S. Department of Transportation, 400 Seventh Street, SW 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

PART 190 - PIPELINE SAFETY PROGRAMS AND RULEMAKING PROCEDURES

submitted at least 120 days before the time the requestor needs the response.

(2) A written interpretation regarding Federal pipeline safety law, 49 U.S.C 60101 *et seq.*, may be obtained from the Office of the Chief Counsel, **RSPA** PHMSA, U.S. Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590-0001. The requestor must include his or her return address and should also include a daytime telephone number.

[Amdt. 190-9, 62 FR 24055, May 2, 1997 as amended by Amdt. 190-9A, 62 FR 34415, June 26, 1997; Amdt. 190-12, 70 FR 11135, Mar. 8, 2005; Amdt. 190-[13], 73 FR 16562, Mar. 28, 2008]

PART 190 - PIPELINE SAFETY PROGRAMS AND RULEMAKING PROCEDURES

Subpart B—Enforcement

§190.201 Purpose and scope.

(a) This subpart describes the enforcement authority and sanctions exercised by the Associate Administrator, OPS for achieving and maintaining pipeline safety. 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.

[Part 190 - Org., 45 FR 20413, Mar. 27, 1980 as amended by Amdt. 190-A, 50 FR 45721, Nov. 1, 1985; Amdt. 190-6, 61 FR 18512, Apr. 26, 1996]

§190.203 Inspections and investigations.

(a) Officers, employees, or agents authorized by the Associate Administrator for Pipeline Safety, **RSPA 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 Administrator, **RSPA PHMSA** or his designee.

(c) If, after an inspection, the Associate Administrator, OPS believes that further information is needed to determine appropriate action, the Associate Administrator, OPS may send the owner or operator a "Request for Specific Information" to be answered within 45 days after receipt of the letter.

(d) To the extent necessary to carry out his responsibilities under 49 U.S.C. 60101 *et seq.*, the Administrator, **RSPA PHMSA** or the Associate Administrator, OPS 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, **RSPA PHMSA** or the Associate Administrator, OPS 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 DOT investigates an incident involving a pipeline facility, OPS may request that the operator make available to the representative all records and information that pertain to the incident in any way, including integrity management plans and test results, and that the operator afford all reasonable assistance in the investigation.

(ef) When the information obtained from an inspection or from other appropriate sources indicates that further OPS action is warranted, the OPS issues a warning letter under §190.205 or initiates one or more of the enforcement proceedings prescribed in §§190.207 through 190.235.

PART 190 - PIPELINE SAFETY PROGRAMS AND RULEMAKING PROCEDURES

[Part 190 - Org., 45 FR 20413, Mar. 27, 1980 as amended by Amdt. 190-A, 50 FR 45721, Nov. 1, 1985; Amdt. 190-3, 56 FR 31090, July 9, 1991; Amdt. 190-6, 61 FR 18512, Apr. 26, 1996; Amdt. 190-7, 61 FR 27789, June 3, 1996; Amdt. 190-10, 63 FR 7721, Feb. 17, 1998; Amdt. 190-12, 70 FR 11135, Mar. 8, 2005]

§190.205 Warning letters.

Upon determining that a probable violation of 49 U.S.C. 60101 *et seq.* or any regulation or order issued thereunder has occurred, the Associate Administrator, OPS may issue a Warning Letter notifying the owner or operator of the probable violation and advising the owner or operator to correct it or be subject to enforcement action under §§190.207 through 190.235.

[Part 190 - Org., 45 FR 20413, Mar. 27, 1980 as amended by Amdt. 190-A, 50 FR 45721, Nov. 1, 1985; Amdt. 190-6, 61 FR 18512, Apr. 26, 1996; Amdt. 190-6A, 61 FR 38403, July 24, 1996]

§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.* 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 §190.209;

(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 Associate Administrator, OPS 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 or proposes an increased civil penalty amount or new or additional remedial action under §190.217, the respondent shall have the opportunity to respond under §190.209.

[Part 190 - Org., 45 FR 20413, Mar. 27, 1980 as amended by Amdt. 190-A, 50 FR 45721, Nov. 1, 1985; Amdt. 190-6, 61 FR 18512, Apr. 26, 1996]

§190.209 Response options.

Within 30 days of receipt of a notice of probable violation, the respondent shall respond to the Regional Director who issued the notice in the following way:

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

(1) Pay the proposed civil penalty as provided in §190.227 and close the case with prejudice to the respondent;

(2) Submit written explanations, information or other materials in answer to the allegations or in mitigation of the proposed civil penalty; or

(3) Request a hearing under §190.211.

