

## ALERTS

### Pipeline Practice Alert - Enforcement And Reporting Updates For Pipeline Operators

2013年3月7日 | アトランタ | シカゴ | コロンバス | デラウェア | エルクハート | フォートウェイン | グランドラピッズ | インディアナポリス | ロサンゼルス | ミネアポリス | サウスベンド

#### District Court Enjoins Pennsylvania Environmental Hearing Board Permit Appeals

Federal Judge Robert D. Mariani granted an injunction to stay proceedings in the Pennsylvania Environmental Hearing Board on appeals filed by Delaware Riverkeeper Network and others of three state environmental permits issued to a pipeline operator, in *Tennessee Gas Pipeline Co., LLC v. Delaware Riverkeeper Network, et al*, No. 3:13-cv-46 (M.D. Pa. Feb. 5, 2013).

Tennessee Gas Pipeline Company (TGPC) sought a declaratory judgment that the Natural Gas Act (“NGA”) preempted Pennsylvania’s Environmental Hearing Board from reviewing appeals of three permits issued to TGPC by the state’s environmental agency as required by an earlier Federal Energy Regulatory Commission (FERC) order. The Court disagreed with TGPC that this issue turned on preemption, noting that two of the permits were issued pursuant to the Clean Water Act, 33 U.S.C. §§ 1251 et seq. and not the NGA. However, the Court found that the three environmental permits were so interrelated that separate reviews of the permits could lead to conflicting outcomes and would be judicially cumbersome. Further, the court rejected claims that the permits were not final until the agency appeals process was complete, finding that the NGA provides for judicial review of “an order or action” by a state agency, not necessarily a “final” agency order. Therefore, the Court held that it was the initial agency determination as to whether a permit should be issued or denied that triggers judicial review. It is unknown if any party will appeal this ruling.

While this case clearly has implications for pipeline operators operating in Pennsylvania, it may also lead to arguments in other jurisdictions as to whether appeals of state environmental permits must be taken to federal court. Notably, the opinion provides an exception to the general rule that a litigant must exhaust its remedies at the agency level before judicial review. This could allow pipeline operators to more quickly obtain finality of state permits through judicial review in lieu of potentially lengthy appeals through the state adjudicative agency process.

#### PHMSA Issues Advisory Bulletin Regarding Proposed Rules for Telephonic Reporting of Pipeline Accidents

On Jan. 30, 2013, the federal Pipeline and Hazardous Materials Safety Administration (PHMSA) issued an advisory bulletin notifying owners and operators of gas and hazardous liquid pipeline systems and liquid natural gas (LNG) facilities that the agency will issue a proposed rule to revise

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telephonic reporting regulations to establish specific time limits for telephonic or electronic notice of accidents and incidents involving pipeline facilities to the National Response Center (NRC). Such owners and operators are currently required to notify the NRC at the “earliest practicable moment” following discovery of an accident or incident. See 49 C.F.R. §§ 191.5 and 195.52. While this standard has been understood by PHMSA to generally mean within one to two hours after discovery of the incident, legislation passed last year requires PHMSA to require a specific time limit for such reporting.

PHMSA states it will issue a proposed rule at a later date. However, PHMSA is encouraging pipeline operators to begin reporting accidents and incidents within one hour of confirmed discovery “as a practice.” Owners and operators will want to review the proposed rule ultimately issued by PHMSA to determine whether the specific time limit proposed by the PHMSA will require changes to current incident reporting procedures, and whether comments should be filed objecting to that rule-making. Operators may also want to review their existing incident reporting protocols and procedures and begin reporting accidents and incidents within the recommended one-hour time limit, absent good cause for a longer time.

The full advisory bulletin may be viewed at: [http://www.phmsa.dot.gov/staticfiles/PHMSA/DownloadableFiles/Files/Pipeline/ADB\\_2013\\_01.pdf](http://www.phmsa.dot.gov/staticfiles/PHMSA/DownloadableFiles/Files/Pipeline/ADB_2013_01.pdf)

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Barnes & Thornburg’s attorneys have experience advising major pipeline operators on compliance with federal and state regulations across the United States and do so with a practical, business-oriented approach. We are also called upon to represent pipeline operators during leak incidents and resulting governmental investigations and enforcement actions.

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