VIA ELECTRONIC FILING

February 25, 2022

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

Re: Docket No. PHMSA-2017-0152, Unusually Sensitive Areas for the Great Lakes, Coastal Beaches, and Certain Coastal Waters

To Whom It May Concern:

On December 27, 2021, the Pipeline and Hazardous Materials Safety Administration (PHMSA or the Agency) published an 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), in the *Federal Register*.[1] The Interim Final Rule amends the hazardous liquid pipeline safety regulations in 49 C.F.R. Part 195 to define the Great Lakes, coastal beaches, and certain coastal waters as unusually sensitive areas (USA or USAs) under 49 C.F.R. § 195.6, effective as of February 25, 2022. The amended USA definition applies for all purposes under the Part 195 regulations, including the integrity management requirements in 49 C.F.R. §§ 195.450-195.452, the requirements for regulated rural gathering lines in 49 C.F.R. § 195.11, and the requirements for rural low-stress lines in 49 C.F.R. § 195.12.

The Agency issued the IFR without publishing a proposed rule, providing the public with the opportunity to comment, or presenting the amended USA definition to the Liquid Pipeline Advisory Committee (LPAC) for consideration. PHMSA found that those actions were impractical or unnecessary under the good-cause exception in the Administrative Procedure Act (APA),[2] because of "the specific instructions" that Congress included in Section 120 of the Protecting Our Infrastructure of Pipelines and Enhancing Safety Act of 2020 (2020 Act).[3] In Section 120, Congress directed 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

[1] Pipeline Safety: Unusually Sensitive Areas for the Great Lakes, Coastal Beaches, and Certain Coastal Waters, 86 Fed. Reg. 73,173 (Dec. 27, 2021).
[2] 5 U.S.C. § 553(b)(3)(B).
[3] Consolidated Appropriations Act, 2021, Division R, § 120, Pub. L. 116-260, 134 Stat. 1181. 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.

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)."[4] Congress also directed PHMSA to "complete the revision to the regulations required" by Section 120 within 90 days of the enactment of the 2020 Act, or by March 27, 2021.[5]

The Agency asked the public to submit comments on the IFR by no later than February 25, 2022. The GPA Midstream Association[6] (GPA), American Petroleum Institute[7] (API), and Association of Oil Pipe Lines (AOPL)[8] (collectively, the Associations) are respectfully submitting the following joint comments in response to PHMSA's request.

I. Summary

- The Associations do not agree that PHMSA had good cause for issuing the IFR without providing prior notice or the opportunity to comment. The good-cause exception in the APA is narrowly construed, and the Agency's findings and statement of reasons do not clear the high bar necessary to invoke that exception. Contrary to PHMSA's repeated assertions, Congress did not clearly define the terms that the Agency included in the amended USA definition, a fact best demonstrated by PHMSA's reference to other sources of authority throughout the Interim Final Rule to provide actual meaning to those terms. Nor does the 90-day rulemaking deadline justify the Agency's decision to forgo the notice-and-comment process. Had Congress intended that result, Section 120 would have been styled as a self-executing provision or included language waiving the notice-and-comment requirements.

- The Associations do not agree that Section 120 provides PHMSA with good cause 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

[4] Division R, § 120, Pub. L. 116-260, 134 Stat. at 2235.
[5] *Id.* § 120(c).
[6] GPA Midstream has served the U.S. energy industry since 1921 and has nearly 70 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.
[7] 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.
[8] AOPL promotes responsible policies, safety excellence, and public support for liquids pipelines. AOPL represents pipelines transporting 97 percent of all hazardous liquids barrel miles reported to the Federal Energy Regulatory Commission. AOPL's diverse membership includes large and small pipelines carrying crude oil, refined petroleum products, NGLs, and other liquids.

consequence area" under 49 C.F.R. § 195.450. Nevertheless, the Interim Final Rule incorporates the amended USA definition throughout the Part 195 regulations, 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. Nothing in Section 120 directs PHMSA to take that action, let alone to do so without complying with the notice-and-comment requirements in the APA and Pipeline Safety Act.

- The Associations do not agree that Section 120 compels PHMSA to use the definitions and databases referenced in the IFR. Despite the Agency's repeated statements to the contrary, PHMSA is not bound by the 12-nautical mile limit in determining the extent of the territorial sea, or the definitions and databases administered by the National Oceanic Atmospheric Administration (NOAA) or U.S. Environmental Protection Administration (EPA) in determining the extent of marine or estuarine waters. The Agency chose to reference these sources of authority and rejected others in developing the Interim Final Rule. Rather than denying that obvious conclusion, PHMSA should acknowledge that any decision to rely on the definitions and databases referenced in the IFR is discretionary, and that the Agency will consider the comments submitted during the rulemaking process in deciding whether to use those definitions and databases in issuing the final rule. PHMSA should also ensure that any agency guidance documents, policies, or practices are consistent with well-established law in determining the status of waterways under Part 195.

