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.

U.S. DEPARTMENT OF TRANSPORTATION, et al.,

Respondents.

On Petition for Review of Final Action of the
Pipeline and Hazardous Materials Safety Administration

FINAL REPLY BRIEF OF STATE PETITIONERS

LETITIA JAMES
Attorney General of New York

MICHAEL J. MYERS
Senior Counsel
MAX SHTERNGEL
Assistant Attorney General
BRIAN LUSIGNAN
Assistant Solicitor General
The Capitol
Albany, New York 12224
(518) 776-2382
michael.myers@ag.ny.gov

Attorneys for the State of New York

ANTHONY G. BROWN
Attorney General of Maryland

JOSHUA M. SEGAL
Assistant Attorney General
STEVEN J. GOLDSTEIN
Special Assistant Attorney General
200 Saint Paul Place, 20th Floor
Baltimore, Maryland 21202
jsegal@oag.state.md.us
(410) 576-6446

Attorneys for the State of Maryland

April 11, 2024

(Counsel for additional petitioners listed on signature page)

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GLOSSARY

120W tank car	DOT113C120W tank car
140W tank car	DOT113C140W tank car
EIS	Environmental impact statement
J.A.	Joint Appendix
LNG	Liquefied natural gas
LNG Rule	*Hazardous Materials: Liquefied Natural Gas by Rail*, 85 Fed. Reg. 44,994 (July 24, 2020)
PHMSA	The U.S. Pipeline and Hazardous Materials Safety Administration
Safety Board Comments	Comments of the National Transportation Safety Board, PHMSA-2018-0025-0078
State Comments	Comments of the Attorneys General of Maryland, New York, California, Delaware, Illinois, Massachusetts, Michigan, Minnesota, New Jersey, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, and the District of Columbia, PHMSA-2018-0025-0283
The Proposal	*Hazardous Materials: Liquefied Natural Gas by Rail*, 84 Fed. Reg. 56,964 (Oct. 24, 2019)
W9 tank car	DOT113C120W9 tank car

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PRELIMINARY STATEMENT

PHMSA's brief largely echoes the same conclusory statements made in the Final Environmental Assessment and repeatedly invokes the concept of agency deference. But deference is only appropriate if the record demonstrates that an agency engaged in reasoned decisionmaking. The record establishes that on each of the three points raised in State Petitioners' opening brief, PHMSA did not. The agency relied on an environmental assessment even though three of NEPA's "intensity" factors indicated that an EIS was required; it issued a finding of no significant impact without taking a hard look at the rule's impact on public safety, greenhouse gas emissions, and environmental justice communities; and it short-circuited NEPA's public review process by issuing a final rule that, without notice or an opportunity for comment, unforeseeably modified the approved tank car design. Vacatur is warranted.

SUMMARY OF ARGUMENT

As the State Petitioners previously demonstrated, vacatur is warranted for three independent reasons, and PHMSA's brief to this Court fails to show otherwise.

First, PHMSA violated NEPA when it issued the LNG Rule without completing an EIS, and its failure to do so warrants vacatur. As State Petitioners previously demonstrated, a straightforward assessment of NEPA's "intensity" factors shows that an EIS was required here. *See* States' Br. 16-20. The LNG Rule

was "highly controversial," as demonstrated by the comments of state governments, emergency responders, and the National Transportation Safety Board, all of which directly questioned the basis for PHMSA's proposed finding of no significant impact. Those same comments noted that the rule was accompanied by "unique, uncertain, or unknown" risks because cryogenic flammable liquids had never been transported by rail tank cars in the amount or the manner authorized. These risks included potentially significant impacts on "public health or safety," because the release of even a single carload of LNG—let alone a cascading failure of a train carrying 100 such tank cars—would pose significant and novel risks to nearby communities and emergency responders. Rather than engage with State Petitioners' arguments on these points, PHMSA's brief merely repeats the agency's own conclusory assessment of the intensity factors.

