VIA ELECTRONIC FILING

August 15, 2022

U.S. Department of Transportation
Docket Management Facility
1200 New Jersey Ave, S.E.
Room W12-140
Washington, D.C. 20590-0001

Re: Supplemental Joint Comment Letter for Liquid Pipeline Advisory Committee Meeting, Docket No. PHMSA-2022-0077, Unusually Sensitive Areas for the Great Lakes, Coastal Beaches, and Certain Coastal Waters

The Technical Hazardous Liquid Pipeline Safety Standards Committee, otherwise known as the Liquid Pipeline Advisory Committee (LPAC), is charged with reviewing and providing a report "on the technical feasibility, reasonableness, cost-effectiveness, and practicability" of proposed amendments to the hazardous liquid pipeline safety regulations in 49 C.F.R. Part 195.[1] To assist the LPAC in meeting these obligations, the Pipeline and Hazardous Materials Safety Administration (PHMSA or the Agency) is required to provide "the risk assessment information and other analyses supporting each proposed standard" to the LPAC.[2] That risk assessment information is to include, among other things, the "regulatory and nonregulatory options that [the Agency] considered in prescribing a proposed standard[,] . . . the costs and benefit associated with the proposed standard[,] . . . [and the] technical data or other information upon which the risk assessment information and proposed standard is based."[3]

The LPAC is being asked in this proceeding to review and provide a report on an interim final rule that PHMSA published in the *Federal Register* on December 27, 2021.[4] The interim final rule, titled "Pipeline Safety: Unusually Sensitive Areas for the Great Lakes, Coastal Beaches, and Certain Coastal Waters" (the Interim Final Rule or IFR), purported to amend the definition of an unusually sensitive area (USA) in 49 C.F.R. § 195.6 to include the Great Lakes, coastal beaches, and certain coastal waters, effective as of February 25, 2022. Citing "the specific instructions"

[1] Liquid Pipeline Advisory Committee (LPAC) Charter – October 2020 to October 2022, https://www.phmsa.dot.gov/standards-rulemaking/pipeline/liquid-pipeline-advisory-committee-lpac-charter-october-2018-october; 49 U.S.C. §§ 60102(b)(4), 60115(c).
[2] 49 U.S.C. § 60115(c)(1).
[3] 49 U.S.C. § 60102(b)(3).
[4] Pipeline Safety: Unusually Sensitive Areas for the Great Lakes, Coastal Beaches, and Certain Coastal Waters, 86 Fed. Reg. 73,173 (Dec. 27, 2021) (hereinafter "Interim Final Rule").

that Congress included in Section 120 of the Protecting Our Infrastructure of Pipelines and Enhancing Safety Act of 2020 (2020 Act)[5] and the good-cause exception in the Administrative Procedure Act (APA),[6] the Agency issued the IFR without publishing a proposed rule, providing the public with the opportunity to comment, or presenting the proposed amendment to the USA definition to the LPAC for consideration.

The GPA Midstream Association[7] (GPA), American Petroleum Institute[8] (API), and Liquid Energy Pipeline Association (LEPA)[9] (collectively, the Associations) are submitting the following comments on the Interim Final Rule to the LPAC for consideration. As briefly summarized here and discussed in more detail below:

- The Associations do not agree that PHMSA had good cause under the APA or Pipeline Safety Act to issue the Interim Final Rule without providing prior notice or the opportunity to comment. The APA's good cause exception is narrowly construed, and the record shows that the Agency did not have a legitimate basis for using that exception. Therefore, the amendments to the USA definition in the IFR do not have the force and effect of law.

- The Associations do not agree that Section 120 provides PHMSA with the authority to apply the amended USA definition outside the context of the integrity management (IM) regulations. Congress only directed the Agency to revise the USA definition "for purposes of determining whether a pipeline is in a high consequence area" under 49 C.F.R. § 195.450. Nothing in Section 120 directs PHMSA to apply the amended USA definition for any other purpose, including in the requirements for regulated rural gathering lines in 49 C.F.R. § 195.11 or rural low-stress lines in 49 C.F.R. § 195.12. Nor does the information in the record otherwise support that action.

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[5] Consolidated Appropriations Act, 2021, Division R, § 120, Pub. L. 116-260, 134 Stat. 1181, 2210. Section 120 of the 2020 Act amended the language that Congress enacted in Section 19 of the Protecting Our Infrastructure of Pipelines and Enhancing Safety Act of 2016, § 19, Pub. L. 114-183, 130 Stat. 514.

[6] 5 U.S.C. § 553(b)(3)(B).

[7] GPA Midstream has served the U.S. energy industry since 1921 and has nearly 60 corporate members that directly employ more than 75,000 employees that are engaged in a wide variety of services that move vital energy products such as natural gas, natural gas liquids (NGLs), refined products and crude oil from production areas to markets across the United States, commonly referred to as "midstream activities." The work of our members indirectly creates or impacts an additional 450,000 jobs across the U.S. economy. GPA Midstream members recover more than 90% of the NGLs such as ethane, propane, butane, and natural gasoline produced in the United States from more than 400 natural gas processing facilities. In 2017-2019 period, GPA Midstream members spent over $105 billion in capital improvements to serve the country's needs for reliable and affordable energy.

[8] API represents all segments of America's natural gas and oil industry, which supports more than 11 million U.S. jobs and is backed by a growing grassroots movement of millions of Americans. Our nearly 600 members produce, process and distribute the majority of the nation's energy, and participate in API Energy Excellence®, which is accelerating environmental and safety progress by fostering new technologies and transparent reporting. API was formed in 1919 as a standards-setting organization and has developed more than 700 standards to enhance operational and environmental safety, efficiency, and sustainability.

