NO. 16-60448

In the United States Court of Appeals for the Fifth Circuit

EXXONMOBIL PIPELINE COMPANY,
Petitioner,

v.

U.S. DEPARTMENT OF TRANSPORTATION, PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMINISTRATION, OFFICE OF PIPELINE SAFETY,

Respondent.

MOTION TO STAY OR EXTEND EFFECTIVE DATE OF COMPLIANCE ORDER PENDING JUDICIAL REVIEW

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The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Local Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualifications or recusal.

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INTRODUCTION

Pursuant to 5 U.S.C. §705 and Federal Rule of Appellate Procedure 18, Petitioner ExxonMobil Pipeline Company (EMPCo) requests a stay, pending judicial review, of the Final Order dated October 1, 2015 (Final Order), Ex. A, and Decision on Petition for Reconsideration dated April 1, 2016 (Reconsideration Denial), Ex. B, of the U.S. Department of Transportation, Pipeline and Hazardous Materials Safety Administration, Office of Pipeline Safety (PHMSA), currently before this Court on petition for review. *See* 49 U.S.C. §60119. In the alternative, EMPCo requests that the effective date of the Compliance Order in the Final Order be extended until after review in this Court is concluded.

The Compliance Order has deadlines set to expire on July 30, 2016. *See* note 6 *infra*. EMPCo respectfully requests a ruling on this motion before that date.

The Final Order contains a Compliance Order and civil penalty stemming from findings of regulatory violations assessed after a longitudinal seam rupture in a pipeline segment containing Low Frequency Electric Resistance Welded (LF-ERW) pipe. In the underlying enforcement action and under the guise of interpreting the pertinent regulations, (49 C.F.R. §195.452 and relevant subparts), PHMSA departed from the regulations' unambiguous text and abandoned its prior interpretation. It also repudiated the industry-standard methodology for

determining a pipeline's "susceptibility to longitudinal seam failure"[1] under federal regulations, which PHMSA commissioned and then recommended to industry. Ultimately, PHMSA seeks to create de facto new regulations imposing new requirements for assessing seam failure susceptibility for LF-ERW pipe.

The test for a stay pending judicial review is readily satisfied. The primary consideration is the balance of equities, which here weighs heavily for a stay. EMPCo will suffer irreparable harm without a stay. In contrast, a stay of PHMSA's vague, unduly burdensome Compliance Order, which requires extensive and costly changes to current practices, would serve the public interest and threatens no harm.

EMPCo also has a substantial likelihood of success on the merits. The findings and Compliance Order directives at issue are not supported by regulations or technical guidance, and are, therefore, unenforceable. PHMSA's new policy and regulatory changes fundamentally changed the rules on the management of all LF-ERW pipelines, without notice-and-comment rulemaking. PMHSA's action, if allowed to stand, will cost millions of dollars to implement what amount to agency policy changes (because no existing rule governs and no new rule has been promulgated) imposed on one company, and not currently required of all pipeline operators. In the underlying action, EMPCo seeks a ruling preventing PHMSA from enforcing relevant portions of the Final Order and Compliance Order and

[1] The methodology is commonly referred to as the "Seam Failure Susceptibility Analysis" (SFSA).

remanding the enforcement action to the agency for review in accordance with its Part 195 regulations, and/or a directive that PHMSA must use notice-and-comment rulemaking to undertake these extensive pipeline-policy and regulatory changes.

BACKGROUND

The underlying proceeding arises from agency action related to a March 29, 2013 failure of one segment of the Pegasus[2] pipeline operated by EMPCo near Mayflower, Arkansas, which resulted in the release of crude oil. EMPCo took the segment out of service shortly after the incident, and it has remained out of service for the past three years. EMPCo has no current plans to submit a restart plan to PHMSA for that segment, eliminating all relevant risks associated with the pipeline during the Court's review of PHMSA's action.

After the incident, the Southwest Region of PHMSA conducted an investigation and then issued to EMPCo a Notice of Probable Violation, Proposed Civil Penalty, and Proposed Compliance Order. The notice alleged nine regulatory violations, and it proposed a civil penalty and compliance action items.