Second, even if an environmental assessment were otherwise permissible, PHMSA's finding of no significant impact did not reflect the requisite "hard look" at relevant environmental impacts and therefore was arbitrary and capricious. *See* States' Br. 20-30. The record lacked any scientific evidence regarding how the unbuilt and untested W9 car would behave during derailment. Nor did the limited and inapposite historic data that PHMSA relied on support such a finding. Moreover, PHMSA failed to adequately assess the differences between transporting a maximum of three tank cars of ethylene in a manifest (i.e., mixed-cargo) train and

transporting upwards of 100 tank cars of LNG in a unit (i.e., single-cargo) train. PHMSA's finding also suffered from arbitrarily curtailed reviews of the Rule's impact on greenhouse gas emissions and environmental justice communities. Both were foreseeable environmental impacts of the Rule, but PHMSA arbitrarily focused on uncertainties to discount these impacts, even as it speculated freely to bolster its assertion of environmental benefits.

Third, PHMSA violated NEPA's public participation requirements when it finalized a rule that marked an unforeseeable departure from the Proposal. *See* States' Br. 14-16. Indeed, the agency's reasons for rejecting the 140W tank car apply equally to the W9 design. Moreover, PHMSA requested public comment only on "operational controls," and not on tank car design features that could mitigate the risk of transporting LNG by rail. Thus, the public had no notice that PHMSA would consider a modified tank car design in its final rule.

ARGUMENT[1]

PHMSA's brief fails to grapple with State Petitioners' arguments, instead defaulting to repeated requests that this Court defer to the conclusions in the agency's Final Environmental Assessment. But deference is unwarranted because

[1] State Petitioners incorporate by reference Environmental Petitioners' reply arguments that the LNG Rule was promulgated in violation of the Hazardous Materials Transportation Act and the Administrative Procedure Act.

those conclusions rested on speculation and conjecture, rather than an adequately developed record. They thus do not reflect the reasoned decisionmaking required by NEPA and the APA and should be set aside as arbitrary and capricious.[2]

I. THREE INTENSITY FACTORS INDEPENDENTLY AND CUMULATIVELY WARRANTED AN ENVIRONMENTAL IMPACT STATEMENT.

Whether an agency action's impacts are "significant" and thus trigger the requirement to prepare an EIS turns on the "context" and "intensity" of the action. 40 C.F.R. § 1508.27 (2019). NEPA's implementing regulations establish ten factors that determine an action's intensity, and this Court has specifically explained that "implicating any one of the factors may be sufficient to require development of an EIS." *National Parks Conservation Ass'n v. Semonite*, 916 F.3d 1075, 1082 (D.C. Cir. 2019); *see also Standing Rock Sioux Tribe v. United States Army Corps of Eng'rs*, 985 F.3d 1032, 1050 (D.C. Cir. 2021) ("[W]e see no good reason for treating

[2] While not purporting to challenge State Petitioners' standing, PHMSA nonetheless contends that when suing the federal government, "State Petitioners cannot establish standing based on 'the health and safety of their residents.'" Resp'ts' Br. 3 (quoting States' Br. 11). But this Court's decision in *Government of Manitoba v. Bernhardt*, 923 F.3d 173 (D.C. Cir. 2019), does not preclude standing on that basis. There, this Court reserved the question whether States can sue the federal government in their parens patriae capacity for violations of NEPA. *See id.* at 181 n.4. In similar contexts, however, the Supreme Court and this Court have recognized that States can indeed sue the federal government in that capacity. *See Maryland People's Counsel v. FERC*, 760 F.2d 318, 320 (D.C. Cir. 1985) (Natural Gas Act); *Massachusetts v. EPA*, 549 U.S. 497, 520-21 (2007) (Clean Air Act). In any case, State Petitioners have also alleged proprietary and procedural injuries, which PHMSA does not dispute are sufficient to confer standing. *See* States' Br. 11-12.

differently a decision that implicates multiple significance factors and a decision that implicates a single factor in several important ways."). The LNG Rule directly implicated at least three of NEPA's intensity factors, each of which independently warranted the preparation of an EIS. *See* States' Br. 16-20.

A. An EIS Was Required Because of the "Highly Controversial" Nature of the LNG Rule.

An agency action's impacts are significant if they are "likely to be highly controversial." 40 C.F.R. § 1508.27(b)(4) (2019). An agency action is "highly controversial," in turn, when "a substantial dispute exists as to the size, nature, or effect of the major federal action." *Standing Rock Sioux Tribe*, 985 F.3d at 1042. PHMSA claims that its history of regulating the transportation of hazardous materials and the LNG Rule's additional safety measures supported a conclusion "that a substantial dispute does not exist regarding the risks from transporting LNG by rail." Resp'ts' Br. 79. That argument is mistaken.