[9] LEPA (formerly Association of Oil Pipe Lines) promotes responsible policies, safety excellence, and public support for liquids pipelines. LEPA represents pipelines transporting 97 percent of all hazardous liquids barrel miles reported to the Federal Energy Regulatory Commission. LEPA's diverse membership includes large and small pipelines carrying crude oil, refined petroleum products, NGLs, and other liquids.

- The Associations do not agree that Section 120 compels PHMSA to use the definitions and databases referenced in the IFR in determining the extent of certain coastal waters and coastal beaches. The Agency chose to reference these sources of authority and rejected others in developing the Interim Final Rule. Consistent with that exercise of discretion, PHMSA should consider using other alternative definitions and databases, particularly in determining the extent of the territorial sea and marine or estuarine waters. Otherwise, the amended USA definition will apply too broadly and undermine the fundamental risk-based principles embodied in the IM regulations.

- The Associations do not agree that the costs, benefits, and other impacts of the IFR are accurately reflected in the Regulatory Impact Analysis (RIA). As in other recent rulemaking proceedings, PHMSA relies on outdated cost information and makes erroneous assumptions.

I. Background

One of PHMSA's predecessor agencies, the Research and Special Program Administration (RSPA), established the original USA requirements in a December 2000 final rule.[10] Issued in response to a rulemaking mandate in the Pipeline Safety Act of 1992,[11] RSPA generally defined a USA in § 195.2 as "a drinking water or ecological resource area that is unusually sensitive to environmental damage from a hazardous liquid pipeline release, as identified under § 195.6."[12] RSPA also added more detailed requirements for USAs to 49 C.F.R. § 195.6, including separate provisions for USA drinking water resources and USA ecological resources, as well as supplemental definitions for certain terms.[13]

As adopted by RSPA and amended in subsequent proceedings, the USA requirements are currently used in three different ways in the Part 195 regulations. First, USAs are incorporated into the definition of a "high consequence area" (HCA) in 49 C.F.R. § 195.450.[14] The HCA definition is used in determining whether certain hazardous liquid or carbon dioxide pipeline segments are subject to the IM requirements in 49 C.F.R. § 195.452. Second, USAs are used in the definition of a "regulated rural gathering line" in 49 C.F.R. § 195.11(a).[15] Rural gathering lines that meet that definition are subject to certain safety requirements and record retention provisions,[16] as well as the reporting requirements in Subpart B.[17] Third, USAs are used in

[10] Pipeline Safety: Areas Unusually Sensitive to Environmental Damage, 65 Fed. Reg. 80,530 (Dec. 21, 2000).
[11] Pub. L. 102-508, § 202, 106 Stat. 3289, 3300-3301 (1992 Act), *as amended by* the Accountable Pipeline Safety and Partnership Act of 1996, Pub. L. 104-304, § 7, 110 Stat. 3793, 3800 (1996 Act),
[12] Pipeline Safety: Areas Unusually Sensitive to Environmental Damage, 65 Fed. Reg. at 80,544.
[13] *Id.*
[14] Pipeline Safety: Pipeline Integrity Management in High Consequence Areas (Hazardous Liquid Operators With 500 or More Miles of Pipeline), 65 Fed. Reg. 75,377, 75,406 (Dec. 1, 2000).
[15] *See also* 49 C.F.R. § 195.2 (defining "gathering line" and "rural area" for purposes of Part 195)
[16] 49 C.F.R. § 195.11(b)-(d)
[17] *See also* Pipeline Safety: Protecting Unusually Sensitive Areas From Rural Onshore Hazardous Liquid Gathering Lines and Low-Stress Lines, 73 Fed. Reg. 31,634 (Jun. 3, 2008).

determining the categorization of low-stress pipelines in rural areas for purposes of the compliance deadlines and safety requirements in 49 C.F.R. § 195.12.[18]

In the Protecting Our Infrastructure of Pipelines and Enhancing Safety Act of 2016,[19] (2016 Act), Congress directed PHMSA to "revise section 195.6(b) of title 49, Code of Federal Regulations, to explicitly state that the Great Lakes, coastal beaches, and marine coastal waters are USA ecological resources for purposes of determining whether a pipeline is in a high consequence area (as defined in section 195.450 of such title)."[20] The 2016 Act did not require the Agency to make these revisions by a specific deadline. Four years later, in the 2020 Act, Congress modified the rulemaking mandate from the 2016 Act by replacing the term "marine coastal waters" with the term "certain coastal waters"[21] and adding definitions for the terms "certain coastal waters" and "coastal beach".[22] Unlike the 2016 Act, Congress included a deadline directing PHMSA to "complete the revision to the regulations required" within 90 days of enactment of the 2020 Act, or by March 27, 2021.[23]

On December 27, 2021, PHMSA published the Interim Final Rule in the *Federal Register*. The IFR purported to amend the requirements in 49 C.F.R. § 195.6(b) by adding "[a] coastal beach" and "[c]ertain coastal waters" to the list of USA ecological resources and incorporating the definitions for a "coastal beach" and "certain coastal waters" from Section 120 into 49 C.F.R. § 195.6(c). The Agency issued the IFR without publishing a proposed rule, providing the opportunity to comment, or presenting the amended USA requirements to the LPAC for consideration. Citing the good-cause exception in the APA, PHMSA found that these actions were impractical or unnecessary because of "the specific instructions" that Congress included in the 2020 Act.[24] The Agency included an RIA and environmental assessment for the Interim Final Rule in the docket[25] and invited the public to submit comments by no later than February 25, 2022.[26]

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[18] *See* 49 C.F.R. § 195.2 (defining "low-stress pipeline" for purposes of Part 195); Pipeline Safety: Protecting Unusually Sensitive Areas From Rural Onshore Hazardous Liquid Gathering Lines and Low-Stress Lines, 73 Fed. Reg. at 31,634.

[19] Pub. L. 114-183, 130 Stat. 514.

