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Via Electronic Submission

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Pipeline and Hazardous Materials Safety Administration
1200 New Jersey Avenue, SE
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Re: **Pipeline Safety: Gas Pipeline Leak Detection and Repair; 88 Fed. Reg. 31,890 (May 18, 2023); Docket No. PHMSA-2021-0039**

Deputy Administrator Brown:

We are the chief legal officers of 21 states. Our States are committed to protecting the quality of our environment while at the same time promoting economic progress, developing natural resources, protecting our citizens' access to affordable energy, and ensuring that government agencies follow the law. We accordingly provide the following comments in response to the Pipeline and Hazardous Materials Safety Administration's Notice of Proposed Rulemaking, *Pipeline Safety: Gas Pipeline Leak Detection and Repair*, 88 Fed. Reg. 31,890 (May 18, 2023) ("Proposed Rule").

I. Background

In 2004, Congress created the Pipeline and Hazardous Materials Safety Administration ("PHMSA") within the Department of Transportation. Pub. L. 108-426, 118 Stat. 2423 (2004) (codified in scattered provisions of Title 49). Congress tasked PHMSA with carrying out "the duties and powers related to pipeline and hazardous materials transportation and safety vested in the [Secretary of Transportation] by chapters 51, 57, 61, 601, and 603" of Title 49. 49 U.S.C. 108(f).

Congress mandated that PHMSA "shall consider the assignment and maintenance of safety as [its] highest priority, recognizing the clear intent, encouragement, and dedication of Congress to the furtherance of the highest degree of safety in pipeline transportation and hazardous materials transportation." 49 U.S.C § 108(c). PHMSA is accordingly tasked with carrying out the pipeline-related powers of 49 U.S.C. Chapter 601, which bears the straight-forward title "Safety."

"The purpose of [Chapter 601] is to provide adequate protection against risks to life and property posed by pipeline transportation and pipeline facilities by improving the regulatory and enforcement authority of the Secretary of Transportation." 49 U.S.C. § 60102(a)(1). To that end, Chapter 601 directs that "[t]he Secretary shall prescribe minimum safety standards for pipeline transportation and for pipeline facilities." 49 U.S.C. § 60102(a)(2). Congress cabined the Secretary's (and thus PHMSA's) authority, however, by requiring that any standard be "practicable" and based on consideration of specific factors, including "the appropriateness of the standard for the particular type of pipeline transportation or facility," "the reasonableness of the standard," "based on a risk assessment, the reasonably identifiable or estimated benefits expected to result from … the standard," and "based on a risk assessment, the reasonably identifiable or estimated costs expected to result from … the standard." 49 U.S.C. § 60102(b).

Three years ago, Congress enacted the PIPES Act of 2020. Pub. L. 116-260, 134 Stat. 2210 (Dec. 27, 2020). As relevant here, Congress amended Chapter 601 to provide that standards must not only be practicable, but also "designed to meet the need for (i) "gas pipeline safety, or safely transporting hazardous liquids, as appropriate; and (ii) protecting the environment." 49 U.S.C. § 60102(b). Congress also tasked the Secretary of Transportation (and thus PHMSA) with promulgating regulations to require "leak detection and repair programs—(A) to meet the need for gas pipeline safety, as determined by the secretary; and (B) to protect the environment." 49 U.S.C. § 60102(q)(1). Congress did not, however, alter its mandate that PHMSA "shall consider the assignment and maintenance of safety as [its] highest priority." 49 U.S.C § 108(c). On the contrary, the Pipes Act of 2020 repeatedly made clear that any environmental actions must not compromise pipeline safety. *See, e.g.*, PIPES Act of 2020 § 114(d)(2), 134 Stat. at 2232 (directing the Secretary to "update pipeline safety regulations … to protect the environment without compromising pipeline safety").

