



State of Louisiana

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February 28, 2022

Tristan Brown
Acting Administrator
Pipeline and Hazardous Materials Safety Administration
1200 New Jersey Ave., S.E.
Washington, D.C. 20590

Via regulations.gov:

RE: Docket No. PHMSA–2021–0058 (HM–264A) – Hazardous Materials: Suspension of HMR Amendments Authorizing Transportation of Liquefied Natural Gas by Rail

Dear Acting Administrator Brown:

The undersigned Attorneys General, as the chief legal officers of our States, write to express our concerns with the Biden Administration’s proposed rule, published Nov. 8, 2021, (the “Proposed Rule”) to suspend authorization to transport liquefied natural gas (“LNG”) by rail tank cars pursuant to a final rule, which had become final August 24, 2020, (the “2020 Rule”).¹ The Pipeline and Hazardous Materials Safety Administration’s (“PHMSA”) decision to reverse course on this amendment to the Hazardous Materials Regulations (“HMR”) creates regulatory uncertainty, chilling potential capital investment in the DOT–113C120W9 specification tank car, a tank car specifically designed to transport LNG.² Moreover, the general concern that transporting LNG by rail might result in an increase in production of natural gas which might result in an increase in greenhouse gases (“GHG”) is an attenuated and speculative concern untethered to the scope of PHMSA’s regulatory purpose. Finally, PHMSA’s reasoning does not adequately

¹ Hazardous Materials: Suspension of HMR Amendments Authorizing Transportation of Liquefied Natural Gas by Rail, 86 Fed. Reg. 61,731 (Nov. 8, 2021).

² See Marybeth Luczak, *LNG by Rail: Temporary Reg Rollback Under Review*, RAILWAY AGE (Jan. 10, 2022), <https://www.railwayage.com/regulatory/lng-by-rail-temporary-reg-rollback-under-review/>.

explain or justify the suspension of a rule that was subject to extensive notice and comment and thorough review of alternatives by the agency. Current geopolitical events involving Russia's unprovoked attack on Ukraine show with painful clarity the need for the United States to maintain its energy independence through multiple distribution points throughout our country. The agency should not move forward with suspension of a rule that serves that important objective.

Natural gas is the primary energy source for electricity generation in the United States.³ Presently, 41% of the country's electricity is generated from natural gas.⁴ Meanwhile, U.S. Greenhouse Gas ("GHG") emissions have decreased by 11.65 percent and GHG emissions from electricity generation have decreased by 33.08 percent within same timeframe.⁵ The growth in U.S. gas production is a geopolitical and economic asset, contributing to our national and global energy security.⁶ And as of 2020, it appeared that PHMSA agreed, stating, "[t]he United States leverages domestic technology improvements to transform American life through increased natural gas production and energy independence."⁷

For certain areas of the country, however, access to supply is limited.⁸ To address the problem of getting supply to demand, American private industry stepped in with a solution. The Association of American Railroads ("AAR") petitioned PHMSA for rulemaking to expand nationwide access to natural gas using rail. AAR's position is that "[f]or more than 80 years, freight railroads have safely transported cryogenic liquids similar to LNG."⁹ PHMSA acknowledged that there was significant interest in transporting LNG by rail. Specifically, in the 2020 Rule, PHMSA states "[t]he recent expansion in U.S. natural gas production has increased interest in a programmatic approach to using appropriately the nation's rail infrastructure to facilitate efficient transportation of LNG."¹⁰

³ U.S. Energy Information Administration, *Electricity Data Browser: Net Generation, United States, All Sectors, Monthly* (last visited, Feb. 18, 2022), Electricity data browser - Net generation for all sectors (eia.gov).

⁴ *Id.*, (Natural Gas: 172,743 thousand megawatthours [Aug. 2021] ÷ All Fuels: 413,949 thousand megawatthours [Aug. 2021] * 100 = 41%).

⁵ United States Environmental Protection Agency, *Greenhouse Gas Inventory Data Explorer* (last visited, Feb. 17, 2021), <https://cfpub.epa.gov/ghgdata/inventoryexplorer/#>, (Emissions: 7,423 MMT CO₂ eq. [2005] to 6,558 MMT CO₂ eq. [2019] equals 11.65% decrease in total GHG emissions; and Emissions, Electricity Generation: 2400 MMT CO₂ eq. [2005] to 1606 MMT CO₂ eq. [2019] equals 33.08% decrease in total GHG emissions).

