



**American
Fuel & Petrochemical
Manufacturers**

1667 K Street, NW
Suite 700
Washington, DC
20006

202.457.0480 office
202.457.0486 fax
afpm.org

**COMMENTS OF THE AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS ON
THE DEPARTMENT OF TRANSPORTATION’S REGULATORY REVIEW,
“NOTIFICATION OF REGULATORY REVIEW”
DOCKET No. DOT-OST-2017-0069
82 FED. REG. 45750 (OCTOBER 2, 2017)**

DECEMBER 1, 2017

David Friedman
American Fuel & Petrochemical
Manufacturers
1667 K Street, NW, Suite 700
Washington, DC 20006

Contents

I.	Introduction.....	3
A.	AFPM’s Interest in DOT’s Notice	3
II.	Department-Wide Comments	4
A.	Focus on Performance Based Outcomes.....	4
B.	Regulation Through Guidance	5
C.	Overlapping Authority	5
D.	National Environmental Policy Act Implementation.....	6
E.	Rulemaking Procedures	8
III.	Pipeline and Hazardous Materials Safety Administration	8
A.	Authority to Implement Tank Car Standards.....	8
B.	Classification of Flammable Liquids	11
C.	Sampling and Testing for Unrefined Petroleum-based Products.....	15
D.	Emergency Order Authority.....	17
E.	Hazardous Liquid Rule	18
F.	Gas Gathering Lines and Transmission Rule.....	19
G.	Miscellaneous Pipeline Revisions.....	20
IV.	Federal Railroad Administration.....	20
A.	Preventing Derailments.....	20
B.	Electronically Controlled Pneumatic Braking Systems	22
C.	Rail Worthiness Directives	23
D.	Rail Safety Advisory Committee	24
E.	One Time Movement Approvals.....	25
F.	Tank Car Storage	26
V.	Federal Aviation Administration	26
A.	Unmanned Aircraft Systems	26
VI.	Federal Motor Carrier Safety Administration	27
A.	Exemptions for Pipeline Operations	27
B.	Hazardous Materials Route Preemption	28
VII.	Conclusion	29
	Appendix: Summary of AFPM Comments and Associated Strategic Goals.....	30

I. INTRODUCTION

The American Fuel & Petrochemical Manufacturers (“AFPM”) welcomes the opportunity to comment on the Department of Transportation’s (“DOT” or the “Department”) Regulatory Review entitled, “Notification of Regulatory Review” (the “Notice”).¹ On October 2, 2017, DOT issued this notice to evaluate the continued necessity and effectiveness of the Department’s existing regulations, and determine whether the regulations “potentially burden the development or use of domestically produced energy.”² Further, this Notice “invites the public to provide input on existing regulations and other actions that are good candidates for repeal, replacement, suspension, or modification.”³ This Notice will supplement the Department’s periodic regulatory review and its activities mandated by Executive Order (“EO”) 13771, “Reducing Regulation and Controlling Regulatory Costs,”⁴ EO 13777, “Enforcing the Regulatory Reform Agenda,”⁵ and EO 13873, “Promoting Energy Independence and Economic Growth.”⁶

A. AFPM’s Interest in DOT’s Notice

AFPM is a national trade association representing nearly 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 a reliable and safe transportation system 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 they manufacture. The United States transportation system is composed of over four million miles of roads,⁷ approximately 140,000 miles of freight railroads,⁸ an extensive inland waterway system, and the largest network of energy pipelines in the world, with more than 2.4 million miles of pipe.⁹ AFPM member

¹ See Docket No. DOT-OST-2017-0069, “Notice of Regulatory Review”, 82 *Fed. Reg.* 45750, proposed October 2, 2017, <https://www.federalregister.gov/documents/2017/10/02/2017-21101/notification-of-regulatory-review>.

² See 82 FR 45750 at 45750.

³ *Id.* at 45750.

⁴ 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>.

⁵ 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>.

⁶ 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>.

⁷ See “2017 Roads Report Card Overview,” May 15, 2017, <https://www.infrastructurereportcard.org/wp-content/uploads/2017/01/Roads-Final.pdf>.

⁸ See “Freight Rail Network,” May 15, 2017, <https://www.fra.dot.gov/Page/P0362>.

⁹ See “Pipeline Mileage and Facilities,” <https://www.phmsa.dot.gov/pipeline/library/data-stats/pipelinemileagefacilities>.

companies utilize all modes of transportation to move their products safely. The U.S. transportation system does more than just move people, it drives our economy.

AFPM member companies reflect a strong appreciation for safety and environmental responsibility, operations, and practices. Our members are committed to protecting the health and safety of their workers, contractors, customers, and the communities where fuels and petrochemical products are transported. A regulatory scheme that fosters the safe movement of essential products on our nation's transportation system is critical.

AFPM supports informed, risk-based, and cost-justified approaches to developing, reviewing, and revising regulations related to transportation, and is committed to working with DOT on this issue. AFPM welcomes this opportunity to provide comments on the Department's Operating Administrations' ("OAs") existing regulations and other actions that could be modernized, repealed, replaced, suspended, or modified. When identifying such items, AFPM provides specific citations, an estimate or discussion of the associated burden with the regulation or policy, and recommended alternatives to the current practice.

In addition, the Appendix to this document provides a summary table of the issues highlighted below and links those issues to DOT's strategic goals of "Safety, Infrastructure, Innovation and Accountability" identified in the "U.S. Department of Transportation Strategic Plan for FY 2018 -2022."¹⁰

II. DEPARTMENT-WIDE COMMENTS

While our recommendations are generally structured based on the OAs' authority, we have also included a generic section capturing broader issues requiring inter-OA coordination, or action from the Department's Office of the Secretary.

A. Focus on Performance Based Outcomes

In October 2017, the National Academies of Sciences, Engineering, and Medicine ("NAS") published a study, sponsored by the Pipeline and Hazardous Materials Safety Administration ("PHMSA"), entitled "Designing Safety Regulations for High-Hazard Industries."¹¹ This study was intended to inform PHMSA's choices of regulatory tools, as well as to help other safety regulators facing similar choices. This study was designed recognizing an interest in the structure of safety regulations in the transportation sector and other high-hazard industries. AFPM encourages DOT to consider this study when evaluating current regulations and policies, or when developing new ones.

¹⁰ See "U.S. Department of Transportation Strategic Plan for FY 2018 -2022" Draft for public comment, published October 19, 2017, <https://www.transportation.gov/sites/dot.gov/files/docs/mission/administrations/office-policy/287816/draft-dot-strategic-plan-fy-2018-2022-public-comment.pdf>.

¹¹ See National Academies of Sciences, Engineering, and Medicine, "Designing Safety Regulations for High-Hazard Industries," Washington, DC: The National Academies Press. Published October 2017, <https://doi.org/10.17226/24907>.

The goal of any transportation safety regulation or safety program is to ensure that industries provide their vital goods and services with no harm to workers, the public, or the environment. This goal is shared by both regulators and the regulated industry. Since the inception of DOT, legislation, policies, and rulemaking related to transportation safety have produced a mix of regulatory designs. The regulations implemented in the transportation sector have ranged from narrowly targeted “prescriptive” safety regulations that specify the means that the regulated industry must adopt or implement (*i.e.*, specific design requirements for a piece of equipment), to “performance-based” requirements that specify the ends to be achieved (*i.e.*, safety goals to be achieved or outcomes to be avoided). In assessing the impact of any regulatory or policy action, regulators must seek an understanding of the root cause of any incident and the most cost-effective mechanism to reduce that risk.

AFPM member companies encourage, where appropriate, the development of performance-based regulations as opposed to prescriptive regulations. Furthermore, AFPM member companies suggest that an outcome-based approach be implemented, not only in the regulatory arena, but through the OA’s enforcement posture as well. AFPM member companies believe a regulatory and enforcement structure focused on punitive punishment is less effective than a regulatory structure dedicated to ensuring safety outcomes. Therefore, as part of this regulatory reform effort, AFPM members encourage DOT to consider the NAS study when designing safety regulations or policies to inform any future actions.

