NO. 16-60448

In the United States Court of Appeals for the Fifth Circuit

EXXONMOBIL PIPELINE COMPANY,

Petitioner,

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION; PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMINISTRATION; OFFICE OF PIPELINE SAFETY,

Respondents.

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Respondents.

The undersigned counsel of record certifies that the following 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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STATEMENT REGARDING ORAL ARGUMENT

Oral argument has been scheduled in this case.

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INTRODUCTION

The Pegasus Pipeline is an 869-mile pipeline that has operated safely for more than 60 years and is now operated by the ExxonMobil Pipeline Company (EMPCo or the Company). In March 2013, the Pipeline experienced a seam rupture and released oil near Mayflower, Arkansas. The Company responded within minutes, which prevented any fires or injuries. After the release, the Pipeline and Hazardous Materials Safety Administration (PHMSA or the Agency) alleged that the Mayflower release was related to violations of specified pipeline safety regulations.

Shortly before the Mayflower release, EMPCo ran an in-line inspection tool on the segment of the Pegasus Pipeline that experienced the seam failure. The vendor that ran the tool did not find the anomaly in the highly unique pipe joint that caused the Mayflower release. According to PHMSA's own research, current technology cannot detect every seam anomaly. PHMSA contends that EMPCo should have run that tool 10 months earlier (although the result would have been the same) and then expands that single contention into multiple violations of three regulations, a multi-million dollar fine, and a compliance order that operates essentially as an injunction affecting all EMPCo pipelines with the similar type of pipe as the Pegasus Pipeline.

The allegedly delayed tool run would have been required 10 months earlier only if the Pegasus Pipeline was "susceptible to longitudinal seam failure" under the Integrity Management Program (IMP) regulations, 49 CFR §195.452. It was not, based on EMPCo's use of a methodology for analyzing seam-failure susceptibility in a technical report commissioned by PHMSA. EMPCo applied that methodology. EMPCo used that methodology with the assistance of the methodology's author, who submitted affidavits attesting that EMPCo properly assessed the Pegasus Pipeline for susceptibility to seam failures within the meaning of the IMP regulations.

PHMSA has never issued any regulations telling operators how to assess susceptibility to seam failure. The IMP regulations simply tell operators to "consider" many pipeline risks, including seam type. EMPCo did thoroughly consider all relevant risks in its comprehensive IMP, as PHMSA knows through its regular audits of EMPCo. So PHMSA must have found violations related to seam-failure susceptibility based on a new regulatory interpretation made after the fact without giving EMPCo fair notice, or based solely on the fact of the release, using a strict-liability approach without Congressional authorization to do so.

THE RECORD

This proceeding is based on a Certified Index to the Administrative Record that the Agency filed. After briefing, EMPCo will file an Appendix of all materials

cited in the briefing by the parties. In this brief, EMPCo will cite exhibits and other materials by reference to the Certified Index, followed by page numbers, exhibit numbers, or other identifying information (*e.g.*, Cert.Index.No.__:Ex.__, at __). The index to the Appendix will refer to the Certified Index.

THE REGULATIONS AT ISSUE

The Final Order found violations of sections (b)(5), (e)(1), and (j)(3) of 49 C.F.R. §195.452. Cert.Index.No.22 (R.E. Tab 1). The full text of each section and of the entirety of §195.452 appears in the Record Excerpts behind Tab 3.

In summary, the regulations require an operator to implement and follow its own Integrity Management Program, including the establishment of a schedule of integrity assessments at intervals not to exceed 5 years. In scheduling the assessments, the operator must consider all risk factors.

JURISDICTION AND VENUE

Jurisdiction in this Court is granted by the Pipeline Safety Act. *See* 49 U.S.C. §60119(a)(1); 49 C.F.R. §190.243(g). Venue is proper in either the D.C. Circuit Court of Appeals or the Circuit Court of Appeals where EMPCo resides or has its principal place of business. 49 U.S.C. §60119(a)(1); 49 C.F.R. §190.243(g).

ISSUES PRESENTED

1. Whether the Pipeline and Hazardous Materials Safety Administration (PHMSA) properly concluded that the ExxonMobil Pipeline Company (EMPCo)

violated 49 C.F.R. §195.452 subsections (b)(5), (e)(1), and (j)(3). Included within this issue are the following subissues:

(a) Whether EMPCo failed to consider pipeline risk factors in developing its baseline and continual assessments of the Pegasus Pipeline; and

(b) Whether, despite its engineering determination that did not reveal susceptibility to seam failure in the Pegasus Pipeline, EMPCo was nonetheless required, and failed to establish and carry out at five-year intervals, a continual assessment of the pipeline using an assessment method capable of assessing seam integrity.

