



March 16, 2020

**VIA REGULATIONS.GOV**

Russell T. Vought  
Acting Director  
Office of Management and Budget  
725 17<sup>th</sup> St., NW  
Washington, DC 20503

**Re: OMB-2019-0006, Improving and Reforming Regulatory Enforcement and Adjudication, Request for Information, 85 Fed. Reg. 5,483 (Jan. 30, 2020)**

Mr. Vought:

GPA Midstream Association (“GPA Midstream”) appreciates this opportunity to submit comments to the Office of Management and Budget (“OMB”) in response to its request for information regarding improving and reforming regulatory enforcement and adjudication.<sup>1</sup>

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.

GPA Midstream’s member companies are subject to regulation by various federal agencies, but these comments are limited to matters within the jurisdiction of the U.S. Environmental Protection Agency (“EPA”)<sup>2</sup> and Pipeline and Hazardous Materials Safety Administration

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<sup>1</sup> Improving and Reforming Regulatory Enforcement and Adjudication, Request for Information, 85 Fed. Reg. 5,483 (Jan. 30, 2020).

<sup>2</sup> EPA is the federal agency that regulates a vast expanse of business activities, including air emissions, discharges to waters of the United States, the generation, transportation, disposal, and treatment of solid and hazardous wastes, and the remedial of contaminated sites.

(“PHMSA”).<sup>3</sup> The enforcement and adjudicatory policies, practices, and procedures of these two federal agencies have the greatest impact on GPA Midstream’s member companies.

**I. Prior to the initiation of an adjudication, what would ensure a speedy and/or fair investigation? What reform(s) would avoid a prolonged investigation? Should investigated parties have an opportunity to require an agency to “show cause” to continue an investigation?**

**A. EPA**

GPA Midstream sees opportunities to reduce delays in nearly every step of the EPA enforcement process, including site inspections, information requests, action on Notices of Violations, and settlement negotiations.

**1. Inspection Reports.**

GPA Midstream begins by noting that EPA recently issued a final rule outlining a uniform inspection procedure.<sup>4</sup> This follows on EPA’s issuance of an interim policy regarding inspection report timeliness and standardization.<sup>5</sup> These guidelines should be very helpful for companies dealing with an inspection and OMB may consider them as templates for other agencies.

EPA is seeking to reduce delays in issuing inspection reports, which is a generally welcome step, but it comes with a trade-off. EPA’s Inspection Guidance requires all inspection reports to be completed within 60 days and issued to the company subject to the inspection upon completion.<sup>6</sup> Inspectors, however, will often make preliminary findings, often verbally, of what they perceive to be potential violations (sometimes phrased as “areas of concern”). Inspection reports can be delayed as the company negotiates with inspectors as to why these areas of concern are not, in fact, violations. Requiring inspection reports to be completed within 60 days will greatly reduce a company’s ability to negotiate with inspectors. The ability to discuss potential violations is of a greater concern now that EPA’s Inspection Guidance states that the Agency will make inspection reports public.<sup>7</sup> Although EPA’s Inspection Guidance cautions that inspection reports should not make a statement of non-compliance, their very purpose is to designate potential violations. Those designations will now be made public with limited responses from the company subject to the inspection.

Neither EPA’s final rule nor its Inspection Guidance resolve the long-standing issue on the Agency’s actions, or inactions, after issuing an inspection report. In many instances, EPA will

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<sup>3</sup> PHMSA is the federal agency within the U.S. Department of Transportation (“DOT”) that is responsible for administering the nation’s Pipeline Safety Laws, 49 U.S.C. § 60101 et seq., and Regulations, 49 C.F.R. Parts 190 to 199.

<sup>4</sup> On-Site Civil Inspection Procedures, 85 Fed. Reg. 12,224 (Mar. 2, 2020).

<sup>5</sup> Susan Parker Bodine, Assistant Administrator, EPA Office of Enforcement and Compliance Assurance, Interim Policy on Inspection Report Timeliness and Standardization (June 29, 2018) (“Inspection Guidance”).

<sup>6</sup> Inspection Guidance at 7. Note, however, that this is only a pilot program and EPA has set goals of timely completing between 60% and 75% of inspection reports. *Id.*

<sup>7</sup> *Id.*

issue an inspection report citing areas of concern or potential violations without any indication as to whether EPA will take an enforcement action. Significant time can pass before the company receives a Notice of Violation (“NOV”). Otherwise, the company must wait years for the statute of limitations to expire before finally understanding that EPA is not pursuing an enforcement action. EPA should set an established time, such as six months after issuing an inspection report, to either issue an NOV or a letter stating that no enforcement action is forthcoming. Although companies are always disappointed to learn that an enforcement action is pending, they also deserve to know whether or not EPA is going to pursue such an action. This will help the company prepare for potential litigation by issuing legal hold notices, interviewing employees, and otherwise preparing for settlement negotiations and the company’s defense. All of these functions are inhibited when EPA, without any prior contact, initiates an enforcement action years after an inspection.