On May 18, 2023, "PHMSA propose[d] regulatory amendments that [purportedly] implement congressional mandates in the [PIPES] Act of 2020 to reduce methane emissions from new and existing gas transmission pipelines, distribution pipelines, regulated (Types A, B, C and offshore) gas gathering pipelines, underground natural gas storage facilities, and liquefied natural gas facilities." *Pipeline Safety: Gas Pipeline Leak Detection and Repair*, 88 Fed. Reg. 31, 890, 31,890 (May 18, 2023). PHMSA subsequently extended the comment period to August 16, 2023. 88 Fed. Reg. 42,284 (June 30, 2023).

II. PHMSA's understanding of the PIPES Act of 2020 is flawed.

A. The PIPES ACT of 2020 Makes A Limited Statutory Change.

We begin with three fundamental points.

First, the statutory scheme set forth in Chapter 601, the existence of PHMSA itself, and the existence of statutes like the Natural Gas Act are premised on Congress's determination that pipelines are necessary and desirable, and that any regulation of those pipelines must satisfy strict statutory constraints. Were it otherwise, Congress could simply ban pipelines.

Second, the PIPES Act of 2020 did not alter PHMSA's mandate to "consider the assignment and maintenance of safety as [its] highest priority, recognizing the clear intent, encouragement, and dedication of Congress to the furtherance of the highest degree of safety in pipeline transportation and hazardous materials transportation." 49 U.S.C § 108(c). PHMSA's assertion that "section 118 of the PIPES Act of 2020 clarified that PHMSA must consider environmental benefits equally with public safety benefits," 88 Fed. Reg. at 31,891, is incorrect. That fundamental legal error alone warrants withdrawal of the Proposed Rule.

Third, the addition of a vague and standardless mandate to consider "protect[ing] the environment" to certain provisions in Chapter 601 does not give PHMSA unfettered discretion to regulate. *Cf. West Virginia v. EPA*, 142 S. Ct. 2587 (2022); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). And whatever that vague and standardless mandate means, regulations to implement it are still subject to the "specific" and "demanding" procedures for regulations issued under the authority of the pipeline safety laws. *GPA Midstream Ass'n v. United States Dep't of Transp.*, 67 F. 4th 1188, 1196-97 (D.C. Cir. 2023).

B. The "Premise" of the PIPES Act of 2020 Is Not That "All Leaks of Methane Are Hazardous to the Environment."

PHMSA states that its "understanding of the PIPES Act of 2020" is that the "premise" of the Act is "all leaks of methane are hazardous to the environment because they contribute to climate change." 88 Fed. Reg. at 31,932 n.230. That can't be correct. On its face, the statute nowhere suggests that premise. *Cf. West Virginia*, 142 S. Ct. 2587. And the text of the PIPES Act of 2020 suggests the opposite. The act at times uses the word "leak" without modification, *i.e.*, only some leaks are "hazardous leaks." The amendments to 49 U.S.C. § 60108 are instructive. There, the statute separately references "eliminating hazardous leaks" and "minimizing releases of natural gas," *i.e.*, methane, and further separately references "the protection of the environment," 134 Stat. at 2231, with each reference necessarily having its own meaning, *i.e.*, not all "releases of natural gas" are "hazardous leaks." The amendments to 49 U.S.C. § 60102 are similarly instructive. There, the statute treats leaks that "are hazardous to human safety or the environment" or "have the potential to become explosive or otherwise hazardous to human safety" as a subset of the broader category of "leaks." 134 Stat. at 2229.

Statutes must not be read in a way "which renders some words altogether redundant." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 574-75 (1995). In *Gustafson*, for example, the Supreme Court addressed a statute providing that "[t]he term 'prospectus' means any prospectus, notice, circular, advertisement, letter, or communication, written or by radio or television, which offers any security for sale or confirms the sale of any security." *Id.* The respondent argued "that any written communication that offers a security for sale is a 'prospectus.'" *Id.* at 574. The Supreme Court rejected that argument, explaining that "[i]f 'communication' included every written communication, it would render 'notice, circular, advertisement, [and] letter' redundant, since each of these are forms of written communication as well.'" *Id.* at 574-75. Other cases are in accord. *See, e.g.*, *Ysleta Del Sur Pueblo v. Texas*, 142 S. Ct. 1929, 1939 (2022) ("It's an interpretation that violates our usual rule against ascribing to one word a meaning so broad that it assumes the same meaning as another statutory term. It's a view that defies our usual presumption that differences in language like this convey differences in meaning."); *Corley v. United States*, 556 U.S. 303, 314

(2009) ("The Government's reading is … at odds with one of the most basic interpretive canons, that a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.").