2. Whether the violations found by PHMSA of 49 C.F.R. §195.452(b)(5), (e)(1), and (j)(3) are improper because they violate due process and offend the requirement of fair notice.

3. Whether PHMSA exceeded its statutory authorization under the Pipeline Safety Act, 49 U.S.C. §60101 *et seq.*, or its implementing regulations. Included within this issue are the following subissues:

(a) Whether PHMSA is authorized to impose strict liability for a release from an oil pipeline;

(b) Whether PHMSA is authorized to issue broad injunctive relief in a Compliance Order that goes beyond requiring compliance with the violations found; and

(c) Whether the penalty imposed by PHMSA should be reversed or reduced.

STANDARD OF REVIEW

Under section 119 of the Pipeline Safety Act, 49 U.S.C. §60119(a)(3), 49 C.F.R. §190.243(h), the standard of review applied to the final agency action at issue is that prescribed by the Administrative Procedure Act (APA), 5 U.S.C. §706. Under that section of the APA, the reviewing court shall hold unlawful and set aside certain categories of agency action, findings, and conclusions, including those found to be—

> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity; [or]
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.

5 U.S.C. §706. The scope of review extends to the whole record or those parts cited by a party.

"[L]egal conclusions are reviewed *de novo*." *Texas v. EPA*, __ F.3d __, No. 16-60118, 2016 WL 3878180, at *12 (5th Cir. July 15, 2016) (citing *Bd. of Miss.*

Levee Comm'rs v. EPA, 674 F.3d 409, 417 (5th Cir. 2012)). That would include the issue of whether an agency is acting without statutory authorization.

De novo review also applies to the issue of whether agency action violates due process. *See FCC v. Fox Television Stations, Inc*., 132 S. Ct. 2307, 2317 (2012). Due process is a "fundamental principle in our legal system" that requires those that would regulate the conduct of others, and subject them to possible civil and criminal sanctions, to "give fair notice of conduct that is forbidden or required." *Id*.; *Diamond Roofing Co. v. Occupational Safety & Health Review Comm'n*, 528 F.2d 645, 649 (5th Cir. 1976).

Because the pertinent provisions of the regulations at issue are unambiguous, the Agency's interpretations of them are likewise reviewed *de novo*. *See Util. Air Regulatory Group v EPA*, 134 S. Ct. 2427, 2444 (2014); *Texas v. EPA*, __ F.3d __, No. 16-60118, 2016 WL 3878180, at *12. Even if the regulatory provisions were ambiguous so that deference to an agency interpretation might be owed under *Auer v. Robbins*, 519 U.S. 452, 461 (1997),[1] a number of exceptions to that category of deference exist. The exceptions noted by the Supreme Court include: (1) when the

[1] The motion panel referred to deference under *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc*., 467 U.S. 837 (1984). *See* Order Denying Mot. for Stay, at *5, *ExxonMobil Pipeline Co. v. U.S. Dept. of Transp.*, No. 16-60448, (Aug. 11, 2016). Here, however, the issue is whether deference is owed to PHMSA's interpretation of its regulations, under *Auer v. Robbins*, 519 U.S. 452 (1997). *See Gonzales v. Oregon*, 546 U.S. 243, 255 (2006) (explaining that *Chevron* deference applies when courts review agency statutory interpretations, and *Auer* deference applies when courts review agency regulatory interpretations).

agency's interpretation is "plainly erroneous or inconsistent with the regulation"; (2) when the interpretation subjects an entity to "unfair surprise," especially when penalties are involved; (3) when an interpretation is offered for the first time in an enforcement proceeding and threatens substantial liability for prior conduct; and (4) when an interpretation reflects an agency "post hoc rationalizatio[n]." *Christopher v. SmithKline Beecham*, 132 S. Ct. 2156, 2166 (2012) (quotations omitted); *see Gomez v. Lynch*, __ F.3d __, 2016 WL 4169123, at *3 (5th Cir. Aug. 5, 2016).

Key to this proceeding is the "Baker Report." This technical report was commissioned by PHMSA, published to the industry on its website, and PHMSA has endorsed the Report in enforcement proceedings and referenced it in PHMSA's enforcement manual. But PHMSA never incorporated the Report into its regulations, therefore PHMSA's interpretation of this Report, especially an interpretation in conflict with one of the Report's authors, is entitled to no deference.