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[2] "Pegasus" refers herein only to the Northern segment of the Pegasus Pipeline. That segment runs from Patoka, Illinois to Corsicana, Texas. PHMSA conceded the "Northern and Southern Sections are two separate systems, despite the common Pegasus name." Post-Hearing Decision Confirming Corrective Action Order, *In re ExxonMobil Pipeline Co.*, CPF No. 4-2013-5006-H (May 10, 2013), *available at* https://primis.phmsa.dot.gov/comm/reports/enforce/documents/420135006H/420135006H_Post-Hearing%20Decision%20on%20Corrective%20Action%20Order_05102013_text.pdf (last visited July 6, 2016).

EMPCo requested an agency hearing.[3] Following the hearing, PHMSA issued its October 1, 2015 Final Order that confirmed the Southwest Region's violation findings, the vast majority of the civil penalty, and the Compliance Order. It also set deadlines for paying the penalty and meeting the compliance directives.

EMPCo requested reconsideration and a stay of the Compliance Order, which PHMSA granted through February 2, 2016. PHMSA later granted a further 60-day stay, explaining that "extending the stay for an additional 60 days while the pipeline remains out of service will not compromise safety." Ex. C (Letter from PHMSA to Counsel for EMPCo (Feb. 4, 2016)).

PHMSA ultimately denied reconsideration in its April 1, 2016 Reconsideration Denial, which is the final agency action. The Reconsideration Denial directs the Compliance Order's deadlines to begin running April 1. Those deadlines will expire long before the conclusion of judicial review. Because the deadline to pay the civil penalty has already expired, and to avoid further penalties, the accrual of interest, and a possible enforcement proceeding, *see* Ex. A, at 41, EMPCo paid the civil penalty, but reserved all rights available to it, including the right to seek a refund of the amount of penalty paid.[4]

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[3] Such hearings are before an Agency Hearing Officer (a dedicated attorney in the agency), not a neutral Administrative Law Judge or other impartial, uninterested adjudicator.

[4] Paying a refundable penalty does not moot a request for judicial review that seeks a refund. *See, e.g.*, *BP Exploration & Oil, Inc. v. U.S. Dep't of Transp.*, 44 F.Supp.2d 34, 37 (D.D.C.

EMPCo, however, requested that PHMSA stay the Compliance Order or postpone its effective date pending judicial review. PHMSA declined, stating:

> [T]he decision on the Petition for Reconsideration constitutes final agency action in the proceeding. Due to its finality, the Associate Administrator will not be engaging in further adjudication of procedural requests or motions to stay this case.

Ex. D (Email from PHMSA Chief Counsel to EMPCo Counsel (Apr. 26, 2016)).

REASONS WHY THE COURT SHOULD GRANT THE RELIEF REQUESTED

Under 5 U.S.C. §705, the Court "may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings." Relief may be granted "[o]n such conditions as may be required and to the extent necessary to prevent irreparable injury." *Id*.; *Tesfamichael v. Gonzales*, 411 F.3d 169, 174 (5th Cir. 2005); *Asbestos Info. Ass'n/N. Am. v. OSHA*, 727 F.2d 415, 418 (5th Cir. 1984). Rule 18(a)(2) states, "[a] motion for a stay may be made to the court of appeals."

I. PHMSA DENIED EMPCO'S REQUEST TO STAY THE COMPLIANCE ORDER PENDING JUDICIAL REVIEW, AND FURTHER REQUESTS TO THE AGENCY WOULD BE FUTILE.

EMPCo requested, and PHMSA denied, a stay of the Compliance Order and civil penalty pending judicial review. *See* Fed. R. App. P. 18(a)(2)(A). The denial cites the finality of the agency's action and makes plain that further stay requests to

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1999); *Comfort Lake Ass'n v. Dresel Contracting, Inc*., 138 F.3d 351, 356 (8th Cir. 1998) (collecting cases).

the agency would be futile. *See* Ex. D. Denial of a stay merely *because* PHMSA has taken final agency action is at odds with §705, which recognizes, "[w]hen an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review." 5 U.S.C. §705.

PHMSA's stay denial is *not* premised on safety or public-interest concerns. This is consistent with PHMSA's prior recognition that staying the Compliance Order conditions "will not compromise safety," particularly since the pipeline remains out of service. Ex. C. Given the pipeline segment remains out of service and EMPCo has no current plans to restart it, the justification for a stay is as applicable now as when PHMSA originally granted a stay during reconsideration.

