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Federal Jurisdiction for Above-Ground Oil Storage Tanks: A Practical Analysis for Navigating Federal Regulations

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COMMENT

FEDERAL JURISDICTION FOR ABOVE-GROUND OIL STORAGE TANKS: A PRACTICAL ANALYSIS FOR NAVIGATING FEDERAL REGULATIONS

KATHRYN HUSSONG*

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I. INTRODUCTION

A. *The Role of Pipelines and Refineries in the United States*

Pipelines transporting crude, refined products, and highly-volatile liquids are numerous and widespread, with more than 2.4 million miles of pipeline located in the continental United States.¹ Pipelines connect to over 141 refineries² and transport billions of barrels of petroleum products each year.³ Refineries receive petroleum products delivered by pipelines and process the petroleum into fuel oils for asphalt, electricity, heating generation, and feedstocks. The feedstocks are then refined into chemicals used for nearly everything, including: synthetics, gasoline, agricultural chemicals, and plastic goods commonly purchased by consumers.⁴ Refineries are crucial in getting petroleum products to the market to meet the growing global demand for gasoline and other petroleum-based products.⁵ Pipelines and refineries are viewed as critical infrastructures and expressed as “the veins of the American economy.”⁶ However, both are

1. See *Where Are Liquids Pipelines Located?*, PIPELINE 101, <http://www.pipeline101.com/where-are-pipelines-located> [<https://perma.cc/7DNY-Z2ZL>] (providing a map showing pipelines are located in every state in the continental United States).

2. *When Was the Last Refinery Built in the United States?*, U.S. ENERGY INFO. ADMIN., <https://www.eia.gov/tools/faqs/faq.php?id=29&t=6> [<https://perma.cc/V9BQ-VEPQ>].

3. *About Pipelines: Pipelines Transport Billions of Barrels of Petroleum Products Each Year*, ASS'N OIL PIPE LINES, <http://www.aopl.org/pipeline-basics/about-pipelines/> [<https://perma.cc/63Z2-DPTJ>].

4. *What Are Petroleum Products, and What is Petroleum Used for?*, U.S. ENERGY INFO. ADMIN., <https://www.eia.gov/tools/faqs/faq.php?id=41&t=6> [<https://perma.cc/377H-A6PL>].

5. *Refining, Distribution and Marketing*, ENERGY API, <http://www.api.org/oil-and-natural-gas/wells-to-consumer/fuels-and-refining/refineries/refining-distribution-and-marketing> [<https://perma.cc/FCQ4-JZHV>].

6. *Pipelines: Securing the Veins of the American Economy: Before the H. Subcomm. on Transp. Sec. & H. Comm. on Homeland Sec.*, 114th Cong. 1 (2016) (statement of Paul W. Parfomak, Specialist in Energy and Infrastructure Policy, Cong. Res. Serv.); see *National Infrastructure Protection Plan*, U.S. DEPT

subject to extensive federal regulatory oversight by the Department of Transportation⁷ through the Pipeline and Hazardous Safety Administration (PHMSA),⁸ the Occupational Safety and Health Administration (OSHA),⁹ the Environmental Protection Agency (EPA),¹⁰ and various state agencies.¹¹ Pipelines and refineries are considered the heaviest regulated industries in the United States.¹² This comment will address PHMSA's current approach in determining regulatory authority over assets traditionally regulated by OSHA and the EPA. Additionally, this comment will address whether PHMSA will further expand its jurisdiction to above-ground storage tanks located inside refineries which are predominately used for purposes other than continued transportation of petroleum products by pipeline.¹³

HOMELAND SECURITY, https://www.dhs.gov/xlibrary/assets/nipp_snapshot_energy.pdf [<https://perma.cc/GEN3-MN3C>] (identifying petroleum refineries as critical infrastructure subject to federal oversight).

7. Department of Transportation Act of 1966, Pub. L. No. 89-670, 80 Stat. 931. The Department of Transportation was promulgated by Congress because “the general welfare, the economic growth, and stability of the Nation and its security require the development of national transportation policies and programs[.]” *Id.* § 2(a). Because pipelines are considered part of national transportation, the Department is authorized to oversee and manage PHMSA. *Id.* § 5.

8. 49 C.F.R. § 195.0 (2018).

9. 29 C.F.R. § 1910.1 (2018).

10. 40 C.F.R. § 112.1 (2018).

11. Jacquelyn Pless, *Making State Gas Pipelines Safe and Reliable: An Assessment of State Policy*, NAT'L CONF. ST. LEGISLATURES (Mar. 2011), <http://www.ncsl.org/research/energy/state-gas-pipelines-federal-and-state-responsibili.aspx> [<https://perma.cc/3QSF-KEPQ>].

12. See Brad Shamlal, *Counterpoint: Pipelines Are a Vital Link for the Oil We All Use*, STARTRIBUNE (Sept. 8, 2016, 6:23 PM), <http://www.startribune.com/counterpoint-pipelines-are-a-vital-link-for-the-oil-we-all-use/392817461/> [<https://perma.cc/3WED-XYZK>] (discussing pipelines are heavily regulated although considered one of the “safest, most reliable[.] and most efficient method of transporting liquid petroleum products”); see also *Over-Regulation of the Nation's Refineries*, INST. FOR ENERGY RES. (May 3, 2012), <http://instituteforenergyresearch.org/analysis/over-regulation-of-the-nations-refineries/> [<https://perma.cc/TNX8-FRHV>] (asserting refineries are one of the most heavily regulated industries in the United States and the industry will face more federal and state regulations in the future).

13. See *Fact Sheet: Aboveground Storage Tanks*, PIPELINE & HAZARDOUS MATERIALS SAFETY ADMIN. (Dec. 1, 2011), <https://primis.phmsa.dot.gov/comm/FactSheets/FSAboveGroundStorageTanks.htm> [<https://perma.cc/KDP5-UUE3>] (explaining above-ground storage tanks are a necessary and integral part of a pipeline system and “are constructed of steel plates that can hold large volumes of commodities[.]” including unrefined petroleum, liquefied natural gas, and refined petroleum products).

B. *Multiple Agency Jurisdiction Leads to Confusion Within the Industry*

The extensive federal and state regulatory oversight has generated overlapping regulations, created conflict among federal and state agencies, and produced additional regulatory burdens for pipeline operators¹⁴ and refineries to determine what regulations apply to their facilities.¹⁵ In addition, pipelines that connect to and serve refineries are generally owned and/or operated by a pipeline company as a separate and distinct entity from the refinery, creating additional challenges for pipeline operators and refineries to coordinate regulatory programs.¹⁶ PHMSA has acknowledged the difficulties but taken an uncompromising approach, holding pipeline operators accountable for their own required regulatory compliance and for the regulatory compliance of refineries the pipeline operators serve.¹⁷ Stated differently, pipeline operators are liable for gaps in the regulatory programs for the assets they own and/or operate, and may be held accountable for gaps in the regulatory programs for the assets the pipeline operator is associated with but that are owned by other companies and not under the immediate control of the pipeline operator.¹⁸

While it may pose practical difficulties for a pipeline operator to ensure that breakout tanks owned and maintained by another company but used to

14. See *Operator Resources*, PIPELINE & HAZARDOUS MATERIALS SAFETY ADMIN., <https://www.phmsa.dot.gov/pipeline/operator-resources> [<https://perma.cc/D3GW-VB53>] (providing pipeline operators are subject to state and federal regulations and are responsible for the “safe and reliable operation and maintenance of their hazardous liquid and natural gas pipelines”).

15. See Michael D. Caples & Travis R. Steele, *Environmental Update—PHMSA & OSHA Issue Guidance on Midstream Facilities*, BUTLER SNOW (Sept. 18, 2015), <https://www.butlersnow.com/2015/09/environmental-update-phmsa-osh-a-issue-guidance-midstream-facilities/> [<https://perma.cc/PD4K-DSUP>] (reviewing PHMSA’s and OSHA’s recent decision on what federal agency has regulatory authority, or jurisdiction, over midstream facilities).

16. See Letter from Troy E. Valenzuela, Vice President, Plains Pipeline, L.P., to R.M. Seeley, Dir., Sw. Region, Pipeline & Hazardous Materials Safety Admin. (July 2, 2012), [https://primis.phmsa.dot.gov/comm/reports/enforce/documents/420125020/420125020_Operator Response to Notice_07022012.pdf](https://primis.phmsa.dot.gov/comm/reports/enforce/documents/420125020/420125020_Operator%20Response%20to%20Notice_07022012.pdf) [<https://perma.cc/224Z-A7B2>]) (highlighting the interrelationship between pipeline operators and refinery owners to manage regulatory burdens on breakout tanks that are owned by a refinery but are used by a pipeline operator to relieve surges on the pipeline). Not only are pipeline operators and refineries tasked with adhering to stringent regulations from multiple federal and state agencies, they are also tasked with coordinating—at a great expense to the operator and refinery, and subsequently the consumers—amongst each other, to ensure compliance. *Id.*

17. *Id.*

18. *Id.*

protect the pipeline operator's facilities are properly inspected and tested under Part 195 and that such tests are properly documented, the regulation imposes an obligation on the pipeline operator to ensure that breakout tanks used to protect its system meet the requirements of [the applicable regulations].¹⁹

While PHMSA has indicated a desire to have a “single agency jurisdictional approach” to help operators and refinery owners determine which federal agency has authority, PHMSA has failed to provide operators with clear jurisdictional boundaries. That lack of clarity has created confusion within the industry, placing pipeline operators and refineries at risk of failing to comply with federal regulations.²⁰

19. *In re Plains Pipeline, LP*, CPF No. 4-2012-5020, 2013 WL 3788034, at *2. (Pipeline & Hazardous Materials Safety Admin. May 17, 2013).

