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RE: Comments – Pipeline Safety: Midstream Facilities Frequently Asked Questions; Docket No. PHMSA-2019-0199

I. Introduction

On November 4, 2020, the U.S. Department of Transportation's (DOT's) Pipeline and Hazardous Materials Safety Administration (PHMSA or the Agency) published a notification and request for comments (Notice) in the above-captioned proceeding.[1] In the Notice, PHMSA proposed, in the form of agency guidance, a set of frequently asked questions (FAQs) and responses for the purpose of "delineat[ing] where PHMSA and the Occupational Safety and Health Admininstration (OSHA) will each perform inspection and enforcement activities for midstream processing facilities where there is overlapping authority."[2] The Notice indicated that the objective of the FAQs was to "clarify when each of PHMSA or OSHA intends to exercise its respective regulatory inspection and enforcement authority over midstream processing facilities involved in pipeline transportation of energy products."[3] The Notice also indicated that the FAQs would address "[u]ncertainty regarding where each of these respective regulatory authorities begins and ends in connection with midstream processing facilities [which] has led to confusion among regulated entities and unnecessary duplication of regulatory efforts by the Federal Government."[4]

The Association of Oil Pipe Lines, the American Petroleum Institute, GPA Midstream, Interstate Natural Gas Association of America, and American Gas Association (collectively, the Associations) appreciate the opportunity to submit the following joint comments in response to the Notice.[5] The Associations support PHMSA's efforts to provide greater clarity on the oversight of midstream processing facilities, which aids the work of both regulators and regulated entities. The Associations also support PHMSA's decision to engage affected members of the stakeholder community in developing this guidance document. The Associations recognize that the proposed FAQs are the product of a collaborative effort to address important jurisdictional issues. The

[1] Pipeline Safety: Midstream Facilities Frequently Asked Questions, 85 Fed. Reg. 70,124 (Nov. 4, 2020).
[2] *Id.*
[3] *Id.* at 70,125.
[4] *Id.*
[5] The Associations also appreciate the extension of time to submit these comments which was granted December 10, 2020. 85 Fed. Reg. 81,440 (Dec. 16, 2020).

Associations offer these comments in furtherance of the Agency's collaborative initiative and support the Agency pursuing similar iniatives in the future.

II. Background

The Associations believe it is important at the outset to discuss the basic framework underlying the FAQs. PHMSA's regulatory authority is derived from the Pipeline Safety Act[6] and the safety standards and reporting requirements established in the Pipeline Safety Regulations.[7] OSHA's regulatory authority is derived from the Occupational Safety and Health Act (OSH Act)[8] and provisions in the process safety management (PSM) regulations.[9] As part of a collaborative effort, PHMSA's Pipeline Advisory Committees formed a multistakeholder Midstream Working Group (Working Group) in 2014 to address the exercise of PHMSA's and OSHA's respective regulatory responsibilities at midstream processing facilities. The Working Group met on several occasions to discuss relevant jurisdictional and regulatory issues, which led to the development of a proposed set of FAQs that were presented to the Gas Pipeline Advisory Committee (GPAC) and Liquid Pipeline Advisory Committee (LPAC) during an August 2015 public meeting. Though the FAQs were revised in certain respects by the Agency after that meeting, the Working Group's efforts formed the basis for the FAQs that PHMSA published in the Notice.

The FAQs, as agency guidance, are subject to certain important constraints under the Administrative Procedure Act[10] and DOT's implementing regulations.[11] An agency guidance document generally is used to explain new regulations, respond to stakeholder questions, clarify existing policies, and share leadership priorities and initiatives.[12] Unlike legislative rules, which can have the force and effect of law, agency guidance documents cannot be used to alter the obligation of the public to comply with statutory and regulatory requirements. PHMSA has acknowledged these basic legal principles, stating that guidance documents are "intended to help regulated entities and the public to understand PHMSA's regulations" and "lack the force and effect of law, unless expressly authorized by statute or incorporated into a contract."[13]

The Associations offer the following brief overview of PHMSA's and OSHA's regulatory authority to provide context for the comments that follow.

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[6] 49 U.S.C. §§ 60101 et seq.
[7] 49 C.F.R. Parts 190 to 199 (2019).
[8] 29 U.S.C. §§ 651 et seq.
[9] 29 C.F.R. § 1910.119.
[10] 5 U.S.C. §§ 551 et seq.
[11] 49 C.F.R. Part 5, Subpart C.
[12] Government Accountability Office, Guidance Documents from Federal Agencies, https://www.gao.gov/assets/670/669721.pdf.
[13] Pipeline and Hazardous Materials Safety Administration, PHMSA Guidance, https://www.phmsa.dot.gov/guidance (last visited Feb. 3, 2021). Accordingly, PHMSA included the following statement to that effect in the Notice: "All guidance, including these draft FAQs, is intended to be explanatory in nature. FAQs are provided to help the regulated community understand how to comply with the regulations, but they are not substantive rules themselves and do not create legally enforceable rights, assign duties, or impose new obligations not otherwise contained in the existing regulations and standards." Pipeline Safety: Midstream Facilities Frequently Asked Questions, 85 Fed. Reg. at 70,125.