⁶ See Daniel Yergin, *America Takes Pole Position on Oil and Gas*, WSJ (Feb. 14, 2022), <https://www.wsj.com/articles/america-oil-and-gas-russia-lng-exports-natural-gas-producer-rising-price-ukraine-uae-saudi-arabia-europe-energy-crisis-11644872477>.

⁷ Hazardous Materials: Liquefied Natural Gas by Rail, 85 Fed. Reg. 44,994, 44,995 (July 24, 2020).

⁸ Hazardous Materials: Liquefied Natural Gas by Rail, 85 Fed. Reg. 44,994, 44,995 (July 24, 2020).

⁹ Press Release, Association of American Railroads, AAR Backs Legislation to Preserve LNG by Rail Rule (Mar. 25, 2021), <https://www.aar.org/news/aar-backs-legislation-to-preserve-lng-by-rail-rule/>.

¹⁰ Hazardous Materials: Liquefied Natural Gas by Rail, 85 Fed. Reg. 44,994, 44,995 (July 24, 2020).

The Proposed Rule is a response to Executive Order 13990, which directs agencies to review Trump Administration era rules to identify “candidates for suspension, modification, or rescission because of inconsistency with [Biden] Administration policies to . . . prioritize environmental justice [] and reduce GHG.”¹¹ The Proposed Rule states: “Suspension would allow consideration of additional public comment, particularly on issue such as public and worker safety, environmental risks, and environmental justice.”¹² Additionally, the Proposed Rule’s proposed temporary suspension “guarantees no [] transportation [of LNG in rail tank cars] will occur before its companion rulemaking has concluded or no later than June 30, 2024.”¹³

Indeed, suspending the 2020 rule does guarantee no transportation of LNG by rail can occur, which appears to be the overall objective of the suspension and final action. But a change in administrations is not an adequate basis upon which to suspend or repeal a rule that was subjected to thorough notice and comment procedures. PHMSA is required to provide a “detailed justification” of new facts that contradict facts underling its prior policy.¹⁴ Here, PHMSA must give a more “reasoned explanation” to justify suspension of a regulation.¹⁵ Furthermore, PHMSA must “display awareness that it is changing position,” “must show that there are good reasons for the new policy,” and “that the new policy is permissible under the statute.”¹⁶ This requirement applies regardless of whether PHMSA’s stance has changed because of “the inauguration of a new President and the confirmation of a new [agency] Administrator.”¹⁷ Moreover, “Without showing that the old policy is unreasonable, for [an agency] to say that no policy is better than the old policy solely because a new policy *might* be put into place in the indefinite future is as silly as it sounds.”¹⁸ Nevertheless, when suspending or repealing a regulation based on a new policy the agency must “provide a more detailed justification . . . when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account.”¹⁹ PHMSA has not provided any such detailed

¹¹ Hazardous Materials: Suspension of HMR Amendments Authorizing Transportation of Liquefied Natural Gas by Rail, 86 Fed. Reg. 61,731, 61,734 (Nov. 8, 2021).

¹² Hazardous Materials: Suspension of HMR Amendments Authorizing Transportation of Liquefied Natural Gas by Rail, 86 Fed. Reg. 61,731, 61,736 (Nov. 8, 2021).

¹³ Hazardous Materials: Suspension of HMR Amendments Authorizing Transportation of Liquefied Natural Gas by Rail, 86 Fed. Reg. 61,731, 61,732 (Nov. 8, 2021).

¹⁴ See 556 U.S. at 515.

¹⁵ *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

¹⁶ *Id.* at 514–15.

¹⁷ *Nat’l Ass’n of Home Builders v. E.P.A.*, 682 F.3d 1032, 1043 (D.C. Cir. 2012).

¹⁸ *Pub. Citizen v. Steed*, 733 F.2d 93, 102 (D.C. Cir. 1984).

¹⁹ 556 U.S. at 515.

explanations. Providing more time for notice and comment is not an adequate basis to suspend a final rule..

