

DOT Docket Operations Facility

Docket # PHMSA-2018-0047

COMMENTS

submitted by the

AMERICAN PETROLEUM INSTITUTE

ASSOCIATION OF OIL PIPE LINES

AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS

INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA

AMERICAN GAS ASSOCIATION

AMERICAN PUBLIC GAS ASSOCIATION

GPA MIDSTREAM

LNG ALLIES, THE US LNG ASSOCIATION

on

“Pipeline Safety: Regulatory Reform for Hazardous Liquid Pipelines”

**Notice of Proposed Rulemaking Published by the Pipeline and Hazardous Materials Safety
Administration.**

U.S. DEPARTMENT OF TRANSPORTATION

85 Fed. Reg. 21140 (April 16, 2020)

Submitted June 15, 2020

TABLE OF CONTENTS

I.	INTRODUCTION	2
II.	COMMENTS ON PART 190.....	3
1)	§ 190.203 Inspections and investigations.	4
	A. Submission of Records and Information	4
	B. Document Tracking, Redactions, Watermarks, or Other Alterations	5
	C. Requirement for Original Format.....	8
	D. Proposed Section 190.203(g)(4).....	9
	E. LNG Facilities	10
	F. Handling of Confidential Information	11
2)	§ 190.343 Information made available to the public and request for protection of confidential commercial information.	11
III.	COMMENTS ON PART 194.....	13
3)	§ 194.3 Applicability.	13
4)	§ 194.9 Incorporation by reference.....	14
5)	§ 194.107 General response plan requirements.	14
6)	§ 194.113 Information summary.	15
7)	§ 194.115 Response Resources	15
8)	§ 194.119 Submission and approval procedures.....	16
9)	§ 194.121 Response plan review and update procedures.	16
10)	Response plan: Section 9. Response Zone Appendices.....	16
IV.	COMMENTS ON PART 195.....	17
11)	§ 195.3 What documents are incorporated by reference partly or wholly in this part?	17
12)	§ 195.50 Reporting accidents and § 195.52 Immediate notice of certain accidents.	17
13)	§ 195.573 What must I do to monitor external corrosion control?	18
14)	Appendix C.....	19
V.	CONCLUSION.....	19

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Docket Operations Facility (M-30)
U.S. Department of Transportation
West Building
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Washington, D.C. 20590

RE: Docket No. PHMSA-2018-0047, “Regulatory Reform for Hazardous Liquid Pipelines”

I. INTRODUCTION

On April 16, 2020, the Pipeline and Hazardous Materials Safety Administration (PHMSA) published a notice of proposed rulemaking (NPRM) in the Federal Register in the above captioned proceeding.¹ In the NPRM, PHMSA proposed amendments to the Federal Pipeline Safety Regulations for the safety of hazardous liquid pipelines that would revise the requirements for facility response plans, revise the definition for accidents, and consider repealing, replacing, or modifying other specific regulations.² PHMSA also proposed to amend certain recordkeeping requirements in Part 190 which would impact all regulated entities. The intent of these changes is to reduce regulatory burdens and improve regulatory clarity without compromising safety and environmental protection.

The American Petroleum Institute (API),³ Association of Oil Pipe Lines (AOPL),⁴ and American Fuel and Petrochemical Manufacturers (AFPM),⁵ on behalf of their member companies, submit written comments pertaining to Parts 190, 194, and 195. The Interstate

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

² *Id.*

³ 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.

⁴ AOPL promotes responsible policies, safety excellence, and public support for liquids pipelines. AOPL represents pipelines transporting 97 percent of all hazardous liquids barrel miles reported to the Federal Energy Regulatory Commission. AOPL’s diverse membership includes large and small pipelines carrying crude oil, refined petroleum products, NGLs, and other liquids.

⁵ AFPM is a national trade association representing most U.S. refining and petrochemical manufacturing capacity. AFPM’s member companies produce the gasoline, diesel, and jet fuel that drive the modern economy, as well as the petrochemical building blocks that are used to make the millions of products that make modern life possible—from clothing to life-saving medical equipment and smartphones. As such, AFPM members strengthen economic and national security while supporting more than 3 million jobs nationwide.

Natural Gas Association of America (INGAA),⁶ American Gas Association (AGA),⁷ American Public Gas Association (APGA),⁸ GPA Midstream (GPA),⁹ and LNG Allies, the US LNG Association (LNG Allies),¹⁰ on behalf of their member companies, concur with respect to Parts 190 and 195. API, AOPL, AFPM, INGAA, AGA, APGA, GPA, and LNG Allies (collectively “the Associations”), appreciate the opportunity to submit written comments in response to the NPRM. While the Associations generally support PHMSA’s decision to reduce regulatory burdens and improve regulatory clarity, the proposals in the NPRM can be improved as outlined below. Additionally, PHMSA should take this opportunity to address the following:

- The long-standing issue of “idled” pipelines. PHMSA continues to give conflicting messages on this subject. API recommends incorporating by reference API RP 1181 or codifying the guidance provided in Advisory Bulletin ADB-2016-05 as it relates to operators’ ability to defer certain maintenance activities on idled pipelines.

