

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

_____	)	
EXXONMOBIL PIPELINE COMPANY,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 16-60448
	)	
UNITED STATES DEPARTMENT OF	)	
TRANSPORTATION; PIPELINE AND	)	
HAZARDOUS MATERIALS SAFETY	)	
ADMINISTRATION; OFFICE OF	)	
PIPELINE SAFETY,	)	
	)	
Respondents.	)	
_____	)	

**RESPONDENTS' OPPOSITION TO PETITIONER'S MOTION  
FOR A STAY PENDING JUDICIAL REVIEW**

## INTRODUCTION AND SUMMARY

On March 29, 2013, the Pegasus Pipeline, operated by ExxonMobil Pipeline Company (“EMPCo”), ruptured near the town of Mayflower, Arkansas, releasing approximately 5,000 barrels of crude oil into a residential area. The accident caused over \$57 million in property damage, and twenty-two homes were evacuated.

Subsequent investigation by the Pipeline and Hazardous Materials Safety Administration (“PHMSA”) (an operating administration of the U.S. Department of Transportation), Office of Pipeline Safety revealed that the pipeline had experienced numerous seam failures in the past. The pipeline experienced seam failures during hydrostatic testing in 1969 and again in 1991, and experienced an in-service seam leak in 1984. More recently, hydrostatic testing in 2005-2006 resulted in eleven seam-related failures.

Notwithstanding these repeated seam failures, EMPCo steadfastly refused to consider the pipeline “susceptible to seam failure.” Such a designation would have triggered a regulatory requirement to develop a schedule for continually assessing the integrity of the seams. *See* 49 C.F.R. § 195.452(j)(5). PHMSA’s investigation concluded that EMPCo’s erroneous determination that the pipe was not susceptible to seam failure, and its concomitant failure to properly assess that risk, was a contributing factor in the Mayflower accident.

Based on the accident report, and after a hearing, PHMSA concluded that EMPCo committed nine violations of pipeline safety regulations relating to the failure

to establish an appropriate schedule for testing and assessing seam integrity. As a result, PHMSA assessed a civil penalty of \$2,630,400 against EMPCo and issued a compliance order to ensure compliance with the applicable regulations. The compliance order requires EMPCo to take a series of actions to modify its integrity management procedures to ensure proper testing and assessment of its pipelines. After the agency denied reconsideration, EMPCo filed the instant petition for review and now moves to stay the agency's compliance order pending judicial review.

This Court should deny EMPCo's motion. EMPCo has failed to show that, in the absence of a stay, it will suffer irreparable harm. Indeed, as EMPCo concedes, it has already taken substantial steps towards satisfying the compliance order. EMPCo has not shown that complying with the remaining portions, which require it to revise its processes for conducting certain risk analyses, amounts to irreparable harm. Vague generalizations that compliance is costly and burdensome do not suffice.

Moreover, a stay pending appeal is contrary to the public interest. The pipeline failure at issue here resulted in a serious accident. The agency concluded that one of the contributing factors to that accident was EMPCo's failure to accurately assess the risk of seam failure. The compliance order, by requiring EMPCo to revise its processes for assessing such risks, aims to prevent similar accidents. That is a serious safety concern that militates against a stay, even if EMPCo has no immediate plans to re-open the Pegasus pipeline. EMPCo operates over a thousand miles of pipeline similar in type and condition to the Pegasus pipeline, and also subject to the pipeline

safety regulations. The compliance order will ensure that EMPCo has the necessary procedures in place to appropriately assess future risks of seam failure along these pipelines. EMPCo, therefore, cannot show that the balance of equities favors a stay.

In any event, EMPCo cannot show a substantial likelihood of success on the merits, as is required for a stay. PHMSA's compliance order and order denying reconsideration thoroughly explain the bases for the agency's conclusion that EMPCo committed regulatory violations and its assessment of a civil penalty. EMPCo, therefore, cannot show that the agency's actions are arbitrary or capricious.