I. *PHMSA’S CLAIM THAT ECONOMIC UNCERTAINTY IN THE LNG INDUSTRY WARRANTS SUSPENSION IS FLAWED.*

PHMSA states that:

Uncertainties in the underlying economic dynamics driving the potential benefits and public safety and environmental risks considered in the LNG by Rail final rule have increased (e.g., the quantity of LNG that will be moved by rail, the routes involved, and whether new transportation capacity would induce more natural gas extraction). PHMSA believes these increased uncertainties cast doubt on the continued validity of the balance between potential benefits and public safety and environmental risks underpinning the LNG by Rail final rule.²⁰

PHMSA vaguely identifies unsubstantiated and generalized concerns about safety and environmental risks as the reason for economic uncertainty, but this was the subject of prior notice and comment. Its rationale further indicates the driving factor is the change in policy views regarding use of fossil fuels and a hypothetical fear of “induc[ing] more natural gas extraction.”²¹ Setting aside the question whether it is within the proper scope of PHMSA’s authority to regulate national demand for natural gas, the proposed rule itself *is* the cause of the regulatory uncertainty of which it complains. By unilaterally suspending a rule that has undergone considerable evaluation and keeping industry operators in a special permitting regime, it discourages companies from making any capital investment in LNG by rail, specifically, the DOT–113C120W9 specification tank cars that the 2020 Rule authorized. Moreover, concerns about the safety of the tank car appear overblown. The DOT-113C120W tank car was authorized by special permit prior to the 2020 Rule, which suggests that PHMSA’s newly-discovered concern about the same tank car’s safety is pretextual.²²

PHMSA’s true concern, fear of causing “more natural gas extraction,” undercuts its narrative about concern for “public safety and environmental risks due to transport of LNG by rail”²³ Both are overstated and illustrate an irrational reversal in PHMSA’s position in just over one-year’s time.

²⁰ Hazardous Materials: Suspension of HMR Amendments Authorizing Transportation of Liquefied Natural Gas by Rail, 86 Fed. Reg. 61,731, 61,735–36 (Nov. 8, 2021).

²¹ *Id.* at 61,736.

²² Hazardous Materials: Liquefied Natural Gas by Rail, 85 Fed. Reg. 44,994, 45,000 (July 24, 2020).

²³ 86 Fed. Reg. at 61,736.

II. *PHMSA’S CLAIM THAT TRANSPORTATION OF LNG BY RAIL TANK CARS POSES “UNREASONABLE RISKS” TO PUBLIC SAFETY IS INCONSISTENT WITH ITS PRIOR POSITION.*

When it comes to risks, multiple sources conclude that it is safe to transport LNG by rail. According to the AAR, “99.999% of all hazmat railcars reach their destinations without an incident that releases product; in 2016, the number of train accidents with a hazmat product release was 0.69 for every 100,000 hazmat carloads.”²⁴ The Railway Supply Institute (“RSI”) “agrees with and supports PHMSA’s prior analysis that transport by rail improves safety and fuel efficiency, and decreases emissions associated with transporting LNG when compared to transportation by truck.”²⁵ According to Fortis BC, a leading LNG producer, “LNG is not flammable or explosive in its liquid form which means converting natural gas to LNG is one of the safest ways to transport energy.”²⁶ Furthermore, RSI notes that “DOT-113 tank cars are specifically designed for the safe transportation of cryogenic material like LNG and have a strong safety record in their more than (5) decades of service.”²⁷ And the most robust of the cryogenic tank cars and capable of transporting various cryogenic liquids” is the DOT-113C120W9, which the 2020 Rule greenlit.²⁸

Thus, it does not follow that a little over a year after a considered evaluation of this very issue, PHMSA’s prior conclusions are now wrong and transporting LNG poses “unreasonable risks.”²⁹ Moreover, in the Proposed Rule, PHMSA credits as justification for the suspension that “additional further data and knowledge (for example regarding potential benefits as well as safety and environmental risk) could make appropriate further mitigations for shipping LNG by rail tank car.”³⁰ This, however, is the same thing PHMSA stated in 2020 Rule. Furthermore, an agency could always make changes to regulations should new information justify the change, but the *possibility* that new data *might* surface always exists and does not justify suspending a final rule. Even the Transportation Research Board (“TRB”) has stated, “[e]nsuring the safety of LNG by rail, like all hazardous materials shipments, is an ongoing process that will require continued monitoring and adjustment of practice

²⁴ Paul W. Parfomak & John Frittelli, *Rail Transportation of Liquefied Natural Gas: Safety and Regulation*, Congressional Research Service R46414, at 11 (July 28, 2020).

