From:	Coyle, Keith J.
To:	WasteRule, EMNRD, EMNRD
Subject:	[EXT] GPA Midstream Association Comments Draft Waste Rule
Date:	Wednesday, September 16, 2020 11:31:56 AM
Attachments:	GPA Midstream Association Draft Waste Rule Comments.pdf

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To Whom It May Concern:

Attached please find a comment letter on the Draft Waste Rule that I am submitting on behalf of Matt Hite, Vice President of Government Affairs for GPA Midstream Association. Please let me know if you have any problems accessing the attached file, which is in PDF format, or if have any other questions or concerns.

Respectfully,
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VIA ELECTRONIC FILING to EMNRD.WasteRule@state.nm.us

September 16, 2020

Energy, Minerals and Natural Resources Department
Oil Conservation Division
1220 South St. Francis Drive
Santa Fe, NM 87505

RE: Natural Gas Waste Draft Rule

To Whom It May Concern:

On July 20, 2020, the New Mexico Energy, Minerals and Natural Resources Department (EMNRD), Oil Conservation Division (OCD), released a draft waste rule for the oil and gas industry (Draft Waste Rule).[1] According to the information provided by EMNRD, OCD developed the Draft Waste Rule in consultation with the New Mexico Environment Department (NMED) to prevent methane waste and reduce emissions from upstream and midstream oil and gas operations.[2] To accomplish these objectives, OCD included provisions in the Draft Waste Rule for venting and flaring of natural gas as well as statewide natural gas capture requirements for oil and gas production, gathering, and processing. OCD also included safety standards for the design, construction, testing, operation, maintenance, and integrity management of natural gas gathering lines.

As one of the nation's leading trade associations for the midstream industry, GPA Midstream Association (GPA Midstream)[3] appreciates the opportunity to submit comments on the Draft Waste Rule. GPA Midstream is respectfully requesting, for the reasons briefly summarized here and explained in more detail in the comments below, that the OCD withdraw the proposed safety standards for natural gas gathering lines:

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[1] Accessed online at http://www.emnrd.state.nm.us/OCD/documents/NaturalGasWasteDraftRules-July202020.pdf.
[2] Susan Torres, EMNRD's Oil Conservation Division releases draft methane rule (July 20, 2020).
[3] GPA Midstream has served the U.S. energy industry since 1921. GPA Midstream is composed of close to seventy member companies that are engaged in the gathering and processing of natural gas into merchantable pipeline gas, commonly referred to in the industry as "midstream activities." Such processing includes the removal of impurities from the raw gas stream produced at the wellhead as well as the extraction for sale of natural gas liquid products (NGLs) such as ethane, propane, butane, and natural gasoline or in the manufacture, transportation, or further processing of liquid products from natural gas. GPA Midstream membership accounts for more than 90% of the NGLs produced in the United States from natural gas processing.

- The Oil Conservation Commission (OCC) does not have the authority under the Oil and Gas Act to regulate the safety of natural gas gathering lines.[4] The State Pipeline Safety Act provides the New Mexico Public Regulation Commission (NMPRC) with the authority to regulate the safety of intrastate gas pipeline facilities,[5] and the NMPRC has already used that authority to establish safety standards for gas gathering lines in New Mexico.[6] Unlike the State Pipeline Safety Act, there are no provisions in the Oil and Gas Act that authorize the OCC to prescribe or enforce safety standards for gas pipeline facilities. Nor has the OCC ever sought to exercise that authority or established any safety regulations for gas gathering lines in New Mexico.

- Even if the OCC had the authority under the Oil and Gas Act to prescribe safety standards for natural gas gathering lines, the Federal Pipeline Safety Act would prohibit enforcement of the safety standards in the Draft Waste Rule. Unlike the NMPRC, the OCC does not have a certification from the Pipeline and Hazardous Materials Safety Administration (PHMSA) to regulate the safety of intrastate gas pipeline facilities.[7] The safety standards proposed by the OCD are also incompatible with PHMSA's current regulations for gas gathering lines[8] and the supplemental state requirements administered by the NPRMC.[9] Accordingly, the Federal Pipeline Safety Act's preemption provision would prohibit enforcement of the Draft Waste Rule's safety standards for natural gas gathering lines.[10]