The major questions doctrine and the use of differing statutory terms in the PIPES Act of 2020 are inconsistent with PHMSA's understanding of the Act. That's no minor thing. When—as here—an agency misapprehends the "premise" of a statute it points to as the basis for regulations, it calls the entirety of the regulations into doubt. Indeed, here, PHMSA proposes to mandate pipeline operators expend their finite resources chasing down small, *nonhazardous* natural gas leaks in uninhabited areas, *see* 88 Fed. Reg. at 31,892, with the upshot of diverting those resources from more pressing pipeline safety issues. That's directly contrary to PHMSA's unaltered mandate to treat "the assignment and maintenance of safety as the highest priority." 49 U.S.C. § 108(c). PHMSA should withdraw the Proposed Rule and start anew.

III. PHMSA failed to apply the statutory requirements for it to regulate.

A. A Cost-Benefit Analysis Is Required.

Cost-benefit calculations permeate every aspect of the pipeline safety law. Thus, although PHMSA is charged with "consider[ing] the assignment and maintenance of safety as [its] highest priority," 49 U.S.C. § 108(c), the stated purpose of the law is to provide "adequate" safety, not absolute safety. To that end, standards must be "practicable" and the agency must consider the "appropriateness of the standard for the particular type of pipeline transportation or facility," "the reasonableness of the standard," and a "risk assessment" that includes benefits and costs. 49 U.S.C. § 60102(b). Indeed, quantification of costs and benefits is required. 49 U.S.C. § 60102(b)(5); *see also GPA Midstream*, 67 F. 4th at 1200. At a minimum, "a reasoned decision would explain why any unquantified benefits cannot reasonably be quantified." 67 F. 4th at 1200.

B. OIRA – not PHMSA – Made Conclusory Findings That the Proposed Rule Satisfies the Statutory Requirements.

According to reginfo.gov, OIRA received the Proposed Rule on February 13, 2023. While the Proposed Rule was being reviewed by OIRA, on March 6, the District of Columbia Circuit held oral argument in *GPA Midstream Association v. U.S. Department of Transportation*, No. 22-1148. The issue was whether "PHMSA unlawfully failed to disclose the economic basis for regulating [certain] pipelines when it proposed the [challenged] standard, and also failed to make a reasoned determination that regulating [those] pipelines was appropriate." *GPA Midstream*, 67 F. 4th at 1191. Suffice it to say the argument did not go well for PHMSA. Thereafter, OIRA returned the Proposed Rule to PHMSA with a markup that repeatedly inserted perfunctory recitations that the Proposed Rule is "reasonable, technically feasible, cost-effective, and practicable for affected gas transmission and gathering pipeline operators." *See, e.g.*, OIRA Redline at 145-46, 152, 155, 158-59, 161-62, 179-80. By disclosing those changes "in accordance with its obligations under Executive Order 12866 to identify the substantive changes between the draft submitted to [OIRA] for review and the action subsequently announced," OIRA Redline at 1, PHMSA concedes they are substantive.

The record makes clear it was *OIRA* that concluded the statutory requirements are met, not PHMSA. The Proposed Rule thus fails. *See Texas v. Biden*, 10 F. 4th 538, 556 (5th Cir. 2021) ("Stating that a factor was considered … is not a substitute for considering it."); *see also GPA* Midstream, 67 F.4th at 1191 (granting a petition for review because "*PHMSA* said nothing about the [statutory requirement] … until promulgating the final rule, even though the law required [PHMSA] to address those subjects when publishing the proposed rule for public comment and peer review.").

