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Docket No. PHMSA-2011-0023

Re: Comments of the Independent Producers –
Pipeline Safety: Safety of Gas Transmission Pipelines
[81 Fed. Reg. 20722 (April 8, 2016)]

Dear Sirs:

The Independent Petroleum Association of America (IPAA) and its members, along with the American Exploration & Production Council, the Colorado Oil and Gas Association, the Independent Oil & Gas Association of West Virginia, the Kansas Independent Oil & Gas Association, the Kentucky Oil & Gas Association, the Michigan Oil and Gas Association, the Ohio Oil and Gas Association, the Pennsylvania Independent Oil & Gas Association, the Texas Alliance of Energy Producers, the Virginia Oil and Gas Association, and the West Virginia Oil and Natural Gas Association (collectively, Independent Producers), appreciate this opportunity to respond to the Pipeline and Hazardous Materials Safety Administration's (PHMSA's) notice of proposed rulemaking referenced above (NOPR). That notice seeks to upend the existing framework for regulating natural gas production and gathering lines, suggesting that the current framework may no longer be appropriate due to (i) the development of unconventional natural gas resources in shale formations and (ii) the claim that "enforcement of the current requirements has been hampered by the conflicting and ambiguous language of API RP 80." Neither rationale supports the proposals contained in the NOPR.¹

¹See NOPR at 20801.

The Independent Producers represent thousands of independent oil and natural gas producers and service companies across the United States, including many small, family-owned businesses. Those producers drill 90% of the wells in the United States producing much of the country's natural gas and oil. This coalition will actively participate in all phases of this proceeding.

Concerned about the harmful impact that misplaced federal regulation can have on these producers and the energy resources they generate for the country, the Independent Producers make the following comments:

I. Regulatory Background

a. PHMSA Has No Authority Over Production Operations

In 1968, Congress enacted the Natural Gas Pipeline Safety Act (the "Pipeline Safety Act") to establish "minimum Federal safety standards for the transportation of natural and other gas by pipeline and for pipeline facilities."² Congress believed that the rapid growth of the natural gas industry, and in particular the significant increase in pipeline mileage since the Second World War, required a consideration of the industry's pipeline safety record, with a view towards ensuring the safety in design, installation, inspection, testing, construction and operation of pipeline facilities.³ Pipeline facilities subject to the Act, both then and now, include only those facilities used for the transmission and distribution of natural gas, as well as a *limited* group of gathering lines.⁴ **Noticeably excluded by Congress from the Pipeline Safety Act's jurisdiction, however, are those facilities used to transfer natural gas during production operations.**⁵

Tellingly, the Senate also initially excluded gathering lines entirely from the Pipeline Safety Act's jurisdiction, based on the remarkable safety record of those lines:

This jurisdiction had not been in the bill as reported by the Senate committee, but had been added on the floor of the Senate. There is no question that there exist certain gathering lines which are located in populous areas but the tremendous bulk of such lines is located in rural areas. Testimony was offered as to the safety record of these lines and that no man-days had been lost as the

² H.R. Report No. 1390, 90th Cong., 2nd Sess., *reprinted in* 1968 U.S. Code Cong. & Admin. News 3223 (1968).

³ *Id.* at 3224-25 and 3235.

⁴ See 49 U.S.C. §§ 60101(a)(3), (18), and (21).

⁵ This, in fact, has long been the Department's understanding. See, e.g., Office of Pipeline Safety Interpretation Letter from Cesar DeLeon, Director, Regulatory Programs, to Lance Fellhoalter, OXY USA, Inc. (Oct. 8, 1993); Office of Pipeline Safety Interpretation Letter from Cesar DeLeon, Director, Regulatory Programs, to Edward M. Steele, Gas Pipeline Safety Section, The Public Utilities Commission of Ohio (Mar. 12, 1992).

result of accidents on gathering lines during the past 6 years.
The safety record is impressive.⁶

Congress, mindful of the safety of those citizens in more populous areas, however, eventually included within the Act's jurisdiction those gathering lines located within municipalities, but maintained the exclusion for those lines located in rural areas. It did so through the Act's definition of "transportation of gas," meaning –

[T]he gathering, transmission or distribution of gas by pipeline
* * *; **except that it shall not include the gathering of gas in those rural locations which lie outside the limits of** any incorporated or unincorporated city, town, village, or any other designated residential or commercial area such as a subdivision, a business or shopping center, a community development, or any similar populated area which the Secretary may define as a nonrural area[.]⁷

The Pipeline Safety Act has been amended several times since its original enactment. In 1992, for example, finding ambiguity in existing definitions, Congress required the Department to define the term "gathering line" and then define a subclass of "regulated gathering lines" that would not be excluded simply because of their rural nature.⁸ The legislative history shows that Congress meant for this regulation to be based upon an actual – and not merely a perceived – risk of harm from gathering line operations:

H.R. 1489 requires DOT finally to define the term "gathering line," to develop an inventory of these lines, and to define a class of "regulated gathering lines" that warrant some safety regulation. DOT is given a great deal of discretion to implement this section based on the information it receives as it proceeds. **If DOT finds that none of these lines poses a hazard to people, property, or the environment, none of them will be regulated.**

* * * DOT should find out whether any gathering lines present a risk to people or the environment, and if so how large a risk and what measures should be taken to mitigate the risk. **A possible outcome of the DOT rulemaking is the status quo ante.** [*Id.* at 2653 (emphasis is ours)]

Notably absent from any of these amendments, however, is a single congressional effort to include within the Act's scope oil and natural gas **production facilities**.

⁶ 1968 U.S. Code Cong. & Admin. News at 3234 (emphasis is ours).

⁷ *Id.* at 827 (emphasis is ours). See also *id.* at 3235.

⁸ See Pub. L. No. 102-508, § 109(b); 1992 U.S. Code Cong. & Admin. News 2642 at 2652-53.

Those facilities always have been – and remain today – exempt from federal Pipeline Safety Act regulation.

*b. PHMSA Has Limited Authority to Regulate Gathering Lines
– Based on Function and Necessity*

In 1992, and later again in 1996 (although without altering the deadline), Congress directed PHMSA to determine which, if any, rural gathering lines needed to be regulated based on the specific physical safety risks that the lines presented:

Not later than October 24, 1995, the Secretary, if appropriate, shall prescribe standards defining the term “regulated gathering line.” In defining the term, the Secretary shall consider factors such as location, length of line from the well site, operating pressure, throughput, and the composition of the transported gas or hazardous liquid, as appropriate, in deciding on the types of lines that **functionally are gathering** but should be regulated under this chapter because of specific physical characteristics. [49 U.S.C. § 60101(b)(2)(A) (emphasis is ours)]⁹

The legislative history shows PHMSA’s determination was to be based on the actual – as opposed to merely speculative – risks presented by those lines. That was re-emphasized in 1996, when Congress added the “if appropriate” language underscored above, making its directive to PHMSA consistent with the overall focus of those legislative amendments on **risk management**. See 1996 U.S. Code Cong. & Admin. News 4158 at 4167 (“Section 3 also provides that the Secretary shall define ‘regulated gathering line,’ but only if it is appropriate to do so.”).