I. Background

PHMSA administers a national gas pipeline safety program pursuant to the authority provided in the Federal Pipeline Safety Act.[11] PHMSA's primary obligation is to prescribe and enforce minimum federal safety standards for gas pipeline facilities and persons engaged in the transportation of gas. PHMSA has established those safety standards at 49 C.F.R. Parts 190 to 199 and is responsible for ensuring that operators of interstate gas pipeline facilities comply with these requirements.[12]

PHMSA also oversees a federal certification and grant program that allows state authorities to regulate the safety of intrastate gas and hazardous liquid pipeline facilities.[13] To participate in

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[4] N.M. Stat. Ann. §§ 70-2-1 *et seq* (2020).
[5] N.M. Stat. Ann. §§ 70-3-11 – 70-30-20.
[6] N.M. Admin. Code § 18.60.2 (2020).
[7] 49 U.S.C. § 60105 (2020).
[8] 49 C.F.R. § 192.8-192.9 (2020).
[9] N.M. Admin. Code § 18.60.2.8(B)(5).
[10] *Id.* § 60104(c).
[11] *Id.* §§ 60101 *et. seq.*
[12] An interstate gas pipeline facility is defined in the Federal Pipeline Safety Act as a gas pipeline facility that is used to transport gas and is subject to the jurisdiction of the Federal Energy Regulatory Commission (FERC) under the Natural Gas Act (NGA). 49 U.S.C. § 60101(a)(6).
[13] 49 U.S.C. § 60105. An intrastate gas pipeline facility is defined in the Federal Pipeline Safety Act as "a gas pipeline facility and transportation of gas within a State [that is] not subject to the jurisdiction of the [Federal Energy Regulatory Commission] under the [Natural Gas Act]." *Id.* § 60101(a)(9). Gas gathering lines are generally not subject to FERC

that program, a state authority must submit an annual certification to PHMSA, agree to adopt the minimum federal safety standards, and meet other program requirements.[14] A state authority that has a PHMSA-certified pipeline safety program can apply additional or more stringent safety standards to intrastate pipeline facilities, so long as the state standards are compatible with the minimum federal requirements.[15] However, a state authority that does not have a PHMSA certification cannot prescribe or enforce safety standards for intrastate pipeline facilities.[16]

The State Pipeline Safety Act provides the NMPRC with the authority to prescribe and enforce safety standards for intrastate gas pipeline facilities, and the NMPRC has used that authority to establish a PHMSA-certified gas pipeline safety program.[17] As required by the state certification provisions in the Federal Pipeline Safety Act, the NMPRC incorporates PHMSA's federal gas pipeline safety standards by reference into its regulations.[18] The NMPRC has also promulgated additional or more stringent state safety standards for intrastate gas pipeline facilities, including gas gathering lines.[19]

Unlike the provisions in the State Pipeline Safety Act, the Oil and Gas Act does not delegate any specific authority to the OCC or OCD to prescribe or enforce safety standards for intrastate gas pipeline facilities. Nonetheless, three provisions in the Oil and Gas Act are cited as authorizing the proposed natural gas pipeline safety standards in the Draft Waste Rule. The first provision, §70-2-6, gives the OCC "jurisdiction and authority over all matters relating to the conservation of oil and gas and the prevention of waste of potash as a result of oil or gas operations in the state."[20] The second provision, §70-2-11, empowers the OCC "to prevent waste prohibited

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jurisdiction under the NGA and ordinarily qualify as intrastate pipeline facilities for purposes of the Pipeline Safety Act. 15 U.S.C. § 717.

[14] 49 U.S.C. § 60105.

[15] 49 U.S.C. § 60104(c); *see Olympic Pipeline Co. v. City of Seattle*, 437 F.3d 872, 878-79 (9th Cir. 2006) (discussing state authority to regulate intrastate pipelines under the Federal Pipeline Safety Act). Note that a state authority can also enter into a separate agreement with PHMSA to participate in the oversight of interstate pipeline facilities, primarily by performing inspections of intrastate or interstate pipeline facilities for compliance with the federal safety standards. *Id.* § 60106(b).

[16] *See Olympic Pipeline Co.*, 437 F.3d at 878-79 (discussing state authority to regulate intrastate pipelines under the federal pipeline safety laws).

[17] N.M. Stat. Ann. §§ 70-3-11 *et. seq.*; N.M. Admin. Code § 18.60.2.