STATEMENT OF THE CASE

Pipelines are the safest method of transporting oil in this country, with far fewer accidents than transport by truck, barge, or rail. K. Green & T. Jackson, *Safety in the Transportation of Oil & Gas: Pipelines or Rail*, Fraser Research Bulletin (Aug. 2015). To help maintain the safe operation of pipelines, Congress

created the Office of Pipeline Safety in 1968 as part of the Department of Transportation, which is now under PHMSA. In 2002, PHMSA adopted "Integrity Management" rules for pipelines located in populated or environmentally sensitive areas. *See* 49 C.F.R. §195.452. Those rules represent the basis for the violations at issue in this case.

A. Background of this Dispute

On March 29, 2013, the Pegasus Pipeline carrying crude oil ruptured near Mayflower, Arkansas. Cert.Index.No.3, at 1.[2] The pipeline was immediately shut down after the incident, and remains out of service. *In re Mobil Pipeline Co.*, CPF No. 4-2013-5006H, at 2 (Apr. 2, 2013)[3]; Cert.Index.No.30. The pipeline is operated by EMPCo. Cert.Index.No.2, at 1. The segment of the pipeline at issue from Patoka, Illinois to Corsicana, Texas was constructed in 1947-1948. *Id.* Portions of the line, including the segment involved in the Mayflower release, contain pre-1970 low-frequency electric resistance welded steel (LF-ERW) pipe found in 25% of the nation's oil pipelines. Cert.Index.No.10, at 2; Cert.Index.No.13, at 14; Cert.Index.No.20, at 3.

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[2] A diagram of the Pegasus Pipeline appears at page 13 of item number 13 in the Certified Index and that page is behind Tab 4 in the Record Excerpts.

[3] *Available at* http://primis.phmsa.dot.gov/comm/reports/enforce/documents/420135006H/420135006H_Corrective%20Action%20Order_04022013.pdf.

EMPCo has maintained the pipeline under PHMSA regulations, with periodic audits by PHMSA. EMPCo conducted hydrostatic pressure tests of the line at the time of construction, in 1969, 1991, and again in 2005-2006. Cert.Index.No.16, at 13 (Figure 3); *id*.Ex.14 (Corsicana to Patoka Seam/crack tool Hydrotest Learnings (7/06/06)); Cert.Index.No.22, at 9 n.38. Further, EMPCo conducted inline inspections (ILI) of the pipe multiple times, from 1999 to 2001, again in 2010, and again from 2012 to 2013. Cert.Index.No.16, at 13 (Figure 3); *id*.Exs.50 & 54. Despite all of EMPCo's efforts, audited by PHMSA, current technology, including hydrotests and ILI inspections, cannot detect every seam anomaly that could lead to a failure, as verified by PHMSA's own research. In addition, PHMSA periodically audited EMPCo's Integrity Management Program (IMP) and never took issue with EMPCo's process for determining susceptibility to seam failure or its analyses about the Pegasus Pipeline as not being seam-failure susceptible, until after the Mayflower release.

Nevertheless, in November 2013, PHMSA issued a Notice of Probable Violation, Proposed Penalty and Proposed Compliance Order (collectively, the NOPV). Cert.Index.No.3. The NOPV set forth nine alleged violations of IMP rules, and proposed a civil penalty in excess of $2.6 million dollars and a broad Compliance Order. EMPCo contested the allegations and requested an administrative hearing, which occurred on June 11, 2014.

PHMSA issued a Final Order on October 1, 2015, upholding the nine violations, assessing a slightly reduced penalty and issuing a Compliance Order. Cert.Index.No.22 (Final Order and Compliance Order) (R.E. Tab 1). Among other requirements, the Compliance Order directs EMPCo to revise its seam-failure susceptibility process for all pre-1970 LF-ERW pipe in all pipelines it operates. EMPCo petitioned the Agency for reconsideration of its decision, but that was denied on April 1, 2016. Cert.Index.Nos.24, 31 (R.E. Tab 2). On June 27, 2016, EMPCo timely filed with the Clerk of this Court a Petition for Review of PHMSA's final agency action with this Court.

B. Overview of the Integrity Management Program

The federal Pipeline Safety Act and PHMSA implementing regulations require each pipeline operator to create its own written IMP specific to its pipeline systems. Under the IMP rules, operators must prepare a written IMP plan, create a baseline assessment plan, establish a schedule for hydrotest and/or ILI inspection, and, when appropriate, develop risk reduction or remediation strategies. *See* 49 C.F.R. §195.452.

