VIA ELECTRONIC FILING

November 12, 2020

Docket Management Facility
U.S. Department of Transportation
1200 New Jersey Ave, S.E.
Washington, D.C. 20590

Re: Gas Pipeline Advisory Committee Meeting
Docket No. PHMSA-2018-0046, Pipeline Safety: Gas Pipeline Regulatory Reform

To Whom It May Concern:

On October 7, 2020, the Pipeline and Hazardous Materials Safety Administration (PHMSA or the Agency) convened a meeting of the Gas Pipeline Advisory Committee (GPAC) to review a notice of proposed of rulemaking (NPRM) in the above-captioned proceeding.[1] In the NPRM, PHMSA proposed certain amendments to the gas pipeline safety standards in 49 C.F.R. Part 192 and associated reporting requirements in 49 C.F.R. Part 191. As explained in the NPRM, the Agency proposed these amendments in order to "ease regulatory burdens on the construction, operation, and maintenance of gas transmission, distribution, and gathering pipeline systems."[2]

GPA Midstream Association[3] (GPA Midstream) submitted written comments responding to the changes proposed in the NPRM and provided additional public comments during the GPAC meeting.[4] GPA Midstream is submitting these supplemental comments to provide PHMSA with

[1] Pipeline Safety: Gas Pipeline Regulatory Reform, 85 Fed. Reg. 35,240 (Jun. 9, 2020).
[2] *Id.* at 35,241.
[3] GPA Midstream Association has served the U.S. energy industry since 1921 and has nearly 70 corporate members that directly employ more than 75,000 employees that are engaged in a wide variety of services that move vital energy products such as natural gas, natural gas liquids (NGLs), refined products and crude oil from production areas to markets across the United States, commonly referred to as "midstream activities". The work of our members indirectly creates or impacts an additional 450,000 jobs across the U.S. economy. GPA Midstream members recover more than 90% of the NGLs such as ethane, propane, butane and natural gasoline produced in the United States from more than 400 natural gas processing facilities. In 2017-2019 period, GPA Midstream members spent over $105 billion in capital improvements to serve the country's needs for reliable and affordable energy.
[4] Additional information about the GPAC meeting is available here: https://primis.phmsa.dot.gov/meetings/MtgHome.mtg?mtg=151.

additional information to consider in developing the final rule.[5] The comments address three specific topics: (1) incident reporting, (2) farm taps, and (3) pressure vessel testing.

I. Incident Reporting

GPA Midstream strongly supports PHMSA's proposal to update the Part 191 incident reporting requirements to account for inflation. As currently defined, reportable incidents include "[a]n event that involves a release of gas" and which causes "[e]stimated property damage of $50,000 or more, including a loss to the operator and others, or both, but excluding the cost of gas lost[.]"[6] PHMSA established the $50,000 threshold in 1984, and that amount has not been adjusted for more than a quarter century.[7] By failing to account for inflation, operators are currently submitting incident reports for events that produce approximately $19,710.17 in estimated property damage in 1984 dollars, an amount that is far below the original monetary threshold.

As the Agency acknowledged during the GPAC meeting, PHMSA accounts for inflation in analyzing incident report data and disregards events that do not meet the inflation-adjusted $50,000 threshold.[8] The Agency's consideration of inflation in analyzing incident report data is entirely appropriate and essential to understanding historical trends in gas pipeline safety. PHMSA's elimination of incidents that do not meet the inflation-adjusted monetary threshold also confirms that operators are submitting reports for events that do not provide any meaningful data.[9] The filing of unnecessary incident reports imposes additional burdens on pipeline operators, PHMSA, and state pipeline safety program personnel without creating any corresponding benefits to public safety.