II. A STAY IS WARRANTED UNDER THE CONTROLLING TEST.

"[T]he familiar four-factor test applied to preliminary injunctions" applies to requests for a stay pending judicial review of agency action. *Tesfamichael*, 411 F.3d at 172; *Asbestos Info.*, 727 F.2d at 418. Under that test, the propriety of a stay is based on whether: (1) irreparable harm would occur without a stay; (2) potential harm to the movant outweighs harm to others if a stay is not granted; (3) granting a stay is not contrary to the public interest; and (4) the movant presents a substantial likelihood of success on the merits. *See Tesfamichael*, 411 F.3d at 172.

"[T]his Court has refused to apply these factors in a rigid, mechanical fashion." *United States v. Baylor Univ. Med. Ctr.*, 711 F.2d 38, 39 (5th Cir. 1983)

(per curiam). Rather, of the four factors, the Court emphasizes the three that involve "balancing the equities of the situation" and de-emphasizes "the likelihood-of-success criteria." *Asbestos Info*., 727 F.2d at 418 n.5. Accordingly, EMPCo "need only present a substantial case on the merits when a serious legal question is involved," provided "the balance of equities weighs heavily in favor of granting the stay." *Baylor Univ. Med. Center*, 711 F.2d at 39 (citation omitted).

A. The Equities Weigh Heavily in Favor of Granting a Stay.

The equities weigh heavily for a stay because a stay would prevent irreparable harm to EMPCo without harming any third party or the public interest.

1. EMPCo faces imminent, irreparable harm without a stay.

The Court has recognized that the most important of the four factors "is that the failure to grant [a stay] will result in irreparable injury to the person requesting the relief." *Lewis v. S. S. Baune*, 534 F.2d 1115, 1121 (5th Cir. 1976). Here, without a stay, EMPCo faces irreparable harm.

There is irreparable harm here because, without a stay, EMPCo would be forced to fully and strictly comply[5] with the Compliance Order pending judicial

[5] Prior to PHMSA's finalization of the Compliance Order, EMPCo had already made extensive improvements to its organizational structure and pipeline risk and integrity management programs, consistent with federal regulations and specifically including improvements to the processes associated with identifying, assessing the risk of, and addressing the threat of potential seam failures on LF-ERW pipelines. EMPCo has already submitted responses to Compliance Order Actions 1(a), 1(b), 1 (c), 2, 3, 4, and 5, while expressly reserving its rights and without waiving its objections, arguments, and defenses. EMPCo timely submitted responses to PHMSA on Compliance Order Actions 1(a) & (b) on

review, which might moot these proceedings. Voluntary, full compliance with an agency compliance order, unlike partial compliance or paying a refundable penalty under protest, can threaten to moot judicial-review proceedings. *See, e.g.*, *Comfort Lake Ass'n v. Dresel Contracting, Inc*.,138 F.3d 351, 356 (8th Cir. 1998).

Further irreparable harm is promised because strict compliance while review is pending would be costly, could not easily be undone should EMPCo prevail in this Court, and could cause harm. Compliance would demand EMPCo to undertake significant, fundamental changes to its pipeline risk and integrity management program (IMP) that applies to all EMPCo's pipelines, not just the Pegasus pipeline that is currently out of service. The programmatic changes required by the Compliance Order, once implemented, would require immediate and significant reprioritization of pipeline segments for assessment (*e.g.*, in-line inspection, hydrotesting, etc.). *See* Ex. E (Affidavit of EMPCo's Steve Koetting). These IMP changes would immediately result in multiple pipeline systems being subjected to more frequent, costly, and potentially destructive assessments, regardless of the actual risks presented by the pipeline systems and without clear regulations or fair notice as to PHMSA's new proposed standardized approach. *See id*. If the Compliance Order is reversed, EMPCo will have unnecessarily spent millions of dollars, been placed at a competitive disadvantage as compared to other pipeline

October 30, 2015, Compliance Order Actions 2 and 3 on May 31, 2016, and Compliance Order Actions 1(c), 4, and 5 on June 30, 2016.

operators that will not have incurred such expenses, and been forced to revamp its entire IMP with no practical way to return to the *status quo ante*.