## **STATEMENT**

### **A. Regulatory Background**

The Pegasus Pipeline is covered by the agency's integrity management regulations, which require EMPCo to have in place a written integrity management program. Order (Stay Motion, Ex. A) at 4, 9. Such a program must include a plan to carry out periodic integrity assessments of each pipeline and address conditions discovered. 49 C.F.R. § 195.452(b)(3), (f)(2)-(5). The integrity management regulations require operators to have a schedule for conducting integrity assessments and prioritizing those assessments, based on all risk factors, to include results of previous integrity assessments, pipe material, manufacturing, seam type, and leak history. 49 C.F.R. § 195.452(e)(1).

The relevant portions of the Pegasus Pipeline are constructed of low-frequency electric-resistance welded (ERW) pipe that was manufactured by Youngstown Sheet

& Tube Company in the 1940s. Order at 9. ERW pipe manufactured prior to 1970 is known to have an increased risk of seam failure due to the method of manufacturing. Order at 8-10 (citing, *inter alia*, the Baker Report).<sup>1</sup> ERW pipe that is susceptible to seam failure must be periodically assessed with appropriate inspection tools or tests to ensure the seam's integrity. 49 C.F.R. § 195.452(j)(5).

After completing an integrity assessment, unless impracticable, within 180 days an operator must obtain sufficient information about any anomalous condition to determine whether that condition presents a potential threat to the pipeline's integrity. 49 C.F.R. § 195.452(h)(2). If so, such an anomalous condition must be addressed promptly and according to a schedule that prioritizes conditions for remediation. 49 C.F.R. § 195.452(h)(1)-(3). Certain conditions must be repaired immediately, while others may be repaired within 60 or 180 days. 49 C.F.R. § 195.452(h)(4). If a condition requires immediate repair, the operator must temporarily reduce operating pressure or shut down the pipe until the repair is completed. 49 C.F.R. § 195.452(h)(4)(i).

The schedule for periodic assessments of pipeline integrity must be based on all risk factors specified in the regulations, but must occur every five years or 68 months, unless the operator obtains a variance. 49 C.F.R. § 195.452(j)(3)-(4).

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<sup>1</sup> The agency has deemed all pre-1970 ERW pipe to be susceptible to seam failure unless an engineering analysis has proved otherwise. 49 C.F.R. § 195.303(d).

## **B. Factual Background**

As noted above, the Pegasus Pipeline had a long history of seam failure. Testing in 1969 and 1991 showed multiple seam failures, and an actual in-service seam failure occurred in 1984. Moreover, hydrostatic testing conducted in 2005-2006 showed eleven seam failures in the ERW pipe. Order at 9. A metallurgical analysis concluded that the seam failures were due to manufacturing defects. *Id.* However, because the analysis showed no evidence of pressure cycling fatigue or preferential seam corrosion, EMPCo concluded that the ERW pipe was not susceptible to seam failure. *Id.*

In the wake of the Mayflower accident, the agency determined that EMPCo had mistakenly determined that the relevant portion of the Pegasus Pipeline was not susceptible to seam failure, and as a result, failed to properly assess the pipeline's risk of rupture and to take any necessary remedial action. Order at 4.

The agency found that EMPCo's conclusion that the pipeline was not susceptible to seam failure was "flawed." Order at 9. First, the agency relied on the Baker Report, a study of pre-1970 ERW pipe commissioned by the agency that provides guidance on determining susceptibility to seam failure in ERW pipe. *Id.* The Baker Report provides that if a seam failure occurs either in-service or during a hydrostatic test, the pipe should be considered susceptible to seam failure. *Id.* The agency reasoned, therefore, that the 2005-2006 test of the Pegasus Pipeline "strongly suggested the ERW pipe was susceptible to seam failure." Order at 10. In addition,

the agency noted that the pipeline had seam-related failures during hydrostatic tests in 1991 and 1969, as well as an in-service seam leak in 1984. *Id.*

The agency further concluded that it was not reasonable for EMPCo to conclude that the pipe was not susceptible to seam failure based solely on a lack of evidence of pressure cycling fatigue or preferential seam corrosion. *Id.* As the agency explained, although there was no evidence of fatigue, there was evidence that the pipe was brittle, and brittle pipe “will not exhibit the same evidence of fatigue cracking.” *Id.* The agency noted that pre-1970 ERW pipe is known to “exhibit brittle qualities” and the Baker Report specifically advises operators to consider the brittleness or toughness of the material in determining whether a pipe is susceptible to seam failure. Order at 11. The agency further explained that the absence of fatigue evidence might have been a result of the pipe’s brittleness, and that EMPCo therefore erred in “dismissing historical seam failures . . . based solely on the absence of fatigue evidence,” without considering pipe toughness. *Id.*

