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**COMMENTS OF THE AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS ON
THE DEPARTMENT OF TRANSPORTATION’S REQUEST FOR COMMENT,
“TRANSPORTATION INFRASTRUCTURE: NOTICE OF REVIEW OF POLICY,
GUIDANCE, AND REGULATION”
DOCKET No. OST-2017-0057
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I. INTRODUCTION

The American Fuel & Petrochemical Manufacturers (“AFPM”) welcomes the opportunity to comment on the Department of Transportation’s (“DOT” or the “Department”) Request for Comment entitled, “Transportation Infrastructure: Notice of Review of Policy, Guidance, and Regulation”¹ (the “RFC”). On June 8, 2017, DOT issued this RFC on existing policy statements, guidance documents, and regulations that provide unnecessary obstacles to transportation infrastructure projects. This RFC will supplement the Department's periodic regulatory review and its activities mandated by Executive Order (“EO”) 13771, “Reducing Regulation and Controlling Regulatory Costs,”² and EO 13777, “Enforcing the Regulatory Reform Agenda.”³ This request for input is narrowly focused on identifying and addressing impediments to the completion of transportation infrastructure projects.

A. AFPM’s Interest in DOT’s Request for Comment

AFPM is a national trade association representing approximately 400 companies that encompass virtually all U.S. refining and petrochemical manufacturing capacity. AFPM’s member companies produce the gasoline, diesel, and jet fuel that drive the modern economy, as well as the chemical building blocks that are used to make the millions of products that make modern life possible—from clothing to life-saving medical equipment and smartphones.

To produce these essential goods, AFPM member companies rely on reliable and safe transportation infrastructure to move materials to and from refineries and petrochemical facilities. AFPM member companies depend upon an uninterrupted, affordable supply of crude oil as a feedstock for the transportation fuels and petrochemicals that they manufacture. AFPM member companies utilize all modes of transportation to move their products and many have made significant infrastructure investments to support and improve the efficiency of the transportation system. AFPM interprets the term “infrastructure projects” broadly to not only include building roads, pipelines, and bridges but also purchasing and maintaining tank cars, cargo tanks, or oil treatment equipment required by federal regulations as a prerequisite to move materials across the country. These transportation infrastructure investments ensure the American people receive the fuels and petrochemical products they use daily in a safe, efficient, and cost-effective manner.

The United States has the largest network of energy pipelines in the world, with more than 2.4 million miles of pipe.⁴ The majority of materials transported by AFPM member

¹ See Docket No. OST-2015-0057, 82 *Fed. Reg.* 26734, proposed June 8, 2017, <https://www.federalregister.gov/documents/2017/06/08/2017-11791/transportation-infrastructure-notice-of-review-of-policy-guidance-and-regulation>.

² See “Executive Order 13771: Reducing Regulation and Controlling Regulatory Costs,” January 30, 2017, <https://www.whitehouse.gov/the-press-office/2017/01/30/presidential-executive-order-reducing-regulation-and-controlling>.

³ See “Executive Order 13777: Enforcing the Regulatory Reform Agenda,” February 24, 2017, <https://www.whitehouse.gov/the-press-office/2017/02/24/presidential-executive-order-enforcing-regulatory-reform-agenda>.

⁴ See “Pipeline Mileage and Facilities,” <https://www.phmsa.dot.gov/pipeline/library/data-stats/pipelinemileagefacilities>.

companies are done so using pipelines. In fact, AFPM member companies own and operate pipeline infrastructure that transport crude, gas, and petroleum products to and from their refineries and facilities in transmission, distribution, and gathering pipelines.

In addition to pipeline transport, reliable inland waterway and port facility infrastructure is essential for AFPM members' companies to efficiently move their products both domestically for U.S. consumer use and internationally for export. American trade is a key element for continued growth in U.S. refining and petrochemical manufacturing. Although U.S. demand for transportation fuels continues to decline, global demand for U.S. refined products and petrochemicals continues to grow. For U.S. export markets to continue growing, they must be supported by robust maritime transportation infrastructure, as 99 percent of overseas trade reportedly travels through U.S. ports.⁵

Surface transportation (rail and highway) also plays an integral role in the fuel and petrochemical supply chain. With over four million miles of roads⁶ and approximately 140,000 miles of freight railroads⁷ in the U.S., surface infrastructure does more than just move people, it drives our economy. Highway transportation often serves as a delivery mechanism for moving refined products, feedstocks, and intermediates from refineries and petrochemical manufacturing facilities to final consumers or the next member in the supply chain. Reliable highway infrastructure ensures safe and efficient transportation of these goods.

Historically, rail transport has been used to both transport crude oil to refineries and petrochemical manufacturing facilities, and move refined products, feedstocks, and intermediates from those same facilities to consumers or other members of the supply chain. The fuel and petrochemical industries are in the middle of completing a massive upgrade to rail infrastructure. Tank car owners in the flammable liquid service are in the process of retrofitting approximately 90,000 tank cars at an estimated cost of \$520 million.⁸

AFPM supports the principles of safe, sound, efficient, and cost-justified regulations presented in EOs 13771 and 13777. Given the importance of this issue, AFPM welcomes this opportunity to comment on DOT policy, guidance, and regulations that provide unnecessary obstacles to transportation infrastructure projects.

B. AFPM's Commitment to Safe Transportation of Hazardous Materials

AFPM member companies reflect a strong appreciation for safety and environmental responsibility, operations, and practices. Members are committed to protecting the health and safety of their workers, contractors, customers, and the communities where fuels and petrochemical products are transported. AFPM member companies have demonstrated this commitment through their investments in maintaining and updating transportation infrastructure.

⁵ See "2017 Ports Report Card Overview," May 15, 2017, <https://www.infrastructurereportcard.org/wp-content/uploads/2017/01/Ports-Final.pdf>.

⁶ See "2017 Roads Report Card Overview," May 15, 2017, <https://www.infrastructurereportcard.org/wp-content/uploads/2017/01/Roads-Final.pdf>.

⁷ See "Freight Rail Network," May 15, 2017, <https://www.fra.dot.gov/Page/P0362>.

⁸ See PHMSA-2016-0011, 81 *Fed. Reg.* 53935 (HM-251C), published August 15, 2016, <https://www.gpo.gov/fdsys/pkg/FR-2016-08-15/pdf/2016-19406.pdf>.

A safe, reliable, and efficient regulatory system that encourages environmentally sound and safe transportation infrastructure is ideal for both industry and the American public.

AFPM supports informed, risk-based, and cost-justified approaches to developing, reviewing, and revising regulations related to transportation infrastructure projects and is committed to working with DOT on this issue. AFPM and its members work diligently to maintain a safe working environment in our refineries, with a goal of zero incidents. This commitment also applies to the safe transportation of our products.

II. EXECUTIVE SUMMARY

AFPM appreciates the opportunity to provide comments on DOT and its Modal Administrations' ("MAs") existing policy statements, guidance documents, and regulations that provide unnecessary obstacles to transportation infrastructure projects. When identifying such items, AFPM provides specific citations, an estimate or discussion of the associated burden with the provision or policy, recommended alternatives to the current practice, and real-world examples of how the provision or policy impedes infrastructure development.

While AFPM attempts to structure the recommendations based on the Department's MAs' authority, we include a generic section capturing broader issues requiring inter-MA coordination, or action from the Department's Office of the Secretary. Furthermore, we clearly differentiate throughout the document whether regulations, policy, and guidance impact existing infrastructure or the development of new infrastructure. In that regard, the appendix to this document provides a summary table of the issues highlighted in the response.

The RFC notes that DOT's primary focus is on administrative items that the Department has direct authority to change. That said, the RFC does provide the opportunity for legislative suggestions if regulatory or policy solutions are not achievable or feasible. In addition to regulatory suggestions, our comments also provide some legislative suggestions AFPM believes DOT should support. AFPM also encourages DOT to work with Congress and consider these legislative solutions in accordance with the principles of EOs 13771, 13777, and 13873, "Promoting Energy Independence and Economic Growth."⁹

While AFPM views this RFC as a meaningful step in the right direction, we encourage the MAs to solicit additional input on all existing regulations. Providing an opportunity for meaningful public and stakeholder comment will help to inform decisions at the MAs. Given the collective knowledge and experience of our almost 400 members, we feel AFPM could provide helpful input related to regulatory reform in the spirit of EOs 13771, 13777, and 13873.

⁹ See "Executive Order 13873: Promoting Energy Independence and Economic Growth," March 28, 2017, <https://www.whitehouse.gov/the-press-office/2017/03/28/presidential-executive-order-promoting-energy-independence-and-economi-1>.

