



U.S. Department
of Transportation
**Pipeline and Hazardous
Materials Safety
Administration**

1200 New Jersey Avenue, SE
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From: Keith J. Coyle, Chief Counsel, PHMSA

To: Linda Daugherty, Acting Associate Administrator for Pipeline Safety, PHMSA

Subject: Revised Procedures for Determining the Contents of the Case File in Pipeline Safety Enforcement Proceedings¹

SUMMARY

The Office of the Chief Counsel (PHC) is advising the Office of Pipeline Safety (OPS) to revise its procedures for determining the agency records that should be included in the case file for a pipeline safety enforcement proceeding. Under the current procedures, OPS's general practice is to include only the agency records listed in 49 CFR § 190.209(b); *i.e.*, the OPS notice or order that initiates the proceeding; a report that OPS prepares in some cases to support the notice or order; any additional materials that OPS submits in cases involving an informal hearing; and the OPS Regional Director's evaluation of the materials submitted by the respondent and recommendation for final action.

While these materials provide the respondent with a considerable amount of evidence and other information, Congress enacted a statute after the adoption of 49 CFR § 190.209 which "require[s] that the case file in an enforcement proceeding include all agency records pertinent to the matters of fact and law asserted."² The Acting General Counsel of the Department of Transportation (DOT) also recently issued a memorandum establishing new procedural requirements for DOT enforcement actions, including an obligation to affirmatively disclose certain types of evidence consistent with the U.S. Supreme Court's ruling in *Brady v. Maryland*, 373 U.S. 83 (1963).³

¹ This memorandum is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law or equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

² 49 U.S.C. § 60117(b)(1)(C).

³ See OFFICE OF THE GEN. COUNSEL, U.S. DEP'T OF TRANSP., MEMORANDUM TO SECRETARIAL OFFICERS AND HEADS OF OPERATING ADMINISTRATIONS: PROCEDURAL REQUIREMENTS FOR DOT ENFORCEMENT ACTIONS 4-11 (Mar. 11, 2025), <https://www.transportation.gov/administrations/office-general-counsel/general-counsel%E2%80%99s-enforcement-memorandum> (DOT Enforcement Memo).

To ensure that the respondent is receiving all of the agency records required under the Pipeline Safety Act and the DOT General Counsel's memorandum, PHC is advising OPS to develop a new procedure for determining the contents of the case file in pipeline safety enforcement proceedings. In developing that new procedure, PHC is advising OPS to consider Congress' statutory directive that the case file include all pertinent agency records,⁴ as well as the Acting General Counsel's application of the *Brady* rule's affirmative disclosure regime. PHC is also advising OPS to consider the other procedural protections afforded to the respondent in determining the agency records that should be included in the case file, particularly in cases where an informal hearing is requested before a Presiding Official.

PHC is advising OPS to apply this new procedure in all cases that are currently pending before PHMSA and in all future pipeline safety enforcement proceedings. PHC is not advising OPS to apply the new procedure retroactively to prior cases that were already the subject of a final administrative action. Nor is PHC advising OPS that its prior procedure violated any law, statute, or regulation.

BACKGROUND

OPS is the entity within PHMSA that conducts inspections and investigations and initiates enforcement actions for probable violations of the Pipeline Safety Act,⁵ Federal Pipeline Safety Regulations,⁶ and orders issued pursuant to the authority provided thereunder. OPS must comply with certain procedural requirements in performing these functions, and the person who is the subject of the OPS inspection or investigation, or the respondent in an enforcement action, must be afforded certain procedural protections.⁷ One of those procedural protections concerns the contents of the case file in an enforcement proceeding.⁸

In 1980, the Research and Special Programs Administration, one of PHMSA's predecessor agencies, issued a final rule creating new procedures for enforcement actions initiated under the Pipeline Safety Act.⁹ That final rule prescribed the contents of the case file used to decide enforcement actions involving compliance orders and the assessment of civil penalties, requiring the following materials:

- (1) The inspection reports and any other evidence of alleged violations;
- (2) A copy of the notice of probable violation . . .;

⁴ See 49 U.S.C. § 60117(b)(1)(C).

⁵ See generally 49 U.S.C. §§ 60101–60143.

⁶ See generally 49 CFR Parts 190–199.

⁷ 49 U.S.C. § 60117(b)(1); 49 CFR Part 190, Subpart B; DOT Enforcement Memo at 4–11; see also *Goldberg v. Kelly*, 397 U.S. 254, 266–71 (1970); *Richardson v. Perales*, 402 U.S. 389, 402–10 (1971); *Mathews v. Eldridge*, 424 U.S. 319, 332–34, (1976); *Brock v. Roadway Exp., Inc.*, 481 U.S. 252, 261 (1987).

⁸ 49 U.S.C. § 60117(b)(1)(C); 49 CFR § 190.209.

