



American  
Petroleum  
Institute



## VIA ELECTRONIC FILING

October 22, 2021

Oil and Gas Division  
Department of Mineral Resources  
North Dakota Industrial Commission  
600 E. Boulevard Avenue,  
Dept 405  
Bismarck, North Dakota 58505-0840

**Re: Comments in response to the Full Notice of Intent to Adopt and Amend  
Administrative Rules**

Dear \_\_\_\_\_:

On August 31, 2021, the Oil and Gas Division of the North Dakota Industrial Commission (Division) published a Full Notice of Intent to Adopt and Amend Administrative Rules (Notice).<sup>1</sup> In the Notice, the Division asked interested parties to submit comments on its proposed amendments<sup>2</sup> to the North Dakota Administrative Code (NDAC).<sup>3</sup> The Association of Oil Pipe Lines<sup>4</sup> (AOPL), the American Petroleum Institute<sup>5</sup> (API), and GPA Midstream Association<sup>6</sup> (GPA) (collectively, the Associations) submit the following joint comments in response to the Notice.

---

<sup>1</sup> North Dakota Industrial Comm'n, Full Notice of Intent to Adopt and Amend Administrative Rules (Aug. 31, 2021).

<sup>2</sup> NDAC Chapter 43-02-03 (Oil and Gas), Chapter 43-02-14 (Geological Storage of Oil or Gas), and Chapter 43-05-01 (Geologic Storage of Carbon Dioxide).

<sup>3</sup> North Dakota Industrial Comm'n, Full Notice of Intent to Adopt and Amend Administrative Rules (Aug. 31, 2021).

<sup>4</sup> 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.

<sup>5</sup> 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. API's members provide most of the nation's energy and are backed by a growing grassroots movement of more than 25 million Americans.

<sup>6</sup> GPA Midstream has served the U.S. energy industry since 1921 and has approximately 70 corporate members that directly employ more than 75,000 employees that are engaged in a wide variety of services that gather, move, and process vital energy products such as natural gas, natural gas liquids ("NGLs"), refined products, and crude oil from production areas to markets, commonly referred to as "midstream activities," across the U.S. GPA Midstream

The Associations appreciate the Division’s willingness to review and amend its regulations. However, AOPL and API are particularly concerned with the proposed amendments to NDAC §§ 43-02-03-29.1 and 43-02-03-55. The Division proposes to amend NDAC § 43-02-03-29.1, covering crude oil and produced water underground gathering pipelines, to clarify that “[i]f these rules differ from federal requirements on federally regulated pipelines, the federal rules take precedence.”<sup>7</sup> The Division references “federally regulated pipelines,” which arguably includes interstate hazardous liquid pipelines.<sup>8</sup> Although the Division styles the amendment to NDAC § 43-02-03-29.1 as intended to address potential conflicts between state and federal law, the state of North Dakota cannot regulate interstate pipelines. The Division also proposes to amend NDAC § 43-02-03-55 to establish requirements for the abandonment of inactive gathering pipelines. As with the proposed amendment to NDAC § 43-02-03-29.1, the Division cannot prescribe or enforce requirements for the abandonment of interstate hazardous liquid pipelines. Accordingly, the Associations respectfully request that the Division make appropriate clarifications to limit the applicability of both regulations.

***The Pipeline Safety Act expressly preempts states from regulating interstate hazardous liquid pipelines.***

Federal law expressly<sup>9</sup> preempts the Division from regulating the safety of interstate pipelines.<sup>10</sup> Specifically, the Pipeline Safety Act<sup>11</sup> provides that, with the exception of one-call notification and damage prevention laws, “[a] State authority may not adopt or continue in force safety standards for interstate pipeline facilities or interstate pipeline transportation.”<sup>12</sup> An “interstate hazardous liquid pipeline facility” is defined for these purposes as “a hazardous liquid pipeline facility used to transport hazardous liquid in interstate or foreign commerce[,]”<sup>13</sup> which includes “commerce between (i) a place in a State and a place outside that State; or (ii) places in

---

members account for more than 90% of the NGLs—such as ethane, propane, butane, and natural gasoline—produced or recovered in the U.S. from more than 400 natural gas processing facilities. The work of our members indirectly creates or impacts an additional 450,000 jobs across the U.S. economy.

<sup>7</sup> Proposed Amendments to NDAC § 43-02-03-29.1(1).