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

(1) Agree to the proposed compliance order;

PART 190 - PIPELINE SAFETY PROGRAMS AND RULEMAKING PROCEDURES

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

(3) 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) Request a hearing under §190.211.

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

(d) All materials submitted by operators in response to enforcement actions may be placed on publicly accessible Web sites. A Respondent that seeks 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 an explanation for each redaction.

[Part 190 - Org., 45 FR 20413, Mar. 27, 1980 as amended by Amdt. 190-A, 50 FR 45721, Nov. 1, 1985; Amdt. 190-1, 53 FR1633, Jan. 21, 1988; Amdt. 190-6, 61 FR 18512, Apr. 26, 1996; Amdt. 190-7, 61 FR 27789, June 3, 1996; Amdt. 190-10, 63 FR 7721, Feb. 17, 1998; Amdt. 190-[13], 73 FR 16562, Mar. 28, 2008]

§190.211 Hearing.

(a) A request for a hearing provided for in this part 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 (including a proposed amendment, a proposed compliance order, or a proposed hazardous facility order), 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.

(b) 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 \$10,000, unless the respondent submits a written request for an in-person hearing. Hearings are held in a location agreed upon by the presiding official, OPS and the respondent.

(c) An attorney from the Office of the Chief Counsel, **Research and Special Programs Administration** Pipeline and Hazardous Materials Safety Administration, serves as the presiding official at the hearing.

(d) The hearing is conducted informally without strict adherence to rules of evidence. The respondent may submit any relevant information and material and call witnesses on the respondent's behalf. The respondent may also examine the evidence and witnesses presented by the government. No detailed record of a hearing is prepared.

(e) Upon request by respondent, and whenever practicable, the material in the case file pertinent to the issues to be determined is provided to the respondent 30 days before the hearing. The respondent may respond to or rebut this material at the hearing.

(f) During the hearing, the respondent may offer any facts, statements, explanations, documents, testimony or other items which are relevant to the issues under consideration.

PART 190 - PIPELINE SAFETY PROGRAMS AND RULEMAKING PROCEDURES

(g) At the close of the respondent's presentation, the presiding official may present or allow the presentation of any OPS rebuttal information. The respondent may then respond to that information.

(h) After the evidence in the case has been presented, the presiding official shall permit argument on the issues under consideration.

(i) The respondent may also request an opportunity to submit further written material for inclusion in the case file. The presiding official shall allow a reasonable time for the submission of the material and shall specify the date by which it must be submitted. If the material is not submitted within the time prescribed, the case shall proceed to final action without the material.

(j) After submission of all materials during and after the hearing, the presiding official shall prepare a written recommendation as to final action in the case. This recommendation, along with any material submitted during and after the hearing, shall be included in the case file which is forwarded to the Associate Administrator, OPS for final administrative action.

[Part 190 - Org., 45 FR 20413, Mar. 27, 1980 as amended by Amdt. 190-A, 50 FR 45721, Nov. 1, 1985; Amdt. 190-3, 56 FR 31090, July 9, 1991; Amdt. 190-6, 61 FR 18512, Apr. 26, 1996; Amdt. 190-7, 61 FR 27789, June 3, 1996; Amdt. 190-12, 70 FR 11135, Mar. 8, 2005]

§190.213 Final order.

(a) After a hearing under §190.211 or, if no hearing has been held, after expiration of the 30 day response period prescribed in §190.209, the case file of an enforcement proceeding commenced under §190.207 is

forwarded to the Associate Administrator, OPS for issuance of a final order.

(b) The case file of an enforcement proceeding commenced under §190.207 includes:

(1) The inspection reports and any other evidence of alleged violations;

(2) A copy of the notice of probable violation issued under §190.207;

(3) Material submitted by the respondent in accord with §190.209 in response to the notice of probable violation;

(4) The Regional Director's evaluation of response material submitted by the respondent and recommendation for final action to be taken under this section; and

(5) In cases involving a §190.211 hearing, any material submitted during and after the hearing and the presiding official's recommendation for final action to be taken under this section.

(c) Based on a review of a case file described in paragraph (b) of this section, the Associate Administrator, OPS shall issue a final order that 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.

(d) Except as provided by §190.215, an order issued under this section regarding an enforcement proceeding is considered final administrative action on that enforcement proceeding.

(e) It is the policy of the Associate Administrator, OPS to issue a final order

PART 190 - PIPELINE SAFETY PROGRAMS AND RULEMAKING PROCEDURES

under this section within 45 days of receipt of the case file, 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 respondent. It is the policy of the Associate Administrator, OPS to issue a final order under this section expeditiously. 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.