⁹ See Pipeline Safety Enforcement Procedures, 45 Fed. Reg. 20,412, 20,415 (Mar. 27, 1980) (codifying requirements in 49 CFR § 190.213 for issuing final orders).

- (3) Material submitted by the respondent . . . in response to the notice of probable violation;
- (4) The Region Chief's evaluation of response material submitted by the respondent and his recommendation for final action . . . ; and
- (5) In cases involving a . . . hearing, any material submitted during and after the hearing and the presiding official's recommendation for final action . . .¹⁰

In 2013, PHMSA issued a final rule amending the procedural regulations for pipeline safety enforcement proceedings.¹¹ The 2013 final rule included a new regulation applying the case file requirements to several additional types of enforcement actions, including proceedings involving notices of amendment, corrective action orders, and safety orders, but otherwise retained the basic concepts established in the 1980 regulation.¹² The 2013 regulation also provided that the case file must be made available to the respondent.

As currently codified, the regulation adopted in the 2013 final rule states:

- (a) The case file, as defined in this section, is available to the respondent in all enforcement proceedings conducted under this subpart.
- (b) The case file of an enforcement proceeding consists of the following:
 - (1) In cases commenced under § 190.206, the notice of amendment and the relevant procedures;
 - (2) In cases commenced under § 190.207, the notice of probable violation and the violation report;
 - (3) In cases commenced under § 190.233, the corrective action order or notice of proposed corrective action order and the data report, if one is prepared;
 - (4) In cases commenced under § 190.239, the notice of proposed safety order;
 - (5) Any documents and other material submitted by the respondent in response to the enforcement action;
 - (6) In cases involving a hearing, any material submitted during and after the hearing as set forth in § 190.211; and
 - (7) The Regional Director's written evaluation of response material submitted by the respondent and recommendation for final action, if one is prepared.¹³

Congress further addressed the contents of the case file in pipeline safety enforcement proceedings as part of the Protecting our Infrastructure of Pipelines and Enhancing Safety Act of 2020 (2020 PIPES Act).¹⁴ The statute, which is currently codified at 49 U.S.C. § 60117(b)(1)(C), states that “[i]n implementing enforcement procedures under this chapter and [P]art 190 of [T]itle 49, Code

¹⁰ 45 Fed. Reg. at 20,415. The Region Chief is now known as the Region Director.

¹¹ Pipeline Safety: Administrative Procedures; Updates and Technical Corrections, 78 Fed. Reg. 58,897, 58,901 (Sept. 25, 2013).

¹² 78 Fed. Reg. at 58,901.

¹³ 49 CFR § 190.209.

¹⁴ See Protecting our Infrastructure of Pipelines and Enhancing Safety Act of 2020, Consolidated Appropriations Act, 2021, Division R, Pub. L. No. 116-260, § 108(a)(2), 134 Stat. 1181, 2221 (2020 PIPES Act).

of Federal Regulations (or successor regulations), the Secretary shall . . . require that the case file in an enforcement proceeding include all agency records pertinent to the matters of fact and law asserted.”¹⁵

Finally, in March 2025, the Acting General Counsel issued a memorandum establishing additional procedural requirements for DOT enforcement actions. In that memo, the Acting General Counsel stated:

It is the Department’s policy that each responsible [Operating Administration] or component of [the Office of the Secretary of Transportation] will voluntarily follow in its civil enforcement actions the principle articulated in *Brady v. Maryland*, in which the Supreme Court held that the Due Process Clause of the Fifth Amendment requires disclosure of exculpatory evidence “material to guilt or punishment” known to the government but unknown to the defendant in criminal cases. Adopting the “*Brady* rule” and making affirmative disclosures of exculpatory evidence in all enforcement actions will contribute to the Department’s goal of open and fair investigations and administrative enforcement proceedings. This policy requires the agency’s adversarial personnel to disclose materially exculpatory evidence in the agency’s possession to the representatives of the regulated entity whose conduct is the subject of the enforcement action. These affirmative disclosures should include any material evidence known to the Department’s adversarial personnel that may be favorable to the regulated entity in the enforcement action—including evidence that tends to negate or diminish the party’s responsibility for a violation or that could be relied upon to reduce the potential fine or other penalties. The regulated entity need not request such favorable information; it should be disclosed as a matter of course.¹⁶

Consistent with the *Brady* rule, the Acting General Counsel further stated that in DOT enforcement actions involving the assessment of civil penalties, “the agency shall voluntarily share penalty calculation worksheets, manuals, charts, or other appropriate materials that sheds light on the way penalties are calculated to ensure fairness in the process and to encourage a negotiated resolution where possible.”¹⁷

ANALYSIS

OPS’s historical practice has been to include only the materials listed in 49 CFR § 190.209(b) in the case file for a pipeline safety enforcement proceeding. Those materials include certain agency records that must be made available to the respondent at the outset, *i.e.*, the notice or order that OPS issued to initiate the proceeding and, in some cases, an OPS violation report or data report.¹⁸ Additional materials submitted by the respondent or OPS are also added to the case file during the

¹⁵ *Id.*

¹⁶ DOT Enforcement Memo at 7-8.

