Guidelines for States Participating in the Underground Natural Gas Storage Safety Program - Procedure to Monitor, Evaluate, and Reject a State Program's Certification

Appendix P

U. S. Department of
Transportation

Pipeline and
Hazardous Materials
Safety Administration

PHMSA Office of Pipeline Safety Procedure to Monitor, Evaluate, and Reject a State Program's Certification

Effective Date: April 2012

I. Purpose

The following procedure outlines the process by which the Secretary of Transportation (Secretary), and PHMSA as the designee, may monitor, evaluate, and reject a state program's Certification and therefore assume *intrastate* regulatory, inspection, and enforcement responsibilities, from a state under an annual Certification. The Secretary may enter into a 60105 Certification with a state such that the state assumes regulatory oversight responsibility for intrastate facilities within that state. The Certification requires that the state successfully meet several requirements, further discussed in this document.

II. Secretary's Authority to Monitor State Programs

After a state becomes certified to regulate its intrastate facilities, the Secretary may monitor a safety program to ensure that the program complies with the Certification. PHMSA's Office of Pipeline Safety (OPS) monitors the performance of the state agencies participating in the pipeline safety program through PHMSA's State Programs Division.

PHMSA has broad statutory authority to regulate pipeline safety. If PHMSA determines that the state is not satisfactorily complying with the Certification requirements, then PHMSA may reject the Certification, assert United States Government jurisdiction, or take other appropriate action to achieve adequate oversight. PHMSA may adopt policies and rules implementing its statutory authority to reject a state's Certification

III. Establishment of Administrative Process and Procedures for Unsatisfactory Compliance with Certification Requirements

The following includes the administrative process and procedures PHMSA will follow if a state is found to have such deficiencies in its pipeline safety program that it is not satisfactorily complying with the Certification requirements and the statute. Such a finding is a prerequisite before PHMSA may initiate a proceeding to reject a state's Certification. In determining a state program's inadequacies, PHMSA may also evaluate a state's overall pipeline safety program, as well as evaluate past specific state oversight activities and enforcement actions. This document also includes the established administrative process and

procedures and other remedies available to a state for contesting a notice alleging it failed to satisfactorily comply with the Certification, should the state elect to do so.

IV. Considerations and alternatives before PHMSA rejects a state's Certification

Before rejecting a state Certification, PHMSA's Associate Administrator, OPS, may take other appropriate action to achieve adequate compliance with the Certification, which may include:

A. The Director of State Programs may issue a letter to the State Senior Official responsible for the Underground Natural Gas Storage safety program identifying the state's deficiencies and warning the state to make certain improvements or take other actions necessary to maintain the state's Certification with PHMSA.

B. PHMSA may notify the state in writing of the proposed action(s) to reject, suspend, or modify a state's certificate and provide that the matter may be resolved once PHMSA verifies that the evidence submitted by the state demonstrates completion of the following:

1. corrected the deficiencies,

2. complied with the required corrective action(s), or

3. a written agreement to correct the deficiencies within the time specified by PHMSA; or on or before the end of the suspension period. C. After giving the state an opportunity to respond, PHMSA may:

1. temporarily suspend the state's certificate, if PHMSA determined that the deficiency can be corrected within a reasonable amount of time;

2. allow states, deemed to have failed to satisfactorily comply with the Certification requirements, the opportunity to enhance their programs and to demonstrate their adequacy through periodic reviews; or

3. convert a state Certification to a 49 U.S.C. § 60106 agreement, which reduces the state's Underground Natural Gas Storage safety responsibility.

D. A state may give up its certificate prior to a final action by PHMSA to reject the state's certificate. The state may do this by sending a certified letter of intent to relinquish all Underground Natural Gas Storage safety responsibilities to the Associate Administrator, OPS. The letter should include a brief explanation with a description of any outstanding or active inspections and enforcement activities, and include a statement that the state understands and agrees that by relinquishing the Certification PHMSA will assume responsibility for intrastate Underground Natural Gas Storage safety.

E. PHMSA may take steps to reject a state's Certification if the state failed to demonstrate that it made improvements or took other actions required by PHMSA to maintain the state's Certification.

V. PHMSA's rejection of a state's Certification

When PHMSA finds that a state has such deficiencies in its Underground Natural Gas Storage safety program that it is not satisfactorily complying with the Certification requirements, then PHMSA may initiate

action to reject a state's Certification. PHMSA must document the basis for an allegation that a state failed to satisfactorily comply with the Certification requirements.