20. *Compare* Memorandum of Understanding Between the Environmental Protection Agency and the Department of Transportation, 36 Fed. Reg. 24,080 (Dec. 18, 1971) [hereinafter Memorandum of Understanding] (“To the extent possible and considering agency resource capabilities and expertise, it is considered most practical to assign one agency the responsibility for regulating a complete operation at any one facility.”), and Memorandum of Agreement Between Richard B. Felder, Assoc. Adm’r, U.S. Dep’t of Transp., & Stephen D. Luftig, Dir., U.S. Envtl. Prot. Agency, to Office of Pipeline Safety Reg’l Dirs., Dep’t of Transp. 3 (Feb. 4, 2000), https://cms.phmsa.dot.gov/sites/phmsa.dot.gov/files/docs/2000_DOT_EPA.pdf [<https://perma.cc/56DB-FVM2>] [hereinafter Memorandum of Agreement] (“While DOT and EPA have different historical emphases, our respective goals are complementary. The mutual long term goals of EPA and DOT are . . . [t]hat as many facilities as possible are subject to single jurisdiction in the interest of regulatory efficiency.”), *with* Shirley J. Neff, President & CEO, Ass’n of Oil Pipelines, Comment Letter on Proposed Amendments to the Spill Prevention, Control, and Countermeasure (SPCC) Rule and the 1971 Memorandum of Understanding Between EPA and DOT 1 (Dec. 14, 2007), https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/oira_2050/2050_091509-2.pdf [<https://perma.cc/YSW5-QUPF>] (“[The] lack of clarity [between EPA and PHMSA jurisdiction] results in [operators and refineries] having to comply with different regulatory requirements mandated by each agency Dual regulation is resulting in unnecessary preparation, maintenance and training to duplicative plans, the burden of compliance with different regulations, and having inspections conducted by two different agencies for the same facility.”), and Robert Nichols & Lowell Rothschild, *OSHA v. PHMSA: The Tangled Web of Jurisdiction over Midstream Operations*, NORTH AM. OIL & GAS PIPELINES (July 20, 2015), <http://napipelines.com/osha-vs-phmsa-jurisdiction/> [<https://perma.cc/8NRQ-Q6RM>] (pointing to continued confusion in the oil and gas sector regarding whether PHMSA or OSHA has jurisdiction and stating that “efforts to reach some understanding about these jurisdictional issues have been complicated[.]” making it “unlikely that any particularly helpful guidance . . . will be forthcoming”). *See also* Letter from Troy E. Valenzuela to R.M. Seeley, *supra* note 16 (arguing PHMSA inspectors had not historically considered the above-ground storage tanks as breakout tanks during previous inspections, thus, the operator did not take steps to ensure compliance with Part 195 regulations as they were under the impression the above-ground storage tanks were not regulated by PHMSA).

II. HISTORY AND BACKGROUND

A. PHMSA's Modern History and Rapid Expansion

The Natural Gas Pipeline Safety Act of 1968 was the first statute in modern history to regulate pipeline safety.²¹ The act was amended by Congress in 1976, expanding the authority of the federal government to regulate liquid pipelines.²² Once the base federal regulations were established, Congress passed additional bills including the Pipeline Safety Reauthorization Act of 1988,²³ the Pipeline Safety Act of 1992,²⁴ the Accountable Pipeline Safety and Partnership Act of 1996,²⁵ the Pipeline Safety Improvement Act of 2002,²⁶ and the Norman Y. Mineta Research and Special Programs Improvement Act of 2004.²⁷ The Pipeline Transportation Safety Improvement Act of 2011 was promulgated in response to significant incidents in the industry.²⁸ The Act of 2011

21. Natural Gas Pipeline Safety Act of 1968, Pub. L. No. 90-481, 82 Stat. 720; *see also A Brief History of Federal Pipeline Safety Laws*, PIPELINE SAFETY TR., <http://pstrust.org/about-pipelines1/regulators-regulations/a-brief-history-of-federal-pipeline-safety-laws/> [<https://perma.cc/F2N5-RL6T>] (“The first statute regulating pipeline safety was the Natural Gas Pipeline Safety Act of 1968 . . .”).

22. Natural Gas Pipeline Safety Act Amendments of 1976, Pub. L. No. 94-477, 90 Stat. 2073.

23. Pipeline Safety Reauthorization Act of 1988, Pub. L. No. 100-561, 102 Stat. 2805.

24. Pipeline Safety Act of 1992, Pub. L. No. 102-508, 106 Stat. 3289.

25. Accountable Pipeline Safety and Partnership Act of 1996, Pub. L. No. 104-304, 110 Stat. 3793.

26. Pipeline Safety Improvement Act of 2002, Pub. L. No. 107-355, 116 Stat. 2985; *see* Carol M. Parker, *The Pipeline Industry Meets Grief Unimaginable: Congress Reacts with the Pipeline Safety Improvement Act of 2002*, 44 NAT. RES. J. 243, 257–63 (2004) (confirming the Safety Improvement Act of 2002 strengthened federal authority to regulate pipelines and “grew teeth” prior to being passed, signaling Congress’s intent to enforce “higher safety standards”).

27. Norman Y. Mineta Research and Special Programs Improvement Act, Pub. L. No. 108-426, § 108, 118 Stat. 2423 (2004).

28. Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011, Pub. L. No. 112-90, 125 Stat. 1904; *see* Britney Taylor, C.E., *The Impact of the Pipeline Safety Act of 2011 on the Industry*, CORROSIONPEDIA (Nov. 10, 2015), <https://www.corrosionpedia.com/2/2467/procedures/test/the-impact-of-the-pipeline-safety-act-of-2011-on-the-industry> [<https://perma.cc/5B6B-SXZ5>] (recognizing pipeline accidents cause the pipeline industry to receive negative public and media attention, pushing Congress to pass additional regulations to prevent pipeline failures from occurring, “even though pipelines are one of the safest and most reliable forms of energy transportation” in the United States). *But see* Parker, *supra* note 26, at 246 (arguing “a single, isolated accident has the potential to be catastrophic” and “a single pipeline accident can ‘injure hundreds of persons, affect thousands more, and cost millions of dollars’” (quoting NAT’L TRANSP. SAFETY BD., NTSB/SS-97/01, SAFETY STUDY: PROTECTING PUBLIC SAFETY THROUGH EXCAVATION DAMAGE PREVENTION, at v (1997))).

expanded the regulatory authority of the Department of Transportation drastically, authorizing the Department to:

- (1) Hire additional pipeline inspection and enforcement personnel[;]
- (2) Regulate biofuel pipelines [which were not previously regulated by the Department[;]
- (3) Provide pipeline safety training to state and local officials[; and]
- (4) Recover its costs in reviewing, inspecting, and overseeing proposed gas, hazardous liquid, or [NGL] pipeline construction . . . and operation projects that . . . use new technologies . . . or have a total cost exceeding \$2.5 billion.²⁹

In response to the expanded authority granted to the Department of Transportation by the Pipeline Act of 2011, industry experts advised:

Pipeline owners and operators should carefully monitor regulatory developments at DOT after the enactment of the Act. DOT is required to promulgate a number of new regulatory requirements, and has been provided with enhanced federal inspection and enforcement capabilities, as well as authority to impose stiffer potential penalties for violations. Many of the studies and reports required or authorized by the Act also may eventually lead to further regulatory or statutory requirements.³⁰

Most recently, the Protecting Our Infrastructure of Pipelines and Enhancing Safety Act of 2016 (PIPE ACT) was signed into law by President Barack Obama.³¹ The PIPE ACT of 2016 reauthorized PHMSA's administrative oversight and following the previous acts of enlarging PHMSA's jurisdiction, the Act "is a clear effort by Congress to expand and strengthen PHMSA's oversight authority[.]"³² Furthermore,

29. Thomas L. Strickland & H. David Gold, *Recently Enacted Pipeline Safety Act Will Increase Federal Oversight of Oil and Gas Pipelines*, WILMERHALE (Jan. 5, 2012), <https://www.wilmerhale.com/pages/publicationsandnewsdetail.aspx?NewsPubId=94953> [<https://perma.cc/RX49-4LKU>].

30. *Id.*

31. Protecting Our Infrastructure of Pipelines and Enhancing Safety Act of 2016, Pub. L. No. 114-183, 130 Stat. 514.

32. Kirstin E. Gibbs et al., *Pipeline and Hazardous Materials Safety Administration Reauthorized*, MORGAN LEWIS (June 29, 2016), <https://www.morganlewis.com/pubs/pipeline-and-hazardous-materials-safety-administration-reauthorized> [<https://perma.cc/C3BF-P5L2>]. *But see The 2017 Babst Calland Report- Upstream, Midstream and Downstream: Resurgence of the Appalachian Shale Industry; Legal and Regulatory Perspective for Producers and Midstream Operators*, BABST CALLAND (June 20, 2017),

PHMSA has a history, and favored approach, of interpreting existing regulations to expand its jurisdiction.³³ Much to the consternation of the industry, PHMSA interpreted existing regulations to extend its jurisdiction to a natural gas fractionation plant.³⁴ After determining existing regulations granted PHMSA the authority over midstream facilities, a months-long leak at an underground storage facility of methane³⁵ prompted PHMSA to further broaden its regulatory oversight to regulate underground gas storage

<http://www.babstcalland.com/news-article/2017-babst-calland-report-upstream-midstream-downstream-resurgence-appalachian-shale-industry-legal-regulatory-perspective-producers-midstream-operators/> [<https://perma.cc/E3VF-DL3W>] (“The Trump [A]dministration is signaling a fundamental shift in the energy policies established by the Obama [A]dministration. New executive orders and policies have been issued that promise to lead to more pipeline development, reduced federal oversight of the oil and gas industry[,] and increased access to oil and natural gas reserves.”). See also Megan Caldwell, *Trump Administration’s Regulatory Freeze Impacts Environmental, Health, Safety, and Pipeline Regulations*, HUSCH BLACKWELL (Feb. 16, 2017), <https://www.emergingenergyinsights.com/2017/02/trump-administrations-regulatory-freeze-impacts-environmental-health-safety-pipeline-regulations/> [<https://perma.cc/5N83-LF2C>] (discussing how pending and proposed rulemakings, including PHMSA’s practice of using advisory bulletins and guidance documents, may be postponed and subject to Trump’s regulatory freeze). However, because advisory bulletins and guidance documents are not new regulations but clarification of existing regulations and practices, PHMSA may continue to issue both until further direction is provided from the Trump Administration. *Id.*

33. See Caldwell, *supra* note 32 (“PHMSA is keen on issuing advisories and guidance documents in lieu of formal rulemakings . . .”).

