

NOT YET SCHEDULED FOR ORAL ARGUMENT

No. 20-1317 (consolidated with Nos. 20-1318, 20-1431, & 21-1009)

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

SIERRA CLUB, et al.,
Petitioners,

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION, et al.,
Respondents.

ON PETITION FOR REVIEW OF FINAL ACTION OF THE
UNITED STATES DEPARTMENT OF TRANSPORTATION

REPLY BRIEF OF ENVIRONMENTAL PETITIONERS

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GLOSSARY

APA	Administrative Procedures Act
Dkt. #	Document number for document filed on the docket in this case
DOT	United States Department of Transportation
Environmental Petitioners	Sierra Club, Center for Biological Diversity, Clean Air Council, Delaware Riverkeeper Network, Environmental Confederation of Southwest Florida, and Mountain Watershed Association
Env. Comments	Comments by Environmental Petitioners, Document ID PHMSA-2018-0025-0440
FRA	Federal Railroad Administration
FRIA	Final Regulatory Impact Assessment, Document ID PHMSA-2018-0025-0479
HMR	Hazardous Materials Regulations
HMTA	Hazardous Materials Transportation Act
JA	Joint Appendix
LNG	Liquefied natural gas
LNG Rule	<i>Hazardous Materials: Liquefied Natural Gas by Rail</i> , 85 Fed. Reg. 44,994 (July 24, 2020), Document ID PHMSA-2018-0025-0480
NEPA	National Environmental Policy Act
NTSB	National Transportation Safety Board

NTSB Comments	Comments from National Transportation Safety Board, Document ID PHMSA-2018-0025-0078
PRIA	Proposed Regulatory Impact Assessment, Document ID PHMSA-2018-0025-0001
Proposed LNG Rule	<i>Hazardous Materials: Liquefied Natural Gas by Rail</i> , 84 Fed. Reg. 56,964 (proposed Oct. 24, 2019), Document ID PHMSA-2018-0025-0002
PHMSA	Pipeline and Hazardous Materials Safety Administration
Respondents	Pipeline and Hazardous Materials Safety Administration; Tristan Brown, in his official capacity as Administrator of Pipeline and Hazardous Materials Safety Administration; United States Department of Transportation; Pete Buttigieg, in his official capacity as Secretary of Transportation; and the United States of America
State Petitioners	State of Maryland, State of New York, State of California, State of Delaware, District of Columbia, State of Illinois, Commonwealth of Massachusetts, People of the State of Michigan, State of Minnesota, State of New Jersey, State of Oregon, Commonwealth of Pennsylvania, State of Rhode Island, State of Vermont, and State of Washington

SUMMARY OF ARGUMENT

In response to the safety arguments raised by Environmental Petitioners, Respondents reiterate the LNG Rule's¹ stance that the transport of liquefied natural gas ("LNG") by rail tank car is safe—yet ignore their own admissions that the authorization to transport LNG by rail needed to be suspended to enable the Pipeline and Hazardous Materials Safety Administration ("PHMSA") to reexamine the safety of such transport. Respondents' arguments in favor of the LNG Rule rest largely on a demand for deference. But the record assembled to support the rule—which showed that three out of three DOT113C120Ws breached under derailment conditions, and which contained no crashworthiness assessment of the DOT113C120W9 design—cannot support a conclusion that the LNG Rule is "safe." The Hazardous Materials Transportation Act's ("HMTA's") mandate that PHMSA ensures the safe transportation of hazardous materials and the Administrative Procedure Act's ("APA's") requirements for reasoned decision-making require more.

Respondents also fail to show how the newly designated DOT113C120W9 tank car is a logical outgrowth of the Proposed LNG Rule,² which explicitly relied

¹ *Hazardous Materials: Liquefied Natural Gas by Rail*, 85 Fed. Reg. 44,994 (July 24, 2020), Document ID PHMSA-2018-0025-0480.

² *Hazardous Materials: Liquefied Natural Gas by Rail*, 84 Fed. Reg. 56,964 (proposed Oct. 24, 2019), Document ID PHMSA-2018-0025-0002.

on the safety history of the existing DOT113C120W tank car and only called for comment on additional operational controls. Respondents identify nothing in the Proposed LNG Rule indicating that PHMSA would consider changes to the tank car design. As such, the LNG Rule should be vacated.