- The Associations do not believe 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 in evaluating the IFR.

II. Comments

a. PHMSA Did Not Have Good Cause for Amending the USA Definition Without Providing Prior Notice or the Opportunity to Participate in the Rulemaking Process.

The APA prescribes rulemaking requirements that federal agencies are obligated to follow in establishing new regulations.[9] 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.[10] 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.[11] As the federal courts have made clear:

[9] 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.
[10] *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).
[11] *N.C. Growers' Ass'n, Inc.,* 702 F.3d. at 763.

> 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).[12]

The APA allows federal agencies to issue certain final rules without notice and comment by using what is known as the good-cause exception.[13] That exception 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."[14] The federal courts have repeatedly emphasized that the good cause exception "is . . . 'narrowly construed and only reluctantly countenanced.'"[15] Federal agencies must clear "a high bar to invoke the exception[,]" and "the circumstances justifying reliance on the . . . exception are 'rare[.]'"[16] The federal agency seeking to forgo the notice-and-comment process bears the burden of demonstrating that good cause exists,[17] and the reasons provided for doing so must withstand "meticulous and demanding" scrutiny.[18]

In relying on the good-cause exception, PHMSA found that 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.[19] 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.[20] 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

[12] *Id.*
[13] 5 U.S.C. § 553(b)(3)(B).
[14] *Id*. The Pipeline Safety Act acknowledges that some of the supplemental rulemaking requirements in the statute do not apply if PHMSA properly issues a final rule under the APA's good cause exception, 49 U.S.C. § 60102(b)(6)(C).
[15] *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).
[16] *N.C. Growers' Ass'n, Inc.,* 702 F.3d at 767.
[17] *Nat'l Res. Def. Council*, 894 F.3d at 113-114.
[18] *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)).
[19] Interim Final Rule, 86 Fed. Reg. at 73,182.
[20] *Id.*

regulations with the grave public safety and environmental risks posed by hazardous liquid lines."[21]

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.'"[22] 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."[23] "[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.'"[24]

PHMSA does not point to any credible imminent hazard or threat in its good cause finding,[25] relying instead on Congress' decision to include new definitions and a 90-day rulemaking deadline in Section 120 of the 2020 Act. As to the former, the Agency repeatedly states that the clear and unalterable definitions provided by Congress support a finding of impracticability, but then goes to great lengths to explain why definitions and databases administered by other federal agencies must be used to understand the actual meaning of these (otherwise clearly and unalterably defined) terms. The Agency never discusses why Congress failed to reference these other sources of authority in the 2020 Act, or why Congress would assume that definitions and databases administered by other federal agencies acting under different legal authorities are binding on PHMSA.[26] Nor does the Agency explain why Congress felt compelled to direct PHMSA to "complete the revision to the regulations required" by Section 120 if the relevant terms had already been clearly and unalterably defined in the 2020 Act. In any event, the

[21] *Id.* at 73,183.
[22] *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)).
[23] *Id.* (quoting *Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 93 (D.C. Cir. 2012)).
[24] *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)).
[25] The Agency cites three recent hazardous liquid pipeline releases as evidence in support of the need to amend the USA definition in the IFR. However, PHMSA acknowledges that two of those releases occurred on pipeline segments in HCAs already subject to the IM regulations, and the Agency recently found that the third release occurred in an HCA and USA in a corrective action order. PHMSA also cites 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 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.
[26] The Agency's previous guidance to pipeline operators that the definitions used by EPA in determining the status of waterways "have no relevance to the pipeline safety laws" directly contradicts such an assumption. PHMSA Letter of Interpretation to Mr. R. J. Redweik, Shell Western E&P Inc., PI-97-0101 (Sept. 16, 1997). Indeed, PHMSA's 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.