III. DEPARTMENT-WIDE COMMENTS

A. National Environmental Policy Act Implementing Procedures

The National Environmental Policy Act (“NEPA”) was enacted to ensure that federal agencies take a hard look at environmental impacts of their decisions. Given DOT’s mission and its prominent role in infrastructure development, NEPA and the associated procedures are integral in promulgating DOT regulations, policy, and guidance. DOT provides a listing of DOT’s MAs’ NEPA implementing procedures on its website.¹⁰

On December 20, 2016, DOT published in the *Federal Register* a “Notice of Availability and Request for Comment” entitled, “National Environmental Policy Act Implementing Procedures Update” (“NEPA Implementing Procedures”).¹¹ DOT provided a 21-day comment period, which was insufficient to ensure fully informed comment on the issue. Furthermore, despite valid requests for an extension of that comment period, on January 4, 2017, DOT denied the request for extension of the comment period.¹² To date, no NEPA implementation procedure revision has been published.

While AFPM supports a revision and clarification of DOT’s NEPA Implementing Procedures, we are concerned with what appears to be a rushed attempt to implement new procedures prior to the administration change with insufficient time for public input. In light of this fact, AFPM requests publication of a supplemental Notice of Proposed Rulemaking (“NPRM”) so that the agency receives appropriate comment on potential revisions to its NEPA Implementing Procedures and reassures that the principles laid out in EOs 13766, 13771, 13777, and 13873 are appropriately considered.

B. Overlapping Authority

While federal agencies and departments have defined statutory authorities granted to them by law, there are instances where there is an overlap of scope or purview between entities. This gray area can create regulatory confusion, thus negatively impacting regulatory compliance. Furthermore, duplicative or conflicting regulatory requirements or enforcement authorities can foster an inefficient regulatory system and confound compliance by regulated entities. While overlap cannot be eliminated completely, a clear understanding of agency authorities can improve compliance and efficiencies.

In many cases where there is potential departmental or agency overlap, the agencies with the overlap will enter into formal agreement to establish parameters that define the relationship and oversight of a particular action. These agreements are often referred to as “Memorandum of Understanding” (“MOU”) or “Memorandum of Cooperation” (“MOC”). While not legally

¹⁰ See “Federal Environmental Statutes, Regulations, and Executive Orders Applicable to the Development and Review of Transportation Infrastructure Projects,” last updated October 31, 2016, <https://www.transportation.gov/policy/transportation-policy/environment/laws>.

¹¹ See “Procedures for Considering Environmental Impacts (DOT Order 5610.1D),” proposed December 20, 2016, <https://www.regulations.gov/document?D=DOT-OST-2016-0239-0002>.

¹² See “Memorandum on Requests to Extend Comment Period,” January 4, 2017, <https://www.regulations.gov/document?D=DOT-OST-2016-0239-0011>.

binding, these agreements create a clear understanding of each party's purpose and of their commitments. Currently, DOT has a number of these agreements in place; however, many are outdated and do not reflect current practices.

A good example are the MOUs from the Pipeline and Hazardous Materials Safety Administration's ("PHMSA's") Office of Pipeline Safety. Due to PHMSA's statutory authority and the interjurisdictional nature of pipelines, PHMSA must work closely with other federal agencies (*e.g.*, the Federal Energy Regulatory Commission, United States Coast Guard ("USCG"), Environmental Protection Agency ("EPA"), Department of Energy, and the Occupational Safety and Health Administration ("OSHA")). That said, a review of PHMSA's MOUs shows that many are over a decade old.¹³ In fact, most of PHMSA's pipeline-related MOUs were issued under PHMSA's predecessor agency, the Research and Special Programs Administration. Given that much has changed in federal regulations and the energy industry over the last decade, many of these MOUs are out of date and in need of revision to reflect the current energy landscape.

For example, on February 4, 2000, as part of an MOU entitled, "Jurisdiction over Breakout Tanks / Bulk Oil Storage Tanks at Transportation and Non-Transportation-Related Facilities," DOT and EPA attempted to clarify jurisdictional issues and establish mutual goals.¹⁴ As part of this document, both agencies cited a desire to improve communication and continue to work on trying to reduce the overlap of jurisdiction. However, progress to this end has been minimal. Based on the continued lack of clarity, it can be difficult to determine whether tanks need to be built to DOT, EPA, or both sets of standards, and this can hinder infrastructure development. Beyond just the initial build, there are duplicative, and sometimes significantly different, requirements for maintaining these facilities.

A second example would be the enforcement and inspection practices of DOT and OSHA related to midstream facilities in the oil and natural gas industry. Currently, enforcement and inspection of these facilities is inconsistent and can result in considerable confusion over jurisdictional boundaries of the respective agencies. This can result in compliance issues, projects delays, and the need for unnecessary consulting and legal services. In 2014, as part of the Gas and Liquid Pipeline Advisory Committee, PHMSA formed a Subcommittee on Midstream Safety to look at this and other issues. While this Subcommittee developed a draft set of Frequently Asked Questions ("FAQs") designed to clarify overlapping enforcement and inspection issues, PHMSA has yet to finalize these FAQs and it appears as if the only document addressing PHMSA and OSHA coordination is a generic single-page MOU between DOT and OSHA issued in May of 1972.¹⁵

¹³ See "Memorandum of Understanding,"

<https://www.phmsa.dot.gov/portal/site/PHMSA/menuitem.6f23687cf7b00b0f22e4c6962d9c8789/?vgnextoid=a2fdc afec2b1d110VgnVCM1000009ed07898RCRD&vgnnextchannel=bc79c0124500d110VgnVCM1000009ed07898RC RD>.

¹⁴ See "Jurisdiction over Breakout Tanks / Bulk Oil Storage Tanks (Containers) at Transportation and Non-Transportation-Related Facilities," February 4, 2000,

https://www.phmsa.dot.gov/staticfiles/PHMSA/DownloadableFiles/2000_DOT_EPA.pdf.

¹⁵ See "Memorandum of Understanding Between OSHA and DOT," May 1972,

https://www.phmsa.dot.gov/staticfiles/PHMSA/DownloadableFiles/1972_DOT_OSHA.pdf.

AFPM supports a departmental-wide review and update of MOUs / MOCs related to infrastructure. This review should fully consider the principles set forth in EOs 13771 and 13777 with the goal of eliminating needlessly shared jurisdictions. Furthermore, considering EO 13873, DOT should further focus on MOUs / MOCs that have the potential to directly impact critical energy infrastructure such as pipelines, highways, or import / export facilities.

Transportation necessarily crosses jurisdictional lines. Congress has long recognized the need for uniform regulations governing the transportation and handling of hazardous materials. Such uniformity promotes safety, compliance, and efficiency. For this reason, Congress provided PHMSA with preemptive authority over state regulations. To maximize the benefits of uniform regulations, MOUs that PHMSA executes with other federal agencies must ensure that PHMSA considers the mission of these other agencies, but ultimately takes the lead on these overlapping issues.

IV. PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMINISTRATION

A. Classification of Flammable Liquids

On January 18, 2017, PHMSA issued an Advance Notice of Proposed Rulemaking, entitled “Hazardous Materials: Volatility of Unrefined Petroleum Products and Class 3 Materials” (the “ANPRM”).¹⁶ PHMSA issued this ANPRM in response to Petition for Rulemaking P-1669 (the “Petition”) filed by the State of New York’s Office of the Attorney General (the “petitioners”). The Petition seeks to limit the Reid Vapor Pressure (“RVP”) of crude oil transported by rail to 9.0 pounds per square inch absolute (“psia”). The ANPRM expands the scope of the Petition to all Class 3 flammable materials and all modes of transportation, including rail, motor carrier, pipeline, aviation, and marine.

While AFPM has previously submitted comments¹⁷ on the ANPRM, we take this opportunity to highlight them again considering this RFC related to infrastructure project burdens, as well as EOs 13771, 13777, and 13873. While AFPM understands that this action was an ANPRM and there were no regulatory proposals in it, we wish to highlight some potential significant impacts related to transportation infrastructure burdens that were not fully enumerated in our previous comments.

First and foremost, lowering the RVP of crude oil transported in bulk would not reduce the risk of fire in the event of a derailment. There are many parameters that determine the flammability hazards of liquids. Flammable liquids exposed to an ignition source will catch fire, regardless of RVP. At the most basic level, based on current information available, any changes related to the classification of flammable liquid would be premature and have the potential to require significant, unnecessary infrastructure investments on the part of the energy industry,

¹⁶ See Docket No. PHMSA-2016-0077 (HM-251D), 82 *Fed. Reg.* 5499, published Jan. 18, 2017, <https://www.federalregister.gov/documents/2017/03/21/2017-05488/hazardous-materials-volatility-of-unrefined-petroleum-products-and-class-3-materials>.

