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U.S. Department of Transportation
West Building
1200 New Jersey Avenue, SE
Washington, D.C. 20590

**RE: Supplemental Comments - “Pipeline Safety: Regulatory Reform for
Hazardous Liquid Pipelines,” Docket No. PHMSA-2018-0047**

On April 16, 2020, the U.S. Department of Transportation’s Pipeline and Hazardous Materials Safety Administration (PHMSA) published a notice of proposed rulemaking (NPRM) in the above-captioned proceeding.¹ In the NPRM, PHMSA proposed changes in regulations to reduce regulatory burdens and improve regulatory clarity without compromising safety and environmental protection. The NPRM included, among other things, certain proposed changes to Part 190 of PHMSA’s regulations (49 C.F. R. Part 190), which encompasses PHMSA’s Pipeline Safety Enforcement and Regulatory Procedures. On June 15, 2020, the American Petroleum Institute, Association of Oil Pipe Lines, American Fuel and Petrochemical Manufacturers, the Interstate Natural Gas Association of America, American Gas Association, and GPA Midstream (collectively the Associations),² filed comments in response to the NPRM, including on the proposed changes to the Part 190 regulations. The enclosed comments supplement the comments filed June 15 concerning PHMSA’s Part 190 regulations.

Specifically, the Associations request and recommend further guidance from PHMSA on key aspects of its Part 190 regulations that would help reduce regulatory burdens, improve regulatory clarity, and promote greater transparency, efficiency and consistency. As reflected in the enclosed Supplemental Comments, the Associations respectfully request that PHMSA implement enhancements to improve and reinforce consistency and transparency with respect to: (1) issuance of enforcement and regulatory interpretations; (2) settlement negotiations; (3) issuance of civil penalties; (4) recommended decisions; and (5) burden of proof.

The Associations submit that providing such guidance would improve regulatory certainty and due process in the agency’s enforcement and regulatory process, improve the efficiency of those processes, and thus advance pipeline safety to the benefit of the public and pipeline operators.

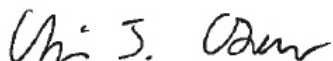
Respectfully Submitted,

¹ Pipeline Safety: Regulatory Reform for Hazardous Liquid Pipelines, 85 Fed. Reg. 21140 (April 16, 2020) (hereinafter “NPRM”).

² The comments were also joined by the American Public Gas Association.



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Supplemental Comments
“Pipeline Safety: Regulatory Reform for Hazardous Liquid Pipelines”
Docket No. PHMSA-2018-0047

On April 16, 2020, the U.S. Department of Transportation’s (DOT’s) Pipeline and Hazardous Materials Safety Administration (PHMSA or the Agency) published a notice of proposed rulemaking (NPRM) in the above-captioned proceeding. In the NPRM, PHMSA proposed changes to reduce regulatory burdens and improve regulatory clarity without compromising safety and environmental protection, including certain proposed changes to PHMSA regulations at 49 C.F.R. Part 190. As set forth below, the American Petroleum Institute, Association of Oil Pipe Lines, American Fuel and Petrochemical Manufacturers, Interstate Natural Gas Association of America, American Gas Association, and GPA Midstream (collectively the Associations) request and recommend further guidance from PHMSA on key aspects of its 49 C.F.R. Part 190 enforcement and procedural regulations that would help reduce regulatory burdens, improve regulatory clarity, and promote greater transparency, efficiency and consistency.

As authorized under the Pipeline Safety Act (PSA), the Office of Pipeline Safety (OPS) within PHMSA implements pipeline, liquefied natural gas (LNG), and underground natural gas storage facility safety regulations to ensure the safe transportation of natural gas, hazardous liquids, and other products. To facilitate compliance, PHMSA publicizes OPS enforcement actions¹ on its website, provides published inspection forms and protocols, issues and publishes regulatory interpretations, and issues other guidance materials (advisories, FAQs, etc.).

OPS assures compliance with its regulations through field inspections of facilities and construction projects, programmatic inspections of operator systems and procedures, incident investigations, and by other means. At the conclusion of the inspection process, OPS may employ a range of enforcement mechanisms to allege noncompliance with federal pipeline safety laws, specify corrective actions to achieve compliance, and propose a civil penalty. OPS maintains a pipeline safety Enforcement Procedures Manual that summarizes the Agency’s enforcement tools under 49 C.F.R. Part 190 and the processes established to assure their proper application and implementation (Enforcement Procedures Manual).