Certain GPAC members questioned whether the Agency's estimated cost savings of $30,000 per year justifies eliminating incident reports that do not meet the inflation-adjusted monetary threshold.[10] The Agency's cost savings estimate assumes that PHMSA would receive approximately 40 fewer incident reports per year, and that operators would no longer be dedicating the 10 hours of labor required to complete those reports. However, as noted by other GPAC members, PHMSA's cost estimate does not account for the resources that pipeline safety program

---

[5] GPA Midstream also joined a separate supplemental comment letter that was recently submitted by several other industry trade associations, including the Interstate Natural Gas Association of America, American Gas Association, American Public Gas Association, and American Petroleum Institute.

[6] 49 C.F.R. § 191.3.

[7] Transportation Infrastructure: Notice of Review of Policy, Guidance, and Regulation, 82 Fed. Reg. 26,734 (June 8, 2017), and Notification of Regulatory Review, 82 Fed. Reg. 45,750 (Oct. 2, 2017).

[8] GPAC Meeting Transcript at 169:2 – 7 (Oct. 7, 2020) (Statement of John Gale, PHMSA,), https://primis.phmsa.dot.gov/meetings/FilGet.mtg?fil=1131 ("PHMSA's own analysis of trends already accounts for inflation. The significant trend analysis filters out incidents that don't meet the other criteria and result in less than $50,000 in 1984 in regards to damage.").

[9] *Id.* at 182:13 - 22 (Statement of Peter Chace, Ohio Public Utilities Commission) ("And now you've kind of -- to me, what always seemed to be the ridiculous situation that you take your data incident that you collect, and you ignore it. And then you look at your significant incident data because the other stuff is garbage. And it seems like this rule would just kind of skip that step and allow you to devote resources to thinking about what to do with the data instead of separating the wheat from the chaff, so to speak.")

[10] *Id.* at 176:2 - 4 (Statement of Sara Gosman) ("And we're saving $30,000 per year. This is pocket change in the world of regulation.").

personnel invest in responding to unnecessary incident reports.[11] Nor does the Agency's cost estimate account for the future resources that operators and pipeline safety program personnel would need to invest in submitting and responding to incident reports if the monetary threshold is not adjusted for inflation. PHMSA estimates that operators already file about 40 unnecessary incident reports per year, and that number will only increase over time without an appropriate inflationary adjustment.

Despite the reservations expressed by a few members, an overwhelming majority of the GPAC supported the Agency's proposal to update the Part 191 incident reporting requirements to account for inflation. GPA Midstream supports that recommendation and urges PHMSA to act expeditiously to adopt that change in the final rule.

II. Farm Taps

GPA Midstream supports the Agency's decision to withdraw some of the changes proposed in the NPRM for farm taps but continues to have significant concerns with PHMSA's approach to the regulation of farm tap piping. As explained in our earlier written comments and public statement at the GPAC meeting, GPA Midstream remains strongly opposed to treating farm taps as distribution service lines starting at the first isolation point downstream from the source piping.[12] PHMSA appeared to endorse that position in the preamble to the NPRM and proposed to amend § 192.740(c)(4) to use "[t]he inlet to the first pressure regulator" as a point of jurisdictional significance for farm tap piping.[13] There is no support for that concept in the text, structure, or history of the gas pipeline safety regulations, and applying the gas distribution service line regulations to piping downstream of the first isolation point would impose substantial costs on the midstream industry without creating any justifiable safety benefits, particularly for operators of non-jurisdictional production and gas gathering pipelines.[14] Accordingly, GPA Midstream supports PHMSA's decision to withdraw that proposal from the changes under consideration in this rulemaking proceeding.

With that said, GPA Midstream urges the Agency to acknowledge in the final rule that operators can exercise reasonable discretion in determining the classification of farm tap piping. A wide variety of farm tap configurations exist throughout the country, and operators have traditionally used a functional approach in determining whether that piping is used for production, gathering, transmission, or distribution service. In some cases, the classification of piping may change at a valve, regulator, meter, or other component, or at the point where custody of the gas

[11] *Id.* at 183:3 - 16 (Statement of Peter Chace) ("Also I will point out as a state regulator that investigating these incidents is not really cost free. I mean, it is something where we have to mobilize, get instructors, inspectors out into the field. Collect information, pay our overtime, and all that sort of thing. And it's time we're spending on that that we don't have things to spend the --that we can't spend in other places. Now if it is an incident, that's something we ought to be doing and we're happy to do it. I just want to point out, it is really not, you know, a cost-free endeavor for the regulators.")