¹⁷ See “Comment from American Fuel and Petrochemical Manufacturers,” submitted May 22, 2017, <https://www.regulations.gov/document?D=PHMSA-2016-0077-0071>.

including refiners and petrochemical manufacturers. These significant, unnecessary infrastructure investments would be felt throughout the supply chain and include burdens on both new and existing infrastructure and subsequently the American consumer.

The potential requirement to keep the RVP under 9.0 psia for the transportation of Hazard Class 3 Flammable Liquids would have three outcomes: 1) it would require field treatment of much of the crude oil extracted from oilfield production areas; 2) it would require flammable liquids that exceed those limits to be treated as a Division 2.1 Flammable Gas; and/or 3) it would make transportation of flammable liquids not cost-effective. AFPM harbors grave concerns about the costs of either requirement considering no data has been presented to date to make a compelling scientific or safety case for the restriction. Because these costs are enormous and could impact the ability to produce oil from these areas, PHMSA should not proceed with the ANPRM.

Field treatment of crude oil (also referred to as “field conditioning” or “pre-treatment”) would impose burdens on both new and existing infrastructure projects. Because the crude oil would need to be treated to 9.0 psia or below before consignment in Class 3 packagings, treatment would need to occur at the wellhead. This would require oil producers to make a significant investment to install substantial numbers of field conditioners across the country. That said, even current equipment for separation or heat treatment is insufficient to reduce crude oil RVP to levels suggested in the ANPRM. Therefore, oil producers who previously purchased equipment to meet state requirements (*e.g.*, those put in place by the North Dakota Industrial Council)¹⁸ may now need to abandon that recent investment.

Most importantly, pretreatment will not address the fundamental nature of flammability. Even stripped of all light ends, crude oil will still ignite. What matters is a source of spark or flame and a Class 3 liquid. The vapor pressure of the lading does not communicate the risk of ignition for bulk packagings. Pretreatment may even increase transportation safety risks as there would be a need for tank cars dedicated to transporting the separated light ends. With no local demand for the light ends (a critical difference between the Bakken and the Eagle Ford Shale), shippers would need to transport them long distances to new markets. The risk of an accidental release and exposure would only increase with the distance. Alternatively, the production well would be closed, or the light ends would be stranded in the distribution chain and their economic value wasted.

As previously noted, the equipment needed to pretreat crude oil and address the light ends that are removed is considerable and goes beyond process heater treatment. Other infrastructure investments could include extensive piping systems for moving both gases and liquids from the process and new distribution systems. Alternatively, producers would require topping refineries to distill the crude oil to a vapor pressure well below the threshold; these facilities simply do not exist in remote locations. Exploration and production companies would bear the capital costs of wellhead pretreatment. In the Bakken area and Permian Basin, much of

¹⁸ See “Industrial Commission Adopts New Standards to Improve Oil Transportation Safety,” December 9, 2014, <http://www.nd.gov/ndic/ic-press/dmr-order25417.pdf>.

the production might cease altogether for some time, especially in the current low-price environment.

The alternative to field treatment is the equally untenable option of using pressurized packaging for flammable liquids above 9.0 psia. Pipelines in the Bakken, for example, could not hope to absorb the additional light ends in the short-term, as the ANPRM recognizes. Liquid petroleum gases removed from light oil require use of pressurized tank cars or tank trucks for transport. Yet the transition would not come cheap, nor result in any overall risk reduction to crude transportation, as the risk of fire from a derailment of bulk flammable liquids with RVPs of 9.0 is virtually identical to the risk from a derailment of bulk flammable liquids with higher RVPs.

Historically, rail transport has been used to both transport crude oil to refineries and petrochemical manufacturing facilities, and move refined products, feedstocks, and intermediates from those same facilities to consumers or other members of the supply chain. In the past two years, in response to a DOT final rule¹⁹ and subsequent revisions to that rule²⁰ required by the Fixing America's Surface Transportation Act ("FAST Act"), tank car owners in flammable liquid service began one of the largest rail tank car retrofits in U.S. history. According to revised DOT estimates, this required replacing or retrofitting over 90,000 tanks cars. This substantial infrastructure investment (which impacted both directly and indirectly many AFPM member companies) requires the phasing out of the DOT Specification 111 tank car and replacement of those tank cars with new DOT Specification 117 Tank Cars or retrofitted DOT Specification 117R tank cars (according to DOT estimates at a total cost of \$520 million).²¹

Crude shippers have already sunk enormous costs into new and retrofitted non-pressurized tank cars; many of those cars would suddenly become useless investments if the proposals in the Petition were adopted into regulation. Pressurized tank cars are considerably more expensive than non-pressurized tank cars considering the thicker shells and additional safety equipment required (estimated between \$175,000 and \$200,000 per tank car). In addition, these cars weigh considerably more than currently authorized tank cars, necessitating additional tank cars to transport the same volume of materials—this has adverse effects on productivity, traffic, emissions, and safety. These cars would have to be produced or existing cars would have to be retrofitted, potentially creating backlogs and delays as the new de facto requirements coincide with PHMSA's DOT Specification 117 tank car mandate. Crucially, refiners would need to invest major capital in new loading and unloading infrastructure to accommodate the new pressure tank cars.

Rail transportation would not be the only mode that would become more expensive. Producers and refiners would need substantial investments in pressurized truck transportation, another source of large capital outlays. Like the tank cars, these cargo tanks weigh considerably

¹⁹ See PHMSA–2012–0082, 80 *Fed. Reg.* 26644 (HM-251), published May 8, 2015, <https://www.gpo.gov/fdsys/pkg/FR-2015-05-08/pdf/2015-10670.pdf>.

²⁰ See PHMSA–2016–0011, 81 *Fed. Reg.* 53935 (HM-251C), published Aug. 15, 2016, <https://www.gpo.gov/fdsys/pkg/FR-2016-08-15/pdf/2016-19406.pdf>.

²¹ See PHMSA–2016–0011, 81 *Fed. Reg.* 53940 (HM-251C), published August 15, 2016, <https://www.gpo.gov/fdsys/pkg/FR-2016-08-15/pdf/2016-19406.pdf>.

more than currently authorized cargo tanks, necessitating additional cargo tanks to transport the same volume of materials—this has adverse effects on productivity, traffic, emissions, and safety. Regarding highway transport, the selection of the type of cargo tank motor vehicle specification is dependent on hazard classification. New trucking equipment might be especially necessary for transporting mid- and winter-season gasoline, the vapor pressure of which typically exceeds the limits discussed in the ANPRM—again, without any increase in transportation safety. Lastly, it should be noted that such changes to the type of packaging for flammable liquids will place the U.S. Hazardous Materials Regulations (“HMR”) at odds with international trading partners, most notably Mexico and Canada, who are the U.S.’s largest trading partners for crude oil and refined products.

AFPM respectfully requests that DOT reject the petition and close this docket without further proceedings for both procedural and substantive reasons. Further proceedings based on crude oil characteristics conflict with Congress’ considered judgment to delay further regulation until the completion of ongoing studies (*e.g.*, Sandia Laboratories studies)²² on the transport of flammable materials. Even if Congress had not done so, PHMSA has every reason to await the results of those studies before crafting any regulation that would impose enormous costs, including infrastructure investments, without any corresponding safety benefit. The table on the following page provides a high-level summary of the significant burdens imposing a vapor pressure standard could cause.

²² See “Office of Fossil Energy, Crude Oil Characteristics Research,” <https://energy.gov/fe/articles/crude-oil-characteristics-research>.

