



VIA ELECTRONIC FILING

June 15, 2020

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

Re: Docket No. PHMSA-2018-0047, Regulatory Reform for Hazardous Liquid Pipelines

To Whom It May Concern:

On April 16, 2020, the Pipeline and Hazardous Materials Safety Administration (PHMSA or the Agency) published a Notice of Proposed Rulemaking (NPRM) in the *Federal Register* entitled “Regulatory Reform for Hazardous Liquid Pipelines.”¹ The NPRM contained several proposed changes to the pipeline safety regulations in 49 C.F.R. Parts 190, 194, and 195, which PHMSA indicated are intended to reduce the regulatory burdens imposed on operators of hazardous liquid pipelines. The Agency asked the public to submit comments on the proposed changes within 60 days, or by no later than June 15, 2020.

GPA Midstream Association (GPA Midstream)² strongly supports PHMSA’s efforts to repeal or modify regulations that impose unnecessary burdens on hazardous liquid pipeline operators. As the Agency noted in the NPRM, GPA Midstream submitted comments in the Secretary of Transportation’s two earlier regulatory reform proceedings and included a request that PHMSA adjust the accident reporting threshold for hazardous liquid pipeline operators to account for inflation.³ GPA Midstream welcomes the Agency’s decision to propose that change

¹ Pipeline Safety: Regulatory Reform for Hazardous Liquid Pipelines, 85 Fed. Reg. 21,140 (Apr. 16, 2020) (hereinafter “NPRM”).

² 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. See <https://gpaglobal.org/>

³ 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).

in the NPRM and supports incorporating a mechanism in the final rule for updating the damage threshold biennially through direct final rulemaking, using the formula in the NPRM with inflation rates that reflect the most recent full calendar year in the final rule.

With that said, GPA Midstream is concerned by the proposed changes to the pipeline safety enforcement procedures in Part 190, particularly the new requirements for submitting electronic or digital records in pipeline safety inspections and investigations. The proposed changes would impose unnecessary burdens on pipeline operators and are not consistent with basic security practices for information technology systems or the provisions in other federal laws and regulations. Accordingly, GPA Midstream is respectfully requesting that PHMSA retain the existing requirements or only include limited revisions in the final rule.

I. GPA Midstream Does Not Support the Proposed Changes to 49 C.F.R. § 190.203

The Agency is proposing to add a new paragraph (g) to 49 C.F.R. § 190.203, the regulation that prescribes certain procedural requirements for conducting pipeline safety inspections and investigations. Proposed paragraph (g) would contain new requirements for pipeline operators that submit electronic or digital records in response to a request from PHMSA, including limitations on the electronic systems used for delivering those documents as well as new restrictions for document formatting.

The Agency already has broad authority to collect information from pipeline operators as part of the inspection and enforcement process,⁴ and the proposed changes to § 190.203 would impose additional burdens on the regulated community, a result that is particularly inappropriate in a rulemaking proceeding intended to provide regulatory relief. Rather than adopting the changes laid out in the NPRM, PHMSA should only make modest revisions to § 190.203, such as requiring operators to designate a point of contact for addressing issues with electronic or digital submissions and establishing a process for the Agency to request that documents be submitted in an alternative format in appropriate cases.⁵

In the event that PHMSA nonetheless decides to proceed with the proposals included in the NPRM, GPA Midstream is offering the following comments on behalf of its membership.

A. Dilution of Commonly Acceptable Information Security Protections and Inconsistency with Freedom of Information Act Requirements

Many of the provisions in the NPRM interfere with the three basic security concepts that the U.S. Cybersecurity and Infrastructure Security Agency (CISA) prescribes for protecting electronic information.⁶ The first concept is confidentiality, *i.e.*, that potentially sensitive information shared electronically will not be read or copied by unauthorized individuals. The second concept is integrity, *i.e.*, that the information shared electronically will not become

⁴ See 49 U.S.C. § 60117(a) and (b) (2018); *See also*, 49 U.S.C. § 60118(a)(3).

⁵ NPRM at 21,154 (proposed § 190.203(g)(3) and (4)).

⁶ Linda Pesante, Introduction to Information Security (2008), <https://www.us-cert.gov/sites/default/files/publications/infosecuritybasics.pdf>

corrupted or tampered with due to an insecure network. The third concept is availability, *i.e.*, that the information shared electronically remains accessible to the intended parties. PHMSA should not be creating a document production process that fails to meet these basic cybersecurity principles.

Some of the changes in the NPRM are also inconsistent with the requirements in other federal laws and regulations, including the provisions for submitting records under the Freedom of Information Act (FOIA) and the Transportation Security Agency's (TSA) requirements for submitting sensitive security information (SSI). The provisions in FOIA and TSA's SSI regulations mandate that operators include certain markings on information submitted to PHMSA and other federal agencies. The NPRM would potentially prohibit the use of those markings on documents submitted in an electronic or digital format to the Agency, creating a conflict with the regulated community's ability to comply with the obligations imposed in these other federal laws and regulations.

