

3 Selection of Administrative Enforcement Actions

This section provides guidance for the selection of administrative enforcement proceedings. The regulatory language describing these enforcement actions is in 49 CFR Part 190, Subpart B “Enforcement.” While the purpose of this section is to provide PHMSA personnel with guidance on when to select different enforcement tools and to improve PHMSA’s consistency in implementing the pipeline enforcement program, PHMSA’s decisions and selections regarding enforcement actions are also discretionary involving complex considerations made on a case-by-case basis. For example, the Region¹ is often in the best position to evaluate various subjective considerations, such as an operator’s commitment to safety and compliance, and what may be the best approach to further safety and fairness during an inspection.

This section is divided into two parts:

Section 3.1 covers enforcement actions which allege that an operator did not satisfy a cited requirement (in the sense of either violating a requirement or that a required procedure or plan was not adequate).

Section 3.2 covers other enforcement actions.

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¹ Following the Region chain of command.

3.1 Enforcement Actions That Allege a Requirement Was Not Satisfied

PHMSA inspections and investigations can reveal that an operator is not satisfying the Pipeline Safety Regulations or Laws, a PHMSA order, or a Special Permit. In these situations, it is important to take enforcement action to ensure that operators address the deficiencies in their program and/or facilities in order to return to – and sustain – compliance with safety requirements. There are three basic enforcement actions: a Notice of Probable Violation, a Warning Letter, and a Notice of Amendment. The following sections address when these enforcement actions are to be used.

3.1.1 Notice of Probable Violation

A Notice of Probable Violation alleges the existence of one or more probable violations, and includes a civil penalty or compliance order for at least one of the probable violations. A Notice of Probable Violation is a separate letter, and does not include any other enforcement actions, with one exception. Warning items may be included in a Notice of Probable Violation as long as there is at least one Notice item with a proposed civil penalty and/or compliance order.

3.1.1.1 *When to Use a Notice of Probable Violation*

A Notice of Probable Violation is used to notify an operator of one or more circumstances or conditions that are not in compliance with:

- Pipeline Safety Regulations (49 CFR Parts 190 – 199).
- Pipeline Safety Laws (49 US Code Chapter 601).
- An order from PHMSA, such as a Corrective Action Order, Compliance Order, Order Directing Amendment, Safety Order, or Consent Order.
- A Special Permit.
- Requirements related to an operator’s plans or procedures that are judged to be more serious than “inadequate.” (See subsection 3.1.3 Notice of Amendment, for the criteria to distinguish between inadequate plans or procedures and what is judged to be more serious.)

The region typically identifies a probable violation through direct observation of pipeline facilities, tests, records, procedures, documents, employee activities, etc., while conducting inspections at the operator’s pipeline facilities or offices. Other circumstances or activities which may result in the identification of a probable violation include but are not limited to:

- Incident/accident investigations,
- Safety-related condition report follow-ups,
- Public complaint investigations,
- “Whistleblower” allegation investigations,

- Reports or information from other Federal or state agencies,
- Investigations, inspections, or other activities performed to determine the need for a corrective action or safety order, or
- Failure to submit required reports, data, notifications, or other submittals, or failure to provide complete, accurate, current, and up-to-date information.

Additional guidance for identifying probable violations for a number of specific issues and topics (such as corrosion, integrity management, operations and maintenance, and operator qualification) is provided on the PHP-60 SharePoint site under “Enforcement Guidance.”

Possible enforcement actions for probable violations include:

- A proposed civil penalty;
- A Proposed Compliance Order;
- Both a proposed civil penalty and a Proposed Compliance Order; or
- A warning. If neither a civil penalty nor a Compliance Order is proposed, the enforcement action is considered a warning. Probable violations for which a warning is the appropriate enforcement action may be communicated in a separate Warning Letter or as a warning item in a Notice of Probable Violation, as described in Section 4.