<sup>8</sup> The scope of the existing regulations includes “all underground gathering pipelines designed for or capable of transporting crude oil, natural gas, carbon dioxide, or produced water from an oil and gas production facility for the purpose of disposal, storage, or for sale purposes or designed for or capable of transporting carbon dioxide from a carbon capture facility for the purpose of storage or enhanced oil recovery.” NDAC § 43-02-03-29.1(1).

<sup>9</sup> Federal preemption is derived from the Supremacy Clause of the U.S. Constitution, which states, in relevant part, that “the Laws of the United States . . . shall be the supreme Law of the land . . . any Thing in the Constitution or Laws of any State to the contrary notwithstanding.” U.S. Const., art. VI. The federal courts have recognized two general kinds of preemption under the Supremacy Clause: (1) express preemption and (2) implied preemption. *Washington Gas Light Co. v. Prince George’s County Council*, 711 F.3d 412, 419-420 (4th Cir. 2013); *Tex. Midstream Gas Servs. LLC v. City of Grand Prairie*, 608 F.3d 200 (5th Cir. 2010). Express preemption exists if a federal law explicitly prohibits a state authority from regulating a particular activity. Implied preemption exists if a federal law creates a regulatory regime that is so comprehensive that there is no room left for state regulation (a principle commonly referred to as field preemption), or if compliance with a federal and state law would be impossible or frustrate congressional objectives (a principle commonly referred to as conflict preemption).

<sup>10</sup> 49 U.S.C. § 60104(c).

<sup>11</sup> *Id.* §§ 60101-60143.

<sup>12</sup> *Id.* § 60104(c).

<sup>13</sup> *Id.* § 60101(a)(7).

the same State through a place outside the State.”<sup>14</sup> The Pipeline and Hazardous Materials Safety Administration (PHMSA), the federal agency responsible for administering the Pipeline Safety Act, is the only authority that can prescribe and enforce safety standards for interstate hazardous liquid pipeline facilities. This statutory regime is important because it “provides for a national hazardous liquid pipeline safety program with nationally uniform minimal standards and with enforcement administered through a Federal-State partnership.”<sup>15</sup>

The federal courts have reviewed the Pipeline Safety Act and the text of the preceding statutes<sup>16</sup> and have repeatedly held that states are expressly preempted from regulating the safety of interstate pipelines. As the U.S. Court of Appeals for the Eighth Circuit explained in *Kinley Corp. v. Iowa Utilities Board*, “Congress has expressly stated its intent to preempt the states from regulating the safety of interstate hazardous liquid pipelines.”<sup>17</sup> There have been a number of cases invalidating state efforts to prescribe or enforce safety standards for interstate hazardous liquid or natural gas pipeline facilities under the Pipeline Safety Act.<sup>18</sup> In particular, in *ANR Pipeline Co. v. Iowa State Commerce Comm’n*, the state of Iowa argued that it was permissible to adopt state regulations governing interstate pipelines as long as those standards were identical to the federal requirements.<sup>19</sup> The court disagreed, finding that “Congress intended to preclude states from regulating in any manner whatsoever...”<sup>20</sup> These cases affirm the fundamental principle that the Pipeline Safety Act “leaves nothing to the states in terms of substantive safety regulation of interstate pipelines, regardless of whether the local regulation is more restrictive, less restrictive, or identical to the federal standards.”<sup>21</sup>

North Dakota’s NDAC § 43-02-03-29.1 regulations contain requirements that clearly qualify as safety standards, including provisions for design, construction, leak detection, spill

---

<sup>14</sup> *Id.* § 60101(a)(8)(B). Hazardous liquid pipeline facilities that are subject to the jurisdiction of the Federal Energy Regulatory Commission are generally treated as interstate hazardous liquid pipeline facilities under the Pipeline Safety Act. 49 C.F.R. Part 195, Appendix A.

<sup>15</sup> 49 C.F.R. Part 195, Appendix A.

<sup>16</sup> The Natural Gas Pipeline Safety Act (NGPSA) and the Hazardous Liquid Pipeline Safety Act of 1979 (the HLPESA) preceded the Pipeline Safety Act. In 1992, Congress recodified these statutes as the Pipeline Safety Act. The preemption provision in the current statute mirrored the preemption provision from those prior statutes. The current federal law provides that “a State authority may not adopt or continue in force safety standards for interstate pipeline facilities or interstate pipeline transportation.” 49 U.S.C. § 60104(c). Congress stated in the NGPSA that “No State agency may adopt or continue in force any such standards applicable to interstate transmission facilities.” 49 U.S.C. App. § 1672(a)(1). Likewise, the preemption provision in the HLPESA provided that “No State agency may adopt or continue in force any safety standards applicable to interstate pipeline facilities or the transportation of hazardous liquids associated with such facilities.” 49 U.S.C. App. § 2002(d).