## 2. Information Requests.

Receiving an EPA information request, such as under Section 114 of the Clean Air Act, is likely the most frequently used tool to begin an EPA investigation. Responding to these requests, which often demand detailed technical records going back many years, is expensive and time consuming. The burden is very similar to responding to a request for production of documents in civil litigation. The company issues a litigation hold to dozens or more employees who may be involved in the subject matter indicated by the information request; relevant employees are interviewed both for their knowledge of potentially responsive documents and for information regarding the underlying matter; and company counsel must review all potentially responsive documents in order to respond. The burden of responding to these requests is often substantial and, given that EPA demands that a senior company officer sign the response under penalty of perjury, exposes company employees to some legal risk.

GPA Midstream acknowledges that EPA now follows a policy that limits the use of information requests to where they are more likely to be useful for actual enforcement matters,<sup>8</sup> ending the prior EPA practice of issuing “fishing expedition” requests to disfavored industries. Nevertheless, EPA still issues, and companies still respond to, information requests. Yet, in many instances, companies will hear nothing from the Agency for many months, or even years, after responding. In other cases, companies will hear nothing at all, and only the passage of the statute of limitations informs companies that no enforcement action will be filed. This means that information requests hang over the company’s head for years. Sometimes, the company may receive notice of an enforcement action years afterwards. In this case, as described above with late-filed enforcement actions after inspection reports, the company’s ability to defend itself may be significantly diminished.

A notice stating that EPA will either take no further action would greatly benefit companies who responded to information requests. Even a periodic notice, issued every six months, stating that the matter remains under review would be helpful. If, however, EPA does plan to initiate an enforcement action it should take care to do so promptly. Although companies are more likely to

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<sup>8</sup> Memorandum from Rosemarie Kelley, Dir., EPA Office of Civil Enforcement, “Best Practices for Compliance and Enforcement-Related Information Requests (Nov. 21, 2018).

issue litigation holds in response to an agency information request, where an NOV issues years after the request, many of the relevant personnel may have left the company. Thus, the company would not be able to interview those persons in order to gather facts needed for its defense. GPA Midstream understands that agencies operate under budget constraints and shifting priorities, however, filing an enforcement action near the end of the statute of limitations (or beyond, where a tolling agreement is used) impedes a company's ability to defend itself and unnecessarily delays implementing any compliance corrections that may be necessary.

### 3. Notices of Violations.

After a company receives an inspection report or information request, EPA may issue an NOV; sometimes promptly, sometimes after a substantial delay. However, even after EPA issues an NOV, there are times where the Agency takes no action, leaving the NOV unresolved. This creates an uncertainty similar to that with inspection reports and information requests, however, a key difference is that NOV's create a public record of purported violations.

EPA's Enforcement and Compliance History Online ("ECHO") database records lists the compliance status for several thousand facilities around the country. It is designed for the public "to search for facilities in [their] community to assess their compliance with environmental regulations."<sup>9</sup> When EPA issues an NOV, ECHO records this as a violation, displaying the following:

QTR 8	QTR 9	QTR 10	QTR 11	QTR 12
07/01-09/30/18	10/01-12/31/18	01/01-03/31/19	04/01-06/30/19	07/01-09/30/19
Violation Identified	Violation Identified	Violation Identified	Violation Identified	Violation Identified
Reportable Noncompliance	Reportable Noncompliance	Reportable Noncompliance	Reportable Noncompliance	Reportable Noncompliance

The indicator "Violation Identified" rolls over for each quarter that the NOV remains unresolved.

Yet, as EPA has admitted, and the Fifth Circuit has ruled, an NOV does not even arise to the status of an allegation, much less a formal finding of liability. "The EPA has consistently maintained" that NOV's "lack finality," "proceed initiation of administrative or judicial enforcement action," and only "reflect a threshold allegation."<sup>10</sup> As a result, they are "advisory, preliminary, and non-binding" and carry no legal consequences.<sup>11</sup>

<sup>9</sup> See EPA, Enforcement and Compliance History Online, [echo.epa.gov](https://echo.epa.gov).

<sup>10</sup> *Luminant Generation Co. v. U.S. Env't Prot. Agency*, 757 F.3d 439, 441-2 (5th Cir. 2014).

<sup>11</sup> *Id.* at 442.

Generally, companies see NOV as invitations to settlement discussions prior to EPA filing a formal administrative or judicial complaint. However, where EPA declines to either act on an NOV or withdraw it, the company has no recourse to either settle or contest the agency's quasi-allegation of a violation. EPA, and any other agency that uses a mechanism similar to an NOV, should not even issue the document unless it has already committed to pursuing an enforcement action. Absent that, companies should be able to take some action to have dormant NOV's officially withdrawn, or NOV's should expire automatically after a given time if EPA takes no further action.