[20] *Id.* § 19(b), 130 Stat. at 527; *see also id.* § 19(a), 130 Stat. at 527 (adding the Great Lakes, coastal beaches, and marine coastal waters to the areas that PHMSA is required to consider as unusually sensitive to environmental damage under 49 U.S.C. § 60109(b)(2)).

[21] 2020 Act, Pub. L. 116-260 § 120(a)(2), 134 Stat. at 2235; *see also id.* § 120(b), 134 Stat. 2235 (replacing "marine coastal waters" with "certain coastal waters" in the areas that PHMSA is required to consider as unusually sensitive to environmental damage under 49 U.S.C. § 60109(b)(2)).

[22] *Id.* § 120(a)(1), 134 Stat. at 2235 (defining "certain coastal waters" as "'(i) the territorial sea of the United States; (ii) the Great Lakes and their connecting waters; and (iii) the marine and estuarine waters of the United States up to the head of tidal influence" and "coastal beach" as "any land between the high- and low-water marks of certain coastal waters").

[23] *Id.* § 120(c), 134 Stat. at 2235.

[24] Interim Final Rule, 86 Fed. Reg. at 73,182.

[25] PHMSA, Regulatory Impact Analysis (RIA) (Oct. 2021), https://www.regulations.gov/document/PHMSA-2017-0152-0003.

[26] Interim Final Rule, 86 Fed. Reg. at 73,173 (comments are available here https://www.regulations.gov/docket/PHMSA-2017-0152/comments).

The Associations submitted a joint comment letter to PHMSA before the close of the comment period.[27] In the joint comment letter, the Associations stated that PHMSA did not have good cause under the APA for issuing the Interim Final Rule without providing prior notice or the opportunity to comment, and that the Agency exceeded the authority provided in Section 120 of the 2020 Act by amending the USA definition "for purposes" other than "determining whether a pipeline is in a high consequence area" under 49 C.F.R. § 195.450. The Associations further stated that PHMSA erred in concluding that Section 120 compelled the use of certain definitions and databases referenced in the IFR in determining the extent of coastal beaches and certain coastal waters, and that the Agency had not prepared an adequate risk assessment as required under the Pipeline Safety Act.

GPA and API subsequently filed a separate petition for judicial review (Petition) of the Interim Final Rule in the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit),[28] along with a motion asking PHMSA to stay the IFR pending judicial review (Motion). In the Motion, GPA and API urged PHMSA to grant a stay because the Agency had not complied with the APA and Pipeline Safety in issuing the Interim Final Rule, the members of GPA and API would suffer irreparable harm if relief was not granted, and the balance of the equities and public interest otherwise favored a stay. Although PHMSA denied the Motion, in so doing the Agency committed to continuing the rulemaking process and refraining from enforcing certain requirements in the IFR pending the issuance of a final rule.[29]

On April 21, 2022, PHMSA advised hazardous liquid pipeline operators and state pipeline safety program partners of these commitments in a Notice of Enforcement Discretion Regarding Interim Final Rule for Pipeline Safety: Unusually Sensitive Areas for the Great Lakes, Coastal Beaches, and Certain Coastal Waters (Notice).[30] Specifically, the Agency acknowledged its intent in the Notice "to promulgate a final rule that addresses the concerns raised by GPA and API in their Motion, the comments PHMSA received on the IFR, and the recommendations and report of a forthcoming meeting of the Liquid Pipeline Advisory Committee."[31] The Agency further "advise[d] regulated entities that until that finalized rule becomes effective, PHMSA will exercise its discretion to refrain from taking enforcement action alleging violations of obligations under § 195.11 or § 195.12 in connection with hazardous liquid pipeline facilities that are or will become subject to regulation as 'regulated rural gathering lines' pursuant to § 195.11, or as categories 1 or 2 'rural low stress lines' pursuant to § 195.12(b)(1)-(2) and (c)(1)-(2), as a result of the amendments to § 195.6(b)(6), (7), and (c) codified by the IFR."[32]

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[27] Comments of GPA, API and AOPL (Feb. 25, 2022), PHMSA-2017-0152, https://www.regulations.gov/comment/PHMSA-2017-0152-0007.

[28] Petition for Review, *GPA Midstream Ass'n v. U.S. Dep't of Transp.*, No. 22-1037 (D.C. Cir. filed Mar. 1, 2022).

[29] Motion to Stay Interim Final Rule Pending Judicial Review, PHMSA-2017-0152 (Mar. 1, 2022), https://www.regulations.gov/document/PHMSA-2017-0152-0010.

[30] https://www.phmsa.dot.gov/sites/phmsa.dot.gov/files/2022-04/Coastal%20USAs%20Partial%20Enforcement%20Discretion%20%28ALL%20Operators%20and%20State%20Partners%29.pdf.

[31] *Id.* at 2.

[32] *Id.*

II. Comments

a. PHMSA Failed to Comply with the APA and Pipeline Safety Act in Issuing the Interim Final Rule.

The APA prescribes rulemaking requirements that federal agencies are obligated to follow in establishing new regulations.[33] As general matter, the APA requires a federal agency to provide the public with a notice of proposed rulemaking and afford interested parties the opportunity to submit comments on that proposal.[34] The APA further requires the federal agency to consider and respond to those comments before promulgating a final regulation that has the force and effect of law.[35] As the U.S. Court of Appeals for the Fourth Circuit has explained:

> The important purposes of this notice and comment procedure cannot be overstated. The agency benefits from the experience and input of comments by the public, which help "ensure informed agency decisionmaking." *Spartan Radiocasting Co. v. FCC*, 619 F.2d 314, 321 (4th Cir.1980). The notice and comment procedure also is designed to encourage public participation in the administrative process. *See Chocolate Mfrs. Ass'n v. Block*, 755 F.2d 1098, 1103 (4th Cir.1985). Additionally, the process helps ensure "that the agency maintains a flexible and open-minded attitude towards its own rules," *id.* (citation omitted), because the opportunity to comment "must be a meaningful opportunity," *Prometheus Radio Project v. FCC*, 652 F.3d 431, 450 (3d Cir.2011) (citation omitted).[36]