Summary of Potential Infrastructure Burdens Related to Revisions of Flammable Liquid Classification for the Fuel and Petrochemical Industry²³

Equipment	Summary of Purpose	Impact²⁴
Field Conditioners / Heater Treaters	Current equipment for separation or heat treatment is insufficient to reduce crude oil RVP to levels suggested in the ANPRM.	Cost are variable and dependent on RVP level. Given the RVP level discussed in the ANPRM, current treaters would need to be replaced.
Testing Equipment	To ensure compliance, testing costs and frequency would increase.	Unknown but likely significant, dependent on testing demand.
New Gathering Systems	Piping systems would be needed to move gases and liquids from the wellhead to processing or transportation facilities.	These investments are capital intensive and generally longer-term. Need is dependent on current / future take-away capacity for oil and gas and varies by region. A nationwide RVP level could result in closing of production wells until new infrastructure is in place.
Storage Tanks	Additional storage tanks for the light ends produced by the process will likely be needed.	
New Distribution Systems	New distribution systems would need to be built to handle increased transport of gases.	
Topping Refineries	Needed to distill the crude oil to a vapor pressure below the threshold; these facilities simply do not exist in remote locations.	
Pressurized Tank Cars for Rail Transport	Shipments may no longer be able to be shipped in DOT specification 117 tank cars and would need to be shipped in a pressurized tank car.	~\$175,000 - \$200,000 per tank car; however, the marginal cost increase would be the difference in cost between a pressure car and a DOT-117. The increased weight of these tank cars could necessitate additional tanks / trips to transport the same volume of materials.
New Unloading Infrastructure for Pressurized Tank Cars	Loading and Unloading infrastructure differs between pressurized and non-pressurized cars: therefore, these points on the supply chain would also incur costs.	Current un/loading facilities would be unusable for pressure cars. An unknown amount of new facilities would need to be built to handle increase in pressure cars.
Pressurized Cargo Tanks for Highway Transport	Shippers would need substantial investments in pressurized cargo tanks as previously authorized trucks would no longer be authorized.	Costs are variable and dependent on the purchase of new or used assets; however, pressurized tanks are more expensive and a sufficient fleet may not currently be available. The increased weight of these tanks could necessitate additional tanks / trips to transport the same volume of materials.

²³ **Table Note 1:** This table only considers impacts to the fuel and petrochemical industry and does not attempt to quantify the substantial impacts for other industries that use or transport other flammable liquids. This listing is not an all-inclusive accounting of all impacts but rather an illustrative example of identifiable likely impacts.

²⁴ **Table Note 2:** Given the level of uncertainty about the final PHMSA actions, we cannot provide a specific total cost of flammable liquid classification changes. While the universe of affected entities is unknown, this table attempts to provide an indication of the significant economic implications of changes to flammable liquid classification.

B. Authority to Implement Tank Car Standards

On August 12, 2016, a group of organizations representing shippers of hazardous materials, including AFPM, submitted a Petition for Rulemaking P-1678 (the “shippers’ petition”)²⁵ to PHMSA in accordance with 49 Code of Federal Regulations (“CFR”) Part 106.26. The subject of the shippers’ petition concerns the authority to implement tank car standards. The shippers’ petition seeks to ensure that PHMSA is the sole regulator of hazardous materials packaging and make clear that railroads may not refuse to accept or otherwise discourage the transportation of hazardous materials that are offered in accordance with PHMSA’s regulations. The shippers’ petition requested that PHMSA begin a rulemaking proceeding that would modify the existing rules and adopt new requirements that would explicitly prohibit any person from requiring compliance with tank car specifications that are different from those in 49 CFR Part 179,²⁷ except as authorized by Special Permit.

As of July 24, 2017, a response to the shippers’ petition had not been issued. Considering this RFC and EOs 13771, 13777, and 13873, AFPM asks that DOT grant this petition, which has the potential to require that shippers of hazardous materials invest considerable capital in transportation assets (*i.e.*, tank cars) outside of the notice and comment rulemaking process required by the Administrative Procedures Act (“APA”). While the shippers’ petition provides a detailed discussion of the issue and support for the proposals, AFPM would like to highlight some key points of this petition that our members view as adding unnecessary burden.

The shippers’ petition reaffirmed what already is inherent in PHMSA’s statutory authority. The relevant statutes and legislative history make clear that Congress intended DOT to create uniform national standards for transportation of hazardous materials. DOT must adhere to the due process requirements of the APA by developing such national standards through notice and comment rulemaking and actions by states or private parties may not undermine DOT’s uniform regulations.

Through the American Association of Railroads (“AAR”) Tank Car Committee (“TCC”), the AAR has claimed a right to require adherence to different tank car standards than those of DOT and PHMSA. AAR, through the TCC and in its role as an industry association, has asserted itself as the *de facto* standard-setting body for tank car specifications whenever it disagrees with DOT standards. AAR either has required, or threatened to require, compliance with tank car specifications adopted by the TCC that differ from those considered and adopted by PHMSA, or those considered and expressly rejected for adoption by PHMSA. AAR has done so through its Interchange Rules, which apply to every tank car that moves in interchange anywhere in North America. Consequently, no shipper may use a tank car that does not comply with AAR’s standards even though the tank car fully complies with PHMSA requirements.

²⁵ See “Petition to Amend Tank Car Standards,” submitted August 12, 2016, https://www.regulations.gov/document?D=PHMSA_2016_0093_0001.

²⁶ See 49 CFR Part 106 <https://www.law.cornell.edu/cfr/text/49/part-106>.

²⁷ See 49 CFR Part 179 <https://www.law.cornell.edu/cfr/text/49/part-179>.

This is particularly troubling because AAR's railroad members constitute a supermajority on the TCC and they generally do not own or provide tank cars for transportation. Thus, they are insulated from the burdens of complying with their own requirements and the implications of those requirements for the broader public interest. Nor must the TCC comply with the procedural due process requirements of the APA. This system effectively usurps PHMSA's role as the regulatory authority over hazardous materials tank car specifications and, in so doing, bypasses the due process and notice and comment rulemaking requirements of the APA.

Historically, the TCC has functioned collaboratively with the various stakeholders (railroads, tank car manufacturers and suppliers, and railroad customers), reaching agreement on the recommendations and approvals specified in PHMSA's regulations. That historical collaboration, however, has broken down on several occasions over the last two decades. These disagreements at the TCC were fueled by the composition and internal rules of the TCC itself. The TCC charter states that votes cannot take place unless there is a railroad majority present. Given this organizational structure, railroads control and dictate the actions of the TCC, which is precisely what they have done by exercising their majority position to require compliance with tank car requirements that deviate from PHMSA specifications without the concurrence of other stakeholders.

While the shippers' petition for rulemaking provides much more detail, AFPM would like to highlight a recent example that would directly impact member companies. In 2015, AAR pushed the TCC into direct conflict with DOT when it proposed tank car top fitting protection that PHMSA had expressly declined to adopt just a few months earlier.²⁸ Specifically, PHMSA noted they would not require a specific type of top fittings protection as part of the DOT-117R retrofit requirement because "the costs involved appeared to be greater than the expected safety benefits."²⁹ Considering this RFC and EOs 13771, 13777, and 13873, AFPM asks that DOT move expeditiously to grant P-1678.

C. Office of Pipeline Safety Emergency Order Authority

On October 3, 2016, PHMSA issued an Interim Final Rule ("IFR")³⁰ to issue industry-wide emergency orders without notice and comment in certain circumstances. This expansion of PHMSA's authority was authorized in the "Protecting Our Infrastructure of Pipelines and Enhancing Safety Act" ("PIPES Act") signed on June 22, 2016. PHMSA is empowered to respond immediately to violations of pipeline safety laws or unsafe conditions or practices that constitute or cause an imminent hazard to public health and safety or to the environment. PHMSA is now able to impose emergency restrictions, prohibitions, and safety measures on owners and operators of gas or hazardous liquid pipeline facilities to address any violation of pipeline safety law, unsafe condition, or unsafe practice. These provisions were adopted into 49 CFR Part 190 of the PHMSA pipeline regulations.

²⁸ See "Final Regulatory Impact Analysis" [Docket No. PHMSA-2012-0082] (HM-251), "Hazardous Materials: Enhanced Tank Car Standards and Operational Controls for High-Hazard Flammable Trains," May 2015, <https://www.regulations.gov/document?D=PHMSA-2012-0082-3442>.

²⁹ See PHMSA-2012-0082, 80 *Fed. Reg.* 26676 (HM-251), May 8, 2015, <https://www.gpo.gov/fdsys/pkg/FR-2015-05-08/pdf/2015-10670.pdf>.

³⁰ See PHMSA-2016-0091, 81 *Fed. Reg.* 70980, Oct. 14, 2016, <https://www.gpo.gov/fdsys/pkg/FR-2016-10-14/pdf/2016-24788.pdf>.

While AFPM submitted comments³¹ on the provisions in this IFR, we take this opportunity to highlight them again considering this RFC and EOs 13771, 13777, and 13873. Given the negative public comments the IFR received, AFPM recommends that PHMSA modify the IFR before finalizing the rule. Specifically, AFPM has concerns that the provisions in the IFR related to the Emergency Order Authority petition and notification processes do not meet the statutory mandate. For example, DOT fails to implement the requirements in the law that upon “receipt of a petition for review from an entity subject to, and aggrieved by an emergency order the Secretary shall provide an opportunity for a review of the order under section 554 of title 5.”