In evaluating the "highly controversial" factor, courts ask whether commenters articulated "flaws in the methods or data relied upon by the agency in reaching its conclusions," paying particular attention to the concerns raised by experts and government agencies. *National Parks Conservation Ass'n*, 916 F.3d at 1083. As this Court has recognized, "an EIS is perhaps especially warranted where an agency explanation confronts but fails to resolve serious outside criticism." *Standing Rock Sioux Tribe,* 985 F.3d at 1043.

That characterization aptly describes this case. As State Petitioners have explained, numerous government agencies and emergency response organizations stressed the lack of safety studies supporting PHMSA's finding that transporting LNG by rail would not have a significant impact on public safety or the environment. *See* States' Br. 18-20. The National Transportation Safety Board (the "Safety Board"), for example, noted that the record lacked any data providing a crashworthiness assessment for the proposed tank car, and sharply criticized PHMSA's approach of relying on the accident history of similar hazardous materials transported in the small fleet of 120W tank cars. (Safety Board Comments 3, J.A. 118.)

PHMSA failed to address these concerns when it issued a Final Rule adopting the W9 design. Indeed, PHMSA continued to rely on the same historic derailment data that the Safety Board, State Petitioners, and emergency response organizations criticized in their comments, rather than bolster the record with a crashworthiness assessment. *See* States' Br. 20. If anything, PHMSA exacerbated the problems highlighted by the commenters by requiring a novel and untested tank car design.

PHMSA's brief makes no attempt to distinguish this case from circumstances where this Court has found that the "highly controversial" factor required an EIS. *See* Resp'ts' Br. 77-80. Instead, PHMSA restates the same conclusory analysis that appeared in the Final Environmental Assessment: that the history of transporting

hazardous materials by rail and the Final Rule's additional requirements adequately addressed commenters' concerns. Resp'ts' Br. 79. The highly controversial effects of the Rule thus were never resolved, and PHMSA was required to prepare an EIS. *See National Parks Conservation Ass'n*, 916 F.3d at 1085-86.

B. The Unique Dangers Inherent in Transporting LNG by Rail Required an EIS.

Impacts are also significant if they are "highly uncertain or involve unique or unknown risks." 40 C.F.R. § 1508.27(b)(5) (2019). PHMSA claims that the risks of transporting LNG by rail are not "uncertain, unique, or unknown" because "the risks from transporting cryogenic flammable gases are well known." Resp'ts' Br. 79 (citing Final Environmental Assessment 59, J.A. 494). That position ignores several obvious and unique aspects of transporting LNG by rail.

First, the large amounts of LNG envisioned for transportation under the LNG Rule present unique risks. PHMSA unreasonably relied on safety data compiled from the transportation of different cryogenic liquids in shipments involving at most three cars per manifest train, which is far less than the dozens of LNG cars PHMSA envisions being shipped in manifest or unit trains. (State Comments 8, J.A. 169.) Such train configurations pose unique hazards. The risk of cascading failure, for example, is relatively low for the traditionally limited shipments of other cryogenic flammable gases in manifest trains because the limited number of cars carrying such gases limits the potential for cargo released from one car to compromise another.

Second, LNG itself behaves in ways that set it apart from other flammable liquids shipped in unit train configurations. LNG is heavier than air and, if released from a car under atmospheric conditions, may form an extra-cold odorless cloud capable of travelling long distances until it disperses, ignites, or explodes. (State Comments 3, J.A. 164.) Transporting LNG thus presents unique challenges for emergency responders. States' Br. 17 n.4 (citing comments).

Indeed, PHMSA's statements that risks were not "uncertain, unique, or unknown" run contrary to its own reasoning for temporarily suspending the LNG Rule. PHMSA claims that it "suspended the Rule because uncertainties—e.g., regarding the near-term commercial viability of rail tank car LNG transportation, as well as potential safety and environmental benefits and risks of such transportation—had increased since the Rule issued." Resp'ts' Br. 12. But the safety and environmental uncertainties that led PHMSA to temporarily suspend the LNG Rule in 2023 were also present when PHMSA finalized the rule in 2020. The National Academies Reports referenced in the Suspension Rule did not reveal *new* data gaps but, rather, confirmed that the LNG Rule had been published without adequate supporting data. *See* Resp'ts' Br. 12 (citing need "to complete ongoing testing and evaluation efforts" identified by the National Academies Reports as reason for Suspension Rule). In light of these "significant data gaps," an EIS was

required. *See Environmental Defense Ctr. v. Bureau of Ocean Energy Mgmt.*, 36 F.4th 850, 880-82 (9th Cir. 2022).