Under the current PHMSA Enforcement Procedures Manual, PHMSA counsel are available to support enforcement efforts, and attorney review is expressly required when a proposed penalty exceeds a certain threshold.² As a practical matter, however, it does not appear that PHMSA

¹ Enforcement actions encompass all remedies available to OPS by 49 C.F.R. Part 190, Subpart B.

² PHMSA Pipeline Safety Enforcement Procedures state (1) “Region staff can consult with the Region Attorney, particularly if the request is related to a significant accident or incident, or where a large civil penalty may be anticipated.” (Section. 4.1.2.1, p. 21 (Dec. 12, 2018)); (2) “Region staff may seek input or assistance from the Region Attorney in drafting the notice letter and in preparing the Violation Report. The Region Attorney will be useful in identifying the best regulatory citation, formulating the legal and evidentiary arguments into a strong case, and in presenting the evidence in complicated enforcement cases.” (Section 4.1.3.1, p. 28 (Dec. 12, 2018)); (3) If the proposed civil penalty amount is \$200,000 or greater, the Enforcement Director or Compliance Officer ensures that the Region Attorney has reviewed the case file. The purpose of this review is to ensure that all aspects of the case are legally sound (e.g. that evidence is sufficiently developed to support each of the alleged violations [...])” (Section.

counsel are typically involved in the development of enforcement cases—if at all—until a case has already been prepared. Similarly, it is unclear how or when the Office of Chief Counsel is involved in the review and consideration of regulatory interpretations.

The issuance of regulatory enforcement actions and interpretations necessarily involves the application of facts to the relevant legal requirements and the consideration of legal precedent and agency guidance. As set forth below, the Associations respectfully request that PHMSA implement enhancements to improve and reinforce consistency and transparency with respect to: (1) issuance of enforcement and regulatory interpretations; (2) settlement negotiations; (3) issuance of civil penalties; (4) recommended decisions; and (5) burden of proof.

To fulfill these goals, the Associations request that PHMSA adopt the following guidance on these issues.

I. ENHANCED ROLE OF PHMSA COUNSEL IN ENFORCEMENT AND REGULATORY INTERPRETATIONS

To further reinforce transparency and consistency with applicable law when the Agency issues OPS enforcement and regulatory interpretations, below are several formal measures that PHMSA's Office of Chief Counsel will utilize in conjunction with PHMSA's OPS Regions, Standards and Rulemaking Division, and Enforcement Division. Collectively, these practices are intended to increase consistency, efficiency, transparency and equity in PHMSA's enforcement processes.

A. PHMSA Enforcement

OPS has recently taken informal measures to involve counsel earlier in the development of an enforcement case, including review of certain Notices of Probable Violation (NOPVs). To further improve consistency, efficiency, transparency and equity in the Agency's enforcement processes, Region Attorneys and PHMSA Regional Directors should implement the following measures with respect to enforcement.

1. Statutory and Evidentiary Standards

A Region Attorney will coordinate with the Region to review alleged noncompliance, from initial written preliminary inspection findings and review of the case file, to filing the formal enforcement action. This collaboration will enable PHMSA to meet its statutory and regulatory obligations in post-inspection briefings and the evidentiary standard in building an enforcement action.

As set forth below, the burden of proof and persuasion lies with PHMSA to demonstrate the existence of a violation.³ OPS must articulate the specific evidence and facts upon which a

4.1.3.4, p. 29 (Dec. 12, 2018)). Available at <https://www.OPS.dot.gov/pipeline/enforcement/pipeline-enforcement-procedures>.