In addition, while this IFR deals with existing infrastructure, some consideration should be given to how an emergency order may affect ongoing or planned pipeline construction at the time of issuance of an emergency order. Finally, AFPM strongly urges PHMSA to quickly promulgate final regulations that address the requirements in the statute explicitly.

V. FEDERAL RAILROAD ADMINISTRATION

A. Electronically Controlled Pneumatic Braking Systems

As part of the FAST Act, DOT was required to revisit a regulation adopted in May 2015 that required certain train configurations of transporting large volumes of flammable liquids to be equipped with Electronically Controlled Pneumatic (“ECP”) braking systems. Specifically, the FAST Act required DOT to test ECP braking³² and reevaluate the economic analysis (“Regulatory Impact Analysis” or “RIA”) supporting the ECP braking requirement. This legislation also required the Government Accountability Office and National Academy of Sciences (“NAS”) to study the cost, benefits, and performance of ECP brakes.³³ This additional research of ECP braking is designed to verify safety performance and determine if ECP braking is an improved technology in comparison to more widely-used conventional braking systems.

The FAST Act provides specific deadlines regarding a final decision on this matter. Following the completion of the NAS study and additional ECP braking testing, DOT is required to update the previous RIA based on results of the new testing and modeling (90 days after testing is completed). The FAST Act also requires that no later than two years after the date of enactment of the Act (December 5, 2017), the Secretary shall determine whether the applicable ECP braking requirements are justified and if so, publish in the *Federal Register* the determination and reasons for such determination.

While much of this research has already been completed, some work remains and the results of the research has not yet been formally published. That said, on July 6, 2017, the Federal Railroad Administration (“FRA”) presented preliminary results of additional ECP testing

³¹ See “Comment from American Fuel and Petrochemical Manufacturers,” December 16, 2016, <https://www.regulations.gov/document?D=PHMSA-2016-0091-0007>.

³² Given the high cost of physical testing, DOT and the National Academy of Sciences agreed to more advanced computational analysis of ECP braking and limited physical testing in lieu of full scale physical test.

³³ “Fixing America’s Surface Transportation Act,” Section 7308, signed December 5, 2015.

and modeling to the NAS in a public meeting.³⁴ While FRA was unable to complete the testing exactly as stipulated in the FAST Act, FRA did work with NAS to address concerns in the original model and complete smaller scale ECP braking tests. At this meeting, FRA presented the results of that testing, along with a preliminary run of the revised model (this is a revised version of the analysis used to support the HM-251 final rule). Based on the new FRA modeling, the estimates of ECP braking efficacy were revised downward. FRA also noted that it is revising the RIA based on the results of this testing and modeling, as required by the FAST Act.

AFPM recognizes the need for additional ECP braking study to better guide determinations as to whether they offer improved safety benefits in a cost-effective manner. AFPM looks forward to the formal release of FRA's additional testing and modeling data as well as the revised RIA. However, given the preliminary results, AFPM remains concerned that ECP braking is not cost justified and does not offer a significant level of safety improvement over currently more reliable conventional braking technologies. As previously noted, FRA revised the effectiveness estimates for ECP braking downward based on the new testing and modeling (*i.e.*, original DOT estimates of ECP's ability to mitigate derailment consequences were overestimated). As these effectiveness rates are a key component of the cost benefit analysis used to justify ECP braking, and in the original analysis ECP was only marginally cost beneficial under a high consequence low probability scenario, AFPM has concerns that ECP braking is not a cost-justified technology.³⁵ AFPM is confident that with lower effectiveness rates the ECP braking requirements will be even more cost prohibitive. Currently, revised cost benefit figures have not been published; however, as required by the FAST Act, the revised RIA will be published in the *Federal Register* upon completion.

AFPM is concerned that despite the additional testing and revised modeling, the effectiveness rates of ECP braking compared to conventional braking systems may still overestimate real-world ECP braking performance. While the FRA modeling is extensive, there remains concern that the model is not a validated physics-based model that can accurately predict real-world behavior in a derailment scenario.

Regardless of the results of additional DOT ECP brake testing, information available on crude oil train incidents indicates that the use of ECP brakes would have had no impact on preventing the incidents identified in the DOT rulemaking implementing this technology.³⁶ None of the derailments relied upon by DOT to justify implementing ECP brakes would have been prevented by ECP brakes. Furthermore, an AAR task force reviewed derailment

³⁴ "Review of Department of Transportation Testing of Electronically Controlled Pneumatic Brakes" Meeting 9, July 6-7, 2017, <http://www8.nationalacademies.org/cp/meetingview.aspx?MeetingID=9405&MeetingNo=9>

³⁵ According to the final rule and associated RIA, original analysis estimated ECP braking would provide between \$470 million – \$1,114 million in benefits and cost \$492 million over 20 years (discounted 7 percent). See PHMSA–2012–0082, 80 *Fed. Reg.* 26649 (HM-251), published May 8, 2015, <https://www.gpo.gov/fdsys/pkg/FR-2015-05-08/pdf/2015-10670.pdf>.

³⁶ See John Rimer, CSX Transportation, "Braking Systems and Distributed Power," June 10, 2014, presented to the U.S. White House Office of Management and Budget by the Association of American Railroads, available at <http://www.reginfo.gov/public/do/viewEO12866Meeting?viewRule=false&rin=2137AE91&meetingId=212&acronym=2137-DOT/PHMSA> ("handout 2").

simulations involving ECP compared to conventional braking systems and concluded that “the alternatives considered provided marginal benefits.”³⁷

Despite these marginal benefits, the costs of ECP brakes are substantial. Unlike conventional braking systems currently in use, ECP brakes would require retrofitting all the tank cars and the locomotives on a train. Additional costs would include: overlay systems, the extensive training of rail personnel to operate the new equipment, and the cost of likely disruption in services when equipment fails. As many of these costs were likely underestimated in the original RIA, DOT should revise these figures to more accurately represent the current operating environment in the revision of the RIA.

AFPM values market certainty on considerable investments such as tank cars, locomotives, and the braking systems with which they are equipped. In addition, as the FAST Act requires public comment on the additional research and updating of the associated RIA, AFPM is concerned that the December 5, 2017, deadline for a final decision may not be met. AFPM looks forward to the opportunity to comment on the revised RIA and requests the DOT provide ample time to comment on what is sure to be an extensive revision of the RIA. AFPM also requests that following careful consideration of public comments on the revised RIA, that DOT act swiftly in deciding the fate of ECP braking.

AFPM strongly urges DOT to rescind the ECP braking requirements as concerns remain about the brake modeling (*e.g.*, model validation or parameters considered), the accuracy of ECP braking effectiveness rates derived from that modeling, the economic analysis and assumptions used to support adoption of the technology, and the marginal benefits ECP may provide. In addition, if the revised RIA indicates ECP braking is not cost justified, which is likely, then the ECP requirements should be vacated. AFPM believes a quick resolution will establish market certainty and allow for more efficient fleet management and investment in tank car infrastructure, thus improving safety.

B. Track Integrity

Any effort to enhance rail safety must begin with addressing the primary root causes of derailments and other accidents, including track integrity. Track and equipment failures are the primary causes of train derailments. Investment in accident prevention would result in the greatest reduction in the risk of rail incidents. Despite track failures being a leading cause of derailments, much of DOT’s regulatory efforts related to the transport of flammable liquids have been primarily focused on the characteristics of the materials transported and the tank car specification, neither of which is a causal factor of derailments. Improvements in track integrity paired with the in-progress upgrading of the flammable liquid tank car fleet are likely to drastically reduce both the frequency and consequences of a derailment.

Railroads have already adopted new technologies to monitor the health of the tracks, and flag potential safety issues for maintenance. These technologies include: track geometry cars that collect and process valuable infrastructure data and notify operators of potential track

³⁷ See T87.6 Task Force Summary Report, September 5, 2013, <https://www.regulations.gov/document?D=PHMSA-2012-0082-0012>.

defects, onboard tools that check the alignment of the track, and wayside detectors that monitor passing trains for potential issues. Further, in the December 2016 DOT Significant Rulemaking Report (the last full report the Department has published), there was an announced rule entitled, “Track Safety Standards; Improving Rail Integrity.”³⁸ The abstract for this rulemaking noted the action “would amend or add regulations addressing continuous testing of rail defects, rail head wear, inspection records, continuous welded rail, qualified operators, and Class 6-9 rail inspection frequencies.”