A. PHMSA Authority

The Pipeline Safety Act generally authorizes PHMSA to prescribe and enforce minimum federal safety standards for the transportation of gas and hazardous liquids by pipeline.[14] That general grant of authority is subject to certain jurisdictional limitations, which are codified in the Pipeline Safety Act and reflected in PHMSA's regulations.[15] PHMSA has also recognized other limitations on its authority as a matter of policy or discretion.[16]

PHMSA's safety standards for gas pipeline facilities are codified at 49 C.F.R. Part 192. Part 192 generally applies to "pipeline facilities and the transportation of gas, including pipeline facilities and the transportation of gas within the limits of the outer continental shelf as that term is defined in the Outer Continental Shelf Lands Act (43 U.S.C. 1331)."[17] Pipeline facility is defined for these purposes as "new and existing pipelines, rights-of-way, and any equipment, facility, or building used in the transportation of gas or in the treatment of gas during the course of transportation."[18] "Transportation of gas" is further defined as "the gathering, transmission, or distribution of gas by pipeline or the storage of gas, in or affecting interstate or foreign commerce."[19] As a result of a recent amendment, Part 192 contains safety standards that specifically apply to underground natural gas storage facilities, which are defined, in relevant part, as "a gas pipeline facility that stores natural gas underground incidental to the transportation of natural gas."[20]

Part 192 does not apply to production facilities or pipelines that are not used for the transportation of gas.[21] Nor does Part 192 apply to onshore gas gathering lines that operate at less than 0 psig or that do not meet the definition of a regulated Type A or Type B gathering line, except for certain inspection and reburial requirements that apply within the inlets of the Gulf of Mexico.[22] PHMSA has also acknowledged that Part 192 does not apply to "in-plant piping" that

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[14] 49 U.S.C. §§ 60101 et seq.

[15] 49 U.S.C. § 60101(a)(21) (defining "transporting gas" for purposes of PHMSA's jurisdiction as "the gathering, transmission, or distribution of gas by pipeline, or the storage of gas, in interstate or foreign commerce[,]" subject to an exception for certain unregulated gas gathering lines); *id.* at (a)(22) (defining "transporting hazardous liquid" as "the movement of hazardous liquid by pipeline, or the storage of hazardous liquid incidental to the movement of hazardous liquid by pipeline, in or affecting interstate or foreign commerce," subject to exceptions for certain unregulated gathering lines and onshore production, refining, or manufacturing facilities and associated storage or in-plant piping systems); 49 C.F.R. §§ 192.1(b)(4), 195.1(b)(4), (8).

[16] *See e.g.*, 49 C.F.R. §§ 192.1(b)(5) (exception for certain petroleum gas systems), 195.1(b)(3) (exception for certain low-stress pipelines).

[17] *Id.* § 192.1(a).

[18] *Id.* § 192.3.

[19] *Id.*

[20] *Id.*

[21] *See* 49 U.S.C. § 60101(a)(21)(A); 49 C.F.R. §§ 192.8 and 192.9. *See also* PHMSA Letter of Interpretation to Mr. Edward M. Steele, Public Utilities Comm'n of Ohio, PI-92-010 (Mar. 12, 1992) ("Part 192 does not apply to production facilities"); PHMSA Letter of Interpretation to Mr. Lance Fellhoalter, Engineering Technician, OXY USA, Inc. PI-93-060 (Oct. 8, 1993) ("The regulations in Parts 40, 191, 192, and 199 apply to pipeline facilities used in the transportation of gas beginning at the end of the production process.").

[22] 49 C.F.R. § 192.1(b)(4). In determining whether a pipeline is an onshore gas gathering line, Part 192 incorporates the provisions in API Recommended Practice 80, "Guidelines for the Definition of Onshore Gas Gathering Lines," 1st edition, April 2000, subject to certain supplemental regulatory limitations. 49 C.F.R. §§ 192.7(b)(4), 192.8(a).

is not used for the transportation of gas.[23] While not defined in Part 192, PHMSA has described in-plant piping as piping that is "operated by the facility operator entirely on the grounds of the facility."[24] PHMSA has further acknowleged that Part 192 does not apply to gas pipelines that leave plant grounds "if they are associated with the plant, meaning they are operated by plant personnel, run between plant buildings, and are less than one mile in length."[25] Finally, PHMSA has indicated that for large volume customers, such as factories, power plants, and other institutional users of gas, pipeline transportation ends and in-plant piping generally begins at the "point where pressure control changes from the pipeline operator to the destination facility operator."[26]

PHMSA's safety standards for hazardous liquid pipeline facilities are codified at 49 C.F.R. Part 195. Part 195 generally applies "to pipeline facilities and the transportation of hazardous liquids . . . associated with those facilities in or affecting interstate or foreign commerce, including pipeline facilities on the Outer Continental Shelf (OCS)."[27] Pipeline facility is defined for these purposes as "new and existing pipe, rights-of-way and any equipment, facility, or building used in the transportation of hazardous liquids or carbon dioxide."[28] Hazardous liquid is further defined as "petroleum, petroleum products, anhydrous ammonia, and ethanol or other non-petroleum fuel, including biofuel, which is flammable, toxic, or would be harmful to the environment if released in significant quantities."[29] Part 195 also applies to the category of storage tanks known as breakout tanks, which are defined as tanks that are "used to (a) relieve surges in a hazardous liquid pipeline system or (b) receive and store hazardous liquid transported by a pipeline for reinjection and continued transportation by pipeline."[30]

The Pipeline Safety Act prohibits PHMSA from applying Part 195 to "onshore production (including flow lines), refining, or manufacturing facilities or storage or in-plant piping systems

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[23] *See, e.g.,* PHMSA Letter of Interpretation to Darin R. Burk, Illinois Commerce Comm'n, PI-09-0020 (Aug. 11, 2010) [hereinafter ICC Interpretation]; PHMSA Letter of Interpretation to Stacie Campbell-Eckhoff, Olin, PI-18-0012 (Apr. 29, 2019).

[24] ICC Interpretation.