ARGUMENT

I. Respondents Fail to Refute Environmental Petitioners' Case that the LNG Rule Does Not Comply with the HMTA.

While the HMTA acknowledges that some risk is “inherent in the transportation of hazardous material,” the Act nevertheless directs the Department of Transportation to “protect against” that risk and ensure “*safe* transportation” of such materials. 49 U.S.C. §§ 5101, 5103(b) (emphasis added). The statute and case law clarify that PHMSA’s mandate is to hold “consideration of safety as the highest priority.” Environmental Petitioners’ Initial Brief at 22-23 & n.3. PHMSA has failed to show that the LNG Rule meets the safety threshold required by the HMTA. Instead of engaging with Environmental Petitioners’ arguments identifying the LNG Rule’s deficiencies, Respondents largely rehash the text of the Rule that Environmental Petitioners have challenged. Ultimately, the record does not support any finding that the new tank car is safe for LNG shipments, nor that the various operational controls or other LNG-specific requirements can render it so. The LNG Rule thus violates the HMTA and should be vacated.

A. Respondents Fail to Demonstrate Adequate Safety of the New Tank Car.

Respondents have identified nothing in the record to demonstrate that a tank car that had never before been constructed or studied was proven safe for LNG carriage. Instead, Respondents lean erroneously on *Blau v. Commissioner of IRS* for the proposition that PHMSA “made the most of the available data” and is therefore entitled to deference. Respondents’ Brief at 27; 924 F.3d 1261, 1276 (D.C. Cir. 2019). That case is of little use here. In *Blau*, this Court deferred to the US Tax Court’s use of a “commonly recognized” property valuation method, rather than the appellant’s preferred valuation method. 924 F.3d at 1277-78. PHMSA’s discussion of the DOT-113 Class hardly compares. In the interrelated context of the National Environmental Policy Act (“NEPA”), “an initial lack of information does not afford an agency carte blanche to disregard” effects, and an agency may not claim certain effects are impossible to forecast before “at least attempt[ing] to obtain the information necessary to fulfill its statutory responsibilities.” *Food & Water Watch v. FERC*, 28 F.4th 277, 285-86 (D.C. Cir. 2022). It is particularly audacious that PHMSA asks this Court to defer to its attempt to do, in essence, the ‘best it could’ with limited data when that lack of data was due to the haste with which PHMSA authorized LNG transport in a tank car that *did not exist* and was not tested prior to issuance of the LNG Rule. Indeed, Respondents’ Brief fails to

recognize (much less refute) that PHMSA ignored its own acknowledgement that further testing was needed to fill the research gaps it had identified.³

Respondents instead focus on the features that the legacy DOT-113C120W and the DOT-113C120W9 share, Respondents' Brief at 20-30, but fail to refute Environmental Petitioners' arguments about the limitations of these features.⁴ For instance, Respondents fail to refute arguments that pressure relief devices are likely to fail in real-world derailment conditions, Env. Comments at 22, JA_0228; that cold embrittlement from an LNG release can imperil the *outer* tanks of neighboring cars which may not be rated for cryogenic temperatures, *id.* at 7, JA_0213; and that the sole fire survivability test in the record was so flawed as to be worthless, *id.* at 22-23, JA_0228-29. Respondents' Brief acknowledges *some* of the defects Environmental Petitioners raised regarding the test, refutes none of them, then inexplicably doubles down on its "reasonabl[e]" conclusion, based on the same test, that a boiling liquid expanding vapor explosion is "unlikely." *See* Respondents' Brief at 30.

Respondents claim that the performance of legacy DOT-113 tank cars—making some 100,000 trips over the course of more than 50 years with few

³ *See* Environmental Petitioners' Initial Brief at 36.