³ *In re Bridger Pipeline Co.*, Final Order, CPF No. 5-2007-5003, 2009 WL 7796887 at *1 (DOT Apr. 2, 2009); *Schaffer v. Weast*, 546 U.S. 49, 56 (2005) (citing *Dir., Office of Workers' Comp. Programs, Dep't of Labor v. Greenwich Collieries*, 512 U.S. 267, 272 (1994)); *In re ANR Pipeline Co.*, Final Order, CPF No. 3-2011-1011, 2012 WL 7177134 at *3 (DOT Dec. 31, 2012); see also *In re CITGO Pipeline Co.*, Decision on Pet. for Reconsideration, CPF No. 4-2007-5010, 2011 WL 7517716, at *5 (Dec. 29, 2011) (emphasis supplied).

probable violation is based and demonstrate why the conduct constitutes a violation. This should include consideration of relevant enforcement precedent and appropriate reference to, and awareness of, PHMSA guidance as well as the recognition that guidance is not binding regulation.

2. Documentation

PHMSA's inspection documentation may include, but is not limited to, the following: evidence files; inspector notes (including interview notes); operator responses to the inspection questions; completed inspection checklists/forms; operator documentation retained by the Region; photographs; and any other material generated or obtained by Region staff that is material to the determination of compliance with pipeline safety regulations.⁴ PHMSA's case file for any enforcement action issued, including the Pipeline Safety Violation Report where applicable, must contain all material relied upon by the Region and Region Attorney in developing and issuing the enforcement action as well as any potentially exculpatory evidence. Region Attorneys should review the supporting evidentiary case file in an enforcement case to confirm that it contains sufficient evidence of a probable violation to support an enforcement action.

In order to ensure a level playing field for a respondent faced with an Agency enforcement action, respondents will be provided with all information and evidence pertinent to the matters of fact and law asserted by the Agency, including information that could lead to the discovery of additional relevant evidence. Under the current regulations, when a respondent receives an enforcement action, a respondent may request the case file.⁵ The case file should include all evidence pertinent to the matters of fact and law asserted by the Agency in an enforcement action, including, but not limited to, the Pipeline Safety Violation Report or data report. Further, this evidence should include, where applicable, the basis for any proposed civil penalties (See Section III.).

Such evidence is essential to (1) identifying options for an amicable resolution outside the hearing process, and (2) ensuring full preparation for a hearing by both parties, including the development of a complete and accurate evidentiary record before the Agency and to facilitate any examination of witnesses. Disclosure of such evidence will advance fundamental fairness as well as allow for a more efficient adjudication process.

3. Burden of Proof

It is well established in the Agency's own decisional law, such as Final Orders, that PHMSA bears the burden of proving the allegations in an administrative enforcement action, which includes both the burden of production and the burden of persuasion.⁶ As such, the Office of Chief Counsel will work with OPS to ensure that these burdens are met. The Agency not only "bears the burden of proof as to *all elements* of the proposed violation," but the Agency also bears the "obligation to come forward with the *evidence* at different points in the proceeding."⁷ To meet the burden of

⁴ PHMSA Pipeline Safety Enforcement Procedures, Section. 4.1.1.1, p. 18 (Dec. 12, 2018).

⁵ 49 C.F.R. § 190.208(c), 190.209(b).

⁶ See footnote 3, *supra*.

⁷ *ANR Pipeline Co.*, 2012 WL 7177134 at *3; *Schaffer* 546 U.S. at 56 (citing *Dir., Office of Workers' Comp. Programs*, 512 U.S. at 272).

persuasion, PHMSA “must prove, by a preponderance of the evidence that the facts necessary to sustain a probable violation actually occurred.”⁸

The Agency satisfies this burden “only if the evidence supporting the allegation outweighs the evidence and reasoning presented by Respondent in its defense.”⁹ Where “the evidence is closely balanced,” PHMSA does not meet its burden of persuasion and the allegation should be withdrawn.¹⁰ Likewise, where PHMSA fails to produce evidence in support of its allegation or provides insufficient evidence that its allegation is more probable than not, the allegation should be withdrawn.¹¹

DOT regulations require that adversarial personnel determine whether the record contains the evidence sufficient to support an alleged violation prior to proceeding with an enforcement action.¹²

4. Compliance with Other Statutory and Regulatory Obligations and DOT Policy

Involvement of Region Attorneys in review of enforcement actions earlier in the process, including with regard to whether PHMSA has sufficient evidence to demonstrate an alleged violation, should better ensure that the Agency has complied with its statutory and regulatory obligations. These obligations include, but are not limited to, (i) other statutes such as the Administrative Procedure Act (APA) (and associated case law requiring fair notice and due process in agency enforcement) and the Freedom of Information Act (FOIA) (in referencing information obtained from an operator); (ii) DOT regulations (49 C.F.R. Part 5 regulations regarding fair notice, due process, transparency, and the use of guidance); and (iii) DOT policy (enforcement discretion notices, etc.).