#### 4. Negotiations.

One of the most frustrating aspects of any potential enforcement action involves settlement negotiations. In many instances, before the parties can begin discussing liability, potential penalties, or injunctive relief, they must spend an extensive amount of time debating test methods and EPA regulations. Frequently, there are indications that EPA inspectors were not properly trained to use testing or sampling equipment properly, creating "false positives" during the inspection or leading to accusations that the company's employees or contractors use the incorrect test method, or that they use the right test method incorrectly. Even where companies enlist the help of outside experts to demonstrate flaws in EPA testing practices or to verify the company's testing practices, EPA staff are rarely persuaded.

Companies sometimes encounter similar problems with EPA regulations. It is unfortunately too common that EPA staff, including government attorneys, have only the most basic familiarity with the relevant EPA regulations. This has led to unsupportable or unorthodox claims of violations based on a poor understanding of complex and technical regulatory requirements. Unfortunately, companies too often encounter Agency staff that use a "go with your gut" approach to enforcement, leading Agency staff to disregard regulatory language, guidance documents, or prior EPA interpretations that contradict the theory of liability developed for a specific case. Although some EPA staff may ultimately be persuaded that their novel interpretations entail significant litigation risk, this is only achieved after companies spend significant time and resources educating Agency staff on their own regulations through multiple settlement meetings. Improved training and Agency management can reduce the need for companies to spend meeting after meeting walking EPA staff through the details of their own regulations.

#### B. PHMSA

PHMSA's regulations for conducting pipeline safety inspections and investigations are codified at 49 C.F.R. Part 190, Subpart B. These regulations establish very informal procedures that only provide limited constraints on PHMSA's ability to exercise its considerable enforcement discretion. For example, PHMSA reserves the right to conduct pipeline safety inspections in a variety of circumstances, including "[w]henever deemed appropriate by the Associate Administrator" for Pipeline Safety.<sup>12</sup> PHMSA also reserves the power to issue requests for specific

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<sup>12</sup> 49 C.F.R. § 190.203(b)(6) (2019).

information to pipeline operators whenever “the Associate Administrator [for Pipeline Safety] or [a] Regional Director believes that further information is needed to determine appropriate action.”<sup>13</sup> Pipeline operators must respond to those requests within 30 days, “unless [another deadline is] otherwise specified in the notification.”<sup>14</sup> A 30-day response deadline is not always practicable for pipeline operators, particularly for voluminous requests. Some PHMSA Regional Directors have even sought responses to request for information in less than 30 days.

To protect the due process rights of regulated parties, PHMSA’s authority to conduct pipeline safety inspections and investigations and issue requests for information should be subject to more meaningful constraints, including those identified in the Department of Transportation’s (DOT) recent final rule (“DOT Rule on Rules”)<sup>15</sup> addressing the requirements in Executive Order 13892, *Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication* (“Enforcement EO”).<sup>16</sup> For example, the DOT Rule on Rules states that “DOT’s investigative powers must be used in a manner consistent with due process, basic fairness, and respect for individual liberty and private property[,]” and that “[t]he employees and contractors of DOT responsible for [performing] inspections and other investigative functions must not use these authorities as a game of ‘gotcha’ with regulated entities and should follow existing statutes and regulations.”<sup>17</sup> The DOT Rule on Rules further states that DOT inspection and enforcement personnel should not engage in “‘fishing expedition[s]’ to find potential violations of law in the absence of sufficient evidence in hand to support the assertion of a violation.”<sup>18</sup>

GPA Midstream welcomes DOT’s willingness to acknowledge the importance of these basic due process protections to the overall legitimacy and fairness of the administrative enforcement process. However, the DOT Rule on Rules includes a disclaimer that appears to render all of the aforementioned provisions unenforceable.<sup>19</sup> DOT should eliminate that disclaimer and direct the personnel in all of its modal administrations, including PHMSA, to abide by the inspection and enforcement reforms prescribed in the Rule on Rules. DOT should also make clear that regulated parties have the right to vindicate any violation of those provisions in subsequent administrative and judicial proceedings.

Additionally, to improve transparency and consistency, PHMSA should publish new guidelines for conducting pipeline safety inspections and investigations. The new guidelines

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<sup>13</sup> *Id.* § 190.203(c).

<sup>14</sup> *Id.*

<sup>15</sup> Administrative Rulemaking, Guidance, and Enforcement Procedures, 84 Fed. Reg. 71,714 (Dec. 27, 2019). *See* Administrative Rulemaking, Guidance, and Enforcement Procedures, 85 Fed. Reg. 1,747 (Jan. 13, 2020) and Administrative Rulemaking, Guidance, and Enforcement Procedures, 85 Fed. Reg. 3,254 (Jan. 21, 2020) (providing technical corrections to the Rule on Rules).

<sup>16</sup> Promoting the Rule of Law Through Transparency and Fairness in Civil Administration Enforcement and Adjudication, Executive Order No. 19892, 84 Fed. Reg. 55,239 (Oct. 15, 2019).

<sup>17</sup> 49 C.F.R. § 5.61.

<sup>18</sup> *Id.* § 5.67.

