UNITED STATES DEPARTMENT OF TRANSPORTATION
PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMINISTRATION
WASHINGTON, D.C.

Pipeline Safety: Unusually Sensitive Areas for the Great Lakes, Coastal Beaches, and Certain Coastal Waters	)	**Docket No. PHMSA–2017–0152**

MOTION TO STAY INTERIM FINAL RULE PENDING JUDICIAL REVIEW

Pursuant to the Administrative Procedure Act (APA), 5 U.S.C. § 705, and Federal Rule of Appellate Procedure (FRAP) 18(a)(1), the GPA Midstream Association (GPA) and American Petroleum Institute (API) (collectively, the Associations) respectfully submit this motion (the Motion) to the Pipeline and Hazardous Materials Safety Administration (PHMSA or the Agency) requesting a stay of the Interim Final Rule in the above-captioned proceeding (Interim Final Rule or IFR).[1] The Associations are asking PHMSA to stay the Interim Final Rule in its entirety, or in the alternative, for a partial stay, to preserve the status quo pending judicial review. A stay is warranted because PHMSA failed to comply with the notice-and-comment rulemaking requirements in the APA and Pipeline Safety Act[2] in issuing the IFR, the Associations' members will suffer irreparable harm if relief is not granted, and the balance of the equities and public interest otherwise favors a stay.

A. Procedural Background

On December 27, 2021, PHMSA published the Interim Final Rule in the *Federal Register*,[3] which 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 without limitation under the Part 195 regulations, including for purposes of the integrity management (IM) requirements in 49 C.F.R. §§ 195.450-195.452, as well as 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.

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

[1] 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").
[2] *See* 49 U.S.C. §§ 60102, 60115.
[3] Interim Final Rule at 73,173.

Advisory Committee (LPAC) for consideration. Citing the good-cause exception in the APA,[4] PHMSA found that notice and comment were impractical or unnecessary because of "the specific instructions"[5] that Congress included in Section 120 of the Protecting Our Infrastructure of Pipelines and Enhancing Safety Act of 2020 (2020 Act).[6]

In the 2020 Act, Congress amended an earlier rulemaking requirement from Section 19(b) of the Protecting Our Infrastructure of Pipelines and Enhancing Safety Act of 2016 (2016 Act)[7] by adding definitions for the terms "certain coastal waters" and "coastal beach."[8] Congress also amended the language in Section 19(b) of the 2016 Act by instructing 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)."[9] Finally, Congress directed PHMSA to "complete the revision to the regulations required" by Section 19(b) of the 2016 Act, as amended by Section 120 of the 2020 Act, within 90 days of enactment, or by March 27, 2021.[10]

On March 1, 2022, the Associations filed a petition for judicial review of the Interim Final Rule in the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) under the Pipeline Safety Act[11] and APA.[12] The Agency is authorized to stay the IFR pending judicial review under the APA,[13] and the D.C. Circuit ordinarily requires a petitioner first to seek such relief from the agency under FRAP 18(a)(1). The Associations respectfully request that PHMSA grant a stay under these provisions for the reasons provided below.

B. Legal Standard

The standard for obtaining a stay of a final rule from a federal agency pending judicial review is the same as the standard for obtaining a stay from a federal court.[14] Under the well-established four-part test, a request for stay requires consideration of whether: (1) the movant presents a substantial likelihood of success on the merits; (2) irreparable harm would occur without a stay; (3) potential harm to the movant outweighs harm to others if a stay is not granted; and (4) granting a stay is not contrary to the public interest.[15]