[12] *Id.* at 53-55 (Statement of Matt Hite, GPA Midstream).

[13] Pipeline Safety: Gas Pipeline Regulatory Reform, 85 Fed. Reg. at 35,253.

[14] As PHMSA staff acknowledged during the GPAC meeting, the Agency does not have the kind of safety data needed to make an informed decision on the risks, costs, or benefits associated with regulating farm tap piping. GPAC Meeting Transcript at pp. 69:16 - 70:7 (Statement of Sayler Palabrica) ("We do not have an estimate of the number of service lines that would be unaffected [sic] by the rule change, that is, those connected to the regulated source pipelines. . . . There isn't a way to identify farm taps, per se, easily on the gas distribution annual report form.").

transfers to the customer or another pipeline operator. In other cases, a production, gathering, or transmission line may deliver gas directly to a customer without passing through a distribution line. To provide the industry with certainty, PHMSA should clearly state that these principles will continue to guide operators in determining the regulatory status of farm tap piping in the final rule.

The Agency indicated at the GPAC meeting that the treatment of farm taps would be clarified in a Frequently Asked Questions (FAQs) document that remains under development.[15] GPA Midstream previously submitted comments on the draft version of the FAQs, which also appeared to endorse the first isolation point test in determining the classification of farm tap piping. In those comments, GPA Midstream opposed the use of the first isolation point test and advised the Agency to state that operators can exercise reasonable discretion in determining the classification of farm tap piping in the final FAQs. Given the text of the existing regulations and PHMSA's decision to withdraw the proposed amendment to § 192.740(c)(4), GPA expects the Agency to remove any references to the first isolation point test in the final farm tap FAQs.

Although PHMSA declined to present these proposals to the GPAC for consideration, GPA Midstream reiterates its request that the Agency take other actions to provide midstream operators with regulatory relief. First, PHMSA should amend the regulations to clarify that the reporting and registration requirements in Part 191 and standards in Part 192 do not apply to farm tap piping that originates on non-jurisdictional production and gathering lines. Applying the Agency's regulations to piping that is part of these non-jurisdictional lines creates unnecessary compliance burdens, particularly for operators that do not have any other regulated pipeline facilities. For these reasons, GPA Midstream respectfully requesting that PHMSA amend the regulations as follows:

§191.1 Scope.

(a) . . .

(b) This part does not apply to—

(1) . . .

(5) Pipelines that deliver gas directly to a farm tap customer from an onshore production or gathering line that is not subject to the requirements in part 192 of this chapter.

§192.1 What is the scope of this part?

(a) . . .

(b) This part does not apply to—

(1) . . .

[15] GPAC Meeting Transcript at 58-62.

(6) Pipelines that deliver gas directly to a farm tap customer from an onshore production or gathering line that is not subject to the requirements in this part.

Second, PHMSA should define the term "farm tap customer" in its regulations to clarify the status of farm tap piping and exemptions for non-jurisdictional pipeline operators. Consistent with prior Agency guidance, a farm tap customer should be defined as a landowner or other party receiving gas for residential or agricultural use directly from a pipeline pursuant to the terms of a right-of-way, lease, or other similar written agreement. Accordingly, GPA Midstream is respectfully requesting that PHMSA add the following definition to the regulations:

§192.3 Definitions.

As used in this part:

****

Farm tap customer means a landowner or other party that receives gas for residential or agricultural use directly from a pipeline pursuant to the terms of a right-of-way, lease, or other similar written agreement.