At that time, Congress consciously made a wholesale shift in its regulatory methodology for pipeline systems – from “command-and-control” to a risk-based model. The Report from the Committee on Transportation and Infrastructure states, for example:

In the past decade, Congress has directed the Secretary to issue certain regulations on a variety of safety measures and prescribed the contents and coverage of certain regulatory actions in detail. Legislation was largely driven by successive reactions to particular accidents, whereby Congress would impose additional prescriptions on the industry to remedy the perceived safety problems. In this time period however, these regulatory actions have had varying impacts on overall pipeline safety; **the industry’s record remained consistently excellent**.

⁹ Note that this provision supports the definitional methodology adopted by RP-80 – i.e., whether a line or piece of equipment is properly characterized as production or gathering **depends on the function of the facility**.

OPS and the pipeline industry have both proposed to move the program away from the prescriptive model towards a risk-based approach. The Committee agrees * * *.

H.R. Rep. No. 110(I), 104th Cong., 1st Sess. 1995 (Risk Assessment) (emphasis is ours). It then goes on to discuss the fundamental concept behind the new risk-based methodology – a true weighing of the costs of regulation versus its benefits. Quoting an earlier House Report that served as the driver for the Risk Assessment and Cost Benefit Act of 1995, the Committee stated:

The general problem as perceived by many in State and local government and in the business community is that Federal regulatory costs are too often out of proportion to the problems that the regulations are designed to address. The concern in the area of health, safety and environmental regulations is that the Federal programs require expenditures of substantial economic resources **on reductions in risk which are either too hypothetical, exaggerated or small**. The overall perception from many quarters is that a significant portion of Federal health, safety or environmental regulatory costs reflect unwise priorities for national economic resources.

* * *

In many contexts, Federal agencies explicitly state that their risk assessment process is designed to produce estimates that ‘err on the side of safety’ because of scientific uncertainties and to ensure that the broadest range of the public is protected, consistent with Federal statutory intent. It is generally believed that these ‘upper bound estimates’ are highly improbable and differ from the most plausible level of risk by many orders of magnitude. Moreover, the practice of only calculating upper bound or worst case estimates of risk is criticized as **inappropriately collapsing scientific findings with a preconceived policy judgment or bias**. * * *

Many advocate giving more prominence to the consideration of the relationship between costs and benefits and setting regulatory priorities.

Id. (emphasis is ours). As a consequence, the Committee recommended – **and Congress ultimately adopted** – the use of risk management concepts for pipeline safety matters. The Independent Producers believe that those concepts, both as a matter of congressional intent and sound public policy, must and should inform the inquiry here – i.e., whether there is a need to change the existing regulatory framework regarding natural gas gathering lines, a framework that took decades to finally resolve.

c. Resulting Framework: American Petroleum Institute RP-80

After 30 years of regulatory discussion, PHMSA adopted the industry consensus standards contained in the American Petroleum Institute's (API's) Recommended Practice 80, known in the industry simply as "RP-80."¹⁰ Those standards were developed by over 20 national, regional and state oil and gas industry associations representing every facet of our national oil and gas industry, including production, gathering, processing and transmission operations. RP-80 properly focuses on **the function performed by the facility** under regulatory scrutiny, recognizing, for example, that production operations often extend well downstream from the wellhead and may include processes required to prepare the gas for transportation (including separation, dehydration, liquid stripping, and compression). See, e.g., 71 Fed. Reg. 50 at 13289 (PHMSA recognizing that "Congress gave DOT specific authority to define gas gathering lines ... [and directing] DOT to consider functional and operational characteristics [when deriving those definitions].").

II. The Independent Producers' Comments on the NOPR

PHMSA proposes to repeal RP-80 and redefine both *onshore production operation* and *onshore gathering line* as follows:

Onshore production facility or *onshore production operation* means, wellbores, equipment, piping, and associated appurtenances confined to the physical acts of extraction or recovery of gas from the earth and the **initial preparation for transportation**. Preparation for transportation does **not necessarily mean the gas will meet "pipeline quality"** specifications as may be commonly understood or contained in many contractual agreements. Piping as used in this definition may include individual well flow lines, equipment piping, and transfer lines between production operation equipment components. **Production facilities terminate at the furthestmost downstream point where: Measurement for the purpose of calculating minerals severance occurs; or there is commingling of the flow stream from two or more wells.**¹¹

Gathering line (Onshore) means a pipeline, or a connected series of pipelines, and equipment used to collect gas from the **endpoint of a production facility/operation** and transport it to the furthestmost point downstream of the endpoints described in paragraphs (1) through (4) of this definition:...(4) The point where **separate production fields are commingled, provided the**

¹⁰ 71 Fed. Reg. 13289.

¹¹ See NOPR at 20826 (emphasis is ours).

distance between the interconnection of the fields does not exceed 50 miles, unless the Associate Administrator of Pipeline Safety finds a longer separation distance is justified in a particular case (see § 190.9 of this chapter).¹²

The Independent Producers adamantly oppose this proposal and submit the following comments below.

a. The Independent Producers Oppose the Wholesale Repeal of RP-80

RP-80, adopted after decades of inquiry and discussion, provides the appropriate methodology for determining the dividing line between onshore production operations and gathering lines in accordance with all applicable federal statutes, and offers the certainty necessary for safe and efficient operations. RP-80's focus on the function of a line is not only consistent with the congressional directives but provides the flexibility necessary to define the end point of production and the beginning of gathering in production fields as disparate as the North Slope in Alaska to the shallow stripper wells found in Appalachia.¹³ PHMSA's wholesale rejection of that standard threatens to exceed its statutorily-circumscribed jurisdiction and is based on a flawed assessment of the need to do so.

i. Rejection of RP-80 Threatens to Exceed PHMSA's Statutorily-Prescribed Jurisdiction

The Independent Producers are concerned that an overly expansive view of gathering that is based on something other than a pipeline's function – as in RP-80 – threatens to regulate congressionally-exempted production facilities at the expense of sorely needed domestic energy resources and without any commensurate improvement in actual pipeline safety. This concern is not an invalid one – for over a decade commenters have urged PHMSA to ignore their statutorily defined jurisdictional boundaries in the name of public safety. For example, in 2002, the National Association of Pipeline Safety Representatives commented:

Historically, **production operations have been considered non jurisdictional** to pipeline safety regulations because they do not meet the definition of transporting gas for interstate commerce. Therefore **we would caution [PHMSA] to avoid defining the production/gathering interface in such a way that public safety is placed at a higher risk.** That is, a regulatory definition that attempts to fit all production operations may move the production/gathering interface further downstream from the producing well. This, in turn, may result in certain segments of piping that have a high inherent risk associated with their

¹² *Id.* at 20825 (emphasis is ours).