Restrictions on Watermarks, Time Stamps, and Other Tracking Features

The proposed restrictions on watermarks, timestamps, and other alterations are not consistent with the provisions in FOIA or TSA's SSI regulations. Operators often use watermarks or headers to designate a document submitted to PHMSA as "confidential"⁷ or exempt from disclosure under FOIA.⁸ TSA similarly requires that every page of a document containing SSI be marked with a specific SSI header and footer.⁹ PHMSA has also stated that an additional category of information should be excluded from public disclosure, security-sensitive information,¹⁰ including operational attributes that operators routinely include in documents submitted to the Agency as part of an inspection or investigation.¹¹ Requiring that any documents submitted to PHMSA electronically be "free of redactions, watermarks, or other alterations" creates a conflict with each of these obligations.

The proposed restrictions on time stamps and other tracking features do not align with commonly acceptable information security recommendations. Pipeline operators must be able to use these security methods to maintain confidentiality and ensure that only authorized parties are viewing a particular document. Many pipeline operators' current document management systems automatically mark documents with certain information, including the date of downloads and user information for printing. Removing these basic safeguards will compromise the security of operator electronic information systems and impose additional costs without creating any

⁷ 49 C.F.R. § 190.343 (2019).

⁸ 5 U.S.C. § 552.

⁹ 49 C.F.R. § 1520.13(a). PHMSA has previously recognized that certain pipeline attributes are SSI. Pipeline Safety: Request for Revision of a Previously Approved Information Collection: National Pipeline Mapping System Program, 84 Fed. Reg. 14,717, 14,718-719 (Apr. 11, 2019) ("After discussions with the Transportation Security Administration (TSA), PHMSA identified six proposed attributes which, if collected, would receive Sensitive Security Information (SSI) status. These attributes are: Maximum Allowable Operating Pressure (MAOP)/ Maximum Operating Pressure (MOP), percent Specified Minimum Yield Strength (SMYS), segment could affect a drinking water Unusually Sensitive Area, pump and compressor station locations, mainline block valve locations, and gas storage fields.")

¹⁰ 49 U.S.C. § 60138(a)(2)(B).

¹¹ PHMSA Facility Response Plan Policy, PHMSA 2050.1A (June 27, 2014).

corresponding benefits for the regulated community. Accordingly, the Agency should not include the proposed restrictions on watermarks, timestamps, and other alterations in the final rule.

Prohibition on Pre-Access Conditions

The proposed restriction on pre-access conditions appear to conflict with basic cybersecurity practices.¹² CISA and TSA both recommend that documents submitted electronically be on an encrypted or password-protected drive. TSA further recommends that documents containing SSI be submitted on an encrypted drive or via a password-protected email.¹³ CISA's program for submitting critical infrastructure information to the Federal government on a voluntary basis follows the same approach, requiring that Protected Critical Infrastructure Information (PCII) be encrypted or password-protected prior to submission.¹⁴ The ability to submit sensitive information to government agencies in a secure fashion is critical in an age of increasing cybersecurity threats. Pipeline operators need the ability to establish pre-access conditions to ensure that only PHMSA is able to access its information.

Requirement to Maintain Original Format Without Modification

The proposal to limit electronic record submissions to the original document format is unnecessary and unduly restrictive. Specifically, the NPRM states that “[w]here an operator submits electronic records to PHMSA, the documents must be submitted in their original format unless PHMSA allows an alternative format.”¹⁵ The Agency's proposal is more stringent than the comparable provisions in the Federal Rules of Civil Procedure, which allow parties to produce electronically-stored information either in a form “in which it is ordinarily maintained or in a reasonably usable form.”¹⁶

Rather than establishing a default rule that requires electronic or digital submissions to be in their original format, PHMSA should follow the Federal Rules of Civil Procedure and allow operators to submit documents in “a reasonably usable format.” A reasonably useable format might be a portable document format (pdf) for some documents; for others it might be an excel spreadsheet. In either case, pipeline operators should be afforded the same flexibility in producing documents to the Agency as in other federal civil proceedings. A reasonably usable format standard is consistent with the Federal Rules of Civil Procedure and will allow the Agency to achieve its goal of defining production standards in a way that does not create a barrier to innovation in record production technology.

¹² PHMSA Preliminary Regulatory Impact Analysis Regulatory Reform for Hazardous Liquid Pipelines Notice of Proposed Rulemaking at 15, PHMSA-2018-0047-0002 (March 2020), <https://beta.regulations.gov/document/PHMSA-2018-0047-0002>.

¹³ TSA, Sensitive Security Information, Best Practices Guide for Non-DHS Employees and Contractors, https://www.tsa.gov/sites/default/files/ssi_best_practices_guide_for_non-dhs_employees.pdf

¹⁴ CISA, Protected Critical Infrastructure Information Program Procedures Manual at 10-11 (Apr. 2009), https://www.cisa.gov/sites/default/files/publications/pcii-program-procedures-manual_508.pdf.

¹⁵ NPRM at 21,154 (proposed § 190.203(g)(2)).