In addition, the Compliance Order is vague and, as a result, is impossible to satisfy. That creates additional expenses caused by confusion in attempting to comply. It may also result in implementation of measures, during the pendency of judicial review, that even PHMSA is not requiring because the threat of possible civil and criminal penalties may skew EMPCo's efforts at compliance. Moreover, a stay is proper to relieve a party from the burden of civil and criminal penalties for violation of a vague order under due process grounds. *See Women's Med. Ctr. of Nw. Houston v. Bell*, 248 F.3d 411, 421-22 (5th Cir. 2001) (affirming a preliminary injunction preventing, on due process grounds, enforcement of vague law).

The Compliance Order's vagueness is readily apparent. For example, it directs EMPCo to review its processes for scoring certain failure risks in pre-1970 LF-ERW pipe. Ex A, at 43 (Compliance Order Action 1(c)). It then requires ensuring "appropriate management review and approval of all integrity decisions," without explaining what "appropriate management review and approval of all integrity decisions" means, let alone citing an applicable regulation requiring as much. *Id*. Then, PHMSA directs that the aforementioned risk analysis should be conducted without "relative ranking" among pipeline segments. *Id*. But the

pertinent regulations appear to require the opposite; they call for an "assessment schedule that prioritizes pipeline segments for assessment." 49 C.F.R. §195.452(e).

EMPCo faces irreparable harm if it must expend significant resources guessing at compliance, then developing and implementing new IMP procedures not founded on, or that appear to contradict, existing regulations, and all while facing serious consequences for guessing wrong. EMPCo will also have no means to recover costs expended attempting to comply with PHMSA's erroneous order. *See, e.g.*, *Enter. Int'l, Inc. v. Corporacion Estatal Petrolera Ecuatoriana*, 762 F.2d 464, 473 (5th Cir. 1985); *Janvey v. Alguire*, 647 F.3d 585, 600 (5th Cir. 2011); Ex. E.

Much the same problems arise with the Compliance Order's directives to revise EMPCo's process for analyzing possible seam failure susceptibility in pre-1970 LF-ERW pipe. Ex. A, at 42, 43 (Compliance Action Item 1(d)). PHMSA demands that EMPCo revise its Seam Failure Susceptibility Analysis (SFSA) Process "to incorporate up-to-date knowledge and relevant results of the operator and industry knowledge from failure analyses and research." But compliance with this directive is impracticable because it is hopelessly vague and non-specific.[6]

[6] *See also* Ex. A, at 44 (Compliance Action Item 1(e)). The current deadline for compliance with Items 1(d) & (e) is July 30, 2016. It is for this reason that EMPCo respectfully requests a ruling on this motion on or before July 30, 2016.

Relevant new industry analysis and research is not complete. This is reflected in the 2013 Final Report of a PHMSA-commissioned study known as the Battelle study, which recognizes that gaps in research remain and additional work is needed to identify an effective tool for assessing risk of seam failure.[7]

Ultimately, EMPCo is essentially being ordered to incorporate whatever PHMSA picks and chooses as relevant from the Battelle study (and other relevant industry research) into its IMP, which then becomes de facto regulation only to EMPCo, even though that research itself recognizes it is incomplete. At the same time, EMPCo's prior IMP process that specifically incorporated available industry research consistently embraced by PHMSA was rejected by PHMSA for the first time in the Final Order. *See id.* at 9-12; Part II.B.1 *infra*.

Meanwhile, EMPCo could be better allocating personnel time and attention to higher priority pipeline-safety and integrity issues as identified by EMPCo integrity-management experts based on actual threat and risk-assessment data.

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[7] In 2011, PHMSA commissioned Battelle Memorial Institute to conduct an extensive study of the characteristics of ERW seams that make them susceptible to failure, and to identify factors to consider to ensure the safety of the pipelines. Battelle's 2013 Final Report summarizes the overall findings and notes that research will continue with a second phase to identify tools for use by the industry, explaining that "it is clear that gaps remain both in the understanding of the failure process, and in quantifying the effectiveness of current schemes and technology to manage the ERW pipeline network. As such, the work initiated . . . is being continued to bridge those gaps. The objective is to deliver a tool for use by the industry . . . ." Battelle Memorial Institute, *Final Summary Report and Recommendations for the Comprehensive Study to Understand Longitudinal ERW Seam Failures—Phase I* (Oct. 23, 2013), *available at* https://primis.phmsa.dot.gov/matrix/FilGet.rdm?fil=8501&s=CA5DAB3040C24EFE8F31736A1BC5E6C6&c=1 (last visited July 6, 2016).