²⁵ Railway Supply Institute, Comment Letter on Notice of Proposed Rulemaking “Hazardous Materials: Suspension of HMR Amendments Authorizing Transportation of Liquefied Natural Gas by Rail” (Dec. 23, 2021), (quoting 84 Fed Reg. 56,964, 56,971 (Oct. 24, 2019)).

²⁶ *The Facts About LNG Safety*, FORTIS BC (last visited, Feb. 20, 2022), <https://talkingenergy.ca/facts-about-lng-safety>.

²⁷ Railway Supply Institute, Comment Letter on Notice of Proposed Rulemaking “Hazardous Materials: Suspension of HMR Amendments Authorizing Transportation of Liquefied Natural Gas by Rail” (Dec. 23, 2021).

²⁸ *Id.*

²⁹ Hazardous Materials: Suspension of HMR Amendments Authorizing Transportation of Liquefied Natural Gas by Rail, 86 Fed. Reg. 61,731, 61,734 (Nov. 8, 2021).

³⁰ Hazardous Materials: Suspension of HMR Amendments Authorizing Transportation of Liquefied Natural Gas by Rail, 86 Fed. Reg. 61,731, 61,734 (Nov. 8, 2021), (citing 85 Fed. Reg. 44,995).

and regulations.”³¹ Thus PHMSA would continue to have that responsibility and the capacity to act should new facts actually justify a change. Ultimately, when reconciling PHMSA’s complete reversal on transportation of LNG by rail, the facts about safety are the same.

III. *PREVENTING LNG BY RAIL HARMS THE U.S. ECONOMY AND IS ENVIRONMENTALLY COUNTER-PRODUCTIVE.*

On the 2020 presidential campaign trail, then-candidate Biden promised, “We are going to get rid of fossil fuels.”³² President Biden took action with Executive Order 14008, which provides that “the Secretary of the Interior shall pause new oil and natural gas leases on public lands or in offshore waters.”³³ These leases, however, arise from programs authorized by Congress under the Outer Continental Shelf Lands Act (“OCSLA”), Gulf of Mexico Energy Security Act (“GOMESA”), and the Mineral Leasing Act (“MLA”).³⁴ The same day the Executive Order was signed, the Department of Interior, Bureau of Land Management published a document stating “HITTING PAUSE ON NEW OIL AND GAS LEASING.”³⁵ As a result of the pause, Leases 257 and 258 were rescinded to comply with Executive Order 14008.³⁶ Importantly, these actions were taken without any notice or consultation with States, even though freezing new leasing and drilling permits on federal lands and in the Gulf of Mexico deprives Louisiana and other states of revenues from initial lease payments, royalties, and rentals.³⁷

In fact, the cancellation of Lease 257 caused an immediate loss of millions of dollars earmarked for coastal recovery and restoration used to protect against tropical storms and hurricanes.³⁸ Therefore, President Biden’s actions to tackle climate change ironically make Louisiana and its coast more susceptible to the dangers of extreme weather events. The loss of revenue also deprives the federal government of funds used for environmental projects and deprives States like Alaska, Wyoming, New Mexico, Utah, and Colorado of revenue these states depend on for a wide scope of programs.

In addition, the proposed rule ignores findings that transporting LNG by rail can have positive effects on the environment. According to National Gas Intelligence, the 2020 Rule “would allow the bulk transport of liquefied natural gas (LNG) in

³¹ National Academies of Sciences, Engineering, and Medicine 2021, *Preparing for LNG by Rail Tank Car: A Review of a U.S. DOT Safety Research, Testing, and Analysis Initiative*. WASHINGTON, DC: THE NATIONAL ACADEMIES PRESS 8 (2021), <https://doi.org/10.17226/26221>.

³² John Kartch, *Joe Biden: “We Are Going To Get Rid of Fossil Fuels”*, Americans for Tax Reform (Feb. 8, 2020), <https://www.atr.org/joe-biden-we-are-going-get-rid-fossil-fuels>.

³³ Exec. Order No. 14008, 86 Fed. Reg. 7619 (Jan. 27, 2021).