¹⁶ Fed. R. Civ. P. 34(b)(2)(E)(ii).

B. Prohibition Against View-Only Portals

The proposal to require that all documents be submitted in a downloadable or printable format would make the document production process far less efficient and could dramatically increase the Agency's FOIA obligations. The NPRM states that if an operator chooses to submit documents through an electronic system or file transfer protocol (ftp), the Agency must have the ability to download and print a copy of each individual record.¹⁷ This provision would create a de facto ban on the view-only or read-only portals that operators have been using in recent years to provide PHMSA inspectors with prompt and reasonable access to large volumes of documents and other information.

View-only or read-only portals are the kind of technology that can make the document production process more efficient for all stakeholders. Operators can place large volumes of documents on a portal without compromising the confidentiality, integrity, or availability of the information, thereby meeting the basic security concepts identified by CISA. The Agency's inspection and enforcement staff is also given the opportunity to review all of the content in the portal and identify the documents that need to be submitted in paper or electronic format. In other words, view-only or read-only portals are a technology that serves the interests of both operators and PHMSA. If the Agency prohibits the use of these portals, operators will not have a secure method for readily sharing large volumes of information and may revert to the far more cumbersome process of submitting paper copies to the Agency.

The de facto ban on view-only or read-only portals could also significantly expand PHMSA's FOIA obligations. An "agency record" includes those records that an agency both (1) "create[s] or obtain [s]," and (2) "control[s] . . . at the time the FOIA request [was] made."¹⁸ If a PHMSA inspector downloads a document, it is in the Agency's control and therefore subject to FOIA.¹⁹ Courts have outlined a test to further examine whether an agency is in control of a document at the time of a FOIA request.²⁰ Courts evaluate "(1) the intent of the document's creator to retain or relinquish control over the records; (2) the ability of the agency to use and dispose of the record as it sees fit; (3) the extent to which agency personnel have read or relied upon the document; and (4) the degree to which the document was integrated into the agency's record system or files."²¹ By providing documents for PHMSA inspectors to download, the operator has relinquished control of the document and the Agency can use and dispose of the record as it sees fit.

The U.S. Department of Justice has explained that on-screen viewing of documents does not make a document "an agency record[.]" but if an agency employee prints or otherwise uses the document, that document would become an agency record subject to FOIA.²² Instead of

¹⁷ NPRM at 21,153 (proposed § 190.203(g)(1)).

¹⁸ *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 146 (1989) (quoting *Forsham v. Harris*, 445 U.S. 169, 182 (1980)).

¹⁹ Dep't of Justice, Office of Information Policy, FOIA POST (Jan. 24, 2006), <https://www.justice.gov/oip/blog/foia-post-2006-foia-counselor-qa>

²⁰ *Tax Analysts v. United States Department of Justice*, 845 F.2d 1060, 1069 (D.C. Cir. 1988), *aff'd*, *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136 (1989).

²¹ *Id.* (quoting *Lindsey v. Bureau of Prisons*, 736 F.2d 1462, 1465 (11th Cir. 1984)).

²² Dep't of Justice, Office of Information Policy, FOIA POST (Jan. 24, 2006).

mandating that electronic portals allow the Agency to download all documents, PHMSA should consider a screening process in order to review large volumes of information quickly and efficiently. Agency personnel could then request specific documents in paper or electronic format. Such a process would reduce the volume of documents that the Agency collects and may need to review to respond to a subsequent FOIA request.

C. Consistency Between Paper and Electronic Records

PHMSA states that the proposed changes to Part 190 are necessary to “maintain consistency between operator-submitted paper and electronic records.”²³ However, an operator who chooses to respond to a PHMSA document request with a paper record would also need to include watermarks, timestamps, and other alterations. As discussed above, the operator would need to mark the document as confidential in accordance with § 190.343 if confidential commercial information is included. The operator may also need to affix the SSI headers and footers as required by 49 C.F.R. § 1520.13.

II. Treatment of Confidential Commercial Information

PHMSA proposes to remove the existing presumption in § 190.343 that information marked as confidential will be treated as such unless the Agency notifies the operator otherwise. PHMSA did not explain why that change is necessary in the NPRM. In the absence of such explanation, the existing language in § 190.343 should be retained. It is important that an operator have the assurance that confidential information submitted to PHMSA will not be disclosed unless it is notified by the Agency.

III. Conclusion

GPA Midstream strongly supports PHMSA’s decision to adjust the accident reporting threshold for hazardous liquid pipeline operators, but urges the Agency to withdraw or modify its proposed changes to § 190.203. In an age of increasing cybersecurity concerns, all stakeholders must continue to employ safeguards to protect sensitive information. If you have any questions,

²³ NPRM at 21,141.

please contact Matt Hite at GPA Midstream at (202) 279-1664 or by email at mhite@GPAglobal.org.

Sincerely,

A handwritten signature in black ink that reads "Matthew Hite". The signature is written in a cursive, flowing style.

Matthew Hite
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cc: Chris Hoidal, Senior Technical Advisor, PHMSA