Dear Madam Secretary,

On February 5, 2019, the Office of the Secretary of Transportation (OST) published a notice in the *Federal Register* asking for public comment on whether the Department of Transportation (DOT) should repeal or revise any guidance documents (Notice). As OST explained in the Notice, DOT uses guidance documents to clarify legal requirements, assist with compliance, and communicate the agency’s position on specific issues. However, the Administrative Procedure Act does not allow DOT to use guidance documents as a substitute for the rulemaking process or to create new legal obligations. OST also noted that even non-binding guidance documents can cause regulated entities to take actions that impose costs, and that some guidance documents need to be updated to reflect recent developments in technology or other events.

Citing a statutory mandate in the Fixing America’s Surface Transportation Act applicable to guidance documents administered by the Federal Motor Carrier Safety Administration, and a desire to improve the guidance documents administered by all DOT agencies, OST asked the public to comment on any DOT guidance documents that should be considered for repeal or revision. In particular, OST asked the public “to identify [DOT] guidance documents that (a) are no longer necessary; (b) spur cost-inducing action by the regulated entities; (c) are inconsistent or unclear; (d) may not be conducive to uniform or consistent enforcement; or (e) need to be updated to reflect developments that have taken place since the guidance was issued.”

GPA Midstream Association (GPA Midstream) welcomes the opportunity to provide the following comments in response to the Notice. GPA Midstream has served the U.S. energy industry since 1921. GPA Midstream is composed of nearly 100 corporate members that are

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2 Id. at 1,820.
3 Id.
4 Additional information about GPA Midstream is available at [https://gpaglobal.org/](https://gpaglobal.org/). Prior to April 2016, GPA Midstream was known as the Gas Processors Association.
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.

The Pipeline and Hazardous Materials Safety Administration (PHMSA or the Agency), the DOT agency responsible for regulating the safety of the nation’s gas and hazardous liquid pipelines,\(^5\) has issued a variety of guidance documents affecting the design, construction, testing, operation, and maintenance of the pipelines that GPA Midstream’s member companies use to gather and process domestic energy products.\(^6\) PHMSA and the state authorities that participate in the federal pipeline safety program use these guidance documents to conduct compliance, inspection, and enforcement activities. Pipeline operators also rely on PHMSA’s guidance documents in performing the activities necessary to comply with the pipeline safety regulations.

GPA Midstream believes there are several PHMSA guidance documents that should be repealed or revised. GPA Midstream has identified each of these guidance documents below and included an explanation supporting the requested action. GPA Midstream has also identified one guidance document that PHMSA developed several years ago as part of a collaborative stakeholder effort that still needs to be finalized and issued. GPA Midstream is confident that taking these actions will improve pipeline safety and ensure that PHMSA’s guidance documents are grounded in sound policy and consistent with applicable laws and regulations.

1. **Retroactive Application of Design Requirements**


*Requested Action*: Repeal or Revise to Acknowledge that Design Requirements Do Not Apply Retroactively

*Justification*: Guidance Documents Violate the Non-Retroactivity Provision in the Federal Pipeline Safety Laws and Regulations and Create New Legal Requirements

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\(^6\) For example, PHMSA provides interested parties with written interpretations of regulations and responses to other issues concerning pipeline safety, 49 C.F.R. § 190.11(b) (2018). PHMSA also publishes frequently asked questions and advisory bulletins that provide operators and the public with information about pipeline safety. Finally, and perhaps most importantly, PHMSA maintains a comprehensive set of pipeline enforcement guidance for specific topics, including corrosion control, integrity management, operations and maintenance, operator qualification, and public awareness. Pipeline Enforcement Guidance (Oct. 19, 2018), [https://www.phmsa.dot.gov/pipeline/enforcement/enforcement-program-0](https://www.phmsa.dot.gov/pipeline/enforcement/enforcement-program-0).
Without Complying with the Notice-and-Comment Rulemaking Process in the Administrative Procedure Act and Pipeline Safety

PHMSA has taken the position in recent years that the design requirements in 49 C.F.R. Part 192 can be applied retroactively to existing pipeline facilities. In a series of advisory bulletins, letters of interpretation, and rulemaking documents issued after the September 2010 gas transmission line incident in San Bruno, California, PHMSA has said that operators must have “traceable, verifiable and complete” design records to substantiate the maximum allowable operating pressure (MAOP) of a gas pipeline. PHMSA has also said that operators must comply with the tensile strength testing requirements in section 192.107(b) and section II-D of Appendix B if these records are lacking.7