3.1.1.2 Exercise of Enforcement Discretion

PHMSA has broad discretion in deciding what enforcement action, if any, to take against a particular operator to ensure compliance.² These actions range all the way from a Letter of Concern to an emergency Corrective Action Order issued in response to an incident and that may require immediate shutdown of a pipeline. These Enforcement Procedures cannot begin to address the myriad situations where enforcement action may be appropriate or what tool PHMSA should use in every situation. Instead, this Section 3 should be used as a guide to help PHMSA field staff select the most appropriate and effective administrative enforcement tool(s) at their disposal and to apply them as consistently as possible.

Within this context, operators are obviously in the best position to identify deficiencies and non-compliances in their own systems and to correct them promptly. When they do this, public safety and environmental protection are enhanced. This reinforces a strong safety culture in the regulated community so that operators themselves can identify and swiftly correct deficiencies and non-

² See 49 C.F.R. § 5.65, “Proper exercise of prosecutorial and enforcement discretion.” (issued December 27, 2019)

compliances, rather than waiting for PHMSA to discover them, sometimes much later, during an inspection or in the wake of an incident.

The Region Director will generally factor such proactive measures into the exercise of enforcement discretion. For example, when an operator has already taken steps to correct a non-compliance and prevent its recurrence before PHMSA learns of it through an inspection or investigation, the Region Director may decide to forego any enforcement action at all, or seek a less severe enforcement action, depending upon the particular circumstances. If an operator has also timely self-reported the non-compliance, this may be an additional sign of an operator's positive safety culture.

In situations where an operator has failed to follow its own written procedures but has actually exceeded the regulatory requirements, the Region Director may decide to issue an NOPV for failure to follow procedures, issue a Warning Letter, or take no action at all if the alternative procedures provide a higher level of safety.

The bottom line is *safety and protection of the environment* - past, present, and future. In contemplating whether to initiate enforcement action and what type of action to take, the Region Director should consider all of these factors, including the need to prevent future violations by the operator in question and to deter other operators from committing similar violations.

3.1.1.3 If Criminal Activity is Suspected

If criminal activity is suspected, refer to Section 2 Criminal Enforcement and OIG Coordination of the Pipeline Safety Enforcement Procedures. If there are probable pipeline safety violations involving suspected criminal activity, OPS should bring administrative enforcement actions, if appropriate,³ even when criminal activity has been referred to PHC and/or the OIG. The Enforcement Division tracks the results of administrative enforcement in SMART Enforcement so it is important that PHMSA captures these most serious violations in the operator's enforcement history.⁴

³ Refer to the first paragraph on page 1 that acknowledges that enforcement actions are also discretionary.

⁴ Prompt administrative enforcement action also ensures that such action can be completed before the statute of limitations runs out.

3.1.1.4 *When to Use a Proposed Civil Penalty*

To reinforce the message of the Notice of Probable Violation, draw attention to the problem area, emphasize the need for lasting attention, and deter the respondent and other operators from committing future violations, a proposed civil penalty should be considered.⁵ A civil penalty may be proposed for any probable violation, but should generally be proposed if the characteristics of the probable violation are consistent with any of the criteria listed in the bullets below, where the probable violation (was a):

- Causal factor in an accident/incident.
- Factor in increasing the severity of consequences of an accident/incident.
- Egregious or willful (see Culpability section in Violation Report).⁶
- “Repeat violation” (see definition in Violation Report).
- Essentially the same as a past probable violation including a warning item (for a reasonable past period).
- Systemic, i.e. if it had repetitive characteristics or demonstrated an underlying deficiency in the operator’s system, practices, or procedures.
- Significantly increased the likelihood of a pipeline failure.
- Significantly and adversely impacted an operator’s pipeline safety program that is critical to assuring pipeline integrity.
- Failure of operator to analyze and determine the root causes of failure or to identify effective actions to prevent recurrence.
- Failure to report a reportable incident.
- Involved an absence of corrective action by the operator over an extended period of time.
- Linked to an economic incentive for noncompliance.