[25] *Id.*

[26] *See id*. *See also* PHMSA Letter of Interpretation to Leo M. Haynos, Kansas Corp. Comm'n, PI-12-0005 (Mar. 4, 2013). The Associations note that historical PHMSA interpretations, issued prior to the formation of the Working Group, suggest that other points can be used to demarcate the end of pipeline transportation and beginning of in-plant piping, including devices located on plant grounds that are not used for pressure control or, if there are no suitable devices located within plant grounds, the property line for the plant. *See e.g.*, PHMSA Letter of Interpretation to Mr. Scott Vickers, CPN Pipeline Co., PI-07-0105 (Feb. 5, 2007); PHMSA Letter of Interpretation to Ms. Amy Ng, Conoco Inc., PI-91-008 (Mar. 25, 1991); PHMSA Interpretation to Ms. Nancy J. Skancke, Ross Marsh Foster Myers & Quiggle, PI-91-038 (Dec. 26, 1991).

[27] 49 C.F.R. § 195.1(a).

[28] *Id.* § 195.2. Petroleum includes "crude oil, condensate, natural gasoline, natural gas liquids, and liquefied petroleum gas." *Id.* Petroleum products include "flammable, toxic, or corrosive products obtained from distilling and processing of crude oil, unfinished oils, natural gas liquids, blend stocks and other miscellaneous hydrocarbon compounds." *Id.* PHMSA has said that sodium hydroxide, bleach, caustics, acids, and petrochemical products made by chemical means using petroleum products as a raw material, such as ethylene glycol, are not hazardous liquids. PHMSA Letter of Interpretation to Mr. Jeremy Copeland, CHMN, Wacker Polysilicon North America, LLC, PI-15-0002 (April 2. 2015); PHMSA Letter of Interpretation to Mr. Glynn Blanton, Tennessee Regulatory Authority, PI-98-001 (Mar. 31, 1998); PHMSA Letter of Interpretation, PI-96-0101 (May 3, 1996).

[29] 49 C.F.R. § 195.2.

[30] 49 C.F.R. § 195.2.

associated with such facilities[.]"[31] An in-plant piping system is defined for these purposes as "piping that is located on the grounds of a plant and used to transfer hazardous liquid or carbon dioxide between plant facilities or between plant facilities and a pipeline or other mode of transportation, not including any device and associated piping that are necessary to control pressure in the pipeline under §195.406(b)."[32] PHMSA has also said that in-plant piping can cross a single public thoroughfare, like a roadway or railway track, or third-party parcel of property yet remain eligible for the exception.[33]

Other exceptions limit the applicability of Part 195 to gravity lines and rural gathering lines, except for purposes of PHMSA's reporting requirements,[34] to certain low-stress lines,[35] and to certain facilities located on the grounds of a materials transportation terminal.[36]

B. OSHA Authority

The OSH Act generally authorizes OSHA to prescribe and enforce occupational safety and health standards for the purpose of "provid[ing] safe or healthful employment and places of employment."[37] Pursuant to that general grant of authority and a provision in the 1990 Clean Air Act Amendments, OSHA administers process safety management (PSM) "requirements for preventing or minimizing the consequences of catastrophic releases of toxic, reactive, flammable, or explosive chemicals."[38] OSHA's PSM requirements generally apply to a process or activity involving highly hazardous chemicals that meet or exceed certain threshold quantities; but the OSH Act prohibits OSHA from exercising jurisdiction over "working conditions of employees with respect to which other Federal agencies . . . exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health."[39] Therefore, where another agency, such as PHMSA, has prescribed regulations for pipelines, the PHMSA regulations and not the OSHA regulations apply. OSHA has determined that it is precluded from enforcing the PSM regulations with respect to gas transmission and distribution processes that are regulated by PHMSA.[40] OSHA has determined, however, that natural gas processing plants, which are not covered by PHMSA regulations, are covered under the PSM regulations and therefore are subject to OSHA oversight and enforcement.[41]

The PSM standard is a performance-based regulation that does not establish a precise set of requirements for employers. Rather, the standard establishes a set of general elements that

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[31] 49 C.F.R. § 195.1(b)(8); *see* 49 U.S.C. § 60101(a)(22)(B)(ii)-(iii).
[32] 49 C.F.R. § 195.2.
[33] PHMSA Letter of Interpretation to Gweneyette Broussard, Shell Oil Products Co., PI-98-0100 (Nov. 18, 1998). PHMSA has said that "[w]ithin a fenced boundary, indicating the extent of plant grounds, in-plant piping can include crossing of railroad spurs, levees, pipeline easements, and even separately owned pipeline pump stations, because the crossings are on land that is generally associated with plant functions, with access subject to plant control." PHMSA Letter of Interpretation to Bruce D. Beighle, Unified Engineering, PI-95-056, WinDOT # 195.1 75 (Dec. 27, 1995).
[34] 49 C.F.R. § 195.1(b)(2), (4).
[35] *Id.* § 195.1(b)(3).
[36] *Id.* § 195.1(b)(9)(ii).
[37] 29 U.S.C. § 652(8) (defining "occupational safety and health standard").
[38] 29 C.F.R. §1910.119.
[39] 29 U.S.C. § 653(b)(1).
[40] OSHA Standard Interpretations, Natural Gas Distribution and Transmission Facilities, Letter to Mr. Michael Baly, III, President, American Gas Association (Oct. 3, 1992), https://www.osha.gov/laws-regs/standardinterpretations/1992-10-30.
[41] *Id*.

employers may adapt to their own specific operations to identify, evaluate, and control the hazards posed by the hazardous materials involved in their processes.[42] Under the standard, a "process" is defined as "any activity involving a highly hazardous chemical including any use, storage, manufacturing, handling, or the on-site movement of such chemicals, or combination of these activities."[43] The definition of "process" stipulates that "any group of vessels which are interconnected and separate vessels which are located such that a highly hazardous chemical could be involved in a potential release shall be considered a single process."[44]

Consistent with the Pipeline Safety Act's exception of refining and manufacturing facilities and associated storage and in-plant piping, OSHA oversees safety at "refineries," "chemical plants," and "processing plants."[45] OSHA defines a refinery as "a plant in which flammable liquids are produced on a commercial scale from crude petroleum, natural gasoline, or other hydrocarbon sources."[46] OSHA also defines "crude petroleum" as "hydrocarbon mixtures that have a flash point below 150°F and which have not been processed in a refinery."[47] These definitions encompass both crude oil refining and natural gas liquids fractionation.