⁴ *See* Environmental Petitioners' Initial Brief at 31-33.

accidents and no fatalities—demonstrates the safety of the container.⁵

Respondents' Brief at 25. But reliance on that data overlooks the fact that the vast majority of the cargoes shipped in the DOT-113C120W are inert (e.g., argon, nitrogen). *See* Env. Comments at 63 (according to the U.S. Energy Information Administration, ethylene represented less than 3% of all cryogenic shipments in 2015 (356 of 12,700 total)), JA_0269; Proposed Regulatory Impact Assessment ("PRIA") at 10, JA_0087 (no shipments of ethylene in waybill data for DOT-113 tank cars in 2014, 2015, and 2016). And while much of PHMSA's case for the "safety" of LNG by rail hinges on the purported similarities between LNG and liquid ethylene, Respondents do not meaningfully address the critical differences between those two substances.⁶ Environmental Petitioners' Brief at 27-28.

Unlike LNG, for which there is a demonstrated industry appetite to ship large quantities in unit train configurations, 85 Fed. Reg. at 45,005, the record does not furnish a single example of a train consist with more than three cars of liquid ethylene, *see, e.g.*, Federal Railroad Administration ("FRA") Factual Accident

⁵ The fleet of 67 DOT113C120W tank cars is a small subset of the 405 tank car fleet of DOT-113s. NTSB Comments at 3, JA_0118.

⁶ Regarding PHMSA's comparisons to ethylene, Respondents correctly identify that the issue is not whether its properties are identical to LNG, but rather whether such comparison was "reasonable." Respondents' Brief at 24. It was not, and PHMSA provides no explanation as to why the comparison was reasonable in the face of a 100-degree difference in storage temperature and other critical distinctions. Environmental Petitioners' Brief at 27-28.

Report, File #HQ-2011-24, (Document ID PHMSA-2018-0025-0571) at 6, JA_1030. In fact, the record indicates that industry experts “were not aware of any parties transporting liquid ethylene or hydrogen in unit train configurations” and confirmed that there was neither demand nor infrastructure to do so. PHMSA, Notes from the Listening Session for HM-264 LNG by Rail (Document ID PHMSA-2018-0025-0471) at 1 (summarizing comments from the American Chemistry Council), JA_0430.

Thus, the specifics of the DOT113C120W’s service history—that the vast majority of cargoes are non-flammable; that the closest comparable substance to LNG, ethylene, only has a minor presence on manifests; and that there are only 67 extant cars in this specification—mean that there have been fewer opportunities for DOT113C120W cars to derail and lower risk in the historically rare times that one has derailed. Yet PHMSA cannot deny that every breach of an inner tank has led to the full loss of its cargo, and in instances of flammable cargoes, invariably resulted in a fire.⁷ Out of 67 extant tank cars, the three that are known to have derailed all had their shells breached (or needed to be breached) (at speeds below 50 miles per hour), creating a fire plume visible from 10 miles away,⁸ which, as the National

⁷ PHMSA searched instances and found one derailment with ethylene, which led to breach and fire. PRIA at 10, JA_0087; 84 Fed. Reg. at 56,972.

⁸ FRA Factual Accident Report, File #HQ-2011-24, (Document ID PHMSA-2018-0025-0571) at 1, 6, JA_1025, 1030.

Transportation Safety Board (“NTSB”) noted, “is not a compelling ‘demonstrated safety record.’” NTSB Comments at 4, JA_0119. Given that a breach of just one loaded LNG tank car can disperse into a flammable cloud of over 1.3 million cubic meters,⁹ PHMSA’s facile comparisons to dissimilar past performance fall far short of the reasoned decision-making required by the APA. *See Lilliputian Sys., Inc. v. PHMSA*, 741 F.3d 1309, 1312-14 (D.C. Cir. 2014) (applying APA reasoned decision-making requirements to decisions under the HMTA).

A lack of catastrophic accidents is not the same thing as a history of proven survivorship in derailments—especially when every *actual* derailment of the DOT-113C120W has resulted in breach. As this Court has observed, “limited data do[es] not justify unlimited inferences.” *See Am. Petrol. Inst. v. EPA*, 862 F.3d 50, 70 (D.C. Cir. 2017). The DOT-113 class may well be a reasonable choice for *other* cryogenic liquids, but PHMSA’s decision that it is appropriate for LNG shipments was arbitrary, capricious, and well beyond PHMSA’s discretion under the HMTA and its regulations.