<sup>17</sup> *Kinley Corp. v. Iowa Utilities Bd.*, 999 F. 2d 354, 358 (8<sup>th</sup> Cir. 1993).

<sup>18</sup> *ANR Pipeline Co. v. Iowa State Commerce Comm’n*, 828 F.2d 465 (8<sup>th</sup> Cir. 1987) (ruling that state authority could not adopt and apply PHMSA’s pipeline safety standards to an interstate gas pipeline facility); *Natural Gas Pipeline Co. of America v. R.R. Comm’n of Tex.*, 679 F.2d 51 (5<sup>th</sup> Cir. 1982) (ruling that state authority’s safety rules for pipelines containing hydrogen sulfide could not be applied to an interstate gas pipeline facility); *Colo. Interstate Gas Co. v. Wright*, 707 F.Supp.2d 1169 (D. Kan. 2010) (ruling that state authority could not apply its safety standards for underground natural gas storage fields to an interstate gas pipeline facility).

<sup>19</sup> This case involved interstate natural gas pipelines and the text of the NGPSA. However, in the subsequent *Kinley* case, the court determined that because the text of the preemption clauses in the NGPSA and the HLPESA are virtually identical, the analysis from the *ANR* case is relevant to hazardous liquid pipeline preemption questions. *Kinley Corp. v. Iowa Utilities Bd.*, 999 F. 2d 354, 358 (8<sup>th</sup> Cir. 1993).

<sup>20</sup> *ANR Pipeline Co.*, 828 F.2d at 470.

<sup>21</sup> *Id.*

response, corrosion control, pipeline integrity, maintenance, repair, and abandonment. The Division cannot prescribe or enforce any safety standards for interstate hazardous liquid pipeline facilities, regardless of whether those standards differ from PHMSA's regulations or not. Similarly, North Dakota's NDAC § 43-02-03-55 would impose requirements for the abandonment of inactive gathering pipelines. These requirements also qualify as safety standards that the Division cannot apply to interstate hazardous liquid pipeline facilities.

***States can assist PHMSA with inspections of interstate operators but are prohibited from promulgating their own regulations.***

While a state authority can enter into an agreement with PHMSA to participate in the oversight of interstate pipeline facilities as an interstate agent, that state must first submit a certification to PHMSA under 49 U.S.C. § 60105.<sup>22</sup> An interstate agent can only conduct inspections. It cannot promulgate its own regulations or independently pursue enforcement of the federal pipeline safety regulations.<sup>23</sup>

Since NDAC §§ 43-02-03-29.1 and 43-02-03-55 are preempted by the federal Pipeline Safety Act insofar as these regulations are applied to interstate pipelines, the Associations respectfully request that the Division revise these regulations and the proposed amendments to clearly exclude interstate pipelines from the scope of the regulations. AOPL and API appreciate the opportunity to submit comments in response to the Notice. If you have any questions, please feel free to contact either of the undersigned.

Sincerely,



Andy Black, President and  
CEO  
Association of Oil Pipe Lines  
900 17th St, NW Suite 600  
Washington, D.C. 20006  
[ablack@aopl.org](mailto:ablack@aopl.org)



Dave Murk, Pipeline Director  
American Petroleum Institute  
200 Massachusetts Ave, NW  
Suite 1100  
Washington, DC 20001  
[murkd@api.org](mailto:murkd@api.org)



Matthew Hite, Vice President of  
Government Affairs  
GPA Midstream Association  
505 9th St, NW Suite 700  
Washington, DC 20004  
[mhite@gpamidstream.org](mailto:mhite@gpamidstream.org)

---

<sup>22</sup> 49 U.S.C. § 60106(b)(1).

<sup>23</sup> 49 U.S.C. § 60104(c). *See also*, 49 U.S.C. § 60106(b)(1) ("Nothing in this section modifies section 60104(c) or authorizes the Secretary to delegate the enforcement of safety standards for interstate pipeline facilities prescribed under this chapter to a State authority.")