Contrary to PHMSA’s recent statements, operators do not have a legal obligation to use “traceable, verifiable and complete” design records to substantiate the MAOP of a gas pipeline. Part 192 does not contain any MAOP-related recordkeeping requirements, and the “traceable, verifiable and complete” standard is based on a National Transportation Safety Board (NTSB) recommendation that is not codified in any statute or regulation.8 Nor do operators of existing pipeline facilities have an obligation to comply with the tensile strength testing requirements in Part 192. The tensile strength testing requirements are part of PHMSA’s design and initial testing standards, and the Pipeline Safety Laws prohibit PHMSA from retroactively applying these kinds of standards to existing pipelines.9

Moreover, even if the Pipeline Safety Laws did not have a non-retroactivity provision, the Part 192 tensile strength testing requirements were never intended to apply—and cannot be...
practically applied—to in-service gas pipeline facilities. Tenile strength testing can only be performed at the design phase of a project, i.e., when the pipe is separated into individual lengths, located aboveground, and easily accessible for physical examination, inspection, and destructive testing. By directing operators to perform tensile strength testing on in-service pipeline facilities, PHMSA is essentially requiring operators to replace the facilities. The cost of performing these actions is enormous—PHMSA recently estimated that one narrow sector of the pipeline industry, operators of gas transmission lines installed prior to 1970 who lack “traceable, verifiable and complete” design records, would need to spend approximately $2.67 billion to $3.67 billion over a 15-year period to conduct tensile strength testing.

For these reasons, GPA Midstream is respectfully requesting that PHMSA repeal or revise any guidance documents stating that the Part 192 design requirements can be applied retroactively to existing pipeline facilities. These guidance documents are not consistent with applicable law and regulations and direct operators to take actions that impose enormous costs on the pipeline industry. PHMSA should reaffirm the longstanding principle that the design regulations, including the design pressure limitation in the MAOP provision, do not apply to existing pipeline facilities, and that the tensile strength testing requirements are design and initial testing standards that only apply at the design phase of a pipeline project. PHMSA should also acknowledge that Part 192 allows operators to reestablish MAOP where necessary by conducting a new pressure test or determining the maximum safe operating pressure based on the pipeline’s history.

2. Recordkeeping


Requested Action: Repeal or Revise to Acknowledge that There is No General Duty to Maintain Records and that §192.603(b) is Not a Lifetime Recordkeeping Requirement.

Justification: Creates New Legal Requirements Without Complying with the Administrative Procedure Act and Pipeline Safety Laws

DOT should repeal or revise PHMSA’s Operations and Maintenance Enforcement Guidance for 49 C.F.R. § 192.603(b) to ensure consistency with applicable law and regulations.

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10 The tensile strength testing requirements referenced in § 192.107(b) and codified in section II-D of Appendix B are based on Section 811 of the 1968 edition of the USA Standard Code for Pressure Piping, Gas Transmission and Distribution Piping Systems, USAS B31.8-1968, the consensus industry standard that DOT relied upon in developing the original federal gas pipeline safety regulations. Establishment of Minimum Standards, 35 Fed. Reg. 13,247 (Aug. 19, 1970).

11 Pipeline Safety: Safety of Gas Transmission and Gathering Pipelines, 81 Fed. Reg. at 20,814 (“Under existing regulations, in order for pipelines with insufficient records to maintain operating pressure, operators must excavate the pipeline at every 10 lengths of pipe (commonly referred to as joints) in accordance with section II-D of Appendix B of Part 192 (as specified in §192.107(b)), do a cutout, determine material properties by destructive tensile test, and repair the pipe. The process is similar to doing a repair via pipe replacement.”).

12 The estimate did not cover the costs imposed on gas distribution and gathering line operators, who are also covered by PHMSA’s guidance, but those costs would be several orders of magnitude higher.


Section 192.603(b) is a limited recordkeeping provision for records deemed “necessary to administer the [operating and maintenance] procedures established under [49 C.F.R.] § 192.605.”\(^\text{15}\) Section 192.605 requires pipeline operators to prepare and follow a manual of written procedures for conducting operations, maintenance, and emergency response activities.\(^\text{16}\) Section 192.603(b) provides that an operator must maintain records necessary to implement those procedures.\(^\text{17}\)

By way of background, PHMSA borrowed the language from USA Standard Code for Pressure Piping, Gas Transmission and Distribution Piping Systems (B31.8 or the Standard) in promulgating § 192.603(b) nearly five decades ago.\(^\text{18}\) Nothing in the language of B31.8 or the history of that original rulemaking proceeding suggests that the Agency intended to create a general duty clause for recordkeeping purposes. In fact, DOT consistently advised the industry in the years following the initial rulemaking proceeding that the records required were limited to those needed to implement the operations and maintenance manual. In 1972, for example, the Agency stated that “If an operator requires maps as a record to properly administer the operating and maintenance plan to meet the Federal safety requirements, then these maps must be maintained by the operators.”\(^\text{19}\) As part of a submission to OMB for approval of a revised information collection in 1989, PHMSA limited the type of records required under § 192.603(b) to maps, construction records, and operating history.\(^\text{20}\)