³⁴ *Louisiana v. Biden*, No. 2:21-CV-00778, 2021 WL 2446010, at *2 (W.D. La. June 15, 2021), *appeal filed*, No. 21-30505 (5th Cir. Aug. 17, 2021).

³⁵ *Biden*, 2021 WL 2446010, at *16.

³⁶ *Id.* at *15.

³⁷ *Id.* at * 6–7; *AIDEA v. Biden*, 3:21-cv-00245-SLG.

³⁸ *Id.*

specialized rail tank cars in what could prove a boon for small-scale projects across the United States.”³⁹ The same source also indicates that “[m]oving the fuel by rail could also help projects in certain parts of the country like those in the Permian Basin, where producers have flared off natural gas at record rates in recent years.”⁴⁰ Thus, not suspending the 2020 Rule would allow for efficient distribution of natural gas through multiple means and can offset otherwise flared natural gas that leads to increased GHGs and wasting the resource entirely.

IV. *PHMSA’S PROPOSED RULE CONTRIBUTES TO INCREASED COSTS AT THE PUMP AND SHIFTS DEMAND FROM DOMESTIC TO FOREIGN SOURCES TO MEET SUPPLY.*

The PHMSA, while exhibiting concern about climate change, does not address the continuing need to supply the energy needs of this country, especially during winter months when demand is high. Rather, as a means of regulating production or consumption, the proposed rule appears to adopt a less efficient approach that discourages investment in newer tank cars (special permitting) in place of a considered transportation rule.

Notably, since President Biden took office LNG spot prices have increased 61%.⁴¹ According to the Energy Information Administration (EIA), in January 2022, colder weather led to increased demand for natural gas used for space heating and power generation, thus causing upward pressure on prices.⁴² Ultimately, “the average American household paid about \$1,000 in higher energy costs in 2021 compared to 2020,” and “households that use natural gas spent an extra \$300.”⁴³

Suspending the 2020 Rule only constricts the means by which demand can be satisfied – which may be the actual point of this proposed rule – but it does not change the need for fuel to heat American homes in winter. Rather, it burdens hard-working Americans with higher costs to do so, even putting people in danger when they cannot afford to pay their increasingly expensive bill. That problem appears to be getting worse not better due to Russia’s unprecedented incursion into Ukraine. Indeed Russia’s invasion of Ukraine is expected to have far-reaching implications for energy

³⁹ Jamison Cocklin, *U.S. Issues Final Rule Authorizing Widespread Transport of LNG by Rail*, NGI (June 19, 2020), <https://www.naturalgasintel.com/u-s-issues-final-rule-authorizing-widespread-transport-of-lng-by-rail/>.

⁴⁰ *Id.*

⁴¹ U.S. Energy Information Administration, *Natural Gas, Data, Henry Hub Natural Gas Spot Price* (last visited, Feb. 18, 2022), <https://www.eia.gov/dnav/ng/hist/rngwhhdm.htm>, (\$2.71 per Million Btu [Jan. 21, 2021] to \$4.38 per Million Btu [Feb. 3, 2022] equals increase of 61.62 %).

⁴² U.S. ENERGY INFORMATION ADMINISTRATION, *SHORT-TERM ENERGY OUTLOOK 2–3* (Feb. 2022), https://www.eia.gov/outlooks/steo/pdf/steo_full.pdf.

⁴³ Linnea Lueken & James Taylor, *Biden Energy Policies Cost U.S. Households More than \$1,000 in 2021*, THE HEARTLAND INSTITUTE (Feb. 8, 2022), <https://www.heartland.org/publications-resources/publications/biden-energy-policies-cost-us-households-more-than-1000-in-2021>.

markets given Moscow's role as the world's second-largest producer of natural gas and one of the world's largest oil-producing nations.⁴⁴

V. *PHMSA'S PROPOSED RULE HAS NATIONAL SECURITY IMPLICATIONS.*

Though the United States is the leading natural gas producer globally, Russia is second with 18 percent global share.⁴⁵ Nonetheless, Russia is looking to expand its influence through construction of the NORD STREAM 2 pipeline. This pipeline is intended to meet Europe's growing need for natural gas and complement existing pipelines through Belarus and Ukraine.⁴⁶ Even as Russia's actions are increasing geopolitical tension, it continues to grow its global energy profile through this expansion. As Russia accrues economic power, the United States is ceding it globally with irrational energy policies that have already resulted in increased reliance on foreign suppliers for the energy needs of our country.