Moreover, in planning for reassessments, EMPCo used a program that relied on the behavior of ductile pipe to predict seam failures. *Id.* The agency explained that such a program was not appropriate here, given the brittleness of the pipe at issue and because it was not designed to determine seam failure susceptibility. *Id.*; Denial of Reconsideration (Stay Mot., Ex. B) at 8. Nor did the program account for the history of seam failures. Order at 11.

For all these reasons, the agency concluded that EMPCo erred in determining that its ERW pipe was not susceptible to seam failure. As a result, EMPCo failed to comply with a number of regulatory requirements that the agency considered to be applicable.

### **C. Agency's Compliance Order and Denial of Reconsideration**

The agency concluded that EMPCo violated nine regulatory requirements in connection with the pipeline accident:

1. EMPCo failed to properly consider the risk of seam failure when establishing a continual integrity assessment schedule, in violation of 49 C.F.R. § 195.452(e)(1). Among other things, EMPCo failed to consider the presence of ERW pipe and its risk of seam failure, the history of seam failures, and the brittleness of the pipe. Order at 6-12.
2. EMPCo failed to perform an integrity assessment within five years or sixty-eight months, as required by 49 C.F.R. § 195.452(j)(3). Although EMPCo performed a hydrostatic test in 2005-2006, the next seam integrity assessment did not occur until 2012-2013. Order at 12-13.
3. EMPCo did not seek a variance from the timeline for performing an integrity assessment, contrary to 49 C.F.R. § 195.452(b)(5). Order at 13-16.
4. EMPCo did not properly prioritize segments for assessment based on all risk factors, in violation of 49 C.F.R. § 195.452(e)(1). EMPCo should have



prioritized the segment of the Pegasus Pipeline with the highest volume of ERW pipe and most extensive history of seam failures. Order at 16-19.

5. EMPCo failed to reduce operating pressure or shut down the pipeline when addressing three immediate repair conditions, as required by 49 C.F.R. § 195.452(h)(1). Order at 19-22.

6. EMPCo failed to discover the condition that posed a threat to the pipeline within 180 days of an integrity assessment, contrary to 49 C.F.R. § 195.452(h)(2). Because EMPCo combined four testable segments of the pipe into two testable segments, resulting in long testing times, it did not finish processing the testing results in the required time. Order at 22-25.

7. EMPCo did not revise its risk analyses based on relevant changes, as required by 49 C.F.R. § 195.452(b)(5). When EMPCo delayed a risk assessment on one segment of the pipeline from 2011 to 2013, that required EMPCo to determine whether an updated risk assessment was required. Order at 25-27.

8. EMPCo did not follow its procedures when assessing risk, contrary to 49 C.F.R. § 195.402(a). Contrary to its procedures, EMPCo misrepresented the current status of the integrity verification on the pipeline when entering information into its threat identification and risk assessment program. Order at 27-29.

9. EMPCo failed to follow its written procedures for documenting management of change, in violation of 49 C.F.R. § 195.452(b)(5), when it combined four testable segments into two. Order at 29-31.

Based on these violations, the agency assessed a civil penalty in the amount of \$2,630,400. Order at 31-41. Pursuant to 49 U.S.C. § 60118(b) and 49 C.F.R. § 190.217, the agency ordered EMPCo to take a number of actions to comply with the pipeline safety regulations. Order at 43-45. Each action item of the order identifies the specific regulatory violation the item is intended to remedy. *Id.* Specifically, the agency ordered EMPCo to:

1(a). Identify all pre-1970 ERW pipe covered by integrity management regulations.

1(b). Identify all integrity management procedures used in risk assessment that are used in determining susceptibility to seam failure, in development of seam integrity assessment plans, and assessments of pre-1970 ERW pipe.

1(c). Review and revise process for scoring risk of pre-1970 ERW pipe to ensure pipe segments susceptible to seam failure receive heightened risk score.