B. Regulation Through Guidance

Federal regulatory agencies are issuing guidance documents (*e.g.*, Audit Protocols such as Inspector Assistant considerations, Guidance Documents, Advisory Bulletins, etc.) more frequently in lieu of regulations in order to implement policy. AFPM members share concerns that these guidance documents are becoming drivers for inspections and are being utilized as enforcement mechanisms or *de facto* regulation. However, any regulatory requirements must be implemented only through formal notice-and-comment rulemaking, rather than based on the interpretation of an individual auditor. For example, over the last several years, DOT agencies have issued interpretations and guidance documents that are incongruent with the Department’s regulations.¹² This can cause regulatory confusion and inconsistent enforcement practices in differing regions. AFPM therefore encourages DOT to evaluate existing guidance to ensure OAs are not regulating outside of the proper channels.

C. 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 among 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

¹² See Docket No. PHMSA-2012-0068, “PHMSA Advisory Bulletin: Verification of Records,” 77 *Fed. Reg.* 26822, published May 7, 2012, <https://www.regulations.gov/docket?D=PHMSA-2012-0068>; see also Docket No. PHMSA-2009-0349, “Pipeline Safety: Operator Qualification (OQ) Program Modifications,” 73 *Fed. Reg.* 64123, published December 9, 2009, <https://www.regulations.gov/document?D=PHMSA-2009-0349-0001>.

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 “Memoranda of Understanding” (“MOU”) or “Memoranda of Cooperation” (“MOC”). While not legally 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.

For example, there remains significant confusion and overlap between DOT and the Environmental Protection Agency (“EPA”) regarding facility response plans under Section 311 of the Clean Water Act and which agency has primacy. On February 4, 2000, EPA issued a letter clarifying jurisdictional boundaries between EPA and DOT for the regulation of onshore pipeline facilities. The overlapping jurisdiction creates confusion among the regulated community, and can even create overlapping requirements for the same facility. For example, EPA and DOT have different methods for calculating worst case discharge and different plan content requirements. In addition, both EPA and DOT require plan review and approval; however, both have different processes. These discrepancies create regulatory confusion and inefficiencies.

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 the OAs with preemptive authority over state regulations. To maximize the benefits of uniform regulations, DOT must consider the mission of other federal agencies, but ultimately still take the lead on transportation issues, when executing MOUs / MOCs with these other agencies.

AFPM supports a departmental-wide review and update of MOUs / MOCs. MOU and the applicable regulations to clarify that compliance with one should be deemed to be compliance with both. 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, railroads, highways, or import / export facilities.

D. National Environmental Policy Act Implementation

The National Environmental Policy Act (“NEPA”) was enacted to ensure that federal agencies take a close look at the environmental impacts of their regulatory decisions. Given DOT’s mission and its prominent role in transportation infrastructure development, NEPA and

the associated procedures are integral in promulgating DOT regulations, policy, and guidance. DOT provides a listing of the OAs' NEPA implementing procedures on its website.¹³

On January 24, 2017, President Trump signed EO 13766, "Expediting Environmental Reviews and Approvals for High Priority Infrastructure."¹⁴ 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 to streamline and enhance the ability of industry to build and maintain energy infrastructure. NEPA compliance is a key aspect of the permitting process for infrastructure development.

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").¹⁵ 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.¹⁶ To date, no NEPA Implementing 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 a new administration with insufficient time for public input. In light of this fact, AFPM requests publication of a supplemental notice of proposed rulemaking ("NPRM") to ensure 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.

AFPM acknowledges that many 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. 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.

Regarding permit processing, AFPM supports NEPA reviews that are limited to the authority and jurisdiction of the specific federal agency completing the review. Attempts to

¹³ 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>.

¹⁴ 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>.

¹⁵ 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>.

¹⁶ See "Memorandum on Requests to Extend Comment Period," January 4, 2017, <https://www.regulations.gov/document?D=DOT-OST-2016-0239-0011>.

expand the NEPA review beyond the scope of the agencies' statutory authority should be avoided. Specifically, agencies reviewing NEPA with a lens that goes beyond their statutory authority can result in redundant and potential conflicting analysis.

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 updating guidance, specifically DOT's implementation procedures.

E. Rulemaking Procedures

On August 7, 2017, the Federal Motor Carrier Safety Administration ("FMCSA") published in the *Federal Register* an NPRM entitled, "Rulemaking Procedures Update."¹⁷ This NPRM proposed to amend FMCSA rulemaking procedures by revising the process for preparing and adopting rules, petitions, and direct final rules. These proposed actions, required under the Fixing America's Surface Transportation Act (the "FAST Act"), are designed to improve FMCSA's transparency during the rulemaking process.¹⁸

AFPM supports amendments that require OAs to be more transparent regarding the petition and rulemaking processes, like those in FMCSA's NPRM.¹⁹ Specifically, AFPM supports the proposed provisions in the NPRM that would require advanced or negotiated rulemakings for major rules²⁰ with the potential for considerable impacts.²¹ The additional rulemaking stages would facilitate more informed rulemaking by providing additional opportunities for public comment and collaboration.

III. PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMINISTRATION

A. Authority to Implement Tank Car Standards

PHMSA is the federal regulatory agency with authority over the transportation of hazardous materials by rail. PHMSA's Hazardous Materials Regulations ("HMR") cover product classification, operating rules, and tank car standards, among other issues. The Association of American Railroads' ("AAR") Tank Car Committee ("TCC"), comprised of railroads, rail car owners and manufacturers, and a limited number of hazmat shippers, also

¹⁷ See Docket No. FMCSA-2016-0341, "Rulemaking Procedures Update", 82 *Fed. Reg.* 36719, proposed August 7, 2017, <https://www.federalregister.gov/documents/2017/08/07/2017-16452/rulemaking-procedures-update>.

¹⁸ See "Fixing America's Surface Transportation Act," December 5, 2015, <https://www.congress.gov/114/bills/hr22/BILLS-114hr22enr.pdf>.

¹⁹ See Section 5202 of "Fixing America's Surface Transportation Act."

²⁰ The Congressional Review Act defines a major rule as one that is likely to have an annual effect on the economy of \$100 million or more; that will increase costs and prices for certain constituencies such as consumers or state and local governments; or that will have some other adverse effect on the economy.

²¹ See Docket No. FMCSA-2016-0341, "The American Fuel & Petrochemical Manufacturers Comments on the Federal Motor Carrier Safety Administration's 'Rulemaking Procedures Update' Notice of Proposed Rulemaking (DOCKET NO. FMCSA-2016-0341/ 82 FED. REG. 36719)," posted October 10, 2017, <https://www.regulations.gov/document?D=FMCSA-2016-0341-0011>.

establishes industry-wide standards for the design and operation of tank cars through the AAR's interchange standards, which apply to every tank car that moves anywhere in North America.

This effectively means that two regulatory bodies—one a statutorily-mandated federal government agency, and the other, an industry-based body with a railroad majority—implement tank car standards. While these two bodies have generally aligned on tank car standards, there have been instances where the two standards have diverged. DOT's regulatory reform effort provides an opportunity to resolve the complex relationship between federal regulatory standards and industry interchange standards. Resolving this issue would alleviate regulatory burdens associated with potentially duplicative and contradictory tank car standards that can result from the dual standard-setting body structure.

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")²² to PHMSA in accordance with 49 Code of Federal Regulations ("CFR") Part 106.23. The shippers' petition, which concerns the authority to implement tank car standards, 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 requests that PHMSA begin a rulemaking proceeding that would explicitly prohibit any common carrier from refusing to transport hazardous materials offered in compliance with the HMRs.

As of December 1, 2017, a response to the shippers' petition has not been issued. Considering this Notice and EOs 13771, 13777, and 13873, AFPM requests that DOT grant this petition and open rulemaking proceedings on this issue to facilitate a solution. The current dual-bodied system 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, below are some key points that illustrate the 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 the 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 TCC, 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

²² See Docket No. PHMSA-2016-0093, "Petition to Amend Tank Car Standards," submitted August 12, 2016, <https://www.regulations.gov/document?D=PHMSA-2016-0093-0001>.

²³ See 49 CFR Part 106 <https://www.law.cornell.edu/cfr/text/49/part-106>.

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.

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. 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.