Starting in approximately 2005,\(^\text{21}\) PHMSA began to dramatically expand the reach of § 192.603(b) in its internal enforcement guidance, stating that “[w]hen a regulation does not specifically require records, then paragraph § 192.603(b) can be used when appropriate records have not been kept.”\(^\text{22}\) PHMSA has gone even farther in recent years, characterizing § 192.603(b) as a lifetime recordkeeping requirement.\(^\text{23}\) In a 2015 letter of interpretation, PHMSA said that “[s]ections 192.517 and 192.603 require that all records regarding the pipeline MAOP determination be kept for the life of the pipeline segment, including records of pipe properties, pipeline component properties, pressure test records, class location studies, current class location designation, and operating history.”\(^\text{24}\)

There is no indication that PHMSA ever obtained the proper approvals from OMB under the Paperwork Reduction Act to apply § 192.603(b) so broadly. According to the available records on OMB’s website, PHMSA has sought renewal of its information collection authority

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\(^{15}\) 49 C.F.R. § 192.603(b).

\(^{16}\) Id. § 192.605(a).

\(^{17}\) Id. § 192.603(b).


\(^{19}\) PHMSA Letter of Interpretation to Mr. Allan E. Anderson, P.E., Henningson, Durham & Richardson, PI-72-031 (July 17, 1972) (emphasis added).


\(^{21}\) The 2005 Enforcement Guidance was released publicly in 2010.

\(^{22}\) PHMSA Operations and Maintenance Guidance, 49 C.F.R. 192 (Subparts L & M) at 35 (2005).

\(^{23}\) PHMSA Letter of Interpretation to Mr. Joseph Como, Acting Director, Office of Ratepayer Advocates, California Public Utilities Commission, PI-14-0005 at 3 (Jan. 23, 2015).

\(^{24}\) Id. (emphasis added).
for gas transmission pipeline records on a regular basis dating back to at least 1984. PHMSA did not characterize § 192.603(b) as an all-encompassing, lifetime recordkeeping requirement in any of these submissions. In fact, PHMSA characterized § 192.603(b) as a “one time” collection and only attributed ten hours per operator to update the records associated with that regulation in its 2008, 2012, and 2015 submissions to OMB. Clearly, the information provided to OMB is not consistent with the views expressed in the 2005 internal enforcement guidance or the 2015 interpretation.

PHMSA’s recent proposal to add a new lifetime recordkeeping requirement to the gas pipeline safety regulations further undermines the current enforcement guidance for § 192.603(b). In 2016, the Agency proposed a new general duty recordkeeping requirement as part of the Gas Transmission NPRM. PHMSA proposed that “[e]ach operator must make and retain records that demonstrate compliance with this part.” Although the need for this proposal will be evaluated through the rulemaking process, it calls into question the Agency’s prior interpretation of § 192.603(b). If PHMSA already had the broad recordkeeping authority under § 192.603(b) as stated in the enforcement guidance, there would be no need for this latest proposal.

In summary, GPA Midstream is respectfully requesting that PHMSA repeal or revise any guidance document indicating that § 192.603(b) creates a lifetime recordkeeping requirement that applies throughout the Part 192 regulations. The text, structure, and history of the pipeline safety regulations do not support that position, and PHMSA did not indicate that § 192.603(b) required operators to keep any records for the life of the pipe for decades. If the Agency wants to transform § 192.603(b) into an all-encompassing, lifetime recordkeeping requirement, PHMSA must complete the notice-and-comment rulemaking process and properly evaluate the resulting information collection burden under the Paperwork Reduction Act.

3. Midstream FAQs


Requested Action: Expedite Issuance of Final Guidance

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28 Id. (to be codified at 49 C.F.R. § 192.13(e)).
**Justification:** Eliminates Regulatory Uncertainty by Clarifying the Extent of PHMSA’s Jurisdiction Over Midstream Processing Facilities

DOT should finalize the draft guidance document relating to midstream processing facility safety that was presented at the August 2015 Gas and Liquids Advisory Committee (Advisory Committee) meeting, *Delineation and Regulatory Oversight of “Processing” – Oil and Gas Midstream Facilities* (Draft Midstream Processing Guidance). Prepared by the Advisory Committee’s Subcommittee for Midstream Safety (Subcommittee), the Draft Midstream Processing Guidance contains guidance for determining whether midstream processing facilities are subject to regulation by PHMSA or the Occupational Health and Safety Administration (OSHA).  