1(d). Revise process for analyzing seam failure susceptibility to include, *inter alia*, results from failure analyses.

1(e). Revise process for conducting crack growth analysis through pressure cycle fatigue modeling to ensure conservative assumptions are used for developing re-inspection timelines.

2. Revise procedures regarding assessment intervals to ensure all risk factors are assessed within regulatory timeframes.
3. Revise integrity management procedures to ensure timely discovery of immediate repair conditions.
4. Revise integrity management procedures to ensure timely discovery of anomalous conditions within 180 days of integrity assessment.
5. Conduct internal investigation of certain processes to adequately identify and assess the risk of potential seam failures on the Pegasus line.
6. Revise risk assessment procedures to ensure that risk assessment assumptions are appropriately conservative.
7. Revise risk assessment and data integration processes to ensure identified threats are not discounted.
8. Provide EMPCo's total cost for complying with the ordered safety improvements.

EMPCo has already fully complied with items 1(a) and 1(b) of the compliance order, and has submitted responses to items 1(c), 2, 3, 4, and 5. Items 1(d) (revise seam failure susceptibility analysis), 1(e) (revise fatigue analysis procedures), 6 (revise risk assessment procedures), and 7 (revise risk assessment and data integration

processes) remain outstanding.<sup>2</sup> Item 8 is not mandatory, but is included in all compliance orders. EMPCo has also already paid the civil penalty.

EMPCo subsequently sought reconsideration of the agency's order, challenging all nine violations, elimination or reduction of the civil penalty, and withdrawal of the compliance order. *See* Stay Mot., Ex. G. The agency denied the petition for reconsideration. *Id.*, Ex. B.

## ARGUMENT

A stay pending appeal is an “extraordinary remedy,” *Belcher v. Birmingham Trust Nat'l Bank*, 395 F.2d 685, 685 (5<sup>th</sup> Cir. 1968), and is a matter of judicial discretion. The stay applicant bears the burden of establishing that an exercise of that discretion is warranted by showing that four factors are satisfied: (1) the applicant will suffer irreparable injury absent a stay; (2) a stay will not substantially injure other parties; (3) a stay is not against the public interest; and (4) the applicant is likely to succeed on the merits. *Nken v. Holder*, 556 U.S. 418, 425-26, 434 (2009). EMPCo has failed to satisfy any of those factors.

### I. EMPCO'S VAGUE ALLEGATIONS THAT COMPLYING WITH THE AGENCY'S ORDER IS COSTLY AND BURDENSOME DO NOT SUFFICE TO SHOW IRREPARABLE INJURY.

As EMPCo acknowledges (Stay Mot. at 7), this Court has recognized that irreparable injury is “the most important of the four factors” for obtaining a stay.

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<sup>2</sup> EMPCo primarily seeks a stay to delay compliance with items 1(d) and 1(e). Stay Mot. at 10 n.6.

EMPCo alleges two injuries: (1) compliance would be costly and burdensome, Stay Mot. at 8-10; and (2) compliance with the agency's order "might" moot its petition for review, Stay Mot. at 7-8 (citing *Comfort Lake Ass'n v. Dresel Contracting, Inc.*, 138 F.3d 351, 356 (8<sup>th</sup> Cir. 1998)). As explained below, neither of these alleged injuries demonstrates irreparable injury.

It is well-established that "[m]ere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough" to satisfy the irreparable harm standard. *American Hospital Ass'n v. Harris*, 625 F.2d 1328, 1331 (7<sup>th</sup> Cir. 1980); accord *Morgan v. Fletcher*, 518 F.2d 236, 240 (5<sup>th</sup> Cir. 1975). Thus, even if EMPCo could substantiate its allegations that compliance would be costly and burdensome, that would not be enough to demonstrate irreparable injury. But EMPCo does not make any effort to explain the specific steps that it envisions are required by the agency's order or to quantify the associated costs. Instead, EMPCo asserts (Stay Mot. at 8-9) that compliance with the order "would be costly" because it would have "to undertake significant, fundamental changes to its pipeline risk and integrity management program," and that the order is vague, which will "create[] additional expenses caused by confusion." EMPCo further alleges that compliance will put it "at a competitive disadvantage as compared to other pipeline operators," Stay Mot. at 8-9, but that presumes that other pipeline operators have not already undertaken the minimum actions necessary to comply with the applicable

regulations, which is what the compliance order directs EMPCo to do. Such generalized grievances are not sufficient to show irreparable injury.