More than any other regulations under Part 195, the IMP provisions in §195.452 are performance based, rather than prescriptive. *See* Final Rule, 65 Fed. Reg. 75378, 75382 (Dec. 1, 2000). A performance-based regulation identifies a

minimum standard and provides each regulated entity the flexibility and discretion to decide how best to reach it:

> Regulators can direct those they govern to improve their performance in at least two basic ways. They can prescribe exactly what actions regulated entities must take to improve their performance. Or they can incorporate the regulation's goal into the language of the rule, specifying the desired level of performance and allowing the targets of regulation to decide how to achieve that level. This second approach is . . . [performance-based regulation].

C. Coglianese, J. Nash, & T. Olmstead, *Performance-Based Regulation: Prospects and Limitations in Health, Safety and Environmental Protection*, ADMINISTRATIVE LAW REVIEW 705, 706 (Fall 2003); *id*. ("[I]nstead of establishing specific prescriptions (or proscriptions) for behavior, regulations can also set goals for the outcome of that behavior. A performance-based regulation sets performance goals and allows individuals and firms to decide how to meet them.").

Section 195.452 adopts a performance-based approach:

> [P]erformance based language will best achieve effective integrity management programs that are sufficiently flexible to reflect pipeline specific conditions and risks. . . . Performance based standards allow an operator to select the most effective processes and technologies as they become available.

Final Rule, 65 Fed. Reg. 75378, 75382 (Dec. 1, 2000); *id*. ("Based on our considerable experience with performance-based regulations, [the Office of Pipeline Safety] believes that performance-based language will best achieve

effective integrity management programs that are sufficiently flexible to reflect pipeline-specific conditions and risks.").

PHMSA anticipated that integrity management would be an evolving "dynamic" iterative process for both operators and the industry, a point that the Agency continues to emphasize. *See* Final Rule, 65 Fed. Reg. 75378, 75386 (Dec. 1, 2000); *see also* PHMSA Advisory, 79 Fed. Reg. 25990, 25993 (May 6, 2014).[4]

Under §195.452's performance-based approach, the identified minimum standard is for operators to develop a written IMP that includes: (1) identification of pipelines that could affect sensitive areas, called high consequence areas; (2) a baseline assessment plan for initial assessments of those pipelines; (3) procedures for the integration of all available information about pipeline integrity and the consequences of a failure; (4) prompt action to address issues identified by the assessment and prioritization of repairs; (5) reassessment at least every five years; (6) continual evaluation to include additional preventive and mitigative measures as appropriate; (7) methods to measure effectiveness; and (8) a process for review of the assessment results by a qualified individual. 49 C.F.R. §195.452(f); *see* Cert.Index.No.16:Ex.53 (EMPCo's IMP Manual); R.E.3 (Figure 1 from EMPCo Pre-Hearing Brief).

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[4] This dynamic process is illustrated at page 7 of EMPCo's Pre-Hearing Brief (Cert.Index.No.16, at 7), and that page is behind Tab 5 of the Record Excerpts.

A primary component of an IMP is the operator's threat identification and risk assessment process, which informs both the integrity assessment schedule and method. *See* 49 C.F.R. §§195.452(e) & (j)(5). Operators are tasked with evaluating numerous risk factors for each pipeline segment, including the results of prior assessments, manufacturing information and seam type, among other factors. 49 C.F.R. §195.452(e). Consistent with the performance-based approach and goal of the IMP regulations, operators must "consider" all applicable risk factors in developing an assessment schedule, but they have discretion in determining the weight and risk score given to each factor and prioritization for a particular pipeline system. *See, e.g.*, *In re Magellan Midstream Partners, L.P.*, CPF No. 4-2006-5020, at *7 (Dec. 23, 2009). Based upon the results of an operator's risk-assessment analysis, it must prioritize its pipeline segments for reassessment on a five-year interval. 49 C.F.R. §195.452(j)(3).

In addition to addressing the assessment schedule, the IMP rules set forth three assessment methods available to operators: (1) ILI; (2) hydrostatic pressure testing; and (3) external corrosion direct assessment. 49 C.F.R. §195.452(j)(5).

