The Trouble With New Rules For Natural Gas Processors

Law360, New York (November 19, 2013, 3:36 PM ET) -- The Department of Transportation's Pipeline and Hazardous Materials Safety Administration ("PHMSA") has recently expressed its intent to apply 49 CFR part 195 regulations to midstream natural gas liquids ("NGL") processing facilities traditionally regulated by the Occupational Safety and Health Administration and the U.S. Environmental Protection Agency. The potential expansion of part 195 would obligate companies to reassess physical assets and create new compliance programs and may cause confusion regarding what specific regulatory rules or standards will be applied to midstream facilities.

Factual Background

In Aug. 2011, a major fractionation facility operator asked PHMSA for an opinion regarding its jurisdiction over an NGL processing facility. This request led to correspondence in which PHMSA interpreted part 195 to apply to facilities and equipment that many in the industry believed were exempt from PHMSA regulation. PHMSA subsequently sought to inspect the operator’s plant and litigation ensued. The operator’s challenge to PHMSA’s expansive interpretation of part 195 and its allegation that PHMSA violated the rulemaking process are pending before the U.S. Court of Appeals for the D.C. Circuit. Concurrently, PHMSA is pursuing an administrative action against the operator.

Acting on the expanded interpretation of part 195, PHMSA and state regulators have inspected a number of NGL fractionation and storage facilities currently operated pursuant to OSHA and EPA regulations. In May 2013, PHMSA formally issued two notices of potential violations to such an NGL fractionation and underground storage facility. CPF 320135014 and CPF 320135015. The Texas Railroad Commission has also inspected fractionation and underground storage facilities belonging to a number of companies and issued notices of alleged violations of part 195.

Statutory Background

The Pipeline Safety Act ("PSA") authorizes PHMSA to promulgate regulations covering pipeline systems and the transportation of hazardous liquids associated with those systems. It expressly precludes PHMSA from regulating “onshore production, refining, or manufacturing facilities ... or storage or in-plant piping systems associated with onshore production, refining, or manufacturing facilities.” Part 195 mirrors the statute, covering the transportation of hazardous liquids via pipeline but exempting certain facilities and their associated storage and in-plant piping.

Historically, the statutory “refining” exemption has been interpreted to limit PHMSA’s jurisdiction to regulating the transportation of NGL up to the first pressure regulation device at the perimeter of a facility. In other words, part 195 was not thought by NGL companies to typically regulate operations
“inside the fence” of such facilities.


The regulatory jurisdictional relationship between PHMSA and OSHA is complex. OSHA’s authority generally is focused on regulating the working conditions of laborers whose working conditions are not regulated by another federal agency. As a result, PHMSA regulations may preempt OSHA regulations. Precedents suggest, however, that PHMSA must affirmatively and comprehensively regulate working conditions in a given field before OSHA regulations governing that field are preempted. Chao v. Mallard Bay Drilling, Inc., 534 U.S. 235 (2002).

**PHMSA Letters Interpreting Part 195**

The plant operator’s request for jurisdictional guidance mentioned earlier posed two questions regarding the scope of part 195: (1) is the in-plant piping of a processing facility outside of PHMSA’s jurisdiction? and (2) is underground storage associated with a processing facility outside of PHMSA’s jurisdiction? PHMSA answered these questions in letters dated Feb. 28, 2012; Aug. 8, 2012; and Nov. 13, 2012. PI-11-2012.

PHMSA’s interpretation addressed the following points:

- Midstream facilities are subject to part 195 regulation. PHMSA coined a new term — “midstream hazardous liquid pipeline storage facilities” to describe a broad class of facilities that it claimed were within PHMSA’s jurisdiction. Many facilities previously thought to be outside of PHMSA’s jurisdiction — e.g., a fractionation facility with associated storage — are now characterized as “midstream facilities” and subject to part 195 regulation.

- Part 195 extends “inside the fence” of midstream facilities. PHMSA stated that the application of part 195 to a facility depends on its configuration. While in-plant piping and storage facilities exclusively related to processing remain exempt, all other in-plant piping and storage facilities are subject to part 195, including lines with shared use (i.e., those used in both processing and non-processing applications).

- Fractionation or other processing plants do not equate to “refineries” to trigger the statutory exemption. PHMSA discounted the idea that the presence of a fractionation plant makes the facility a refinery and consequently exempt from regulation, stating: “[t]he presence of a fractionation plant or other kinds of separation or processing equipment located on the grounds of a mid-stream hazardous liquid pipeline facility does not mean that virtually the entire facility is exempt from regulation as a refinery.”

- PHMSA further concluded that a fractionation facility cannot be a refinery because it does not chemically alter the NGLs.
• PHMSA limited its prior statement that had exempted piping “inside” an NGL processing plant from part 195 regulation. PHMSA stated that “[s]eparation or processing plants located on the grounds of a production facility where NGLs are initially produced and a NGL pipeline originates are not subject to the jurisdiction [of the PSA].” However, any midstream facility that receives products that are already in the stream of transportation is subject to part 195 regulation.

• PHMSA declined for now to regulate fractionation equipment, piping and storage wells used exclusively for fractionation and underground storage wells and piping that are down hole from the wellhead valves because PHMSA has not promulgated applicable regulations. PHMSA declined to regulate two in-plant systems — those used exclusively for processing and those used for storage down-hole of a pressure regulator — based on the absence of applicable regulations rather than the statutory exemption. PHMSA thus reserves the authority to regulate such systems in the future.

What Are the Effects of PHMSA’s Expanded Jurisdiction?

The expansion of PHMSA’s jurisdiction “inside the fence” of midstream processing facilities will change the regulatory landscape significantly.

Part 195 regulations are more prescriptive than OSHA PSM requirements. Extended to midstream facilities that are operated and built to meet OSHA requirements, they will require companies to retool their plants in order to comply, potentially resulting in operational stoppages and economic losses.

Furthermore, there is no evidence in a rulemaking or other source that these changes will result in safer operations. Based on actual experience, the current OSHA regime appears to have been effective in identifying operating processes, establishing engineering and equipment controls and protecting human safety and the environment. Moreover, many of the technical requirements in PHMSA part 195 do not appear intended to apply to low pressure operations inside a midstream facility.

The prospect of simultaneous regulation of midstream facilities by PHMSA and OSHA also will pose problems and will increasing operational uncertainty and compliance costs. At a minimum, companies would need to perform costly gap or coverage analyses to determine how the two sets of regulations overlap and how best to comply with both. That is particularly difficult because PHMSA has not promulgated specific regulations tailored to processing facilities.

Finally, companies face citations and potentially significant exposure to fines for noncompliance with part 195 in a facility that complies with OSHA PSM. Fines and remediation costs can be significant; PHMSA has issued an $800,000 fine to, and ordered extensive remedial action by, one operator after finding that its midstream PSM facility did not comply with part 195.

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