Historically, the TCC has functioned collaboratively with its various stakeholders (*e.g.*, 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 past two decades. These disagreements were fueled by the composition and internal rules of the TCC itself; for example, 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, and have exercised their majority position to require compliance with tank car requirements that deviate from PHMSA specifications without the concurrence of other stakeholders.

A recent TCC action illustrates the potential adverse impacts of the current TCC structure on AFPM's member companies. In 2015, AAR pushed the TCC into direct conflict with DOT when it proposed a tank car top fitting protection that PHMSA had expressly declined to adopt just a few months earlier.²⁴ 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."²⁵ Had this measure been implemented by the TCC, it would have required AFPM member companies to install equipment on tank cars, where the costs of the equipment clearly exceeded the estimated benefits. This action was ultimately rendered moot by congressional action, but it demonstrates the TCC's ability to usurp PHMSA's regulatory authority without notice-and-comment.

DOT's regulatory reform effort provides an opportunity to resolve the complex relationship between federal regulatory and industry interchange standards. AFPM asks that DOT move expeditiously to grant the shippers' petition and open rulemaking proceedings on this issue. By opening rulemaking proceedings DOT can explore potential solutions that maintain DOT's ability to tap the valuable technical expertise of TCC members while ensuring due process and notice-and-comment rulemaking requirements of the APA. Further DOT can engage with the AAR TCC directly to reform its charter and requirements to provide for more

²⁴ See Docket No. PHMSA-2012-0082-3442 (HM-251), "Final Regulatory Impact Analysis - Hazardous Materials: Enhanced Tank Car Standards and Operational Controls for High-Hazard Flammable Trains," Posted May 2015, <https://www.regulations.gov/document?D=PHMSA-2012-0082-3442>.

²⁵ See Docket No. PHMSA-2012-0082 (HM-251), "Hazardous Materials: Enhanced Tank Car Standards and Operational Controls for High-Hazard Flammable Trains," 80 *Fed. Reg.* 26676, published May 8, 2015, <https://www.gpo.gov/fdsys/pkg/FR-2015-05-08/pdf/2015-10670.pdf>.

transparent and equitable decision making (*e.g.*, a more balanced composition of industry experts to include shippers). Lastly, DOT, specifically PHMSA, can potentially avoid future conflicts in tank car standards by expeditiously responding to petitions for rulemaking related to tank car standards particularly those supported by both shippers and the railroads.

Resolving this issue would alleviate regulatory burdens associated with potentially duplicative and contradictory tank car standards that can result from the dual standard-setting body structure.

B. 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”).²⁶ 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 previously submitted comments²⁷ on the ANPRM, below are some key takeaways from our comments to highlight several of the significant impacts and regulatory burdens that could result from further rulemaking.

First, 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 investments on the part of the energy industry, including refiners and petrochemical manufacturers. For example, keeping the RVP under 9.0 psia for the transportation of Hazard Class 3 Flammable Liquids could lead to the following outcomes:

- Requiring field treatment of much of the crude oil extracted from oilfield production areas;
- Requiring flammable liquids that exceed those limits to be treated as a Division 2.1 Flammable Gas; and/or
- Reducing the cost-effectiveness of transporting flammable liquids, potentially stifling the movement of needed energy products.

²⁶ See Docket No. PHMSA-2016-0077, “Hazardous Materials: Volatility of Unrefined Petroleum Products and Class 3 Materials (HM-251D)”, 82 *Fed. Reg.* 5499, published January 18, 2017, <https://www.federalregister.gov/documents/2017/03/21/2017-05488/hazardous-materials-volatility-of-unrefined-petroleum-products-and-class-3-materials>.

²⁷ See Docket No. PHMSA-2016-0077-0071, “Comment from American Fuel & Petrochemical Manufacturers,” submitted May 22, 2017, <https://www.regulations.gov/document?D=PHMSA-2016-0077-0071>; see also Docket No. PHMSA-2017-0057-0132, “Comment from American Fuel & Petrochemical Manufacturers,” submitted July 27, 2017, <https://www.regulations.gov/document?D=DOT-OST-2017-0057-0132>.

To date, no data has been presented to make a compelling scientific or safety case for limiting the RVP of Hazard Class 3 Flammable Liquids. Because the burdens outlined above are enormous and could negatively impact the ability to produce oil from affected 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 throughout the supply chain. 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)²⁸ may now need to abandon that recent investment.

Most importantly, pre-treatment 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. Pre-treatment 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 Region and Permian Basin, much of 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

²⁸ See “Industrial Commission Adopts New Standards to Improve Oil Transportation Safety,” December 9, 2014, <http://www.nd.gov/ndic/ic-press/dmr-order25417.pdf>.

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 rule²⁹ and subsequent revisions to that rule³⁰ required by the 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 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).³¹ Furthermore, as noted by a recent report by the Bureau of Transportation Statistics, there are virtually no more non-jacketed DOT-111 specification tank cars in crude oil rail service with a reduction of over 99 percent in the fleet size.³²

Crude shippers have already invested enormous amounts of capital 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. Subsequently, 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 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

²⁹ See Docket No. PHMSA–2012–0082, “Hazardous Materials: Enhanced Tank Car Standards and Operational Controls for High-Hazard Flammable Trains,” 80 *Fed. Reg.* 26644 (HM-251), published May 8, 2015, <https://www.gpo.gov/fdsys/pkg/FR-2015-05-08/pdf/2015-10670.pdf>.

³⁰ See Docket No. PHMSA–2016–0011, “Hazardous Materials: FAST Act Requirements for Flammable Liquids and Rail Tank Cars,” 81 *Fed. Reg.* 53935 (HM-251C), published August 15, 2016, <https://www.gpo.gov/fdsys/pkg/FR-2016-08-15/pdf/2016-19406.pdf>.

³¹ See Docket No. PHMSA–2016–0011, Hazardous Materials: FAST Act Requirements for Flammable Liquids and Rail Tank Cars,” 81 *Fed. Reg.* 53940 (HM -251C), published August 15, 2016, <https://www.gpo.gov/fdsys/pkg/FR-2016-08-15/pdf/2016-19406.pdf>.

³² See Bureau of Transportation Statistics, “Fleet Composition of Rail Tank Cars That Transport Flammable Liquids: 2013–2016,” published September 2017, <https://www.bts.gov/sites/bts.dot.gov/files/docs/browse-statistical-products-and-data/surveys/annual-tank-car-facility-survey/208061/fleet-composition-rail-tank-cars-flammable-liquids-sept-5-2017.pdf>.

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 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)³³ 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. Table 1 provides a high-level summary of the significant burdens imposing a vapor pressure standard could cause.

Table 1: Potential Burdens Related to Revisions of Flammable Liquid Classification³⁴		
Equipment	Summary of Purpose	Impact³⁵
Field Conditioners / Heater Treaters	Current equipment for separation or heat treatment is insufficient to reduce crude oil RVP to levels suggested in the ANPRM.	Costs are variable and dependent on RVP level. At RVP levels 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.	

³³ See “Office of Fossil Energy, Crude Oil Characteristics Research,” <https://energy.gov/fe/articles/crude-oil-characteristics-research>.

³⁴ **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.

³⁵ **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.

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 number 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.

C. Sampling and Testing for Unrefined Petroleum-based Products

On May 8, 2015, PHMSA, in coordination with the Federal Railroad Administration (“FRA”), issued a final rule entitled, “Enhanced Tank Car Standards and Operational Controls for High-Hazard Flammable Trains,” intended to improve the safety of trains transporting large volumes of flammable liquids, such as crude oil and ethanol.³⁶ One provision adopted in this final rule required offerors / shippers of all unrefined petroleum-based products to develop and carry out a sampling and testing program for all unrefined petroleum-based products, such as crude oil, to address:

- Sampling and testing frequencies that accounts for any appreciable variability of the material;

³⁶ See Docket No. PHMSA-2012-0082, “Hazardous Materials: Enhanced Tank Car Standards and Operational Controls for High-Hazard Flammable Trains,” 80 *FR* 26643, published May 8, 2015, <https://www.federalregister.gov/documents/2015/05/08/2015-10670/hazardous-materials-enhanced-tank-car-standards-and-operational-controls-for-high-hazard-flammable>.