[Part 190 - Org., 45 FR 20413, Mar. 27, 1980 as amended by Amdt. 190-A, 50 FR 45721, Nov. 1, 1985; Amdt. 190-6, 61 FR 18512, Apr. 26, 1996; Amdt. 190-12, 70 FR 11135, Mar. 8, 2005]

§190.215 Petitions for reconsideration.

(a) A respondent may petition the Associate Administrator, OPS for reconsideration of a final order issued under §190.213. It is requested, but not required, that three copies be submitted. The petition must be received no later than 20 days after service of the final order upon the respondent. 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 effectiveness of the final order should be stayed.

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

(c) The Associate Administrator, OPS does not consider repetitious information, arguments, or petitions.

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

(e) The Associate Administrator, OPS may grant or deny, in whole or in part, any petition for reconsideration without further proceedings. In the event the Associate Administrator, OPS reconsiders a final order, 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, OPS as deemed appropriate .

(f) It is the policy of the Associate Administrator, OPS to issue notice of the action taken on a petition for reconsideration within 20 days after receipt of the petition, unless it is found impracticable to take action within that time. In cases where it is so found and 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 respondent. It is the policy of the Associate Administrator, OPS to issue notice of the action taken on a petition for reconsideration expeditiously. 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.

[Part 190 - Org., 45 FR 20413, Mar. 27, 1980 as amended by Amdt. 190-A, 50 FR 45721, Nov. 1, 1985; Amdt. 190-6, 61 FR 18512, Apr. 26, 1996; Amdt. 190-7, 61 FR 27789, June 3, 1996; Amdt. 190-12, 70 FR 11135, Mar. 8, 2005]

COMPLIANCE ORDERS

§190.217 Compliance orders generally.

PART 190 - PIPELINE SAFETY PROGRAMS AND RULEMAKING PROCEDURES

When the Associate Administrator, OPS has reason to believe that a person is engaging in conduct which involves a violation of 49 U.S.C. 60101 *et seq.* or any regulation issued thereunder, and if the nature of the violation, and the public interest warrant, the Associate Administrator, OPS may conduct proceedings under §§190.207 through 190.213 of this part to determine the nature and extent of the violations and to issue an order directing compliance.

[Part 190 - Org., 45 FR 20413, Mar. 27, 1980 as amended by Amdt. 190-A, 50 FR 45721, Nov. 1, 1985; Amdt. 190-6, 61 FR 18512, Apr. 26, 1996]

§190.219 Consent order.

(a) At any time before the issuance of a compliance order under §190.213 the Associate Administrator, OPS and the respondent may agree to dispose of the case by joint execution of a consent order. Upon such joint execution, the consent order shall be 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 acknowledgment 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.

[Part 190 - Org., 45 FR 20413, Mar. 27, 1980 as amended by Amdt. 190-A, 50 FR

45721, Nov. 1, 1985; Amdt. 190-6, 61 FR 18512, Apr. 26, 1996]

CIVIL PENALTIES

§190.221 Civil penalties generally.

When the Associate Administrator, OPS has reason to believe that a person has committed an act which is a violation of any provision of the 49 U.S.C. 60101 *et seq.* or any regulation or order issued thereunder, proceedings under §§190.207 through 190.213 may be conducted to determine the nature and extent of the violations and to assess and, if appropriate, compromise a civil penalty.

[Part 190 - Org., 45 FR 20413, Mar. 27, 1980 as amended by Amdt. 190-A, 50 FR 45721, Nov. 1, 1985; Amdt. 190-6, 61 FR 18512, Apr. 26, 1996]

§190.223 Maximum penalties.

(a) Any person who is determined to have violated a provision of 49 U.S.C. 60101 *et seq.* or any regulation or order issued thereunder, is subject to a civil penalty not to exceed **\$25,000** \$100,000 for each violation for each day the violation continues except that the maximum civil penalty may not exceed **\$500,000** \$1,000,000 for any related series of violations.

(b) Any person who knowingly violates a regulation or order under this subchapter applicable to offshore gas gathering lines issued under the authority of 49 U.S.C. 5101 *et seq.* is liable for a civil penalty of not more than \$25,000 for each violation, and if any such violation is a continuing one, each day of violation constitutes a separate offense.

PART 190 - PIPELINE SAFETY PROGRAMS AND RULEMAKING PROCEDURES

(c) Any person who is determined to have violated any standard or order under 49 U.S.C. 60103 shall be subject to a civil penalty of not to exceed \$50,000, which penalty shall be in addition to any 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 shall be subject to a civil penalty not to exceed \$1,000, which shall be in addition to any other penalties to which such person may be subject under paragraph (a) of this section.