34. See 49 C.F.R. § 195.1(b)(8) (2018) (excepting PHMSA’s regulations for “[t]ransportation of hazardous liquid or carbon dioxide through onshore production (including flow lines), refining, or manufacturing facilities or storage or in-plant piping systems associated with such facilities”); see also Letter from John A. Gale, Dir., Office of Standards & Rulemaking, U.S. Dep’t of Transp., to Wesley Christensen, Senior Vice President, NGL Operations, ONEOK NGL Pipeline, L.P. 3 (Feb. 28, 2012), [https://www.phmsa.dot.gov/sites/phmsa.dot.gov/files/legacy/interpretations/Interpretations/Pipeline/2012/ONEOK-PI-11-0012-02-28-2012-Part 194, 195.pdf](https://www.phmsa.dot.gov/sites/phmsa.dot.gov/files/legacy/interpretations/Interpretations/Pipeline/2012/ONEOK-PI-11-0012-02-28-2012-Part%20194%2C%20195.pdf) [<https://perma.cc/2LW6-DR58>] (rejecting the argument made by a fractionation plant that Part 195 allows the plant to claim an exception within § 195.1(b)(8) for production, refining, or manufacturing facilities and in-plant storage or piping systems); Rachel Giesber Clingman & Jacob Dweck, *The Trouble with New Rules for Natural Gas Processors*, LAW360 (Nov. 19, 2013, 3:36 PM), <https://www.law360.com/articles/488021/the-trouble-with-new-rules-for-natural-gas-processors> [<https://perma.cc/KDB9-G7F2>] (alerting the industry that PHMSA has coined new terminology to expand its jurisdiction to “midstream hazardous liquid pipeline storage facilities” in an effort to “describe a broad class of facilities that [PHMSA] claimed [are] within [its] jurisdiction”). See generally, *Natural Gas Processing Plant Data Now Available*, U.S. ENERGY INFO. ADMIN. (Oct. 25, 2012), <https://www.eia.gov/todayinenergy/detail.php?id=8530> [<https://perma.cc/HA32-FBAA>] (“Processing plants are midstream facilities that separate natural gas liquids (NGL) from natural gas.”). Processing plants and midstream facilities nomenclature will be used interchangeably during this article, as is common in the industry. *Id.*

35. Paige St. John, *229 Leaks Found in State’s Underground Gas Storage Facilities, Most Considered Minor*, L.A. TIMES (Mar. 23, 2016, 6:56 PM), <http://www.latimes.com/local/lanow/la-me-ln-gas-leaks-storage-wells-20160322-story.html> [<https://perma.cc/NTN8-GH72>].

tanks.³⁶ PHMSA issued a rule revising “Federal [P]ipeline [S]afety regulations to address critical safety issues related to downhole facilities, including wells, wellbore tubing, and casing, at underground gas storage facilities[,]” effectively expanding its jurisdiction.³⁷ It is imperative that pipeline operators and refineries have a clean and concise understanding of what assets PHMSA will regulate. There are high costs involved in: complying with federal regulations; receiving and dealing with any notices of violations; and the critical nature of meeting the energy needs of the United States.³⁸ Specifically, experts in the industry are questioning whether assets traditionally considered part of the “refining” process will continue to remain exempt from PHMSA jurisdiction “to the first pressure regulation device at the perimeter of a facility[,]” or if PHMSA will expand its jurisdiction further into the refinery fence line.³⁹ Historically, PHMSA would regulate the pipeline and pipeline appurtenances⁴⁰ to the

36. See Lisa Song, *U.S. Pipeline Agency Pressed to Regulate Underground Gas Storage*, INSIDECLIMATE NEWS (Feb. 26, 2016), <https://insideclimatenews.org/news/26022016/phmsa-pipeline-regulator-pressed-regulate-underground-natural-gas-storage-aliso-canyon-methane> [https://perma.cc/DRB9-7SEJ] (criticizing the American Petroleum Institute guidelines on underground storage tanks as insufficient and noting the White House Office of Management and Budget Committee has been urged to swiftly enable PHMSA to regulate underground storage tanks).

37. *Underground Natural Gas Storage*, PIPELINE & HAZARDOUS MATERIALS SAFETY ADMIN., <https://www.phmsa.dot.gov/pipeline/underground-natural-gas-storage/underground-natural-gas-storage> [https://perma.cc/YC5G-X9S4]; see 49 C.F.R. § 191.1(a) (prescribing the “requirements for the reporting of incidents, safety-related conditions, annual pipeline summary data, National Operator Registry information, and other miscellaneous conditions by operators of underground natural gas storage facilities and natural gas pipeline facilities located in the United States or Puerto Rico”).

38. See Clingman & Dweck, *supra* note 34 (“The potential expansion of [P]art 195 would obligate companies to reassess physical assets and create new compliance programs and may cause confusion regarding what specific regulatory rules or standards will be applied to midstream facilities.”).

39. *Id.*; see Telephone Interview with John A. Jacobi, P.E., J.D., Regulatory Programs & Principal, G2 Partners, LLC (Oct. 5, 2017) (generally discussing whether PHMSA will regulate assets traditionally considered refinery assets exempt from Part 195); see also Letter from George W. Tenley, Jr., Assoc. Adm’r, Pipeline Safety, to Amy Ng, Attorney, Legal Dep’t, Conoco Inc. 2 (Mar. 25, 1991), <https://www.phmsa.dot.gov/sites/phmsa.dot.gov/files/legacy/interpretations/Interpretation%20Files/Pipeline/1991/PI91008.pdf> [https://perma.cc/2AR6-FDN7] (“If the operator has adequate alternative means to control pressure in the pipeline outside the refinery, then we consider the in-plant piping to end and the regulated pipeline to begin at the boundary of the refinery grounds, which usually is marked by a fence.”).

40. See 49 C.F.R. § 195.2 (“*Pipeline or pipeline system* means all parts of a pipeline facility through which a hazardous liquid or carbon dioxide moves in transportation, including, but not limited to, line pipe, valves, and other appurtenances connected to line pipe, pumping units, fabricated assemblies associated with pumping units, metering and delivery stations and fabricated assemblies therein, and breakout tanks.”).

demarcation point at the refinery fence line if the operator had a pressure control device⁴¹ outside of refinery grounds,⁴² or to the pressure control device on refinery grounds.⁴³ It is evident that Congress is rapidly expanding the Department of Transportation's regulatory authority, granting PHMSA the ability to regulate assets traditionally considered exempt refining, or storage or in-plant piping systems associated with refining facilities.⁴⁴ Because of PHMSA's continued regulatory expansion, pipeline operators and refineries should anticipate that PHMSA will enter the refinery fence line⁴⁵ and regulate above-ground storage tanks used predominately as part of the refining process, but on infrequent occasions used for the continued transportation of product, as breakout tanks, subject to Part 195 regulations.⁴⁶

41. *Id.* § 195.428; *see generally* CROSBY VALVE INC., TECHNICAL DOCUMENT NO. TP-V300, CROSBY PRESSURE RELIEF VALVE ENGINEERING HANDBOOK 2-1 (1997) (“A pressure relief valve is a safety device designed to protect a pressurized vessel or system during an overpressure event. An overpressure event refers to any condition [that] would cause pressure in a vessel or system to increase beyond the specified design pressure or maximum allowable working pressure (MAWP).”).

42. *See* Letter from Dir. of Sec. & Risk Mgmt. Issues, Am. Fuel & Petrochemical Mfrs., to U.S. Dep't of Transp., Pipeline & Hazardous Materials Safety Admin. (Dec. 1, 2014), https://www.afpm.org/uploadedFiles/Content/Policy_Positions/Agency_Comments/Documents/NPMS%20Comments%20FINAL.pdf [<https://perma.cc/Z7B3-9XUG>] (arguing PHMSA does not have jurisdictional authority to regulate assets within the refinery fence line). The American Fuel and Petrochemical Manufacturers pointed to PHMSA's 1971 Memorandum of Understanding with the EPA to argue, “Although pipelines may be physically connected to refineries, legal, business, and jurisdictional boundaries between the entities exist.” *Id.*

43. Letter from George W. Tenley, Jr. to Amy Ng, *supra* note 39.

44. *See* Gibbs et al., *supra* note 32 (stating “[t]he newly enacted legislation further bolsters PHMSA's growing oversight of storage and pipeline transport facilities” and has significantly increased funding to PHMSA, authorizing up to “\$134 million for fiscal years 2016 through 2019” in spending).

45. *See* ExxonMobil Refining & Supply Co., CPF No. 5-2005-5007, 2009 WL 7810541, at *2-3 (Pipeline & Hazardous Materials Safety Admin. July 23, 2009) (final order) (disagreeing with the refinery's argument that PHMSA's regulatory authority ends at the piping at the fence line).

46. 49 C.F.R. § 195.2; *see* BO “Breakout” Tanks, DEP'T TRANSP., at 3-4, http://www.psc.alabama.gov/Energy/gps/2014_pres/PHMSA_Breakout_tanks.pdf [<https://perma.cc/7U9A-FDRZ>] (demonstrating how product is routed to and from above-ground storage tanks located on refinery grounds). Pipelines are used to route petroleum products to above-ground storage tanks located inside the refinery fence. *Id.* at 5. Once routed to the above-ground storage tank, product can be routed for non-transportation purposes for additional refining, routed back into a pipeline for continued transportation subsequently making the tank a breakout tank, or commingled or blended in the tank with product streams and transported back into the pipeline for continued transportation. *Id.* at 10.