- Sampling prior to the initial offering of the material for transportation and when changes that may affect the properties of the material occur;
- Sampling methods that ensure a representative sample of the entire mixture, as offered, is collected;
- Testing methods that enable classification of the material under the HMR;
- Quality control measures for sample frequencies;
- Duplicate samples or equivalent measures for quality assurance;
- Criteria for modifying the sampling and testing program; and
- Testing or other appropriate methods used to identify properties of the mixture relevant to packaging requirements.³⁷

While the proper classification of a hazardous material ensures that the material is properly packaged, the hazard is communicated appropriately, and that in the event of an accident, the needed emergency response actions are taken, AFPM believes the sampling and testing program adopted in this final rule provided no added safety benefit and only added costs, when compared to the existing HMR requirements for classification.

These new requirements were adopted despite already existing mature requirements that the offeror of a hazardous material must properly classify hazardous materials and certify that the classification is correct.³⁸ In fact, the addition of the new sampling and testing requirements caused considerable confusion across the regulated community due to ambiguous language regarding the frequency of testing, the applicability of the requirements (*e.g.*, what modes are covered), and the duplicative nature of the additional classification requirements.

While the majority of this final rule applied only to rail transport, this provision applied to all modes. This ambiguity also caused further confusion across the regulated community as the unclear and duplicative requirements spurred inconsistent enforcement activities and numerous requests from industry for clarification. Ultimately, the unclear requirements even prompted DOT to issue guidance explaining and clarifying who was covered by this requirement and what was required.³⁹

The adopted sampling and test program has limited safety benefits. The existing classification regimen specified in 49 CFR § 173.22 has been successfully implemented throughout numerous industries, including the energy sector. In fact, the oil industry conducts additional testing for product quality purposes well beyond what is required for transportation classification. Further, the adopted sampling and testing program singles out specific commodities that have no demonstrable history of misclassification. Improper transport classifications played no role in any of the recent crude oil and ethanol train accidents cited by PHMSA to support their final rule.

³⁷ See 49 CFR 173.41 <https://www.law.cornell.edu/cfr/text/49/173.41>.

³⁸ See 49 CFR § 173.22 <https://www.law.cornell.edu/cfr/text/49/173.22>.

³⁹ See Sampling and Testing Program for Unrefined Petroleum-Based Products, https://www.phmsa.dot.gov/staticfiles/PHMSA/DownloadableFiles/Files/Crude_Oil_Sampling_and_Testing_web.pdf.

According to the Regulatory Impact Analysis for the final rule adopting these requirements, the sampling and testing program would cost \$18.9 million dollars (discounted at 7 percent) over twenty years.⁴⁰ Given that PHMSA already required shippers and offerors to properly classify materials prior to this rule and that PHMSA failed to identify evidence of misclassification of unrefined petroleum products, the level of risk reduction comes into question.

AFPM believes the requirements adopted in 49 CFR § 173.41 are duplicative with those in 49 CFR § 173.22 and add additional burden without corresponding benefits. While our members understand the importance of properly classifying hazardous materials, the sampling and testing program (49 CFR § 173.41) adopted in this final rule does not improve the accuracy of classification. Further, the sampling and testing program provides no added safety benefits, and only added costs (\$18.9 million dollars), when compared to the existing requirements for classification (49 CFR § 173.22). Based upon these factors, AFPM respectfully requests that PHMSA rescind this requirement. AFPM also encourages DOT to examine other opportunities to reduce paperwork burdens in line with the Paperwork Reduction Act.

D. Emergency Order Authority

On October 3, 2016, PHMSA issued an Interim Final Rule (“IFR”)⁴¹ to issue industry-wide emergency orders in certain circumstances without notice and comment. 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, 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 of the aforementioned violations, conditions, or practices. These provisions were adopted into 49 CFR Part 190 of the PHMSA pipeline regulations.

As detailed further in the comments⁴² AFPM submitted on this IFR, we recommend that PHMSA modify the IFR before finalizing the rule. Specifically, AFPM is concerned that the provisions in the IFR related to the Emergency Order Authority petition and notification processes do not meet the statutory mandate under the PIPES Act. 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.” Finally, AFPM strongly urges PHMSA to quickly promulgate final regulations that address the requirements in the statute explicitly.

⁴⁰ According to a breakeven analysis, the sampling and testing provisions would be cost effective if the requirement reduces risk by 1.29 percent.

⁴¹ See Docket No. PHMSA-2016-0091, “Pipeline Safety: Enhanced Emergency Order Procedures,” 81 *Fed. Reg.* 70980, October 14, 2016, <https://www.gpo.gov/fdsys/pkg/FR-2016-10-14/pdf/2016-24788.pdf>.

⁴² See Docket No. PHMSA-2016-0091-0007, “Comment from American Fuel and Petrochemical Manufacturers,” December 16, 2016, <https://www.regulations.gov/document?D=PHMSA-2016-0091-0007>.

E. Hazardous Liquid Rule

On January 13, 2017, PHMSA released an advanced copy of its Hazardous Liquid final rule (“Hazardous Liquids Rule” or “the final rule”), amending the Part 195 regulations for hazardous liquid pipelines.⁴³ The final rule responded to issues raised by recent pipeline accidents; implemented new provisions in the Pipeline Safety Laws; addressed recommendations of the National Transportation Safety Board and the Government Accountability Office; and responded to comments submitted on PHMSA’s 2010 ANPRM⁴⁴ and 2015 NPRM.⁴⁵

On January 20, 2017, the Chief of Staff for the White House, Reince Priebus, issued a “Memorandum for the Heads of Executive Departments and Agencies” (the “Memo”),⁴⁶ instructing that agencies withdraw regulations that have been sent to the Office of the Federal Register, but had not yet been published, so that they can be reviewed and approved by a department or agency head appointed or designated by the president after January 20, 2017. As a result of this memo, PHMSA withdrew its request for the *Federal Register* to publish the final rule and removed the posted advanced copy from their website. To date, no follow-up actions have been taken on the Hazardous Liquids Rule.

AFPM shares PHMSA’s goal of increasing pipeline safety. Upon reviewing the previously released advanced copy of the final rule, AFPM is concerned that certain provisions in this final rule may result in pipeline operators reallocating resources and focusing away from higher risk or PHMSA-defined “High Consequence Areas” (“HCAs”) to lower risk pipelines, with little benefit.

In the Preliminary Regulatory Impact Analysis (“PRIA”) supporting this rule, PHMSA claims that the new regulations are justified because the limited benefits outweigh marginal compliance costs. The American Petroleum Institute (“API”) conducted a review of the cost-benefit analysis of the Hazardous Liquid Rule and found that PHMSA underestimated both the amount of work that would be required to comply with the proposed regulations and the actual cost of doing so in most of the requirement areas. The API cost-benefit analysis review asserts that the PRIA for this rulemaking is seriously flawed, noting that the costs would actually exceed the benefits. PHMSA’s failure to consider the full range of impacts of its proposal resulted in a significant gap between the industry-analyzed costs of approximately \$600 million annually versus PHMSA’s estimated \$22 million annually. This is a significant cost-gap discrepancy that must be addressed.

AFPM supports the comments submitted by API and the Association of Oil Pipelines (“AOPL”) and concurs with API’s cost-benefit analysis review. AFPM shares the concerns that API and AOPL stated in their comments, including PHMSA’s substantial underestimation of: 1) inspection costs; 2) frequency of excavations; 3) repairs per mile; and 4) repair cost estimates.

⁴³ Weblinks to the advance copy of this final rule have been removed from DOT websites.

⁴⁴ See Docket No. PHMSA-2010-0229, “Pipeline Safety: Safety of On-Shore Hazardous Liquid Pipelines,” 75 *Fed. Reg.* 63774, October 18, 2010, <https://www.regulations.gov/document?D=PHMSA-2010-0229-0001>.

⁴⁵ See Docket No. PHMSA-2010-0229, “Pipeline Safety: Safety of On-Shore Hazardous Liquid Pipelines,” 80 *Fed. Reg.* 61610, October 13, 2015, <https://www.regulations.gov/document?D=PHMSA-2010-0229-0041>.

⁴⁶ See “Memorandum for the Heads of Executive Departments and Agencies,” published January 20, 2017, <https://www.whitehouse.gov/the-press-office/2017/01/20/memorandum-heads-executive-departments-and-agencies>.