Finally, PHMSA should amend Part 192 to provide regulated gathering and transmission line operators with the flexibility to treat any pipeline that exists in a farm tap configuration as part of the regulated source piping for purposes of the gas pipeline safety standards, reporting, drug and alcohol, and other requirements.[16] Providing that flexibility eliminates the unnecessary compliance burdens that arise from applying the gas distribution regulations to piping that represents a negligible portion of the operator's overall pipeline assets. Therefore, GPA Midstream is respectfully requesting that PHMSA add the following new regulation to Part 192:

§192.17 Farm Taps

An operator may treat a pipeline that delivers gas directly to a farm tap customer from a regulated onshore gathering line or transmission line as part of that gathering or transmission line for purposes of the requirements in this part and the other requirements in this chapter.

[16] GPA Midstream notes that commenters in a prior rulemaking proceeding asked PHMSA to make similar changes to Part 192. *See* Interstate Natural Gas Ass'n of America, Comments at 11, Docket No. PHMSA-2013-0163 (Sept. 8, 2015) https://www.regulations.gov/document?D=PHMSA-2013-0163-0032 (Sept. 9, 2015); *See also*, Kinder Morgan, Inc., Comments at 9 (Sept. 8, 2015), https://www.regulations.gov/document?D=PHMSA-2013-0163-0047. The Agency declined to adopt those changes in that proceeding, indicating that the compliance requirements for farm taps needed to be uniform for enforcement purposes. Pipeline Safety: Operator Qualification, Cost Recovery, Accident and Incident Notification, and Other Pipeline Safety Changes, 82 Fed. Reg. 7,972, 7,984, 7,985 (Jan. 23, 2017). Regardless of whether GPA Midstream agreed with the rationale that PHMSA provided at that time, the amendments proposed in the NPRM, which would allow operators to manage inspections of pressure regulators serving farm taps either under the transmission requirements of § 192.740 or a distribution integrity management plan, demonstrate that the emphasis on uniformity is no longer controlling. Pipeline Safety: Gas Pipeline Regulatory Reform, 85 Fed. Reg. at 35,242. The Agency should acknowledge that fact and advance the stated purpose of this proceeding by allowing operators to treat farm tap service lines as part of the source piping.

III. Pressure Vessel Testing

Section 192.153 of PHMSA's gas pipeline safety regulations prescribes design and installation standards for components fabricated by welding. In the NPRM, the Agency proposed to amend § 192.153 to clarify the testing requirements for pressure vessels installed after July 14, 2004, but before the effective date of the final rule. The Pipeline Safety Trust (PST) opposed that proposal in comments submitted in response to the NPRM, arguing that the amendment violated the non-retroactivity provision in 49 U.S.C. § 60104(b) of the Pipeline Safety Act. Certain members of the GPAC expressed the same concern during the public meeting.

As explained in more detail below, GPA Midstream does not agree that the proposed amendment to § 192.153 violates the Pipeline Safety Act's non-retroactivity provision. Section 60104(b) only prohibits PHMSA from retroactively applying design and installation standards that require the replacement or modification of existing pipeline facilities. The proposed amendment to § 192.153 does not have that kind of prohibited retroactive effect—it merely seeks to clarify the design and installation standards applicable to certain pressure vessels in existence prior to the effective date of the final rule. That clarification would not affect the compliance obligations imposed on operators would in any way.[17]

Moreover, even if the amendment did provide retroactive relief from a design and installation standard, § 60104(b) does not preclude PHMSA from adopting that regulation in the final rule. The record shows that operators would not need to modify or replace any existing pressure vessels to achieve compliance; therefore, the regulation would not have an impermissible retroactive effect. As important, the amendment is also consistent with the terms of a stay of enforcement that the Agency issued for § 192.153. Nothing in § 60104(b) limits PHMSA's broad authority to issue that stay of enforcement or codify its terms into the Part 192 regulations.