VI. Unsatisfactory Compliance Elements

Below are illustrative examples of nonconformance. A state program may be considered unsatisfactory if the state engages in one or more of these (as circumstances warrant):

A. Substantially failed to conform to the requirements detailed in its Certification or the statute when the state:

- Failed to have regulatory jurisdiction over the standards and practices prescribed by the Certification and statute,

- Failed consistently to take enforcement or corrective action after finding significant violations of Underground Natural Gas Storage safety laws and regulation,

- Failed to adopt regulations at least as stringent as the minimum Federal regulations,

- Failed to provide adequate oversight through ways that include inspections conducted by State employees that meet the qualifications prescribed by the statute,

- Failed to encourage and promote the establishment of a damage prevention program to prevent excavation damage to Underground Natural Gas Storages, to which the Certification applies, subjecting persons who violate the program requirements to civil penalties and other enforcement actions substantially the same as prescribed by the statute,

- Failed to provide for the enforcement of record maintenance, reporting, and inspection substantially the same as provided in the statute, or

B. Failed to provide for the enforcement of safety standards under a state law by injunctive relief and civil penalties substantially the same as provided in the statute.

C. Has been unable to have the majority of inspectors successfully complete requisite Underground Natural Gas Storage safety training conducted by PHMSA.

D. Engaged in any behavior that gives PHMSA reason to believe the state has not satisfactorily complied with the Certification requirements or statute.

E. Performance indicators, such as incident rates in combination with corrective actions, indicate the state is not satisfactorily meeting the intent of the safety oversight program.

VII. Adjudication Process and Procedures: Notice of Intent to Reject a State's Certification/Show Cause Order

When PHMSA determines that a state has such deficiencies in its Underground Natural Gas Storage safety program that it is not satisfactorily complying with the Certification requirements, PHMSA must notify the state of its intent to reject the state's Certification and provide an opportunity for a hearing before taking final action. PHMSA's Associate Administrator, OPS, may initiate the proceedings by serving Notice on the State with an order to show cause why the state's certificate should not be rejected. The Notice must include the basis for each allegation that a state failed to satisfactorily comply with the Certification requirements. When Notice is given, the state bears the burden of proof that it is enforcing satisfactorily compliance with the prescribed standards. The Notice shall provide an opportunity for the state to appear at a hearing to show cause why PHMSA should not reject its certificate or to show cause why it has not completed any required action(s) identified in written correspondence from PHMSA.

The show cause order shall provide:

- a time and place for the hearing and shall be served upon the state to give evidence upon the matter specified therein
- contain a statement(s) of the matters or allegations with respect to which PHMSA is inquiring;
- notify the state they bear the burden of proof for enforcing satisfactorily compliance with the prescribed standards
- notice and opportunity for the state to respond to any allegation(s) that it has not satisfactorily enforced compliance with safety standards in accordance with 49 U.S.C. Chapter 60101 *et seq*.
- PHMSA may dismiss a Notice to show cause before issuing a final order based on evidence that the state has taken action to address the alleged deficiencies

- the state appear no less than twenty business days after the receipt of such order, except where the safety of life, environment or property is involved, PHMSA may provide in the order for a shorter period of time to appear

- an extension of time may be granted upon a written request timely submitted by the state demonstrating good cause for an extension

- notice and opportunity to be represented by counsel at the hearing.

- notice and opportunity for the state to present witnesses, and submit any relevant explanations, information and material during a hearing.

- an opportunity to present evidence on any allegation(s)

- PHMSA to make publicly available all notices, findings and determinations.

- an opportunity for the state to petition for reconsideration of the final determination [process to be further defined]

PHMSA shall make a final written determination, including the reasons for the decision. PHMSA will notify the state of its final determination, including a brief statement of the reason(s) why the state's certificate should or should not be rejected, or whether other appropriate action may be taken.

VIII. Adverse Action

Any adverse action taken by PHMSA against a state may impact the state's grant funding.

IX. Reinstatement of State Certification

A decertified State may apply for Certification to PHMSA and must provide supporting documentation that the state meets Certification requirements.

A. A state applying for reinstatement must provide evidence of compliance with all Certification requirements, at least 30 days prior to the next grant application/Certification opportunity.

B. PHMSA will respond to such requests and perform an adequacy review in a timely manner.

C. PHMSA may not consider an untimely application for reinstatement or an application that failed to include all evidence of compliance at least 30 days prior to the next grant application/Certification opportunity.

D. PHMSA may grant a request to reinstate a state's Certification upon such showing by the state that it has improved its Underground Natural Gas Storage safety program to an adequate level.

Relevant Contacts

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