2. No meaningful countervailing harm is threatened by a stay, and a stay is not contrary to the public interest.

EMPCo's requested stay, if granted, would entail no meaningful threat of harm to others or the public interest. The Pegasus pipeline is not currently in service, and EMPCo has no current plans to seek permission to restart it. Ex. E. PHMSA itself previously acknowledged that an earlier stay of the Compliance Order "while the pipeline remains out of service will not compromise safety." Ex. C. Further, PHMSA's denial of a stay pending judicial review cited merely the finality of PHMSA's order, not any safety or environmental concerns.

The public interest would be served by a stay. The Compliance Order's enforcement-derived regulation, drafted solely by PHMSA's Southwest Region, will ultimately affect every operator within the region's jurisdiction, if it is permitted to stand. It could affect the entire pipeline industry because it will undoubtedly be imposed on other operators based on this precedent.[8] At the same time, there is no technical support for what PHMSA requires in its enforcement-derived regulation, and, because of the lack of technical support and the vagueness and incomprehensibility of much of the order, it is virtually impossible to

[8] *See* Notice of Amendment, *In re Magellan Pipeline Company LP*, CPF No. 4-2015-5013-M (June 9, 2015), *available at* http://primis.phmsa.dot.gov/comm/reports/enforce/documents/420155013M/420155013M_NOA_06092015_text.pdf (last visited July 6, 2016) (enforcement action taken after Pegasus incident and requiring, as here, that operator revise integrity management procedures for LF-ERW-pipe seam-failure susceptibility); Notice of Amendment, *In re Phillips 66*, CPF No. 4-2015-5014M (July 2, 2015), *available at* http://primis.phmsa.dot.gov/comm/reports/enforce/documents/420155014M/420155014M_NOA_07022015.pdf (last visited July 6, 2016) (same).

determine what full, adequate compliance looks like. Nonetheless, compliance would likely cost the industry hundreds of millions of dollars. *See* Ex. E. If no stay is granted, operators within PHMSA's Southwest Region jurisdiction or industry-wide could be subject to enforcement for failing to comply with new regulatory interpretations and directives that are still under review. That state of affairs would disserve the public interest.

B. EMPCo Has a Substantial Likelihood of Success on the Merits.

The final stay factor is also satisfied because EMPCo has a substantial likelihood of success on the merits. First, PHMSA's findings of regulatory violations are reversible error because EMPCo fully complied with the relevant regulations, as demonstrated by the regulations' unambiguous text, PHMSA's prior guidance, and undisputed facts. Second, PHMSA unlawfully reinterpreted and rewrote §195.452 requirements in this proceeding, in a manner that deprived EMPCo of "fair notice." The petition presents a substantial case on these issues, as well as independently presenting a substantial likelihood of success on each. *See Asbestos Info.*, 727 F.2d at 418 n.5; *Baylor Univ. Med. Center*, 711 F.2d at 39.

1. EMPCo fully complied with the relevant regulations.

PHMSA found EMPCo violated five IMP regulations (all §195.452 subparts) associated with its integrity management of the Pegasus pipeline. The five alleged violations (Final Order Items 1-4, 7) hinge on PHMSA's conclusion

that EMPCo should have determined in 2006 that the pipe was susceptible to longitudinal seam failure. Ex A, at 12.

EMPCo presents a substantial likelihood of success on the merits because the Final Order, to achieve the five violation findings, essentially rewrites the pertinent regulations to add a new "susceptible to seam failure" risk factor, elevates that factor above factors actually enumerated in the regulation and discussed in PHMSA's guidance, ignores undisputed facts, and retroactively disregards for the first time in the underlying enforcement action that same guidance, published by PHMSA, for how an operator is to determine "seam failure susceptibility."