<sup>19</sup> *Id.* § 5.111 (entitled “No third-party rights or benefits” and prohibiting parties from enforcing any due process rights related to agency enforcement or adjudications—including parties subject to the DOT enforcement action that would be challenged”).

should provide more detailed information on the factors that PHMSA considers in determining whether to conduct pipeline safety inspections and require PHMSA to provide regulated parties with more information in advance of a scheduled inspection, including details about the scope of the inspection and the protocols that the inspector intends to follow. Providing more information ahead of time will minimize unnecessary disruption to pipeline operations and improve the efficiency of the inspection process, *e.g.*, pipeline operators can schedule responsible compliance personnel to appear, retrieve appropriate compliance records, *etc.*

The new guidelines should also provide more robust criteria for issuing requests for specific information. The regulations provide PHMSA with nearly unlimited discretion in deciding whether to issue such a request, and the request itself only needs to “provide a reasonable description of the specific information required.”<sup>20</sup> There is no requirement in the regulations to provide pipeline operators with a justification for the request itself or the scope of the information sought. Nor is there a process in place for pipeline operators to object to unreasonable requests. To ensure that the agency does not abuse the considerable powers afforded to the federal government, PHMSA should establish clear criteria for issuing requests for specific information and create a mechanism that allows pipeline operators to seek appropriate relief from unreasonable requests.

## **II. Would applying the principle of *res judicata* in the regulatory context reduce duplicative proceedings? How would agencies effectively apply *res judicata*?**

GPA Midstream notes that the U.S. Supreme Court has previously held that the doctrines of collateral estoppel and *res judicata* can apply to determinations made in federal administrative proceedings.<sup>21</sup> The potential applicability of these doctrines creates a strong incentive to ensure that the due process rights of parties that are subject to regulation by EPA and PHMSA are fully protected, regardless of whether the enforcement process is informal or follows more trial-like procedures. Regulated parties should not bear the burden of carrying adverse agency findings into subsequent litigation unless the original administrative process provides a full and fair opportunity to litigate those issues.

## **III. In the regulatory/civil context, when does an American have to prove an absence of legal liability? Put differently, need an American prove innocence in regulatory proceeding(s)? What reform(s) would ensure an American never has to prove the absence of liability? To the extent permissible, should the Administration address**

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<sup>20</sup> *Id.* § 190.203(c).

<sup>21</sup> *Astoria Fed. Savings & Loan Ass'n v. Solimino*, 501 U.S. 104, 107 (1991) (“We have long favored application of the common-law doctrines of collateral estoppel (as to issues) and *res judicata* (as to claims) to those determinations of administrative bodies that have attained finality. When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose.”).

**burdens of persuasion and/or production in regulatory proceedings? Or should the scope of this reform focus strictly on an initial presumption of innocence?**

Although PHMSA has acknowledged that the agency bears the burden of proof in the enforcement process, GPA Midstream believes that additional due process protections can be implemented to make sure that the agency respects that obligation.<sup>22</sup> For example, the DOT Rule on Rules states that “[i]t is the Department's policy that each responsible [Operating Administration] or component of [the Office of the Secretary of Transportation] will voluntarily follow in its civil enforcement actions the principle articulated in *Brady v. Maryland*, [373 U.S. 83 (1963)][,]” and that “[t]his policy requires the agency’s adversarial personnel to disclose materially exculpatory evidence in the agency's possession to the representatives of the regulated entity whose conduct is the subject of the enforcement action.”<sup>23</sup> Requiring DOT agencies, like PHMSA, to disclose exculpatory evidence to regulated parties is consistent with basic principles of fairness and the notion that the federal government should not engage in unscrupulous conduct to meet its burden of proof. The DOT Rule on Rules includes other provisions that serve these same purposes, such as reviewing enforcement procedures and individual cases for legal sufficiency, ensuring that regulated parties have fair notice of the actions that need to be taken to satisfy legal requirements, and the steps that should be taken to avoid bias and potential conflicts of interest.<sup>24</sup>

GPA Midstream applauds DOT’s willingness to acknowledge the importance of these fundamental due process protections. However, the rights of regulated parties can only be meaningfully vindicated if DOT eliminates the disclaimer that appears to render all of the aforementioned provisions unenforceable<sup>25</sup> and makes clear that the enforcement and adjudicatory personnel in all of its modal administrations, including PHMSA, are under a legal obligation to follow the requirements in the DOT Rule on Rules.