(de) No person shall be subject to a civil penalty under this section for the violation of any requirement of this subchapter and an order issued under §190.217, §190.219 or §190.233 if both violations are based on the same act.

[Part 190 - Org., 45 FR 20413, Mar. 27, 1980 as amended by Amdt. 190-A, 50 FR 45721, Nov. 1, 1985; Amdt. 190-2, 54 FR 32343, Aug. 7, 1989; Amdt. 190-6, 61 FR 18512, Apr. 26, 1996; Amdt. 190-6A, 61 FR 38403, July 24, 1996; Amdt. 190-12, 70 FR 11135, Mar. 8, 2005]

§190.225 Assessment considerations.

The Associate Administrator, OPS assesses a civil penalty under this part only after considering:

- (a) The nature, circumstances and gravity of the violation;
- (b) The degree of the respondent's culpability;
- (c) The respondent's history of prior offenses;
- (d) The respondent's ability to pay;
- (e) Any good faith by the respondent in attempting to achieve compliance;

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

(g) Such other matters as justice may require.

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

(a) The Associate Administrator, OPS shall 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) The respondent's ability to pay;

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

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

(b) The Associate Administrator, OPS 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.

[Part 190 - Org., 45 FR 20413, Mar. 27, 1980 as amended by Amdt. 190-A, 50 FR 45721, Nov. 1, 1985; Amdt. 190-6, 61 FR 18512, Apr. 26, 1996; Amdt. 190-12, 70 FR 11135, Mar. 8, 2005]

§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 this case) payable to "U.S. Department of Transportation" to the Federal Aviation Administration, Mike Monroney

PART 190 - PIPELINE SAFETY PROGRAMS AND RULEMAKING PROCEDURES

Aeronautical Center, Financial Operations Division (AMZ-320 120341), 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. Payments exceeding \$10,000 must be made by wire transfer. Payments, or in the case of wire transfers, notices of payment, must be sent to the Chief, General Accounting Branch (M-86.2), Accounting Operations Division, Office of the Secretary, room 2228, Department of Transportation, 400 Seventh Street, SW, Washington, DC 20590.

(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 interest and penalties, in accordance with 31 U.S.C. §3717 and 49 C.F.R. Part 89.

[Part 190 - Org., 45 FR 20413, Mar. 27, 1980 as amended by Amdt. 190-A, 50 FR 45721, Nov. 1, 1985; Amdt. 190-1, 53 FR 1633, Jan. 21, 1988; Amdt. 190-6, 61 FR 18512, Apr. 26, 1996; Amdt. 190-7, 61 FR 27789, June 3, 1996; Amdt. 190-12, 70 FR 11135, Mar. 8, 2005; Amdt. 190-[13], 73 FR 16562, Mar. 28, 2008]

CRIMINAL PENALTIES

§190.229 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 shall upon conviction be subject for each offense to a fine of not more than \$25,000 and imprisonment for not more than five years, or both.

(b) Any person who willfully violates a regulation or order under this subchapter issued under the authority 49 U.S.C. 5101 *et seq.* as applied to offshore gas gathering lines shall upon conviction be subject for each offense to a fine of not more than \$25,000, imprisonment for a term not to exceed 5 years, or both.

(c) Any person who willfully and knowingly injures or destroys, or attempts to injure or destroy, any interstate transmission facility, or 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.*) shall, upon conviction, be subject for each offense to a fine of not more than \$25,000, imprisonment for a term not to exceed 15 years, or both.

(d) Any person who willfully and knowingly defaces, damages, removes, destroys any pipeline sign, right-of-way marker, or marine buoy required by 49 U.S.C. 60101 *et seq.* or 49 U.S.C. 5101 *et seq.*, or any regulation or order issued thereunder shall, upon conviction, be subject, for each offense to a fine of not more than \$5,000, imprisonment for a term not to exceed 1 year, or both.

(e) 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

PART 190 - PIPELINE SAFETY PROGRAMS AND RULEMAKING PROCEDURES

damage to the operator and to the appropriate authorities; or

(3) Subsequently damages a hazardous liquid pipeline facility that results in the release of more than 50 barrels of product; shall, upon conviction, be subject for each offense to a fine of not more than \$5,000, imprisonment for a term not to exceed 5 years, or both.

(ef) 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 190.229 if both violations are based on the same act.