a. Overview of Non-Retroactivity Provision

Section 60104(b) of the Pipeline Safety Act states that "[a] design, installation, construction, initial inspection, or initial testing standard does not apply to a pipeline facility existing when the standard is adopted."[18] Congress enacted the original version of that provision in the Natural Gas Pipeline Safety Act of 1968 (1968 Act), the law that initially authorized the Secretary of the U.S. Department of Transportation (USDOT) to prescribe and enforce minimum federal safety standards for gas pipeline facilities and persons engaged in the transportation of gas.[19] As originally enacted, Section 3(b) of the 1968 Act stated that "[s]tandards affecting the design, installation, construction, initial inspection, and initial testing shall not be applicable to pipeline facilities in existence on the date such standards are adopted."[20] According to the legislative history, Congress added Section 3(b) to address "the fear of the industry that it might

[17] GPAC Meeting Transcript GPAC Meeting Transcript at 85-89 (Statement of Steve Nanney, PHMSA).
[18] 49 U.S.C. § 60104(b).
[19] Pub. L. No. 90-481, 82 Stat. 720.
[20] *Id.* § 3(b), 82 Stat. at 721.

be required to bear the expense of removing large quantities of pipeline laid before a standard becomes effective for no other reason than it does not comply with the Federal standard, irrespective of whether the pipe is sound and safe."[21]

USDOT interpreted Section 3(b) in a manner consistent with the stated intent of Congress in the years following the passage of the 1968 Act. In establishing the original gas pipeline safety regulations in August 1970, USDOT received comments "express[ing] concern that existing pipelines would not meet the design, construction, and testing requirements of the new regulations and would therefore have to be replaced or otherwise modified in order to comply[.]"[22] USDOT responded by stating that "[t]here is no basis for this concern and the prospective effect of Part 192 is made clear in section 192.13."[23] Indeed, USDOT noted that the non-retroactivity provision in "Section 3(b) . . . [of the 1968 Act] speaks quite clearly on this point".[24] USDOT described the non-retroactivity provision in similar terms in a 1982 letter of interpretation. In concluding that the corrosion control requirements in 49 C.F.R. Part 192, Subpart I could be applied to existing pipeline facilities, USDOT stated that those regulations "are not standards which would require modification of a pipeline's design to achieve compliance[,]" a result that "would be forbidden by [the non-retroactivity provision in] Section 3(a)(1) [of the 1968 Act]."[25]

As these statements from the legislative and regulatory history clearly show, Congress and USDOT shared the same view on the purpose of the non-retroactivity provision in the 1968 Act. Specifically, Section 3(b) prohibited USDOT from applying certain standards (for design, installation, construction, initial inspection, and initial testing) that would require operators to modify or replace existing pipeline facilities in order to achieve compliance. Section 3(b) did not prohibit USDOT from applying all safety standards to existing pipeline facilities. Safety standards that did not address the proscribed topics or impose retroactive compliance obligations fell outside the reach of that provision.

Congress made slight modifications to the original language of the non-retroactivity provision in the 1994 recodification of the Pipeline Safety Act. Adopted as part of a broader recodification of various transportation laws, Congress made clear that those modifications were intended to be purely technical or clerical in nature. As such, the original understanding of the non-retroactivity provision should still control.

---

[21] H.R. Rep. No. 90-1390, *reprinted in* 1968 U.S.C.C.A.N. 3223, 3236. Another clause in Section 3(b) of the 1968 Act authorized the Secretary to issue orders to pipeline operators to take the steps necessary to address a particular facility that was hazardous to life or property. The legislative history makes clear that Congress did not intend the non-retroactivity provision to supersede the Secretary's authority to issue orders to operators of hazardous pipeline facilities where necessary to address matters affecting design, installation, construction, initial inspection, and initial testing.