B. *PHMSA Obtains Authority from Statutes, Regulations, Letters of Interpretation, Letters of Agreements, and Memorandums of Understanding*

PHMSA has long-established regulatory authority through letters of interpretation⁴⁷ on issues that are non-substantive in nature.⁴⁸ Consistent with the EPA and similar agencies, PHMSA's approach is acceptable so long as "Congress has not directly addressed the precise question at issue[.]"⁴⁹ Reviewing the letters of interpretation and memorandums of understanding between PHMSA and the EPA demonstrates a history of PHMSA progressively clarifying its regulatory authority over assets inside the refinery fence line.⁵⁰ In 1971, PHMSA entered into a memorandum of understanding with the EPA to provide clarity to operators and refinery owners on which agency had jurisdictional boundaries over "transportation-related" and "non[-]transportation-related" facilities.⁵¹ The memorandum confirmed PHMSA would have jurisdiction over transportation-related facilities, whereas the EPA would have jurisdiction over non-transportation-

47. See Defendants' Response to Plaintiffs' Motion for Temporary Restraining Order at 5 n.4, *ONEOK Hydrocarbon, L.P. v. U.S. Dep't of Transp.*, No. 12-CV-660-JHP-FHM, 2012 WL 12296670 (N.D. Okla. Dec. 6, 2012) (arguing a challenge to an interpretation letter is effectively challenging the regulation itself).

The fact that the interpretations that Plaintiffs challenge are in PHMSA letters rather than in regulatory text or an agency order is of no moment. The letters, even if deemed by the Court to constitute final agency action, have no legal force independent of the regulations that they interpret. Accordingly, for the purpose of applying Section 60119, there is no practical or logical distinction between PHMSA's interpretation of its PSA regulations and the regulations themselves: a challenge to PHMSA's interpretation of a regulation is effectively a challenge to that regulation.

Id.

48. See *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984) (deferring authority to administrative agencies on interpreting statutes so long as the interpretation does not conflict with Congress's intention); *Am. Bus. Ass'n v. United States*, 627 F.2d 525, 526 (D.C. Cir. 1980) (stating non-substantive "general statements of policy" do not require an administrative agency to follow the "notice-and-comment procedures" required by section 553 of the Administrative Procedure Act (quoting 5 U.C.A. § 553 (2012))); see also Caldwell, *supra* note 32 ("PHMSA is keen on issuing advisories and guidance documents in lieu of formal rulemakings . . .").

49. See *Chevron*, 467 U.S. at 843 (clarifying administrative agencies are given great deference to interpret existing regulations and their power "to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress" (quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974))).

50. Memorandum of Understanding, *supra* note 20, at 24,080–81; Memorandum of Agreement, *supra* note 20.

51. Memorandum of Understanding, *supra* note 20, at 24,080.

related facilities.⁵² The memorandum further clarified that the Department of Transportation would generally be responsible for regulating the movement of regulated products by pipeline, whereas the EPA would generally be responsible for regulating refining facilities.⁵³ Additionally, the memorandum stated that non-transportation activities would include “[o]il storage facilities including all . . . appurtenances related thereto, as well as . . . terminal oil storage facilities, . . . but excluding in-line or breakout storage tanks needed for the continuous operation of a pipeline system and any terminal facility . . . integrally associated with the handling or transferring of oil[.]”⁵⁴ Where the memorandum validated PHMSA’s existing authority to regulate breakout tanks under Part 195, the memorandum did not specifically discuss tanks that are used predominately for refinery purposes and only on occasion used to route product for the continued transportation by pipeline.⁵⁵ An additional memorandum of understanding was entered into on February 4, 2000 between PHMSA and the EPA to provide further clarity, however, the agreement resulted in even more confusion across the industry.⁵⁶ The agreement provided diagrams indicating that an above-ground storage tank, which stored oil and also served as a breakout tank, would be subject to PHMSA’s jurisdiction.⁵⁷ PHMSA utilized both memoranda to review the issue of whether PHMSA will claim jurisdiction over tanks and tank farms, used for blending or commingling products, located inside refineries.⁵⁸ Ultimately, PHMSA indicated its regulatory authority will expand to *any asset* used, *even rarely*, for the continued transportation of petroleum products regulated by

52. Neff, *supra* note 20, at 2.

53. Memorandum of Understanding, *supra* note 20, at 24,080–81; Memorandum of Agreement, *supra* note 20.

54. Memorandum of Understanding, *supra* note 20, at 24,080–81.

55. 49 C.F.R. § 195.2 (2017); Memorandum of Understanding, *supra* note 20, at 24,080–81.

56. Memorandum of Agreement, *supra* note 20; see API PIPELINE COMM. ON ENV’T, HEALTH & SAFETY (CEHS), RATIONALE SUPPORTING PHMSA’S SOLE JURISDICTION OVER FACILITIES PRIMARILY PERFORMING PIPELINE TRANSPORTATION-RELATED ACTIVITIES i (2007) (discussing the letter added to the confusion in the industry because it “left the door wide open for too much interpretation and caused additional confusion through the attachment of ten diagrams intended to illustrate jurisdictional boundaries between DOT and [the] EPA”).

57. Memorandum of Agreement, *supra* note 20.

58. See MATHPRO, AN INTRODUCTION TO PETROLEUM REFINING AND THE PRODUCTION OF ULTRA LOW SULFUR GASOLINE AND DIESEL FUEL 16 (2011) (blending occurs when a refinery “[c]ombine[s] blendstocks [such as gasoline, jet and diesel] to produce finished products that meet product specifications and environmental standards”).

PHMSA.⁵⁹ In response to the second memorandum, the Association of Oil Pipelines (AOPL), on behalf of its members,⁶⁰ put forth a proposition that PHMSA and the EPA should approach jurisdictional decisions holistically, by considering the “primary function of the facility.”⁶¹ Applying the primary function test, the AOPL recommended that there should never be dual jurisdiction for spill prevention purposes.⁶² If the above-ground storage tanks are located in a processing plant with a primary purpose of production and storage, the above-ground storage tanks should not be considered transportation-related pipeline facilities subject to Part 195 jurisdiction without additional input from the industry.⁶³ PHMSA has declined to allow the primary purpose test proposed by the industry to apply when determining whether the asset would be considered used for the purpose of transportation or transportation-related activities.⁶⁴

59. See 49 C.F.R. § 195.2 (“*Hazardous liquid* means petroleum, petroleum products, anhydrous ammonia, or ethanol.”); see also Letter from Cesar De Leon, Dir. of Pipeline Safety, Regulatory Programs, to Robert M. Mendell, Horan & Devlin (Oct. 9, 1991), <https://www.phmsa.dot.gov/sites/phmsa.dot.gov/files/legacy/interpretations/Interpretation%20Files/Pipeline/1991/PI91030.pdf> [<https://perma.cc/R84Q-NTUT>] (validating Part 195 applies to above-ground storage tanks if the tank meets the definition of a “breakout tank regardless of the level of activity of the tank” if used as a breakout tank).

60. See *About AOPL*, ASS’N OIL PIPE LINES, <http://www.aopl.org/about-aopl/> [<https://perma.cc/R7PM-YX6X>] (“AOPL is a nonprofit organization whose membership is comprised of owners and operators of liquid pipelines. . . . [AOPL represents pipeline operators] before Congress, regulatory agencies, and the courts . . . and [a]cts as an information clearinghouse for the public, media, and pipeline industry regarding liquid pipeline issues.”).

61. Neff, *supra* note 20, at 2.

62. See *id.* (proposing dual jurisdiction for spill prevention purposes is unnecessary as PHMSA “specifically express[es] an intent, not only to promote pipeline safety, but also to protect the environment”). Echoing the goals of the EPA, PHMSA has made multiple statements outlining objectives in administering and enforcing the regulations to “diminish the environmental consequences of spills[,]” to “protect the environment[,]” and to implement integrity management programs that protect “commercially navigable waterways[,]” indicating a strong policy of protecting the environment. *Id.* at 2–3; see also Parker, *supra* note 26, at 280 (arguing pipeline safety should be removed from PHMSA’s federal oversight and placed within the EPA’s jurisdictional oversight).

63. Neff, *supra* note 20, at 2.

64. Defendants’ Response to Plaintiffs’ Motion for Temporary Restraining Order at 5 n.4, ONEOK Hydrocarbon, L.P. v. U.S. Dep’t of Transp., No. 12-CV-660-JHP-FHM, 2012 WL 12296670 (N.D. Okla. Dec. 6, 2012); Letter from John A. Gale to Wesley Christensen, *supra* note 34. When presented with such an argument, PHMSA responded:

[The] novel argument that the presence of a fractionation plant on the grounds of a mid-stream transportation storage facility transforms not only the fractionation plant, but the entire transportation storage facility into a refinery and thus qualifies the entire facility for a blanket-type exemption is inconsistent with the purpose, intent, and express terms of [PHMSA regulations], including the express authority provided by [PHMSA] to regulate the safety of pipeline

Because PHMSA rejected the primary purpose test, it is clear that if a pipeline operator or refinery used an above-ground storage tank inside the refinery fence line as a breakout tank, even on rare occasions and even if the processing facility is primarily used for storage and production purposes, PHMSA will treat the above-ground storage tank as a breakout tank subject to Part 195 regulations.⁶⁵ In other words, if an operator or refinery is trying to determine whether PHMSA will consider an above-ground storage tank a breakout tank subject to Part 195, the operator or refinery will need to conduct an analysis of the asset to determine if (1) the above-ground storage tank is used to “relieve surges in a hazardous liquid pipeline system” or to “receive and store hazardous liquid transported by a pipeline for reinjection and continued transportation by pipeline[;]”⁶⁶ and (2) whether the above-ground storage tank is used, even *rarely* or occasionally, as a breakout tank.⁶⁷ However, additional analysis may still be required based on PHMSA’s recent litigation with a natural gas fractionation plant.⁶⁸

III. THE FALLOUT OF PHMSA’S REGULATORY EXPANSION: OPERATORS CHALLENGE THE LEGALITY OF THE ADMINISTRATION’S AUTHORITY TO REGULATE ASSETS LOCATED ON REFINERY GROUNDS

A. *Natural Gas Fractionation Plant Initiates Litigation Challenging PHMSA’s Authority to Inspect and Regulate Assets Previously Subject to OSHA’s Jurisdiction*

The challenges of pipeline operators and refineries to determine what agency has jurisdictional authority escalated when a natural gas liquids

transportation storage facilities and protect the public from the risks associated with the hazardous, toxic, and highly-flammable products transiting these facilities.