III. Comments

A. General

As PHMSA acknowledged in the Notice, the guidance provided by the FAQs must be derived from the legal obligations imposed by the Pipeline Safety Act or PHMSA's regulations. The Associations believe that both regulators and regulated entities would benefit by PHMSA referring, in some manner, to the specific law or regulation that underlies the agency guidance offered in each of the FAQs, as a clear statement of legal authority will provide additional clarity. The Associations also urge the Agency to use terms in the FAQs that are either defined in the Pipeline Safety Act or PHMSA's regulations or have a generally-accepted meaning within the pipeline industry. The Agency's regulations define several terms that are relevant in determining the extent of PHMSA's jurisdiction over midstream processing facilities.[48] PHMSA should reference these defined terms in the final FAQs and include either an appropriate citation to the underlying legal authority or an explanatory parenthical.

Part 192 and Part 195 generally use the term "plant" in describing a location where processing or other similar kinds of activities occur.[49] PHMSA has also used the term "plant" in determining whether Part 192 or Part 195 applies to piping located entirely on plant grounds, or to

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[42] 29 C.F.R. § 1910.119(d)-(f).
[43] 29 C.F.R. § 1910.119(b)
[44] *Id.*
[45] 29 C.F.R. §§ 1910.106(a)(28), 1910.106(a)(8), 1910.106(h)(1).
[46] *Id.* § 1910.106(a)(28).
[47] *Id.* § 1910.106(a)(10).
[48] For example, the provisions in API Recommended Practice 80, "Guidelines for the Definition of Onshore Gas Gathering Lines," 1st edition, April 2000, which apply in determining whether a pipeline is part of an onshore gas gathering line under 49 C.F.R. § 192.8, contain a definition for the term "gathering line" as well as supplemental definitions for various terms of art that are used in the oil and gas industry. The term "in-plant piping system" is also defined in 49 C.F.R. § 195.2, and that definition applies in determining the applicability of certain exceptions in the hazardous liquid pipeline safety regulations.
[49] 49 C.F.R. § 192.8(a)(2) (using the terms "gas processing plant" or "natural gas processing plant" in defining onshore gas gathering line and identifying potential endpoints); 49 C.F.R. §§ 195.1(b)(8), 195.2 (defining in-plant piping system for purposes of the exception for production, refining, and manufacturing facilities).

pipelines that exit plant grounds for short distances or cross public thoroughfares. The FAQs do not use the term "plant" in articulating the PHMSA-OSHA jurisdictional boundaries at midstream processing facilities. Nor do the FAQs incorporate the concepts that the Agency has traditionally used in determining the extent of plant grounds or regulatory status of pipelines that exit plant grounds for short distances or cross public thoroughfares. The Associations believe that the Agency guidance provided in the FAQs should be consistent with these well-established principles. Accordingly, the Associations ask the Agency to affirm that operators may use these sources of authority in determining the extent of plant grounds and identifying the appropriate PHMSA-OSHA jurisdictional boundaries at midstream processing facilities under the FAQs.

The FAQs do not explicitly state whether the guidance provided applies to plants or facilities that are not used for midstream processing, including production facilities, refining facilities (other than crude oil refining facilities), manufacturing facilities, materials transportation terminals, and the like.[50] To avoid potential ambiguities and disagreements over the intended scope and applicability of the FAQs, the Associations recommend that PHMSA include a clear statement that the guidance is not applicable to plants or facilities not used for midstream processing.

B. FAQ-1: Definitions

1. Processing (FAQ-1-A)

FAQ-1-A proposes to define the term "processing" generally as "treatment of products" and provides several examples of processing functions. The term "products" is not defined in Part 192 or Part 195,[51] and the proposed definition of "processing" does not include reference to any activities that are jurisidictional to PHMSA. The Associations note that operators generally understand the forms of processing plants which are not subject to PHMSA regulation (because they are not used for transportation) to include the treatment of gas or hazardous liquids for purposes of dehydration; removal of contaminants by separation, filtration or other mechanical or chemical means; blending with other products; or heating or cooling of products to separate or purify the products or to precipitate, condense or otherwise remove liquids from a product stream. Treatment of a substance transported by pipeline that does not meet the definition of a gas or hazardous liquid should not be considered processing for purposes of the FAQs. Nor should treatment of gas or hazardous liquids that are transported in a pipeline that is not subject to regulation under Part 192 or Part 195.[52] The Associations recommend that these jurisdictional predicates be clearly explained in defining "processing" in the final FAQs.

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[50] 49 C.F.R. § 195.1(b).

[51] Part 192 defines "gas" and "petroleum gas" (49 C.F.R. § 192.3); Part 195 defines "hazardous liquid" which includes "petroleum, petroleum products, anhydrous ammonia, and ethanol or other non-petroleum fuel, including biofuel"; "petroleum" in turn includes "crude oil, condensate, natural gasoline, natural gas liquids, and liquified petroleum gas"; and "petroleum product" includes "flammable, toxic, or corrosive products obtained from distilling and processing of crude oil, unfinished oils, natural gas liquids, blend stocks and other miscellaneous hydrocarbon compounds." (49 C.F.R. § 195.2).