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<sup>22</sup> See *In re Air Products and Chemicals, Inc.*, Final Order, CPF No. 4-2013-1001, 2015 WL 6758819, at \*3 (D.O.T. Aug. 10, 2015) (PHMSA did not meet its burden of proving a violation when it did not produce “any evidence to support its position”); *In re ExxonMobil Pipeline Co.*, Final Order, CPF No. 5-2013-5007, 2015 WL 780721, at \*12 (D.O.T. Jan. 23, 2015) (PHMSA failed to meet burden of proving that certain measures were required under regulations); *In re So. Star Central Gas Pipeline, Inc.*, Final Order, CPF No. 3-2008-1005, 2011 WL 7006614, at \*4 (D.O.T. Oct. 21, 2011) (finding the evidence insufficient to sustain the allegation); *In re Golden Pass Pipeline, LLC*, CPF No. 4-2008-1017, 2011 WL 1919517, at \*5 (D.O.T. Mar. 22, 2011) (PHMSA did not meet its burden of proving that its interpretation of regulatory language was correct); *In re Butte Pipeline Co.*, CPF No. 5-2007-5008, 2009 WL 3190794, at \*1 (D.O.T. Aug. 17, 2009) (“PHMSA carries the burden of proving the allegations set forth in the Notice, meaning that a violation may be found only if the evidence supporting the allegation outweighs the evidence and reasoning presented by Respondent in its defense.”).

<sup>23</sup> Administrative Rulemaking, Guidance, and Enforcement Procedures, 84 Fed. Reg. at 71,731.

<sup>24</sup> *Id.* at 71,730, 71731.

<sup>25</sup> 49 C.F.R. § 5.111 (entitled “No third-party rights or benefits” and prohibiting parties from enforcing any due process rights related to agency enforcement or adjudications—including parties subject to the DOT enforcement action that would be challenged”).



**IV. What evidentiary rules apply in regulatory proceedings to guard against hearsay and/or weigh reliability and relevance? Would the application of some of the Federal Rules of Evidence create a fairer evidentiary framework, and if so, which Rules?**

GPA Midstream believes that administrative enforcement proceedings generally provide satisfactory procedures for considering evidence. In the context of EPA administrative proceedings, both Administrative Law Judges and the Environmental Appeals Board have generally adhered to the Federal Rules of Evidence and the Federal Rules of Civil Procedure.<sup>26</sup>

PHMSA does not follow the Federal Rules of Evidence in its informal hearing process, but GPA Midstream recognizes that full and formal procedural requirements may not be necessary in every instance. In certain situations, a less formal environment may present a less expensive and time-consuming option for relative minor enforcement matters. However, GPA Midstream generally supports the concept that respondents should have the option to hold the government to rigorous evidentiary rules for enforcement proceedings that involve potentially significant penalties or injunctive relief.

**V. Should agencies be required to produce all evidence favorable to the respondent? What rules and/ or procedures would ensure the expedient production of all exculpatory evidence?**

Administrative agencies should be required to disclose exculpatory evidence to respondents in enforcement actions. In both criminal and civil matters, prosecuting agencies must provide exculpatory evidence either as a matter of constitutional right or upon request under the Federal Rules of Civil Procedure. Although GPA Midstream does not necessarily endorse expensive and time-consuming discovery procedures for all administrative enforcement proceedings, at the very least, any evidence that may be viewed as exculpatory should be provided to the respondent.

GPA Midstream cannot imagine any legitimate governmental purpose that is furthered by withholding relevant evidence, much less evidence that the government believes could exculpate the respondent regarding liability or provide grounds for mitigating any penalty. Requiring government agencies to provide any and all exculpatory evidence provides an incentive for agency staff to consider that evidence in determining whether or not to file an administrative complaint. Without having to produce such evidence, agency staff would have little reason to carefully consider all of the evidence in making these decisions, especially given common claims of limited staff resources and the natural inclination to increase the number of enforcement actions.

As previously discussed, the DOT Rule on Rules states the *Brady* rule should be applied in all DOT enforcement proceedings, including those initiated by PHMSA.<sup>27</sup> The approach articulated in the DOT Rule on Rules can serve as a template for facilitating the disclosure of exculpatory material evidence in all federal administrative proceedings. With that said, the DOT

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<sup>26</sup> See, e.g., *In re: Euclid of Virginia, Inc.*, 13 E.A.D. 616 (EAB 2008).

<sup>27</sup> Administrative Rulemaking, Guidance, and Enforcement Procedures, 84 Fed. Reg. at 71,731.

Rule on Rules includes a disclaimer that appears to prohibit a regulated party from taking any action in an administrative or judicial proceeding to vindicate a potential *Brady* rule violation.<sup>28</sup> DOT should eliminate that disclaimer and make clear that all DOT personnel must adhere to the *Brady* rule and that regulated parties have a legal right to enforce that provision in administrative and judicial proceedings.

**VI. Do adjudicators sometimes lack independence from the enforcement arm of the agency? What reform(s) would adequately separate functions and guarantee an adjudicator's independence?**

All Administrative Law Judges (“ALJs”), including EPA ALJs, Regional Judicial Officers, and Environmental Appeals Board Judges should be subject to the Appointments Clause of the Constitution, per *Lucia v. Securities and Exchange Commission*.<sup>29</sup> There, the Supreme Court held that the distinction between a mere employee of an agency and an “Officer of the United States” turned on the permanency of the position, whether the person may bind the United States and private parties, and exercise significant discretion in the course of their duties.<sup>30</sup> EPA ALJs, Regional Judicial Officers, and Environmental Appeals Board judges meet these criteria.