⁹ LNG’s 600x liquid-to-gas expansion ratio, multiplied an additional 20x for its 5% lower flammability limit ($100/5 = 20$) means that any volume of LNG, on release, can expand by 12,000x before diffusing below risk of explosion. Conservatively, the 30,000 gallons of one tank car = $113.56\text{m}^3 * 12,000 = 1,362,720\text{m}^3$.

B. The Totality of Operational Controls and Additional Measures Still Fails to Ensure Safe, Rail-Based Transportation of LNG.

PHMSA offers a scattered assortment of operational controls and other measures that it argues confer additional safety. Respondents' Brief at 31-49. Even taken together, these provisions still fall far short of the HMTA's mandate to ensure safe transportation. 49 U.S.C. § 5103(b).

PHMSA defends its decision not to impose binding operational controls regarding crucial safety parameters such as speed limits, on the basis that the most recent version of OT-55 "has been incorporated into railroads' operating rules," and that PHMSA, via the FRA, is unaware of examples of railroads failing to comply with OT-55's guidelines. Respondents' Brief at 34.

But even if the record demonstrated ironclad compliance with OT-55—which it certainly does not—PHMSA has failed to show how past *voluntary* compliance ensures future *voluntary* compliance. Moreover, PHMSA has failed to address the Environmental Petitioners' argument that OT-55 is substantively insufficient for a cargo as dangerous as LNG. As Environmental Petitioners have repeatedly argued, there is overwhelming evidence that PHMSA's approved packaging cannot survive impacts at speeds significantly lower than the voluntary 50 mph limit suggested by OT-55. Environmental Petitioners' Brief at 24; FRA Full-Scale Impact Test of a DOT-113 Tank Car (Feb. 2020) (Document ID

PHMSA-2018-0025-0473) at 3 (puncture of DOT-113C120W at 16.7 mph), JA_0434; Final Regulatory Impact Assessment (“FRIA”) at 30, JA_0527 (DOT-113C120W9 expected to have 20-30% additional puncture resistance). Any breach of an LNG tank car in a derailment is likely to lead to catastrophic loss. *See* FRIA at 30-31, JA_0527-28.

II. The Final Rule Violates the Procedural Notice and Comment and Public Participation Requirements of the APA by Authorizing the Transportation of LNG in an Entirely New Tank Car Design.

The APA requires that a final rule must be a “logical outgrowth” of the proposed rule. *Brennan v. Dickson*, 45 F.4th 48, 68-69 (D.C. Cir. 2022). That standard is satisfied if affected parties “should have anticipated” the final rule in light of the notice. *Id.* Respondents fail to adequately explain how commenters could have anticipated that the LNG Rule would invent a new tank car design when the proposed rule relied on the history of an existing tank car and only called for comments on possible operational controls for that existing tank car.

Notably, Respondents’ Brief fails to cite any cases where this Court has found a final rule to be a logical outgrowth of a proposed rule that even approaches the kind of changes PHMSA made here without inviting comment. Respondents do nothing to refute cases that were much closer calls that this Court struck down. In *CSX Transportation v. Surface Transportation Board*, for example, this Court found notice inadequate when the Surface Transportation Board’s proposed rule

stated that it would release one-year data for comparison groups of rail rates, but finalized a rule using four years of data instead. 584 F.3d 1076, 1082 (D.C. Cir. 2009). The Court saw “no way that commenters [] could have anticipated which particular aspects of the Board’s proposal were open for consideration.” *Id.* (cleaned up). Similarly, Petitioners could not have anticipated that PHMSA would approve a new tank car design with attendant greater weight, especially when PHMSA rejected the possibility of considering a new tank car design in the Proposed LNG Rule and only solicited public input on *operational* controls.

A. The Proposed LNG Rule Gave No Notice PHMSA was Considering a New Tank Car Design.

Respondents fail to point to anything in the Proposed LNG Rule indicating that PHMSA would consider changing the tank car design or otherwise suggesting that commenters should have included tank car design proposals as part of their comments. PHMSA limited its invitation for comments to its “reliance on *existing* regulations and the *operational* controls in Circular OT-55 (not incorporated into the HMR) and whether additional *operational* controls may be warranted based on an assessment of risk.” 84 Fed. Reg. at 56,969 (emphases added). In the Proposed LNG Rule, PHMSA “also encourage[d] commenters to provide data on the safety or economic impacts associated with any proposed *operational* controls, including analysis of the safety justification or cost impact of implementing *operational*

controls.” *Id.* (emphases added). The public was thus deprived of an opportunity to comment on an important aspect of the final rule—namely the DOT-113C120W9 design—and thus the LNG Rule should be vacated.