The APA contains a good-cause exception that allows federal agencies to issue certain final rules without following the notice-and-comment process.[37] The federal courts have repeatedly emphasized that this exception "is . . . 'narrowly construed and only reluctantly countenanced,]'"[38] that federal agencies must clear "a high bar to invoke the exception[,]" and that "the circumstances justifying reliance on the . . . exception are 'rare[.]'"[39] For these reasons, the federal agency seeking to forgo the notice-and-comment process bears the burden of demonstrating that good

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[33] 5 U.S.C. § 553. The Pipeline Safety Act supplements the APA's general rulemaking requirements in certain respects, including by establishing a risk assessment requirement for evaluating the costs, benefits, and other impacts of proposed rules, and requiring PHMSA to present proposed rules, risk assessments, and other supporting information to the Pipeline Advisory Committees for consideration. *See* 49 U.S.C. §§ 60102, 60115.

[34] *See e.g.*, *Natl. Res. Def. Council v. Nat'l Highway Traffic Safety Admin.*, 894 F.3d 95, 113 (2nd Cir. 2018); *N.C. Growers' Ass'n, Inc. v. United Farm Workers*, 702 F.3d 755, 763 (4th Cir. 2012).

[35] *N.C. Growers' Ass'n, Inc.*, 702 F.3d. at 763.

[36] *Id.*

[37] 5 U.S.C. § 553(b)(3)(B) (stating, in relevant part, that states, in relevant part, that prior notice and the opportunity to comment is not required "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest").

[38] *Jifry v. FAA.*, 370 F.3d 1174, 1179 (D.C. Cir. 2004) (quoting *Tenn. Gas Pipeline Co. v. FERC*, 969 F.2d 1141, 1144 (D.C. Cir.1992).

[39] *N.C. Growers' Ass'n, Inc.*, 702 F.3d at 767.

cause exists,[40] and the reasons provided for using the exception must withstand "meticulous and demanding" scrutiny.[41]

In the Interim Final Rule, PHMSA found that the good-cause exception applied because providing notice and the opportunity to comment on the amended USA definition would be impracticable and unnecessary. In support of that finding, the Agency pointed to "the specific instructions from Congress" in Section 120 of the 2020 Act, including the "clear, defined terms" for "certain coastal waters" and "coastal beaches" that PHMSA could not alter or amend.[42] The Agency further noted that other federal agencies have established definitions and maintain databases that depict the extent of "certain coastal waters" and "coastal beaches", and that PHMSA must use these definitions and databases to satisfy the requirements in Section 120.[43] Finally, PHMSA referenced the 90-day deadline in Section 120 and asserted that allowing prior notice and the opportunity for comment would "frustrate an aggressive Congressional timeline for prompt completion of the specific regulatory amendments that Congress understood as being necessary to align PHMSA's IM regulations with the grave public safety and environmental risks posed by hazardous liquid lines."[44]

The Associations respectfully submit that none of the Agency's findings or reasons clears the "high bar" or withstands the "meticulous and demanding" scrutiny required to invoke the good-cause exception. As the federal courts have explained, "notice and comment on a rule may be found to be 'impracticable' when 'the due and required execution of the agency functions would be unavoidably prevented by its undertaking public rule-making proceedings.'"[45] Impracticability may exist, for example, if a regulation is "needed 'to address threats posing a possible imminent hazard to aircraft, persons, and property within the United States,' . . . [is] 'of life-saving importance to mine workers in the event of a mine explosion,' or . . . [is required] to 'stave off any imminent threat to the environment or safety or national security."[46] "[T]he 'unnecessary' prong of the good cause exception," according to the federal courts, "applies when an administrative rule is 'a routine determination, insignificant in nature and impact, and inconsequential to the industry and to the public[,]'" or contains changes that are "'minor or merely technical,' and of little public interest.'"[47]

PHMSA did not point to any credible imminent hazard or threat to support its good cause finding in the IFR,[48] relying instead on Congress' decision to include new definitions and a 90-

[40] *Nat'l Res. Def. Council*, 894 F.3d at 113-114.
[41] *Sorenson Communications Inc. v. FCC*, 755 F.3d 702, 706 (D.C. Cir. 2014) (quoting *N.J. Dep't of Envt'l Protection v. EPA*, 626 F.2d 1038, 1046 (D.C. Cir. 1980)).
[42] Interim Final Rule, 86 Fed. Reg. at 73,182.
[43] *Id.*
[44] *Id.* at 73,183.
[45] *N.C. Growers' Ass'n, Inc.*, 702 F.3d at 766 (4th Cir. 2012) (quoting *Nat'l Nutritional Foods Ass'n v. Kennedy*, 572 F.2d 377, 384–85 (2d Cir. 1978)).
[46] *Id.* (quoting *Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 93 (D.C. Cir. 2012)).
[47] *Id.* at 766-767 (quoting *Mack Trucks, Inc.*, 682 F.3d at 94; *Nat'l Nutritional Foods Ass'n*, 572 F.2d at 384-85)).
[48] The Agency cited three recent hazardous liquid pipeline releases as evidence in support of the need to amend the USA definition in the IFR. However, PHMSA acknowledged that two of those releases occurred on pipeline segments in HCAs already subject to the IM regulations, and the Agency found that the third release occurred in an HCA and USA in a corrective action order. PHMSA also cited another event, an anchor strike to a pipeline in the Great Lakes that did not result in a release of hazardous liquids, as support for the Interim Final Rule, as well as other historical

day rulemaking deadline in Section 120 of the 2020 Act. As to the former, the Agency stated that Congress' addition of clear and unalterable definitions for "certain coastal waters" and "coastal beaches" in Section 120 supported a finding of impracticability. However, PHMSA's subsequent analysis of the language contradicts its own position, *i.e.*, the Agency acknowledges that at least one key term, "marine waters", is not defined in the U.S. Code, and that other another critical term, the "territorial sea", is susceptible to different meanings depending on the federal law at issue. PHMSA's reliance on definitions and databases administered by other federal agencies to provide the actual meaning for the language in Section 120 further undermines the suggestion that Congress clearly and unalterably defined the relevant terms.[49] The same can be said of Congress' decision to direct PHMSA to "complete the revision to the regulations required" by Section 120—a directive that would hardly seem necessary if the relevant terms had already been clearly and unalterably defined in the 2020 Act.