II. COMMENTS ON PART 190

The NPRM proposes revisions to 49 C.F.R §§ 190.203 and 190.343 to clarify the requirements for producing records during an inspection or investigation and reduce the burden required to submit confidential information. PHMSA explains that the revisions are intended to improve the regulatory process by reducing burdens, improving efficiency, and recognizing advances in technology, but at the same time ensuring that the agency can continue to enforce the Federal Pipeline Safety Regulations. The Associations support updating the regulations for

⁶ INGAA is a trade association that advocates regulatory and legislative positions of importance to the interstate natural gas pipeline industry. INGAA represents the vast majority of the U.S. interstate natural gas transmission pipeline companies. INGAA’s members operate nearly 200,000 miles of pipelines and serve as an indispensable link between natural gas producers and consumers.

⁷ AGA, founded in 1918, represents more than 200 local energy companies that deliver clean natural gas throughout the United States. There are more than 73 million residential, commercial and industrial natural gas customers in the U.S., of which 95 percent — over 69 million customers — receive their gas from AGA members. Today, natural gas meets more than one-fourth of the United States’ energy needs.

⁸ APGA is the national, non-profit association of publicly owned natural gas distribution systems. APGA was formed in 1961 as a non-profit, non-partisan organization, and currently has over 740 members in 37 states. Overall, there are nearly 1,000 municipally owned systems in the U.S. serving more than five million customers. Publicly owned gas systems are not-for-profit retail distribution entities that are owned by, and accountable to, the citizens they serve. They include municipal gas distribution systems, public utility districts, county districts, and other public agencies that have natural gas distribution facilities.

⁹ GPA has served the U.S. energy industry since 1921 and 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.

¹⁰ LNG Allies, The US LNG Association, is the only independent nonprofit organization focused solely on advancing the interests of the US LNG industry. LNG Allies promotes effective public policy and communicates the domestic and global benefits of robust US LNG exports. Internationally, LNG Allies works with its members to open new markets, expand existing markets, and establish strategic relationships. The mission of LNG Allies is to help bring the climate, environmental, economic, and geostrategic benefits of US LNG to the world.

the reasons discussed in the NPRM and provide a series of comments below to ensure that the regulations are aligned with the goals PHMSA seeks to achieve and provide for compliance with important federal laws requiring that certain confidential, proprietary, and security sensitive information be safeguarded from public disclosure.

1) § 190.203 Inspections and investigations.

A. Submission of Records and Information

(e) If a representative of the U.S. Department of Transportation inspects a pipeline facility or investigates an accident or incident involving a pipeline facility, the operator must make available to the representative, pursuant to paragraph (g) of this section, all records and information that pertain to the event in any way, including but not limited to integrity management plans and test results.

The NPRM proposes to revise Section 203(e) to cross-reference proposed Section 203(g). The Associations seek clarification that the cross-reference is only for purposes of making clear the various options for submitting records to the agency. More specifically, the Associations request that PHMSA clarify Section 203(e) to make clear that the cross-reference to Section 203(g) does not change existing practice, whereby the agency will review all records and information that pertain to the event in any way and then the operator submits documents the agency requests as being relevant to its inspection or investigation:

(e) If a representative of the U.S. Department of Transportation inspects a pipeline facility or investigates an accident or incident involving a pipeline facility, the operator must make available to the representative, and submit upon request pursuant to paragraph (g) of this section, all records and information that pertain to the event in any way, including but not limited to integrity management plans and test results.

(g) When an operator submits records in response to a PHMSA inspection or investigation under this section, the operator must provide the records via hard copy or use an electronic or digital method such as email, data-storage device, or other means that comply with this section.

The NPRM proposes revisions to Section 203(g) that seek to improve efficiency and minimize burdens on operators when providing documents to the agency during inspections and investigations. The Associations support PHMSA's goals to improve the document review and production process, allowing the option to submit documents in either hard copy or electronic format. Electronic production of documents can improve processes for both PHMSA and operators, provided the requirements are not overly burdensome and do not compromise important data protocols, including document security, identification and authentication. The Associations believe a 21st Century document review and production process should include the option of using technology to ensure the agency has access to review all pertinent records and information through an electronic portal or other electronic delivery system, and then regulated

entities provide requested information through electronic means in a more expeditious and efficient way than a burdensome and time consuming paper production process.

Proposed Section 190.203(g) states that requested records are to be provided by hard copy, email, data-storage device, or “other means,” but does not specifically state that access to view and provide documents can be made through an electronic delivery system. To ensure paragraph (g) accurately reflects the various approaches available to securely and efficiently provide access to records and information, and to make clear the methods to provide records, the Associations request the following revision to paragraph (g):

When an operator submits records in response to a PHMSA inspection or investigation under this section, the operator ~~may provide view access to records through an electronic delivery system and~~ must provide the records via ~~either~~ hard copy or use of an electronic or digital method such as ~~an electronic delivery system~~, email, data-storage device, ~~download~~, or other means that comply with this section.

In addition, the Associations request that PHMSA clarify it will not seek access to underlying recordkeeping programs or file structures used by the operator to manage records but will only seek hard copies or electronic copies of documents requested during an inspection or investigation.

B. Document Tracking, Redactions, Watermarks, or Other Alterations

(1) Any electronic system must permit PHMSA to download and print a copy of each record free of redactions, watermarks, or other alterations, from any U.S.-based internet access point. Any electronic system for delivering records to PHMSA must not include activation codes to begin an individual session, internet connectivity requirements to view downloaded documents, document tracking features, login time-out intervals shorter than one hour, or pre-access conditions.