AFPM would support DOT efforts to improve track integrity through fostering advancements in technology, adding more track inspection equipment, hiring more qualified inspectors, conducting more frequent track inspections, or supporting a regulatory and financial environment that encourages continued private investment in the nation’s freight railroad system.

C. Rail Worthiness Directives

In instances where the FRA determines, based on the existence of probable cause, that a tank car or a class or design of tank cars may be in an unsafe operating condition, FRA may require, through a “Rail Worthiness Directive,” that the car or cars be inspected without regard to any other periodic inspection requirements. These directives are designed to protect public safety, ensure compliance with applicable federal regulations related to the rail transport of hazardous materials, and restore the rail worthiness of deficient equipment of rail cars. Rail worthiness directives describe the condition or defect, and order the testing and inspection of the tank car(s). The directives also require correction of all defects and unsafe conditions, whether determined by federal standards. While FRA indicates that 49 CFR 180.509³⁹ provides the authority to issue these directives, a “Rail Worthiness Directive” is not explicitly mentioned in the regulation.

Under federal statute, FRA is the delegated authority to issue emergency orders where an unsafe condition or practice “causes an emergency situation involving a hazard of death, personal injury, or significant harm to the environment” in the rail industry.⁴⁰ These orders may immediately impose restriction and prohibitions that may be necessary to abate the dangerous situation.

Emergency orders and rail worthiness directives are extraordinary measures that have the potential to significantly disrupt business. These types of actions should be well documented, used judiciously and only in the face of an imminent hazard. Emergency orders and rail worthiness directives should be issued in conjunction with the ability to accept comment from affected parties, should be immediately appealable to a court of competent jurisdiction, and last only as long as necessary to abate the hazard before notice and comment rulemaking can occur. Given that rail worthiness directives and Emergency Orders serve similar purposes, clear parameters surrounding FRA’s use of these tools would foster more effective implementation of

³⁸ See “Significant Rulemaking Report Archive, December 2016 report” at 59, December 2016, <https://cms.dot.gov/regulations/significant-rulemaking-report-archive>.

³⁹ See 49 CFR 180.509, <https://www.law.cornell.edu/cfr/text/49/180.509>.

⁴⁰ See 49 U.S.C. 20104, <https://www.law.cornell.edu/uscode/text/49/20104>.

such directives, ensure an efficient return to safe operating procedures, and avoid any regulating through guidance outside of the APA notice and comment requirements.

On September 30, 2016 (and subsequently revised), FRA issued Rail Worthiness Directive 2016-01 to address potential non-compliance regarding non-conforming welding practices.⁴¹ While further testing and recall of the suspect welds was necessary, FRA actions in response to this issue effectively set a precedent for a new set of acceptance criteria for nondestructive testing. Many in the regulated community share a concern that policies set in response to these directives may be a mechanism to subvert the notice and comment requirement of the APA. This provides a potential example of regulating through guidance outside of the APA notice and comment requirements.

AFPM supports a review of the rail worthiness directive process focusing on potential overlap with other FRA capabilities to mitigate non-compliance, methods to improve the implementation of such directives, and ways to avoid implementing new regulatory requirements via these directives. Furthermore, any potential FRA guidance on rail worthiness directives would only improve this program.

D. Tank Car Facility Registration

At the most recent Rail Safety Advisory Committee's ("RSAC") meeting on May 25, 2017, the full committee agreed upon regulatory text developed by the Hazardous Materials Working Group relating to tank car facility registration. Specifically, the text establishes a registration procedure for persons who are engaged in the manufacture, assembly, inspection and testing, certification, or repair of tank cars. To be clear, this regulatory text will still need to be proposed and adopted in upcoming rulemakings.

Currently, the certification of tank car repair, alteration, or construction facilities has been delegated by DOT to AAR's TCC. To revoke a facility's certification, FRA must do so through the AAR. As part of the agreed upon text at RSAC, FRA plans to add tank cars to the existing text of 49 CFR Part 107,⁴² which certifies facilities that repair or build other DOT specification packagings. Consequently, if the RSAC language is adopted, tank car facilities would be required to maintain redundant AAR and FRA certification to repair or build tank cars, and without both certifications, a facility will not be allowed to work on tank cars.

AFPM acknowledges there are issues with the current tank car facility registration program. Furthermore, AFPM applauds RSAC efforts to address this issue. That said, we encourage the development of a solution that would avoid duplicative and redundant registration requirements and clearly designate the entity responsible for overseeing these facilities. Ultimately, the more complex the certification process becomes, the less shops are incentivized to do it, which eliminates competition and leads to adverse market conditions when repairing tank cars. Further, like the authority to implement tank car standards, AFPM believes the

⁴¹ See "Railworthiness Directive for Certain Railroad Tank Cars Equipped with Bottom Outlet Valve Assembly and Constructed by American Railcar Industries and ACF Industries," September 30, 2016, <https://www.fra.dot.gov/eLib/details/L18383>.

⁴² See 49 CFR Part 107 <https://www.law.cornell.edu/cfr/text/49/part-107/subpart-F>.

authority to create uniform national standards for transportation of hazardous materials, including those pertaining to tank car facilities, is an inherent DOT function.

E. One Time Movement Approvals

FRA has the enforcement authority and responsibility to ensure the safe transportation of hazardous materials. One Time Movement Approvals (“OTMA”) are required for certain types of hazardous material shipments, such as a one-time shipment of hazardous material carrying tank cars for repair and other non-conforming packagings designed, marked or otherwise represented for the transportation of hazardous material. According to FRA, the purpose of OTMAs are the following: 1) provide for the safe movement of non-complying bulk packages by rail; 2) track movements of non-complying bulk packages transported by rail; 3) assure that proper/necessary repairs are completed by authorized (certified or registered) entities (as appropriate for the defect); and 4) identify systemic safety problems.⁴³

On January 31, 2012, FRA issued the HMG-127 OTMA Procedures. This guidance provides procedures for applying for an approval in accordance with 49 CFR 174.50⁴⁴ for bulk hazardous materials packagings (*e.g.*, tank cars) that do not meet the required design specification and must be moved to a cleaning facility and/or a certified repair shop to complete the necessary repairs and qualifications to bring the packaging back into compliance. HMG-127 has been revised multiple times and moved from a 4-tier approval process to a 3-tier approval process. The most recent version of HMG-127 was issued on October 28, 2014.⁴⁵

While the OTMA process is necessary, it can be burdensome and in some instances strand tank car assets that need to be moved expeditiously. In addition, not all types of tank car damages are equal and need significant review. Understanding the current process could be streamlined, RSAC’s Hazardous Materials Working Group developed an OTMA task force to address the issue. At the most recent RSAC meeting, there was consensus approval of proposed regulatory text related to OTMAs. AFPM encourages the expeditious incorporation of this streamlined process into the HMR. This will reduce burden on both the regulated community and the federal government.

VI. MARITIME ADMINISTRATION

A. Deepwater Port Licensing Program and Policy

Reliable inland waterways and import / export facilities are essential infrastructure for AFPM member companies to efficiently move their products for U.S. consumers and exports. American trade is a key element for continued growth in U.S. refining and petrochemical manufacturing. To that end, DOT’s Maritime Administration (“MARAD”) works closely with

⁴³ See Federal Railroad Administration One Time Movement Approval (OTMA) Process and Special Permit Fitness Review,” presented June 2013, <https://www.fra.dot.gov/Elib/Document/3305>.

⁴⁴ See 49 CFR Part 174.50 <https://www.law.cornell.edu/cfr/text/49/174.50>.

⁴⁵ See “HMG-127 One-Time Movement Approval Procedures,” last updated October 28, 2014, <https://www.fra.dot.gov/eLib/details/L15988>.

the USCG and other government agencies to promote the use of waterborne transportation and its seamless integration with other segments of the intermodal transportation system.