Additionally, AFPM members are concerned that compliance costs will increase significantly if PHMSA's intent is to also prescribe a specific type of leak detection system.

AFPM requests that the White House Office of Management and Budget ("OMB") ensure the final PHMSA rulemaking is modified to address the following: 1) a revision of the cost-benefit analysis; and 2) a reassessment of the benefits of diverting focus and resources from HCAs to non-HCAs. Given the likely changes to the advanced copy of the final rule, AFPM supports the opportunity for additional public comment on the revised provisions in this rule and the supporting analysis. Specifically, AFPM supports the issuance of a Supplemental NPRM along with a revised regulatory impact analysis addressing the concerns raised by API / AOPL and echoed by AFPM.

F. Gas Gathering Lines and Transmission Rule

On April 8, 2016, PHMSA published an NPRM that would make significant changes to the federal regulations for onshore gas gathering lines.⁴⁷ The proposed rule would establish a new definition of an onshore gas gathering line; extend certain requirements in 49 CFR Part 192 to gas gathering lines in Class 1 locations; modify the requirements that apply to currently regulated gas gathering lines in Class 2, 3, and 4 locations; and require operators of all gathering lines (whether regulated or not) to comply with the reporting requirements in 49 CFR Part 191. As currently drafted, the proposed rule significantly expands the scope of pipeline regulation under Part 192 in an overbroad and imprecise manner resulting in costly new burdens being imposed on the regulated community.

AFPM's member companies have significant concerns with the gas gathering aspects of the NPRM. In addition, as AFPM's member companies own or rely on hazardous liquids pipelines, we are concerned with the precedent this rulemaking could set for potential similar expansion of regulatory scope for hazardous liquid pipeline regulations. Although AFPM supports regulations that improve the safety of the industry, we believe the NPRM does not appropriately address the intent of the congressional mandates and the National Transportation Safety Board ("NTSB") recommendations upon which the proposed regulations attempted to address. Further, the NPRM is not driven by a risk management approach targeted at eliminating the most significant risks posed to public safety and the environment.

Collecting additional safety-related data for gas gathering lines is essential to informing policy decisions. We encourage PHMSA to work with industry on accomplishing this goal prior to implementing the rules in the absence of appropriate safety data on the subject. Furthermore, AFPM believes that opportunities exist for PHMSA to work with industry in developing and possibly updating industry consensus standards relative to gas gathering lines. The Administration should revisit or withdraw the elements of the NPRM pertaining to gathering lines in favor of focusing on collecting additional safety-related data essential to informing policy decisions.

⁴⁷ See Docket No. PHMSA-2011-0023, "Pipeline Safety: Safety of Gas Transmission and Gathering Pipelines," 81 *Fed. Reg.* 20722, April, 8, 2016, <https://www.federalregister.gov/documents/2016/05/13/2016-11240/pipeline-safety-safety-of-gas-transmission-and-gathering-pipelines>.

G. Miscellaneous Pipeline Revisions

Table 2, below, lists additional Office of Pipeline Safety (“OPS”) regulations that have been noted as being out-of-date, too vague, or otherwise subject to revision and/or repeal.

Table 2: PHMSA OPS Regulations for Repeal, Replacement, or Modification		
Citation	Suggested Revision(s)	Desired Outcome(s)
§195.50 Reporting accidents	Revise current threshold requirements in these sections from \$50,000 as they do not reflect current value, or remove a cost-based trigger altogether.	Updates outdated cost metric, which was put in place based on 1981 dollars. In addition, this cost trigger captures pipeline incidents that are of low impact.
§195.52 Immediate notice of certain accidents		
§195.52(a)(5) Immediate notice of certain accidents	Remove or revise the following reporting criteria: “In the judgment of the operator was significant even though it did not meet the criteria of any other paragraph of this section.”	Clarifies ambiguous requirements. This is overly general and leaves too much ambiguity. This can result in inconsistent interpretation of reporting requirements.
§195.116 Valves	Clarify 6D requirements, specifically related to valve applications for which 6D applies.	Clarifies ambiguous requirements.
§195.305 Testing of components	Consider accepting all tests from the factory / manufacturer rather than just one component.	Modernizes the regulations and allows for new performance-based approaches.
Idle Pipelines	Current requirements do not account for idle pipelines ⁴⁸ they only account for active or permanently abandoned pipelines. Update regulations to address idle pipelines and exempt them from inspection and maintenance tasks (<i>e.g.</i> valve inspections, overpressure protection, etc.).	Strictly regulating idle pipelines provides little safety value, and potentially diverts resources away from higher risk activities.

IV. FEDERAL RAILROAD ADMINISTRATION

A. Preventing Derailments

Any effort to enhance rail safety must begin with addressing the primary root causes of derailments and other accidents, including track integrity. Investments in accident prevention would result in the greatest risk reduction of rail incidents. Track and equipment failures are the primary causes of train derailments. Yet, most of DOT’s regulatory efforts related to the

⁴⁸ Idle Pipelines would include pipelines physically separated from system, cleaned of product, and usually filled with inert gas.

transport of flammable liquids have been 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 would drastically reduce both the frequency and consequences of derailments.

On October 11, 2017, NAS, through the Transportation Research Board, released the results of a multi-year study on energy transportation entitled, “Safely Transporting Hazardous Liquids and Gases in a Changing U.S. Energy Landscape.”⁴⁹ This study was completed by the Committee for a Study of Domestic Transportation of Petroleum, Natural Gas, and Ethanol and focused on rail, pipeline and maritime transport of energy products.⁵⁰ While the report stressed that the vast majority of these energy supplies have been transported without incident, the study makes policy recommendations that could help reduce the likelihood of future incidents involving the transportation of these domestic energy supplies. The report highlighted the importance of preventing derailments through frequent track inspection in its findings. Specifically, the report noted:

“[A] deeper understanding of crash-causation factors will, among other things, inform railroad track inspection programs. Ensuring that these programs spot track defects that can lead to failures is essential to ensuring the safe operation of flammable liquids unit trains. To strengthen these programs, the committee recommends that FRA enable and incentivize more frequent and comprehensive inspections of rail routes with regular energy liquids traffic, particularly by enabling railroads to exploit new inspection capabilities made possible by advances in sensor, high-resolution imaging, and autonomous systems technologies.”

While railroads have adopted new technologies to monitor the health of the tracks and flag potential safety issues for maintenance, the report notes more work can be done to identify track defects, including the deployment of track geometry cars that collect and process valuable infrastructure data and notify operators of potential track defects, onboard tools that check the alignment of the track, and wayside detectors that monitor passing trains for potential issues. Further, in the September 2017 DOT Significant Rulemaking Report (the most recent report the Department has published), there was an announced rule entitled, “Track Safety Standards; Improving Rail Integrity.”⁵¹ 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.

⁴⁹ See “Safely Transporting Hazardous Liquids and Gases in a Changing U.S. Energy Landscape,” October 11, 2017, <https://www.nap.edu/catalog/24923/safely-transporting-hazardous-liquids-and-gases-in-a-changing-us-energy-landscape>.

⁵⁰ See Committee composition, <http://www.trb.org/PolicyStudies/CommitteeBios.aspx>.

⁵¹ See “Significant Rulemaking Report Archive, December 2016 report” at 59, December 2016, <https://cms.dot.gov/regulations/significant-rulemaking-report-archive>.

AFPM also supports effort to address the NAS recommendations on track inspection discussed above.

B. Electronically Controlled Pneumatic Braking Systems

On May 8, 2015, PHMSA, in coordination with FRA, issued a final rule entitled, “Enhanced Tank Car Standards and Operational Controls for High-Hazard Flammable Trains” intended to improve the safety of trains transporting large volumes of flammable liquids, such as crude oil and ethanol.⁵² This rule adopted a provision requiring high hazard flammable unit train⁵³ to be operated with an Electronically Controlled Pneumatic (“ECP”) braking system after December 31, 2020. This provision was adopted despite many highly critical comments. In addition, the provision was adopted despite estimates that the technology would produce marginal benefits and significant costs. Following the publication, many were critical of the ECP inclusion in the final rule and RIA’s apparent overestimation of the benefits and underestimation of the costs of ECP braking. This ultimately led to legal challenges and congressional action on ECP brakes.