[18] PHMSA's regulations require operators to use the definition in American Petroleum Institute (API) Recommended Practice 80, Guidelines for the Definition of Onshore Gas Gathering Lines (1st ed., April 2000) to determine if a pipeline is an "onshore gathering line," subject to certain additional regulatory limitations. 49 C.F.R. § 192.8(a). If a pipeline meets the definition of an onshore gas gathering line, PHMSA requires operators to determine if the line is part of a regulated gathering line. *Id.* § 192.8(b). Two categories of gas gathering lines are currently regulated: (1) Type A gathering lines, which are higher stress pipelines that pass through more populated Class 2 locations, Class 3 locations, and Class 4 locations, 49 C.F.R. §§ 192.8(b), 192.9(c), and (2) Type B gathering lines, which are lower stress pipelines that pass through those same locations, 49 C.F.R. §§ 192.8(b), 192.9(d). PHMSA's regulations do not currently apply to gas gathering lines in sparsely populated Class 1 locations, although PHMSA is in the process of finalizing new safety standards and reporting requirements for these pipelines. *See Pipeline Safety: Safety of Gas Transmission and Gathering Pipelines*, 81 Fed. Reg. 20,722 (Apr. 8, 2016).

[19] The additional or more stringent provisions for regulated gas gathering lines include establishing and following supplemental written procedures for handling pipeline emergencies, performing maintenance activities, preventing accidental ignitions, and conducting valve maintenance, as well as associated recordkeeping requirements and provisions for conducting leakage surveys. *See* N.M. Admin. Code § 18.60.2.8(B)(5).

[20] N.M. Stat. Ann. § 70-2-6(A).

by this act and to protect correlative rights, as in this act provided."[21] The third provision, §70-2-12, enumerates the various powers of the OCC, but only expressly references pipelines in relation to identifying ownership.[22]

II. Comments

a. The OCC Does Not Have the Authority under the Oil and Gas Act to Issue Safety Standards for Natural Gas Gathering Lines.

GPA Midstream does not agree that the OCC has the authority to issue safety standards for natural gas gathering lines. In discussing the extent of the OCC's jurisdiction under the Oil and Gas Act, the New Mexico Supreme Court has reiterated the well-established principle that "[a]n agency may not create a regulation that exceeds its statutory authority."[23] The Supreme Court has further explained:

> The Oil Conservation Commission is a creature of statute, expressly defined, limited and empowered by the laws creating it. The commission has jurisdiction over matters related to the conservation of oil and gas in New Mexico, but the basis of its powers is founded on the duty to prevent waste and to protect correlative rights. . . . Actually, the prevention of waste is the paramount power, inasmuch as this term is an integral part of the definition of correlative rights.[24]

While the Oil and Gas Act certainly provides the OCC broad authority to prevent waste and protect correlative rights, there is no indication that prescribing safety standards for gas pipeline facilities serves either of these purposes. In fact, the express delegation of that authority to another state agency, the NMPRC, in a different statute, the State Pipeline Safety Act, seems to confirm that the OCC has no jurisdiction over gas pipeline safety matters.[25] Accordingly, GPA Midstream is not persuaded that the OCC has the power under the Oil and Gas Act to prescribe the proposed safety standards for gas gathering lines in the Draft Waste Rules.

b. Even if the OCC had the Authority under the Oil and Gas Act to Issue Safety Standards for Natural Gas Gathering Lines, the Federal Pipeline Safety Act Would Prohibit Enforcement of the Proposed Safety Standards in the Draft Waste Rule.

Even if the OCC had the authority under the Oil and Gas Act to issue safety standards for natural gas gathering lines, the Federal Pipeline Safety Act would prohibit enforcement of the proposed safety standards in the Draft Waste Rule. A state authority must submit an annual certification to PHMSA and meet other program requirements to regulate the safety of intrastate gas pipeline facilities.[26] The NMPRC is the only state authority in New Mexico that has a

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[21] *Id.* at § 70-2-11(A).
[22] *Id.* at §70-2-12(B)(8).
[23] *Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 146 N.M. 24, 27 (2009) (quoting *Gonzales v. N.M. Educ. Ret. Bd.*, 109 N.M. 592, 595 (1990)).
[24] *Cont'l Oil Co. v. Oil Conservation Comm'n*, 70 N.M. 310, 318 (1962).
[25] N.M. Stat. Ann. §§ 70-3-13(A) (providing that "[r]ules adopted pursuant to the [State] Pipeline Safety Act shall substantially conform to federal pipeline safety rules.")
[26] 49 U.S.C. §§ 60104(c), 60105.