PHMSA argues that it provided notice because the newly designed DOT-113C120W9 is a *type* of DOT-113C120W tank car (albeit one newly created and designated through the LNG Rule), and therefore Environmental Petitioners were on notice to comment on the suitability of the DOT-113C120W9 to transport LNG. Respondents’ Brief at 50. However, when PHMSA proposed the LNG Rule, the DOT-113C120W9 tank car did not exist, and PHMSA never indicated that it was contemplating its creation. Merely characterizing their newly designed tank car as a sub-type of the existing car does not change the underlying fact that the final LNG Rule departed from the Proposed LNG Rule and designated a newly created tank car to transport LNG. The new tank car design changes the thickness of the outer shell, but there was no reason to believe that any changes would be made to the designated tank car, let alone “just” changes to shell thickness. Indeed, under “Tank Car Specification” in the Proposed LNG Rule, PHMSA continued to emphasize the *existing* “DOT-113C120W design specification” as being “suitable for the transport of . . . LNG.” 84 Fed. Reg. at 56,967.

Respondents argue that the only changes from the existing DOT-113C120W cars are increases in the thickness of the outer shell and changes to the type of steel

required, and thus the DOT-113C120W9 tank car could have been constructed by tank car manufacturers prior to the LNG Rule and still have complied with the DOT-113C120W specifications. Respondents' Brief at 54. But just because PHMSA adopted a change in tank thickness that manufacturers arguably could have done of their own accord does not mean that more changes should not have been made, or that the public was on notice that such changes *could* be made by PHMSA.

Respondents argue that Environmental Petitioners' suggestions for design changes to the tank car should have been made based on the Proposed LNG Rule but they fail to identify any portion of the proposed rule that provided notice that they were considering such changes. Respondents' Brief at 54. As previously argued, if Environmental Petitioners had notice that the tank car design was open to modification, they would have suggested many improvements. *See* Environmental Petitioners' Brief at 39. But that is not what PHMSA invited comment on; rather, it limited its invitation to "existing regulations" and possible "operational controls." 84 Fed. Reg. at 56,969. Modifying the design of the tank car is not an operational control¹⁰—it is a new packaging system. For the logical

¹⁰ Although "operational control" is not defined in the Hazardous Materials Regulations ("HMR"), references to "operational controls" include how something is operated, not physical changes. *See, e.g.*, 49 C.F.R. § 172.102(c)(1)387 ("operational controls imposed by regulation (*e.g.*, requirements to protect from sources of heat, including other cargo carried at a temperature above ambient)").

outgrowth doctrine to shield an agency action, the final rule must have its “roots in the agency’s proposal because something is not a logical outgrowth of nothing, nor does it apply where interested parties would have had to divine the agency’s unspoken thoughts.” *Env’t Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005) (internal quotations and citations omitted); *cf. GPA Midstream Assoc. v. United States Dep’t of Transp.*, 67 F.4th 1188, 1197 (D.C. Cir. 2023) (“The PHMSA tries to make something out of nothing, but that is an impossible task.”).

The PRIA also reenforces that a new tank car design was not a logical outgrowth of the Proposed LNG rule. The PRIA specifically categorizes the proposed LNG rule as “a deregulatory action . . . [with] no incremental compliance costs,” noting that “although it does not propose any *operational* controls in the NPRM, it does seek comment on the appropriateness of requiring *operational* controls for the transportation of LNG by rail.” PRIA at 16, JA_0093 (emphasis added). In the final LNG Rule and FRIA, PHMSA recognized that there were “monetary impacts of the operational controls *and* tank car enhancements” imposed by the LNG Rule. FRIA at 15, JA_0512 (emphasis added). As such, the FRIA found that the final LNG Rule would add \$3,000-\$5,000 per tank car for additional construction expenses related to the thicker outer tank and \$15,000-\$20,000 in additional costs for the additional and higher-quality steel required by the LNG Rule to construct the DOT-113C120W9 tank car. FRIA at 17, JA_0514.