[22] Establishment of Minimum Standards, 35 Fed. Reg. 13,248, 13,250 (Aug. 19, 1970)

[23] *Id.*

[24] *Id.*

[25] PHMSA Letter of Interpretation to Mr. Dale W. Johansen, Mo. Pub. Serv. Comm'n, PI-82-012 (June 30, 1982).

b. Procedural History of § 192.153

Since USDOT adopted the original federal gas pipeline safety regulations in 1970, the requirements in Section VIII of the American Society of Mechanical Engineers (ASME) Boiler and Pressure Vessel Code (BPVC) have been incorporated by reference into § 192.153.[26] In 1999, ASME changed the test factor applicable to pressure vessels designed and fabricated under the BPVC from 1.5 times maximum allowable working pressure (MAWP) to 1.3 times MAWP. In 2004, PHMSA incorporated the 2001 edition of the ASME BPVC by reference into § 192.153, which used the 1.3 times MAWP test factor for the design and fabrication of pressure vessels.[27] In a subsequent final rule, PHMSA incorporated the 2007 edition of the ASME BPVC by reference, which also used the 1.3 times MAWP test factor for the design and fabrication of pressure vessels.[28]

In March 2015, the Agency issued a final rule that made certain amendments to Part 192.[29] One of those amendments added the following new provision to § 192.153: "A component having a design pressure established in accordance with paragraph (a) or paragraph (b) of this section and subject to the strength testing requirements of §192.505(b) must be tested to at least 1.5 times the [maximum allowable operating pressure (MAOP)]."[30] In the preamble to the final rule, PHMSA indicated that the 1.5 times MAOP test factor applied retroactively to pressure vessels designed and fabricated in accordance with the editions of the ASME BPVC incorporated by reference since the 2004 final rule.[31]

The Interstate Natural Gas Association of America (INGAA) responded by filing a petition for reconsideration of the final rule.[32] INGAA challenged the Agency's decision to adopt the 1.5 times MAOP test factor and its assertion that the new test factor applied retroactively to pressure vessels installed since the effective date of the 2004 final rule, explaining that the text, structure, and history of the relevant regulations did not support that conclusion. INGAA asked PHMSA to either rescind the amendment to 49 C.F.R. § 192.153 or clarify that the new test factor did not apply pressure vessels installed in accordance with the editions of the ASME BPVC in effect prior to the final rule.

In September 2015, the Agency denied INGAA's petition.[33] PHMSA continued to assert that the 1.5 times MAOP test factor applied retroactively to pressure vessels installed prior to the

[26] 49 C.F.R. § 192.7(7) - (9) (2020).
[27] Pipeline Safety: Periodic Updates to Pipeline Safety Regulations (2001), 69 Fed. Reg. 32,886, 32,892 (June 14, 2004).
[28] Pipeline Safety: Periodic Update of Regulatory References to Technical Standards and Miscellaneous Edits, 75 Fed. Reg. 48,593, 48,602 (Aug. 11, 2010).
[29] Pipeline Safety: Miscellaneous Changes to Pipeline Safety Regulations, 80 Fed. Reg. 12,762 (Mar. 11, 2015).
[30] *Id.* at 12,778.
[31] *Id.* at 12,772.
[32] Interstate Natural Gas Ass'n of America, Petition for Reconsideration, No. PHMSA-2010-0026 (Apr. 10, 2015), https://www.regulations.gov/document?D=PHMSA-2010-0026-0057.
[33] Pipeline Safety: Miscellaneous Changes to Pipeline Safety Regulations: Response to Petitions for Reconsideration, 80 Fed. Reg. 58,633 (Sept. 30, 2015)

final rule but expressed a willingness to add an exception if warranted upon further review and analysis. INGAA then filed a petition for review in the U.S. Court of Appeals for the D.C. Circuit. The petition for review, which remains pending, challenged PHMSA's amendment to § 192.153 and effort to apply that regulation retroactively to existing pressure vessels. Shortly after INGAA filed the petition for review, the Agency issued a stay of enforcement for any violations of §§ 192.153(e) and 192.505(b) that "arise from the installation of pressure vessels covered by 49 C.F.R. § 192.153(a)-(b) and 192.165(b)(3) and which were put into service between July 14, 2004 and October 1, 2015."[34]