In cases involving closely connected probable violations, consideration may be given to which of the closely connected violations to assign a civil penalty. For example, when there are probable violations for failure to identify an OQ covered task in the written operator’s qualification program and failure to ensure personnel are qualified to perform this missing covered task, if a civil penalty is proposed, consideration may be given to propose a penalty for the lack of identification of a covered task and not for the qualification of personnel for this missing covered task.

⁵ Refer to the first paragraph on page 1 that acknowledges that enforcement actions are also discretionary.

⁶ If criminal activity is suspected see subsection 3.1.1.2 of these Enforcement Procedures.

3.1.1.5 When to Use a Proposed Compliance Order

A Compliance Order should be proposed when the characteristics of the probable violation are such that corrective action is necessary to:

- Bring the operator into compliance;
- Ensure that a similar non-compliance will not recur;
- Promptly correct operator procedures where they are so serious that a substantial safety issue may result from application of the procedure; or
- Ensure that any adverse safety impacts due to the probable violation are mitigated promptly and fully.

3.1.2 Warning Letter

3.1.2.1 When to Use a Warning Letter/Item

A Warning Letter/Item is used to notify an operator of one or more circumstances or conditions that are not in compliance with the regulations (49 CFR Parts 190 – 199), the pipeline safety statutes (49 US Code Chapter 601), or a special permit, but the circumstances do not warrant a proposed Notice of Probable Violation (in other words do not warrant a proposed civil penalty or a Proposed Compliance Order). Thus, in that sense, a Warning Letter/Item is generally used for lower risk items.

3.1.2.2 When Not to Use a Warning Letter/Item

A Warning Letter/Item is not used where a Proposed Compliance Order or civil penalty is appropriate.

3.1.3 Notice of Amendment

A Notice of Amendment is a separate letter, and does not include any other enforcement actions. The Notice of Amendment states that PHMSA has identified apparent inadequacies in the operator's plans or procedures, and advises the operator to correct them. It is possible for an inspection or investigation to result in both NOPV and NOA letters.

3.1.3.1 When to Use a Notice of Amendment

A Notice of Amendment is used to notify an operator that its plans or procedures required under 49 Parts 192, 193, 195, and 199 are "inadequate" to assure safe operation of a pipeline facility. Deficiencies related to an operator's plans or procedures that cause them to be "inadequate" may include those that:

- Repeat or paraphrase the regulatory text, instead of providing instructions for how to implement a regulatory requirement;
- Provide instructions for compliance in a vague, general or conflicting manner that offers little or no practical or meaningful guidance, and therefore increases the likelihood of error, confusion, or the exercise of poor judgment by the operator;

- Contain procedural omissions or technical errors (including lack of technical basis); or
- Do not provide an adequate basis for personnel training.

3.1.3.2 When Not to Use a Notice of Amendment

If PHMSA determines the operator's plans or procedures are judged to be more serious than "inadequate," then PHMSA should proceed to issue a Notice of Probable Violation. Conditions more serious than "inadequate" have some well-defined criteria, but also have some grey areas. Examples of deficiencies, that may be more serious than inadequate, may be plans or procedures that:

- Are not in place before initial operation of the facility to which they apply;
- Are not available at locations where the work is conducted;
- Omit a specific requirement of a regulation or referenced standard;
- Contain serious procedural or technical errors or omissions that result in a likelihood that application of the procedure will lead to an accident/incident, serious integrity threats will be overlooked, or serious risks will not be addressed; or
- Have not been implemented.

3.2 Other Enforcement Actions

PHMSA has other enforcement tools available to address operator performance issues. These tools are a Corrective Action Order, Notice of Proposed Corrective Action Order, Notice of Proposed Safety Order, and Letter of Concern. The following sections address when these enforcement actions are to be used.

3.2.1 Corrective Action Order

A Corrective Action Order finds that a pipeline facility is or would be hazardous to life, property, or the environment, and specifies corrective measures that must be taken.