For example, the text of the regulation pertinent to two alleged violations requires an operator like EMPCo to "establish an integrity assessment schedule that prioritizes pipeline segments for assessment" based on *EMPCo's* "consideration" of a variety of risk factors:

> The factors an operator must consider include, but are not limited to:
>
> (i) Results of the previous integrity assessment, defect type and size that the assessment method can detect, and defect growth rate;
>
> (ii) Pipe size, material, manufacturing information, coating type and condition, and seam type;
>
> (iii) Leak history, repair history and cathodic protection history.
>
> [listing other factors not relevant for present purposes] . . . .

49 C.F.R §195.452(e)(1). The regulation does not prescribe that any one risk factor should outweigh any other. Nor does it dictate particular conclusions. Importantly, "susceptibility to seam failure" is not a listed risk factor in §195.452(e). Indeed, the term "susceptible to longitudinal seam failure," or anything analogous, is not defined anywhere in §195.452(e)(1) or elsewhere in the §195.452 regulations.

Consistent with §195.452(e)(1)'s unambiguous text outlining a non-exhaustive list of factors *an operator* is to consider, the IMP regulations have since their inception been primarily "performance-based," and not "prescriptive," which allows for operator flexibility in compliance and reliance on industry standards. *See* 65 Fed. Reg. 75,378, 75,381, 75,382 (Dec. 1, 2000). This is undisputed.

And consistent with that performance-based approach, and relevant to all five aforementioned alleged violations, a 2004 PHMSA-commissioned report specifically addresses how an operator like EMPCo should determine whether LF-ERW pipe is "susceptible to longitudinal seam failure" under federal regulations.[9] PHMSA does not dispute, and indeed admits, that the report, known as the "Baker Report," provides guidance for determining seam-failure susceptibility. Ex. A, at 9; *see also* 76 Fed. Reg. 53,086, 53,097 (Aug. 25, 2011) (noting Baker Report "provided suggested guidelines that can be used to create policy for longitudinal

[9] *See* Michael Baker & John Kiefner, *Low Frequency ERW and Lap Welded Longitudinal Seam Evaluation, Final Report (rev. 3)* (Apr. 2004), *available at* https://primis.phmsa.dot.gov/iim/docstr/TTO5_LowFrequencyERW_FinalReport_Rev3_April2004.pdf (last visited July 6, 2016).

seam testing"). The Baker Report specifically includes a standardized flowchart for determining susceptibility to seam failure under the pertinent regulations.

EMPCo established below, and PHMSA again has never disputed, that: (i) EMPCo's IMP adopted the Baker Report flowchart methodology; (ii) EMPCo applied the methodology here; and (iii) the methodology determined the pipe at issue was not "susceptible to seam failure."[10] It is further undisputed that in 2002 EMPCo retained one of the Baker Report's authors, Dr. John Kiefner, to design EMPCo's methodology based on his work, specifically including the Baker Report.[11] With that methodology in place, previous PHMSA audits of EMPCo's IMP never once identified the relevant EMPCo process as deficient. *See* Ex. G, at 6 (Pet. for Reconsideration); Ex. E. At the same time, PHMSA has represented that

> during every integrity management and other audit, [PHMSA] checks to see that each pipeline operator that uses low-frequency ERW pipe . . . has a plan that describes how the operator intends to mitigate potential threats posed by the pipelines. The plan must be risk based and requires a baseline assessment and remedial measures. The results of pipeline tests are factored into the plan so that more aggressive assessments can be pursued when needed.[12]

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[10] *See*, *e.g.*, Ex. F, at ¶21 (Kiefner Affidavit) (noting, "[t]he seam-integrity assessment activities that EMPCo employed on this segment of pipe were consistent with the Baker Report Flow Chart and IMP regulations and guidance in effect at the time").

[11] *See* Ex. F, at ¶10-12 (noting, "I helped the Company review and apply the 2002 report and subsequent revisions, including the 2004 Baker Report recommendations in regard to evaluating the relative risk of low frequency electric resistance welded (LFERW) pipe.").

[12] NTSB, *Rupture of Hazardous Liquid Pipeline With Release and Ignition of Propane, Carmichael, Mississippi* (Nov. 1, 2007), 27-28, *available at* http://www.ntsb.gov/investigations/AccidentReports/Reports/PAR0901.pdf (last visited July 6, 2016).