[4] 5 U.S.C. § 553(b)(3)(B).
[5] Interim Final Rule at 73,182.
[6] Consolidated Appropriations Act, 2021, Division R, § 120, Pub. L. 116-260, 134 Stat. 1181.
[7] § 19(b), Pub. L. 114-183, 130 Stat. 514.
[8] Division R, § 120(a), Pub. L. 116-260, 134 Stat. at 2235.
[9] § 19(b), Pub. L. 114-183, 130 Stat. at 527 as amended by Division R, § 120(a), Pub. L. 116-260, 134 Stat. at 2235.
[10] Division R, § 120(c), Pub. L. 116-260, 134 Stat. at 2235.
[11] 49 U.S.C. § 60119.
[12] 5 U.S.C. § 702.
[13] *Id.* § 705.
[14] *Sierra Club v. Jackson*, 833 F. Supp. 2d 11, 29-30 (D.D.C. 2012).
[15] *Virginia Petroleum Jobbers Ass'n v. Fed. Power Comm'n.*, 259 F.2d 921, 925 (D.C. Cir. 1958); *see also, Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); *Nken v. Holder*, 556 U.S. 418, 434 (2009).

C. Basis for Relief

The Agency should stay the Interim Final Rule in its entirety. The Associations have a strong likelihood of success on the merits, because PHMSA issued the IFR without complying with the rulemaking requirements in the APA and Pipeline Safety Act. The APA's good-cause exception is "narrowly construed and only reluctantly countenanced," and the Agency's stated purpose of satisfying the requirements in Section 120 is not one of the rare circumstances justifying the use of that exception.[16] Contrary to PHMSA's assertions, Congress did not clearly and unalterably define the terms that the Agency codified in the amended USA definition, and the rulemaking deadline in Section 120 does not warrant PHMSA's decision to forgo the notice-and-comment process. The Associations' members will sufferable irreparable harm, including nonrecoverable compliance costs and a significant procedural injury, if the Interim Final Rule is not stayed in its entirety, and the balance of the harms and public interest favor granting that relief to preserve the status quo pending judicial review.

In the alternative, the Agency should grant a partial stay of the IFR. The Associations' likelihood of success on the merits is even stronger as to PHMSA's use of the good-cause exception to amend the USA definition outside of the circumstances prescribed in the 2016 and 2020 Acts. 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,[17] but the Interim Final Rule amends the USA definition in Part 195 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. 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' members include operators of rural gathering and low-stress lines that will sufferable irreparable harm, including nonrecoverable compliance costs and a significant procedural injury, if the IFR is applied for any purposes other than those specified in the 2016 and 2020 Acts, and the balance of the harms and public interest otherwise favor granting a partial stay on that basis pending judicial review.

1. The Interim Final Rule Should Be Stayed in its Entirety.

The Associations satisfy the four-part test for obtaining a wholesale stay of the IFR pending judicial review.

a) The Associations Have a Strong Likelihood of Success on the Merits.

To meet the first prong of the four-part test, the Associations must make "a strong showing that [they are] likely to succeed on the merits"[18] or have raised "serious legal questions."[19] The Associations easily meet that standard because of PHMSA's failure to comply with the notice-

[16] *Tenn. Gas Pipeline Co. v. FERC*, 969 F.2d 1141, 1144 (D.C. Cir.1992) (quoting *New Jersey v. EPA,* 626 F. 2d 1038, 1045 (D.C. Cir. 1980).
[17] § 19(b), Pub. L. 114-183, 130 Stat. at 527 as amended by Division R, § 120(a), Pub. L. 116-260, 134 Stat. at 2235.
[18] *Leiva-Perez v. Holder*, 640 F.3d 962, 966 (9th Cir. 2011) (quoting *Nken*, 556 U.S. at 434).
[19] *Risinger v. SOC LLC,* No. 2:12-cv-00063-MMD-PAL, 2015 WL 7573191, *1 (D. Nev. Nov. 24, 2015).

and-comment rulemaking requirements in 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.[20] As general matter, the APA requires a federal agency to provide the public with notice of a proposed rulemaking and afford interested parties the opportunity to comment.[21] 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.[22] As the federal courts have made clear:

> 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).[23]

However, the APA allows certain final rules to be issued without notice and comment under what is known as the good-cause exception.[24] "'[N]arrowly construed and only reluctantly countenanced[,]'"[25] a federal agency must clear "a high bar" to show that the good cause exception applies, and "the circumstances justifying reliance on the . . . exception are 'rare[.]'"[26] The federal agency also bears the burden of demonstrating that good cause exists,[27] and the reasons provided for using the exception must be "examine[d] closely"[28] and are subject to "meticulous and demanding" scrutiny.[29]

[20] 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.