As signed into law on December 5, 2015, as part of the FAST Act, DOT was required to revisit the ECP braking requirements adopted in May 2015. Specifically, the FAST Act required DOT to test ECP braking⁵⁴ and reevaluate the RIA supporting the ECP braking requirement. This legislation also required the Government Accountability Office (“GAO”) and NAS to study the cost, benefits, and performance of ECP brakes.⁵⁵ This additional research of ECP braking was designed to verify safety performance and determine if ECP braking is an improved technology in comparison to more widely-used conventional braking systems.

On September 29, 2017, NAS released their review of the DOT additional testing entitled, “Review of the Department of Transportation Testing and Analysis Results for Electronically Controlled Pneumatic Brakes: Letter Report (Phase 2).”⁵⁶ Following the release of the NAS report, on October 16, 2017, DOT published a revised RIA on ECP braking (“revised RIA”).⁵⁷ While the revised RIA accounted for some of the GAO recommendations, it did not consider NAS’s final report, and noted DOT “was unable to get the results of the NAS’s final study prior to the publication of this [revised] RIA.”

⁵² See Docket No. PHMSA-2012-0082, “Hazardous Materials: Enhanced Tank Car Standards and Operational Controls for High-Hazard Flammable Trains,” 80 *Fed. Reg.* 26643, published May 8, 2015, <https://www.federalregister.gov/documents/2015/05/08/2015-10670/hazardous-materials-enhanced-tank-car-standards-and-operational-controls-for-high-hazard-flammable>.

⁵³ A High Hazard Flammable Unit Train is defined as a train comprised of 70 or more loaded tank cars containing Class 3 flammable liquids traveling at greater than 30 mph.

⁵⁴ Given the high cost of physical testing, DOT and NAS agreed to more advanced computational analysis of ECP braking and limited physical testing in lieu of a full scale physical test.

⁵⁵ See “Fixing America’s Surface Transportation Act,” Section 7308, signed December 5, 2015.

⁵⁶ See “A Review of the Department of Transportation Testing and Analysis Results for Electronically Controlled Pneumatic Brakes: Letter Report (Phase 2),” publicly released September 29, 2017, <https://www.nap.edu/catalog/24903/a-review-of-the-department-of-transportation-testing-and-analysis-results-for-electronically-controlled-pneumatic-brakes-letter-report-phase-2>.

⁵⁷ See Docket No. PHMSA-2017-0102-0014, “Electronically Controlled Pneumatic Braking- Updated Regulatory Impact Analysis,” posted October 13, 2017, <https://www.regulations.gov/document?D=PHMSA-2017-0102-0014>.

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 was required to update the previous RIA based on results of the new testing and modeling (90 days after testing was completed). As mentioned above, DOT did publish the revised RIA on October 16, 2017, and gave until November 1, 2017, to provide comments. AFPM submitted extensive comments to DOT on November 1, 2017, clearly detailing our rationale for rescinding the ECP braking requirements.⁵⁸

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. As this date rapidly approaches, AFPM requests DOT formally rescind the requirements related to ECP braking as part of its regulatory reform efforts for the reasons enumerated in our previous comments. AFPM values market certainty on considerable investments such as tank cars and locomotives, as well as the braking systems with which they are equipped and thus requests that DOT act swiftly.

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 rail car equipment. 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. While FRA indicates that 49 CFR 180.509⁵⁹ 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.⁶⁰ These orders may immediately impose restrictions 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 and used judiciously and only in the face of an imminent hazard. In addition, emergency orders and rail worthiness directives should grant the opportunity for comments from affected parties, be immediately appealable to a court of competent jurisdiction, and last only as long as necessary to abate the imminent hazard before notice-and-comment rulemaking can occur. Given that rail

⁵⁸ See Docket No. PHMSA-2017-0102-0031, “AFPM Comments on Revised ECP Analysis” posted November 1, 2017, <https://www.regulations.gov/document?D=PHMSA-2017-0102-0031>

⁵⁹ See 49 CFR 180.509, <https://www.law.cornell.edu/cfr/text/49/180.509>.

⁶⁰ See 49 U.S.C. 20104, <https://www.law.cornell.edu/uscode/text/49/20104>.

worthiness directives and Emergency Orders serve similar purposes, clear parameters surrounding FRA’s use of these tools would foster more effective implementation of 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.⁶¹ 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 proper notice-and-comment rulemaking channels. 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.

D. Rail Safety Advisory Committee

In March 1996, FRA established the Railroad Safety Advisory Committee (“RSAC” or the “Committee”), pursuant to Section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92-463) to provide advice and recommendations to the FRA on railroad safety matters. The RSAC is a formally chartered and structured Federal Advisory Committee and provides a forum for collaborative rulemaking and program development and includes representatives from all of the FRA’s major stakeholder groups, including railroads, shippers, labor organizations, suppliers and manufacturers, and other interested parties. The diversity of the Committee ensures the requisite range of views and expertise necessary to discharge its responsibilities.

To achieve RSAC goals, the Committee often will create working groups designed to address issues in a specific knowledge area. These working groups are then tasked with the responsibility to discuss, deliberate, and recommend solutions on the specific issues enumerated in a task statement. The Hazardous Materials Working Group (the “Working Group” or the “Group”) was developed to address the special handling and/or operational controls of trains and vehicles transporting such materials and the classification of materials. The Working Group’s task statement was accepted on November 5, 2015, and since that date, the Group has been developing collaborative regulatory suggestions on rail-related hazardous materials regulations.⁶²

On May 27, 2017, the first round of recommendations from the Working Group was approved by the full RSAC. These recommendations were in line with the Group’s task order and included important regulatory improvements designed to modernize and update the

⁶¹ 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>.

⁶² See Hazardous Materials Issues Task No. 2015-4, <https://rsac.fra.dot.gov/tasks.php>.

hazardous materials rail safety regulations. Notably, these recommendations reflected broad consensus and represented regulatory improvements supported by all major stakeholder groups. While the rulemaking process would further analyze the costs and benefits of any future regulations, it was generally agreed that these proposed amendments represented editorial amendments or were cost-beneficial in nature.

As is the process with RSAC's hazardous materials recommendations, the recommendations are first forwarded to the FRA Administrator. If the FRA Administrator approves the RSAC recommendations, the hazardous materials-related recommendations are sent to the PHMSA Administrator for approval and the eventual initiation of a rulemaking. It is AFPM's understanding that DOT, specifically PHMSA and FRA, may delay the initiation of a rulemaking based on the RSAC consensus recommendations related to rail transport of hazardous materials. This understanding is supported by the lack of any RSAC-related hazardous materials rulemakings included in the latest Unified Agenda of Regulatory and Deregulatory Actions.⁶³

AFPM values the input of the RSAC participants and believes the recommendations brought forth by the Working Group are aligned with DOT's broader regulatory reform efforts. Specifically, the RSAC's hazardous materials recommendations forwarded to FRA and subsequently PHMSA are generally non-controversial and provide some excellent candidates for regulations in need of modernization, repeal, replacement, suspension, or modification. AFPM encourages PHMSA to initiate a rulemaking related to the RSAC recommendations as part of DOT's regulatory reform efforts. The section below provides a relevant example of an RSAC recommendation that would result in needed regulatory reform.

E. One Time Movement Approvals

FRA has the enforcement authority and responsibility to ensure the safe transportation of hazardous materials. One Time Movement Approvals ("OTMAs") 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, OTMAs fulfill the following purposes: 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.⁶⁴

On January 31, 2012, FRA issued the HMG-127 OTMA Procedures ("HMG-127"). This guidance provides procedures for applying for an approval in accordance with 49 CFR §174.50⁶⁵ 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

⁶³ See Current Unified Agenda of Regulatory and Deregulatory Actions, <https://www.reginfo.gov/public/do/eAgendaMain>.

⁶⁴ 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>.