C. The Potential for Significant Public Safety Impacts Required an EIS.

Significance is also a matter of "the degree to which the proposed action affects public health or safety." 40 C.F.R. § 1508.27(b)(2) (2019). PHMSA claims that the "120W cars have a strong safety record, have been used for decades, and have not been linked to any fatalities," Resp'ts' Br. 78, and that the additional features of the W9 tank car provide "safeguards" that "reduce the impact to a minimum." Resp'ts' Br. 78 (quoting *New York v. Nuclear Regul. Comm'n*, 681 F.3d 471, 477 (D.C. Cir. 2012)). But the history on which PHMSA relies does not support a conclusion that the health and safety risks are minimal, and the record lacked a sufficient basis for PHMSA to conclude that the W9's additional features would sufficiently minimize those risks. States' Br. 16-17, 21-25.

The historic operation of 120W cars is of limited value here because the amounts of LNG that can be shipped under the LNG Rule will vastly exceed the amounts of cryogenic flammable cargo previously shipped in 120W cars. Under NEPA, an agency's safety conclusions must be "forward-looking" and account for changes made by the proposed rule itself. *See Nuclear Regul. Comm'n*, 681 F.3d at 479. Thus, the assertion that 120W cars have safely transported small amounts of

ethylene in the past is of limited value in assessing the risks that the LNG Rule presents.

To the extent that the safety history on which PHMSA relies is relevant, it does not support the agency's conclusion of minimal risk. (*See* Safety Board Comments 3, J.A. 118.) The Final Environmental Assessment cited only two historic derailments involving 120W (or equivalent) tank cars, each of which involved significant breaches. In the Kansas derailment cited in the Final Environmental Assessment, two out of three cars breached, losing their cargo, and the vent stream from the third car's pressure relief device caught fire. In the Louisiana derailment, both cars breached and lost their cargo. *See* States' Br. 22-23. PHMSA discounts those breaches because there were no reports of injuries or fatalities in either incident. Resp'ts' Br. 68. An absence of past injury, however, does not prove that the risk of future injury is minimal. *See Standing Rock Sioux Tribe*, 985 F.3d at 1051; *Nuclear Regul. Comm'n*, 681 F.3d at 481.

The record also does not support PHMSA's conclusion that the LNG Rule's additional controls would minimize that risk. Nearly four years after the LNG Rule was finalized, studies to determine the effectiveness of those modifications remain incomplete. This Court should not blindly accept PHMSA's assurances in such a situation. *See Nuclear Regul. Comm'n*, 681 F.3d at 471 (rejecting agency's claims that untested changes would reduce risks to a minimum).

In short, trains carrying up to 100 cars of LNG pose a clear and serious threat to public safety, one highlighted in detail not just by all Petitioners, but also by the National Transportation Safety Board, and emergency responders. Neither the history of transporting limited amounts of other cryogenic flammable liquids by rail nor the untested increase in tank thickness provided by the LNG Rule excused PHMSA from preparing an EIS.

II. PHMSA'S FINDING OF NO SIGNIFICANT IMPACT WAS ARBITRARY AND CAPRICIOUS BECAUSE THE AGENCY FAILED TO TAKE A "HARD LOOK" AT IMPACTS ON PUBLIC SAFETY, GREENHOUSE GAS EMISSIONS, AND ENVIRONMENTAL JUSTICE COMMUNITIES.

Even if it were otherwise acceptable for PHMSA to rely upon an environmental assessment, the agency's finding of no significant impact was arbitrary and capricious. PHMSA's contrary arguments rest largely on the assertion that its decision whether to prepare an EIS is owed "considerable deference." Resp'ts' Br. 64 (quoting *Nuclear Regul. Comm'n*, 681 F.3d at 477). But where, as here, the record lacks sufficient evidence to support the agency's finding, no such deference is warranted. *See Nuclear Regul. Comm'n*, 681 F.3d at 483 (holding that the court "cannot defer" to an agency's conclusions where the agency failed to sufficiently analyze the risks of its action).