Moreover, EMPCo's complaint that the compliance order is unduly vague rings hollow. EMPCo has already submitted a response to at least one portion of the order that it faults for vagueness. *See* Stay Mot. at 9 (citing section 1(c) of order). And while EMPCo has never formally sought clarification from the agency as to the other portions of the order (or asked for an extension of time in which to comply), it has engaged in extensive discussions with the agency as to what is required by the compliance order. *See American Hospital Ass'n*, 625 F.2d at 1331 ("injury resulting from attempted compliance with government regulation ordinarily is not irreparable harm"). In addition, each portion of the compliance order expressly refers back to the specific violation it is intended to remedy, which provides sufficient context to discern what is required. In any event, the agency remains willing and available to engage, as necessary, in any such further discussions.<sup>3</sup>

EMPCo's generalized claims of burden are also undermined by its acknowledgment that it has already submitted responses to sections 1(a), 1(b), 1(c), 2, 3, 4, and 5 of the compliance order. *See* Stay Mot. at 7 n.5. Thus, EMPCo has already undertaken the principal burden about which it complains (Stay Mot. at 8)—revision of its integrity management program (items 3 and 4). The only compliance items for

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<sup>3</sup> For example, because the agency found some deficiencies in EMPCo's submissions on items 2 and 3, it has requested an amended response from EMPCo.

which EMPCo has not yet made any submissions are sections 1(d), 1(e), 6, and 7, which require revisions to certain of EMPCo's risk assessment procedures. EMPCo has not shown that compliance with these items will cause irreparable injury.

Further, EMPCo is wrong to rely on *Comfort Lake* to argue that compliance with the agency's order could moot its petition for review. *Comfort Lake* merely holds that voluntary compliance with an agency order may moot a citizen suit seeking injunctive relief. 138 F.3d at 355. Nothing in *Comfort Lake* disturbs the longstanding principle that compliance with an injunctive order during the pendency of further review does not moot the case. *See, e.g., Walker v. U.S. Dep't of Housing and Urban Development*, 912 F.2d 819, 825 (5<sup>th</sup> Cir. 1990). The order requires EMPCo to alter its written plans for inspecting and testing its pipelines and for determining whether its pipelines are susceptible to seam failure. If EMPCo prevails in this Court, it can simply revert to its previous inspection and testing plans.

## **II. SUBSTANTIAL SAFETY CONCERNS COUNSEL AGAINST A STAY OF THE AGENCY'S ORDER.**

EMPCo has also failed to demonstrate that a stay does not result in harm to others or is not against the public interest. The agency's investigation revealed significant flaws in the way in which EMPCo determines whether pipelines are susceptible to seam failure. The purpose of the compliance order is to prevent another, similar pipeline accident by requiring EMPCo to alter its testing and inspection procedures to ensure proper determinations of potential seam problems

before another potentially catastrophic incident. A stay of the order would undermine that significant safety concern.

EMPCo points out (Stay Mot. at 12) that the agency previously agreed to a stay of the compliance order during the agency's administrative review process. That stay was limited in duration, however, and does not diminish the agency's (or the public's) significant interest in enforcing the compliance order to ensure pipeline safety now that the agency has completed its administrative review. Moreover, after undertaking an inventory of its pre-1970 ERW pipe (as required by item 1 in the compliance order), EMPCo has indicated that it has over one thousand miles of such pipe subject to the agency's pipeline safety regulations. The agency and the public, therefore, have a significant interest in ensuring that those pipelines are operating in compliance with federal safety standards.

EMPCo contends (Stay Mot. at 12) that the public interest counsels in favor of a stay because the compliance order "will ultimately affect every operator within the region's jurisdiction." But EMPCo provides no evidence that other operators have adopted inadequate inspection and testing plans that persistently deem pipelines as not susceptible to seam failure notwithstanding repeated failures during testing, and the order by its terms applies only to EMPCo. Moreover, even if the precedent set by the compliance order may affect other pipelines and operators, that is further reason *not* to stay the compliance order. Improving pipeline safety is undoubtedly in the



public interest. For that reason, if this Court were to grant EMPCo's motion for a stay, we respectfully request that this Court expedite its review in this case.