Defendants’ Response to Plaintiffs’ Motion for Temporary Restraining Order at 19, *ONEOK Hydrocarbon, L.P.*, 2012 WL 12296670.

65. 49 C.F.R. § 195.2 (2017).

66. *Id.*

67. *Id.*; Letter from John A. Gale to Wesley Christensen, *supra* note 34; Letter from Cesar De Leon to Robert M. Mendell, *supra* note 59.

68. *ONEOK Hydrocarbon, L.P. v. U.S. Dep’t of Transp.*, No. 12-CV-660-JHP-FHM, 2012 WL 7853812, at *1 (N.D. Okla. Dec. 7, 2012); see E. Nichole Saunders, *Report of the Compliance & Enforcement Committee*, 34 ENERGY L.J. 345, 367 (2013) (synopsizing that pipeline safety litigation initiated by pipeline operators against PHMSA is very rare, with minimal cases filed against PHMSA in the last decade).

fractionation plant⁶⁹ located in Kansas filed a Motion for Temporary Restraining Order and a Motion for Preliminary Injunction to stay an inspection scheduled by PHMSA.⁷⁰ Because the plant asserted it met the definition of a “refining facility,” the plant maintained PHMSA did not have jurisdiction over their facilities,⁷¹ except for over certain inbound and outbound pipelines and pressure control devices associated with the pipelines.⁷² Additionally, the plant emphasized the refinery was regulated by other federal agencies,⁷³ and if PHMSA conducted the inspection, it was

69. *What is the Difference Between Crude Oil, Petroleum Products, and Petroleum?*, U.S. ENERGY INFO. ADMIN. (Dec. 7, 2016), <https://www.eia.gov/tools/faqs/faq.php?id=40&t=6> [<https://perma.cc/H6FU-XHFM>]. The terms “refinery,” “plant,” “processing facility,” “petroleum,” and “oil” will be used interchangeably, as standard nomenclature in the industry. *Id.*

Petroleum products are produced from the processing of crude oil and other liquids at petroleum refineries, from the extraction of liquid hydrocarbons at natural gas processing plants, and from the production of finished petroleum products at blending facilities. Petroleum is a broad category that includes both crude oil and petroleum products. The terms *oil* and *petroleum* are sometimes used interchangeably.

Id.

70. *See* 49 U.S.C. § 60102 (2018) (granting the Secretary of Transportation enforcement and regulatory authority to take action, including scheduled inspections, to protect the public against risks to property and life associated with operations of pipelines and refineries).

An officer, employee, or agent of the Department of Transportation . . . may enter premises to inspect the records and property of a person at a reasonable time and in a reasonable way to decide whether a person is complying with this chapter and standards prescribed or orders issued

49 U.S.C. § 60117(c) (2018).

71. *ONEOK*, 2012 WL 7853812, at *1; *see* Press Release, ONEOK Inv’r Relations, ONEOK Partners Subsidiaries Seek Ruling on Regulatory Agency Jurisdiction (Dec. 3, 2012), <http://ir.oneok.com/news-and-events/press-releases/2012/12-03-2012> [<https://perma.cc/HX2C-GF7J>] (informing the industry of ONEOK Partners’ ongoing disagreement with PHMSA regarding whether PHMSA has jurisdiction over the fractionation plant currently regulated by OSHA). ONEOK stated, “[ONEOK] believe[s] PHMSA is outside its jurisdictional authority by inspecting and attempting to impose different regulations on the assets and operating procedures currently regulated by OSHA and the EPA. [ONEOK] believe[s] that having different rules within the same plant could result in misinterpretation and confusion[.]” *Id.*

72. *See* 49 U.S.C. § 60101(a)(22)(B)(ii) (excluding “onshore production, refining, or manufacturing facilities” from PHMSA’s jurisdiction); Letter from George W. Tenley to Amy Ng, *supra* note 39 (validating refining facilities are excluded from PHMSA’s jurisdiction but a definition for refinery is not provided in the regulations). However, to determine whether the facility would be considered a refining facility, PHMSA considers that if a “facility is involved in one of the processes of a refinery, [PHMSA] consider[s] it a refining facility.” *Id.*

73. *ONEOK*, 2012 WL 7853812, at *1. During a joint meeting between PHMSA and OSHA, both regulatory agencies, through proposed guidance, confirmed jurisdiction over midstream facilities. Caples & Steele, *supra* note 15. The practical result of the meeting is that pipeline operators and

highly probable that in-plant refinery piping would fail to meet the standards mandated by PHMSA.⁷⁴ A failure to comply with PHMSA standards can result in a notice of probable violation and significant civil penalties, ranging from \$1,000 to \$200,000 for each violation, with a maximum of \$2,000,000 in civil penalties possible.⁷⁵ Also, if refinery and pipeline owners and operators fail to comply with applicable federal and state laws, the fines leveraged for non-compliance against the company will subsequently cause the public to perceive the owners and operators as having little regard for federal regulations, public safety, and the environment.⁷⁶ Complying with regulations is time consuming and costly, and it is imperative that refinery owners and pipeline operators adhere to the appropriate regulations to ensure, first and foremost, compliance with federal and state laws, and secondly, though equally important, to protect workers, the community, and pipeline and refinery assets.⁷⁷ Moreover, refineries “take painstaking efforts”⁷⁸ to adhere to OSHA Process Safety Management

refineries will be regulated at a minimum by three federal administrative agencies: the EPA, OSHA and PHMSA. *Id.*

PHMSA provides regulatory oversight “in transportation[.]” including transmission or mainlines entering and exiting midstream facilities or storage units. See 49 C.F.R. Parts 192 and 195. OSHA regulations provide oversight *within* midstream facilities under the Process Safety Management regulations. See 29 C.F.R. Part 1910. Finally, EPA regulates certain aspects of midstream facilities through its Risk Management Program (RMP) and Spill Prevention, Controls and Countermeasures (SPCC) program. See 40 C.F.R. Part 68 and 40 C.F.R. Part 112.

Id.

74. ONEOK, 2012 WL 7853812, at *1.

75. 49 U.S.C. § 60122 (2018).

76. See Ernest J. Rammelt, *Presidential Paper*, PIPELINE (Indep. Oil & Gas Assoc. of N.Y., Hamburg, N.Y.), Winter 2015, at 1, 2 <https://www.iogany.org/files/Winter2015PipelineNewsletter.pdf> [<https://perma.cc/RRG8-RBKQ>] (asserting the public at large has a very negative outlook on the energy sector and has condemned the industry “because of a culture unwilling to be educated and not wanting to accept the inconvenient truth that [the energy sector], when allowed to do what [the energy sector] do[es] best, has raised the quality of living for numerous societies around the world”).

77. See *Pipeline Safety*, ENERGY API, <http://www.api.org/oil-and-natural-gas/wells-to-consumer/transporting-oil-natural-gas/pipeline/pipeline-safety> [<https://perma.cc/ZH6P-UHTL>] (affirming the “pipeline industry has made a number of commitments to move towards [its] goal of zero incidents, from using the latest technologies, to creating recommended practices with regulators and forming industry work groups to share best practices”). Moreover, the industry spent over \$2.2 billion in 2014 ensuring that pipelines and associated infrastructure are safe and reliable. *Id.*

78. Amanda E. Ferguson, *PHMSA Pushes Into Midstream Facilities*, JACKSON KELLY PLLC (Dec. 5, 2013), <http://safety-health.jacksonkelly.com/2013/12/phmsa-pushes-into-midstream-facilities.html> [<https://perma.cc/3W54-KDHW>]; see *Refineries Urged to Comply with Process Safety Standard*, RELIABLE PLANT, <http://www.reliableplant.com/Read/18142/refineries-urged-to-comply-with-process-safety-standard> [<https://perma.cc/FFZ3-FG6N>] (asserting OSHA is working with and urging

(PSM)⁷⁹ required programs and the EPA’s Risk Management Plan—both regulatory agencies have worked closely with refineries for decades to ensure compliance—whereas PHMSA is “unfamiliar with midstream operations”⁸⁰ and PHMSA regulations “do not logically relate to the low pressure operations inside processing facilities that the agency [PHMSA] now intends to regulate.”⁸¹

B. *PHMSA Broadens Regulatory Authority to Midstream Facilities and Underground Natural Gas Storage Tanks*

Despite the perception PHMSA would not regulate refinery assets traditionally subject to OSHA and EPA regulations, PHMSA broadened their regulatory oversight in response to the challenges brought forth by the plant.⁸² Specifically, PHMSA issued final orders and letters of interpretation declaring midstream facilities,⁸³ traditionally considered in the industry to be exempt as “in-plant” refinery piping, are now subject to Part 195 jurisdiction.⁸⁴ The decision made by PHMSA to regulate “in-plant refinery piping” for midstream facilities sent shockwaves throughout the industry, and pipeline operators and refineries are concerned that PHMSA may continue to expand regulations—despite EPA and OSHA currently regulating the assets—unnecessarily increasing regulatory oversight.⁸⁵ Besides sending shockwaves throughout the industry, PHMSA’s decision further compounded the issue of what federal agency has jurisdictional

refineries to comply with mandatory process safety management standards including the continued development of comprehensive safety management systems).