A. PHMSA Failed to Take a "Hard Look" at the LNG Rule's Public Safety Impacts.

PHMSA asserts that its analysis of historic derailments, existing operational controls, and the LNG Rule's additional requirements adequately supported a finding that the LNG Rule would not have a significant impact on public safety. Resp'ts' Br. 65-68. But this Court has rejected findings of no significant impact where, as here, the record lacked sufficient evidence to support such findings.

For example, in *Nuclear Regulatory Commission* the Commission argued that historical data showing limited leaks from the onsite storage of spent nuclear fuel sufficiently supported its conclusion that onsite storage for an additional sixty years would not have a significant impact. 681 F.3d at 479-81. The Commission acknowledged that leaks had occurred in the past but "brushe[d] away" those examples because they "had only a negligible near-term health impact." *Id*. at 481. This Court concluded that the Commission failed to evaluate the risks "in a forward-looking fashion" and failed to "examine the potential consequences" of future leaks. *Id*. at 479. It also rejected the Commission's arguments that untested improvements to spent fuel storage pools would further reduce the threat of leaks and that the Commission's continuing oversight of storage facilities would provide yet another buffer against such harm. *Id*. at 479-81.

This Court's reasoning in *Nuclear Regulatory Commission* applies with equal force here. PHMSA acknowledged two sets of derailments, only to brush them away

because there were no reports of injuries. *See* Resp'ts' Br. 68. Critically, PHMSA offered no analysis suggesting that any lack of injuries was due to the safety of the cars affected, as opposed to "site specific factors or even sheer luck." *See Nuclear Regul. Comm'n*, 681 F.3d at 481 (rejecting agency's discussion of historic leaks on the same basis).

PHMSA also argues that the LNG Rule's additional requirements, primarily the thicker outer tank of the W9 model, would further minimize the risk from any breach. Resp'ts' Br. 68. But the record lacked sufficient evidence to support that conclusion, because neither the crashworthiness of the W9 tank car nor its performance when exposed to LNG under derailment conditions had been tested. States' Br. 21, 24-25. Indeed, subsequent reports from the National Academies of Sciences confirm that PHMSA lacked data fundamental to understanding the W9's crashworthiness when it finalized the LNG Rule, and PHMSA acknowledged as much when it temporarily suspended the LNG Rule. Resp'ts' Br. 12; *see* discussion above at pages 8-9. Just as in *Nuclear Regulatory Commission*, this Court should not defer to the agency's finding of no significant impact based on such "untested" assumptions. 681 F.3d at 481.

Even if the Court were to accept PHMSA's position that the W9 reduces the risk of tank failure, that alone would not be enough to support the agency's finding of no significant impact. Such a finding is not appropriate simply because the risks

of a given activity have been reduced. Rather, it "is appropriate only if a grave harm's probability is so low as to be remote and speculative, or if the combination of probability and harm is sufficiently minimal." *Standing Rock Sioux Tribe,* 985 F.3d at 1049 (internal quotation marks omitted). As this Court recognized in *Standing Rock Sioux Tribe*, "doing away with the obligation to prepare an EIS whenever a project presents a low-probability risk of very significant consequences would wall off a vast category of major projects from NEPA's EIS requirement." *Id*. Yet PMHSA urges that very approach here.

B. PHMSA's Analysis of Greenhouse Gas Emissions Was Arbitrarily Curtailed.

PHMSA asserts that it gave a "hard look" to the LNG Rule's impact on greenhouse gas emissions in the Final Environmental Assessment. Resp'ts' Br. 69. But the agency's narrow analysis of greenhouse gas impacts was insufficient. It is true that PHMSA accounted for the relative greenhouse gas emissions of transporting LNG by rail and truck, the emissions associated with fabricating new W9 tank cars, and the emissions from venting and potential accidents. Resp'ts' Br. 70-72. That analysis, however, entirely ignored the more fundamental question whether the LNG Rule—which was specifically promulgated to spur "development of our nation's vast energy resources," Hazardous Materials: Liquefied Natural Gas by Rail, 85 Fed. Reg. 44,994, 44,998 (July 24, 2020)—would in fact induce additional upstream and downstream emissions.