¹³ See 49 U.S.C. §§ 60101(a)(21) and 60101(b).

operation becoming nonjurisdictional to pipeline safety code.
[NAPSR Comments (Feb. 17, 2002) (emphasis is ours)]

And that comment was repeated in the NOPR itself. When discussing whether the definitions for *production operation* and *onshore gathering line* ought to be changed, PHMSA observed: “NAPSR and Commissioners of Wyoming County Pennsylvania suggested PHMSA assert regulatory authority **beginning at the wellhead or first metering point.**”¹⁴ That jurisdictional overreach, though, comes with no corresponding pipeline safety benefit despite the significant economic burden it creates.

An interest in promoting apparent pipeline safety does not provide a legitimate basis for extending PHMSA’s regulatory authority beyond its permissible statutory reach. It has long been the law that an agency’s jurisdiction is limited to that granted by statute, and that an agency cannot extend its own jurisdiction by regulatory fiat. See, e.g., *Michigan v. Environmental Protection Agency*, 268 F.3d 1075, 1081 (D.C. Cir. 2001).¹⁵ This is true even when an agency seeks to address what it sees as a legitimate, serious health problem. See, e.g., *Food and Drug Administration v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000) (“Regardless of how serious the problem an administrative agency seeks to address, however, it may not exercise its authority ‘in a manner that is inconsistent with the administrative structure that Congress enacted into law.’”) (Supreme Court holding that FDA did not have authority to regulate tobacco products despite concern over public health).

Nor is it necessary to do so here. PHMSA suggests that it seeks to repeal RP-80, at least in part, because “experience has shown that facilities are being classified as production much further downstream than was ever intended”¹⁶ and because it wishes to regulate greater pipeline mileage.¹⁷ The former is without any factual support whatsoever, and the latter – under RP-80 – is already happening. Members of the Independent Producers have reported that the construction of production facilities and gathering lines needed to develop shale fields naturally results in greater mileage being classified as regulated gathering under RP-80. Yet, even so, the desire to regulate more gathering lines and the challenges faced by PHMSA in enforcing its regulatory program do not justify disregarding the jurisdictional boundaries set by Congress.

¹⁴ See NOPR at 20802 (emphasis added).

¹⁵ “It is elementary that our federal government is one of limited and enumerated powers. ‘The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written.’ [citation omitted] This principal applies with equal force to the so-called modern administrative state. EPA is a federal agency – a creature of statute. It has no constitutional or common law existence or authority, but only those authorities conferred upon it by Congress.” See also, e.g., *Birth Hope Adoption Agency, Inc. v. Arizona Health Care Cost Containment System*, 218 F.3d 1040, 1045 (9th Cir. 2000) (“We note as a preliminary matter that ‘[t]he scope of an agency’s power is measured by statute and may not be expanded by agency fiat.’”).

¹⁶ See NOPR at 20803.

¹⁷ *Id.* at 20801.

Simply put, the legal principles cited above are particularly applicable here, where there has been no demonstrated need for federal pipeline safety regulatory authority over production facilities. There has been no showing that production facilities have been inadequately regulated by the states, where Congress properly left that authority. Even an advocate of greater authority for the Secretary at the time of the Pipeline Safety Act's original enactment warned against the unjustifiable encroachment of administrative jurisdiction: "I would nonetheless caution against a familiar pitfall of consumer legislation, the desire of well-intentioned administrators to achieve a wider jurisdiction than is proved necessary." Congressman Van Deerlin, 1968 U.S. Code Cong. & Admin. News at 3272. That congressional admonition is especially valid here.

ii. Rejection of RP-80 Conflicts with Congress' Directive for Updating Technical Standards

Congress directs federal agencies to use industry-adopted consensus standards whenever appropriate. See, e.g., 80 Fed. Reg. 168 (Jan. 5, 2015) (PHMSA acknowledging that "The National Technology Transfer and Advancement Act ... directs Federal agencies to **use voluntary consensus standards** and design specifications developed by voluntary consensus standard bodies **instead of government-developed** voluntary technical standards when appropriate."). Congress has further directed PHMSA to update those technical standards to the extent appropriate and practicable. See 49 U.S.C. § 60102(l) ("The Secretary shall, to the extent appropriate and practicable, update incorporated industry standards that have been adopted as part of the Federal pipeline safety regulatory program under this chapter.") PHMSA reaffirmed its incorporation of RP-80 as the applicable federal pipeline safety standard for gathering line regulation just over a year ago. In doing so, PHMSA noted that it "regularly reviews updates to currently referenced consensus standards as well as new editions of standards to ensure that their content remains consistent with the intent of the pipeline safety regulations."¹⁸ Importantly, PHMSA also acknowledged its "responsibility to establish regulations and standards that ensure pipelines are operated safely and **will only adopt those portions of industry standards into the Federal regulations that meet the agency's goals and best promote public safety.**"¹⁹

This raises the obvious question – what happened between January 2015 and April 2016 to justify a wholesale repeal of RP-80? The NOPR does not say. Assuming for the moment that PHMSA is correct that there is a need to do something (which the Independent Producers dispute), the NOPR fails to identify why an update of RP-80 – as opposed to its wholesale repeal – is not appropriate or practicable, as directed by Congress. If PHMSA believes that the language of RP-80 is vague, or that changes in natural gas production require a re-assessment of the production facilities and gathering line definitions, the Independent Producers and other industry stakeholders would participate in an effort to assess the need for action and clarify and update RP-80 if appropriate. That effort should be a collaborative undertaking, reflecting the broad diversity of the industry and producing regions throughout the country, to update a standard that is to be applied across the nation.

¹⁸ 80 Fed. Reg. at 169.