Each of these positions is a “continuing and permanent” position within the context of the Appointments Clause.<sup>31</sup> This means that their duties in adjudicating enforcement proceedings, among other matters, is not “occasional and temporary,”<sup>32</sup> such as presiding over proceedings on an *ad hoc* basis or where these adjudicatory duties are only a small part of their responsibilities.

Each of these positions may bind both the United States and private parties. Although appeals are available to both respondents and the United States, absent such appeals, decisions by ALJs, Regional Judicial Officers, and the Environmental Appeals Board are final and binding.<sup>33</sup>

Lastly, each of these positions exercises significant discretion in the course of their duties. For ALJs and Regional Judicial Officers, they decide all motions, may find a respondent to be in default (or set aside such a default order when good cause is shown), direct pre-hearing conferences, preside over hearings, rule on objections, issue decisions, and assess penalties and injunctive relief.<sup>34</sup> Although these decisions are subject to appeal, the Environmental Appeals Board grants deference to determinations of witness credibility and factual findings to the ALJ or

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<sup>28</sup> *Id.*

<sup>29</sup> 138 S. Ct. 2044 (2018).

<sup>30</sup> *Id.* at 2051-55.

<sup>31</sup> *Id.* at 2051 (quoting *United States v. Germaine*, 99 U.S. 508, 511-12 (1879)).

<sup>32</sup> *Id.*

<sup>33</sup> See 40 C.F.R. §§ 22.27(c) (decisions by ALJs and Regional Judicial Officers are final and binding after 45 days unless a party takes further action or the Environmental Appeals Board elects for *sua sponte* review), 22.17 (discussing ability to determine a respondent is in default, order the payment of penalties by defaulting parties, and that such “default order shall become due and payable by respondent without further proceedings 30 days after the default order becomes final...”); 22.31 (a “final order” by the Environmental Appeals Board “constitutes the final Agency action in a proceeding.”).

<sup>34</sup> See 40 C.F.R. §§ 22.16(c), 22.17, 22.19(b), 22.21, 22.23(a), 22.27.

Regional Judicial Officer.<sup>35</sup> Environmental Appeals Board judges also exercise significant discretion in that they may review decisions *sua sponte*,<sup>36</sup> preside over all appeals,<sup>37</sup> issue final orders,<sup>38</sup> and, in the case of respondent liability, “assess a penalty that is higher or lower than the amount recommended” by an ALJ or Regional Judicial Officer.<sup>39</sup>

The Appointments Clause “is among the significant structural safeguards of the constitutional scheme.”<sup>40</sup> Not only does the Appointments Clause provide for accountability and overall fairness, but it “was also designed to assure a higher quality of appointments.”<sup>41</sup> Here, independence and fairness (and the perception of independence and fairness) are of the greatest importance where the same agency is responsible for issuing regulations, enforcing those regulations, and making a judicial determination as to whether a private party violated those regulations.

Unlike EPA, PHMSA does not use ALJs in adjudicating enforcement actions against regulated parties. PHMSA uses what are known as Presiding Officials (“POs”).<sup>42</sup> POs are attorneys within PHMSA’s Office of Chief Counsel who are part of the staff of the Deputy Chief Counsel, the most senior career legal officer within PHMSA.<sup>43</sup> Although prohibited by regulation from participating in investigatory or prosecutorial functions, POs do not enjoy the same degree of independence from the enforcement process as ALJs. POs also exercise many of the same powers that the U.S. Supreme Court identified as significant for Appointments Clause purposes in *Lucia*.

GPA Midstream strongly supports requiring PHMSA to use ALJs (or a comparable administrative judicial officer with the same degree of independence) in adjudicating at least a subset of enforcement actions. ALJs or an equivalent should be made available to a regulated party on request, particularly in cases where PHMSA is proposing a significant civil penalty or compliance order as an administrative sanction for an alleged violation of the Pipeline Safety Act or Regulations. PHMSA uses ALJs to adjudicate enforcement cases for alleged violations of the Hazardous Materials Safety Act and Regulations. Pipeline operators and other regulated parties should be entitled to request an adjudicator that enjoys the same degree of independence in a PHMSA pipeline safety proceeding.

## **VII. Do agencies provide enough transparency regarding penalties and fines? Are penalties generally fair and proportionate to the infractions for which they are**

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<sup>35</sup> *In re Cutler*, 11 EAD 622, 640-41 (EAB 2004).

<sup>36</sup> 40 C.F.R. § 22.27(c)(4)

<sup>37</sup> *Id.* § 22.30

<sup>38</sup> *Id.* § 22.31

<sup>39</sup> *Id.* § 22.30(f).

<sup>40</sup> *Edmond v. United States*, 520 U.S. 651 (1997).

<sup>41</sup> *Id.*

<sup>42</sup> 49 C.F.R. § 190.212.

<sup>43</sup> *Id.* § 190.212(a).