PHMSA contends that "unknowns frustrated [PHMSA's] ability to meaningfully predict the rule's impact on gas markets," Resp'ts' Br. 72, but that statement is hard to reconcile with the agency's stated purpose for the Rule. If the very purpose of the Rule was to increase upstream gas production, then a "hard look" should have included an assessment of those not only foreseeable but specifically intended effects. *See, e.g., Sierra Club v. FERC*, 867 F.3d 1357, 1374-75 (D.C. Cir. 2017) ("*Sabal Trail*") (holding that "hard look" required assessment of greenhouse gas emissions despite need to rely on educated assumptions).

It was vital that PHMSA credibly consider greenhouse gas emissions here, because the LNG Rule represented the last federal action needed before rail carriers could ship LNG in tank cars. *See State of Cal. v. Block*, 690 F.2d 753, 761 (9th Cir. 1982). This is not the type of agency action where environmental impacts will be reviewed at a later stage. Instead, it is the type of transformational change that this Court has found requires a detailed evaluation of all reasonably foreseeable effects. *See Foundation for Econ. Trends v. Heckler*, 756 F.2d 143, 154 (D.C. Cir. 1985) (requiring environmental impact statement where record indicated that project could result in dispersion of genetically modified organisms into the environment).

C. PHMSA's Analysis of Impacts on Environmental Justice Communities Was Arbitrarily Curtailed.

PHMSA does not dispute that it was required to consider the LNG Rule's impacts on communities with environmental justice concerns. Resp'ts' Br. 74.

Rather than examine the composition of communities along the rail lines most likely to carry LNG trains, however, the agency fell back on a series of speculative and equivocating statements to excuse itself from taking the requisite hard look at those impacts.

PHMSA claims, as it did below, that the rule "might facilitate LNG transportation through [such] communities . . . but it also might reduce highway transportation of LNG through those communities." Resp'ts' Br. 74 (quoting Final Environmental Assessment 42, J.A. 477). And because "PHMSA did not know the routes that shippers would use," it claims that it did not have to consider the composition of communities along routes that were likely to be used. Resp'ts' Br. 74. At the same time, PHMSA relies on the entirely speculative assertion that "lower-income families and economically-distressed areas could potentially benefit from lower gas prices" because of the Rule. Resp'ts' Br. 74.

Such speculative statements fall far short of the level of consideration that this Court has found necessary to satisfy the "hard look" requirement. In *Sabal Trail*, for example, the Court found that the agency had satisfied that requirement when it compared the composition of communities along proposed pipeline routes; the Court noted, however, that its analysis would have been different if the "agency had refused entirely to discuss the demographics" of its proposal. *Sabal Trail*, 867 F.3d at 1369. That is exactly what happened here.

PHMSA further errs in claiming that it was excused from conducting a more thorough evaluation of the LNG Rule's impact on communities burdened with environmental justice concerns because it did "not know the routes that shippers would use." Resp'ts' Br. 75. PHMSA had other options available. For example, it could have assessed the demographics around all rail lines to provide a general picture of how rail shipment might impact environmental justice communities. It also could have conducted a more focused analysis of likely rail routes. Instead, the agency did nothing to assess impacts on environmental justice areas and thus failed to take the "hard look" NEPA required. *See Sabal Trail*, 867 F.3d at 1369.

III. THE W9 DESIGN WAS AN UNFORESEEABLE DEPARTURE FROM THE PROPOSAL, UNDERMINING THE PUBLIC'S ABILITY TO PARTICIPATE IN THE NEPA PROCESS.

NEPA requires agencies to give the public a meaningful opportunity to comment on proposed actions that might impact the environment. *See* States' Br. 14-16. Here, PHMSA's decision to authorize the W9 tank car failed to comply with that requirement, for it marked an unforeseeable departure from the Proposal. Indeed, the W9 design did not even exist when PHMSA published the Proposal. Until the final rule was published, PHMSA gave no indication it was considering approving a new and untested tank car design that would need to be built entirely from scratch.

PHMSA's adoption of such a design was even less foreseeable in light of two statements that the agency made in the Proposal. First, PHMSA specifically rejected a different model tank car—the 140W—because it lacked sufficient information concerning that model. States' Br. 15 (citing Final Environmental Assessment 6, J.A. 441). Thus, PHMSA seemed to appreciate that it needed *some* information concerning a rail tank car's performance before approving it to transport LNG. Yet PHMSA possessed *no* information concerning the W9's performance under derailment conditions when it issued the LNG Rule. Nor could it have, because one had never been built.