[Part 190 - Org., 45 FR 20413, Mar. 27, 1980 as amended by Amdt. 190-A, 50 FR 45721, Nov. 1, 1985; Amdt. 190-2, 54 FR 32343, Aug. 7, 1989; Amdt. 190-4, 56 FR 63770, Dec. 5, 1991; Amdt. 190-6, 61 FR 18512, Apr. 26, 1996; Amdt. 190-12, 70 FR 11135, Mar. 8, 2005]

§190.231 Referral for prosecution.

If an employee of Research and Special Programs Administration Pipeline and Hazardous Materials Safety Administration becomes aware of any actual or possible activity subject to criminal penalties under §190.229, the employee reports it to the Office of the Chief Counsel, Research and Special Programs Administration, U.S. Department of Transportation, Washington, DC 20590. The Chief Counsel refers the report to OPS for investigation. Upon completion of the investigation and if appropriate, the Chief Counsel refers the report to the Department of Justice for criminal prosecution of the offender.

[Part 190 - Org., 45 FR 20413, Mar. 27, 1980 as amended by Amdt. 190-A, 50 FR 45721, Nov. 1, 1985; Amdt. 190-6, 61 FR

18512, Apr. 26, 1996; Amdt. 190-12, 70 FR 11135, Mar. 8, 2005]

SPECIFIC RELIEF

§190.233 Hazardous facility orders.

(a) Except as provided by paragraph (b) of this section, if the Associate Administrator, OPS finds, after reasonable notice and opportunity for hearing in accord with paragraph (c) of this section, and §190.211(a), a particular pipeline facility to be hazardous to life or property, the Associate Administrator, OPS shall issue an order pursuant to this section requiring the owner or 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 action, as appropriate.

(b) The Associate Administrator, OPS may waive the requirement for notice and hearing under paragraph (a) of this section before issuing an order pursuant to this section when the Associate Administrator, OPS determines that the failure to do so would result in the likelihood of serious harm to life or property. However, the Associate Administrator, OPS shall include in the order an opportunity for hearing as soon as practicable after issuance of the order. The provisions of paragraph (c)(2) of this section apply to an owner or operator's decision to exercise such an opportunity for hearing. The purpose of such a post-order hearing is for the Associate Administrator, OPS to determine whether the order should remain in effect or be rescinded or suspended in accord with paragraph (g) of this section.

(c) Notice and hearing:

(1) Written notice that OPS intends to issue an order under this section shall be served in accordance with §190.5, upon the owner or operator of an alleged hazardous

PART 190 - PIPELINE SAFETY PROGRAMS AND RULEMAKING PROCEDURES

facility. The notice shall allege the existence of a hazardous facility, stating the facts and circumstances supporting the issuance of a "hazardous facility order", and providing the owner or operator an opportunity for a hearing, identifying the time and location of the hearing.

(2) An owner or operator elects to exercise his opportunity for a hearing under this section, by notifying the Associate Administrator, OPS of that election in writing within 10 days of service of the notice provided under paragraph (c)(1) of this section or, under paragraph (b) of this section when applicable. Absence of such written notification waives an owner or operator's opportunity for a hearing and allows the Associate Administrator, OPS to proceed to issue a "hazardous facility order" in accordance with paragraphs (d) through (h) of this section.

(3) A hearing under this section shall be presided over by an attorney from the Office of Chief Counsel, Research and Special Programs Administration acting as Presiding Official, and conducted without strict adherence to rules of evidence. The Presiding Official presents the allegations contained in the notice issued under this section. The owner or operator of the alleged hazardous facility may submit any relevant information or materials, call witnesses and present arguments on the issue of whether or not a "hazardous facility order" should be issued.

(4) Within 48 hours after conclusion of a hearing under this section, the Presiding Official shall submit a recommendation to the Associate Administrator, OPS as to whether or not a "hazardous facility order" is required. Upon receipt of the recommendation, the Associate Administrator, OPS shall proceed in accordance with paragraphs (d) through (h) of this section. If the Associate Administrator, OPS finds the facility to be

hazardous to life or property the Associate Administrator, OPS shall issue an order in accordance with this section. If the Associate Administrator, OPS does not find the facility to be hazardous to life or property, the Associate Administrator, OPS shall dismiss the allegations contained in the notice, and promptly notify the owner or operator in writing by service as prescribed in §190.5.

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

(1) If under the facts and circumstances the Associate Administrator, OPS determines the particular facility is hazardous to life or property; 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, OPS determines is hazardous to life or property, unless the operator involved demonstrates to the satisfaction of the Associate Administrator, OPS that, under the particular facts and circumstances involved, such equipment, material, or technique is not hazardous to life or property.