Further, Dr. Kiefner stated, "EMPCo's conclusion that the segment was not 'seam failure susceptible' under federal regulations was reasonable, and was consistent with the seam failure susceptibility determination guidance available prior to March 29, 2013." Ex. F, at ¶19 (Kiefner affidavit). He then reaffirmed and supplemented his conclusions in a Supplemental Affidavit attached to EMPCo's Petition for Reconsideration. Ex. H, at ¶¶7-8, 18, 20, 22, 24 (Supplemental Kiefner Affidavit). The Final Order and Reconsideration Denial do not refute or rebut this expert testimony; they simply ignore it.

In sum, PHMSA announced in the Final Order that EMPCo violated a new standard, one essentially based on the fact that the Pegasus pipeline failed at a longitudinal seam. Because there was a seam failure, the Final Order concludes, using strict-liability reasoning, there must have been a failure to adequately assess the risk of failure. But the plain text of the pertinent regulations, PHMSA's adopted guidance, and the undisputed facts (including PHMSA's prior audits of EMPCo's IMP) establish that EMPCo complied with the relevant regulations that underpin PHMSA's violation findings for Items 1-4 and 7.

2. No agency deference is warranted.

PHMSA may attempt to recast the issues as involving deference to regulatory interpretation. But no deference is warranted to an agency interpretation when, as here, the regulation's text is unambiguous. *See Util. Air Regulatory*

Group v EPA, 134 S.Ct. 2427, 2444 (2014) ("[W]hen an agency claims to discover in a long-extant statute an unheralded power to regulate . . . we typically greet its announcement with a measure of skepticism.").[13] Nor has PHMSA "interpreted" §195.452(e)(1) or any other regulation here. It has instead effectively rewritten the pertinent regulations, without the needed notice-and-comment rulemaking.

Even if a regulation is ambiguous, deference has its bounds. An agency interpretation receives no deference if an "alternative reading is compelled by . . . indications of the [agency's] intent at the time of the regulation's promulgation." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994). Likewise, no deference is owed when an interpretation conflicts with prior interpretations, *Akzo Nobel Salt, Inc. v. Fed. Mine Safety & Health Review Comm'n*, 212 F.3d 1301, 1304-05 (D.C. Cir. 2000), or if the agency has effectively rewritten regulations under the guise of interpreting them. *Christensen v. Harris Cnty.*, 529 U.S. 576, 588 (2000). Likewise, no deference is due when an interpretation would subject a regulated party to "unfair surprise" *Christopher v. SmithKline Beecham Corp.*, 132 S.Ct. 2156, 2168 (2012).

PHMSA's stark, unheralded departure from the regulation's plain language and prior agency interpretations is entitled to no deference under these principles.

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[13] *See also Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 462 (2002) (agency lacked authority "to develop new guidelines or to assign liability in a manner inconsistent with the [unambiguous] statute"); *Moore v. Hannon Food Serv., Inc.*, 317 F.3d 489, 495 (5th Cir. 2003).

3. EMPCo was never afforded fair notice of PHMSA's new application and interpretation of "susceptible to seam failure" under federal regulation.

EMPCo will also succeed on the merits because regulations and PHMSA public statements must identify with "ascertainable certainty" the standards with which the regulated community must conform. *Gen. Elec. v EPA*, 53 F.3d 1324 (D.C. Cir. 1995).[14] Once PHMSA has identified these standards, it cannot change them, as it did here, without fair notice. *See Appalachian Power v. EPA*, 208 F.3d 1015, 1025 (D.C. Cir. 2000); *United States v. Am. Nat'l Can Co.*, 126 F.Supp.2d 521, 530 (N.D. Ill. 2000). If an agency provides "no pre-enforcement warning, effectively deciding 'to use a citation . . . as the initial means for announcing a particular interpretation' -- or for making its interpretation clear," the question is whether the "regulated party received, or should have received, notice of the agency's interpretation in the most obvious way of all: by reading the regulations." *Gen. Elec.*, 53 F.3d at 1329 (quoting *Martin v. OSHRC*, 499 U.S. 144, 158 (1991)). Here, EMPCo received no such necessary notice.