An additional requirement may apply to pre-1970 LF-ERW pipe. If LF-ERW pipe is shown to be susceptible to longitudinal seam failure, the assessment method "must be capable of assessing seam integrity and of detecting corrosion and deformation anomalies." *Id.* PHMSA guidance clarifies that such methods

include an ILI device capable of detecting seam flaws, metal loss corrosion, and deformation anomalies, and include a hydrostatic test. *PHMSA Hazardous Liquid FAQ* 6.10, https://primis.phmsa.dot.gov/iim/faqs.htm. In addition, PHMSA guidance clarifies that evaluation of seam susceptibility "can involve a variety of factors such as original pipe purchase specifications, incident history, operating pressure, prior pressure testing, pressure cycling, etc." *PHMSA Hazardous Liquid FAQ* 6.11a, https://primis.phmsa.dot.gov/iim/faqs.htm. PHMSA guidance also notes that a process should be in place to reevaluate this determination on an appropriate interval if any factors have the potential to change. *Id.*

PHMSA, through regulations, has never told operators how they must determine whether LF-ERW pipe is susceptible to seam failure. Rather, a methodology for making the determination is in a 2004 technical report that PHMSA commissioned and published on its website. Cert.Index.No.16:Ex.3.[5] This report, often called the Baker Report, was prepared by Michael Baker, Jr. and Dr. John F. Kiefner of Kiefner & Associates Incorporated. The Report was largely based on a 2002 report issued by Dr. John F. Kiefner. Cert.Index.No.24:Ex.93.

The Baker Report not only represents industry practice; PHMSA has endorsed the Report through subsequent enforcement and referenced it in the Agency's enforcement manual. *See In re Kinder Morgan Energy Partners*, CPF

[5] The full Report is *available at* https://primis.phmsa.dot.gov/iim/techreports.htm.

No. 1-2004-5004 (June 26, 2006); PHMSA, *Hazardous Liquid IM Enforcement Guidance*, at 131 (Dec. 7, 2015)[6]; *see also* Cert.Index.No.16, at 8-9 n.5; Cert.Index.No.24, at 8. Further, §195.452(b)(6) specifically instructs operators to "[f]ollow recognized industry practices in carrying out this section" unless the regulations specify otherwise or a reliable alternative is supported by engineering evaluation.

While the Baker Report extensively discusses pipeline metallurgy, its seam-failure-susceptibility methodology appears in section 4 of the report. Cert.Index.No.16:Ex.3. The process in that section 4 of the Baker Report was "largely based" on Dr. Kiefner's "prior work." Cert.Index.No.24:Ex.82 ¶6. Figure 4.1 on page 18 of the Report represents the methodology in the form of a flowchart or decision tree. It is, in the words of the Report, "a decision tree that allows one, by supplying appropriate data on a given segment, to determine if a seam-integrity assessment is required *based on the federal pipeline integrity management regulations.*" Cert.Index.No.16:Ex.3, at 18 (emphasis added). This brief will refer to Figure 4.1 as the "Baker/Kiefer Decision Tree," or sometimes as the "Decision Tree." The Decision Tree appears behind Tab 6 in the Record Excerpts.

[6] *Available at* http://www.phmsa.dot.gov/staticfiles/PHMSA/DownloadableFiles/Files/O_M_Enforcement_Guidance_Part195_12_07_2015.pdf.

The Baker Report's process, illustrated by the Baker/Kiefner Decision Tree, considers pipe and seam characteristics, in-service and hydrostatic test failures, the cause of those failures, operating stress level, fracture toughness, fatigue crack growth rate characteristics and the nature of operational pressure cycles on the pipeline. This data is then applied to determine whether a given segment of LF-ERW pipe is susceptible to seam failure. Cert.Index.No.16:Ex.3. Accordingly, the Baker/Kiefner Decision Tree does not result in a finding of seam-failure susceptibility simply because there are failures during a test. Instead, it asks *why* the seams failed during the test, and it arrives at a determination of susceptibility to seam failure during normal operation only if the cause of the failure was pressure cycling induced fatigue or preferential seam corrosion.

C. EMPCo's Initial Implementation of IMP Requirements

EMPCo first prepared its written IMP baseline assessment plan in 2001 and finalized the plan in 2002. Cert.Index.No.16:Ex.53 (EMPCo IMP Manual); Cert.Index.No.16:Ex.1 ¶10 (Affidavit of J. Kiefner). EMPCo has developed a 444-page manual for its IMP. Cert.Index.No.16:Ex.53. That plan, procedures, and outputs were developed and applied in close consultation with leading industry experts, often relied upon by PHMSA, including Dr. John F. Kiefner and Kent Muhlbauer. Cert.Index.No.16:Exs.1 ¶10 & 2 ¶6. As anticipated by the regulations, EMPCo's IMP plan has been audited annually and updated over time (with

continuing input from Kiefner and Muhlbauer), to reflect changes in the regulations and to incorporate industry guidance and lessons learned from operation of the EMPCo system. *Id*. According to Muhlbauer, EMPCo's IMP manual "is among the most complete and well-written of the many such manuals I have seen." Cert.Index.No.16:Ex.2 ¶7.

