



VIA ELECTRONIC FILING

June 19, 2020

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

Re: Docket No. PHMSA-2019-0131; Farm Taps Frequently Asked Questions

To Whom It May Concern:

On April 20, 2020, the Pipeline and Hazardous Materials Safety Administration (PHMSA or the Agency) published a request for comments (RFC) in the *Federal Register* in the above-captioned proceeding.¹ The RFC concerned draft Frequently Asked Questions (FAQs) for the regulation of farm taps, which are pipelines that PHMSA generally describes as individual service lines directly connected to transmission, gathering, or production pipelines.² The Agency asked that interested parties submit comments in response to the draft FAQs within 60 days, or by no later than June 19, 2020.

GPA Midstream Association³ (GPA Midstream) and the American Petroleum Institute (API)⁴ are submitting these joint comments on behalf of their respective member companies. As a preliminary matter, GPA Midstream and API strongly support PHMSA's decision to follow a notice-and-comment process in developing the farm tap FAQs. Providing the public with notice and the opportunity to comment on agency guidance documents facilitates better decision making

¹ Pipeline Safety: Farm Taps Frequently Asked Questions, 85 Fed. Reg. 21,820 (April 20, 2020).

² *Id.* at 21,820; 49 C.F.R. § 192.720 (2019).

³ GPA Midstream has served the U.S. energy industry since 1921. GPA Midstream is composed of nearly 100 corporate members that are engaged in the gathering and processing of natural gas into merchantable pipeline gas, commonly referred to in the industry as "midstream activities." Such processing includes the removal of impurities from the raw gas stream produced at the wellhead as well as the extraction for sale of natural gas liquid products (NGLs) such as ethane, propane, butane, and natural gasoline or in the manufacture, transportation, or further processing of liquid products from natural gas. GPA Midstream membership accounts for more than 90% of the NGLs produced in the United States from natural gas processing.

⁴ API is the national trade association representing all facets of the oil and natural gas industry, which supports 10.3 million U.S. jobs and 8 percent of the U.S. economy. API's more than 625 members include large integrated companies, as well as exploration and production, refining, marketing, pipeline, and marine businesses, and service and supply firms. They provide most of the nation's energy and are backed by a growing grassroots movement of more than 25 million Americans.

and encourages compliance with applicable legal requirements. The Agency's decision to withdraw a prior version of the farm tap FAQs, which did not undergo notice-and-comment review, demonstrates the value in applying those procedures when issuing other guidance documents in the future.

As to the substance of the draft FAQs, GPA Midstream and API do not support the proposed "first isolation point" test for determining where production, gathering, or transmission line ends and a distribution service line begins in farm tap configurations. That test lacks any legal basis and appears to be the latest attempt in a multi-year effort to redefine the jurisdictional status and classification of farm taps outside the context of a notice-and-comment rulemaking proceeding. The Agency has never considered the economic impact of applying the gas distribution regulations to farm tap piping downstream from the first isolation point, particularly for operators of non-jurisdictional production and gathering lines that are not otherwise subject to PHMSA's regulations. The Agency should honor the text, structure, and history of those regulations and acknowledge that operators are allowed to exercise reasonable discretion in determining the classification of farm tap piping.

GPA Midstream and API are also urging the Agency to clarify that production and onshore gathering lines used for fuel gas, gas lift, or gas injection operations are not considered farm taps for purposes of these FAQs or the Agency's regulations. The classification of production and gathering lines is determined on the basis of the provisions in API Recommended Practice 80, "Guidelines for the Definition of Onshore Gas Gathering Lines," 1st edition, April 2000, (RP 80), which is incorporated by reference into PHMSA regulations, subject to certain additional limitations. Nothing in the draft FAQs should be interpreted as affecting the functional approach used in defining the extent of production and gas gathering operations under RP 80 and Part 192, including for fuel gas, gas lift, or gas injection lines.

GPA Midstream and API note that these comments do not address any of the proposed amendments to the regulations and reporting requirements for farm taps that PHMSA recently published in a Notice of Proposed Rulemaking (NPRM) in the *Federal Register*.⁵ GPA Midstream and API will be developing and submitting additional comments on the NPRM in the docket for that proceeding.