¹⁹ *Id.*

iii. A Flawed Report and Risk Assessment Do Not Justify a Repeal of RP-80

In HB 2845, Congress set out the appropriate path for PHMSA to follow when considering changes to the regulation of gas gathering lines and, by default, for determining where production ends and gathering begins. Congress called for PHMSA to study the issues and report to Congress on any need to modify its regulations. Then, Congress allowed itself the “necessary time to review the results of the report ... and during the review period, [DOT] **shall not issue final regulations.**” Section 8(b)(2). HB 2845 goes on to require an additional report by PHMSA that addresses whether federal and state laws and regulations are sufficient to ensure the safety of gas gathering lines, focusing specifically on:

(B) the economic impacts, technical practicability, and challenges of applying existing Federal regulations to gathering lines that are not currently subject to Federal regulation when compared to the public safety benefits; and

(C) subject to a risk-based assessment, the need to modify or revoke existing exemptions from Federal regulation for gas and hazardous liquid gathering lines.

HB 2845, Section 21(b)(2) B and C.

A complete report has never been produced. In fact, the only report delivered contains no analysis of the sufficiency of existing regulation but simply lists existing state regulations applicable to gathering lines.²⁰ The Independent Producers believe that the safety of the national pipeline system would be better served by the fulfillment of HB 2845’s requirements and the informed regulatory process that it contemplates. With the exceptional safety history in the Barnett Shale as an example, there is good reason to believe that there is little need for additional federal regulation of gathering lines. Any other path to change regulation of gathering lines is directly contrary to Congress’ express intent.

The only actual risks discussed in the NOPR involve older gas transmission lines that do not support a change in gas gathering regulation. For example, the NOPR states as a justification the following:

Data indicate that some pipelines continue to be vulnerable to issues stemming from **outdated construction methods or materials**. Much of the **older line pipe** in the nation’s gas transmission infrastructure was made before the 1970s using techniques that have proven to contain latent defects due to the

²⁰ See generally Review of Existing Federal and State Regulations for Gas and Hazardous Liquid Gathering Lines, dated September 4, 2013 delivered to The Honorable John Thune, Chairman, Committee on Commerce, Science, and Transportation United States Senate on May 8, 2015.

manufacturing process. ***. Because these manufacturing techniques were used during the time before the Federal gas regulations were issued, many of those pipes are subsequently exempt from certain regulations, most notably the requirement to pressure test the pipeline or otherwise verify its integrity to establish MAOP.²¹

Similarly, the NOPR states, for example: “[s]weeping changes in the natural gas industry have caused significant shifts in supply and demand, and the nation’s **relatively safe but aging pipeline** network faces increased pressures from these changes.”²²

The Independent Producers acknowledge that there are a number of challenges associated with the operation of older transmission lines. However, the NOPR conflates those challenges with the risks presented by new gathering systems constructed for shale gas development, which are frequently built to much higher standards than the aging transmission lines that are at the core of PHMSA’s concerns. And while it is indisputable that these new gathering systems are larger than those that have been used for conventional production historically, that fact must be considered in the context of the function of the new lines. Unconventional shale wells typically have very high initial flow rates that decrease significantly during the first several years of the well’s productive life. Thus, gathering infrastructure for such wells is built to accommodate the high initial rate of production with the expectation that, during the majority of the life of the well, the flow into the gathering system will be significantly lower. Therefore, the new larger gathering lines will only be operated near their capacity when they are new, as the production declines over time. When the function of the new gathering lines is considered, it is clear that they have little in common with the transmission lines that are at the heart of the incidents that PHMSA is relying upon to justify the changes proposed by the NOPR.

Moreover, the cost analysis that PHMSA relies on in the NOPR is fundamentally flawed. The NOPR’s changes to the definitions of onshore production operations and onshore gathering lines would dramatically increase the number of miles of regulated gathering – well beyond the mileage estimates relied upon in the cost analysis. Moreover, the cost analysis fails to include an assessment of the compliance costs that will be associated with related rulemakings. For example, it fails to take into account the compliance costs associated with PHMSA Docket No. 2014-0098 (addressing requirements for plastic pipe) and PHMSA Docket No. 2013-0163 (regarding operator qualifications).²³ Also absent from the cost analysis is consideration of the production that will be lost as costs of compliance are incurred and wells are abandoned or shut-in (and resources lost) to avoid those additional costs.²⁴

²¹ See NOPR at 20728.

²² *Id.* at 20725.

²³ 80 Fed. Reg. at 29263 and 39915, respectively.

²⁴ See Initial Regulatory Flexibility Analysis Proposed Rule for Safety of Gas Transmission and Gathering Pipelines; U.S. Department of Transportation Pipeline and Hazardous Materials Safety Administration Office of Pipeline Safety February 2016.

Without that information, PHMSA cannot accurately assess the true costs of its proposal, and thus whether public safety is actually enhanced. Instead, it is left with speculation and risks a misallocation of funds that could better be spent elsewhere. HB 2845 has called for a two-year study to determine if there is any need to regulate additional gas gathering lines. That study has only been partially completed. Any new regulatory initiatives should await its full completion.

b. The Proposed Definition for Onshore Production Facility Fails to Comply with Congress' Directives

PHMSA proposes to re-define *onshore production facilities* to mean the:

[W]ellbores, equipment, piping, and associated appurtenances confined to the physical acts of extraction or recovery of gas from the earth and the initial preparation for transportation. Preparation for transportation does not necessarily mean the gas will meet “pipeline quality” specifications as may be commonly understood or contained in many contractual agreements. Piping as used in this definition may include **individual well** flow lines, equipment piping, and transfer lines between production operation equipment components. **Production facilities terminate at the furthest downstream point where: Measurement for the purpose of calculating minerals severance occurs; or there is commingling of the flow stream from two or more wells.**