The FRIA also did a separate comparison of “LNG Operational Controls” in the Proposed LNG Rule versus the final LNG Rule, FRIA at 23, JA_0520, notably not including the “tank car enhancements.” The FRIA thus makes clear that the “tank car enhancements” are *not* operational controls.

Respondents argue that changes to the DOT-113C120W tank car, unlike consideration of the DOT-113C140W tank car, “do not require . . . extensive additional engineering review,” and it is within “PHMSA’s realm of technical expertise” to decide not to conduct additional engineering review.¹¹ Respondents’ Brief at 54. Respondents cite *ATK Launch Systems, Inc. v. EPA*, for the proposition that they should receive “an extreme degree of deference” in making this determination. 669 F.3d 330, 336 (D.C. Cir. 2012). Respondents’ reliance on *ATK Launch Systems* is misplaced for several reasons. First, *ATK Launch Systems* was not a logical outgrowth case. PHMSA does not, and cannot, cite any case law supporting its claim that its conclusion that the DOT-113C120W9 is a logical outgrowth of its proposal to use the long-existing DOT-113C120W is due an “extreme degree of deference.” Second, in arguing for deference, PHMSA does

¹¹ Given that PHMSA’s “duties and powers relate[] to pipeline and hazardous materials transportation and safety,” 49 U.S.C. § 108(f)(1), it is questionable how much expertise PHMSA has in tank car engineering, especially as it relates to weight and impacts on railroad tracks. See *West Virginia v. EPA*, 597 U.S. 697, 729 (2022) (deference limited “[w]hen an agency has no comparative expertise in making certain policy judgments”) (cleaned up).

not explain *why* the DOT-113C120W9 does not require additional engineering review, other than saying that DOT-113C120W tank cars could always have come with increased thickness. This bald assertion, contradicted by PHMSA's own need to increase the weight authorization for the DOT-113C120W9 tank car (but not the DOT-113C120W), does not constitute reasoned decision making and does not deserve this Court's deference.

Third, PHMSA's assertions that the changes made to the DOT-113C120W tank car do not require extensive additional engineering review are belied by the post-LNG Rule history, as described in Respondents' Brief.¹² As Respondents laid out, PHMSA has temporarily suspended the LNG Rule, in part to "allow[] PHMSA and the Federal Railroad Administration to complete ongoing testing and

¹² Although normally post-record evidence should not be considered in evaluating the merits of an agency's actions under the APA, there is an exception when "events may have progressed sufficiently to indicate the truth or falsity of agency predictions . . . [as] a court need [not] blind itself to such events, at least when the events are evidenced by public testimony . . . [because a] contrary rule would convert the reviewing process into an artificial game." *Amoco Oil Co. v. EPA*, 501 F.2d 722, 729 n.10 (D.C. Cir. 1974). In *Amoco*, this Court explicitly considered "certain events [which had] transpired [during and after final promulgation of the challenged regulations] which bear upon the issues before us," specifically including subsequent rulemaking actions. *Id.* at 729. Here, PHMSA had asserted that it had sufficient information to assure safety and issue the LNG Rule. Pursuant to *Amoco*, this Court need not blind itself to PHMSA's present admissions that it needs more information and has thus suspended the authorization to transport LNG by rail. *See also Monroe Energy, LLC v. EPA*, 750 F.3d 909, 918-19 (D.C. Cir. 2014) (in considering merits of petition to review 2013 renewable fuel standards, considering whether agency's predictions made in rulemaking were borne out and considering agency's subsequent rulemaking actions).

evaluation efforts and consider recommendations from technical experts at the National Academy of Sciences, Engineering, and Medicine.” Respondents’ Brief at 12. PHMSA also justified the temporary suspension on a belief that “uncertainties—e.g., regarding . . . potential safety and environmental benefits and risks of such transportation—had increased since the Rule issued.” *Id.* PHMSA admits that by suspending the LNG Rule, it “avoids potential risks to public health and safety or environmental consequences (including direct and indirect greenhouse-gas emissions) that PHMSA will evaluate in the companion amendment rulemaking.” *Id.* But Respondents can point to nothing in the record that shows that the actual risks of transporting LNG have changed—rather, PHMSA’s understanding of the potential risks has increased, changing the risk-benefit analysis. Those very same risks that have caused PHMSA to suspend the LNG Rule include using a new tank car with increased weight.