79. 29 C.F.R. § 1910.1 (2018); OCCUPATIONAL SAFETY & HEALTH ADMIN., PROCESS SAFETY MANAGEMENT FOR PETROLEUM REFINERIES: LESSONS LEARNED FROM THE PETROLEUM REFINERY PROCESS SAFETY MANAGEMENT NATIONAL EMPHASIS PROGRAM (2017).

80. Ferguson, *supra* note 78.

81. *Id.*

82. *See* Clingman & Dweck, *supra* note 34 (discussing how PHMSA interpreted Part 195 to apply to processing facilities that were traditionally regulated by other federal agencies including OSHA and the EPA).

83. *See* Letter from John A. Gale to Wesley Christensen, *supra* note 34, at 3 (“[T]he exception in § 195.1(b)(8) applies to any facilities at the [fractionation] plant that are used for the production, refining, or manufacturing of NGLs, including any associated storage or in-plant piping systems as defined in § 195.2.”).

84. *See* 49 C.F.R. § 195.1(b)(8) (2018) (excepting PHMSA’s regulations for “[t]ransportation of hazardous liquid or carbon dioxide through onshore production (including flow lines), refining, or manufacturing facilities or storage or in-plant piping systems associated with such facilities”).

85. *See* Ferguson, *supra* note 78 (“Uncertainty abounds in the wake of PHMSA’s newly expanded ideas of its own jurisdiction. Operators should prepare for increased regulation of previously exempted facilities.”).

authority over specific assets inside the refinery fence line that may involve non-transportation activities.⁸⁶ Whereas the situation involving the natural gas fractionation plant did not specifically involve issues concerning above-ground storage tanks, the methodology PHMSA employed to determine jurisdictional oversight can be used to analyze the issue of whether PHMSA will further expand jurisdiction to above-ground storage tanks located inside refineries that are predominately used for purposes other than continued transportation of petroleum products by pipeline.⁸⁷ Currently, PHMSA has jurisdictional authority to regulate above-ground storage tanks that meet the definition of a breakout tank.⁸⁸ However, refineries and natural gas fractionation plants also have above-ground storage tanks, associated with pipeline transportation, that *are not* used directly for pipeline transportation, but rather, have a primary function of “storage of product from a refining or production activity[.]”⁸⁹ Because these tanks have a primary function other than continued transportation of regulated petroleum products, an argument has been put forth by the industry that above-ground storage tanks used for a primary purpose other than pipeline transportation should be exempt from PHMSA regulations and regulated *only* by the EPA and OSHA.⁹⁰ As previously addressed, PHMSA answered the proposed “primary function test” in the negative, refusing to allow the industry to apply the test to determine whether an above-ground storage tank would be considered a breakout tank subject to

86. See Nichols & Rothschild, *supra* note 19 (bringing forth the concern of the jurisdictional complexities created by PHMSA’s decision to regulate midstream facilities, specifically, that it is “unlikely that any particularly helpful guidance, such as a memorandum of understanding among these federal agencies [(OSHA, EPA, and PHMSA)] clearly demarcating their jurisdiction over midstream assets, will be forthcoming anytime soon”).

87. See *Fact Sheet: Aboveground Storage Tanks*, *supra* note 13 (providing a diagram demonstrating the role of above-ground storage tanks in transporting petroleum products by pipeline).

88. See 49 C.F.R. § 195.2 (defining a breakout tank as “a tank used to (a) relieve surges in a hazardous liquid pipeline system or (b) receive and store hazardous liquid transported by a pipeline for reinjection and continued transportation by pipeline”).

89. Neff, *supra* note 20, at 2.

90. *Id.*; see *Aboveground Storage Tanks (ASTs)*, FEDCENTER.GOV., <https://www.fedcenter.gov/assistance/facilitytour/tanks/aboveground/index.cfm?> [<https://perma.cc/UJX8-2H2V>] (validating the authority of the EPA to regulate above-ground storage tanks as promulgated in 40 C.F.R. 112, which “applies to any owner or operator of a non-transportation-related onshore or offshore facility engaged in drilling, producing, gathering, storing, processing, refining, transferring, distributing, using, or consuming oil and oil products, which due to its location, could reasonably be expected to discharge oil in quantities that may be harmful”).

Part 195 jurisdiction.⁹¹

In addition, the natural gas fractionation plant poised the following question to PHMSA, “Is the underground storage tank at the . . . facility (here, underground caverns) ‘storage associated with refining’ and, as such, within the exception set forth in § 195.1(b)(8) and, therefore, not subject to PHMSA’s jurisdiction?”⁹² PHMSA affirmatively answered that if even “some”⁹³ of the products received at the natural gas processing facility are stored within the refinery fence line and deposited back into the pipeline structure without processing, PHMSA’s jurisdiction would extend into the refinery to the wellhead site valve at the underground storage tank.⁹⁴ Likewise, PHMSA rejected the argument that the terminal was a refinery excepted from Part 195 regulations because, while the fractionation process involved the separation of compounds, no actual chemical change took place.⁹⁵ PHMSA clarified that a refinery “is a facility in which refined products are produced by changing the chemical and physical characteristics of petroleum, exclusive of the process of separating and removing gas (as well as other compounds) and generally purifying the petroleum.”⁹⁶ This is particularly problematic for refineries which have above-ground storage

91. Neff, *supra* note 20. PHMSA did not outright reject the primary function test; rather, PHMSA, through letters of interpretation to the industry, clearly declined to follow the recommended test put forth by the AOPL as demonstrated by its decision to regulate assets within a midstream natural gas fractionation plant. Letter from John A. Gale to Wesley Christensen, *supra* note 34. “The minimum Federal safety standards in Part 195 apply to *any* facilities at the [fractionation] plant that are used *directly* for the transportation of hazardous liquids by pipeline, but not to any facilities that are *only* used to fractionate NGLs.” *Id.* at 3 (emphasis added).

92. Letter from John A. Gale to Wesley Christensen, *supra* note 34, at 2.

93. See Letter from Vanessa Allen Sutherland, Chief Counsel, Pipeline & Hazardous Materials Safety Admin., to Vince Murchison, Esq., SNR Denton, US LLP 4 (Aug. 8, 2012), [https://www.phmsa.dot.gov/sites/phmsa.dot.gov/files/legacy/interpretations/Interpretations/Pipeline/2012/ONEOK-PI-11-0012-02-28-2012-Part 194, 195.pdf](https://www.phmsa.dot.gov/sites/phmsa.dot.gov/files/legacy/interpretations/Interpretations/Pipeline/2012/ONEOK-PI-11-0012-02-28-2012-Part%20194,%20195.pdf) [<https://perma.cc/2LW6-DR58>] (confirming if even some of the product received in the refinery or terminal is “transported through shared manifolds or other shared piping on the grounds of the facility to outgoing pipelines without undergoing fractionation processing or being stored underground, *all of this piping and appurtenances* are subject to . . . Part 195 regulations” (emphasis added)).

94. Letter from John A. Gale to Wesley Christensen, *supra* note 34, at 4. *But see* Pipeline Safety: Safety of Underground Natural Gas Storage Facilities; Petition for Reconsideration, 82 Fed. Reg. 28,224 (June 20, 2017) (to be codified at 49 C.F.R. § 191.1 (2017)) (issuing an interim final ruling requiring operators for existing underground storage tanks to develop procedures and policies to comply with Part 195 requirements of underground storage tanks).

95. Letter from John A. Gale to Wesley Christensen, *supra* note 34.

96. Letter from Vanessa Allen Sutherland to Vince Murchison, *supra* note 93, at 3.

tanks that are predominately regulated by the EPA and OSHA⁹⁷ and are used for “non-transportation” purposes, such as blending and commingling, but may on rare occasions be used in the “transportation” of a regulated product for reinjection into a pipeline.⁹⁸ PHMSA clearly rejected the argument put forth by the fractionation plant that the natural gas entering the facility was part of the refining process because the product did not undergo a chemical change prior to being reinjected into the pipeline for continued transportation.⁹⁹ Specifically, PHMSA stated that because the plant could divert the products to storage for commingling without additional processing, and then reinject into the pipeline for continued transportation, the piping would not meet the exception set forth in Part 195.¹⁰⁰ Commingling of products is described as “involv[ing] the mixing of homogenous goods, which maintain their identity after mixing. The specific goods themselves remain unaltered[,] but it is impossible to identify the precise components within the greater bulk[.]”¹⁰¹ Blending goods is described as “involv[ing] the mixing of heterogeneous goods, which essentially lose their identity in the mixing process. For example, raw materials [that] are used in a [refining] process are often irreversibly combined to create a new product.”¹⁰² Differing from commingling and blending, chemically changing the petroleum product involves a complex processing including, but not limited to, distillation, cracking, treating, and reforming that ultimately changes the composition of the substance.¹⁰³

97. See OCCUPATIONAL SAFETY & HEALTH ADMIN., *supra* note 79, at 3 (confirming OSHA’s process safety management applies to refining facilities and strongly urging refineries to establish systems to conform with OSHA requirements).

98. See Neff, *supra* note 20, at 2 (outlining the differences between transportation-related activities and non-transportation-related activities).

99. Letter from John A. Gale to Wesley Christensen, *supra* note 34, at 3.

100. 49 C.F.R. § 195.1(b)(8) (2018); see Letter from John A. Gale to Wesley Christensen, *supra* note 34, at 3 (confirming if “[p]roduct is also transported through the manifold piping and directly back into regulated pipelines without being processed[.]” PHMSA’s jurisdiction would extend to the assets and Part 195 would apply).