I. PHMSA's "First Isolation Point" Test for Classifying Farm Tap Piping Lacks any Legal Basis.

In the draft FAQs, PHMSA proposes a new test for determining where source piping ends and distribution service line piping begins in farm tap configurations. Specifically, the Agency states: "On a farm tap, the 'source' piping ends and the service line begins at the first point where the downstream service line can be isolated from source piping (e.g. the inlet to a valve or regulator, hereafter referred to as the 'first isolation point')." ⁶ PHMSA further states that "[i]f piping is at source pressure and cannot be isolated from the source, then the piping is considered part of the source pipeline and subject to any applicable federal pipeline safety regulations."⁷

⁵ Pipeline Safety: Gas Pipeline Regulatory Reform, 85 Fed. Reg. 35240-35254 (Jun. 9, 2020).

⁶ Proposed Farm Tap FAQs at FAQ #3, <https://www.regulations.gov/document?D=PHMSA-2019-0131-0001>.

⁷ *Id.*

Federal agencies are generally prohibited from adopting new regulations outside of the notice-and-comment rulemaking process and are limited by well-established principles of administrative law in interpreting the language of existing regulations.⁸ PHMSA does not cite to any legal authority in the draft FAQs that supports the proposed first isolation point test for determining the regulatory status of farm tap piping. Indeed, the phrase “first isolation point” is not used anywhere in the Part 192 regulations, including in the definitions that apply in determining whether a pipeline is a production, gathering, transmission, or distribution line.⁹

Nor does the structure of the Part 192 regulations indicate that the first isolation point has any special legal significance in distinguishing between “source” piping and distribution “service line” piping, particularly in farm tap configurations. The Agency uses a functional approach in determining whether a pipeline is a production or onshore gas gathering line to accommodate the wide variety of operations throughout the industry¹⁰ and has said that the classification of a pipeline as a transmission line is made on a case-by-case basis depending on the particular facts and circumstances for each line.¹¹ PHMSA also incorporates performance-based requirements that provides operators with significant discretion to achieve certain outcomes in various portions of the Part 192 regulations.¹² In other words, there is no indication that an arbitrary point of demarcation is necessary to accommodate the overall regulatory framework that the Agency applies to gas pipelines.

Perhaps most significantly, PHMSA has never used the first isolation point test in determining the regulatory status of farm taps in any prior enforcement cases, guidance documents, or letters of interpretation.¹³ In fact, the Agency’s most recent interpretations on the topic make no mention of the first isolation point as a factor that needs to be considered in applying Part 192 to farm taps.¹⁴ The absence of any such reference in a September 2012 interpretation letter is particularly striking, because PHMSA took the position that farm taps have been treated as distribution service lines since the inception of Part 192 regulations and cited statements from rulemaking documents in the 1970s and 1990s, an interpretation issued in 1980, and an industry

⁸ *Kisor v. Wilkie*, 139 S.Ct. 2400, 2414-16 (2019).

⁹ 49 C.F.R. § 192.3 (defining gathering line, transmission line, and distribution line, including main and service line); 49 C.F.R. §§ 192.8(a) (requiring operators to follow the provisions in API Recommended Practice 80, “Guidelines for the Definition of Onshore Gas Gathering Lines,” 1st edition, April 2000 (RP 80) in determining if a pipeline is an onshore gas gathering line, subject to certain limitations); RP 80 § 2.2 (defining onshore gathering line), § 2.3 (defining production operation), § 2.4 (supplemental definitions).

¹⁰ RP 80 § 2.1.

¹¹ See *In the Matter of Plains All American Pipeline*, CPF No. 5-2009-0018 (July 8, 2011) (The ‘determination of whether a pipeline is [a] transmission line’ is made ‘on a case-by-case basis depending on the set of circumstances for each line.’”).

¹² See e.g., 49 C.F.R. Part 192, Subparts O and P.

¹³ Even if PHMSA identified a genuinely ambiguous regulation supporting the use of the first isolation point test in determining the regulatory status of farm taps, the deference owed to that interpretation would be undermined by the Agency’s failure to acknowledge in the draft FAQs that the first isolation point test reflects a change in position that is inconsistent with prior guidance on the topic.

¹⁴ PHMSA Letter of Interpretation to Mr. Thomas Correll, Northern Natural Gas Co., PI-11-0008 (Apr. 19, 2011); PHMSA Letter of Interpretation to Mr. Charles Yarbrough, Atmos Energy, PI-11-0016 (Sept. 12, 2012); PHMSA. (November 5, 2018). PHMSA Letter of Interpretation to Mr. Michael J. Schmitt, Kentucky Pub. Serv. Comm’n, PI-18-0019 (Nov. 9, 2018).

standard that is currently used in determining whether a pipeline is part of an onshore gas gathering line to support that conclusion.¹⁵ None of these documents include any references to the first isolation point in discussing the regulatory status of farm tap piping. The failure to acknowledge that the draft FAQs are inconsistent with the Agency's prior position shows that the first isolation point test does not reflect its fair and considered judgment.