In response to the nation's growing energy and security needs, Congress accelerated the deepwater port licensing process to promote the import of oil and natural gas to offshore energy receiving facilities as well as the export of oil and natural gas to offshore energy transfer facilities. MARAD oversees this deepwater port licensing application process. The process is designed to streamline the review and construction of liquefied natural gas ("LNG") and oil deepwater ports. MARAD has noted they are committed to expediting the application process while striving to protect the nation's environment, meeting our growing energy needs, and improving waterborne transportation efficiencies. Typically, the approval process for deepwater ports takes one year with two-thirds of the time devoted to NEPA analysis and review.⁴⁶

On May 7, 2015, MARAD issued its final policy⁴⁷ regarding the review and processing of applications for the export of oil and natural gas from offshore deepwater port facilities under the Deepwater Port Act. Under this policy, MARAD and the USCG state they use the existing deepwater port licensing framework and regulations (33 CFR Parts 148, 149 and 150)⁴⁸ to evaluate and process export license applications. The final policy clarifies key points regarding the processing of export applications. Importantly, MARAD will treat all requests for export authorization, including the conversion of existing facilities, as new license applications requiring a comprehensive review and public engagement process. For the conversion of existing facilities, a new environmental impact statement ("EIS") under NEPA may be required. However, MARAD noted that a supplemental EIS ("SEIS") or environmental assessment ("EA") may potentially be used instead to meet NEPA review requirements. In that case, the SEIS or EA would focus on analyzing the differences in impacts of regasification and liquefaction technologies and operations, or impacts from bi-directional operations.

AFPM supports the streamlining of deepwater port permitting processes and believes that MARAD has made considerable strides to address changing energy markets. That said, AFPM supports efforts to avoid duplicative and redundant analysis when possible. As stated above, MARAD treats all requests for export authorization, including the conversion of existing facilities, as new license applications requiring a comprehensive review and public engagement process. Although the final policy notes that for a conversion of an existing facility a SEIS or EA may potentially be used instead to meet NEPA review requirements, it is unclear under what circumstances this would be permitted. AFPM supports a review of this policy to find any efficiencies and elements of review that can avoid being repeated and thus expedite the conversion process of existing facilities.

While USCG is no longer a part of DOT, due to the relationship between MARAD and USCG relating to the deepwater port program, it is important to remember that pending USCG regulations have the potential to impact the program. In addition to the MARAD final policy, on

⁴⁶ See "MARAD Licensing Process and Requirements," <https://www.marad.dot.gov/ports/office-of-deepwater-ports-and-offshore-activities/licensing-process-and-requirements/>.

⁴⁷ See Docket No. MARAD-2014-0132, 80 *Fed. Reg.* 26321, May 7, 2015, <https://www.gpo.gov/fdsys/pkg/FR-2015-05-07/pdf/2015-10619.pdf>.

⁴⁸ See 33 CFR Chapter I Subchapter MN, <https://www.law.cornell.edu/cfr/text/33/chapter-I/subchapter-NN>.

April 9, 2015, the USCG published an NPRM related to deepwater port regulations.⁴⁹ This NPRM proposed revisions to its regulations for the licensing, construction, design, equipment, and operation of deepwater ports, used as ports or terminals for the import or export of oil and natural gas. The proposed revisions would provide additional information, clarify existing regulations, provide additional regulatory flexibility, and add new requirements to ensure safety. Specifically, the proposed revisions are expected to help expedite licensing reviews by clarifying the regulatory process and cooperating agency requirements and update the regulations to account for new technologies and uses, including LNG exports. To date, a final rule based on these proposals has not been published. Its projected final rule date was listed as February 2017 in the Fall 2016 Semiannual Regulatory Agenda.⁵⁰

Although AFPM did not provide comments on the April 2015 NPRM, we are encouraged by efforts to streamline and improve the licensing, construction, design, equipment, and operation of deepwater ports, used as ports or terminals for the import or export of oil and natural gas. We look forward to the publication of the final rule and trust that any regulatory revisions in that final rule will be consistent with the principles of EOs 13771, 13777, and 13783.

VII. FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION

A. Cargo Tank Testing

In August 2016, the Federal Motor Carrier Safety Administration (“FMCSA”) issued an enforcement notice regarding the use of EPA Method 27 Testing for tank trucks in petroleum distillate service.⁵¹ Prior to issuance of this guidance, all petroleum distillate vehicles could be inspected using the EPA Method 27 test, which allows for a visual inspection of the tank trailer. That said, based on this FMCSA notice, diesel fuel, biodiesel, ethanol, and methanol are no longer considered petroleum distillates. Accordingly, vehicles transporting these materials are now required to undergo hydrostatic testing in lieu of visual inspection. The result of this guidance was an increase in the cost of testing, with no demonstrated corresponding safety or environmental benefit as it pertains to the maintenance of certain fuel transportation assets. As this change was made through guidance, no opportunity for comment or supporting analysis was provided for the change in policy. Furthermore, no safety case was presented to warrant this change and the practice of visual inspection for such tanks has proven effective through the years. AFPM urges DOT to rescind this guidance and return to the previous policy regarding testing of tank trailers used to haul diesel fuel.

⁴⁹ See USCG-2012-0061-0001, 80 *Fed. Reg.* 19118, proposed April 9, 2015, <https://www.regulations.gov/document?D=USCG-2012-0061-0001>.

⁵⁰ See “Semiannual Regulatory Agenda” published December 23, 2016, <https://www.federalregister.gov/documents/2016/12/23/2016-29856/fall-2016-semiannual-agenda-of-regulations>.

⁵¹ See “Safety Advisory: Limitations on the use of the EPA Method 27 Test in lieu of the Leakage Test on DOT Specification Cargo Tank Motor Vehicles,” https://www.fmcsa.dot.gov/sites/fmcsa.dot.gov/files/docs/Use%20of%20EPA%20Method%2027%20Test_Final_11302016.pdf.

B. Exemptions for Pipeline Operations

Infrastructure maintenance is integral to ensure our nation's transportation system is operating safely and efficiently. Maintenance of pipeline systems is highly technical and requires a variety of extremely skilled and trained labor force including, but not limited to, pipeline welders. The efficient maintenance of our nation's pipelines keeps critical energy infrastructure running safely and efficiently.

FMCSA regulations provide exemptions from certain requirements (*e.g.*, hours of service) based on the nature of the trucking that is being completed. For example, under the oilfield exemption, trucks operating on oil exploration and extraction sites can extend the 14-hour driving window while waiting to load or unload rather than being penalized for sitting in the truck. The agricultural industry is afforded similar exemptions for certain carriers transporting agricultural commodities and farm supplies for the purposes of farming and not long-haul trucking.

FMCSA provides exemptions for "pipeline welding trucks" in 49 CFR § 390.38.⁵² While the current exemption provides reasonable relief for pipeline welding trucks, it is limited in its application and unnecessarily limits the use of this provision. A broader exemption, not limited to strictly pipeline welders, but expanded to pipeline operations would facilitate operator maintenance and integrity management operations that cross state lines while not conflicting with the intent of FMCSA exemptions. These types of personnel are highly skilled and limited in number. Providing relief (*e.g.*, from hours of service requirements) for maintenance and integrity management operations personnel would aid pipeline operators to ensure a quick response to pipeline emergencies, as well as an expedited return to operation of critical pipeline infrastructure.

Like the agriculture-related exemptions described above, pipeline maintenance crews are not engaged in business of interstate trucking nor are they typically engaged in daily driving activities. AFPM supports the review and revision of the pipeline welding truck exemption to foster infrastructure maintenance while maintaining driver safety. Specifically, AFPM supports an expansion of this exemption to include other pipeline operations (beyond welding) that are needed to keep infrastructure running safely and efficiently. It is critical for a pipeline operator to be able to respond quickly to events and ensure the safe, reliable operation of our nation's pipeline infrastructure.

VIII. LEGISLATIVE COMMENTS

The RFC notes that DOT's primary focus is on administrative items that the Department has direct authority to change. That said, the RFC does provide the opportunity for legislative suggestions if regulatory or policy solutions are not achievable or feasible. While AFPM's comments in this RFC primarily focus on amendments to regulations, guidance, or policy, AFPM believes DOT should support legislative solutions in some areas.

⁵² See 49 CFR Part 390.38, <https://www.law.cornell.edu/cfr/text/49/390.38>.

A. Pipeline Permit Streamlining

President Trump signaled at the outset of his Administration that reducing burdensome regulations on business and streamlining environmental permitting processes are key to establishing energy independence, improving the nation's critical infrastructure, and creating jobs. For refiners and petrochemical manufacturers, continued investment in our nation's critical infrastructure is key to access expanding U.S. resources and delivering products to market. However, the permit process to maintain and build energy infrastructure can be lengthy and cumbersome. As President Trump highlighted in his speech at DOT headquarters on June 9, 2017, "it can take 10 years and far more than that just to get the approvals and permits needed to build a major infrastructure project." This includes pipeline permitting, and AFPM member companies have seen firsthand project schedules ballooning due to redundant and duplicative permitting requirements required by multiple federal and state agencies, and a public participation process that has been abused by environmentalists to delay projects in furtherance of their anti-fossil fuel agenda.