[21] *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).

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

[23] *Id.*

[24] 5 U.S.C. § 553(b)(3)(B). The good-cause exception provides, 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." *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).

[25] *Tenn. Gas Pipeline Co.*, 969 F.2d at 1144 (quoting *New Jersey,* 626 F.2d at 1045).

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

[27] *Nat'l Res. Def. Council*, 894 F.3d at 113-114.

[28] *Council of the S. Mountains, Inc. v. Donovan*, 653 F.2d 573, 580 (D.C. Cir. 1981) (citation omitted).

[29] *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)).

PHMSA found that the Interim Final Rule could be issued under the good-cause exception because providing prior notice and the opportunity to comment 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 could not be altered or amended.[30] PHMSA further stated that other federal agencies have definitions and databases depicting the extent of "certain coastal waters" and "coastal beaches" that must be used to satisfy the requirements in Section 120.[31] Finally, the Agency referenced the 90-day rulemaking deadline in Section 120, stating that allowing notice and 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."[32]

The Agency's findings do not demonstrate that providing notice and comment would be impracticable. The federal courts have held that "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.'"[33] 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."[34] PHMSA does not point to any imminent hazard or threat in its good-cause finding,[35] but relies instead on the definitions and 90-day rulemaking deadline in Section 120 of the 2020 Act.

As to the definitions, the Agency repeatedly characterizes the language in Section 120 as clear and unalterable, but then relies on definitions and databases administered by other federal agencies to provide the actual meaning for these terms. The Agency does not explain why Congress failed to reference these other authorities in Section 120, or why Congress would assume that definitions and databases administered by other federal agencies acting under different laws would be binding on PHMSA.[36] Nor does the Agency explain why Congress asked PHMSA to

[30] Interim Final Rule, 86 Fed. Reg. at 73,182.
[31] *Id.*
[32] *Id.* at 73,183.
[33] *N.C. Growers' Ass'n, Inc.*, 702 F.3d at 766 (quoting *Nat'l Nutritional Foods Ass'n v. Kennedy*, 572 F.2d 377, 384–85 (2d Cir. 1978)).
[34] *Id.* (quoting *Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 93 (D.C. Cir. 2012)).
[35] The three recent hazardous liquid pipeline releases cited in the IFR do not support the need to amend the USA definition to address an imminent hazard or threat. Two of those releases occurred on pipeline segments in HCAs that were 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. The other events cited by PHMSA either did not involve an actual release of hazardous liquids from a pipeline, or were historical events involving non-jurisdictional offshore production facilities and maritime transportation. Interim Final Rule, 86 Fed. Reg. at 73,177-178.
[36] That assumption is contradicted by the Agency's previous statement that the definitions used by 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). It is also contradicted by PHMSA's statement in the IFR 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 its regulations at 49 C.F.R. §§ 192.3 and 195.2. Interim Final Rule, 86 Fed. Reg. at 73,175.

"complete the revision to the regulations required" by Section 120 if the terms had already been clearly and unalterably defined in the 2020 Act.

More importantly, PHMSA's characterization of the language in Section 120 is at odds with its own analysis. For example, the Agency 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 extending 12 nautical miles seaward from the baseline of the United States.[37] However, the Agency acknowledges that other definitions of the "territorial sea" exist, including a 3-mile limit applied by EPA under the Clean Water Act (CWA) as well as other authorities that prescribe a 3-nautical mile limit.[38] While PHMSA explains in a footnote why the Agency does not believe it is "appropriate" to use the former, 3-mile limit from the CWA in determining the extent of the "territorial sea" under Section 120 and § 195.6, the explanation itself demonstrates that PHMSA is *choosing* to use the 12-nautical mile limit.