PHMSA's contention that the 90-day rulemaking deadline in Section 120 rendered notice-and-comment impracticable is equally unpersuasive. While certainly demonstrating a desire for prompt action,[50] the 90-day deadline does not suggest that Congress intended the Agency to forgo the notice-and-comment rulemaking process in its entirety.[51] Had Congress intended that result, Section 120 would have been styled as a self-executing provision or included language waiving the rulemaking requirements in the APA and Pipeline Safety Act.[52] Nor does a rulemaking deadline in and of itself create the kind of imminent threat or hazard that supports a finding of impracticability.[53] If that were the case, PHMSA could use the 1-year rulemaking deadline in

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events involving non-jurisdictional offshore production facilities and maritime transportation. None of these events demonstrate that the amended USA definition is necessary to address an imminent threat or hazard involving a hazardous liquid or carbon dioxide pipeline facility. Interim Final Rule, 86 Fed. Reg. at 73,177-178.

[49] The Agency never explained in the IFR why Congress failed to reference these other sources of authority in the 2020 Act, or why Congress expected that PHMSA would be bound by definitions and databases administered by other federal agencies acting under different legal authorities in implementing Section 120. Indeed, the Agency's previous guidance to pipeline operators that the definitions used by the U.S. Environmental Protection Administration (EPA) in determining the status of waterways "have no relevance to the pipeline safety laws", PHMSA Letter of Interpretation to Mr. R. J. Redweik, Shell Western E&P Inc., PI-97-0101 (Sept. 16, 1997), and its own statements in the IFR confirm that Congress would have made no such assumption, as the Agency continues to disregard well-established and longstanding authority in stating that the Submerged Lands Act, 43 U.S.C. § 1301 *et seq.*, is not relevant in determining whether a pipeline is offshore under 49 C.F.R. Part 192 and 49 C.F.R. Part 195, even though that statute is explicitly referenced in 49 C.F.R. §§ 192.3 and 195.2. Interim Final Rule, 86 Fed. Reg. at 73,175.

[50] *Transportation Div. of the Int'l Ass'n of Sheet Metal, Air, Rail & Transportation Workers v. Fed. R.R. Admin.*, 10 F.4th 869, 874 (D.C. Cir. 2021) ("When Congress provides a procedural requirement such as a short period for rulemaking, it indicates that the agency should move with dispatch.")

[51] *Methodist Hosp. of Sacramento v. Shalala*, 38 F.3d 1225, 1236 (D.C. Cir. 1994) ("[a]s a general matter, 'strict congressionally imposed deadlines, without more, by no means warrant invocation of the good cause exception'") (quoting *Petry v. Block*, 737 F.2d 1193, 1203 (D.C. Cir. 1984)).

[52] *Nat'l Women, Infants, and Children Grocers Ass'n v. Food & Nutrition Serv.,* 416 F.Supp.2d 92, 105 (D.D.C. 2006) (where Congress directed an agency to issue implementing regulations but explicitly permitted the agency to issue an interim rule, the court determined that the inclusion of the phrase "interim rule" allowed the agency to promulgate a preliminary rule "without first providing notice and comment").

[53] Congress has provided PHMSA with specific statutory mechanisms for addressing imminent hazards, including in the emergency order provisions in 49 U.S.C. § 60117(p) and hazardous facility or corrective action order provisions in 49 U.S.C. § 60112. The Agency remains free to use these authorities to address a circumstance that constitutes an imminent hazard to a hazardous liquid or carbon dioxide pipeline in the Great Lakes or coastal waters or beaches during the notice-and-comment rulemaking process.

Section 113 of the 2020 Act to prescribe final gas pipeline leak detection regulations without notice and comment at any time,[54] an extraordinary position that the Agency does not even support.[55]

Finally, the IFR is not a minor or merely technical rule with insignificant or inconsequential impacts. PHMSA estimates that the amended USA definition will affect more than 2,900 miles of hazardous liquid and carbon dioxide pipelines, resulting in at least $40 million dollars in compliance costs over a 10-year period, a significant portion of which ($3.1 million) will be imposed in the next 12 months.[56] Operators in Louisiana and Texas will be particularly affected, with an additional 2,423 miles of pipelines and 408 miles of pipelines, respectively, being impacted by the new USA definition.[57] These impacts are certainly not insignificant or inconsequential. Nor does PHMSA's incorporation of the language in Section 120 verbatim make the amendments to § 195.6 "minor or merely technical." Congress would not have directed PHMSA to "*complete the revision to the regulations* required" by Section 120 if the outcome of this rulemaking proceeding was already a foregone conclusion, and the impacts caused by the Interim Final Rule are all directly attributable to the amendments. None of those impacts occurred when Congress enacted Section 120 or would have occurred without PHMSA's revision to the USA definition in § 195.6.[58]

In summary, the Agency did not have grounds for issuing the IFR under the good-cause exception. The definitions and 90-day deadline that Congress included in Section 120 did not render compliance with the notice-and-comment rulemaking requirements impracticable or unnecessary. There is no factual or legal support in the record for PHMSA's claim that "'the due and required execution of [its] functions would [have been] unavoidably prevented by its undertaking public rule-making proceedings.'"[59] Nor are the amendments in the Interim Final Rule part of "'a routine determination, insignificant in nature and impact, and inconsequential to the industry and to the public[,]'" or "'minor or merely technical,' and of little public interest.'"[60] Because PHMSA failed to comply with the notice-and-comment rulemaking requirements in the APA and Pipeline Safety Act in issuing the Interim Final Rule, the purported amendments to the USA definition in the IFR do not have the force and effect of law.