The NPRM provides that PHMSA intends to define document production standards that do not create a barrier to innovation, and set consistent minimum standards such that operators can choose to select the best method to deliver the information that PHMSA needs to enforce the Pipeline Safety Laws. The agency explains that it seeks to encourage the use of technology that makes sending and receiving records more convenient, does not require operators to modify records to meet the regulatory requirements, and that documents not be submitted in a manner that would impede effective or efficient document review. The Associations agree with this approach, but the restrictions proposed in paragraph (g)(1) must be eliminated or, at minimum, significantly modified, to be consistent with these goals.

The Associations believe the “minimum standards” proposed in paragraph (g)(1) will significantly limit the ability of the agency and regulated entities to use technology as envisioned in the NPRM. If not modified, the restrictions in paragraph (g)(1) would eliminate an operator’s ability to ensure document authenticity and integrity, as well as violate IT security and tracking

protocols generally associated with electronic document management. Operators have numerous procedures and policies in place to protect the security of their networks, which apply to all external users (including government agencies). Also, records requested by PHMSA may be considered Protected Critical Infrastructure Information (PCII), Sensitive Security Information (SSI), or For Official Use Only (FOUO) by Department of Homeland Security (DHS). Pipeline records marked as one of these categories could disclose an operational or security vulnerability if not handled correctly. For such records, DHS requires the record owner (the pipeline operator) and recipient (PHMSA) to follow certain control, storage, handling, transmission, distribution, marking, and disposal requirements that are inconsistent with the marking, pre-access, and other restrictions of paragraph (g)(1). In fact, stakeholders handling SSI must apply the protective SSI header and footer required by 49 C.F.R. 1520.13 on each page.¹¹ TSA also recommends that parties transmit SSI only through encrypted drives or password-protected emails.¹² Records may also be considered privileged (PRIV) or critical energy infrastructure information (CEII) by the Federal Energy Regulatory Commission (FERC). Additionally, records may include confidential commercial proprietary information of an operator and/or its contractors that is protected from disclosure under Freedom of Information Act (FOIA) exemptions and/or intellectual property laws (e.g., information protected by trademark, patent, trade secrets, and copyright laws).

PHMSA should ensure its regulations support operators having necessary security measures in place. If an operator is not confident it can adequately secure electronic documents consistent with common industry security protocols, then it may be left with no choice other than to supply hard copy records to the agency, and thus defeat the shared goals of making the document production process more timely and efficient, and less burdensome for the agency and operators.

For example, if not modified, the proposal that documents be free of watermarks or other alterations would require operators to fundamentally change their approach to document tracking. It is commonly accepted practice that the document provider uniquely marks each page of a document provided (e.g., Bates numbering/labeling) so that it may be positively identified and differentiated from other similar documents and/or different versions of the same document. Such labeling may be done by watermarking or other means of “altering” the original document. It is also common for electronic document management systems to automatically watermark the date a document was printed. This is important because an operator’s procedures and programs are often “living” documents and are frequently revised. Such a marking serves a valuable purpose for the reader to understand the validity of a document. Further, operators may need to mark documents as “CONFIDENTIAL” in conformance with Section 190.343.

The prohibition on implementing “document tracking features” also raises significant concerns. Such a feature may track changes made to an original document for the purpose of authenticating a source, which is essential to maintain document security. Maintaining document tracking features provides security also to ensure only qualified personnel have access to sensitive information. Without document tracking protection, questions could be raised as to whether a document was altered, either intentionally or accidentally, and its use as evidence in an enforcement or other agency or adjudicated proceeding could be compromised.

¹¹ 49 C.F.R. § 1520.13.

¹² https://www.tsa.gov/sites/default/files/ssi_best_practices_guide_for_non-dhs_employees.pdf

The proposed regulation would also prohibit the use of activation codes, which are used to authenticate that the user is authorized to access documents. Activation requirements are a common security feature of file transfer protocol sites and portable storage devices. This layer of security provides assurance that documents have not been accessed by unauthorized parties or for unauthorized purposes. The Associations are unaware of why the use of activation safeguards would hinder the agency's ability to reasonably inspect records. A restriction on such practices would diminish security protocols that are intended to ensure the integrity of the information provided to the agency. In the final rule, the agency should eliminate such restriction or at least make clear that operators are permitted to develop mutually agreed upon means of protecting document access. In a related vein, the proposed regulation would eliminate the use of "pre-access conditions," which is not defined and raises concerns about an operator's ability to maintain document security. Operators must be able to employ commonly used security measures for electronic data delivery systems as well as for other electronic systems for providing data, such as the ability to encrypt emails and documents, password protect USB drives and external hard drives, and use multi-factor authentication. Therefore, this limitation should be removed, or at minimum, the agency should recognize the need to develop mutually agreed upon pre-access conditions.

The proposal in paragraph (g)(1) that electronic delivery systems do not have "internet connectivity requirements" for downloading documents is also problematic. In addition to a lack of clarity, the Associations are concerned that internet connectivity issues may occur on the agency's side of the firewall, completely out of the hands or control of the operator.