B. Letters of Interpretation

For similar reasons, an attorney from the PHMSA Office of Chief Counsel should be involved in the Agency’s review and response to requests for interpretations issued under 49 C.F.R. § 190.11(b). Many of these interpretation requests involve legal interpretive questions regarding PHMSA’s authority and the scope of its jurisdiction. In preparing draft interpretations, PHMSA counsel should consider relevant statutory, rulemaking and enforcement history, past

⁸ *In re Alyeska Pipeline Serv. Co.*, Decision on Petition for Reconsideration, CPF No. 5-2005-5023, 2009 WL 5538655, at *3 (DOT Dec. 16, 2009) (citing *In re Butte Pipeline Co.*, Final Order, CPF No. 5-2007-5008, 2009 WL 3190794, at *1, n.3 (DOT Aug. 17, 2009); *Schaffer*, 546 U.S. at 56-58).

⁹ *Butte Pipeline Co.*, 2009 WL 3190794, at *1.

¹⁰ *Alyeska Pipeline Service Co.*, 2009 WL 5538655, at *3 (citing *Schaffer*, 546 U.S. at 56).

¹¹ *Id.*

¹² 49 C.F.R. § 5.67 (2019); 84 Fed. Reg. 248 (Dec. 27, 2019). As articulated in a DOT-wide policy memo that has been incorporated into the regulations, “[t]he Department will not initiate enforcement actions as a ‘fishing expedition’ to find potential violations of law in the absence of sufficient evidence in hand to support the assertion of violation.” <https://www.transportation.gov/administrations/office-general-counsel/general-counsel%E2%80%99s-enforcement-memorandum>; 84 Fed. Reg. 248 (Dec. 27, 2019); see 49 C.F.R. § 5.67 (2019).

interpretations and other Agency guidance and policies. This will further ensure PHMSA's compliance with its statutory obligations under the PSA and the APA.¹³

II. SETTLEMENT POLICY

The Agency recognizes that settlement of enforcement actions is often a more efficient way to resolve disputes. Settlements can benefit the government, the public, regulated entities, and the environment by conserving government resources through faster resolution of disputes and providing for quicker implementation of remedial activities than might otherwise be achieved through the full enforcement process. Consistent with other federal administrative agencies, PHMSA has identified the following general principles that set forth how the Agency should exercise its enforcement discretion with regard to settlement of an enforcement case.

A. Timing of Settlement

The Region Director or Region Attorney may consider an offer of settlement at any time during the enforcement process, including before, during, or after a hearing. The Presiding Official must allow the PHMSA Region and respondent a reasonable time to engage in meaningful settlement discussions and, to the extent settlement discussions occur prior to a hearing, should postpone scheduling a hearing until any initial settlement discussions have concluded. The Presiding Official shall determine the reasonable amount of time for settlement discussions on a case by case basis, depending on the circumstances of the enforcement action, the number of allegations involved, and the scope of any proposed compliance order. The parties may, if initial settlement discussions prove unfruitful, resume settlement discussions at any time prior to service of a Final Order or Decision on Reconsideration.

B. Settlement Discussions

PHMSA encourages settlement discussions and encourages the Region Director and respondent to have such discussions either in-person, by phone, or video conference, on mutual agreement of the parties. The parties are encouraged to hold as many settlement discussions as needed to determine whether settlement is achievable.

Region Attorneys should be involved in settlement discussions to ensure that settlement terms are well documented, meet regulatory requirements, and are consistent with DOT policies and procedures. Region Attorneys should review all settlement terms prior to execution of a settlement agreement.

C. Executing Settlement Agreements

PHMSA may execute settlements through either a written settlement agreement signed by the Associate Administrator in accordance with the Agency's procedures for issuing a consent order (49 C.F.R. § 190.219), or through a mutually agreeable recommendation to the Presiding Official. The respondent should withdraw its hearing request once a settlement has been reached, but it may reserve its right to request a new hearing if a settlement agreement or the Final Order does not include the agreed upon terms. In the event of a later dispute on the meaning of the terms of a

¹³ 5 U.S.C. § 551 *et. seq.*

settlement agreement, the Chief Counsel, not the Associate Administrator, shall make a determination with respect to the dispute.