Second, the agency specifically asked for comments on "whether additional operational controls may be warranted" but did not seek comment on changes to the tank car design itself. Hazardous Materials: Liquefied Natural Gas by Rail, 84 Fed. Reg. 56,964, 56,969 (Oct. 24, 2019); Environmental Pet'rs' Br. 37-38. Thus, commenters unsurprisingly focused their attention on operational controls and not potential changes to the 120W tank car design that could mitigate safety concerns.

PHMSA argues that, even if the public lacked notice of the W9 design, the lack of notice was harmless because the W9 increased the safety of the LNG Rule. Resp'ts' Br. 63. That argument is again speculative because the record lacks sufficient data to show that the W9 design, which is heavier than the existing 120W tank car, in fact provides enhanced safety. *See* States' Br. 22-25. PHMSA also

argues that "manufacturers have always been allowed to build outer tanks that are thicker than the minimum requirements." Resp'ts' Br. 53. Yet it provides no indication that manufacturers have ever done so, much less that such voluntary conduct would have provided the public with notice that PHMSA was considering increasing the minimum regulatory requirement in the final LNG Rule.

CONCLUSION

The petition for review should be granted and the Court should vacate the LNG Rule.

Dated: April 11, 2024

Respectfully submitted,

LETITIA JAMES
Attorney General of New York

/s/ Michael J. Myers
Michael J. Myers
Senior Counsel
Max Shterngel*
Assistant Attorney General
Brian Lusignan
Assistant Solicitor General
The Capitol
Albany, NY 12224
(518) 776-2382
michael.myers@ag.ny.gov

Attorneys for the State of New York

ANTHONY G. BROWN
Attorney General of Maryland

/s/ Joshua M. Segal[3]
Joshua M. Segal
Assistant Attorney General
Steven J. Goldstein*
Special Assistant Attorney General
200 Saint Paul Place, 20th Floor
Baltimore, Maryland 21202
(410) 576-6446
jsegal@oag.state.md.us

Attorneys for the State of Maryland

[3] Counsel for the State of Maryland represents that the other parties listed in these signature blocks consent to this filing.

FOR THE STATE OF CALIFORNIA

ROB BONTA
Attorney General of California

/s/ Kavita Lesser
Edward H. Ochoa*
Senior Assistant Attorney General
Jeremy Brown*
Supervising Deputy Attorney General
Kavita Lesser
Deputy Attorney General
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
(213) 269-6605
kavita.lesser@doj.ca.gov
ed.ochoa@doj.ca.gov
dennis.beck@doj.ca.gov

Attorneys for the State of California

FOR THE STATE OF DELAWARE

KATHLEEN JENNINGS
Attorney General of Delaware

/s/ Christian Douglas Wright
Christian Douglas Wright
Director of Impact Litigation
Ralph K. Durstein III*
Deputy Attorney General
Delaware Department of Justice
820 N. French Street
Wilmington, DE 19801
(302) 683-8899
christian.wright@delaware.gov
ralph.durstein@delaware.gov

Attorneys for the State of Delaware

FOR THE STATE OF ILLINOIS

KWAME RAOUL
Attorney General

/s/Elizabeth Dubats
Elizabeth Dubats
Jason E. James
Assistant Attorneys General
69 W. Washington St., Suite 1800
Chicago, IL 60602
(773) 590-6794
elizabeth.dubats@ilag.gov
jason.james@ilag.gov

Attorneys for the State of Illinois

FOR THE COMMONWEALTH OF MASSACHUSETTS

ANDREA JOY CAMPBELL
Attorney General

/s/ Seth Schofield
Seth Schofield
Senior Appellate Counsel
Energy and Environment Bureau
Office of the Attorney General
One Ashburton Place, 18th Floor
Boston, MA 02108
(617) 727-2200
seth.schofield@mass.gov

Attorneys for the Commonwealth of Massachusetts

FOR THE PEOPLE OF THE STATE OF MICHIGAN

DANA NESSEL
Attorney General

/s/ Elizabeth Morrisseau
Elizabeth Morrisseau
Assistant Attorney General
Environment, Natural Resources,
and Agriculture Division
6th Floor G. Mennen Williams Building
525 W. Ottawa Street
P.O. Box 30755
Lansing, MI 48909
(517) 335-7664
morrisseaue@michigan.gov