The proposed regulations would also preclude login time-out intervals shorter than one hour, which raises serious security issues, as it may allow unauthorized users to access records. Moreover, this proposal does not comport with National Institute of Technology and Security (NIST) requirements, which provide that "reauthentication of the subscriber shall be repeated following any period of inactivity lasting 15 minutes or longer."¹³

The Associations are quite concerned that proposed paragraph (g)(1) would stifle the ability of PHMSA and operators to move forward with efficient use of technology to improve the document production process. As discussed above, the Associations believe proposed paragraph (g)(4) provides the agency with the ability to ensure it has access to all needed records without imposing unwarranted restrictions, as it broadly allows the agency to order an operator to provide records in an alternative way if it would impede or prevent the agency's efficient review of records or if document functionality impedes agency review. If PHMSA nevertheless believes that additional protection is needed beyond paragraph (g)(4), then the Associations request that the proposed regulation be modified as follows:

(1) Any electronic system must permit PHMSA to download and print a copy of each record free of redactions, ~~watermarks~~, or other alterations, with the exception of alterations needed for document security, identification and authentication, from any

¹³ See NIST Special Publication 800-63B Digital Identity Guidelines, <https://pages.nist.gov/800-63-3/sp800-63b.html>.

secure U.S.-based internet access point. Any electronic system for delivering records to PHMSA ~~must not~~ may include security, identification and authentication protections, such as activation codes to begin an individual session, internet connectivity requirements to view downloaded documents, document tracking features, ~~login time out intervals shorter than one hour,~~ or pre-access conditions, provided such protections do not restrict PHMSA's ability to reasonably access and use such records.

Further, while the Associations recognize PHMSA needs to have a copy of all *relevant* information in unredacted form, it is oftentimes the case that documents provided in response to an inspection or investigation contain irrelevant information, such as personal information covered by data privacy laws and not needed by the agency. Therefore, the Associations request that, in the final rule, the PHMSA clarify that paragraph (g)(1) allows operators to redact such irrelevant information prior to submission to PHMSA.

In short, the Associations urge PHMSA to set minimum standards for use of modern technology for record production and delivery without restricting the operator's ability to implement commonly accepted security, identification, and authentication protocols.

C. Requirement for Original Format

(2) Where an operator submits electronic records to PHMSA, the documents must be submitted in their original format unless PHMSA allows an alternative format. If the original format allows an operator to magnify a document while maintaining legibility; search a record for text; or search for specific records by name, date, or file type, then the operator may not alter the format of the record prior to submission in a way that limits the ability of PHMSA to use the same capabilities.

The proposal in paragraph (g)(2), to require that documents be submitted in "original format," lacks clarity and could result in significant document production delays and costs if not revised. It is important to recognize that many operators use sophisticated, and often proprietary, data and document management systems, so providing a document in "original format" may be interpreted to require submission of electronic data in a format that is not readable without specific software which may not be available to the agency due to licensing restrictions or may be available only at significant cost. Alternatively, if the record is housed in a proprietary platform, to provide a copy to PHMSA it would be necessary to produce an alternative format that invariably alters many functionalities (magnification, search, etc.) of the underlying software platform. The proposal could also be interpreted to mean that a document could not be submitted in electronic format, if that document was not originally created in an electronic format (for example, paper documents which have been digitized may not be considered to be in "original format").

It is a commonly accepted practice to provide documents in more universally available formats, such as portable document format (PDF), which have all the document functionality needed by

the agency. The Associations request that a PDF file that permits magnification and search functions should always be an acceptable format for submittals to PHMSA, regardless of the document's "original format." Some original formats, like Microsoft Word or Excel, are subject to additional security risks since they can be easily modified (particularly if the document contains field codes that are automatically updated), unlike PDF documents which can be changed only with deliberate effort.¹⁴

In addition, the Associations request that PHMSA reference existing Department of Transportation (DOT) regulations under 49 C.F.R. Part 7 and § 190.343 in proposed Section 190.203(g)(2). These existing regulations require PHMSA to maintain the confidentiality of any information or documents claimed as confidential by the operator until such time that a FOIA request is made for the information. At that time, DOT regulations mandate that PHMSA contact the operator and allow the operator to substantiate its claim through a consultation process.

Given these concerns, the Associations request that proposed paragraph (g)(2) be modified to make clear that operators may submit documents in PDF format or an alternative format as long as the document allows for use of the same capabilities when in original format and to cross-reference existing Part 190 and DOT regulations regarding the protection of confidential documents:

(2) Where an operator submits electronic records to PHMSA, the documents must be submitted in their original format or portable document format unless PHMSA allows an alternative format. If the original format allows an operator to magnify a document while maintaining legibility; search a record for text; or search for specific records by name, date, or file type, then the record submitted, whether in original format or portable document format, must allow operator may not alter the format of the record prior to submission in a way that limits the ability of PHMSA to use the same capabilities. An operator must comply with 49 C.F.R. § 190.343 when submitting information electronically to PHMSA that it considers to be confidential commercial information. PHMSA will review requests for confidential treatment under 49 C.F.R. § 190.343 and 49 C.F.R. Part 7.