### III. EMPCO IS UNLIKELY TO SUCCEED ON THE MERITS.

On the merits, this Court will review the agency's final order and its decision denying reconsideration to determine whether the agency's conclusions are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. *See* 49 U.S.C. § 60119(a); 5 U.S.C. 706. Under that highly deferential standard, *Texas Clinical Labs, Inc. v. Sebelius*, 612 F.3d 771, 775 (5<sup>th</sup> Cir. 2010), this Court "will uphold an agency's actions if its reasons and policy choices satisfy minimum standards of rationality." *Medina County Environmental Action Ass'n v. Surface Transp. Bd.*, 602 F.3d 687, 699 (5<sup>th</sup> Cir. 2010). And "[w]here an agency's particular technical expertise is involved, we are at our most deferential in reviewing the agency's findings." *Id.* Applying that deferential standard here—a standard that EMPCo ignores—EMPCo cannot show that the agency's well-reasoned, final order, or its denial of reconsideration, is arbitrary or capricious.

Indeed, the agency thoroughly explained its conclusion here, citing the relevant regulations, as to why EMPCo should have determined that the Pegasus Pipeline was susceptible to seam failure. As the agency explained in its final order, the relevant portions of the Pegasus Pipeline were constructed of pre-1970 ERW pipe, which is "known to exhibit an increased risk of longitudinal seam failure," Order at 8, thereby requiring EMPCo to consider the pipe's susceptibility to seam failure, Order at 9. The

agency explained that, in addition to seam failures in past years, EMPCo's 2005-2006 hydrostatic test resulted in approximately 11 seam failures in the ERW pipe. Order at 9. EMPCo analyzed those failures for evidence of pressure cycling induced fatigue and preferential seam corrosion, but since neither condition was detected, EMPCo concluded that the pipe was not susceptible to seam failure. *Id.*

The agency explained that EMPCo's conclusion was flawed because, among other things, (1) seam-related failures during the hydrostatic test strongly suggested the ERW pipe was susceptible to seam failure; (2) the pipeline experienced an in-service seam leak in 1984; (3) EMPCo failed to consider that the absence of fatigue was because the pipe was brittle; (4) EMPCo's program for assessing fatigue was based on the behavior of ductile, rather than brittle, pipe and was not designed to determine seam failure susceptibility. Order at 1-11; Denial of Reconsideration at 8. Accordingly, the agency found that EMPCo's conclusion that the pipe was not susceptible to seam failure, solely because there was no evidence of fatigue, was improper. Although EMPCo may disagree with the agency's conclusion, it has not demonstrated that it is arbitrary or capricious. *Medina County Environmental Action Ass'n*, 602 F.2d at 699 ("When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, we might find contrary views more persuasive.").

Because the agency reasonably determined that the pipe was susceptible to seam failure, it concluded that, pursuant to the regulations, there were nine regulatory

requirements that EMPCo was obligated to satisfy, but did not. For example, pursuant to 49 C.F.R. § 195.452(e)(1), an operator is required to prioritize assessments of pipelines based on risk conditions and establish a continual integrity assessment schedule for segments that are susceptible to seam failure to ensure their continued integrity. 49 C.F.R. § 195.452(j)(5). All pre-1970 ERW pipe has been deemed “susceptible to longitudinal seam failure” unless an engineering analysis proves otherwise. 49 C.F.R. § 195.303(d). Moreover, EMPCo’s 2005-2006 assessment of the pipeline revealed 11 seam failures in the ERW pipe, which “strongly suggested the ERW pipe was susceptible to seam failure.” Order at 9-10. Accordingly, the agency reasonably concluded that EMPCo violated § 195.452(e)(1) “by failing to properly consider the susceptibility of its ERW pipe to seam failure when establishing a continual integrity assessment based on all risk factors of the Pegasus Pipeline.” Order at 12.