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[54] 49 U.S.C. § 60102(q).

[55] PIPES Act Web Chart (updated Aug. 11, 2022), https://www.phmsa.dot.gov/sites/phmsa.dot.gov/files/2022-08/8.11.22%20PIPES%20Website%20Chart.pdf.

[56] PHMSA, Regulatory Impact Analysis, Pipeline Safety: Unusually Sensitive Areas for the Great Lakes, Coastal Beaches, and Certain Coastal Waters at 5, 38 - 39 (Oct. 2021) (RIA), https://www.regulations.gov/document/PHMSA-2017-0152-0003.

[57] *Id.* at 20.

[58] The Agency's decision to adopt the language of Section 120 verbatim does not make the impacts from the IFR any less significant or consequential. As PHMSA explains in the IFR, the Agency updated the geospatial data in the National Pipeline Mapping System (NPMS) to incorporate certain NOAA and EPA datasets to depict the extent of the "coastal waters" and "coastal beaches" covered by the amended USA definition. Interim Final Rule, 86 Fed. Reg. at 73,174. The Agency's decision to update the NPMS, and repeated statements in the IFR about the binding nature of the information provided in the NOAA and EPA datasets, confirms that the impacts caused by the amended USA definition are immediate, significant, and consequential.

[59] *N.C. Growers' Ass'n, Inc.*, 702 F.3d at 766 (4th Cir. 2012) (quoting *Nat'l Nutritional Foods Ass'n*, 572 F.2d at 384–85).

[60] *Id.* at 766-767 (quoting *Mack Trucks, Inc.*, 682 F.3d at 94; *Nat'l Nutritional Foods Ass'n*, 572 F.2d at 384-85)).

b. PHMSA Exceeded the Authority Provided in Section 120 by Applying the Amended USA Definition to the Requirements for Regulated Rural Gathering Lines and Rural Low-Stress Lines.

PHMSA relied primarily on Section 120 of the 2020 Act as the authority for issuing the IFR. In that provision, Congress instructed the Agency to "revise section 195.6(b) of title 49, Code of Federal Regulations, to explicitly state that the Great Lakes, coastal beaches, and certain coastal waters are USA ecological resources for purposes of determining whether a pipeline is in a high consequence area (as defined in section 195.450 of such title)."[61]

Section 195.450, one of the two regulations referenced in Section 120, prescribes definitions for terms that are used in the IM regulations in 49 C.F.R. § 195.452. One of those terms is an HCA, which is defined to include commercially navigable waterways, certain populated areas, and USAs.[62] The applicability of the IM regulations turns on whether or not a pipeline segment could affect an HCA. However, the IM regulations in § 195.452 do not apply to certain pipelines, including regulated rural gathering lines and certain low-stress lines in rural areas.[63] Regulated rural gathering lines are only subject to the safety requirements prescribed in 49 C.F.R. § 195.11(b), which do not include the IM requirements. Category 3 low-stress lines are only subject to the safety requirements prescribed in § 195.12(c)(3), which also do not include the IM requirements.

Section 195.6, the other regulation referenced in Section 120, prescribes the definition of a USA for purposes of the Part 195 regulations. USA proximity is one of the criteria used in determining if a gathering line in a rural area is regulated under 49 C.F.R. § 195.11(a), *i.e.*, the pipeline must be located in or within 0.25 miles of a USA. USA proximity is also used in determining the categorization of rural low-stress lines under 49 C.F.R. § 195.12(b)(1)-(2), *i.e.*, a Category 1 or Category 2 rural low-stress line must be located in or within 0.5 miles of a USA, and a Category 3 rural low-stress line must be located more than 0.5 miles from a USA. As previously discussed, USAs are incorporated into the definition of an HCA in 49 C.F.R. § 195.450 and used for purposes of determining whether a pipeline segment is subject to the IM regulations in 49 C.F.R. § 195.452.

Section 120 only directed the Agency to "revise" the USA definition "for purposes of determining whether a pipeline is in a high consequence area (as defined in section 195.450 of such title)." Despite that clear directive from Congress, the IFR purported to amend the USA definition in 49 C.F.R. § 195.6 without limitation, including for purposes of the requirements for regulated rural gathering lines in 49 C.F.R. § 195.11 and rural low-stress lines in 49 C.F.R. § 195.12. Section 120 did not authorize PHMSA to take that action, let alone to do so without adhering to the notice-and-comment rulemaking requirements in the APA and Pipeline Safety Act. While the Associations appreciate the Agency's willingness to issue the partial exercise of enforcement discretion described in the Notice, PHMSA clearly had no basis for using Section 120 or the good-cause exception to amend the USA definition for purposes of the requirements for

[61] 2016 Act § 19(b)(2), 130 Stat. at 527 (as amended by the 2020 Act § 120(b), 134 Stat. at 2235).
[62] 49 C.F.R. § 195.450.
[63] Gravity lines and unregulated rural gathering lines are also exempt from the IM requirements, 49 C.F.R. §§ 195.13(c), 195.15(c).

regulated rural gathering lines in 49 C.F.R. § 195.11 or categorization of rural low-stress lines in 49 C.F.R. § 195.12.[64]

Nor does the information in the record suggest that PHMSA should apply the amended USA definition beyond the parameters prescribed in Section 120. None of the incidents that the Agency referenced in the Interim Final Rule involved gathering lines or low-stress lines in rural areas, and PHMSA offered no rationale in the IFR for applying the amended USA definition to these pipelines other than the rulemaking mandate in Section 120. As that provision only applies in the context of determining whether a pipeline is in an HCA under 49 C.F.R. § 195.450, the record contains no basis for applying the amended USA definition to the requirements for regulated rural gathering lines in 49 C.F.R. § 195.11 or rural low-stress lines in 49 C.F.R. § 195.12.

c. Section 120 Does Not Compel PHMSA to Use the Supplemental Definitions and Databases Referenced in the Interim Final Rule.