**assessed? What reform(s) would ensure consistency and transparency regarding regulatory penalties for a particular agency or the federal government as a whole?**

EPA, in the process of settlement negotiations, rarely provides transparency regarding proposed penalties. A common practice is for EPA to assert that a respondent could be liable for large daily penalties spanning a number of years, creating a staggeringly high possible penalty and then apply an arbitrary discount, such as seeking only 10% of the highest possible penalty amount. When pressed, EPA staff may provide more specificity, such as an estimate of economic benefit, however, these estimates are rarely presented as involving rigorous analyses with detailed inputs and are almost always biased to create very large penalties. Frequently, such estimates are presented verbally.

In administrative enforcement actions, penalty calculations are far more transparent, following an established formula. For instance, in *In re: Freedom Performance, LLC*,<sup>44</sup> an EPA ALJ provided a detailed breakdown of how she arrived at a civil penalty of more than \$7 million based on EPA's Clean Air Act Mobil Source Civil Penalty Policy – Vehicle and Engine Certification Requirements (2009) and considering (1) the number of violations established, (2) the economic benefit the respondent received from violating EPA regulations, (3) a gravity factor to reflect purportedly egregious conduct, (4) whether the violations were willful or negligent, (4) the presence or absence of cooperation with EPA, and (6) the respondent's ability to pay. GPA Midstream does not endorse the specific factors involved in this, or any other set of penalty calculations, but agrees that penalty calculations, including those created for settlement negotiations, should be bound to some objective standard or formulation.

Further, such standard or formulation should be subject to public notice and comment as penalty calculation guidelines can often be unduly punitive. For instance, to continue with the *Freedom Performance* example, all profits involved in the regulatory violation were deemed to be an improper economic benefit.<sup>45</sup> The notion that all profits made during the time of a regulatory violation is not only improper, but it amounts to a “disgorgement-plus” approach to enforcement that is not typically found in courts. This economic benefit (disgorgement) served only to establish a baseline before making further upward adjustments. Such upward adjustments include the gravity-based enhancement, which in too many cases, involves both over-complicated analyses and arbitrary judgments as to the severity of a violation. For instance, in *Freedom Performance*, involving the sale of motor vehicle parts that increased emissions, the gravity adjustments were based on how much horsepower the part added to a vehicle.<sup>46</sup> In *Ram, Inc.*,<sup>47</sup> the ALJ used a complex, nine-cell matrix based on unexplained judgments of “Major, Moderate, and Minor” Underground Storage Tank violations. The result of such unusual and arbitrary “gravity” calculations is that they often fail to account for actual environmental harm (if any) resulting from a violation. As a result, “paperwork” violations, such as a failure to maintain records, can generate large penalties while actual releases of pollutants into the environment can result in comparatively lower penalties. Any standard or formulation for penalty calculations should begin with the

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<sup>44</sup> Docket No. CAA-HQ-2019-8392 (Feb. 24, 2020) (“*Freedom Performance*”) at 2-13.

<sup>45</sup> *Id.* at 4.

<sup>46</sup> *Id.* at 5-6.

<sup>47</sup> Docket No. SWDA-06-2005-5301 (July 12, 2008) at 5.

underlying principle that violations resulting in actual harm to human health and the environment should result in higher penalties.

PHMSA has provided more information about the civil penalty calculation process to regulated parties in recent years. PHMSA provides a civil penalty worksheet if requested by a respondent in an enforcement action and makes a generic explanation of PHMSA's approach to applying the civil penalty factors publicly available on its website. However, PHMSA should go even further by providing all documents that agency staff rely upon in calculating a proposed civil penalty to a regulated party. PHMSA should also provide these documents, and the civil penalty worksheets, as a matter of course in all cases and without regard to whether a request is received. Finally, PHMSA should clarify that its staff have an obligation to provide any material evidence in the agency's possession that is relevant in determining the appropriateness of a civil penalty to the regulated party, and that a failure to disclose that evidence provides a basis for seeking appropriate legal remedies, including dismissal of a pending enforcement action or reopening of a previous enforcement action.

#### **VIII. When do regulatory investigations and/or adjudications coerce Americans into resolutions/ settlements? What safeguards would systematically prevent unfair and/or coercive resolutions?**

As discussed above, it is not unusual for companies to receive settlement demands based on arbitrary and excessively high penalty demands in order to coerce a settlement. Given the high cost of contesting such penalty demands, and the litigation risk involved, such tactics can often result in a settlement even where the government has failed to adequately develop its case or where the respondent has defenses to the threatened action. Even worse, if EPA threatens another enforcement action in the future, the penalty demands will be even higher as the company would be deemed to be a repeat offender due to the previous settlement.

Companies may also face significant pressure to agree to injunctive relief imposing regulatory compliance obligations that are not required under the applicable regulations. These new obligations may include monitoring at greater frequencies than required by regulations, using different equipment than required, or forfeiting the use of certain options to demonstrate compliance. There have been times where EPA has initiated enforcement actions against many companies in the same industry in order to impose these additional regulatory obligations on the entire industry rather than initiate a rulemaking.