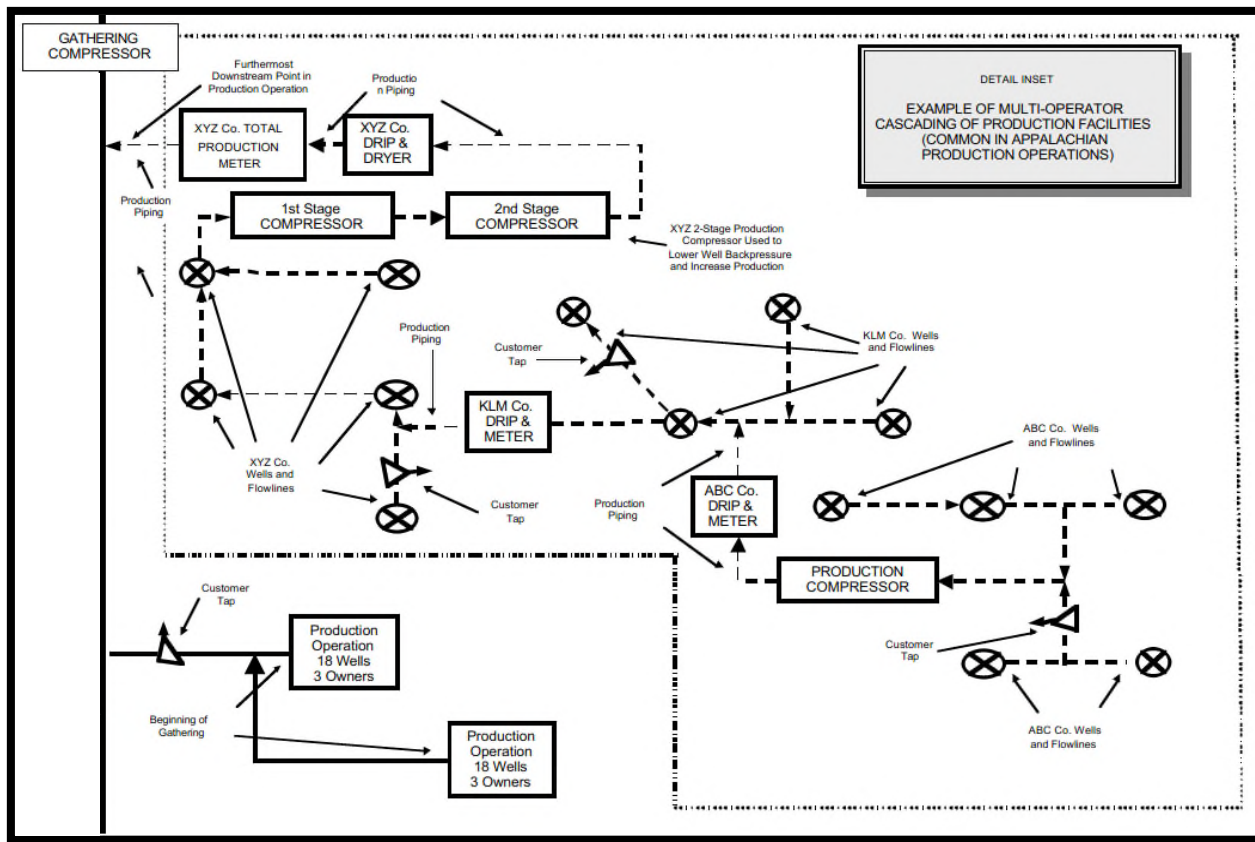
Note that the definition limits the analysis to piping related to **individual wells and associated equipment**, and, **regardless of the line's function**, concludes that the endpoint of a production operation is where metering occurs or where there is a commingling of flow from two or more wells. Not only does that definition ignore PHMSA's jurisdictional constraints by ignoring the actual function of the line (as discussed above), but it is a complete dismissal of the traditional understanding of production operations rightly reflected in RP-80 and the reality of multi-well horizontal development from a single well pad – where, under the proposed definition, regulated gathering could begin on the well pad, at or near the wellhead.²⁵

RP-80 rightly recognized – as did PHMSA in its adoption of RP-80 – that “[t]he production function, in most cases, extends well downstream of the wellhead and may include several processes required to prepare the gas for transportation.”²⁶ It further recognized that “[t]he scope of production operations may include any number of operators and can vary from one well to large consolidated lease blocks with many wells.” *Id.* This is reflected throughout the document. For example, discussing a type of production operation common to the Appalachian Basin, RP-80 notes that “marginal gas producers must often seek economic efficiencies by arranging for their natural gas production to flow through existing production

²⁵ It is not uncommon in unconventional shale production for gas to be metered at the wellhead and consolidated from several wells on a well pad into a single line having traveled only several feet.

²⁶ *Id.* at 6.

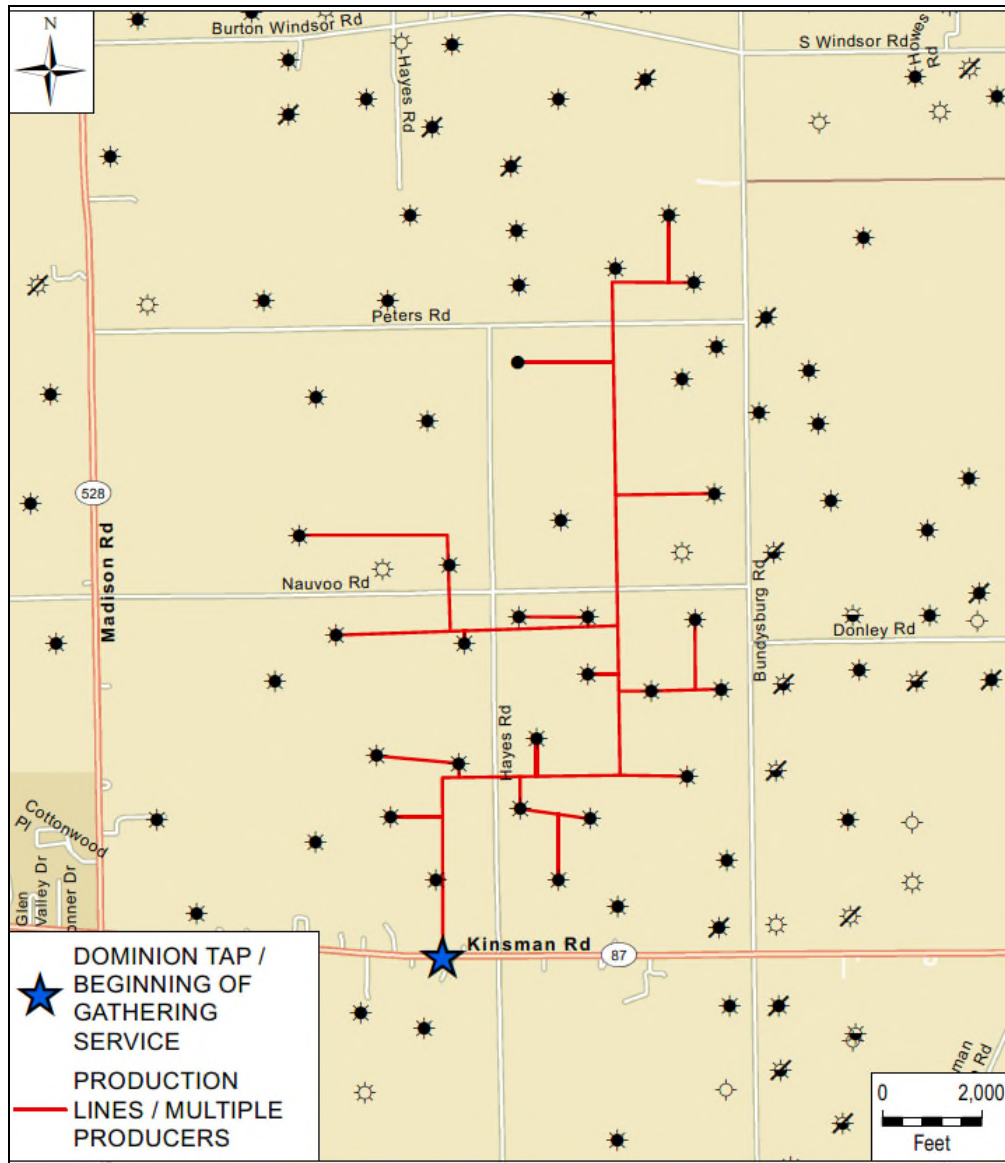
flowlines on offsetting leases to reach the gathering system. This practice avoids duplicative flowline or production piping, reduces the need for multiple metering, and thus lowers the costs of production.”²⁷ Illustrated, it looks like this:



And while it has long been accepted that these facilities perform a production function and thus are exempt from pipeline safety regulation until gathering begins after the furthestmost downstream metering station, the definitions proposed in the NOPR would appear to declare otherwise.

That type of complicated production operation continues to exist today. Below is a schematic of a common arrangement in the Appalachian Basin and elsewhere, with multiple conventional producers sharing production lines having multiple wells flowing gas to a common tap into a third-party gathering line. These types of arrangements are the result of historical happenstance and operator efficiency, but allow for the continued economic viability of the related production.

²⁷ *Id.* at 9.



Based on their function, these lines are exempt from federal pipeline safety regulation as part of a production operation, and thus regulated at the state level. The NOPR threatens to change that historical understanding without the requisite statutory authority to do so or a demonstration of pipeline safety need. And that threat has real world consequences, including, for example, the unnecessary duplication of production piping to accurately reflect the line's production function and maintain producers' non-jurisdictional status. In other words, the industry will install more and duplicative pipelines, or shut-in wells prematurely which negatively impacts national energy production, in order to avoid the increased regulatory cost imposed by PHMSA's over-reach.

As for unconventional operations, PHMSA's proposal threatens to regulate many lines located on a well pad and commonly understood as part of a production operation. Modern development often has multiple wells being drilled on a single well pad, and includes separation;

mechanical and electrostatic coalescing; gas treatment; H₂S treatment; the removal of CO₂; nitrogen, and helium; gas compression to reduce back pressure; dehydration; and measurement (among others). Many of the processes mentioned can take place on or off of the well pad depending on a number of factors, including the geography of well site, the distance to existing facilities, and whether drilling operations are currently being conducted on the well pad. The NOPR's proposed definitions suggest the claim that the production facility has ended on the well pad at the point that the flow from two or more wells is commingled, before any of the mentioned activities has taken place to prepare the production for transportation. Again, that has no relation to the function of the lines and is an impermissible deviation from PHMSA's statutory authority.

c. The Proposed Definition for Onshore Production Is Ambiguous

PHMSA's proposed definition for *onshore production operation* is also fatally unclear. For example, it states that production operations include the wellbores, equipment, piping and associated appurtenances related to "the initial preparation [of gas] for transportation." But it fails to describe in any helpful detail what the "initial preparation" consists of and when it ends.²⁸ Further, it states that production operations "terminate at the furthestmost downstream point" where measurement occurs "for the purposes of calculating minerals severance" or where there is a commingling of flow from two or more wells.²⁹ The NOPR fails, however, to provide any guidance as to the "furthestmost downstream" concept – e.g., how it is used or determined, or what the phrase "for the purposes of calculating minerals severance" is meant to address – e.g., distinguishing the ownership of production from one operator to another or, perhaps, determining the volumes that are produced at any single well.³⁰ This is in stark contrast to the helpful detail provided in RP-80 for addressing the classification of production and gathering end points regarding a number of commonly used production infrastructure designs. Moreover, commingling of flow can occur from multiple wells in a serial fashion at multiple locations on a line, including up to and at the inlet to a gathering or transmission line. Is this endpoint meant to move gathering further *downstream* from the points commonly understood to be the beginning of gathering today? These failures only introduce ambiguity and uncertainty into the analysis, contrary to PHMSA's rationale for completely repealing RP-80.³¹

d. The Proposed Definition for Gathering Line (Onshore) Also Fails to Comply with Congress' Directive

In part, the NOPR seeks to expand the definition of regulated gathering lines by an artificial reference to pipeline diameter – proposing to newly regulate currently unregulated rural gathering lines of eight inches or greater in size.³² More specifically, "In this NPRM, PHMSA proposes to extend existing requirements for Type B gathering lines to Type A gathering lines in

²⁸ See NOPR at 20826.

²⁹ *Id.*

³⁰ Contrast, e.g., RP-80 section 2.2.1.2.

³¹ See NOPR at 20801.

³² *Id.* at 20802.

Class 1 locations, if the nominal diameter is 8” or greater.”³³ Yet, there appears to be no explanation in the NOPR as to the reason or reasons behind the selection of eight inches as a standard.³⁴ This is contrary to 49 U.S.C. § 60102(b)(3)(D), which states that DOT should “identify technical data or other information upon which the risk assessment information and proposed standard is based.”

During a PHMSA-sponsored webinar on June 8, 2016, one of the 700+ listeners asked for the rationale for choosing 8” as the criteria diameter for regulated gathering. PHMSA responded that it began with the assumption that all gathering lines, regardless of diameter, would be regulated. However, the cost/benefit analysis could be justified only beginning at 8”. Not only does this contradict Congress’ directive regarding the regulation of gathering lines, given the flaws in PHMSA’s projected costs (e.g. underestimating the number of miles, disregarding costs of shut-in production, failing to include the costs of pending rulemakings), it fails to provide a reasoned basis for the proposal.