Attorneys for the People of the State of Michigan

FOR THE STATE OF MINNESOTA

KEITH ELLISON
Attorney General

/s/ Peter N. Surdo
Peter N. Surdo
Special Assistant Attorney General
Minnesota Attorney General's Office
445 Minnesota Street
Town Square Tower, Suite 1400
Saint Paul, MN 55101
(651) 757-1061
peter.surdo@ag.state.mn.us

Attorneys for the State of Minnesota

FOR THE STATE OF NEW JERSEY

MATTHEW J. PLATKIN
Attorney General

/s/ Lisa Morelli
Lisa Morelli
Deputy Attorney General
New Jersey Division of Law
25 Market Street
Trenton, NJ 08625
(609) 376-2740
lisa.morelli@law.njoag.gov

Attorneys for the State of New Jersey

FOR THE STATE OF OREGON

ELLEN F. ROSENBLUM
Attorney General

/s/ Paul A. Garrahan
Paul A. Garrahan
Attorney-in-Charge
Steve Novick
Special Assistant Attorney General
Natural Resources Section
General Counsel Division
Oregon Department of Justice
1162 Court Street NE
Salem, OR 97301
(503) 947-4540
paul.garrahan@doj.state.or.us
steve.novick@doj.state.or.us

Attorneys for the State of Oregon

FOR THE COMMONWEALTH
OF PENNSYLVANIA

MICHELLE A. HENRY
Attorney General

/s/ Ann R. Johnston
Ann R. Johnston
Assistant Chief Deputy Attorney General
Civil Environmental Enforcement Unit
Office of the Attorney General
Strawberry Square
14th Floor
Harrisburg, PA 17120
(717) 857-2091
ajohnston@attorneygeneral.gov

Attorneys for the Commonwealth of Pennsylvania

FOR THE STATE OF
RHODE ISLAND

PETER F. NERONHA
Attorney General

/s/ Nicholas M. Vaz
Nicholas M. Vaz
Special Assistant Attorney General
Office of the Attorney General
Environmental and Energy Unit
150 South Main Street
Providence, RI 02903
(401) 274-4400 ext. 2297
nvaz@riag.ri.gov

Attorneys for the State of Rhode Island

FOR THE STATE OF VERMONT

CHARITY R. CLARK
Attorney General

/s/ Laura B. Murphy
Laura B. Murphy
Assistant Attorney General
Vermont Attorney General's Office
109 State Street
Montpelier, VT 05609
(802) 828-3186
laura.murphy@vermont.gov

Attorneys for the State of Vermont

FOR THE STATE OF WASHINGTON

ROBERT W. FERGUSON
Attorney General

/s/ Julian H. Beattie
Julian H. Beattie
Assistant Attorney General
Office of the Attorney General
P.O. Box 40117
Olympia, WA 98504-0117
(360) 586-6749
julian.beattie@atg.wa.gov

Attorneys for the State of Washington

FOR THE DISTRICT OF COLUMBIA

BRIAN L. SCHWALB
Attorney General

/s/ Caroline S. Van Zile
Caroline S. Van Zile
Solicitor General
Office of the Attorney General
for the District of Columbia
400 6th Street N.W., Suite 8100
Washington, DC 20001
(202) 724-6609
Caroline.vanzile@dc.gov

Attorneys for the District of Columbia

*Not admitted to the bar of this Court.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of the briefing order established in this case, and Federal Rule of Appellate Procedure 32(a)(7)(B), because this brief contains 4,314 words, Environmental Petitioners' brief includes 4,333 words, and the Petitioner Tribe's brief includes 4,329 words excluding the parts of the briefs exempted by Rule 32(f). Thus, petitioners' briefs comprise a total of 12,976 words.

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Rule 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in fourteen-point, Times New Roman.

/s/ Joshua M. Segal
Joshua M. Segal

CERTIFICATE OF SERVICE

I certify that, on this 11th day of April, 2024, this Final Reply Brief of State Petitioners was filed electronically via the Court's CM/ECF system, which will effect service on all counsel of record who are registered CM/ECF users.

/s/ Joshua M. Segal
Joshua M. Segal