101. Angela Wallace, *Title Troubles – Commingled and Blended Petroleum*, ANDREWS KURTH (June 2015), <https://www.andrewskurth.com/insights-1229.html> [<https://perma.cc/V9MN-WF9P>].

102. *Id.*

103. *Processing & Refining Crude Oil*, CHEVRON PASCAGOULA REFINERY, <http://pascagoula.chevron.com/abouttherefinery/whatwedo/processingandrefining.aspx> [<https://perma.cc/5GYH-37CV>]; see Mandeep Sohal, *Chemical Change vs. Physical Change*, CHEMISTRY LIBRETEXTS, https://chem.libretexts.org/Core/Analytical_Chemistry/Qualitative_Analysis/Chemical_Change_vs._Physical_Change [<https://perma.cc/BH84-54VG>] (last updated Feb. 18, 2018) (“In order for a [chemical] reaction to take place, there must be a change in the elemental

Determining whether the above-ground storage tank is commingling, blending, or chemically changing the petroleum product is critical in the analysis to determine if PHMSA will consider the above-ground storage tank a breakout tank subject to Part 195.¹⁰⁴ PHMSA has consistently declined to extend jurisdiction to in-plant piping systems associated with and used *explicitly* for the operations of the refinery.¹⁰⁵ In order to be considered part of the refining process, PHMSA requires the product “undergo a chemical transformation” before being placed back into the pipeline for continued transportation.¹⁰⁶ PHMSA, generally consistent with the EPA’s definition, considers a refinery to be “a facility in which refined products are produced by changing the chemical and physical characteristics of petroleum, exclusive of the process of separating and removing gas (as well as other compounds) and generally purifying the petroleum.”¹⁰⁷ To summarize, if the petroleum product undergoes a chemical transformation in an above-ground storage tank as part of the refining process prior to being reinjected into a regulated pipeline for continued transportation, the above-ground storage tank would be considered part of “in-plant piping” and would not be a breakout

composition of the substance [petroleum product] in question.”) A chemical change occurs “[w]hen bonds are broken and new ones are formed[.]” *Id.*

104. 49 C.F.R. § 195.2; *id.* § 195.432; see Mark A. Baker, *Pipeline Companies Face Challenges in Order to Meet New DOT Breakout Tank Requirements*, BAKER CONSULTING GROUP 1, http://www.bakercgi.com/docs/OPS_Tank_Requirements.pdf [<https://perma.cc/ZTY3-FKVB>] (discussing the costs associated with out-of-service inspections for breakout tanks subject to Part 195 requirements can range from “\$10,000 to \$500,000” with repair costs easily exceeding \$100,000). Moreover, stringent inspection and maintenance requirements for breakout tanks subject to Part 195 regulations generates a challenge for operators and refineries to schedule maintenance and repairs to ensure product shortages are not created by pulling tanks from service. *Id.* Specifically, “some tank farms began experiencing significant increases in the demand for segregated product types requiring additional limitations for segregated product tanks[.]” resulting in “significant efficiency and flexibility losses and limited maintenance opportunities.” *Id.*

105. Letter from George W. Tenley to Amy Ng, *supra* note 39; Letter from John A. Gale to Wesley Christensen, *supra* note 34.

106. Letter from John A. Gale to Wesley Christensen, *supra* note 34, at 3.

107. Letter from Vanessa Allen Sutherland to Vince Murchison, *supra* note 93, at 3; see also *Star Enter. v. U.S. EPA*, 235 F.3d 139, 142 (3d Cir. 2000) (defining a petroleum refinery as “any facility engaged in producing gasoline, kerosene, distillate fuel oils, residual fuel oils, lubricants, or other products through distillation of petroleum or through redistillation, cracking or reforming of unfinished petroleum derivatives” (quoting 40 C.F.R. § 60.101(a) (1999))). See generally *The Refining Process*, AM. FUEL & PETROCHEMICAL MANUFACTURERS, <http://www.afpm.org/The-Refinery-Process/> [<https://perma.cc/NM6F-W4F6>] (providing an explanation of how petroleum products undergo chemical changes during the refining process).

tank.¹⁰⁸ To the contrary, if the petroleum products are simply commingled or blended in an above-ground storage tank prior to reinjection into a pipeline for continued transportation, PHMSA would not consider the tank to be part of the refining process, and as such, the above-ground storage tank would not be excepted as in-plant piping, and would be considered a breakout tank subject to Part 195.¹⁰⁹ Moreover, if an above-ground storage tank is predominately used for processing which results in a chemical change, thus exempt from PHMSA regulations, but on occasion is used for commingling or blending products to be reinjected into a pipeline for continued transportation, the above-ground storage tank, even though it is predominately used for refining purposes, would be considered a breakout tank.¹¹⁰

IV. DETERMINING WHETHER PHMSA WILL REGULATE THE ABOVE-GROUND STORAGE TANK: A PRACTICAL ANALYSIS FOR REFINERIES AND OPERATORS

Based on PHMSA's negative response to the AOPL's proposed primary function test, the clarification provided by PHMSA regarding the definition of a refinery, PHMSA elaborating on what constitutes a chemical change, and PHMSA's decision to regulate the midstream natural gas fractionation plant, operators and refineries can apply a basic analysis to determine if the above-ground storage tanks located within the refinery fence line will be regulated by PHMSA under Part 195.¹¹¹ The analysis will involve determining the following:

Step 1: Whether the above-ground storage tank is “used to (a) relieve surges in a hazardous liquid pipeline system or (b) receive and store hazardous liquid

108. See 49 C.F.R. § 195.2 (“*In-plant piping system* means piping that is located on the grounds of a plant and used to transfer hazardous liquid or carbon dioxide between plant facilities or between plant facilities and a pipeline or other mode of transportation . . .”).

109. *Id.*; Letter from John A. Gale to Wesley Christensen, *supra* note 34, at 3.

110. See 49 C.F.R. § 195.2 (defining a breakout tank as “a tank used to (a) relieve surges in a hazardous liquid pipeline system or (b) receive and store hazardous liquid transported by a pipeline for reinjection and continued transportation by pipeline”); see also Letter from John A. Gale to Wesley Christensen, *supra* note 34 (“Section 195.1(b)(8) states that the pipeline safety standards in Part 195 do not apply to the “[t]ransportation of hazardous liquid or carbon dioxide through onshore production (including flow lines), refining, or manufacturing facilities or storage or in-plant piping systems associated with such facilities.” (quoting 49 C.F.R. § 195.1(b)(8))).

111. 49 C.F.R. § 195.2; Letter from John A. Gale to Wesley Christensen, *supra* note 34; Neff, *supra* note 20; Letter from Vanessa Allen Sutherland to Vince Murchison, *supra* note 93.

transported by a pipeline for reinjection and continued transportation by pipeline.”¹¹²

If the answer in the first step of the analysis is affirmative as to part (a), Part 195 will apply, and the above-ground storage tank will be considered a breakout tank subject to Part 195 regulations.¹¹³ Under that instance, additional analysis is no longer necessary as the regulation clearly provides above-ground storage tanks used to “relieve surges in a hazardous liquid pipeline system” are breakout tanks subject to Part 195.¹¹⁴ However, if the answer to part (a) is negative but positive to part (b), the next steps in the analysis are necessary to determine if the asset would be considered part of the refining process exempt from PHMSA regulations, preventing the above-ground storage tank from being considered a breakout tank subject to Part 195 regulations.¹¹⁵

Step 2: Whether the above-ground storage tank is used for “[t]ransportation of hazardous liquid or carbon dioxide through onshore production (including flow lines), *refining*, or manufacturing facilities or storage or in-plant piping systems associated with such facilities[.]”¹¹⁶

PHMSA’s definition of a refinery, consistent with the EPA’s, is that a refinery is “a facility in which refined products are produced by changing the chemical and physical characteristics of petroleum, exclusive of the process of separating and removing gases (as well as other compounds) and generally purifying the petroleum.”¹¹⁷ If the above-ground storage tank is

112. 49 C.F.R. § 195.2.

113. *Id.*

114. *Id.*; see *In re Plains Pipeline, LP*, CPF No. 4-2012-5020, 2013 WL 3788034, at *2 (Pipeline and Hazardous Materials Safety Admin. May 17, 2013) (finding the pipeline operator liable, even though the pipeline operator lacked ownership or control of the assets, for failure to inspect breakout tanks); see also Letter from Troy E. Valenzuela to R.M. Seeley, *supra* note 16 (explaining to PHMSA the breakout tank was not owned or operated by the pipeline operator). PHMSA rejected the argument put forth by the pipeline operator that because the tanks were owned by the refinery, inspecting the tanks as required by Part 195 “present[ed] practical challenges to [the operator’s] ability to access, inspect[,] and test the [breakout tanks].” *Id.* PHMSA issued a final order against the operator for the tanks owned by the refinery. *Id.*

115. 49 C.F.R. § 195.1(b)(8).

116. *Id.* (emphasis added).