The lack of explanation suggests that there is no data to support that criteria and that it was selected arbitrarily. Yet, this standard has the potential to greatly increase the costs of regulation associated with the transportation of natural gas. Should PHMSA insist on proceeding with this portion of the NOPR, the Independent Producers suggest a collaborative approach, one in which the Independent Producers and others in the industry would participate to determine what diameter, if any, of gathering line might be associated with greater risks.

e. PHMSA Should Create an Exception for Low-Pressure Plastic Lines

Should PHMSA nonetheless adopt the 8”-diameter criteria discussed above, it should expressly exempt low-pressure plastic lines. Members of the Independent Producers report that a significant portion of gathering lines used in rural Kentucky and elsewhere for conventional production rely on low-pressure plastic lines. The 8”-diameter criteria could needlessly convert many of these lines to jurisdictional gathering subject to the MAOP requirements that do not allow for plastic pipe. The costs of transitioning from the existing plastic lines would be inordinately expensive and likely result in the premature abandonment of much of the related production. Thus, for purposes of clarity, the Independent Producers recommend that PHMSA add an express exception to the diameter rule for low-pressure existing plastic gas gathering lines rather than foreclose their operation and the production that feeds them.

f. PHMSA Should Clarify that It Is Not Regulating Production Line Farm Taps

PHMSA should state clearly that it is not regulating production line farm taps under the NOPR. Production line farm taps are often required in leases or rights-of-way, or other similar contracts with producers, as part of the consideration to be paid to an affected landowner. States handle the regulation of these farms taps in various ways. Kentucky, for example, applies significant regulatory control over the establishment of farm taps, their construction and

³³ *Id.*

³⁴ See NOPR generally.

operation. Other states, such as Ohio, largely treat farm taps as contractual arrangements between two parties subject to judicial interpretation, treatment and oversight. Consistent with the long history of this state oversight of farm taps, PHMSA correctly avoided their regulation when it adopted RP-80.³⁵ Now, in the NOPR, that long-reliance on state oversight is unclear. PHMSA states at various points that (i) the NOPR does not address farm taps, (ii) under the NOPR, farm taps constitute transmission or distribution lines, and (iii) under the NOPR, farm taps are service lines.³⁶ Although on the whole the NOPR is ambiguous as to its treatment of production line farm taps, it can be misread to apply PHMSA's existing regulations to those taps generally. That ambiguity should be addressed with a clear statement that the NOPR does not change in any way the regulatory scheme applicable to farm taps today.

Moreover, there is no reason to regulate production line farm taps at the federal level. Those farm taps are intrinsically low-risk lines installed for the benefit of landowners to provide them an inexpensive energy supply. The application of federal pipeline safety regulation to farm taps would increase the cost of their construction and maintenance (something that is not accounted for in the cost analysis of this rule). That cost increase will only harm the landowners, who largely consist of farmers, rural families, and small businesses, as the increase will either fall directly on them under the terms of their agreements or as operators refuse to agree to farm tap provisions in the future. The NOPR does not provide any justification for seeking to regulate those farm taps here. Accordingly, the Independent Producers oppose any such regulation and strongly recommend that PHMSA clarify it is not seeking to do so under the NOPR.

g. PHMSA's Proposal to Regulate Gas Quality Will Unnecessarily Reduce Conventional Production

The NOPR also threatens substantial conventional production volumes by imposing costly monitoring and evaluation requirements for certain lines carrying gas that may need processing or treatment (e.g., gas containing carbon dioxide, hydrogen sulfide, sulfur, microbes, or free water).³⁷ In Texas alone in 2015, however, roughly 3.3 percent of statewide production consisted of gas containing hydrogen sulfide and carbon dioxide, accounting for approximately

³⁵ RP-80 section 3.1.5.4. addresses farm taps as follows "The line that connects to the tap to furnish gas to the end-user or the LDC serving that end-user is the property and responsibility of the end-user and is not otherwise addressed in these comments."

³⁶ "**Treatment of farm taps is not within the scope of the ANPRM topics.** However, PHMSA has engaged in dialogue with industry on this topic and will continue to consider options to address this issue in a separate action." NOPR at 20739. "Pipelines commonly referred to as '**farm taps**' serving residential/commercial customers are **not classified as gathering**, but would continue to be classified as **transmission or distribution** as defined in §192.3." *Id.* at 20808. "Pipelines that serve residential, commercial, or industrial customers that originate at a tap on gathering lines are not gathering lines; they are **service lines** and are commonly referred to as farm taps." *Id.* at 20825.

³⁷ *Id.* at 20830. We note that PHMSA has exempted from this provision Type A, Area 1 gathering. PHMSA should provide a similar exemption for Type A, Area 2 and Type B gathering.

275.4 Bcf of natural gas.³⁸ This is a substantial volume of gas, particularly in a challenging price environment like today. Looking at every producing state in the country, that production volume increases dramatically. When faced with the costs of compliance, the solution for many of these operators, especially the independent producers who make up much of the Independent Producers' membership, may be to prematurely plug and abandon otherwise economically viable wells. That is because, as reported by members of the Independent Producers, the value of the conventional production from those wells, even if the related gas did *not* contain the impurities cited in the rule, would not be able to offset the costs imposed by the corrosion control provisions in the NOPR.

Moreover, the NOPR suggests that several incidents on hazardous liquids transmission lines and the transmission pipeline rupture in San Bruno, California support these new requirements.³⁹ However, none of those instances appear to have involved the production of this quality of gas, and none of these instances involved onshore gathering pipelines. The NOPR itself, in fact, acknowledges that the San Bruno incident was not related to the type or quality of gas being transported, observing instead that it was related to a "lack of pressure test, inadequate records, poor materials and inadequate integrity assessment."⁴⁰ Not once does the NOPR suggest that the San Bruno incident was caused by the type or composition of the gas in the line. Further, there is no suggestion in the NOPR that low-pressure conventional gas production has caused a threat to pipeline safety. There is a significant likelihood that these requirements would therefore be unlawful and unenforceable: "An agency action may be set aside ... if the agency has relied on factors which congress did not intend it to consider...offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."⁴¹

*h. The Independent Producers Support the Retention of RP-80's
Incidental Gathering Concept*

PHMSA should retain the *incidental gathering* concept set forth in RP-80. The NOPR dramatically limits the concept to very narrow circumstances that are wholly unrelated to the line's function, converting what is functionally gathering to transmission.⁴² Not only is that in direct conflict with Congress' directive, but it runs contrary to a decade of practice recognized by

³⁸ See Annual Summary of Texas Natural Gas by the Railroad Commission of Texas Oil and Gas Division. The Independent Producers are not aware of any entity that specifically tracks the amount of gas that is produced and would be within the terms of this discussion.

³⁹ PHMSA cites to a 2003 incident on a Kinder Morgan pipeline, a 2004 incident on an Explorer Pipeline Company pipeline in Oklahoma, a 2005 incident on an Enterprise Products Operating line in Missouri, and a 2008 incident on a Oneok NGL pipeline in Iowa. See NOPR at 20781.