Honoring the commitment made in denying INGAA's petition for reconsideration, PHMSA commissioned Oak Ridge National Laboratory (Oak Ridge) to prepare a study on the safety of pressure vessels designed and manufactured in accordance with the historical and more recent editions of the ASME BPVC. Oak Ridge completed that study and, as explained in an April 2017 report, concluded that the hydrostatic pressure testing provisions in the relevant editions of the ASME BPVC provided an equivalent level of safety. Citing the results of the Oak Ridge study and INGAA's concerns with the March 2015 amendment, the Agency proposed in the NPRM to revise § 192.153 to clarify the status of pressure vessels installed after July 14, 2004, the date when PHMSA incorporated the first edition of the ASME BPVC with 1.3 times MAWP test factor. Specifically, the Agency proposed to amend § 192.153 to state that pressure vessels installed after July 14, 2004, but prior to the effective date of the final rule in this proceeding, only need to be pressure tested in accordance with the 1.3 times test factor.

c. The Proposed Amendment to § 192.153 Does Not Violate the Non-Retroactivity Provision

In comments submitted in response to the NPRM, PST argued that the non-retroactivity provision in 49 U.S.C. § 60104(b) prohibits PHMSA from adopting the proposed amendment to § 192.153. PST stated that the amendment contains "standards relating to the design, installation, construction and initial testing of a pipeline facility[.]"[35] Therefore, the proposed amendment "cannot lawfully be applied to any pipeline in existence before the effective date of any final rule[,]" including any pressure vessels installed between 2004 and that time.[36] Certain members of the GPAC expressed similar concerns in discussing the amendment during the public meeting.

GPA Midstream does not agree that the proposed amendment to § 192.153 violates the non-retroactivity provision in 49 U.S.C. § 60104(b). As INGAA explained in its petition for reconsideration, § 192.153 only required operators to design and fabricate pressure vessels in accordance with the AMSE BPVC from July 14, 2004, until the effective date of the March 2015 final rule. While offering a contrary interpretation of § 192.153 at certain points in time, PHMSA's most recent actions appear to validate the merits of INGAA's position. The Agency issued a stay of enforcement for pressure vessels installed prior to the effective date of that final rule and then

[34] *See* Exhibit A to Joint Motion to Hold Proceeding in Abeyance, No. 15-1343 (D.C. Cir. filed Nov. 13, 2015).
[35] Pipeline Safety Trust Comments at 4, PHMSA-2018-0046 (Aug. 11, 2020), https://www.regulations.gov/document?D=PHMSA-2018-0046-0042.
[36] *Id.*

proposed in the NPRM to amend § 192.153 to adopt the terms of the stay. These two decisions suggest that § 192.153 actually allowed operators to use the 1.3-times-MAWP test factor—or at the very least that operators acted reasonably in reaching that conclusion—before the March 2015 final rule.

In any event, the proposed amendment to § 192.153 is not the kind of retroactive safety standard that is prohibited under 49 U.S.C. § 60104(b). The amendment does nothing more than clarify the initial testing requirements that applied to pressure vessels installed between July 14, 2004, and the effective date of the current final rule. As PHMSA acknowledged during the GPAC meeting, operators that designed and fabricated pressure vessels in accordance with the referenced editions of the ASME BPVC would not need to replace or modify any existing pipeline facilities to achieve compliance.[37] These pressure vessels would remain subject to the 1.3-times-MAOP test factor and be in full compliance with § 192.153 after the amendment. The only meaningful difference is that operators would no longer be faced with the uncertainty that exists as a result of the Agency's March 2015 final rule and subsequent stay of enforcement.