PHMSA 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". But Congress did not reference any laws, statutes, or regulations administered by NOAA or EPA in Section 120, and the Agency does not explain why Congress would have intended these supplemental sources of authority to be used on a selective basis—*i.e.*, EPA's definition of "estuarine waters" clearly and unalterably applies in determining the extent of "certain coastal waters," but EPA's definition of the "territorial sea" does not;[39] 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;[40] NOAA's definitions and boundaries clearly and unalterably apply in determining the extent of "marine waters," even though that term is not defined in Section 120 or anywhere else in the U.S. Code.[41]

In any event, the Agency's repeated assertions about the clear and unalterable nature of the definitions in Section 120 do not support a finding of impracticability.[42] There is no indication that "the due and required execution of [PHMSA's] functions would be unavoidably prevented by" providing the public with notice and the opportunity to comment on the definitions that the Agency wants to adopt in 49 C.F.R. § 195.6(b)(6)-(7) and (c) for "certain coastal waters" and "coastal beaches."[43] To the contrary, PHMSA's understanding of the language in Section 120, as

[37] Interim Final Rule, 86 Fed. Reg. at 73,179.
[38] *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).
[39] Interim Final Rule, 86 Fed. Reg. at 73,180, 73,182.
[40] *Compare id.* at 73,182 *with id.* at 73,175.
[41] *Id.* at 73,182.
[42] The Associations do not believe that any deference is owed to PHMSA's interpretation of Section 120, which is based on a fundamentally flawed understanding of congressional intent. As the D.C. Circuit explained in *Peter Pan Bus Lines, Inc. v. Federal Motor Carrier Safety Adm'n*, "deference to an agency's interpretation of a statute is not appropriate when the agency wrongly 'believes that interpretation is compelled by Congress.'" 471 F. 3d 1350, 1351 (D.C. Cir. 2006) (quoting *PDK Laboratories, Inc. v. DEA*, 362 F.3d 786, 798 (D.C. Cir. 2004)). Nor does the issuance of the Interim Final Rule, which adopted the language in Section 120 into §§ 195.6(b)(6)-(7), (c) verbatim, entitle PHMSA to any additional deference. 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).
[43] *N.C. Growers Ass'n, Inc.*, 702 F.3d at 766.

described in the analysis provided in the Interim Final Rule, suggests that the opposite is true.[44] The Agency would certainly benefit from allowing interested stakeholders to provide meaningful input on the definitions, [45] and the notice-and-comment process would lead to the development of a final rule that reflects the intent of Congress and is the product of reasoned decisionmaking.

Nor does the 90-day deadline in Section 120 support a finding of impracticability. The federal courts have emphasized that the mere presence of a rulemaking deadline does not create good cause under the APA.[46] The federal agency must show that a failure to meet the deadline will result in real harm,[47] or that Congress authorized the rule to be issued without notice and comment.[48] PHMSA has not identified any real harm that the IFR is addressing,[49] and nothing in Section 120 indicates that Congress wanted the Agency to issue the Interim Final Rule without notice and comment.[50] Indeed, PHMSA agrees that the deadlines that Congress included in other rulemaking mandates in the 2020 Act do not make notice and comment impracticable, *i.e.*, the Agency has acknowledged that a notice of proposed rulemaking will be issued for the gas pipeline leak detection regulations required under Section 113 of the 2020 Act,[51] even though that provision includes a 1-year deadline for issuing the final regulations.[52]

[44] *See* discussion, *supra*, note 41.