The Associations do not agree that Section 120 of the 2020 Act compels PHMSA to use the definitions and databases referenced in the IFR. For example, PHMSA states in the Interim Final Rule that "the territorial sea of the United States" is clearly and unalterably defined for purposes of Section 120 by Presidential Proclamation 5928 as the waters extending 12 nautical miles seaward from the baseline of the United States.[65] But Presidential Proclamation 5928 only extended the reach of the territorial sea for international law purposes, primarily to advance national security interests,[66] and did not alter the geographic boundaries of the United States for all purposes under domestic law.[67] Indeed, the Agency acknowledges that fact in the IFR and recognizes that a 3-nautical mile limit is still used to delineate the extent of the territorial sea in certain federal laws and regulations.[68] And while PHMSA contends in a footnote that using that 3-mile nautical limit in determining the extent of the "territorial sea" under Section 120 and § 195.6 is not "appropriate", the explanation itself demonstrates that the Agency is choosing to use the 12-nautical-mile limit referenced in Presidential Proclamation 5928. As that limit is not necessarily controlling under a domestic law like the Pipeline Safety Act, PHMSA should consider whether the text, structure, and history of Section 120 shows that Congress intended the 3-nautical-mile limit to be used in determining the extent of the territorial sea.[69]

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[64] A federal agency's justification for relying on the good cause exception is judged by the "explanation . . . advanced at the time of the rule making[,]", *N.C. Growers' Ass'n, Inc.*, 702 F.3d at 767, and Section 120 was the only justification that PHMSA offered for issuing the IFR.

[65] Interim Final Rule, 86 Fed. Reg. at 73,179.

[66] Proclamation No. 5928, 54 Fed. Reg. 777 (Dec. 27, 1988).

[67] *Id*; *U.S. v. Alaska*, 503 U.S. 569, 588-89, n.11 (1992) ("We also note that the President's proclamation of a 12-mile territorial sea for *international law purposes* functionally established a distinction between the international and the federal-state boundaries.") (emphasis added); Applicability of Federal Aviation Regulations in the Airspace Overlying the Waters Between 3 and 12 Nautical Miles from the United States Coast, 54. Fed. Reg. 264, 264 (Jan. 4, 1989) ("this Proclamation does not extend the jurisdiction of any state or federal law, and therefore, does not alter the geographical boundaries of the United States for domestic purposes.").

[68] Interim Final Rule, 86 Fed. Reg.at 73,179, n.32. *See also* 33 C.F.R. § 2.22(a)(2) (defining where a 3-nautical-mile limit is used in determining the extent of the territorial sea for purposes of U.S. Coast Guard regulations).

[69] *See In re Air Crash Off Long Island, New York on July 17, 1996*, 209 F.3d 200, 217 (2nd Cir. 2000) (Sotomayor, S., dissenting).

The Agency further states that NOAA's definition of "marine waters" and EPA's definition of "estuarine waters" must be used in determining the extent of "certain coastal waters". However, Congress did not reference any laws, statutes, or regulations administered by NOAA or EPA in Section 120, and PHMSA acknowledges in the Interim Final Rule that the term "marine waters" is not defined anywhere in the U.S. Code.[70] Nor does the Agency explain why Congress only compelled PHMSA to apply EPA's definitions on a selective basis in determining the extent of "certain coastal waters", *i.e.*, EPA's definition of "estuarine waters" clearly and unalterably applies, but EPA's definition of the "territorial sea" does not. Or why boundaries established by NOAA clearly and unalterably apply in determining the extent of "certain coastal waters" and "coastal beaches" under Section 120, but not when determining whether a pipeline is onshore or offshore.[71]

In short, Congress did not clearly and unalterably define "certain coastal waters" and "coastal beaches" in Section 120 or compel PHMSA to use the definitions and databases referenced in the Interim Final Rule in providing the actual meaning for those terms. Other sources of authority can and should be considered in amending the USA definition as part of the rulemaking process. Specifically, the Agency should consider using a 3-nautical-mile limit in determining the extent of the "territorial seas". That limit is used in the Clean Water Act (CWA), an environmental statute specifically designed for the protection of waterways, and provides a far more suitable basis for determining the extent of the "territorial sea" under § 195.6 and § 195.450 given Congress' focus on "coastal" waters and beaches in Section 120, not offshore waters located up to 12 nautical miles from the shoreline.

PHMSA should also acknowledge that further analysis is needed to support the use of the NOAA and EPA definitions of "marine waters" and "estuarine waters". Moreover, in the event the Agency decides to use the NOAA database referenced in the IFR in determining the head of tidal influence, PHMSA should limit its use to the layer representing a mapping confidence level of 80 percent. That limitation is consistent with NOAA's disclaimer about accuracy of the information provided in the database and aligns with the data quality criteria that Research Planning, Inc., included in an August 28, 2017 report prepared for PHMSA, *Unusually Sensitive Areas for Ecological Resources: Standards and Best Practices for Database Updates*, Task Order # DTPH5616F00058.