(e) In making a determination under paragraph (d) of this section, the Associate Administrator, OPS 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 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 deteriorate qualities), the sequence in which such materials are

PART 190 - PIPELINE SAFETY PROGRAMS AND RULEMAKING PROCEDURES

transported, and the pressure required for such transportation;

(3) The aspects of the 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, OPS may consider appropriate.

(f) The order shall contain the following information:

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

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

(3) The legal basis for the order.

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

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

(6) If a hearing has been waived pursuant to paragraph (b) of this section, a statement that an opportunity for a hearing is provided at a particular location and at a certain time after issuance of the order.

(g) The Associate Administrator, OPS shall rescind or suspend a "hazardous facility order" whenever the Associate Administrator, OPS determines that the facility is no longer hazardous to life or property. When appropriate, however, such a rescission or suspension may be accompanied by a notice of probable violation issued under §190.207.

(h) At any time after an order issued under this section has become effective, the Associate Administrator, OPS 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.

(a) Except as provided by paragraph (b) of this section, if the Associate Administrator, OPS finds, after reasonable notice and opportunity for hearing in accord with paragraph (c) of this section and §190.211(a), a particular pipeline facility to be hazardous to life, property, or the environment, the Associate Administrator, OPS shall issue an order pursuant to this section requiring the owner or 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) The Associate Administrator, OPS may waive the requirement for notice and opportunity for hearing under paragraph (a) of this section before issuing an order pursuant to this section when the Associate Administrator, OPS determines that the failure to do so would result in the likelihood of serious harm to life, property, or the environment. However, the Associate Administrator, OPS shall provide an opportunity for a hearing as soon as is practicable after the issuance of a compliance order. The provisions of paragraph (c)(2) of this section apply to an owner or operator's decision to exercise its opportunity for a hearing. The purpose of such a post-order hearing is for the Associate Administrator, OPS to determine whether a compliance order should remain in effect or be rescinded or suspended in accord with paragraph (g) of this section.

(c) Notice and hearing:

PART 190 - PIPELINE SAFETY PROGRAMS AND RULEMAKING PROCEDURES

(1) Written notice that OPS intends to issue an order under this section shall be served upon the owner or operator of an alleged hazardous facility in accordance with §190.5. The notice shall allege the existence of a hazardous facility and state the facts and circumstances supporting the issuance of a corrective action order. The notice shall also provide the owner or operator with the opportunity for a hearing and shall identify a time and location where a hearing may be held.

(2) An owner or operator that elects to exercise its opportunity for a hearing under this section must notify the Associate Administrator, OPS of that election in writing within 10 days of service of the notice provided under paragraph (c)(1) of this section, or under paragraph (b) of this section when applicable. The absence of such written notification waives an owner or operator's opportunity for a hearing and allows the Associate Administrator, OPS to issue a corrective action order in accordance with paragraphs (d) through (h) of this section.

(3) A hearing under this section shall be presided over by an attorney from the Office of Chief Counsel, Pipeline and Hazardous Materials Safety Administration, acting as Presiding Official, and conducted without strict adherence to formal rules of evidence. The Presiding Official presents the allegations contained in the notice issued under this section. The owner or operator of the alleged hazardous facility may submit any relevant information or materials, call witnesses, and present arguments on the issue of whether or not a corrective action order should be issued.

(4) Within 48 hours after conclusion of a hearing under this section, the Presiding Official shall submit a recommendation to the Associate Administrator, OPS as to whether or not a corrective action order is required. Upon receipt of the

recommendation, the Associate Administrator, OPS shall proceed in accordance with paragraphs (d) through (h) of this section. If the Associate Administrator, OPS finds the facility is or would be hazardous to life, property, or the environment, the Associate Administrator, OPS shall issue a corrective action order in accordance with this section. If the Associate Administrator, OPS does not find the facility is or would be hazardous to life, property, or the environment, the Associate Administrator shall withdraw the allegation of the existence of a hazardous facility contained in the notice, and promptly notify the owner or operator in writing by service as prescribed in §190.5.

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

(1) If under the facts and circumstances the Associate Administrator, OPS 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, OPS determines is hazardous to life, property, or the environment, unless the operator involved demonstrates to the satisfaction of the Associate Administrator, OPS 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, OPS 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

PART 190 - PIPELINE SAFETY PROGRAMS AND RULEMAKING PROCEDURES

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, OPS may consider appropriate.

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

(1) A finding that the pipeline facility is 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, OPS shall rescind or suspend a corrective action order whenever the Associate Administrator, OPS determines that the facility is no longer

hazardous to life, property, or the environment. When appropriate, however, such a rescission or suspension may be accompanied by a notice of probable violation issued under §190.207.