[45] The Alaska Department of Natural Resources (ADNR) recently submitted a comment letter in this proceeding expressing many of the same concerns as the Associations. Comment to Interim Final Rule, Alaska Department of Natural Resources, (Feb. 25, 2022), available at https://www.regulations.gov/comment/PHMSA-2017-0152-0008. The comment letter notes, for example, that "ADNR has concerns about unexpected impacts of this IFR and is awaiting the authoritative geospatial information depicting the exact areas intended to be captured by this IFR, especially those portions that directly impact State of Alaska lands." *Id.* The comment letter further notes that "ADNR also has general concerns about the truncated process under the 'good cause' exception that is exacerbated by the lack of detailed authoritative geospatial information that is necessary to evaluate the impacts of this IFR on the ground." *Id.* Finally, the comment letter notes that the IFR has significant impacts on ADNR and the State of Alaska, "as the total length of Alaska's shoreline alone (approximately 46,000 miles) is longer than that of the combined shorelines of the entire contiguous United States." *Id.*

[46] *Methodist Hospital 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"); *Western Oil and Gas Ass'n v. U.S. EPA,* 633 F. 2d. 803, 812 (9th Cir. 1980) (characterizing a "blanket exemption [of notice and comment] for agencies operating under pressure of statutory deadlines" as "judicial legislation").

[47] *Natural Resources Defense Council v. Abraham*, 355 F.3d 179, 205 (2d Cir. 2004).

[48] *Nat'l Women, Infants, and Children Grocers Ass'n v. Food & Nutrition Serv.*, 416 F. Supp .2d 92, 106 (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").

[49] *See supra* note 33. 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.

[50] *Compare* cases in *supra* note 36, with case in *supra* note 38.

[51] *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).

[52] 49 U.S.C. § 60102(q).

Finally, PHMSA has not demonstrated that the IFR could be issued under "the 'unnecessary' prong of the good cause exception[.]"[53] That basis for a good-cause finding only "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."[54] The Agency concedes that the amended USA definition has significant and consequential impacts, applying to more than 2,900 miles of hazardous liquid and carbon dioxide.[55] 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. Nor does PHMSA's decision to codify the language in Section 120 verbatim somehow make the amendments to § 195.6(b)(6)-(7) and (c) "minor or merely technical." The Agency's own analysis confirms that the impacts of the Interim Final Rule are directly attributable to the amended regulation. Those impacts did not occur when Congress enacted Section 120 and would not have occurred without the Agency's revision to the USA definition in § 195.6(b)(6),(7) and (c).[56]

b) The Associations Will Suffer Irreparable Harm in the Absence of a Stay.

To satisfy the irreparable harm prong of the four-part test, the Associations must demonstrate that an injury is (1) certain,[57] (2) great[58] and (3) imminent.[59] That standard is met by the nonrecoverable compliance costs that the Associations' member will incur, and the procedural injury that they suffered, as result of PHMSA's decision to issue the IFR without notice and comment.

Courts have held that "complying with a regulation later held invalid almost always produces the irreparable harm of nonrecoverable compliance costs.'"[60] PHMSA acknowledges that the amended USA definition affects at least 2,900 miles of hazardous liquid and carbon dioxide pipelines and will result in at least $40 million in compliance costs over a 10-year period,

[53] *N.C. Growers' Ass'n, Inc.*, 702 F.3d at 766. The legislative history of the APA provides a glimpse into the types of circumstances that warranted good cause because notice and comment would be "unnecessary." According to a report prepared by the U.S. Senate, "'[u]nnecessary' means unnecessary so far as the public is concerned, as would be the case if a minor or merely technical amendment in which the public is not particularly interested were involved." Senate Report, No. 752, 79th Cong. 1st Sess. (1945), reprinted in the Legislative History of the Act at 200.

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

[55] 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.

[56] 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.

[57] *Wisconsin Gas Co. v. FERC,* 758 F. 2d 669, 674 (D.C. Cir. 1985).

[58] *Id.*

[59] *Cigar Ass'n of Am. v. U.S. Food and Drug Admin.,* 317 F. Supp. 3d 555, 562 (D. D.C. 2018).

[60] *Texas v. U.S. Envtl. Prot. Agency*, 829 F.3d 405, 433 (5th Cir. 2016) (quoting *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 220–21 (1994)).

including $3.1 million in the next 12 months.[61] The Associations' members will be unable to recover these costs if the Interim Final Rule is set aside on judicial review.