Agency's repeated assertions about the clear and unalterable nature of the definitions in Section 120 do not support a finding of impracticability.[27]

PHMSA further states that the 90-day rulemaking deadline in Section 120 renders notice-and-comment impracticable. While certainly demonstrating a desire for prompt action, the 90-day deadline does not suggest that Congress intended to give the Agency license to forgo the notice-and-comment rulemaking process in its entirety.[28] 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.[29] Nor does the mere presence of a rulemaking deadline create the kind of imminent threat or hazard that supports a finding of impracticability.[30] If that were the case, PHMSA could use the good cause exception to summarily issue the final gas pipeline leak detection regulations required under Section 113 of the 2020 Act,[31] subjecting operators of the more than 2.6 million miles of regulated gas gathering, transmission, and distribution lines in the United States to new legal obligation without prior notice or comment.[32] Even the Agency does not agree that the 1-year rulemaking deadline in Section 113 grants PHMSA that kind of extraordinary authority.[33]

Finally, the IFR is not a minor or merely technical rule with insignificant or inconsequential impacts. According to PHMSA's own estimates, 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

[27] Nor does the issuance of the Interim Final Rule entitle PHMSA to receive any additional deference in interpreting the meaning of Section 120. As the U.S. Supreme Court explained in *Gonzalez v. Oregon*, "[a]n agency does not acquire special authority to interpret its own words when, instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language." 546 U.S. 243, 257 (2006). In the IFR, the Agency elected to adopt the language of Section 120 verbatim into the amended USA definition. Therefore, PHMSA is not afforded any additional deference in interpreting the language of § 195.6 or Section 120.

[28] *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)).

[29] *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").

[30] 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.

[31] 49 U.S.C. § 60102(q).

[32] PHMSA Portal Access Page, https://portal.phmsa.dot.gov/phmsapub/faces/PHMSAHome?req=6880637864739697222&attempt=0&_afrLoop=223668915596269&_afrWindowMode=0&_afrWindowId=null&_adf.ctrl-state=m4009q4ba_28 (last visited Feb. 21, 2022).

[33] *See* PIPES Act 2020 Web Chart (Jan. 27, 2022), https://www.phmsa.dot.gov/legislative-mandates/pipes-act-web-chart (acknowledging that PHMSA will publish a notice of proposed rulemaking in the *Federal Register* as part of the process of complying with the rulemaking mandate in Section 113 of the 2020 Act).

be imposed in the next 12 months.[34] Operators in Louisiana and Texas will be particularly affected, with an additional 2,423 miles of pipelines and 408 miles of pipelines, respectively, becoming USAs. Impacts of this magnitude can hardly be described as insignificant or inconsequential. Nor does PHMSA's incorporation of the language in Section 120 somehow make the amendments to § 195.6 "minor or merely technical." Congress would simply have amended § 195.6 without directing PHMSA to "*complete the revision to the regulations* required" by Section 120 if the outcome of this proceeding was 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 in the absence of PHMSA's revision to the USA definition in § 195.6.[35]

b. Section 120 Does Not Provide PHMSA with Cause to Amend the USA Definition for Any Purpose Other Than to Determine If a Pipeline is in an HCA under the IM Regulations.

The primary legal authority that PHMSA relied upon in issuing the IFR was Section 120 of the 2020 Act. 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)."[36]

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.[37] HCAs play an important role in determining the applicability of the IM regulations, *i.e.*, an operator of a pipeline located in or that could affect an HCA is required to follow the integrity management program requirements in § 195.452. However, the HCA definition in § 195.450 and IM regulations in § 195.452 do not apply to certain pipelines, including regulated rural gathering lines and certain low-stress lines in rural areas.[38] 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.

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

[35] 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 is updating 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.

[36] Division R, § 120, Pub. L. 116-260, 134 Stat. at 2235.

[37] 49 C.F.R. § 195.450.

[38] Gravity lines and unregulated rural gathering lines are also exempt from the IM requirements, 49 C.F.R. §§ 195.13(c), 195.15.

Section 195.6, the other regulation referenced in Section 120, prescribes the definition of a USA for purposes of the Part 195 regulations. Unlike HCAs, USAs are directly incorporated into the requirements for regulated rural gathering and low-stress lines in §§ 195.11 and 195.12, respectively. 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.

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)." But the IFR's amendment to the USA definition applies throughout the Part 195 regulations, 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 direct PHMSA to amend the USA definition for these purposes, let alone to do so without adhering to the notice-and-comment rulemaking requirements in the APA and Pipeline Safety Act.

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[,]"[39] and Section 120 was the only justification that PHMSA offered for issuing the IFR. Nothing in the text, structure, or history of that provision indicates that Congress intended the Agency to apply the amended USA definition outside the narrow confines of the HCA definition in the IM regulations. Nor is there any indication that Congress wanted PHMSA to use Section 120 to impose new legal obligations on operators of rural gathering and low-stress lines without providing prior notice, the opportunity to comment, or presenting a rulemaking proposal to the LPAC for consideration. As the Interim Final Rule offers no other grounds to support the good cause finding, the Agency clearly cannot meet the "high bar" that applies to the use of that "narrowly construed" and "reluctantly countenanced" exception.