AFPM acknowledges some of the permitting requirements fall outside DOT's authority and purview. That said, we encourage DOT to collaborate with other federal agencies, the Executive Offices of the White House, and Congress to avoid duplicative work and analysis. Efforts to advance environmental permit improvements fall generally into two categories: 1) legislative reform; and 2) Executive Branch actions.

On January 24, President Trump signed EO 13766, "Expediting Environmental Reviews and Approvals for High Priority Infrastructure."⁵³ This EO, followed by subsequent Executive Branch actions, initiated wide-ranging and rapidly developing policy discussions among various federal agencies and departments, lawmakers, and stakeholders. AFPM believes that policies should be put in place that streamline and enhance the ability of companies to build and maintain energy infrastructure. Three overarching goals to improve and streamline the permit process include: 1) establishing and adhering to comment submittal deadlines and agency review deadlines; 2) developing a uniform permit review process across federal agencies; and 3) ensuring the permit review process is uniform across regions.

Specifically, AFPM supports NEPA reviews that are limited to the authority and jurisdiction of the specific federal agency completing the review. Attempts to expand the NEPA review beyond the scope of the agencies' statutory authority should be avoided. AFPM also supports a consistent approach to environmental reviews across regions. Many pipeline projects span multiple federal, state, and regional authorities, creating a patchwork of differing permitting requirements or differing interpretations of existing regulation and law. As mentioned above, many NEPA guidance documents are out of date. AFPM supports an update of guidance whether it be the DOT implementation procedures or the White House Council on Environmental Quality's ("CEQ") "40 Most Asked Questions Concerning CEQ's NEPA

⁵³ See "Executive Order 13766: Expediting Environmental Reviews and Approvals for High Priority Infrastructure," January 24, 2017, <https://www.whitehouse.gov/the-press-office/2017/01/24/executive-order-expediting-environmental-reviews-and-approvals-high>.

Regulations.”⁵⁴ Lastly, AFPM encourages DOT to work with Congress and consider legislative solutions that support the principles of EOs 13771, 13766, 13777, and 13873 related to pipeline permitting.

B. Federal Aviation Administration Drone Policy

Due to the nature of the fuel and petrochemical supply chain, AFPM member companies generally are not overly concerned with infrastructure related to the aviation mode. AFPM member companies recognize the potential that unmanned aircraft systems (“UAS”) have to help inform, protect, and monitor critical infrastructure investments in the energy sector.

On June 28, 2016, the Federal Aviation Administration (“FAA”) announced a set of regulations for the commercial use of small unmanned aircraft systems (“UAS”).⁵⁵ While this rule adopted numerous important requirements, it was silent when it came to the need to protect critical infrastructure (*e.g.*, energy infrastructure, oil refineries, chemical facilities) from improper use of UAS. Following the promulgation of these regulations, Congress approved a short-term (17 months) extension of the FAA authorization and in that legislation included several provisions regarding UAS and critical infrastructure, many of which have yet to be adopted into regulation. When developing regulations to implement these legislative mandates, AFPM urges FAA to consider the need to protect our nation’s critical energy infrastructure and accelerate regulations that tap the vast capabilities UAS offer the energy industry to improve safety.

While AFPM does not have any specific comments on current FAA regulations, policies, or guidance related to UAS, with the current FAA authorization set to run out in less than three months, AFPM encourages DOT to engage Congress on FAA authorization legislation that includes sensible, safe, and secure requirements related to UAS, particularly as they apply to critical energy infrastructure.

IX. CONCLUSION

AFPM member companies rely on reliable and safe transportation infrastructure to transport materials to and from refineries and petrochemical plants. AFPM member companies depend upon an uninterrupted, affordable supply of crude oil as a feedstock for the transportation fuels and petrochemicals they manufacture. AFPM member companies utilize all modes of transportation to move their products and many member companies have made infrastructure investments to support and improve the efficiency of the transportation system. These transportation infrastructure investments ensure the American people receive the fuels and petrochemical products they use daily in a safe and efficient manner.

⁵⁴ See “Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations,” March 23, 1981, <https://energy.gov/sites/prod/files/G-CEQ-40Questions.pdf>.

⁵⁵ See Docket No. FAA–2015–0150, 81 *Fed. Reg.* 42064, June 28, 2016, <https://www.federalregister.gov/documents/2016/06/28/2016-15079/operation-and-certification-of-small-unmanned-aircraft-systems>.

AFPM supports efforts to eliminate burdens associated with the development of new, or modification of existing, infrastructure. Further, AFPM supports the principles of safe, sound, efficient, and cost-justified regulations presented in EOs 13771 and 13777. As previously stated, AFPM member companies own, operate, and use various types of transportation infrastructure to deliver millions of products that make modern life possible. We therefore appreciate the opportunity to provide public comment on this important issue.

AFPM views this RFC as a meaningful step in the right direction and encourages the administration to seek input more broadly on regulations under EOs 13771, 13777, and 13873. Specifically, while this RFC focused on transportation infrastructure projects, we would support similar notices or public meetings soliciting stakeholder feedback at an operating administration level on all existing regulations. Providing an opportunity for meaningful public and stakeholder input will only help to inform decisions at the operating administrations.

AFPM thanks DOT for the opportunity to provide input on the regulatory reform process. Please contact me at (202) 602-6604 or dfriedman@afpm.org if you wish to discuss these issues further.

Sincerely,

A handwritten signature in black ink that reads "David Friedman". The signature is written in a cursive, flowing style.

David Friedman
Vice President, Regulatory Affairs

X. APPENDIX: SUMMARY OF AFPM COMMENT AREAS

Summary of Burdensome Policy, Guidance, & Regulations Related to Transportation Infrastructure Projects			
Agency	Topic / Reference	Potential Level of Burden	Alternative
DOT-Wide	NEPA Implementing Procedures	Considering NEPA’s wide-ranging scope, streamlining redundant reviews could have a considerable impact	Revise DOT’s NEPA implementing procedures considering recent EOs and reopen comment period to provide for meaningful public input
	Overlapping Authorities MOUs / MOCs	With the large number of MOUs / MOCs, this could greatly streamline infrastructure projects	A department-wide review and updating of MOUs related to infrastructure projects in line with principles in recent EOs
PHMSA	Classification of Flammable Liquids 49 CFR Part 173	Changes in classification would require significant investment throughout the supply chain and in all modes as well as pre-transportation activities	Withdraw the ANPRM and monitor impact of safety improvements related to completed and ongoing DOT action related to the transport of flammable liquids
	Tank Car Specifications 49 CFR Part 179	AAR’s interchange requirements could require significant investment by shippers outside of the rulemaking process	Respond to the petition for rulemaking or engage the TCC directly to address issues highlighted in this response
	Emergency Orders 49 CFR Part 190	Consideration should be given to how an emergency order may affect ongoing or planned pipeline construction	The response to the IFR should provide some discussion of potential issues and scope of authority
FRA	ECP Braking 49 CFR Part 174	Per DOT’s regulatory impact analysis, ECP brakes could cost up to \$492 million	Upon completion of additional research and analysis, act swiftly regarding future of ECP brakes
	Track Integrity 49 CFR Part 213	Annually, the rail industry invests billions in track improvements	Support efforts to improve track integrity (<i>e.g.</i> , technology advancements / regulatory reform)
	Rail-Worthiness 49 CFR Part 180	While infrequent, these directives can be precedent-setting as well as impact many tank cars	Review of the directive process focusing on potential overlap with other FRA capabilities to mitigate non-compliance
	Facility Registration 49 CFR Part 105	Duplicative registrations could create regulatory confusion and increase paperwork burdens	Avoid duplicative registration requirements and clearly designate the entity responsible for overseeing these facilities
	OTMAs 49 CFR Part 174	Annually, FRA approves thousands of OTMAs, many of which are routine and low-risk	Expediently incorporate a streamlined process for OTMAs into the regulations
MARAD	Deepwater Ports Final Policy	Potentially impacts trade of oil and natural gas products by slowing the development of import / export facilities	Review policy on deepwater ports, specifically the conversion of import facilities
FMCSA	Cargo Tank Testing 49 CFR Part 178	Requires frequent testing of cargo tanks in certain fuel service without a corresponding safety benefit	Rescind this guidance and return to the previous policy regarding testing of tank trailers used to haul certain fuels
	Pipeline Exemptions 49 CFR Part 390	Limits the ability of highly-skilled pipeline workers to tend to pipeline maintenance and integrity management issues	AFPM supports the review and expansion of the pipeline welding exemption to include other pipeline operations that foster infrastructure maintenance while maintaining safety