II. PHMSA has Never Analyzed the Economic Impact of Applying the Gas Distribution Service Line Regulations to Farm Tap Piping.

PHMSA has never analyzed the costs, benefits, or other impacts of applying the gas distribution service line regulations to farm tap piping downstream from the first isolation point.¹⁶ The Agency has adopted that view in documents developed outside the rulemaking process and without making any effort to comply with the cost-benefit requirements in the Pipeline Safety Act or provide the public or members of the Gas Pipeline Advisory Committee with the opportunity to consider the economic impacts of that position. PHMSA cannot use interpretation letters or other guidance documents to circumvent the rulemaking requirements and other procedural protections in the Administrative Procedure and Pipeline Safety Acts, including the obligation to ensure that binding legal requirements are the product of reasoned decision making from a cost-benefit perspective.¹⁷

Applying the gas distribution service line regulations to piping downstream of the first isolation point will impose substantial costs on the midstream industry without creating any justifiable safety benefits, particularly for operators of non-jurisdictional production and gas gathering pipelines. Non-jurisdictional pipeline operators are not subject to PHMSA's statutory authority and do not have a legal obligation to establish programs or procedures for complying with the Agency's pipeline safety regulations or reporting requirements. By treating farm tap piping downstream from the first isolation point as part of a gas distribution service line, the draft FAQs create new legal obligations for non-jurisdictional operators by regulating piping that represents a negligible portion of their overall assets. Indeed, the draft FAQs state that the gas distribution regulations apply even if the only piece of equipment that a non-jurisdictional pipeline

¹⁵ PHMSA Letter of Interpretation to Mr. Charles Yarbrough, Atmos Energy, PI-11-0016 (Sept. 12, 2012)

¹⁶ In a February 2017 Regulatory Impact Analysis, for example, the Agency admitted that it did not have sufficient information to quantify the overall cost impact of a regulation that specifically applied to farm taps. Regulatory Impact Analysis and Regulatory Flexibility Act Analysis, Pipeline Safety: Operator Qualification, Cost Recovery and other Pipeline Safety Changes, PHMSA-2013-0163, available at <https://www.regulations.gov/document?D=PHMSA-2013-0163-0050>

¹⁷ Earlier this month, PHMSA posted a Preliminary Regulatory Impact Analysis (PRIA) in PHMSA-2018-0046 that included economic information related to proposed amendments to § 192.740 and the distribution integrity management program requirements in Subpart P. Despite the Agency's prior statements that farm taps have been regulated as distribution service lines for nearly five decades, the PRIA in this proceeding is the first time that PHMSA has ever attempted to consider the economic impact of that position. Moreover, the PRIA does not analyze the potential economic impact of applying the Agency's proposed first isolation point test in determining the regulatory status of farm tap piping and, in the absence of that analysis, does not accurately reflect the costs and benefit of applying the Part 192 regulations for gas distribution service lines to farm taps, at least not under the test proposed in the draft FAQs. PHMSA's failure to include that analysis in the PRIA, particularly in a rulemaking proceeding designed to provide regulatory relief to pipeline operators, is particularly concerning given the lack of legal authority to support the Agency's position and the various efforts in recent years to redefine the jurisdictional status of farm taps outside the confines of the notice-and-comment process.

operator actually owns is the valve or regulator that serves as the first isolation point. The cost of requiring an operator to comply with the gas distribution regulations solely for purposes of a single valve or regulator on a farm tap system clearly outweighs any potential benefit from a safety perspective.¹⁸

The burden imposed on midstream companies that operate regulated gathering or transmission pipelines would also be very significant. While these companies have programs in place for complying with Part 192, the requirements that apply to regulated gas gathering and transmission lines are not the same as the requirements that apply to regulated gas distribution lines. For example, the regulations for customer meters, service regulators, and excess flow valves do not apply to regulated gathering or transmission lines, and the maximum allowable operating pressure and odorization requirements for regulated gathering and transmission lines are different than the comparable requirements for gas distribution lines. Making midstream companies that operate other regulated pipelines comply with an entirely new set of gas distribution regulations creates an unjustifiable burden, particularly in cases where the company is only operating a valve, regulator, or short piece of piping downstream from the first isolation point in a farm tap configuration.