Moreover, even if the amendment provides operators of existing pipeline facilities with substantive relief, 49 U.S.C. § 60104(b) would not prohibit PHMSA from adopting the proposed revision to § 192.153. Assuming that the Agency's earlier statements are correct and that the 1.5-times-MAOP test factor applied prior to the March 2015 final rule, the amendment would still not have an impermissible retroactive effect. Operators that designed, fabricated, and tested pressure vessels in accordance with the editions of the ASME BPVC in effect at that time would not need to do anything to comply with the 1.3-times MAOP testing requirement in the new regulation. Given that the provision is intended to prevent the Agency from imposing undue burdens on pipeline operators, the proposed amendment to § 192.153 is clearly not the kind of standard that should be prohibited under 49 U.S.C. § 60104(b).

Finally, regardless of whether the amendment is a clarification or substantive revision, the Agency can revise § 192.153 as a matter of enforcement discretion. PHMSA enjoys broad authority in deciding whether to enforce a particular requirement in the pipeline regulations,[38] and the Agency has issued a stay of enforcement for any violations of §§ 192.153(e) and 192.505(b) that "arise from the installation of pressure vessels covered by 49 C.F.R. § 192.153(a)-(b) and 192.165(b)(3) and which were put into service between July 14, 2004 and October 1, 2015."[39] Nothing in the non-retroactivity provision limits PHMSA's authority to codify the terms of the stay of enforcement into Part 192. In fact, a decision by PHMSA to rescind the stay and resume

[37] GPAC Meeting Transcript at 86-88 (Statement of Steve Nanney, PHMSA).

[38] *See* U.S. Const. art. II, § 3 (empowering the executive branch to "take Care that the laws be faithfully executed"); 49 U.S.C. §§ 60118(b)-(c) (authorizing PHMSA to issue compliance orders and grant waivers), 60122 (authorizing PHMSA to impose civil penalties). *See, e.g., Hotel and Rest. Employees Union v. Smith*, 846 F.2d 1499, 1519 (D.C.Cir.1988) (*en banc*) (Silberman, J., separate opinion) ("The extrastatutory decision to withhold enforcement is an exercise of the Executive Branch's discretion to decide whether to prosecute a case that flows from the Constitution's admonition that that Branch 'take Care that the Laws be faithfully executed."). Like other federal agencies, PHMSA's enforcement decisions are generally committed to its discretion by law. *Heckler v. Chaney*, 470 U.S. 821, 833 & n.4 (1985); *Baltimore Gas & Elec. Co. v. FERC*, 252 F.3d 456, 460 (D.C. Cir. 2001).

[39] *See* Exhibit A to Joint Motion to Hold Proceeding in Abeyance, No. 15-1343 (D.C. Cir. filed Nov. 13, 2015).

an effort to retroactively apply the 1.5-times-MAOP test factor to existing pressure vessels would raise serious legal questions, particularly given the lack of fair notice and legitimate reliance interests that would be adversely affected by that action.[40] For these reasons, the Agency can adopt the proposed changes to § 192.153 purely as an exercise of its enforcement discretion.

While not relevant to the foregoing legal analysis, GPA Midstream notes that the Oak Ridge Study confirms that adopting the proposed amendment to § 192.153 would not have any adverse impact on public safety. Oak Ridge found that pressure vessels designed, constructed, and fabricated in accordance with the historical and more recent editions of the ASME BPVC provide an equivalent level of safety. In reaching that conclusion, Oak Ridge specifically noted that the change in the test factor from 1.5-times MAWP to 1.3-times MAWP in the ASME BPVC did not provide any reduction in safety given the other corresponding revisions to the standard. Accordingly, the proposed amendment to § 192.153 is justified on policy grounds.

IV. Conclusion

GPA Midstream appreciates the opportunity to submit comments in response to the GPAC meeting. If you have any questions, please feel free to contact me at 202-279-1664 or mhite@gpamidstream.org.

Sincerely,

Matthew Hite
Vice President of Government Affairs
GPA Midstream Association
(202) 279-1664
mhite@gpamidstream.org

[40] *See Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1913-1915, 207 L. Ed. 2d 353 (2020) (discussing importance of considering reliance interests as part of agency decision to terminate stay of enforcement).