Compounding the injury of non-recoverable compliance costs is the absence of the opportunity to participate at all in the rulemaking process. Courts have recognized that an agency's issuance of a final rule without following the APA's notice-and-comment requirements can result in irreparable harm.[62] By improperly relying on the good-cause exception, PHMSA deprived the Associations of their opportunity to participate in the *entire rulemaking process* and issued a regulation with the force and effect of law. The Associations did not have the opportunity to submit comments or provide any meaningful input to the Agency in developing that regulation. Nor does PHMSA's willingness to accept comments after issuing the Interim Final Rule eliminate the resulting harm.[63]

c) The Balance of Harms and Public Interest Both Favor a Stay.

Courts consider the third and fourth prong of the standard (whether the potential harm to the movant outweighs harm to others and if a stay is contrary to the public interest) in tandem.[64] The Associations will suffer irreparable harm in the form of non-recoverable compliance costs and forced conformity with a regulation issued in violation of the APA and Pipeline Safety Act. These harms are concrete, significant, and immediate as the amendment adopted in the Interim Final Rule is already in effect. The public interest also is served by granting the relief necessary to redress these irreparable harms and preserve the status quo pending judicial review. "Congress . . . determined, in passing the APA, that it is in the public interest to allow the public to comment on proposed regulations prior to their promulgation."[65] On the other hand, there "is generally no

[61] RIA at 5, 38. As PHMSA explains in the RIA, operators will incur costs under the IM regulations for updating plans and procedures, performing baseline integrity assessments and integrity reassessments, repairing anomalies, and implementing additional preventative and mitigative measures. Operators of regulated rural gathering lines and low-stress lines will also incur costs for reporting, establishing maximum operating pressure, implementing public education and damage prevention programs, corrosion control, operator qualification, installing and maintaining line markers, and complying with the design, installation, construction, and initial testing for new, replaced, or relocated pipelines.

[62] *Northern Mariana Islands v. United States,* 686 F. Supp. 2d 7, 17 (D.D.C. 2009) ("A party experiences actionable harm when 'depriv[ed] of a procedural protection to which he is entitled' under the APA. *Sugar Cane Growers Cooperative of Florida v. Veneman*, 289 F.3d 89, 94–95 (D.C. Cir. 2002). If such were not the case, 'section 553 would be a dead letter.' *Id.* at 95."); *Ass'n of Community Cancer Centers v. Azar,* 509 F. Supp. 3d 482 (D. Md. 2020) (agreeing that the issuance of final rule without providing notice-and-comment under the APA is a procedural injury that can cause irreparable harm if accompanied by other detrimental effects on concrete interests, including economic harms).

[63] *U.S. Steel Corp. v. U.S. EPA*, 595 F. 2d 207, 214-215 (5th Cir. 1979) ("[P]ermitting the submission of views after the effective date [of a regulation] is no substitute for the right of interested persons to make their views known to the agency in time to influence the rule making process in a meaningful way." (quoting *City of New York v. Diamond*, 379 F.Supp. 503, 517 (S.D.N.Y. 1974))); *see also New Jersey v. EPA*, 626 F. 2d 1038, 1038 (D.C. Cir. 1980); *Ass'n of Community Cancer Centers,* 509 F. Supp. 3d at 501 ("The plaintiffs have articulated meaningful concerns that were likely within their rights to air, which the agency was required by the APA to give "consideration," 5 U.S.C. 553(c), and which now the agency will be far less receptive to hearing.").

[64] *Soundboard Ass'n. vs. U.S. Fed. Trade Comm'n.,* 254 F. Supp. 3d 7, 14 (D. D.C. 2017) (citing *Pursuing Am.'s Greatness v. FEC,* 831 F.3d 500, 511 (D.C. Cir. 2016)); *see also,* Nken, 556 U.S. at 435.