(h) At any time after a corrective action order issued under this section has become effective, the Associate Administrator, OPS 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.

[Part 190 - Org., 45 FR 20413, Mar. 27, 1980 as amended by Amdt. 190-A, 50 FR 45721, Nov. 1, 1985; Amdt. 190-3, 56 FR 31090, July 9, 1991; Amdt. 190-6, 61 FR 18512, Apr. 26, 1996; Amdt. 190-12, 70 FR 11135, Mar. 8, 2005]

§190.235 Injunctive action.

Whenever it appears to the Associate Administrator, OPS 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, **RSPA** PHMSA, 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 ~~of~~ 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.

[Part 190 - Org., 45 FR 20413, Mar. 27, 1980 as amended by Amdt. 190-A, 50 FR

PART 190 - PIPELINE SAFETY PROGRAMS AND RULEMAKING PROCEDURES

45721, Nov. 1, 1985; Amdt. 190-6, 61 FR 18512, Apr. 26, 1996; Amdt. 190-12, 70 FR 11135, Mar. 8, 2005]

§190.237 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 shall provide an opportunity for a hearing under §190.211 of this part and shall specify the alleged inadequacies and the proposed action for revision of the plans or procedures. The notice shall allow the operator 30 days after receipt of the notice to submit written comments or request a hearing. After considering all material presented in writing or at the hearing, the Associate Administrator, OPS shall determine whether the plans or procedures are inadequate as alleged and order the required amendment if they are inadequate, or withdraw the notice if they are not. In determining the adequacy of an operator's plans and procedures, the Associate Administrator, OPS shall consider:

- (1) Relevant available 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.

(b) The amendment of an operator's plans or procedures prescribed in paragraph (a) of this section is in addition to, and may be used in conjunction with, the appropriate

enforcement actions prescribed in this subpart.

[Amdt. 190-3, 56 FR 31087, July 9, 1991 as amended by Amdt. 190-6, 61 FR 18512, Apr. 26, 1996]

§190.239 Safety orders.

(a) When may PHMSA issue a safety order? If the Associate Administrator, OPS 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, risk assessment, risk control, data integration, information management, 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 response 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

PART 190 - PIPELINE SAFETY PROGRAMS AND RULEMAKING PROCEDURES

procedures for requesting informal consultation and a hearing. An operator receiving a notice will have 30 days to respond.

(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 PHMSA 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 PHMSA 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, PHMSA, 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

PART 190 - PIPELINE SAFETY PROGRAMS AND RULEMAKING PROCEDURES

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, OPS 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, OPS 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;

PART 190 - PIPELINE SAFETY PROGRAMS AND RULEMAKING PROCEDURES

(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.

[Amdt. 190-[13], 73 FR 16562, Mar. 28, 2008]

PART 190 - PIPELINE SAFETY PROGRAMS AND RULEMAKING PROCEDURES

Subpart C—Procedures for Adoption of Rules

§190.301 Scope.

This subpart prescribes general rulemaking procedures for the issue, amendment, and repeal of Pipeline Safety Program regulations of the Research and Special Programs Administration Pipeline and Hazardous Materials Safety Administration of the Department of Transportation.

[Amdt. 190-8, 61 FR 50907, Sept. 27, 1996 as amended by Amdt. 190-12, 70 FR 11135, Mar. 8, 2005]

§190.303 Delegations.

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

[Amdt. 190-8, 61 FR 50907, Sept. 27, 1996 as amended by Amdt. 190-12, 70 FR 11135, Mar. 8, 2005]

§190.305 Regulatory docket.

(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 Research and Special Programs Administration Pipeline and

Hazardous Materials Safety Administration at 400 7th Street, SW 1200 New Jersey Avenue, SE., Washington, DC 20590-0001.

(b) Any person may examine and docketed material, once a docket is established, at the offices of the Research and Special Programs Administration at any time during regular business hours after the docket is established, except material which the Administrator determines should be withheld from public disclosure under applicable provisions of any statute administered by the Administrator and section 552(b) of Title 5, United States Code, and may obtain a copy of it upon payment of a fee. Any person may examine public docket material, once a docket is established, at the offices of the Dockets Management System, U.S. Department of Transportation, 400 7th Street, SW., Room PL-401, Washington, DC 20590, and may obtain a copy of it upon payment of a fee, at any time between the hours of 9 a.m. and 5 p.m., Monday through Friday, excluding Federal holidays, with the exception of material which the Administrator, PHMSA determines should be withheld from public disclosure under applicable provisions of any statute administered by the Administrator and section 552(b) of title 5, United States Code. Public comments may also be submitted and reviewed by accessing the Dockets Management System's Web site at <http://dms.dot.gov>. Inquiries and comment submissions must identify the Docket. 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

PART 190 - PIPELINE SAFETY PROGRAMS AND RULEMAKING PROCEDURES

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 50907, Sept. 27, 1996 as amended by Amdt. 190-12, 70 FR 11135, Mar. 8, 2005; Amdt. 190-[13], 73 FR 16562, Mar. 28, 2008]

§190.307 Records.