D. Proposed Section 190.203(g)(4)

(4) If PHMSA determines the form in which the records are provided would impede or otherwise prevent the efficient review of records in an inspection or investigation, or if the system is otherwise in conflict with PHMSA regulations, PHMSA may order an operator to deliver records in an alternative way. If PHMSA finds that an operator or a system alters records to remove functionality in a way that impedes the

¹⁴ It should be recognized, however, if under paragraph (g)(2) each PDF document must be converted to optical character recognition (OCR) format, this will require a significant expenditure of time and resources by operators.

agency's review, PHMSA may require the operator to resubmit records in their original form.

The Associations support PHMSA's proposal for the catchall provision in paragraph (g)(4) to make clear that the agency must be able to access records in a format that does not impede or prevent an efficient review and does not otherwise conflict with the agency's regulations. Indeed, given the scope of paragraph (g)(4), and PHMSA's goals of implementing "minimum standards" and to "encourage the use of technology," the Associations suggest that PHMSA should allow greater flexibility with the limitations proposed in the provisions discussed above. The Associations do request one modification to paragraph (g)(4), to make clear that the "alternative ways" the agency would order an operator to deliver records are those set forth in paragraph (g):

(4) If PHMSA determines the form in which the records are provided would impede or otherwise prevent the efficient review of records in an inspection or investigation, or if the system is otherwise in conflict with PHMSA regulations, PHMSA may order an operator to deliver records, pursuant to paragraph (g)(1)-(3), in an alternative way. If PHMSA finds that an operator or a system alters records to remove functionality in a way that impedes the agency's review, PHMSA may require the operator to resubmit records in their original form.

The Associations share the agency's goal of promoting the use of technology to make the document production and delivery process faster and more efficient, while at the same time ensuring that document access and utilization is not impaired. However, operators and the agency will not be able to fully utilize an electronic data production process unless operators are able to ensure document security and that valid, authentic records are provided for agency review. In the absence of such protections, operators will need to resort to producing voluminous paper records, and thus frustrate the shared goals of relying on modern technology to improve the process.

E. LNG Facilities

Finally, the Associations believe that PHMSA should engage in a more deliberate process to consider appropriate requirements for information sharing involving liquefied natural gas (LNG) export facilities. The one-size-fits-all approach in proposed § 190.203(g) does not account for the unique, highly confidential, and proprietary information that is reviewed during the design and construction of an LNG export facility, including information subject to PHMSA's design review, siting and construction authority and FERC siting and construction authority. Because this information often contains complex design plans and processes, protected intellectual property, and CEII and SSI related to a facility, it must be protected to prevent the unauthorized access and appropriation of these documents and the ability to alter or modify them. Although some of these considerations also exist for pipeline facilities, the significant differences between pipeline and LNG facilities warrants consideration of an alternate information sharing process that is more

appropriately tailored towards LNG export facilities. The NPRM does not account for these concerns.

To protect the safety, security, and intellectual property of LNG export facilities, it may be appropriate for PHMSA to provide exceptions from its Part 190 information sharing requirements and develop an alternate process for the submission of this highly sensitive information. PHMSA should create a process for receiving input from LNG export facility operators on these specific issues before finalizing the proposed modifications to the Part 190 regulations. This should include a dedicated discussion regarding LNG export facility considerations during the Gas Pipeline Advisory Committee meeting related to this NPRM.

F. Handling of Confidential Information

2) § 190.343 Information made available to the public and request for protection of confidential commercial information.

The Associations appreciate the agency's update to its regulations concerning the submittal and treatment of confidential information, particularly PHMSA providing operators the option of whether to submit redacted records containing confidential information for purposes other than rulemaking and special permit proceedings, such as in response to an inspection or investigation. The Associations provide comments below on the proposed revisions to Section 190.343.

(a) *Asking for protection of confidential commercial information.* You may ask PHMSA to give confidential treatment to information you give to the agency by taking the following steps:

(1) Mark "CONFIDENTIAL" on each page of the original document containing information that you would like to keep confidential; and

(2) Explain in detail why the information you are submitting is confidential commercial information. General claims of confidentiality are not sufficient.

The Associations support the requirement in proposed paragraph (a)(1) to mark information as "CONFIDENTIAL." The Associations point out as discussed above, however, that proposed Section 190.203(g)(1) prohibits watermarks or other alterations to the original document. To preserve the confidentiality of these documents, proposed Section 190.203(g)(1) should be revised consistent with the comments above.

With respect to proposed paragraph (a)(2), the Associations request that PHMSA delete the vague requirement that operators explain "in detail" why information is confidential. While the Associations recognize that a confidentiality request must be explained, the operator should only be required to provide an adequate explanation of the legal basis for confidentiality, not a detailed, line-by-line explanation of each document. As the Supreme Court has recently explained (*Food Marketing Inst. v. Argus Leader Media*, 139 S. Ct. 2356 (2019)), to demonstrate that information is confidential commercial information protected under FOIA, a party need only

show that it is “customarily kept private, or at least closely held by the person imparting it.” Existing PHMSA regulations already require the submission of an explanation: Section 190.343(a)(3) requires operators to “Explain why the information you are submitting is confidential commercial information.” In addition, existing DOT regulations at 49 C.F.R. Part 7 already have in place a process for operators to consult with PHMSA to substantiate FOIA exemptions when and if records are the subject of a FOIA request. For these reasons, a requirement that operators provide a justification in “detail” would needlessly increase regulatory burdens on operators (in submitting the information) and PHMSA (in reviewing the information), contrary to the intent of the NPRM.