Given the importance of the issue and amount of time that has elapsed since the release of the Draft Midstream Processing Guidance, DOT should publish the final version of the guidance at the earliest practicable date.

By way of background, the Advisory Committee formed the Subcommittee in 2014 to address growing concerns over PHMSA’s efforts to regulate piping, storage, and other facilities located inside the grounds of processing plants. Two other federal agencies, (1) OSHA, which administers the Process Safety Management (PSM) Program Requirements in 29 C.F.R. § 1910.119, and (2) the U.S. Environmental Protection Agency (EPA), which administers the Risk Management Program (RMP) Requirements in 40 C.F.R. Part 68 and Spill Prevention, Control, and Countermeasure (SPCC) Program in in 40 C.F.R. Part 112, also exercise regulatory authority over these facilities. The Subcommittee developed the Draft Midstream Processing Guidance to clarify the applicability of these programs and address the regulatory status of storage and related piping (whether at midstream processing facilities or as incident to pipeline transportation).

The Subcommittee made an important threshold determination in developing the Draft Midstream Processing Guidance, *i.e.*, that PHMSA’s pipeline safety regulations and OSHA’s PSM regulations provide an equivalent level of safety for midstream processing facilities. The Subcommittee then developed a series of Frequently Asked Questions (FAQs) with detailed guidance on the applicability of PHMSA’s and OSHA’s regulations in specific situations. After completing the FAQs, the Subcommittee presented the Draft Midstream Processing Guidance at an August 2015 meeting of the Advisory Committee. Several Advisory Committee members asked questions about the FAQs and offered commentary on the presentation, which by all accounts was very well received. Nonetheless, for reasons not explained in the public record, PHMSA has not issued a final version of the guidance in the three years and seven months since that meeting.

GPA Midstream is concerned by the Agency’s failure to validate the Subcommittee’s work and release the final guidance for midstream processing facilities. The guidance contains information that addresses an issue of significant practical concern for operators and helps to

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30 The Subcommittee met with representatives of PHMSA and other interested federal agencies on several occasions and developed the Draft Midstream Guidance as part of a multi-stakeholder, collaborative effort.

31 *Delineation and Regulatory Oversight of “Processing” – Oil and Gas Midstream Facilities* at 4 (Aug. 2015).

32 A copy of the transcript from the meeting and the discussion of the presentation is available at [https://primis.phmsa.dot.gov/meetings/FilGet.mtg?fil=690](https://primis.phmsa.dot.gov/meetings/FilGet.mtg?fil=690)
minimize the uncertainty that arises when multiple federal agencies exercise authority over the same facilities. These are the kinds of problems that impose unnecessary costs on the regulated community, lead to inconsistent and conflicting enforcement, and frustrate the overall goal of promoting facility safety.

GPA Midstream has also learned of cases where PHMSA appears to have disregarded some of the principles laid out in the Draft Midstream Processing Guidance. In a recent enforcement action, the Agency applied the pipeline safety regulations to equipment located inside an underground NGL storage facility. PHMSA does not have any regulations for underground hazardous liquid storage facilities, and the Agency’s apparent desire to characterize equipment located inside an underground NGL storage cavern as transportation-related piping subject to PHMSA’s current regulations is alarming. That position is not consistent with the Draft Midstream Processing Guidance or PHMSA’s past practice of limiting the applicability of the pipeline safety regulations to surface piping located beyond particular endpoints at sites containing underground hazardous liquid storage facilities.

In summary, GPA Midstream is respectfully requesting that PHMSA expedite the issuance of the final version of the guidance for midstream processing facilities. The Subcommittee already presented the Draft Midstream Processing Guidance to the Advisory Committee for consideration, and several years have passed since that time without further action by PHMSA. Failing to finalize the guidance undermines the efforts of the Subcommittee and perpetuates the uncertainty that the guidance sought to resolve.

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GPA Midstream appreciates the opportunity to submit comments on improving DOT’s guidance documents. We offer our continued assistance to DOT as it evaluates comments and remain available to provide additional data or answer questions that DOT may have. If you have questions, please contact me at (202) 279-1664 or by email at mhite@GPAGlobal.org.

Sincerely,

Matthew Hite
Vice President of Government Affairs
GPA Midstream Association

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34 Pipeline Safety: Safety of Hazardous Liquid Pipelines, 80 Fed. Reg. 61,610, 61,620 (Oct. 13, 2015)(“At present nothing indicates that . . . the issuance of regulations for underground storage facilities is necessary.”)