The Company's IMP plan has also been audited by PHMSA on multiple occasions, during inspections occurring in 2003, 2007, and 2011, including an in-depth review of the Pegasus Pipeline system specifically in 2007. Cert.Index.No.18, at 85, 96.[7] The Company addressed all concerns noted by the Agency in those reviews, through further revisions to its IMP plan. Cert.Index.No.18, at 85, 96; Cert.Index.No.23:Ex.94.[8]

Under EMPCo's IMP, the Company's process for analyzing seam failure susceptibility of LF-ERW pipe (and performing fatigue analysis under that

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[7] *See also* PHMSA Operator Inspection Summary, Mobil Pipeline Co., *available at* http://primis.phmsa.dot.gov/comm/reports/operator/OperatorIE_opid_4906.html?nocache=2725#_InspectionActivity_tab_2; PHMSA Operator Inspection Summary, EMPCo, *available at* http://primis.phmsa.dot.gov/comm/reports/operator/OperatorIE_opid_4906.html?nocache=2725#_InspectionActivity_tab_2; PHMSA Electronic Reading Room, ExxonMobil AR Pipeline Failure 3-29-13, PHMSA Mobil/EMPCo Inspection Reports, *available at* http://www.phmsa.dot.gov/portal/site/PHMSA/menuitem.6f23687cf7b00b0f22e4c6962d9c8789/?vgnextoid=d46eb5676d5cd310VgnVCM100000d2c97898RCRD&vgnextchannel=2d037fd9b896b110VgnVCM1000009ed07898RCRD&vgnextfmt=print.

[8] *See also In re Exxon Mobil Pipeline Co*., CPF No. 4-2007-5030M (Aug. 2, 2007); CPF No. 4-2007-5029W (Aug. 2, 2007); PHMSA PSVR, Exhibit N, p. 20-27; *see also* PHMSA EMPCo, Operator Enforcement Summary, http://primis.phmsa.dot.gov/comm/reports/operator/OperatorIE_opid_4906.html?nocache=9120#_EnforcementActions_tab_2.

process) is based on the protocol outlined in the aforementioned 2004 Baker Report. Cert.Index.No.16:Ex.3. The report's authors, Michael Baker and Dr. John F. Kiefner of Kiefner & Associates, are nationally recognized experts in pipeline metallurgy and system integrity. EMPCo retained Dr. Kiefner to assist the Company in applying the Agency's rules and the Baker Report guidance to the Company's IMP plan. Cert.Index.No.16:Ex.1 ¶¶ 11-12.

As outlined in the Baker Report, "seam related in-service failures and/or hydrostatic test breaks or leaks by themselves do not indicate that a pipeline is susceptible to seam failure." Cert.Index.No.16:Ex3, at 1, 18; Cert.IndexNo.24:Ex82, at ¶7 (Supplemental Affidavit of John Kiefner). Those failures should be analyzed for two primary causes: pressure-cycle induced fatigue and selective seam corrosion. *Id.* ¶7 (noting that "no other causes" are mentioned in the Baker Report because those two causes "are the primary causes of LF-ERW seam failures").

EMPCo first evaluated the Pegasus Pipeline's susceptibility to longitudinal seam failure in late 2004 and early 2005. Cert.Index.No.16:Exs.8 & 9. Over the next six years, EMPCo conducted three other such analyses or reviews, as shown on the diagram that appears at page 13 of EMPCo's Pre-Hearing Brief (Cert.Index.No.16, at 13) and behind Tab 7 of the Record Excerpts.

EMPCo's 2004-2005 evaluations of the Pegasus Pipeline considered all available information, including the pipeline's manufacturing history, pipe materials, 60-plus years of operating and maintenance history, leak history, and the results of prior pressure tests and integrity assessments as well as consideration of pressure cycling induced fatigue. *Id.* This analysis concluded that the pipe was not susceptible to seam failure. *Id.*

EMPCo conducted a baseline assessment hydrostatic test for this line in 2005-2006. Cert.Index.No.16.Ex:40. Following the Baker/Kiefner Decision Tree, the pipeline joints that failed during the 2005-2006 hydrotest were replaced and were later analyzed by a third-party expert in metallurgy. *See* Cert.Index.No.16:Exs. 12, 14 &15. The analyses did not reveal evidence of the two factors enumerated in the Baker Report and the Baker/Kiefner Decision Tree as indicating susceptibility to seam failure—namely, pressure cycling induced fatigue and preferential or selective seam corrosion. Cert.Index.No.16:Ex.1 ¶ 13; Ex. 3, at 18. PHMSA's Final Order apparently concedes the absence of both factors. Cert.Index.No.22, at 9 ("neither condition was detected") & 10 ("The evidence supports [EMPCo's] assertion that prior seam failures did not exhibit evidence of fatigue.").