3.2.1.1 When to Use a Corrective Action Order

A Corrective Action Order is used to notify an operator that PHMSA has determined that its pipeline facility is or would be hazardous to life, property, or the environment, unless corrective measures are taken. A Corrective Action Order is also used to notify an operator that its facility, or a component of the facility, is or would be constructed or operated with equipment, material, or a technique that is hazardous to life, property, or the environment, and to take corrective measures to address this situation. A Corrective Action Order can be used on an in-service pipeline, a pipeline that has been shut down, or a pipeline that is under construction. In all cases, the Corrective Action Order must explain why the facility is or would be hazardous and specifies the corrective measures that must be taken by the operator to address the hazardous condition.

In determining if a facility is or would be hazardous to life property or the environment, the statute requires consideration of the following items, if relevant:

- (1) the characteristics of the pipe and other equipment used in the pipeline facility, including the age, manufacture, physical properties, and method of manufacturing, constructing, or assembling the equipment;
- (2) the nature of the material the pipeline facility transports, the corrosive and deteriorative qualities of the material, the sequence in which the material are transported, and the pressure required for transporting the material;
- (3) the aspects of the area in which the pipeline facility is located, including climatic and geologic conditions and soil characteristics;
- (4) the proximity of the area in which the hazardous liquid pipeline facility is located to environmentally sensitive areas;⁷
- (5) the population density and population and growth patterns of the area in which the pipeline facility is located;
- (6) a recommendation from the National Transportation Safety Board; and
- (7) other factors OPS considers appropriate.

The regulations [190.233 (a)] require that an operator must be given reasonable notice and an opportunity for a hearing before issuing a Corrective Action Order. However, PHMSA may waive the requirement for a notice and opportunity for a hearing if it determines that “the failure to issue the order expeditiously will result in likely serious harm to life, property, or the environment.” In this situation the Corrective Action Order is issued immediately and the operator is given the opportunity for a hearing as “soon as practicable.”

If during the course of determining if a hazardous condition exists, probable violations are discovered, they are addressed using a Notice of Probable Violation, as described in Section 3.1.1. Issuance of a Corrective Action Order does not preclude the issuance of a separate Notice of Probable Violation.

⁷ While not explicitly stated in 49 CFR 190.233(e), this consideration is included in the Statute [49 USC 60112(b)(4)], and must be considered.

3.2.1.2 When Not to Use a Corrective Action Order

A Corrective Action Order is not used when a facility is not, or would not be, hazardous to life, property, or the environment.

A Corrective Action Order is not used when a facility is, or would be, hazardous to life, property, or the environment, but immediate corrective action by the operator is not needed.

3.2.2 Notice of Proposed Corrective Action Order

The Notice of Proposed Corrective Action order proposes to find that a pipeline facility is or would be hazardous to life, property, or the environment.

3.2.2.1 When to Use a Notice of Proposed Corrective Action Order

If PHMSA believes that the conditions for issuance of a Corrective Action Order have been met, but the Corrective Action Order does not need to be issued expeditiously to prevent likely serious harm to life, property, or the environment, the regulations require that an operator be given reasonable notice and an opportunity for a hearing before a Corrective Action Order is issued. In this case, a Notice of Proposed Corrective Action Order is the appropriate enforcement tool.

3.2.2.2 When Not to Use a Notice of Proposed Corrective Action Order

A Notice of Proposed Corrective Action Order is not used when PHMSA determines that corrective measures must be immediately imposed to prevent likely serious harm to life, property, or the environment. In this situation, opportunity for a reasonable notice and hearing is waived and a Corrective Action Order is used, as described in Section 3.2.1.

3.2.3 Notice of Proposed Safety Order

The Notice of Proposed Safety Order alleges the existence of a condition or conditions posing a pipeline integrity risk to public safety, property, or the environment, and states the facts and circumstances supporting the issuance of a Safety Order for the identified pipeline facility(s). The Notice of Proposed Safety Order proposes corrective actions to be taken by the operator, such as testing, integrity assessments, evaluations, or repairs.