[52] Pipelines not subject to regulation under Part 192 or Part 195 are identified in 49 C.F.R. §§ 192.1(b) and 195.1(b). PHMSA requires the same jurisdictional predicate in determining whether liquefied natural gas (LNG) facilities are subject to regulation under 49 C.F.R. Part 193. 49 C.F.R. § 193.2001. LNG Plant Requirements: Frequently Asked Questions, https://www.phmsa.dot.gov/pipeline/liquified-natural-gas/lng-plant-requirements-frequently-asked-

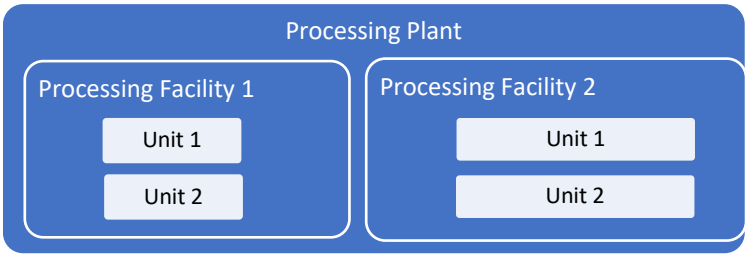
2. Processing Facility (FAQ-1-B, Preamble)

In the definition of "processing facility," the phrase "processing function" as proposed by the Working Group appears to have been inadvertently changed to "processing operation." The Associations submit that "function," a more precise term, be retained in the final FAQs. Furthermore, to ensure internal consistency among the FAQs, the Associations request that PHMSA employ the same term, "function," within FAQ-1-A, the definition of "Processing" (the Associations also note that FAQ-5 continues to use the phrase "processing function").

FAQ-1-B defines the term "processing facility"; further, the preamble to the Notice defines the term "midstream processing facility," then proceeds to add a description of that term.[53] The description could be construed as a third definition, "a processing facility with piping or storage that is engaged in the transportation of gas or hazardous liquids by pipeline, and is therefore a pipeline facility subject to PHMSA jurisdiction."[54] The Associations submit that use of more than one definition could lead to uncertainty, if not disagreement, regarding the scope and applicability of the FAQs. As such, the Associations recommend that PHMSA use only one defined term within the FAQs in the manner recommended below.

The Associations add that potential ambiguity arises with use of certain terms and phrases within the definition of "processing facility." For example, FAQ-1-B defines "processing facility" in terms of "units" rather than the typical connotation of an area or location where processing occurs (e.g., a site, a plant). On the other hand, FAQ-2 speaks in terms of pipelines "entering a processing facility." The question arises whether the demarcation proposed by FAQ-2 is applied "unit"-by-"unit" within a plant, or is intended to apply as a pipeline enters the "plant grounds" or crosses the "boundary of plant grounds."[55]

To provide additional clarity, the Associations recommend that the Agency use the term "processing plant" in the FAQs to refer to a location or site that contains one or more "processing facilities." Using "processing plant" in that context, rather than "processing facility," would resolve potential ambiguities and avoid future disagreements regarding the scope and applicability of the FAQs. Below is a simple graphic representation of the relevant concepts.



In this regard, the Associations recommend that a "processing plant" be described in the final FAQs as "a location or site containing one or more processing facilities or units that perform a processing function."

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questions#g1 (last updated Oct. 23, 2017) (stating that generally a "facility is regulated under 49 CFR Part 193 if the LNG facility either receives from or delivers to a 49 CFR Part 192 pipeline", subject to certain exceptions).

[53] Pipeline Safety: Midstream Facilities Frequently Asked Questions, 85 Fed. Reg. at 70,125.

[54] *Id.*

[55] Regulatory Review: Hazardous Liquid and Carbon Dioxide Pipeline Safety Standards, 57 Fed. Reg. 56,304, 56,305 (Nov. 27, 1992); *see* discussion of "the limit of Part 195 jurisdiction inside plants."

C. FAQ-2: Delineating Between Pipeline Transportation and Processing Facility

Given that FAQ-2 designates a "pressure control device" as the point of demarcation between PHMSA authority and OSHA authority, clarity is warranted. The Associations submit that "pressure control device" could mean many different types of equipment, whether valves, sensors, or other items of equipment. Moreover, not all processing plants have pressure control devices on plant grounds. Further, the FAQs should affirm historical precedent to avoid confusion.

The meaning of pressure control device pursuant to Part 195 is informed by the combination of the Final Rule which promulgated the definition of "in-plant piping system" and Agency precedent, including a recent PHMSA interpretation.[56] The established basic rule is that PHMSA oversight of a transportation pipeline ends at a device necessary to control pressure in the pipeline under 49 C.F.R. 195.406(b); however, in the absence of such a device, historical Agency precedent indicates that operators may select another point, including the plant boundary.[57]

Pursuant to Part 192, pressure control device also may be informed by agency guidance, such as the valve or other physical point of demarcation where control of the pressure changes from the pipeline operator to the processing plant operator.[58]

Accordingly, the Associations request that PHMSA clarify the FAQs to state that the PHMSA-OSHA transition occurs at the first pressure control device inbound to a processing plant and at the last pressure control device outbound from a processing plant, which would be consistent with the Working Group discussion. However, if there is no pressure control device on the inbound or outbound pipeline (or piping), the PHMSA-OSHA transition should occur at another appropriate location inside the grounds of the plant, such as at a pig launcher or receiver, the custody transfer point, or some other component incidental to transportation. The Associations also request that the Agency reaffirm the longstanding principle that in-plant piping can cross a single public thoroughfare, like a roadway or railway track, or third-party parcel of property for purposes of PHMSA's regulations.[59]

D. FAQ-3: Pipelines that Bypass Processing Facilities

PHMSA proposes in the FAQs to define the term "predominantly," for the purpose of evaluating the use of a given pipeline (and/or piping), as "more than 50% of the time during the preceding calendar year."[60] The Associations ask the Agency to provide operators with greater flexibility in making these determinations, along with greater jurisdictional and operational stability once they have been made. A number of different factors can affect the use of a pipeline

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[56] Regulatory Review: Hazardous Liquid and Carbon Dioxide Pipeline Safety Standards, 59 Fed. Reg. 33,388, 33,389 (June 28, 1994); PHMSA Letter of Interpretation to Kevin Burke, Buckeye Processing, LLC, PI-20-0004 (Apr. 7, 2020).