¹⁷ *Id.* at 10.

¹⁸ See 49 CFR § 190.209(b)(1)–(4).

subsequent phases of the proceeding.¹⁹ As a matter of policy, OPS also provides the respondent, on request, with a copy of the worksheet used to calculate a civil penalty if that sanction is proposed in an enforcement proceeding.²⁰

In the 2020 PIPES Act, Congress amended the Pipeline Safety Act to state that “all agency records pertinent to the matters of fact and law asserted” must be included in the case file of a pipeline safety enforcement proceeding.²¹ PHMSA has not revised the requirements in 49 CFR § 190.209 since the enactment of the 2020 PIPES Act, and OPS has not clearly addressed the implementation of this congressional mandate in its enforcement procedures.

The Acting General Counsel has also directed all Operating Administrations, including PHMSA, to voluntarily apply the *Brady* rule in enforcement proceedings initiated by DOT. The *Brady* rule imposes an affirmative disclosure obligation that exceeds the standards prescribed in 49 U.S.C. § 60117(b)(1)(C) and 49 CFR § 190.209(b).²² Meeting that obligation requires OPS to include any materially exculpatory agency records in the case file, regardless of whether the respondent in a pipeline safety enforcement proceeding makes a request for those records.

To ensure that the respondent is receiving all Agency records required under the Pipeline Safety Act and the DOT General Counsel’s memorandum, PHC is advising OPS to revise its procedures for determining the contents of the case file in a pipeline safety enforcement proceeding.

RECOMMENDATION

Effective as of May 29, 2025, PHC is advising OPS to revise its procedures for determining the contents of the case file in a pipeline safety enforcement proceeding. In developing that new procedure, PHC is advising OPS to consider Congress’ directive “that the case file in an enforcement proceeding include all agency records pertinent to the matters of fact and law asserted.”²³ PHC is further advising OPS to consider the provisions in the DOT Enforcement Memo, including the applicability of the *Brady* rule’s affirmative disclosure framework for materially exculpatory evidence as well as the directive to voluntarily share worksheets, manuals, charts, or other appropriate materials about the calculation of a civil penalty.²⁴

¹⁹ See *id.* at § 190.209(b)(5)–(7).

²⁰ See Pipeline Safety: General Policy Statement; Civil Penalties, 81 Fed. Reg. 71,566, 71,566 (Oct. 17, 2016).

²¹ 49 U.S.C. § 60117(b)(1)(C). As a subsequent congressional enactment, the provisions in 49 U.S.C. § 60117(b)(1)(C) determining the agency records that should be included in a pipeline safety enforcement proceeding case file control in the event of a conflict with the regulatory requirements in 49 CFR § 190.209. See *Norman v. U.S.*, 942 F.3d 1111, 1118 (Fed. Cir. 2019) (“It is well-settled that subsequently enacted or amended statutes supersede prior inconsistent regulations.”) (citing *R&W Flammann GmbH v. U.S.*, 339 F.3d 1320, 1324 (Fed. Cir. 2003); *Barsebäck Kraft AB v. United States*, 121 F.3d 1475, 1480 (Fed. Cir. 1997); *Farrell v. U.S.*, 313 F.3d 1214, 1219 (9th Cir. 2002)).

²² See *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (requiring disclosure of exculpatory evidence “material either to guilt or punishment” known to the government but unknown to the defendant in criminal cases).

²³ 49 U.S.C. § 60117(b)(1)(C).

²⁴ See DOT Enforcement Memo at 7–8, 10.

PHC is advising OPS to consider the other procedural protections afforded to the respondent in developing its revised procedures. The availability of Agency records affects the respondent's due process rights at various stages of an enforcement proceeding, including in deciding whether to request an informal hearing before a Presiding Official,²⁵ and, if so, to introduce additional materials prior to a hearing,²⁶ and to call and present testimony from witnesses during a hearing.²⁷ The availability of agency records also affects whether the respondent can effectively "examine the evidence and witnesses presented by" OPS.²⁸

PHC is advising OPS to apply its revised procedures in all enforcement actions that are currently pending before PHMSA and in all future proceedings. PHC is not advising OPS to apply its revised procedures retroactively to enforcement actions that were already the subject of a final administrative action as provided in 49 CFR §§ 190.241 and 190.243(f). Nor is PHC advising OPS that its prior case file procedures violated any law, statute, or regulation.

²⁵ See 49 CFR § 190.208(a)(4), (b)(4).

²⁶ See 49 CFR § 190.211(d).

²⁷ See 49 CFR § 190.211(e).

²⁸ 49 CFR § 190.211(e). PHC notes that the Presiding Official has the power to ensure that OPS includes the materials in the case file that are necessary to conduct a fair and impartial hearing and protect the procedural rights of the respondent under 49 CFR § 190.212.