⁶⁵ See 49 CFR Part 174.50 <https://www.law.cornell.edu/cfr/text/49/174.50>.

the necessary repairs and qualifications to bring the packaging back into compliance. HMG-127 has been revised multiple times and moved from a four-tier approval process to a three-tier approval process. The most recent version of HMG-127 was issued on October 28, 2014.⁶⁶

While the OTMA process is necessary, it can be burdensome and in some instances strands tank car assets that need to be moved expeditiously. Through September 2017, FRA had already received over 6,000 OTMA approvals.⁶⁷ In addition, not all types of tank car damages are equal and need significant review. Understanding that the current process could be streamlined, RSAC's 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.

F. Tank Car Storage

The rules governing the storage of loaded railcars containing hazardous materials are confusing, burdensome, and provide little added safety benefit.⁶⁸ As much of the needed tank car storage involves flammable liquids and energy products, this burden is disproportionately felt by shippers in the energy industry and short line railroad who often use tank car storage to supplement their business. Specifically, the FRA requires shippers and railroads to enter into private track lease agreements to accommodate storage of loaded hazmat cars. The rule requires that a shipper store the cars on a clearly defined section of track for exclusive use of that one shipper.

Furthermore, jurisdictional issues between federal and state / local requirements are frequently encountered and can often result in conflicting or overly burdensome requirements that make storing tank cars virtually impossible. While some regulation is necessary to ensure the safe storage of hazardous materials, DOT should review the regulatory requirements and policies for PHMSA and FRA related to tank car storage as part DOT's regulatory review. Review of this requirement would be consistent with EO 13873. AFPM acknowledges that as PHMSA and FRA share regulatory authority and enforcement responsibility on this issue they will need to collaborate on this suggested reform.

V. FEDERAL AVIATION ADMINISTRATION

A. Unmanned Aircraft Systems

AFPM member companies recognize the potential benefits of unmanned aircraft systems ("UAS") to help inform, protect, and monitor critical infrastructure investments in the energy sector and across other industries. However, despite the tangible benefits UAS provide industry,

⁶⁶ See "HMG-127 One-Time Movement Approval Procedures," last updated October 28, 2014, <https://www.fra.dot.gov/eLib/details/L15988>.

⁶⁷ Per FRA Comments at the October 2017 Association of American Railroads, Tank Car Committee Meetings.

⁶⁸ See 49 CFR Appendix A to § 209 https://www.law.cornell.edu/cfr/text/49/appendix-A_to_part_209 and 49 CFR § 174.14 <https://www.law.cornell.edu/cfr/text/49/174.14>; see also FRA "Tank Car Storage" Presentation, presented July 27, 2013, <https://www.fra.dot.gov/eLib/details/L04686>.

AFPM also is concerned about the security, safety, and economic risks posed by UAS use around critical infrastructure sites.

On June 28, 2016, the Federal Aviation Administration (“FAA”) announced a set of regulations for the commercial use of small UAS.⁶⁹ While the rule attempted to balance safety and security issues to authorized UAS use for commercial purposes, the rule did not adequately address UAS use above or around critical infrastructure (*e.g.*, energy infrastructure, oil refineries, chemical facilities), particularly from hobby UAS operators. Following the promulgation of these regulations, Congress approved a short-term (14-month) extension of FAA authorization in the “FAA Extension, Safety, and Security Act of 2016” (“FAA Extension Act”).⁷⁰ The FAA Extension Act also served as a legislative fix to FAA’s small UAS rule concerning critical infrastructure; however, FAA has yet to act on many of these statutory fixes. Therefore, AFPM urges FAA to act swiftly in implementing regulations in order to protect our nation’s critical energy infrastructure sites, as required by Sections 2209 and 2210 of the FAA Extension Act.

We also encourage FAA to move forward on other important statutory requirements of the FAA Extension Act, including Section 2207, which mandates that FAA establish guidelines on UAS use to facilitate emergency response operations—particularly relating to utility and energy infrastructure restoration efforts—following a natural disaster. This guidance would help to speed up emergency response and energy facility reentry efforts following extreme weather events (as was recently seen with Hurricane Harvey), which would in turn ensure the safety of facility workers and the surrounding public.

Finally, AFPM applauds FAA’s recent engagement efforts with industry and Congress surrounding the development of counter-UAS standards and/or a UAS identification and tracking system in order to establish a safer and more secure National Airspace System. We encourage FAA, DOT, and other relevant government agencies to continue and even expand upon this level of engagement related to upcoming FAA authorization legislation and any future UAS-related rulemakings, particularly as they apply to safe and effective UAS use within the refining and petrochemical industries, while at the same time protecting industry and the entire National Airspace System from potentially malicious actors.

VI. FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION

A. 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,

⁶⁹ See Docket No. FAA–2015–0150 “Operation and Certification of Small Unmanned Aircraft Systems,” 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>.

⁷⁰ See “FAA Extension, Safety, and Security Act of 2016,” signed July 15, 2016, <https://www.congress.gov/bill/114th-congress/house-bill/636/text>.

pipeline welders. The efficient maintenance of our nation’s pipelines keeps critical energy infrastructure running safely and efficiently.

FMCSA regulations provide certain exemptions from the trucking hours of service requirements based on the nature of the trucking operations. 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 § 390.38.⁷¹ While the current exemption provides reasonable relief for pipeline welding trucks (owned by the welder), it is unnecessarily limited to pipeline welders. AFPM believes this exemption should be expanded to pipeline operations to 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 help 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 the 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.

B. Hazardous Materials Route Preemption

Although states have authority to publish hazardous materials routes, FMCSA may preempt those routes that unnecessarily interfere with interstate commerce. FMCSA’s Hazardous Materials Routing authority is derived from the “Hazardous Materials Transportation Act” (“HMTA”).⁷² FMCSA can preempt any state routing requirement that makes it impossible to comply with other federal rules (namely PHMSA requirements to select the most expeditious routes and to avoid all unnecessary delays to transport). AFPM supports states’ authority to declare hazardous materials routes; however, we are concerned about the interstate commerce barriers created when states allow counties and localities to declare routes as well. This can create a patchwork of routing requirements that add miles to hazmat routes and make hauling hazardous materials (including fuels and petrochemical products) less safe and inefficient. AFPM encourages FMCSA to use its authority to ensure these routes line up across jurisdictions.

⁷¹ See 49 CFR Part 390.38, <https://www.law.cornell.edu/cfr/text/49/390.38>.

⁷² See “Hazardous Materials Transportation Act” <https://www.law.cornell.edu/uscode/text/49/subtitle-III/chapter-51>

VII. CONCLUSION

AFPM supports DOT's efforts to eliminate burdensome regulatory requirements and revise and modernize outdated regulations. Further, AFPM supports the principles of safe, sound, efficient, and cost-justified regulations presented in EOs 13771, 13777 and 13873. AFPM views this Notice as a meaningful step in the right direction and encourages the administration to seek input through public meetings at the OA level.

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 style with a large initial "D" and "F".

David Friedman
Vice President, Regulatory Affairs

APPENDIX: SUMMARY OF AFPM COMMENTS AND ASSOCIATED STRATEGIC GOALS

On October 19, 2017, DOT released a draft version of their strategic plan entitled, “U.S. Department of Transportation Strategic Plan for FY 2018 - 2022.” This Strategic Plan establishes the strategic goals⁷³ and objectives for DOT for fiscal year (“FY”) 2018 through FY2022. The Strategic Plan, therefore, presents the long-term objectives and goals DOT hopes to accomplish. Each DOT OA is responsible for developing its own strategic plan that aligns with the DOT Strategic Plan and their own legislative and statutory requirements. The following are the draft DOT Strategic Goals.