3.2.3.1 When to Use a Notice of Proposed Safety Order

A Notice of Proposed Safety Order is used to notify an operator that a particular pipeline facility has a condition or conditions that pose a pipeline integrity risk to public safety, property, or the environment. A Notice of Proposed Safety Order addresses pipeline integrity risks that may not constitute a hazardous facility requiring immediate corrective action (See Corrective Action Order, Section 3.2.1), but do need to be addressed over time. The Safety Order can be used to direct integrity assessments, testing, repairs, or other appropriate actions to remedy the identified risk condition [190.239].

In determining the need for a Notice of Proposed Safety Order, 190.239(d) requires consideration of the following, if relevant:

- The characteristics of the pipe and other equipment used in the pipeline facility, including the age, manufacture, physical properties, and method of manufacturing, constructing, or assembling the equipment;
- The nature of the material the pipeline facility transports, the corrosive and deteriorative qualities of the material, the sequence in which such materials are transported, and the pressure required for transporting the material;
- The aspects of the area in which the pipeline facility is located, including climatic and geologic conditions and soil characteristics;
- The proximity of the area in which a hazardous liquid pipeline facility is located to environmentally sensitive areas;
- The population density and population and growth patterns of the area in which the pipeline facility is located;
- Any recommendation of the National Transportation Safety Board made under another law;
- Other factors the Secretary considers appropriate;
- The likelihood that the condition will impair the serviceability of the pipeline;
- The likelihood that the condition will worsen over time; and
- The likelihood that the condition is present or could develop on other areas of the pipeline.

Some conditions that might lead to consideration of a Notice of Proposed Safety Order include:

- Incident trends or incident investigation results indicating repeated, similar, and/or related problems leading to failures
- In-line inspection or other assessment results indicating widespread problems with underlying causes that may not be fully addressed through pipeline repair or remediation alone
- In-line inspection or metallurgical reports indicating previously unrecognized integrity threats
- Repeated safety-related condition reports for similar and/or related problems indicating a need for broader and more systemic corrective action
- Inspection results and enforcement history showing repeated occurrences of similar and/or related violations indicative of a broader safety management program deficiency
- Operating practices which lead to repeated near misses, could lead to an incident, or could aggravate an incident or its consequences once it occurred.

If, during the course of determining that a risk condition exists (or does not exist), PHMSA discovers probable violations, these can be addressed using a Notice of Probable Violation as described in Section 3.1.1. Issuance of a Notice of Proposed Safety Order does not preclude the issuance of a separate Notice of Probable Violation.

3.2.3.2 When Not to Use a Notice of Proposed Safety Order

A Notice of Proposed Safety Order is not used when PHMSA believes a facility is or would be hazardous to life, property, or the environment without corrective measures, or to address probable violations or procedural inadequacies.

3.2.4 Letter of Concern

A Letter of Concern describes the areas of concern, but does not allege that the operator committed a probable violation. A Letter of Concern is another tool that can be used to communicate PHMSA concerns about any aspect of an operator's safety performance. While Letters of Concern are not in 49 CFR 190, they are an informal mechanism that is used to communicate PHMSA concerns to operators.

3.2.4.1 When to Use a Letter of Concern

A Letter of Concern is used to notify a pipeline operator that an aspect of its pipeline safety program does not conform to sound safety management and engineering practices, even though the operator may not be out of compliance. A Letter of Concern may be used when inspectors are concerned about the technical soundness of practices observed in the field. Similarly, inspectors may observe deteriorating conditions at a facility that, although currently in compliance, could become out of compliance over time if not addressed by the operator.

3.2.4.2 When Not to Use a Letter of Concern

A Letter of Concern is not used when any other enforcement action is appropriate. Specifically, a letter of concern is not used when there are probable violations – even if the violations are considered to be minor, low risk, or administrative in nature. Likewise, Letters of Concern are not used when inadequate procedures are identified – even if the inadequacies are relatively minor or administrative in nature.