Further, while Section 190.343 concerns protection of confidential commercial information, the Associations request that PHMSA also make clear that documents will be accorded confidential treatment to protect other forms of sensitive information, including PCII, SSI, FOUO, and CEII.

Given the above, the Associations request that proposed Section 190.343(a) be modified as follows:

(a) *Asking for protection of confidential commercial information.*
You may ask PHMSA to give confidential treatment to information you give to the agency by taking the following steps:

(1) Mark “CONFIDENTIAL” on each page of the original document containing information that you would like to keep confidential; and

(2) Explain ~~in detail~~ why the information you are submitting is confidential commercial information. General claims of confidentiality are not sufficient.

(b) PHMSA decision. If PHMSA decides to disclose the information, PHMSA will review your request to protect confidential commercial information under the criteria set forth in the Freedom of Information Act (FOIA), 5 U.S.C. 552, including following the consultation procedures set out in the Departmental FOIA regulations. 49 CFR 7.29. If PHMSA decides to disclose the information over your objections, we will notify you in writing at least five business days before the intended disclosure date.

Section 190.343(b) currently provides that “PHMSA will treat as confidential the information that you submitted in accordance with this section, unless we notify you otherwise.” The Associations request that Section 190.343(b) be retained in its current form to be consistent with DOT FOIA regulations (49 C.F.R. Part 7), as operators need to be assured that sensitive information will be treated confidentially and that operators are provided with adequate notice, and an opportunity to respond, should a request be made for disclosure of confidential information.

III. COMMENTS ON PART 194

In Part 194, PHMSA is proposing amendments that would streamline the oil spill response plan requirements and clarify or eliminate five requirements that may be confusing or redundant. Generally, the proposal makes sensible changes. However, the Associations offer substantive comments below.

3) § 194.3 Applicability.

(a) Except for the pipelines listed in paragraph (b) of this section, this part applies to an onshore oil pipeline that, because of its location, the operator determines that oil discharged from any point in the pipeline facility can be expected to adversely affect, within 12 hours after the initiation of the discharge, any navigable waters of the United States or adjoining shorelines, public drinking water intakes, or environmentally sensitive areas.

The proposed revision is attempting to expand the applicability of this Part beyond the scope of the Oil Pollution Act of 1990 (OPA 90), which is the enabling statute for this Part. The facility response plan requirements of OPA 90¹⁵ are applicable to: “An onshore facility that, because of its location, could reasonably be expected to cause substantial harm to the environment by discharging into or on the navigable waters, adjoining shorelines, or the exclusive economic zone.”

This does not necessarily include “public drinking water intakes” or “environmentally sensitive areas”. Also, PHMSA’s use of an “adversely affect” standard, which is arguably less stringent than the statutory “substantial harm” standard, impermissibly expands the scope of discharges covered by the statute. The NPRM makes no mention of these attempted expansions of the scope beyond that authorized by the enabling statute.

This scope expansion also has the potential to significantly increase the number facilities which may be subject to this regulation, which was not considered in the economic impacts.

Neither the enabling legislation nor Part 194 itself, define the terms “public drinking water intakes” or “environmentally sensitive areas.”

These terms are currently used in the context of providing exceptions for submitting response plans under 49 CFR 194.101(b). However, per the current section 194.3, only those pipelines which could cause significant or significant and substantial harm by discharging “oil into or on any navigable waters of the United States or adjoining shorelines,” without consideration of whether it could impact a public drinking water intake or environmentally sensitive area, are subject to this Part. By moving this language from the exception language of 194.101(b) to the applicability section, PHMSA is in fact expanding the applicability of Part 194 beyond the current scope of the rule and beyond the intent of OPA 90.

¹⁵ Codified in 33 USC 1321(j)(5)(C)(iv).

For the reasons above, “public drinking water intakes, or environmentally sensitive areas” should be removed and “adversely affect” should be replaced with “cause substantial harm to the environment.”

The Associations recommend the following language:

“(a) Except for the pipelines listed in paragraph (b) of this section, this part applies to an onshore oil pipeline that, because of its location, the operator determines that oil discharged from any point in the pipeline facility can be expected to cause substantial harm to the environment by discharging into or on the navigable waters of the United States or adjoining shorelines.”

4) § 194.9 Incorporation by reference.

API’s consensus standards are regularly reviewed and revised based on industry experience and with input from regulators, industry practitioners, service providers, manufacturers, and the public, to ensure the latest operational experiences and knowledge are included. They are developed under an American National Standards Institute (ANSI) accredited process and fully meet the processing criteria of the recently updated OMB Circular A-119. API’s standards are reviewed at least every five years and either withdrawn, if no longer applicable, reaffirmed, if still valid but not requiring revision, or revised, to reflect needed changes. The most recent edition of each standard incorporated by reference should receive serious consideration as these standards represent consensus practice. Having disparate requirements that result from regulatory references to older standards is counterproductive, potentially confusing to the operator, community, and others, and could negatively impact safety. The latest editions of the API standards referenced in 49 CFR Part 194 are:

- API Standard 620, Design and Construction of Large, Welded, Low-Pressure Storage Tanks, 12th Edition, October 2013 (including Addendum 1 dated November 2014 and Addendum 2 dated April 2018)
- API Standard 650, Welded Tanks for Oil Storage, 12th Edition, March 2013 (including Errata 1 dated July 2013, Addendum 1 dated September 2014, Errata 2 dated December 2014, Addendum 2 dated January 2016, and Addendum 3 dated August 2018)
- API Recommended Practice 651, Cathodic Protection of Aboveground Petroleum Storage Tanks, 4th Edition, September 2014
- API Standard 653, Tank Inspection, Repair, Alteration, and Reconstruction, 5th Edition, November 2014 (including Addendum 1 dated April 2018)
- API Standard 2350, Overfill Protection for Storage Tanks in Petroleum Facilities, 4th Edition, May 2012

5) § 194.107 General response plan requirements.