Finally, the Agency should ensure that the definitions used in determining the status of waterways under the Part 195 regulations are consistent with "long-established meaning[s]" and "practical understandings."[72] The coast and coastline of the United States play an important role in determining the extent of "certain coastal waters" and "coastal beaches" under Section 120. To avoid causing further confusion and uncertainty, the Agency should ensure that its guidance documents, policies, or practices are consistent with well-established law in determining the status of submerged lands and bodies of water, including for purposes of determining whether a pipeline is located onshore or offshore under Part 195.

[70] Interim Final Rule, 86 Fed. Reg. at 73,182.
[71] *Id*. at 73,175.
[72] *Id*. at 73,182. *See supra*, discussion in note 26.

d. The RIA Does Not Accurately Account for the Costs, Benefits, and Other Impacts of the Interim Final Rule.

The Associations do not agree that the RIA accurately accounts for the costs, benefits, and other impacts of the Interim Final Rule. PHMSA makes several assumptions in the RIA that underestimate the costs of the IFR, including by failing to consider pipeline mileage within 0.25 miles of a USA in the Certain Coastal Water or Coastal Beach dataset.[73] This number reflects the number of pipelines, such as rural gathering and low-stress pipelines, that the Agency expects to be impacted by the final rule. By not considering the entire dataset, PHMSA underestimates the costs associated with the final rule.

The Agency also fails to account for potential increases in hazardous liquid pipeline mileage. PHMSA states in the RIA that it "understands that growth is largely occurring inland (*e.g.*, Texas and North Dakota) and not near coastal or offshore areas subject to this rulemaking."[74] The Agency offers no evidence to support this conclusory assumption, again resulting in an underestimate of the costs associated with the IFR. Concerning PHMSA's estimate of the IM compliance costs, the Agency fails to properly consider operators' compliance with leak detection requirements. PHMSA discusses its 2019 hazardous liquid rule and the expansion of leak detection standards to cover both HCA and non-HCA pipelines.[75] PHMSA concludes that because all pipelines (except gathering) must have a leak detection system, the IFR results in no significant change. But the 2019 final rule gave operators five years to comply with its leak detection provisions. The IFR significantly reduces the 5-year compliance, resulting in additional costs that are not included in the RIA.

As in other rulemaking proceedings, PHMSA relies on outdated information in analyzing the impact of the Interim Final Rule on regulated rural gathering lines.[76] The RIA cites to cost information that the Independent Petroleum Association of America (IPAA) ostensibly provided to the Agency in an earlier, 2006 rulemaking proceeding. GPA and API have questioned the veracity of that information,[77] and PHMSA has failed to produce any of the underlying data in response to previous requests.[78] Nor is any of the data provided by IPAA available in the docket for the earlier rulemaking proceeding, and the final regulatory analysis in that proceeding refers only to "estimates" and "informal discussions".[79] In fact, the only information that is in the docket is a record indicating that a meeting occurred between PHMSA staff, a representative of IPAA, and two other industry trade organizations on July 29, 2004, and that a single operator presented

[73] RIA at 19.
[74] *Id.* at 19, n.29.
[75] *Id.* at 32.
[76] *Id.* at 34.
[77] GPA Midstream Ass'n and American Petroleum Institute, Request for Extension of Time to File Appeal Under 49 C.F.R. § 190.338, Docket No. PHMSA-2011-0023 (Apr. 14, 2022), https://www.regulations.gov/document/PHMSA-2011-0023-0506.
[78] PHMSA, Response to Request for Extension of Time to File Appeal Under 49 CFR 190.338, Docket No. PHMSA-2011-0023 (Apr. 15, 2022), https://www.regulations.gov/document/PHMSA-2011-0023-0507.
[79] PHMSA, Final Regulatory Evaluation: Regulated Natural Gas Gathering Lines, Docket No. PHMSA-RSPA-1998-4868-0208 at 18, 32, 35-36 (Sept. 7, 2006), https://www.regulations.gov/search?filter=PHMSA-RSPA-1998-4868-0208.

"cost/benefit figures" to PHMSA staff during that meeting.[80] No further detail about the data that the operator shared is provided.[81] Whether appropriate for use in an historical context, the Agency cannot prepare an adequate risk assessment based solely on estimates, informal discussions, and information that a single operator may have provided to PHMSA staff in a meeting that occurred nearly 20 years ago.[82]

Finally, operators of rural gathering lines that become regulated under § 195.11 because of the amended USA definition will incur additional compliance costs that are not accounted for in the RIA. For example, PHMSA has made clear that these pipelines subject to the requirements in Section 114 of the 2020 Act due to the change in Part 195 status, and that operators will need to amend their operations and maintenance plans to include provisions for eliminating hazardous leaks, minimizing methane emissions, and replacing or remediating leak-prone pipelines.[83] The RIA does not account for any of these additional compliance costs.

III. Conclusion

The Associations appreciate the opportunity to submit these comments on the Interim Final Rule to the LPAC for consideration. If you have any questions, please feel free to reach out to Matthew Hite, David Murk, or Andy Black at the contact information provided below.

Sincerely,

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[80] Research and Special Programs Administration, Memorandum: Meeting with members of the Independent Petroleum Association of America (IPAA) gathering line task force, Docket No. PHMSA-RSPA-1998-4868-0172 (July 29, 2004), https://www.regulations.gov/document/PHMSA-RSPA-1998-4868-0172.
[81] *Id.*
[82] 49 U.S.C. §§ 60102(b)(3), (b)(5). *See e.g., Am. Pub. Gas Ass'n v. U.S. Dep't of Energy*, 22 F.4th 1018, 1027–28 (D.C. Cir. 2022).
[83] Pipeline Safety: Statutory Mandate To Update Inspection and Maintenance Plans To Address Eliminating Hazardous Leaks and Minimizing Releases of Natural Gas From Pipeline Facilities, 86 Fed. Reg. 31,002 (June 10, 2021).

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