D. Effect of Settlement Agreement

As part of a settlement agreement, PHMSA may compromise all or part of the amount of any proposed civil penalty. If resolved through settlement, the alleged violation will not be considered a finding of violation or part of an operator's prior enforcement history, unless so specified.

E. Confidentiality of Settlement Discussions

All documents exchanged for the purposes of settlement discussions are subject to protection from release to the public under FOIA exemptions 4 and 5 (5 U.S.C. § 552(b)(4), (5)), and they may also be subject to other applicable protections. PHMSA's policy is that effective settlements benefit from the parties' ability to speak candidly and share sensitive information in confidence.

III. CIVIL PENALTY TRANSPARENCY

PHMSA's enforcement goals of transparency and fairness extend to the Agency's development of proposed civil penalties in any enforcement actions. For this reason and as a matter of policy, PHMSA should provide the proposed civil penalty worksheet in its original excel format and the Pipeline Safety Violation Report to the respondent coincident with issuance of a Notice of Probable Violation. Upon request by the operator, PHMSA may provide documentation supporting each component of the civil penalty calculation. If the Agency modifies the civil penalty amount in a Final Order, OPS will provide the revised civil penalty worksheet showing the changes when it issues the Final Order.

IV. REPLIES TO PHMSA POST-HEARING SUBMISSIONS AND RECOMMENDED DECISION

PHMSA strives to ensure that enforcement actions are reasonable and consistent with DOT policy, and the Agency remains committed to continually improving its enforcement processes. PHMSA's current enforcement process includes the submission of post-hearing briefs by both the respondent and the relevant Region, as well as the preparation of a recommended decision by the Presiding Official, following receipt of any post-hearing submissions by respondents and the Region.¹⁴ The recommended decision is provided to the Associate Administrator for Pipeline Safety for consideration in issuance of a Final Order.¹⁵

There is no express right to reply to a post-hearing submission, although informally a Presiding Official may allow an additional filing under certain circumstances, such as if new information was raised that either party was unable to respond to during earlier proceedings. In addition, historically, the recommended decision has not been provided to the respondent, but in order to bring the Agency's practices in alignment with DOT-wide regulations, PHMSA will provide the

¹⁴ 49 C.F.R. §190.211(h).

¹⁵ *Id.*

parties an express opportunity to review and comment on the both the post-hearing submissions and recommended decisions, as set forth below.¹⁶

A. Department Policy

The Secretary of Transportation recently codified DOT's procedural requirements for enforcement actions that apply to all modes within the department. Specifically, the Secretary instructed that, for informal hearings, the "hearing record" shall include the information that the Agency considered "at the time it reached the decision."¹⁷ Further, the Secretary encourages agencies within the department "to make the record available ... to the fullest extent allowed by law."¹⁸

B. PHMSA Policy

PHMSA recognizes that both the Region's post-hearing submission and the Presiding Official's recommended decision are important elements of the enforcement process. As such and in keeping with DOT-wide regulation, PHMSA policy is to provide copies of both documents to the parties to a matter, allowing both the respondent and relevant Region the opportunity to review the documents and to respond. Objections are limited to errors of fact or law, or relevant policy considerations.

Timing for the filing of a response to either PHMSA's post-hearing submission or recommended decision will be established by the Presiding Official, allowing a reasonable amount of time, generally within thirty (30) days following receipt of the relevant document. If a party fails to respond, the opportunity to respond is waived and cannot be raised on reconsideration or rehearing. This step likely will improve the ability to resolve matters prior to issuance of a Final Order and lessen the need for a party to file a Petition for Reconsideration.

¹⁶ 49 C.F.R. §5.79 (2019). These changes would also be consistent with the Senate's recent bipartisan bill to reauthorize PHMSA, the PIPES Act of 2019. *See* S. 2299, Section 109(b)(4)(E) and (H).

¹⁷ 49 C.F.R. §5.79 (2019).

¹⁸ *Id.*