III. Operators Should Be Allowed to Exercise Reasonable Discretion in Classifying Farm Tap Piping.

PHMSA should eliminate the first isolation point test from the draft FAQs and acknowledge that operators are allowed to exercise reasonable discretion in determining the classification of farm tap piping. That interpretation is consistent with the text, structure, and history of the pipeline safety regulations, which generally use a functional approach in determining whether a pipeline qualifies as a production, gathering, transmission, or distribution line. There is no indication that operators need to use a different approach in determining the jurisdictional and regulatory status of farm tap piping, let alone a bright line test that lacks any basis in the relevant statutes and regulations and has never been referenced in any prior agency enforcement cases, guidance documents, or interpretations.

PHMSA should acknowledge that operators can exercise reasonable discretion in determining the starting point for any distribution service line piping in farm tap configurations, whether at the first readily accessible isolation point, such as a valve or regulator, or at another point, such as a meter or custody transfer point.¹⁹ As stated in the draft FAQs, the Agency should

¹⁸ In the case of production and gathering lines, most farm tap agreements make clear that the landowner or free gas user is responsible for installing, operating, and maintaining the piping and equipment downstream from the interconnect. Production and gathering line operators do not own, operate, control, or exercise any legal authority over that piping or equipment under the terms of these agreements. Moreover, farm tap agreements have generally been viewed as creating private contractual obligations that are not subject to regulation for public utility purposes. *See e.g., Adams v. Pub. Util. Comm'n*, 819 A.2d 631 (Pa. Commw. Ct. 2003). The production and gathering line operators that deliver the gas are not treated as public utilities, and the landowners that receive the gas are not treated as ratepayers. While not addressed by PHMSA in any prior rulemaking proceeding or the draft FAQs, these distinctions are important in evaluating the costs, benefits, and economic impacts of applying the gas distribution service line regulations to non-jurisdictional production and gathering line operators.

¹⁹ The Department of Transportation recently codified its long-standing position that guidance must “not impose any substantive legal requirements above and beyond statute or regulation.” *Administrative Rulemaking, Guidance, and Enforcement Procedures*, 84 Fed. Reg. 71,714, 71,715 (Dec. 27, 2019) (codified as 49 C.F.R. § 5.29); *See also*,

continue to recognize that operators may reasonably determine that there is no distribution service line piping in farm tap configurations, including in cases where a production, gathering, or transmission line connects directly to customer-owned piping. Allowing operators to exercise reasonable discretion in classifying farm tap piping is the best way to accommodate the wide variety of configurations that exist throughout the industry.

IV. Production and Gathering Lines Used for Fuel Gas, Gas Lift, or Gas Injection Operations are not Farm Taps

PHMSA requires operators to follow the provisions in RP 80 in determining if a pipeline is part of a production operation or an onshore gas gathering line, subject to certain additional regulatory limitations.²⁰ RP 80 provides that pipelines used for gas lift, gas injection, or fuel gas supply can be part of production or gathering operations,²¹ and the Agency has recognized that classification in prior FAQs for onshore gas gathering lines.²² To avoid creating any uncertainty about the regulatory status of these pipelines, PHMSA should clarify in the final version of the farm tap FAQs that nothing in the document is intended to affect the classification of gas lift, gas injection, or fuel gas lines under RP 80. The Agency should acknowledge that these pipelines do not qualify as farm taps and are not subject to any guidance offered in determining the jurisdictional or regulatory status of farm tap piping.

V. Conclusion

GPA Midstream and API appreciate the opportunity to submit comments in response to PHMSA's draft FAQs for farm taps. If you have any questions, please feel free to contact Matt Hite at GPA Midstream or Dave Murk at API at the contact information provided below.

Sincerely,



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Memorandum from Steven G. Bradbury, General Counsel, U.S. Dep't of Transp. to Secretarial Officers and Heads of Operating Administrations at 3 (Dec. 20, 2018) (Review and Clearance of Guidance Documents), <https://www.transportation.gov/sites/dot.gov/files/docs/regulations/328566/gen-counsel-mem-guidance-documents-signed-122018.pdf>.

²⁰ 49 C.F.R. § 192.8(a).

²¹ RP 80 §§ 2.2(a)(2), 2.3.

²² PHMSA, Onshore Gas Gathering FAQs at Q. 8, <https://www.phmsa.dot.gov/safety-awareness/pipeline/onshore-gas-gathering-faqs> (last accessed June 11, 2020).