certification from PHMSA to regulate the safety of intrastate gas pipeline facilities,[27] and the recordkeeping, materials, design, construction, cover, location, marking, inspection, pressure testing, corrosion control, operations, maintenance, and integrity managements for natural gas gathering lines in 19.15.28.8 to 19.15.28.21 and the associated definitions in 19.15.28.7 of the Draft Waste Rule clearly qualify as pipeline safety standards.[28] The Federal Pipeline Safety Act precludes the OCC from prescribing or enforcing such standards without a PHMSA certification.[29]

The proposed pipeline safety standards in the Draft Waste Rule would raise significant federal preemption questions even if the OCC had a PHMSA certification. The Federal Pipeline Safety Act requires additional or more stringent state safety standards for intrastate gas pipeline facilities to be compatible with PHMSA's regulations.[30] The Draft Waste Rule contains safety standards that would apply to all gas gathering lines in New Mexico, including those that are already subject to PHMSA's regulations and the NMPRC's supplemental state requirements.[31] Requiring gas gathering line operators to comply with two different and overlapping state safety regulations creates obvious compatibility concerns,[32] and the Draft Waste Rule's provisions are inconsistent with PHMSA's current regulations and the NMPRC's supplemental state requirements.[33] As important, PHMSA is also in the process of completing a multi-year rulemaking effort to establish new federal safety standards and reporting requirements for gas gathering lines.[34] When those rules go into effect, the Draft Waste Rule's provisions will become even more incompatible with PHMSA's regulations under the federal preemption provision.

c. The OCD Should Withdraw the Proposed Safety Standards for Natural Gas Gathering Lines.

For these reasons, GPA Midstream is respectfully requesting that the OCD withdraw the proposed safety standards for natural gas gathering lines in 19.15.28.8 to 19.15.28.21 and the associated definitions in 19.15.28.7 of the Draft Waste Rule. The State Pipeline Safety Act provides the NMPRC with the authority to prescribe and enforce safety standards for gas gathering lines, and the NMPRC is exercising that authority in a manner consistent with the requirements in the Federal Pipeline Safety Act. To the extent that the OCD is concerned about the safety of gas gathering lines, the appropriate course of action is to refer the matter to the NMPRC for further consideration. The OCC should not be asked to adopt regulations that are outside the scope of its

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[27] Copies of PHMSA's evaluation of the NMPRC's gas pipeline safety program from 2009 to 2018 are available at https://www.phmsa.dot.gov/working-phmsa/state-programs/nm-ng-program-evaluation.

[28] *See Washington Gas Light Co. v. Prince George's County Council*, 711 F.3d 412, 419-420 (4th Cir. 2013); *Tex. Midstream Gas Servs. LLC v. City of Grand Prairie*, 608 F.3d 200 (5th Cir. 2010) (holding that the Pipeline Safety Act's preemption provision applies to state standards that have a "direct" or "substantial" effect on safety).

[29] *Olympic Pipeline Co.*, 437 F.3d at 879-80.

[30] 49 U.S.C. § 60104(c).

[31] Proposed NM. Admin. Code § 19.15.28.7.G (defining "Gathering pipeline").

[32] 49 U.S.C. § 60104(c).

[33] For example, the definition of "[g]athering pipeline" in the Draft Rule is inconsistent with the definition of onshore gas gathering lines that applies under PHMSA's regulations, 49 C.F.R. § 192.8. The Draft Rule also contains integrity management requirements for gas gathering lines that are not consistent with PHMSA's regulations, including a requirement to perform annual pressure testing, continuous pressure monitoring, or triennial inline inspections. *Compare* proposed N.M. Admin. Code § 19.15.28.20 with 49 C.F.R. § 192.901 *et. seq.*

[34] *Pipeline Safety: Safety of Gas Transmission and Gathering Pipelines*, 81 Fed. Reg. 20,722 (Apr. 8, 2016); *see* OMB, Regulatory Agenda (Spring 2020), https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202004&RIN=2137-AF38.

authority under the Oil and Gas Act and that would be otherwise unenforceable under the Federal Pipeline Safety Act.

III. Conclusion

GPA Midstream appreciate the opportunity to comment on the Draft Waste Rule. If you have any questions or concerns, please feel free to contact me at 202-279-1664 or mhite@gpamidstream.org.

Sincerely,

Matthew Hite
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GPA Midstream Association
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