117. Letter from Vanessa Allen Sutherland to Vince Murchison, *supra* note 93, at 3 (clarifying the differences between a refinery and a terminal); see also *Star Enter. v. U.S. EPA*, 235 F.3d 139, 142 (3d Cir. 2000) (defining a petroleum refinery as “any facility engaged in producing gasoline, kerosene, distillate fuel oils, residual fuel oils, lubricants, or other products through distillation of petroleum or

located within a processing facility that meets the definition of a refinery, the second step of the analysis is to determine whether the product being injected into the above-ground storage tank is undergoing a *chemical* transformation before being reinjected into a pipeline for continued transportation.¹¹⁸ It is imperative to take into consideration PHMSA's stringent approach—even if part of the refinery is used for refinery purposes and meets the definition of a refinery, but other areas of the refinery are not used as part of the refining process, the entire facility *will not be considered* a refinery simply because the majority of the refinery is used in such a way that it meets the definition of a refinery.¹¹⁹ If the above-ground storage tank is located within a refinery, and the product being injected into the tank undergoes a chemical transformation, the tank will be considered an above-ground storage tank associated with the refining process that does not meet the definition of a breakout tank, exempting the tank from Part 195 regulations.¹²⁰ The final step in the analysis is to determine:

Step 3: Whether the above-ground storage tank is used, even *rarely* or occasionally, as a breakout tank.¹²¹

If the above-ground storage tank is used, even rarely or occasionally, for reinjecting product that has not been chemically transformed as part of the refining process into a regulated pipeline, PHMSA has unequivocally stated the above-ground storage tank will be considered a breakout tank subject to

through redistillation, cracking or reforming of unfinished petroleum derivatives” (quoting 40 C.F.R. § 60.101(a) (1999)). *See generally* *The Refining Process*, *supra* note 107 (providing a generalized overview of the refining process, including a description of cracking, reforming and isomerization processes).

118. 49 C.F.R. § 195.1(b)(8); Letter from John A. Gale to Wesley Christensen, *supra* note 34 (supporting PHMSA's determination that the product must undergo a chemical transformation prior to being reinjected into the pipeline system to be considered exempt from Part 195); *see also* Sohal, *supra* note 103 (explaining the differences between a chemical and physical change).

119. *See* Letter from Vanessa Allen Sutherland to Vince Murchison, *supra* note 93, at 3–4 (“The separation of compounds in the NGL mixture . . . in the fractionation plant means that the fractionation plant itself is a processing plant[,] . . . but this does not make the entire . . . facility a refinery.”).

120. 49 C.F.R. § 195.2; *see* Letter from John A. Gale to Wesley Christensen, *supra* note 34, at 3 (explaining facilities used for refining, including “any associated storage [above-ground storage tanks] or in-plant piping systems as defined in § 195.2” would be exempt from Part 195 so long as the product undergoes a chemical transformation as part of the refining process before being reinjected into regulated pipeline for continued transportation).

121. 49 C.F.R. § 195.2; Letter from John A. Gale to Wesley Christensen, *supra* note 34; Letter from Cesar De Leon to Robert M. Mendell, *supra* note 59.

Part 195 regulations.¹²²

In most cases, all of the [petroleum products] that are delivered to [the] plants undergo a chemical transformation as part of the fractionation [refining] process before being sent out for continued transportation as refined products. In the case of [this] plant, however, a shipper has the ability to direct [the petroleum products] to bypass the plant, or to divert those products to private or co-mingled storage, without processing. Consequently, only the piping and equipment used to facilitate the fractionation process [where a chemical transformation takes place] meets the “in-plant piping” definition for purposes of the exception in § 195.1(b)(8).¹²³

To summarize the analysis, for an above-ground tank to be exempt from Part 195, the above-ground tank cannot be used to “relieve surges in a hazardous liquid pipeline system,” and the tank must be used *exclusively* as part of the refining process, on refinery grounds that involve the product undergoing a chemical change in the tank prior to being reinjected into the pipeline.¹²⁴ If the analysis fails on any of these elements, the above-ground storage tank will meet the definition of a breakout tank and will be subject to Part 195 jurisdiction.¹²⁵

V. CONCLUSION

Pipeline operators, owners, and refineries will continue to encounter challenges navigating complex and often redundant regulations enforced by multiple federal agencies.¹²⁶ Moreover, as indicated by PHMSA, pipeline operators will also be held responsible for assets associated with the pipeline system, but owned by the refinery, even if the assets are outside of the

122. 49 C.F.R. § 195.2; *Id.* § 195.432; Letter from John A. Gale to Wesley Christensen, *supra* note 34; Letter from Cesar De Leon to Robert M. Mendell, *supra* note 59.

123. Letter from John A. Gale to Wesley Christensen, *supra* note 34, at 3; *see* Letter from Cesar De Leon to Robert M. Mendell, *supra* note 59 (“Part 195 applies to any storage tank that is used according to the definition of ‘breakout tank’ under [§] 195.2, except tanks used in pipeline transportation listed in [§] 195.1(b)(8).”). *See generally* 49 C.F.R. § 195.2 (defining “breakout tank” and “in-plant piping system”).

124. 49 C.F.R. § 195.2; Letter from John A. Gale to Wesley Christensen, *supra* note 34.

125. 49 C.F.R. § 195.2.

126. Nichols & Rothschild, *supra* note 19; *see* Gibbs et al., *supra* note 32 (discussing the PIPE Act’s “mandate[] that PHMSA establish a task force composed of one representative from each of the [U.S.] Department of Transportation, [U.S.] Department of Health and Human Services, [U.S.] Environmental Protection Agency, [U.S.] Department of Interior, [U.S.] Department of Commerce, and the Federal Energy Regulatory Commission[.]” which “must submit a report to various congressional committees”).

pipeline operators' control.¹²⁷ The strict approach PHMSA adopted—holding an operator accountable for breakout tanks owned and maintained by another refinery—is a stark reminder that federal agencies wield far-reaching authority in enforcing federal regulations.¹²⁸ Because public perception of pipelines and refineries is overwhelmingly negative—despite the critical role both pipelines and refineries play in the United States—pipeline operators and refineries must ensure compliance with federal regulations to continue to build a positive reputation with the public.¹²⁹ If pipeline operators and refineries fail to adhere to federal regulations, and subsequent incidents occur that negatively impact the public and/or environment, Congress has shown a willingness to dramatically increase federal regulations and oversight.¹³⁰ In addition, PHMSA has indicated a willingness to assess large civil penalties for non-compliance with regulations.¹³¹ The creation of additional regulations and large civil penalties can have detrimental economic effects on pipeline operators and refineries, including loss of profit and in the extreme case, closure of facilities.¹³² While this article has proposed an analysis to determine

127. *In re Plains Pipeline, LP*, CPF No. 4-2012-5020, 2013 WL 3788034, at *2 (Pipeline & Hazardous Materials Safety Admin. May 17, 2013); Letter from Troy E. Valenzuela to R.M. Seeley, *supra* note 16.

128. *In re Plains Pipeline, LP*, 2013 WL 3788034, at *2.

129. Rammelt, *supra* note 76 (discussing that the public at large has a very disapproving perception of the energy sector); *see also* Taylor, *supra* note 28 (reviewing the history of regulations and affirming the energy sector's "commitment to the American public" is to ensure pipelines are safe and reliable).

130. *See* Taylor, *supra* note 28 (listing serious pipeline incidents and subsequent revisions made to Part 195 by Congress in response to the incidents). It is imperative for pipeline operators to "remain abreast of regulations and failures, stay[] up to date on why failures [occurred,] so that knowledge can be applied to [pipeline] systems before they result in additional failures and consequential government mandates." *Id.* *But see* Caldwell, *supra* note 32 (reporting President Trump's Administration issued a memorandum to all federal agencies "implementing a regulatory freeze on new and pending regulations[,] leaving federal agencies with "considerable discretion" on how to adhere to the memorandum).

131. *Summary of Cases Involving Civil Penalties*, PIPELINE & HAZARDOUS MATERIALS SAFETY ADMIN., https://primis.phmsa.dot.gov/comm/reports/enforce/CivilPenalty_opid_0.html?nocache=1282 [<https://perma.cc/UB66-H2RN>]. During a five-year period between 2003–2007, PHMSA assessed \$15,318,350 in civil penalties. *Id.* In the subsequent five-year period, 2008–2012, the amount of civil penalties more than doubled to \$32,257,500. *Id.* The last five-year period, 2013 to current, PHMSA assessed \$23,982,100 in civil penalties, indicating civil penalties will continue to increase for non-compliance. *Id.*

132. *See Over-Regulation of the Nation's Refineries*, INST. FOR ENERGY RES. (May 3, 2012), <http://instituteforenergyresearch.org/analysis/over-regulation-of-the-nations-refineries/> [<https://perma.cc/TNX8-FRHV>] (discussing refineries in the United States are closing due to overly

whether PHMSA will consider an above-ground storage tank to be a breakout tank subject to Part 195 requirements, it is imperative that pipeline operators and refineries acknowledge federal regulations are oftentimes written vague and “are purposefully designed that way—to be open to interpretation in order to accommodate the multitude of operators that transport [petroleum products] in [the United States].”¹³³ Moreover, great deference will be given to federal administrative agencies interpretation and application of existing regulations.¹³⁴ Pipeline operators and refineries will need to continue to closely follow federal regulations and should anticipate that Congress will continue to respond with stricter regulations if pipeline operators and refineries fail to comply with existing regulations. Also, pipeline operators and refineries will need to continue to develop their regulatory programs keeping in mind that PHMSA, the EPA, and OSHA will continue to exert regulatory authority over the facilities.¹³⁵

burdensome regulations that negatively impact the refineries ability to remain profitable). The closure of refineries has led to the loss of thousands of jobs and a decrease in the amount of barrels produced per day for consumers, subsequently effecting the price consumers pay for petroleum based products. *Id.* “According to a March 2011 Department of Energy report, in the past [twenty] years, federal regulations were a significant factor in the closing of [sixty-six] U.S. refineries.” *Id.*

133. Taylor, *supra* note 28. Because regulations are written ambiguously and are open to interpretation, pipeline operators and refineries will need to conduct a careful analysis of whether their operating systems are compliant with Part 195 regulations. *Id.* “As with anything vague [such as regulations], there are gaps for misinterpretation, which are identified and brought to light when failures occur.” *Id.* Pipeline operators and refineries will need to be proactive in reducing and eliminating failures to help prevent Congress from reacting to the failures with additional regulations. Gibbs et al., *supra* note 32.

134. See *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (“[C]onsiderable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations has been consistently followed by this Court.” (footnote omitted)).

135. Caples & Steele, *supra* note 15.