Records of the Research and Special Programs Administration 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 50907, Sept. 27, 1996]

§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 §190.331, and petitions for reconsideration submitted under §190.335 must be submitted to: Administrator, Research and Special Programs Administration Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, 400 7th

Street, SW 1200 New Jersey Avenue, SE., Washington DC 20590-0001.

[Amdt. 190-8, 61 FR 50907, Sept. 27, 1996 as amended by Amdt. 190-12, 70 FR 11135, Mar. 8, 2005; Amdt. 190-[13], 73 FR 16562, 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.

[Amdt. 190-8, 61 FR 50907, Sept. 27, 1996]

§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.

[Amdt. 190-8, 61 FR 50907, Sept. 27, 1996]

§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.

PART 190 - PIPELINE SAFETY PROGRAMS AND RULEMAKING PROCEDURES

(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.

[Amdt. 190-8, 61 FR 50907, Sept. 27, 1996]
§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.

[Amdt. 190-8, 61 FR 50907, Sept. 27, 1996]

§190.319 Petitions for extension of time to comment.

A petition for extension of the time to submit comments must be received not later than 10 days before expiration of the time stated in the notice. It is requested, but not required, that three copies be submitted. 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. 190-8, 61 FR 50907, Sept. 27, 1996]

§190.321 Contents of written comments.

All written comments must be in English. It is requested, but not required, that five copies be submitted. 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 shall be identified by document title and page.

[Amdt. 190-8, 61 FR 50907, Sept. 27, 1996]

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

[Amdt. 190-8, 61 FR 50907, Sept. 27, 1996]

PART 190 - PIPELINE SAFETY PROGRAMS AND RULEMAKING PROCEDURES

§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.

[Amdt. 190-8, 61 FR 50907, Sept. 27, 1996]

§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 part. Unless otherwise specified, hearings held under this part are informal, nonadversary 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 50907, Sept. 27, 1996]

§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.

[Amdt. 190-8, 61 FR 50907, Sept. 27, 1996]

§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

PART 190 - PIPELINE SAFETY PROGRAMS AND RULEMAKING PROCEDURES

(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 preemption 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.

[Amdt. 190-8, 61 FR 50907, Sept. 27, 1996]

§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.

[Amdt. 190-8, 61 FR 50907, Sept. 27, 1996]

§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. It is requested, but not required, that three copies be submitted. 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.

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

PART 190 - PIPELINE SAFETY PROGRAMS AND RULEMAKING PROCEDURES

(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 50907, Sept. 27, 1996]

§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 comments 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**.

[Amdt. 190-8, 61 FR 50907, Sept. 27, 1996]

§190.338 Appeals.

(a) Any interested person may appeal a denial of the Associate Administrator 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) It is requested, but not required, that three copies of the appeal be submitted to the Administrator.

(d) 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 50907, Sept. 27, 1996]

§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

PART 190 - PIPELINE SAFETY PROGRAMS AND RULEMAKING PROCEDURES

(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 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 through 190.329.

[Amdt. 190-8, 61 FR 50907, Sept. 27, 1996]

§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;

PART 190 - PIPELINE SAFETY PROGRAMS AND RULEMAKING PROCEDURES

(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; and

(8) If the application is for a renewal of a previously granted waiver or special permit, a copy of the original grant of the waiver or permit.

(d) How does PHMSA handle special permit applications? (1) Public notice. Upon receipt of an application for 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 on matters that PHMSA believes may have significance for proceedings under their areas of responsibility.

(2) Grants 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, on a temporary or permanent basis. 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) 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

PART 190 - PIPELINE SAFETY PROGRAMS AND RULEMAKING PROCEDURES

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.

(f) How do I apply for an emergency special permit? Applications for emergency 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.

(g) 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.

(h) 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 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.

PART 190 - PIPELINE SAFETY PROGRAMS AND RULEMAKING PROCEDURES

(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.

(i) 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.

(j) 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.

[Amdt. 190-[13], 73 FR 16562, Mar. 28, 2008]