C. Consideration of Social Cost of Greenhouse Cases / Social Cost of Methane Is Arbitrary, Capricious, and Contrary to Law.

Turning to the merits, virtually all of the purported benefits identified in the Preliminary Regulatory Impact Analysis ("PRIA") are so-called "climate benefits." PRIA at Table ES-3. Indeed, the purported "climate benefits" dwarf actual benefits from natural gas losses by an order of magnitude. *Id.* Of course, if actual benefits from natural gas losses and liability for harm to property outweighed the cost of tracking down leaks, rational pipeline operators would track down those leaks of their own accord. That's Econ 101.

So PHMSA cooks the books with purported "climate benefits" based on IWG estimates. PHMSA then manipulates the analysis even more by using one discount rate for GHG, and another for other aspects of PHMSA's analysis. It's easy for PHMSA to make a cost-benefit analysis come out however it wants when it conjures a mountain of benefits out of thin air and places them on one side of the scale. But that's not a cost-benefit analysis (or a risk assessment).

Experts have explained in detail the many problems with the IWG estimates. *See, e.g.*, Exh. 1. And a federal district court held the IWG analysis likely violates the major questions doctrine, is contrary to law to the extent it considers global effects, and is likely arbitrary and capricious on multiple grounds.[1] *Louisiana v. Biden*, 585 F. Supp. 3d 840 (W.D. La. 2022). True, that holding was vacated for lack of standing. *Louisiana by and through Landry v. Biden*, 64 F. 4th 674 (5th Cir. 2023). But that hardly means the district court's ruling on the merits was incorrect. PHMSA nevertheless ignores the well-established defects identified by the Western District of Louisiana.

D. The Proposed Rule Fails to Consider Cumulative Costs.

PHMSA links the Proposed Rule to the Biden Administration's "whole of government approach to combatting the climate crisis," a "U.S. Methane Emissions Reduction Action Plan," and "parallel proposals by EPA and PHMSA to reduce methane emissions from natural gas infrastructure [that] occupy a critical role in the Administration's whole-of-government strategy for tackling the climate crisis." 88 Fed. Reg. at 31,923. This "whole of government" approach is fairly characterized as an overarching policy of hostility to fossil fuels and purported GHG emissions.

[1] To the extent PHMSA does consider global effects – it should not – consistency requires that PHMSA consider whether the impact of its proposed rule is meaningful in view of global emissions of methane, both manmade and natural.

Pursuant to that unified, overarching approach, PHMSA and EPA have proposed multiple rules that adversely impact fossil fuel development and the attendant cost of electric generation. *See, e.g.*, 86 Fed. Reg. 63,110 (Nov. 15, 2021); *see also* 88 Fed. Reg. 36,654 (June 5, 2023). At the same time, EPA has proposed multiple rules that require more electric generation. *See, e.g.*, 86 Fed. Reg. 74,434, 74,438 (Dec. 30, 2021) ("We project that … the standards can be met with gradually increasing sales of plug-in electric vehicles in the U.S., from about 7 percent market share in MY 2023 … up to about 17 percent in MY 2026."). EPA also appears to be significantly understating the need for more electric generation imposed by those rules.[2] Particularly given PHMSA's concession that the Proposed Rule is linked to EPA's rules, the impact of all of those rules must be analyzed together, cumulatively, without improper segmentation, so the public and the agency can understand the cumulative and synergistic impacts of PHMSA's and EPA's actions, as well as the cumulative and synergistic costs. *See, e.g.*, *Delaware Riverkeeper Network v. FERC*, 753 F.3d 1304, 1314 (D.C. Cir. 2014).

We note, for example, that the nation's electrical grid is already strained. One system operator has candidly acknowledged that "[t]he retirement of fossil fueled resources driven by public policies is currently outpacing the development of renewable energy and other dispatchable, emission-free resources," resulting in "reliability margins [that] have thinned to concerning levels."[3] And EPA has acknowledged that "reliability of the nation's electric power system" is implicated by emissions rules like PHMSA's Proposed Rule. 88 Fed. Reg. at 33,246-47. Given the stakes to quality of life and human health, PHMSA should show its work, and demonstrate that the Proposed Rule – particularly its cumulative impact vis-à-vis EPA and other agencies rulemaking in the same space – can be successfully implemented without leaving Americans subject to rolling blackouts, skyrocketing heating and electricity prices, and a third-world way of life.