⁴⁰ *Id.* at 20741.

⁴¹ See *Helen Necktopoulous, Stanley Kunitz, Brue W. Konard, John Rottkam, Indra Anadasapapathy and Massimo De Giarde v. Donna E. Shalala, Secretary of the Department of Health and Human Services and Bruce Vladeck, Administrator of the Health Care Financing Administration*, 941 F.Supp. 1382, at 1390 (U.S. District Court for the Southern District of New York 1996).

⁴² See NOPR at 20825 (within proposed definition of *onshore gathering line*, subsection 5.).

this agency. RP-80, adopted and reconfirmed by PHMSA, describes incidental gathering as “the additional downstream gathering pipeline sometimes needed to connect the outlet of an identified gathering endpoint with a transmission line, distribution line, or other pipeline facility.”⁴³ Importantly – “From a **functional standpoint, this section of incidental gathering line is no different from the rest of the gathering system.**”⁴⁴ See also, e.g., Interpretation Letter from John Gale to CDX Gas dated Jul. 14, 2009 (acknowledging that an eight-mile line connecting a gas processing and compression facility to a transmission line was *incidental gathering*). Reflecting the functional analysis required by Congress, PHMSA should continue to expressly acknowledge this concept as set forth in RP-80.

i. PHMSA Should Delay Application of Any Pending Final Rules to Expanded Gathering

PHMSA has several pending final rules (e.g., plastic pipe, operator qualifications) that would apply to certain classes of gathering. Under the NOPR, the miles of gathering lines subject to these two rulemakings, and possibly others, would increase dramatically. However, when PHMSA issued the proposed rules for plastic pipe and operator qualifications, producers not subject to PHMSA’s jurisdiction and gatherers not subject to PHMSA’s regulation would not have commented on the proposed rules. For example, the operator qualification rulemaking was issued on July 10, 2015, with comments due in September 2015. PHMSA issued the plastic pipe proposed rule on May 21, 2015, with comments due in July 2015. Those proposed rules did not include any analysis of the potential costs and benefits of those rules with respect to the expanded definition of gathering proposed in this NOPR. Additionally, the instant NOPR does not include any costs or benefits of applying the not-yet-final plastic pipe and operator qualification rules to the expanded definition of gathering lines that PHMSA proposes to regulate.

The Independent Producers strongly urge PHMSA to withhold application of any pending rulemaking that would apply to gathering, as redefined under the instant NOPR. Once the Gas Transmission/Gathering NOPR is finalized, PHMSA could then propose to apply final rules pertaining to plastic pipe and operator qualifications. Producers and gatherers could submit comments on how they will be affected by those rules, and provide information on how PHMSA might better tailor those rules to facilities not previously under federal regulation, assuming PHMSA succeeds in expanding its jurisdiction. However, until affected entities are provided with adequate notice and opportunity to comment, along with an accurate regulatory impact analysis, PHMSA should not apply rulemakings that were promulgated prior to finalization or, at a minimum, issuance of the instant NOPR.

j. PHMSA Should Provide an Economic Need Exception

The NOPR is meant to address concerns regarding new production patterns and practices, stating: “The dramatic expansion in natural gas production and changes in typical gathering line characteristics require PHMSA to review its regulatory approach to gas gathering pipelines to

⁴³ *Id.* at 5 (Section 2.2.1.2.6).

⁴⁴ *Id.* (emphasis added).

address new safety and environmental risks.”⁴⁵ Consequently, it seeks to re-define regulated gas gathering and make a host of other changes to PHMSA’s regulatory program in the name of addressing shale development. All of these changes carry with them a cost of compliance, and many address issues that have no relationship to conventional production. The Independent Producers submit that PHMSA should add a provision that would allow operators to petition for exceptions to or waivers from regulatory requirements when compliance would have the potential for rendering operations uneconomic.

k. Excessive Reporting Requirements

The NOPR seeks to impose the reporting requirements of 49 C.F.R. Part 191 to both regulated and unregulated gathering lines.⁴⁶ Members of the Independent Producers have noted that this requirement would be one of the most expensive provisions included in the NOPR due to the cost of reporting for unregulated rural gathering lines. The Independent Producers join both API and the Gas Processors Association (GPA) in pointing out that this reporting requirement is expensive, onerous, and not supported by a demonstrated pipeline safety benefit within the NOPR. Further, the Independent Producers join API and GPA in pointing out that application of these reporting requirements to unregulated gathering lines by PHMSA is not supported by any statutory authority, as unregulated gathering lines, by definition, are outside the PHMSA regulatory program.

III. Conclusion

Although production volumes and methods have expanded and evolved, there has been no similar expansion in PHMSA’s regulatory jurisdiction – PHMSA still has no authority to regulate production operations. That is rightly left to the individual producing states. Consequently, even if PHMSA is correct that the inventory of new, larger diameter pipelines is a cause for concern, it still has no authority to infringe upon the regulatory domain of the producing states’ oil and gas commissions.⁴⁷

The Independent Producers strongly oppose, therefore, any changes to the existing definitions for *production operation* and *gathering line* set out in RP-80 and incorporated into 49 C.F.R. Part 192 – definitions that are rightly focused on the function of the infrastructure. Additionally, any changes to the regulatory requirements imposed upon natural gas gathering lines must be based upon scientifically-valid assessments of the risks presented by those lines and accurate assessments of the costs and benefits of the proposed changes. The NOPR fails in both respects – it fails to properly define pipelines by the functions they serve, and it fails to be

⁴⁵ See NOPR at 20728.

⁴⁶ *Id.* at 20723.

⁴⁷ See, e.g., *Exxon Mobil Gas Marketing Company v. Federal Energy Regulatory Commission*, 297 F.3d 1071, 1089 (D.C. Cir. 2002) (“We emphatically agree that ‘need for regulation cannot alone create authority to regulate. ... Rather it is statutory authorization alone that gives FERC the authority to regulate, and in the absence of such authority, FERC’s action ‘is plainly contrary to law and cannot stand.’”).

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supported by valid and accurate assessments of the risks, costs, and benefits associated with the proposed changes.

The Independent Producers welcome the opportunity to work with PHMSA on these issues. Moreover, in the event PHMSA moves forward and repeals RP-80, IPAA and the other Independent Producers expect to be included in any technical conference or other discussions that might be had regarding replacement definitions.

Very truly yours,



Gregory D. Russell, Co-Chair
IPAA's Pipeline Safety Task Force

On behalf of the Independent Producers

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SWG/swg