- **SAFETY: Reduce Transportation-Related Fatalities and Serious Injuries Across the Transportation System.** Safety has consistently been DOT’s top strategic and organizational goal. To improve transportation safety, DOT seeks to work effectively with State, local, and private partners; address human behaviors that increase safety risks; improve safety data analysis to guide decisions; ensure automation brings significant safety benefits; and pursue performance-based rather than prescriptive regulations.
- **INFRASTRUCTURE: Invest in Infrastructure to Ensure Mobility and Accessibility and to Stimulate Economic Growth, Productivity and Competitiveness for American Workers and Businesses.** The DOT seeks to guide investments that stimulate economic growth, maintain and improve the conditions of infrastructure, and enable the more efficient movement of people and goods. To achieve this goal, DOT will provide guidance, technical assistance, and research that leverages Federal funding, accelerates project delivery, reduces project lifecycle costs, and optimizes the operation and performance of existing facilities. By using innovative forms of financing and project delivery, encouraging partnerships between the public and private sectors, and strategically balancing investments across various modes to promote greater efficiencies, DOT can maximize the returns to our economy and the American public.
- **INNOVATION: Lead in the Development and Deployment of Innovative Practices and Technologies that Improve the Safety and Performance of the Nation’s Transportation System.** Emerging technologies are transforming our transportation system. The DOT seeks to continue its leadership role guiding research investments and facilitating the deployment of beneficial transportation technologies. By engaging with the private sector, DOT can leverage Federal resources to support technology transfer (T2) and ensure the safety and security of new technologies.
- **ACCOUNTABILITY: Serve the Nation with Reduced Regulatory Burden and Greater Efficiency, Effectiveness and Accountability.** The DOT will streamline regulations and improve organizational effectiveness of the Department. The DOT will raise accountability standards that improve the efficient use of taxpayer funds. By streamlining business processes and investing in workforce development, DOT will enhance its responsiveness and adaptability to the demands of a rapidly evolving industry.

Given the importance of DOT’s strategic goals, the table below summarizes our comments in this document and notes which DOT strategic goals AFPM’s comments address or relate to.

⁷³ Strategic Goals are general, outcome-oriented, long-term goals for the major functions and operations of DOT. They address the broad impacts desired by DOT.

Summary of Existing DOT-Wide Regulations for Repeal, Replacement, Suspension, or Modernization

Topic	Issue / Impact	Alternative	Related Strategic Goals
Performance Based Outcomes	A regulatory and enforcement structure focused on punitive punishment as opposed to ensuring safety outcomes and addressing root causes is ineffective.	Encourage the development of performance-based regulations, policies, and compliance efforts as opposed to prescriptive regulations.	Safety Innovation Accountability
NEPA Implementing Procedures	Redundant reviews and outdated procedures complicate NEPA compliance and delay infrastructure projects. Streamlining NEPA reviews could have a considerable positive impact for both the government and private industry.	Revise DOT's NEPA implementing procedures and reopen comment period to provide for meaningful public input and work to limit NEPA reviews to agency jurisdiction.	Infrastructure Accountability
Rulemaking Procedures	Rules with considerable impacts do not always provide sufficient analysis of cost or ample deliberation of the proposed provisions.	Require advanced or negotiated rulemakings for major rules. This would permit increased scrutiny on supporting analysis and estimates of impacts.	Safety Innovation Accountability
Regulatory Guidance	Federal regulatory agencies are issuing guidance documents in lieu of regulations to implement policy. Often, this can lead to regulatory confusion and inconsistent enforcement.	Review and evaluate existing guidance to ensure OAs are not regulating outside of the proper channels.	Safety Accountability
Overlapping Authority	Federal agencies have defined statutory authorities by law, yet there are instances when there is an overlap of scope. This can create regulatory confusion, thus negatively impacting compliance.	Conduct a department-wide review and updating of MOUs, including those related to infrastructure projects, to eliminate unnecessary overlap and to ensure MOUs are in line with principles in recent EOs.	Safety Infrastructure Innovation Accountability

Summary of Existing PHMSA Multi-modal & Pipeline Regulations for Repeal, Replacement, Suspension, or Modernization

Topic	Issue / Impact	Alternative	Related Strategic Goals
Tank Car Specifications 49 CFR Part 179	Both PHMSA and AAR implement tank car standards. AAR's interchange requirements can require significant investment by shippers outside of the notice-and-comment process.	Initiate a rulemaking or engage with the AAR TCC directly to reform its charter and requirements to provide for more transparent and fair decision making.	Safety Infrastructure Accountability
Flammable Liquid Classification 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. Likely impacts would be well over the "significant" threshold of \$100 million dollars annual impact.	Withdraw the ANPRM on flammable liquid classification and monitor impact of safety improvements related to completed and ongoing DOT research related to flammable liquids.	Safety Infrastructure Innovation Accountability
Testing & Sampling Plans 49 CFR Part 173	Sampling & testing plans have limited safety benefit, are ambiguous, create compliance issues, are duplicative with the classification requirements, and cost \$18.9 million annually.	Rescind the sampling and testing program requirement and rely on the existing classification requirements of 49 CFR § 173.22.	Safety Accountability
Emergency Order 49 CFR Part 190	The IFR related to emergency order authority does not align with statutory requirements and does not provide due process.	Finalize the IFR, providing discussion of potential issues / scope of authority and provide opportunity for additional comment.	Infrastructure Accountability
Hazardous Liquids Rulemaking	DOT analysis does not fully consider impacts of shifting resources away from riskiest pipelines. Industry estimates rule costs of ~\$600 million versus PHMSA's estimated \$22 million (annually).	Provide the opportunity for additional public comment on any revised provisions in this rule and update the supporting analysis to address identified impacts.	Safety Infrastructure Innovation Accountability
Gas Gathering Lines & Transmission Rulemaking	The NPRM vastly expands PHMSA's regulatory scope and could set a precedent for potential similar expansion for hazardous liquid pipeline regulations.	Revisit or withdraw the elements of the NPRM pertaining to gathering lines in favor of focusing on collecting additional safety-related data for gas gathering lines.	Safety Infrastructure Innovation Accountability

Summary of Existing FRA Rail Regulations for Repeal, Replacement, Suspension, or Modernization

Topic	Issue / Impact	Alternative	Related Strategic Goals
Track Integrity 49 CFR Part 213	While track integrity is a leading cause of derailments, DOT's regulatory efforts related to the transport of flammable liquids have been focused on primarily on classification and the tank car standards, neither a causal factor of derailments.	Pursue efforts to improve track integrity braking (<i>e.g.</i> , technology advancements / regulatory reform) and address human error in rail operations.	Safety Infrastructure Innovation Accountability
ECP Braking 49 CFR Part 174	Per DOT's own RIA, ECP braking is not a cost beneficial technology and according to NAS, DOT's modeling cannot conclusively claim that ECP braking offers safety benefits over current braking systems.	Formally rescind the requirement for ECP.	Safety Infrastructure Innovation Accountability
Rail-Worthiness 49 CFR Part 180	While infrequent, these directives can be precedent-setting and impact many tank cars without providing due process.	Conduct review of the directive process, focusing on potential overlap with other FRA capabilities to mitigate non-compliance.	Infrastructure Accountability
Rail Safety Advisory Committee	DOT may delay a rulemaking based on the RSAC consensus recommendations related to rail transport of hazardous materials. This also delays the benefits of such a rule.	Initiate a rulemaking related to the consensus RSAC recommendations as part of the DOT regulatory reform efforts.	Safety Infrastructure Accountability
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.	Safety Infrastructure Accountability
Tank Car Storage 49 CFR Part 174	Current policies related to federal preemption of tank car storage result in a patchwork of state requirements that limits shippers' and railroads' ability to store tank cars.	Develop a federal standard for tank car storage on leased and closed track.	Safety Accountability

Summary of Existing FAA / FMCSA Air & Highway Regulations for Repeal, Replacement, Suspension, or Modernization

Topic	Issue / Impact	Alternative	Related Strategic Goals
FAA - Unmanned Aerial Systems	To date, FAA has not fully implemented regulations to protect our nation’s critical energy infrastructure sites, as required by Sections 2209 and 2210 of the FAA Extension Act.	Develop safe and secure requirements related to UAS as they apply to critical energy infrastructure. Allow effective UAS use within the energy industry.	Safety Infrastructure Innovation Accountability
FMCSA - Pipeline Exemptions 49 CFR Part 390	Limits the ability of highly-skilled pipeline workers to tend to pipeline maintenance and integrity management issues.	Review and expand the pipeline welding exemption to include other pipeline operations that foster infrastructure maintenance and maintain safety.	Safety Infrastructure Accountability
FMCSA - Route Preemption	Lack of federal preemption can result in a patchwork of routing requirements that make hauling hazardous materials (including fuels and petrochemical products) difficult and inefficient.	Use preemption authority to ensure authorized routes align across jurisdictions so hazardous materials can be transported safely and efficiently.	Safety Accountability