For example, §195.452(e)(1) establishes factors that should be considered in assessing pipeline integrity risk. PHMSA now writes into the regulation the risk factor of "susceptibility to seam failure," even though that is not supported by the only "authoritative" notice by PHMSA on the topic: the Baker Report and

[14] *See United States v. Chrysler Corp.*, 158 F.3d 1350 (D.C. Cir. 1998); *see also Diamond Roofing v. OSHRC*, 528 F.2d 645 (5th Cir. 1976).

flowchart methodology. PHMSA commissioned the report, and every PHMSA statement before this action indicated operators comply by following the report's methodology. *See, e.g.*, 76 Fed. Reg. 53,086, 53,097 (Aug. 25, 2011).[15] PHMSA has never published a different methodology and has not previously disavowed the Baker Report's flowchart methodology for seam-failure susceptibility analysis.[16]

PHMSA's radical, unheralded departure from its prior announced standard for what constitutes an appropriate seam failure susceptibility analysis mandates reversal because PHMSA is not acting upon an existing interpretation, or even clarifying it. PHMSA is instead seeking to enforce an interpretation that replaces the regulation, which it cannot do as it has attempted here.[17]

CONCLUSION

For these reasons, the Court should stay the Final Order and Reconsideration Denial or extend the effective date of the Compliance Order until such time as the Court's review is complete.

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[15] *See also In re Kinder Morgan Energy Partners*, CPF No. 1-2004-5004 (June 26, 2006) (encouraging use of the methodology of the Baker Report's author, Dr. Kiefner, as guidance); PHMSA, *Hazardous Liquid Integrity Management Enforcement Guidance* (Section 195.450 and 452), *available at* http://www.phmsa.dot.gov/staticfiles/PHMSA/DownloadableFiles/Files/Hazardous_Liquid_IM_Enforcement_Guidance_12_7_2015.pdf (last visited July 6, 2016) (citing Baker Report).

[16] The Baker Report, and flowchart, remains posted as the only guidance on PHMSA's website. *See* PHMSA Technical Resources, *Low Frequency ERW and Lap Welded Longitudinal Seam Evaluation, Final Report (rev. 3)* (Apr. 2004), *at* https://primis.phmsa.dot.gov/iim/techreports.htm (last visited July 6, 2016).

[17] If PHMSA has determined that existing regulation on integrity assessments of LF-ERW pipe is insufficient, the established rulemaking process should be invoked and applied evenly across all PHMSA Regions.

DATED: July 6, 2016.

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CERTIFICATE OF CONFERENCE

I certify that Robert Hogfoss and Catherine Little, counsel for Petitioner EMPCo, attempted to contact Teresa Gonsalves, Chief Counsel for PHMSA, about this motion on July 1, 2016 by phone, and left a voice message, and again by email on July 5, 2016. Ms. Gonsalves indicated in a July 5, 2016 email in response that she had not received the voicemail but that a member of her staff would respond to EMPCo's attempt to confer on July 6, 2016. On July 6, 2016, PHMSA's Lauren Clegg informed Ms. Little by email that "PHMSA will be represented in this matter by the Department of Justice, and we expect a DOJ attorney will be assigned soon." EMPCo, therefore, attempted to contact all other parties about this motion but was unable to determine by the time this motion was filed whether an opposition will be filed.

/s/ Reagan W. Simpson
Reagan W. Simpson

CERTIFICATE OF COMPLIANCE

I certify that

1. This motion to stay enforcement complies with the length limitation of Federal Rule of Appellate Procedure 27(d)(2) because it does not exceed 20 pages, exclusive of the certificate of interested persons.

2. This motion complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 27(d)(1) because it was prepared in Microsoft Word in 14-point, proportionally spaced Times New Roman font.

3. The electronic PDF version of this brief is an exact copy of the paper version, includes the required privacy redactions under 5th Cir. R. 25.2.13, and has been scanned and reported free of viruses by the most recent version of a commercial virus-scanning program.

/s/ Reagan W. Simpson
Reagan W. Simpson

CERTIFICATE OF FILING AND SERVICE

I certify that this motion was filed with the Court via the court's electronic filing system, on July 6, 2016. A copy of this motion was also sent to Respondent by the court's electronic filing system and/or Federal Express, addressed to:

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