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. In Section 120, Congress defined the term "certain coastal waters" for purposes of 49 U.S.C. § 60109(b)(2) as (1) "the territorial sea of the United States," (2) "the Great Lakes and their connecting waters," and (3) "the marine and estuarine waters of the united states up to the head of the tidal influence." Congress further defined "coastal beach" as "any land between the high- and low-water marks of certain coastal waters." In the Interim Final Rule, the Agency repeatedly states that all of the terms used in describing "certain coastal waters" and "coastal beaches" are clearly and unalterably defined by other sources of legal authority.

For example, PHMSA states 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

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

extending 12 nautical miles seaward from the baseline of the United States.[40] But, as the Agency acknowledges in a footnote in the IFR, other definitions of the "territorial sea" exist that establish a 3-mile limit.[41] While PHMSA explains in the footnote why it believes that using that 3-mile limit in determining the extent of the "territorial sea" for purposes Section 120 and § 195.6 is not "appropriate", the explanation itself demonstrates that the Agency is *making a choice* to use the 12-nautical mile limit. To choose is to exercise discretion, notwithstanding PHMSA's repeated statements to the contrary.

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" under Section 120. 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.[42] Nor does the Agency explain why Congress would have intended EPA definitions to only apply 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. PHMSA also does not address why boundaries established by NOAA clearly and unalterably apply in determining the extent of "certain coastal waters" and "coastal beaches", but not when determining whether a pipeline is onshore or offshore.[43] Again, the Agency is making choices, and to choose is to exercise discretion.

Rather than continuing to deny the obvious, PHMSA should acknowledge that Congress did not clearly and unalterably define "certain coastal waters" and "coastal beaches" in Section 120, and that reasonable definitions for these terms can be added to 49 C.F.R. § 195.6 as part of the rulemaking process. The Agency should further acknowledge that PHMSA is not bound by the 12-nautical mile limit in determining the extent of the "territorial seas". Other reasonable definitions are available to use for that purpose, including the 3-mile territorial sea limit used in the Clean Water Act (CWA), an environmental statute specifically designed for the protection of waterways. Indeed, the 3-mile CWA limit 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*

[40] Interim Final Rule, 86 Fed. Reg. at 73, 179.
[41] *Id.* at 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).
[42] Interim Final Rule, 86 Fed. Reg. at 73,182.
[43] *Id.* at 73,175.

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."[44] 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.

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 all of the pipeline mileage within 0.25 miles of a USA in the Certain Coastal Water or Coastal Beach dataset.[45] 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 subject to the final rule. In the RIA, PHMSA states 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."[46] This assumption is conclusory and lacks any reasonable basis, 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.[47] PHMSA concludes that because all pipelines (except gathering) must have a leak detection system, the IFR results in no significant change. However, 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.

PHMSA relies on outdated information in its analysis of the impact on regulated rural gathering lines. The RIA cites to cost information provided by the Independent Petroleum Association of America (IPAA) for a 2006 onshore gathering line rulemaking. While PHMSA states that "all cost estimates were updated to 2018 dollars," the Agency does not explain why data

[44] *Id.* at 73,182. *See supra,* discussion in note 26.
[45] RIA at 19.
[46] *Id.* at n.29.
[47] *Id.* at 32.

from 2006 is appropriate to use in estimating the impacts of rule issued more than 15 years later.[48] Nor does the RIA describe how PHMSA updated the 2006 data, or whether the Agency considered any new costs that might have arisen in the intervening years. In that absence of that explanation, PHMSA cannot provide a reasonable estimate of the costs, benefits, and other impacts of the IFR.

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.[49] The RIA does not account for any of these additional compliance costs.

III. Conclusion

The Associations appreciate the opportunity to submit comments in response to the Interim Final Rule. 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,

Matthew Hite
Vice President of Government Affairs
GPA Midstream Association
(202) 279-1664
mhite@gpamidstream.org

Dave Murk
Director, Pipelines
Midstream and Industry Operations
American Petroleum Institute
(202) 682-8080
murkd@api.org

Andy Black
President and CEO
Association of Oil Pipe Lines
(202) 292-4500
ablack@aopl.org

[48] *Id.* at 34. On December 15, 2021, GPA Midstream and API filed a petition for reconsideration challenging the use of the 2006 IPAA data in another rulemaking proceeding concerning onshore gas gathering lines. *Pipeline Safety: Safety of Gas Gathering Pipelines: Extension of Reporting Requirements, Regulation of Large, High-Pressure Lines, and Other Related Amendments*, 86 Fed. Reg. 63,266 Nov. 15, 2021).

[49] 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 (Jun. 10, 2021).