B. The Proposed LNG Rule Did Not Provide Notice of Additional Weight from New Tank Car Design and Higher Filling Density.

Additionally, nothing in the Proposed LNG Rule indicates that PHMSA was considering increasing the maximum filling density from 32.5% to 37.3%, 85 Fed. Reg. at 44,996, again increasing the weight of the cars. Nothing in the Proposed LNG Rule indicated that PHMSA was considering increasing the allowable weight of the cars beyond the standard limit of 263,000 pounds. It is unnecessary for

Environmental Petitioners to prove that there would have been a different outcome if they had been allowed to comment on their concerns regarding the new weight limit. It is dispositive that Environmental Petitioners were denied the opportunity to comment and influence the outcome. *See Ass'n of Am. R.R. v. Dep't of Transp.*, 38 F.3d 582, 589 (D.C. Cir. 1994) (“The policies underlying the notice requirement demand that we inquire whether the notice given affords exposure to diverse public comment, fairness to affected parties, and an opportunity to develop evidence in the record.”) (internal citations and quotations omitted); *Int'l Union, United Mine Workers of Am. v. Mine Safety and Health Admin.*, 407 F.3d 1250, 1259-60 (D.C. Cir. 2005) (maximum velocity of belt not logical outgrowth of proposed rule which only included minimum velocity).

The Respondents' Brief plays down the implications of the additional weight, arguing that the higher authorized weight limit is unlikely to be needed. Respondents' Brief at 43-44. However, “PHMSA acknowledges that the thicker outer tank, as required in this rulemaking, will have a net impact of increasing the overall weight of a loaded DOT-113C120W9 tank car” by adding “approximately 11,050 pounds.” 85 Fed. Reg. at 45,015. PHMSA does not explain why that additional weight requires no additional engineering analysis other than to argue that it was “consistent with the Federal Railroad Administration's standards.” Respondents' Brief at 43.

Furthermore, even though PHMSA admits that it relied on the 2011 FRA notice regarding weight-limits, Respondents' Brief at 42-43, and that the FRA "relied on this white paper when it issued its 2011 notice regarding requirements for cars up to 286,000 pounds gross weight," Respondents ask the Court to "disregard" the white paper, Respondents' Brief at 43, arguing that as long as cars are constructed in accordance with standard S-286 and constructed of TC-128 Grade B steel, no other evidence is required. Respondents' Brief at 44. However, the DOT-113 tank car was not covered by the FRA notice as having demonstrated an equivalent level of safety. 76 Fed. Reg. 4,250, 4,253 (Jan. 25, 2011). The white paper's analysis and considerations fully apply because the FRA did not approve the increased weight limit, and as shown from the absence in the record, PHMSA did not consider the white paper's implications.

III. PHMSA Violated NEPA by Not Preparing an Environmental Impact Statement and Not Allowing Public Comment on New Tank Car Design.

Environmental Petitioners adopt and incorporate the reply arguments of the State Petitioners.

CONCLUSION

For the foregoing reasons and the reasons stated in Environmental Petitioners' Initial Brief, the Court should vacate the LNG Rule.

Respectfully submitted this 10th day of April 2024.

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CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(g), Circuit Rule 32(e), and this Court's September 18, 2023 Order establishing briefing format and schedule, I certify that this Final Reply Brief complies with the type-volume limitation because this Brief contains 4,333 words. I further certify that this Reply Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this Final Reply Brief has been prepared in Times New Roman 14-point font using Microsoft Word.

Dated: April 10th, 2024

/s/ Bradley Marshall
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Attorney

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of April 2024, I served the foregoing Reply Brief on all registered counsel through the Court's electronic filing system.

Dated: April 10th, 2024

/s/ Bradley Marshall
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