To end these practices, OMB should emphasize that agencies must enforce the terms of current law, rather than creating new law through enforcement actions, and that penalties should be based only on evidence that they are prepared to present at a hearing. Settlement demands should involve some type of written calculation indicating how the agency arrived at the numbers they are proposing. This does not mean that agencies should be inflexible during settlement negotiations; both parties seek compromise to avoid litigation. However, a written calculation underlying an agency penalty demand allows the parties to work from a common starting point and allow respondents to challenge the agency's underlying assumptions about the case.

The new DOT Rule on Rules identifies several procedural safeguards that, if enforced, would offer meaningful protections to regulated parties who might otherwise be faced with efforts

to elicit coercive settlements or resolutions in enforcement proceedings. For example, the DOT Rule on Rules states that “[t]he assessment of proposed or final penalties in a DOT enforcement action shall be communicated in writing to the subject of the action, along with a full explanation of the basis for the calculation of asserted penalties[,]” and that “the agency shall voluntarily share penalty calculation worksheets, manuals, charts, or other appropriate materials that shed light on the way penalties are calculated to ensure fairness in the process and to encourage a negotiated resolution where possible.”<sup>48</sup>

The DOT Rule on Rules also reserves a role for the Office of General Counsel in approving a negotiated resolution of certain cases, stating that “[w]henever a proposed settlement agreement, consent order, or consent decree would impose behavioral commitments or obligations on a regulated entity that go beyond the requirements of relevant statutes and regulations, including the appointment of an independent monitor or the imposition of novel, unprecedented, or extraordinary obligations, the responsible [Operating Administration] or [Office of the Secretary of Transportation] component should obtain the approval of [the Office of General Counsel] before finalizing the settlement agreement, consent order, or consent decree.”<sup>49</sup> The DOT Rule on Rules further states that “[n]o DOT settlement agreement, consent order, or consent decree should be used to adopt or impose new regulatory obligations for entities that are not parties to the settlement.”<sup>50</sup> GPA Midstream supports these provisions and believes that DOT should ensure that all modal administrations, including PHMSA, are respecting the rights of regulated parties in enforcing federal laws and regulations.

**IX. Are agencies and agency staff accountable to the public in the context of enforcement and adjudications? If no, how can agencies create greater accountability?**

GPA Midstream believes that making the provisions in the DOT Rule on Rules fully enforceable by regulated parties and creating a role for ALJs (or a judicial officer with equivalent independence) are the two steps that will promote greater accountability in the PHMSA enforcement process in the near future. The DOT Rule on Rules provides a series of basic due process protections that PHMSA and all federal administrative agencies should follow in conducting inspections, investigations, and enforcement actions. Giving regulated parties a clear right to vindicate those due process protections in administrative and judicial proceedings ensures that PHMSA staff will respect the law and be held accountable for any instances of non-compliance. Introducing ALJs or an equivalent judicial officer will have the same beneficial effect. An independent and neutral decisionmaker will be much better equipped to address inappropriate or unlawful conduct by PHMSA staff and protect the rights of regulated parties.

**X. Are there certain types of proceedings that, due to exigency or other causes, warrant fewer procedural protections than others?**

PHMSA has the authority under the Pipeline Safety Laws and Regulations to issue a corrective action order to a pipeline operator of “a particular pipeline facility [that] is or would be

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<sup>48</sup> Administrative Rulemaking, Guidance, and Enforcement Procedures, 84 Fed. Reg. at 71,732.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

hazardous to life, property, or the environment[.]”<sup>51</sup> PHMSA also has the authority to waive the requirement to provide prior notice and the opportunity for a hearing in issuing a corrective actions order if affording those basic due protections “would result in the likelihood of serious harm to life, property, or the environment.”<sup>52</sup> In such cases, PHMSA is required to provide the pipeline operator with an expedited hearing after the corrective action order is issued.

The Administrative Procedure Act and Pipeline Safety Laws and Regulations make clear that the default rule is to provide prior notice and the opportunity for a hearing before taking final agency action, including in cases that may warrant the issuance of a corrective action order. PHMSA has nevertheless developed a practice in recent years of waiving the right to prior notice and the opportunity for a hearing in most, if not all, corrective action order cases. In other words, PHMSA is treating the waiver provision as the default rule. GPA Midstream believes that PHMSA should abide by the requirements in the Administrative Procedure Act and Pipeline Safety Laws and Regulations by providing pipeline operators with prior notice and the opportunity for a hearing in corrective action order cases, except in circumstances where a waiver is truly justified.

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GPA Midstream appreciates the opportunity to submit these comments in response to OMB’s request and is standing by to answer any questions that it may have. If you have questions, please contact Matt Hite at GPA Midstream at (202) 279-1664 or by email at [mhite@GPAglobal.org](mailto:mhite@GPAglobal.org).

Sincerely,



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<sup>51</sup> 40 C.F.R. § 190.233(a).

<sup>52</sup> *Id.* at § 190.233(b).