Further, a hydrotest subjects a pipeline to pressures that far exceed its maximum operating pressure and thus can cause leaks that would not occur

operationally. Cert.Index.No.16:Ex1 ¶13. As Dr. Kiefner explained: "LF-ERW seam failures that occur during a hydrostatic test at a level well above the maximum operating pressure can result from manufacturing defects that, absent any in-service crack growth, do not pose a threat of rupture at the maximum operating pressure." *Id.*

Thus, the hydrotest failures and the analyses by the third-party expert on the Pegasus Pipeline did not indicate susceptibility to seam failure under the Baker/Kiefner Decision Tree. *Id.* ¶¶13-14; Cert.Index.No.16:Ex.3, at 18. EMPCo then considered those results, the pipeline's seam type, history, and the long seam failure susceptibility analysis in developing its integrity reassessment schedules. Cert.Index.No.16:Exs.13, 17 & 18.

D. Subsequent Integrity Assessments and Seam Assessments

PHMSA closely audited the Pegasus Pipeline in 2007, including a specific and intensive review of the Company's seam failure engineering analyses. Cert.Index.No.18, at 85, 96; PHMSA Electronic Reading Room, ExxonMobil AR Pipeline Failure 3-29-13, IU3944 Standard Inspection Report 2007[9]; *see also* Cert.Index.No.23:Ex. 92. Despite four PHMSA inspectors spending a full week on

[9] *Available at* http://www.phmsa.dot.gov/staticfiles/PHMSA/DownloadableFiles/Files/IU3944_std_insp_rpt_11_2007.pdf .

the review, the Agency did not find any flaws in the Company's IMP plan or implementation of its LF-ERW seam risk process. *Id.*

That same year, EMPCo performed another long seam-failure susceptibility analysis of the Pegasus Pipeline, which considered updated information, manufacturing history, pipe materials (including representative toughness values), operating and maintenance history, leak history, and the results of prior pressure tests and integrity assessments (and subsequent metallurgical analysis). Cert.Index.No.16:Exs.14 & 21. Once again, the evaluation concluded that the line was not susceptible to long seam failure. *Id.*; Cert.Index.No.16:Ex.1 ¶ 14 (Dr. Kiefner states that the Pegasus Pipeline "appeared to have a theoretical fatigue life in excess of the conservative reassessment interval implemented by EMPCo").

In 2009, after two years of operation and a planned increase of the pipeline throughput, the Company again reviewed its long seam failure analysis, as well as the metallurgical failure analyses. That review factored in actual toughness values, in preparation for a scheduled 2010 IMP reassessment of the line. Cert.Index.No.16:Ex. 21. Once again, the 2009 analysis concluded that the pipeline was not susceptible to seam failure.

The Company performed an ILI in 2010 to assess the integrity of the pipeline with two ILI tools appropriate for the pipeline based on the Company's risk assessment. Cert.Index.No.16:Ex.50. In 2011, the Company again reevaluated

its long seam failure susceptibility determination, considering all available information (including from the 2010 ILI), which concluded that the pipeline was not susceptible to seam failure. Cert.Index.No.16:Ex.29.

Even though the Pegasus Pipeline was not susceptible to seam failure under the Baker/Kiefner Decision Tree, EMPCo decided to schedule a tool run on the Pegasus Pipeline with one of the most sophisticated tools available, an ILI TFI seam/crack tool. Cert.Index.No.16:Ex.35. EMPCo did so because it often exceeds the minimum requirements and was seeking additional ILI and other information to supplement its risk assessments.

So EMPCo inspected the Pegasus Pipeline with an ILI seam/crack tool in 2012 and 2013. Cert.Index.No.16:Ex. 54. EMPCo ran the tool through the section of line where the Mayflower incident ultimately occurred shortly before the release. Cert.Index.No.16:Ex.13, at 14. The third-party vendor could complete evaluation and processing of the tool-run before the end of the 180-day regulatory deadline, but not before the Mayflower release. Cert.Index.No.10, at 3; Cert.Index.No.16.Ex.54. When the data from the 2013 ILI seam/crack tool run was examined, after the Mayflower incident occurred, the third-party vendor knew that a seam failure had occurred but still could not identify a defect at the point of rupture. *Id.*; Cert.Index.No.13, at 14. Thus, running the tool 10 months earlier, as

PHMSA says EMPCo should have done, would not have prevented the Mayflower release.