EMPCo argues (Stay Mot. at 19-20) that the regulations did not require it to consider whether the pipeline was susceptible to seam failure. As the agency explained in its order, however, the regulations did require EMPCo to make that determination, given that the presence of pre-1970 ERW pipe. Order at 8-9. And EMPCo did, in fact, consider whether the pipeline was susceptible to seam failure. *See* Stay Mot., Ex. G at 9 (“EMPCo expressly and properly considered the seam failure of the Pegasus Pipeline”). EMPCo simply discounted substantial evidence to erroneously conclude that the pipeline was not susceptible to seam failure; a

conclusion that conveniently relieved EMPCo of certain regulatory requirements. Thus, EMPCo simply disagrees with the agency's ultimate conclusion that the pipeline was susceptible to seam failure. That disagreement, however, does not demonstrate that the agency's decision was arbitrary or capricious. *Medina County*, 602 F.2d at 699. Far from rewriting the governing regulations, as EMPCo asserts (Stay Mot. at 13), the agency's order is merely a straightforward application of them.

EMPCo suggests (Stay Mot. at 14) that the agency's conclusion that EMPCo violated § 195.452(e)(1) is arbitrary and capricious because that regulation does not list "susceptible to seam failure" as a specific risk factor that an operator must consider in establishing a continual integrity assessment. As EMPCo concedes (Stay Mot. at 15), however, the factors listed for consideration are not exhaustive, but merely illustrative. 49 C.F.R. § 195.452(e)(1) ("The factors an operator must consider include, but are not limited to. . ."). Accordingly, especially considering the listed risk factors, which include the seam type of the pipe and the method of manufacturing, results of previous assessments, pipe material and condition, and leak history, it was reasonable for the agency to conclude that EMPCo should have considered that the pipe was pre-1970 ERW pipe and that it had a history of seam failures (both during testing and in-service), two factors that support a conclusion that the pipe was susceptible to seam failure and therefore subject to the requirement of continual integrity assessments.

EMPCo does not explain how the agency's conclusion that EMPCo violated eight other regulatory provisions is arbitrary and capricious. Instead, EMPCo vaguely asserts (Stay Mot. at 14, 17) that the agency is creating ad hoc requirements, not contained in the regulations. That argument is belied by the agency's final order which explains, in detail, its interpretation of each regulatory provision and the facts that support its conclusion that EMPCo violated those provisions.

Finally, EMPCo argues (Stay Mot. at 17-18) that no deference is owed to the agency's regulatory interpretations here. That position is contrary to well-established law, which provides that an agency's interpretation of its regulations is owed deference, so long as that interpretation is not inconsistent with the text of the regulation. *See, e.g., Texas Clinical Labs*, 612 F.3d at 777. EMPCo has shown no such inconsistency here. Nor can EMPCo credibly argue that § 195.452(e)(1) is unambiguous, when that regulation contains a non-exhaustive list of risk factors to be considered. *Cf. San Francisco Baykeeper v. Cargill Salt Div.*, 481 F.3d 700, 705 (9<sup>th</sup> Cir. 2007) (where regulation provided exhaustive definition, it was unambiguous).

## CONCLUSION

For the forgoing reasons, respondents respectfully request that this Court deny petitioner's motion for a stay of the agency's compliance order.

Respectfully submitted,

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August 2, 2016

### **CERTIFICATE OF SERVICE**

I certify that on August 2, 2016, I filed and served the foregoing Respondents' Opposition to Petitioner's Motion for a Stay Pending Judicial Review by causing an electronic copy to be served on this Court via the ECF system, as well as three paper copies to be served on this Court by Federal Express, and by causing one copy to be served on the following counsel via the ECF system:

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## **CERTIFICATE OF COMPLIANCE**

I certify that the attached response complies with the type-volume limitations of Federal Rule of Appellate Procedure 27(d) because it has been prepared in a proportionally-spaced typeface, using Garamond 14-point font, and is not more than 20 pages.

I further certify that the required privacy redactions have been made, 5<sup>th</sup> Cir. R. 25.2.13; the electronic submission is an exact copy of the paper documents, 5<sup>th</sup> Cir. R. 25.2.1.; and the electronic submission has been scanned with the most recent version of commercial virus-scanning software and was reported free of viruses.

s/ Catherine H. Dorsey  
CATHERINE H. DORSEY

Date: August 2, 2016