[57] Regulatory Review: Hazardous Liquid and Carbon Dioxide Pipeline Safety Standards, 59 Fed. Reg. 33,388, 33,389 (June 28, 1994); PHMSA Letter of Interpretation to Kevin Burke, Buckeye Processing, LLC, PI-20-0004 (Apr. 7, 2020).

[58] *See,* ICC Interpretation.

[59] PHMSA Letter of Interpretation to Gweneyette Broussard, Shell Oil Products Co., PI-98-0100 (Nov. 18, 1998). PHMSA has said that "[w]ithin a fenced boundary, indicating the extent of plant grounds, in-plant piping can include crossing of railroad spurs, levees, pipeline easements, and even separately owned pipeline pump stations, because the crossings are on land that is generally associated with plant functions, with access subject to plant control." PHMSA Letter of Interpretation to Bruce D. Beighle, Unified Engineering, PI-95-056, WinDOT # 195.1 75 (Dec. 27, 1995).

[60] Pipeline Safety: Midstream Facilities Frequently Asked Questions, 85 Fed. Reg. at 70,126.

or facility, including seasonal trends, upstream production trends, downstream constraints, and consumer demand. The calendar-year-based, 50-percent threshold proposed in the FAQs does not account for these factors and may lead to unintended outcomes, as well as greater regulatory costs and uncertainty due to the potential for frequent changes in oversight.

The Associations submit that operators should be allowed to consider other criteria in making predominant use determinations, particularly when no criteria are specified in an applicable statute or regulation. For example, volume, rather than percentage of time in a given calendar year, may provide a more accurate representation of predominant use. For these reasons, the Associations recommend that PHMSA provide operators the option to use the most relevant of time, volume, or other relevant basis for determining the predominant use of a given pipeline (and/or piping) within a given facility.

PHMSA should also acknowledge that operators of existing pipelines and midstream processing facilities should make predominant use determinations within a reasonable amount of time following publication of the final FAQs, and that predominant use determinations do not need to be revisited unless a significant change in circumstances occurs. Adopting this recommendation would lend a degree of certainty to operators, as well as avoid imposing potential costs associated with unnecessary changes to the regulatory authority applicable to a given plant. The Associations also advocate that careful implementation of this recommendation would assist PHMSA development of a durable set of FAQs which would result in consistently predictable outcomes.

E. FAQ-4: Piping that Bypasses Processing Downstream of the First Pressure Control Device

As indicated in the comments on FAQ-1, FAQ-2, and FAQ-3, the Associations recommend that PHMSA affirm that operators can use the traditional approach for determining the extent of plant grounds in identifying the PHMSA-OSHA transition point for midstream processing facilities, and clarify that operators may use another appropriate point of demarcation if no pressure control device is located on plant grounds, i.e., inside the plant boundary. The Associations also recommend that the Agency provide operators with greater flexibility in determining the predominant use of pipelines and other facilities at midstream processing plants.

F. FAQ-5: Piping Located on the Grounds of a Processing Facility Served by PHMSA-Regulated Pipelines

The term “PHMSA-regulated pipelines” is used in FAQ-5 but not in any other FAQ. PHMSA should consistently draw an appropriate distinction between regulated pipelines and non-regulated pipelines.

G. Other

1. Changes in Jurisdictional Status

The agency guidance provided in the FAQs departs in certain respects from the historical precedent that PHMSA applies in determining the regulatory status of midstream processing facilities. For example, the Agency has acknowleged that the fence or property line for a plant could be used in establishing the PHMSA-OSHA jurisdictional boundary in interpretations issued before the formation of the Working Group. Operators acting in good faith have also made reasonable judgments about the regulatory status of midstream processing facilities and have

designed, constructed, tested, operated, and maintained those facilities accordingly for quite some time. While the publication of the final FAQs should provide operators with notice and regulatory certainty on a prospective basis, the Associations request that PHMSA clarify the effect of potential changes in jurisdictional status for existing midstream processing facilities.

The Agency should confirm that the conversion-to-service rules in Part 192 and Part 195 do not apply if the FAQs change the PHMSA-OSHA boundaries for existing midstream processing facilities.[61] PHMSA's regulations make clear that a conversion of service does not occur if a previously-unregulated pipeline becomes subject to Part 192 or Part 195 as a result of a change in law or regulation or other circumstances that are beyond the control of the operator.[62] That understanding of the conversion-to-service rules is consistent with the Pipeline Safety Act's non-retroactivity provision, which prohibits the Agency from applying the design, construction, initial testing, and initial inspection requirements to a previously-unregulated pipeline.[63] It is also consistent with the fair notice doctrine, which would preclude PHMSA from applying the conversion-to-service rules to a previously-unregulated pipeline that became subject to Part 192 or Part 195 as a result of new interpretation of an existing statute or regulation.[64] Though not relevant from a jurisdictional perspective, the Associations note that the Working Group determined that the regulations administered by PHMSA and OSHA provide an equivalent level of safety, which addresses the primary objective of the conversion-to-service rules, *i.e.*, demonstrating that a pipeline previously not subject to PHMSA regulation is in satisfactory condition for safe operation. For these reasons, the Associations ask the Agency to confirm in the final FAQs that the conversion-to-service rules apply only if an operator voluntarily changes the use of an OSHA-regulated processing plant in a way that causes Part 192 or Part 195 to become applicable to that facility, in the circumstance where the facility was not previously qualified for use under Part 192 or Part 195.