The Proposed Rule, will only result in more homes in the United States being heated by Russian natural gas rather than supplied with domestic products. In fact, it has already happened. In 2018, "officials in Massachusetts and New Hampshire blocked financing for the \$3 billion Access Northeast Pipeline, which would have reliably provided fuel to three New England states."⁴⁷ And yet while blocking this pipeline, Massachusetts is offloading natural gas from Russia. This is alarming and is nowhere addressed by PHMSA as a potential consequence of the Proposed Rule.

VI. *PHMSA IS OPERATING BEYOND ITS STATUTORY AUTHORITY.*

PHMSA contends, without any specific support for this change in its prior position, that "any lost business opportunities could be offset by avoided safety and environmental risks if the suspension reduces the transportation of LNG (i.e., if it prevents transportation or production of LNG that would otherwise occur)."⁴⁸ PHMSA admits the purpose of the Proposed Rule is not really about safe transportation of hazardous materials in interstate commerce. Rather, it is intended to indirectly regulate the extraction, production, and ultimately consumption of natural gas, which is a purpose that exceeds PHMSA's mandate under the Hazardous

⁴⁴ Sam Meredith, Joanna Tan, Abigail Ng, Oil surges above \$100 for the first time since 2014, before paring gains, CNBC (Feb. 23, 2022), <https://www.cnbc.com/2022/02/24/oil-prices-jump-as-russia-launches-attack-on-ukraine.html> (last accessed Feb. 25, 2022).

⁴⁵ International Energy Agency, *The Role of Critical Minerals in Clean Energy Transitions, Share of Top Three Producing Countries in Extraction of Selected Minerals and Fossil Fuels*, 2019 (2021), <https://www.iea.org/reports/the-role-of-critical-minerals-in-clean-energy-transitions/the-state-of-play>.

⁴⁶ David McHugh, *Explainer: What's Russia's Nord Stream 2 Pipeline to Europe?*, AP NEWS (Feb. 8, 2022), <https://apnews.com/article/russia-ukraine-nord-stream-2-oil-pipeline-779970ee17f6fa9d0fa2996e45cbeab9>.

⁴⁷ Drew Johnson, *Why Is Russian Gas in Boston Harbor?*, WSJ (Mar. 12, 2018), <https://www.wsj.com/articles/why-is-russian-gas-in-boston-harbor-1520897637>.

⁴⁸ Hazardous Materials: Suspension of HMR Amendments Authorizing Transportation of Liquefied Natural Gas by Rail, 86 Fed. Reg. 61,731, 61,738 (Nov. 8, 2021).

Materials Transportation Act (HMTA).⁴⁹ Importantly in *Utility Air Regulatory Group (“UARG”) v. EPA*, the Supreme Court stated:

When an agency claims to discover in a long-extant statute an unheralded power to regulate “a significant portion of the American economy,” we typically greet its announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast “economic and political significance.”⁵⁰

In short, if Congress intended the PHMSA to regulate natural gas extraction, production, or consumption, it has to clearly and expressly say so.⁵¹ Instead, it was directed to regulate transportation. Thus, these broader energy policy objectives exceed its statutory authority.

III. CONCLUSION

For the foregoing reasons, the undersigned Attorney Generals submit that PHMSA should not proceed with a final rule to suspend or withdraw the 2020 Rule, which established an efficient and safe mechanism for transporting LNG by rail. .

Sincerely,



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⁴⁹ 49 U.S.C. § 5101–27 (2022).

⁵⁰ *Id.* at 324 (2014) (quoting *Brown & Williamson*, 529 U.S., at 159).

⁵¹ *See id.*



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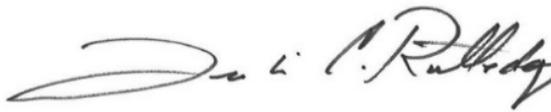
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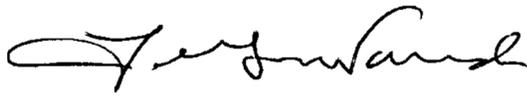
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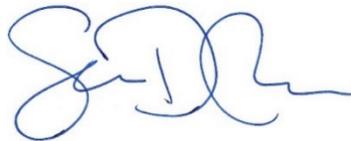
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