* * * * *

(c) Each response plan must include:

* * * * *

(xi) Procedures to provide Safety Data Sheets meeting 29 CFR 1910.1200 to emergency responders and the FOSC within 6 hours of notice of a spill to the National Response Center;

The requirement within § 194.107(c)(xi) should be consistent the wording within the PIPES Act of 2016 regarding which emergency responders are to be required within six hours of notification to the National Response Center. The Associations suggest this section should be revised to read:

“(xi) Procedures to provide Safety Data Sheets meeting 29 CFR 1910.1200 to appropriate state and local emergency responders and the FOSC within 6 hours of notice of a spill to the National Response Center;”

Section 194.113 Information summary

6) § 194.113 Information summary.

(a) * * *

(2) A list of the response zone appendices for which the core plan is applicable.

The Associations recommend that operators should have the option to subdivide applicable response plans for various response zones with appendices, but not be required to alter current response plan formats to meet this requirement. The Associations recommend allowing this as an option, but not a requirement.

7) § 194.115 Response Resources

(a) Each operator must identify and ensure the resources necessary to remove or mitigate to the maximum extent practicable, a worst-case discharge in accordance with 33 CFR part 154, appendix C...

PHMSA is proposing to do what it characterizes as harmonize its oil pipeline response planning requirements in § 194.115 with those of the USCG to ensure that pipeline operators have the necessary personnel and equipment available to remove, to the maximum extent practicable, a WCD. PHMSA believes its current regulations do not adequately specify the appropriate quantity or type of response resources needed to respond to a spill. To address these issues, an audit of this program recommended PHMSA amend § 194.115(a) to reference the USCG’s “Guidelines for Determining and Evaluating Required Response Resources for Facility Response Plans” and to define the meaning of the response tiers in § 194.115(b). At the same time, PHMSA is reaffirming the tiered response times for initial local, regional, and national responses found in current regulations at § 194.115.

PHMSA's proposal to adopt the personnel and equipment resource guidelines of the USCG while retaining current PHMSA response times may create a conflict between the two. While USCG guidelines do provide additional direction on personnel and equipment, they also make changes to response times depending on the type of product released. Thus, in certain circumstances under PHMSA's proposed approach, operators could face conflicting response time requirements.

The Associations recommend PHMSA provide additional language to ensure the response times PHMSA articulates in § 194.115 are not changed by reference to the Coast Guard guidelines. The Associations recognize the issue of response times is a matter for policy consideration but believe a substantive change to response times is outside the scope of this rulemaking intended to reduce regulatory burdens and improve regulatory clarity. Improving emergency response capabilities is a priority for the Associations and its member companies and we look forward to engaging with PHMSA on these types of issues at future times and contexts.

8) § 194.119 Submission and approval procedures.

(a) Each operator must submit an electronic copy of the response plan required by this part. The response plan must be submitted to PHMSA.OPA90@DOT.GOV or other PHMSA-approved electronic means.

The Associations caution PHMSA of file transfer size limitations that may exist on certain means of submittal (e.g. email file size limits) and ensure larger files can be accommodated.

9) § 194.121 Response plan review and update procedures.

(b) * * *

(1) A new oil pipeline or an extension of an existing pipeline in a response zone where the new or extended pipeline is not covered by a previously approved plan prior to filling the pipeline with oil. An operator must include a list or map of the new oil pipeline or extension if the information is not available in NPMS per § 194.113(b)(4);

The preamble indicates that this provision is intended to require a plan update to be submitted prior to a facility becoming operational. However, read in the entire context of the regulation, paragraph (b) requires that when a change in information or operating conditions that would substantially affect the implementation of the response plan occurs, an operator must immediately modify its response plan and, within 30 days of making such a change, submit the change to PHMSA. Examples of such changes are included in subparagraphs (b)(1)-(8).

In the full context of this section, the proposed change would not require plan revisions to be submitted prior to becoming operational, but rather would require that they be submitted “within 30 days of” (i.e. no later than 30 days after) becoming operational. The Associations recommend that PHMSA correct the stated intent and effect in the preamble when issuing the final rule.

10) Response plan: Section 9. Response Zone Appendices.

*** * * * ***

(k) * * *

(2) Procedures to provide Safety Data Sheets meeting 29 CFR 1910.1200 to emergency responders and the FOSC within 6 hours of a spill.

Section 14 of the PIPES Act of 2016 requires that an operator provide safety data sheets to responders “within 6 hours of a telephonic or electronic notice of the accident to the National Response Center,” not within 6 hours of the actual spill. This is also inconsistent with the proposed section 194.107(c)(xi), which also requires procedures to provide safety data sheets to responders within 6 hours of notice a spill to the NRC.