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[61] 49 C.F.R. §§ 192.14 and 195.5. As acknowledged in longstanding PHMSA interpretations, pipelines previously qualified for use under Part 192 or Part 195 do not need to undergo a conversion of service to be placed back into use in that regulated service. PHMSA Letter of Interpretation to Mr. Kevin C. Bodenhamer, OXY USA Inc., PI-90-022 (June 5, 1990). PHMSA recently affirmed the continuing viability of these principles in a 2014 guidance document on conversions of service. Guidance for Pipeline Flow Reversals, Product Changes and Conversion to Service at 14 (Sept. 2014), https://www.regulations.gov/contentStreamer?documentId=PHMSA-2014-0040-0002&attachmentNumber=1&contentType=pdf ("Under Parts 192 and 195, once a pipeline qualifies for operation in gas or hazardous liquid service, it remains qualified for operation in that service. This is regardless of the type of service in which it may be used later.").

[62] For example, the conversion of service rules do not apply if a previously-unregulated onshore gas gathering line becomes subject to Part 192 as a result of a change in class location or increase in dwelling density. 49 C.F.R. § 192.9(e)(3).

[63] 49 U.S.C. § 60104(b).

[64] *ExxonMobil Pipeline Co. v. U.S. Dep't of Trans.*, 867 F.3d 564, 578-579 (5th Cir. 2017) (quoting *Christopher v. Smithkline Beecham Corp.*, 567 U.S. 142, 156 (2012)) (holding that providing deference to an agency interpretation that would impose great liability on conduct that occurred prior to when the interpretation was announced would "seriously undermine the principle that agencies should provide regulated parties with 'fair warning of the conduct [a regulation] prohibits or requires'".)).

2. Agency Intent - Drawings

To help clarify the terms "pressure control device" and "processing facility," as used to delineate the demarcation between segments of pipelines (and/or piping) under OSHA and PHMSA authority, the Associations recommend that PHMSA provide a representative drawing of its intended points of demarcation, potentially in the form of a process flow diagram. Such a drawing, carefully prepared, would provide a common guide for operators of facilities which are quite different in their design, function, process flows and operation, as well as the location of pressure control devices. Though the Federal Register may not be conducive to the presentation of a drawing, the final FAQs could refer to the PHMSA website where such drawings could be made available to the public, as well as to State authorities. Attachment 1 to this comment letter is a drawing that the Associations ask the Agency to use for that purpose. The Associations note that similar drawings were developed by the Working Group.

3. The Docket

The Associations have observed that the docket for the FAQs contains only the Notice and the extension of time-related materials (along with three brief comments).[65] Toward informing future interpretations of the FAQs, the Associations suggest that PHMSA supplement the docket with the following materials:

- The FAQs as proposed in 2015.
- Relevant LPAC/GPAC presentations and meetings transcripts from 2014 and 2015.

Supplementation of the docket should include reference to the PHMSA statement(s) of policy which underlie the responses to the FAQs.

4. Revised FAQs

Attachment 2 to this comment letter presents a revised set of FAQs showing proposed edits which reflect the discussion above.

[65] As of Feb. 3, 2021; https://www.regulations.gov/docket?D=PHMSA-2019-0199.

IV. Conclusion

The Associations appreciate the opportunity to provide the foregoing comments and look forward to collaborating further in this regard.

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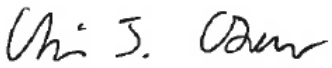

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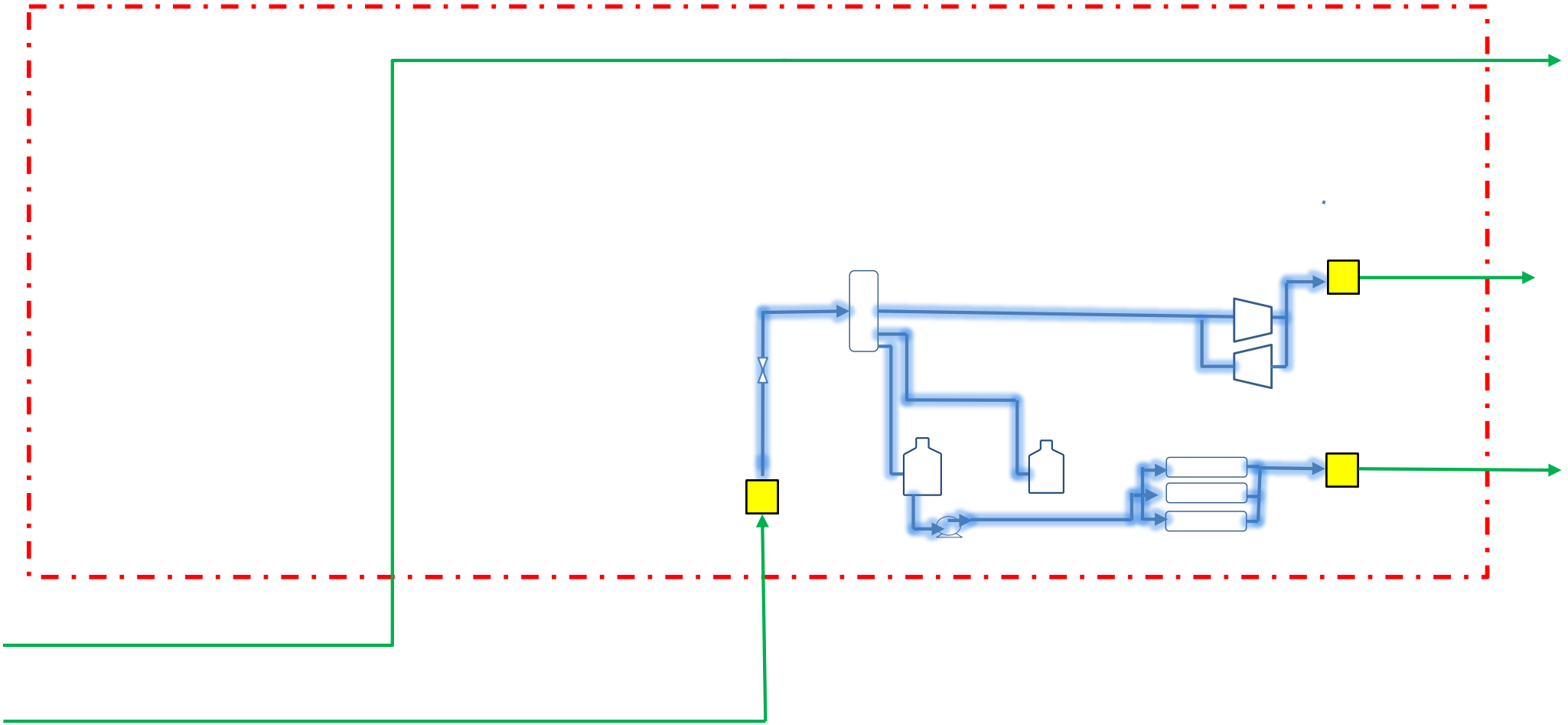
Trade Association Comments to Midstream FAQs
Docket No. PHMSA-2019-0199
ATTACHMENT 1