E. Regulation of Transmission is Statutorily Impermissible in Light of the Demonstrated Lack of Benefit.

Even with PHMSA's thorough cooking of the books, it still can't find a net benefit from the Proposed Rule vis-à-vis transmission pipelines, with estimated net benefits being negative regardless of discount rate. PRIA at Table ES-4. PHMSA is statutorily required to consider the "appropriateness of the standard for the particular type of pipeline transportation or facility," as well as a risk analysis that includes costs and benefits. "No regulation is 'appropriate' if it does significantly more harm than good." *Michigan*, 576 U.S. 743, 752 (2015). On the basis of PHMSA's own analysis, the Proposed Rule should be withdrawn as to transmission pipelines because the Proposed Rule fails to satisfy statutory requirements, e.g., it is not "appropriate" for transmission pipelines, and the costs outweigh the benefits.

PHMSA's insistence on regulating transmission pipelines despite the lack of benefit is part of a larger failure to address "appropriateness" of the Proposed Rule for various types of pipelines. For example, offshore pipeline leaks likely have limited impact on the environment because methane dissolves into the ocean at depths of hundreds of meters, is oxidized to carbon dioxide,

[2] https://www.caranddriver.com/news/a43657072/evs-fall-short-epa-estimates-sae-article/
[3] nyiso.com/documents/20142/2223020/2023-Power-Trends.pdf/

or turns into hydrates.[4] And the existence of large, natural, underwater methane seeps calls into question the rationality for the Proposed Rule as applied to offshore pipelines. *See, e.g.*, Exhs. 2 and 3.

F. PHMSA Ignores Key Aspects of the Safety Problem.

Although "the assignment and maintenance of safety" is the highest priority under the pipeline laws, PHMSA concedes "[t]here is no way to ascertain how many more leaks hazardous to life or property may be discovered through more frequent and more effective pipeline surveys …." PRIA at 88. And PHMSA further concedes that "[t]he severity of human safety and property damages depends principally on the leak rate and location," with "[p]opulation density and proximity to buildings" being "critical factors." PRIA at 91; *see also* 88 Fed. Reg. at 31,933 (noting "the high risk to public safety from distribution pipelines, which are often located in the vicinity of population centers"). So PHMSA handwaves at "estimates" of safety benefits and simply recites that it "expects safety benefits." Such uniformed conjecture doesn't meet the statutory requirements for PHMSA to regulate. *See GPA Midstream*, 67 F.4th at 1199. And PHMSA ignores the practical adverse impact of diverting limited resources from detecting leaks in areas where safety is a real concern – in the vicinity of population centers – to chasing down minor leaks in remote areas, miles from the nearest human or building. *See Michigan*, 576 U.S. at 753 (noting "the reality that so much wasteful expenditure devoted to one problem may well mean considerably fewer resources to deal effectively with other (perhaps more serious) problems.").

More broadly, PHMSA's statutory obligation is to consider *risks*, including in the environmental context. PHMSA can't assume that every leak or release of methane is inherently harmful, or that every leak or release is equally risky. In short, PHMSA once again fails to make the statutorily required analysis of risk.

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The Proposed Rule is deeply flawed and inconsistent with PHMSA's statutory mandates. PHMSA should accordingly withdraw the Proposed Rule and start anew.

With kind regards,

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[4] https://www.bbc.com/news/science-environment-28898223

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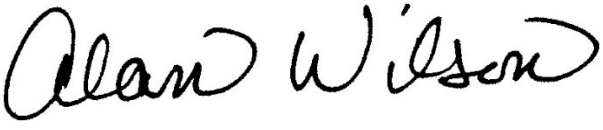

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