The Associations recommend this section be changed to “Procedures to provide Safety Data Sheets meeting 29 CFR 1910.1200 to emergency responders and the FOSC within 6 hours of notice of a spill to the National Response Center”.

IV. COMMENTS ON PART 195

PHMSA is proposing amendments to part 195 to adjust the monetary damage criterion for reporting pipeline accidents for inflation, clarifying that operators may monitor cathodic protection rectifiers remotely, and correcting the organization of the IM guidance in appendix C of part 195. PHMSA also proposes editorial amendments to § 195.3 to meet requirements from the Office of the Federal Register and update the address for API.

11) § 195.3 What documents are incorporated by reference partly or wholly in this part?

* * * * *

Part 195(3)(a)

PHMSA proposes to use the phrase “certain material.” "Certain Material" needs to be defined so that operators understand what exactly is being incorporated.

Part 195(3)(b)

The language appears to incorporate several API standards that are not applicable to pipeline safety. The Associations presume that the asterisks in the proposal indicate that the specific API standards now presented in 195(3)(b)(1) through (22) will be retained in the regulation. The Associations recommend an incorporation approach that is not so broad that it includes inapplicable standards.

12) § 195.50 Reporting accidents and § 195.52 Immediate notice of certain accidents.

The Associations support the change to the definition of accident to adjust the amount of monetary damage to align with inflation. The cost of clean-up of even the smallest of releases in today's environment is far greater than it was in 1984 so even with the inflation adjustment more minor incidents will still be reported than would have been in 1984. Additionally, the increase in threshold will reduce the number of calls to the NRC for minor spills that are easily cleaned up by the operator, preserving first response resources for events where they are needed.

The Associations note that PHMSA's proposed adjusted level of \$118,000 seems to reflect 2017 dollars. The Associations recommend PHMSA establish the threshold to reflect the calendar year

when this rule is finalized, similar to the Agency's commitment in the Part 192 Regulatory Reform NPRM.¹⁶

The Associations also support PHMSA's proposal to update the reporting threshold every two years to account for inflation via notice on the PHMSA public website. A periodic update will provide certainty and avoid a repeat of the current situation, where many years of inflation have resulted in a much lower incident threshold today than in 1984. Conducting biennial rulemakings to update the threshold seems unnecessarily burdensome for both PHMSA and stakeholders; the current NPRM provides appropriate notice and opportunity for comment on the proposed update to the threshold. PHMSA should revise §§ 195.50 and 195.52 to clarify the agency's intended process for periodically updating the threshold.

13) § 195.573 What must I do to monitor external corrosion control?

The Associations support PHMSA explicitly allowing remote monitoring of impressed current CP sources in the pipeline safety regulations. We recommend that PHMSA clarify that operators must physically inspect remotely monitored rectifiers at the cathodic protection test *frequency* required in § 195.573(a)(1), and that the rectifier inspection need not necessarily occur at the exact same time as the cathodic protection testing.

Although rectifier inspections may be performed in conjunction with cathodic protection testing for efficiency purposes, this will not always be the case because the tasks require different tools and may involve different personnel. Furthermore, rectifiers often influence multiple pipe segments, and the currently-proposed wording of §195.573(c)(2) could be interpreted to require a redundant physical inspection of the same rectifier every time each of the segments influenced by that rectifier is tested, or even multiple times per segment if the testing occurs over multiple days.

The Associations recommend revising § 195.573(c)(2) as follows:

(2) Each remotely monitored rectifier must be physically inspected for continued safe and reliable operation at the frequency of ~~whenever~~ cathodic protection tests ~~occur pursuant to required under~~ paragraph (a)(1) of this section.

¹⁶ In the Part 192 Regulatory Reform Notice of Proposed Rulemaking, PHMSA proposed a threshold of \$122,000 for natural gas incidents and stated that "PHMSA intends to base any finalized version of this provision on the price level at the time of publication of the final rule." Pipeline Safety: Gas Pipeline Regulatory Reform, Notice of Proposed Rulemaking Pre-Publication Version (May 28, 2020) at 17.

14) Appendix C

The guidance put forth by PHMSA is appreciated. However, PHMSA must ensure the agency and appropriate staff recognize the information contained within this appendix is for guidance purposes only and places no enforceable regulatory burden on the operator. Additionally, the Associations recommend PHMSA specifically emphasize the need for site specific flexibility. This flexibility may or may not include elements as outlined within this appendix in its entirety or in part.

V. CONCLUSION

The Associations appreciate the opportunity to provide comments on “Pipeline Safety: Regulatory Reform for Hazardous Liquid Pipelines” concerning PHMSA’s proposed amendments to the Federal Pipeline Safety Regulations for the safety of hazardous liquid pipelines to reduce regulatory burdens and improve regulatory clarity. The Associations applaud PHMSA for their diligent efforts to amend these regulations and look forward to future collaboration as changes are made.

Respectfully Submitted,

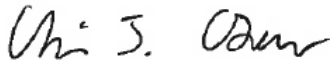
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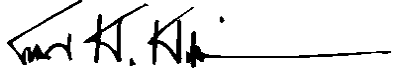
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