Part 192/195-Regulated Pipeline

OSHA PSM Processing Facility

Pressure Control (or Other) Device

Plant Grounds

Trade Association Comments to Midstream FAQs
Docket PHMSA-2019-0199

ATTACHMENT 2

Q 1: Definitions

Q 1-A: What is "processing"?

For the purposes of this guidance document, "processing" is defined as treatment of gas or hazardous liquids including, but not limited to the functions of dehydration; removal of contaminants by separation, filtration, or other mechanical or chemical means; blending with other products; or heating or cooling of products to separate or purify the products and/or to precipitate, condense or otherwise remove liquids from a product stream.

These FAQs do not cover facilities used for the chemical conversion of crude oil into refined petroleum products (*i.e.* refining facilities), or incidental processing at facilities or units used to store or transport natural gas during the course of natural gas transportation.

Q 1-B: What is a "Processing Facility"?

A "processing facility" comprises one or more individual units that perform a processing function (see Q 1-A) and meets the criteria for applicability of the Occupational Safety and Health Administration (OSHA) process safety management regulations (29 CFR 1910.119).

Q 1-C: What is a "Processing Plant"?

A "processing plant" is a location or site that contains one or more processing facilities or units that perform a processing function.

Q 2: How does one delineate the boundary between pipeline transportation and a processing facility at a processing plant?

PHMSA Policy indicates that, in deference to OSHA's exercise of its authority, it will not conduct inspection and enforcement activities ("regulatory oversight activities") under 49 CFR Part 192 and 195 for pipelines downstream of the first pressure control device entering a processing plant, and upstream of the last pressure control device leaving that processing plant, except as described in provisions of FAQ 4. If there is no pressure control device on the inbound or outbound pipeline (or piping), PHMSA's regulatory oversight activities will not extend beyond another appropriate location inside the grounds of the plant, such as at a pig launcher or receiver, custody transfer point, or other component incidental to pipeline transportation.

Q 3: How does PHMSA's policy apply to regulatory oversight of a pipeline entering a processing plant that bypasses a pressure control device?

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A PHMSA-regulated pipeline that predominantly (more than 50%) bypasses a pressure control device for a processing plant will be subject to PHMSA regulatory oversight activities under 49 CFR Part 192 or 195. Operators should consider time, volume, and other relevant factors in determining the predominant use of a pipeline. An operator's predominant use determination need not be revisited absent a significant change in circumstances. Further, if a PHMSA-regulated pipeline enters a processing plant and bypasses a pressure control device that is permanently no longer in service, the pipeline will be subject to PHMSA regulatory oversight activities under 49 CFR Part 192 or 195.

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Q 4: How does PHMSA's policy apply to regulatory oversight of piping that bypasses a processing facility downstream of the first pressure control device at a processing plant?

Piping that is downstream of the first pressure control device at a processing plant that is not predominately (more than 50%) used to bypass a processing facility will be subject to regulatory oversight activities by OSHA under its process safety management regulations. Piping that is downstream of the first pressure control device at a processing plant that is predominantly (more than 50%) used to bypass a processing facility will be subject to PHMSA regulatory oversight activities under 49 CFR part 192 or 195.

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Q 5: What if a given section of piping located on the grounds of a processing plant served by PHMSA-regulated pipelines connects two processing units or facilities or is otherwise used for a processing function?

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If the piping is located downstream of the first pressure control device entering the processing plant and upstream of the last pressure control device leaving the processing plant, it would be subject to regulatory oversight activities by OSHA under its process safety management regulations. PHMSA policy indicates that in deference to OSHA's exercise of its authority, this section of piping would not be subject to PHMSA regulatory oversight activities under 49 CFR part 192 or 195.

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Q 6: How is underground storage and associated piping located on the grounds of a processing plant regulated?

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Piping associated with underground storage at a processing plant that is used for the "purpose of managing processing plant inventory" will be subject to regulatory oversight activities by OSHA under its process safety management regulations. Piping associated with storage caverns used for transportation will be subject to PHMSA regulatory oversight activities under 49 CFR part 192 or 195. Additionally, underground natural gas storage facilities, as defined in § 192.3, must comply with the applicable reporting requirements in 49 CFR part 191 and underground natural gas storage safety requirements in § 192.12

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Q 7: How are pipelines connecting storage facilities or processing plants regulated when traversing public or private lands (outside the grounds of processing plants)?

Pipelines exiting a pressure control device of storage facilities or processing plants and traversing public or private lands outside the grounds of storage facilities or processing plants will be subject to PHMSA regulatory oversight activities under 49 CFR part 192 or 195.

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