[65] *Ass'n of Community Cancer Centers,* 509 F. Supp. 3d at 502 (citing *Mack Trucks, Inc.*, 682 F.3d at 95)

public interest in the perpetuation of unlawful agency action."[66] For these reasons, granting a stay of the Interim Final Rule in its entirety pending judicial review is not contrary to the public interest and is appropriate.

2. In the Alternative, a Partial Stay of the Interim Final Rule Should Be Granted.

In the alternative, the Associations satisfy the four-part test for obtaining a partial stay of the Interim Final Rule pending judicial review. The Associations' likelihood of success on the merits is even stronger as to PHMSA's use of the good-cause exception to amend the USA definition outside of the circumstances prescribed in the 2016 and 2020 Acts. 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,[67] but the Interim Final Rule amends the USA definition in Part 195 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. Nothing in Section 120 directs PHMSA to amend the USA definition for these purposes, let alone to do so without complying with the notice-and-comment requirements in the APA and Pipeline Safety Act.

The Associations' members include operators of rural gathering and low-stress lines that will sufferable irreparable harm, including nonrecoverable compliance costs, if the amended USA definition applies outside of the circumstances prescribed in Section 120. PHMSA acknowledges that rural gathering line operators will incur at least $62,593 in compliance costs during the first year after the IFR, and at least $15,000 per year in additional compliance costs for the nine years that follow.[68] These costs are related to performing activities that are not required to comply with the HCA definition in 49 C.F.R. § 195.450 or IM regulations at 49 C.F.R. § 195.452, such as requirements for reporting, establishing maximum operating pressure, implementing public education and damage prevention programs, corrosion control, operator qualification, line markers, as well as requirements for the design, installation, construction, and initial testing of new, replaced or relocated pipelines.[69]

The Associations' members also suffered a significant procedural harm due to PHMSA's failure to comply with the notice-and-comment requirements in the APA and Pipeline Safety Act,

[66] *Texas v. Biden*, 10 F.4th 538, 560 (5th Cir. 2021) (quoting *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016)).
[67] § 19(b), Pub. L. 114-183, 130 Stat. at 527 as amended by Division R, § 120(a), Pub. L. 116-260, 134 Stat. at 2235.
[68] RIA at 4.
[69] The Associations note that the RIA does not account for all of the IFR's compliance costs for rural gathering line operators, including the costs associated with implementing the provisions in operations and maintenance plans under Section 114 of the 2020 Act for eliminating hazardous leaks, minimizing methane emissions, and replacing or remediating leak-prone pipelines, 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). The RIA also relies on 15-year-old data, submitted in a 2006 rulemaking proceeding for onshore gas gathering lines, in estimating the Interim Final Rule's compliance costs for rural gathering line operators. Finally, the Associations note that ADNR has identified significant concerns with the absence of information necessary to evaluate the potential compliance impact of the IFR on pipelines in Alaska. For these and other reasons, the Associations believe that rural gathering line operators will incur non-recoverable compliance costs that exceed the estimates included in the RIA.

and that harm cannot be cured by the Agency's willingness to accept comments after issuing the Interim Final Rule. *See* discussion *supra.* Finally, the balance of the equities and public interest favor granting a partial stay of the Interim Final Rule to preserve the status quo pending judicial review. Requiring rural gathering and low-stress line operators to comply with unlawful regulations creates irreparable harm and does not serve the public interest, and the Agency is not harmed in any way if the amendments to the USA definition in § 195.6(b)(6), (7) and (c) are only applied for purposes of determining whether a pipeline is in an HCA under 49 C.F.R. § 195.450 as prescribed in the 2016 and 2020 Acts. Accordingly, both the balance of harms and the public interest favor, at a minimum, a partial stay pending judicial review.

D. Conclusion

PHMSA should grant a stay of the Interim Final Rule in its entirety. In the alternative, the Agency should grant a partial stay of the IFR and only require operators to comply with the amended USA definition in 49 C.F.R. § 195.6(b)(6), (7), and (c) for purposes of determining if a pipeline is in an HCA as defined in § 195.450.

Respectfully Submitted,

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