In sum, as shown by undisputed evidence, EMPCo did consider the threat of long seam failure on LF-ERW pipe in the Pegasus Pipeline system as required by §195.452, and it repeated that evaluation process multiple times to include updated information, eventually running a seam/crack ILI tool. The evaluation process, conducted multiple times between 2004 and 2013 (using the Baker Report commissioned by PHMSA), never resulted in a finding that the pipeline was susceptible to seam failure. Examples of EMPCo's use of the Baker/Kiefner Decision Tree appear in the first pages of Exhibits 42 and 52 of EMPCo's Pre-Hearing Brief and the second page of Exhibit 90 to its Petition for Reconsideration. Cert.Index.No.16:Exs.42 & 52; Cert.Index.No.23:Ex.90.[10] Another example appears as the first page of Exhibit 84 to EMPCo's Petition for Reconsideration (Cert.Index.No.23).

The Company's analyses expressly considered all required and available information, including manufacturing history, pipe materials (and actual toughness values once available), 60-plus years of safe operating and maintenance history, leak history, and the results of prior pressure tests and integrity assessments

[10] The first page of Exhibit 42 is Bates Stamped EMPCo-PHMSA016641. The first page of Exhibit 52 is Bates Stamped EMPCo-PHMSA016877. There is no Bates Stamp on Exhibit 90.

(including consideration of seam related breaks and subsequent metallurgical analysis). This included consideration of a minor 1984 pinhole weep at a seam, and seam related breaks that occurred during 1969, 1991, and 2006 hydrostatic tests, none of which exhibited evidence that would indicate that the pipeline was susceptible to seam failure under the Baker Report. Industry expert and co-author of the Baker Report, John Kiefner, reviewed these inspection and evaluation activities and data, and he concluded that the "Company correctly followed the guidance described in the Baker Report. This analyses would not have resulted in a finding that the failed segment was 'susceptible to seam failure in the context of the Part 195 IMP regulations.'" Cert.Index.No.24:Ex.82 ¶18.

SUMMARY OF ARGUMENT

EMPCo Complied with the IMP Regulations.

As required by 49 CFR §195.452, the Integrity Management Program or "IMP" regulations, EMPCo considered all pipeline risks, and it determined—not just once but four times—that seam-integrity assessments were not required under the Baker/Kiefner Decision Tree. Therefore, EMPCo was not required to inspect the Pegasus Pipeline with seam-assessment methods at five-year intervals. EMPCo nevertheless did use seam-assessment methods on the Pegasus Pipeline, just not as often as PHMSA now says it should have. Indeed, the ILI seam/crack tool run shortly before the Mayflower release—10 months after PHMSA contends it should

have been run—was later analyzed by the third-party vendor, who failed to find the highly unusual manufacturing-related anomaly that led to the Mayflower release.

IMP regulations do not prescribe how to consider pipeline risks, how to determine susceptibility to seam failure, or what methods to use in assessing seam integrity. In assessing susceptibility to seam failure, EMPCo used the methodology in a technical report commissioned by PHMSA called the Baker Report. To ensure compliance with that Report, EMPCo retained Report co-author Dr. John F. Kiefner as a consultant. Using the Baker/Kiefner Decision Tree in the Baker Report, EMPCo determined that seam-assessments at five-year intervals were not required for the Pegasus Pipeline because of susceptibility to seam failure. Until the Mayflower release, PHMSA never objected to EMPCo's process for evaluating susceptibility to seam failure or its application of that process to the Pegasus Pipeline, and its regular audits of EMPCo gave it adequate opportunity to object or voice concerns.

In this proceeding, for the first time, PHMSA objects to how EMPCo applied the Baker/Kiefner Decision Tree in section 4 of the Report, and it disagrees with Dr. Kiefner's opinions about the application of the Decision Tree and the process described in section 4 of the Baker Report. PHMSA's new stance does not change the plain text of the allegedly violated regulation that requires "consideration" of risks.

EMPCo complied with the regulations by thoroughly and repeatedly considering susceptibility to seam failure. PHMSA improperly attempts to justify its application of the IMP regulations by relying on a rebuttable presumption in an expired and irrelevant section of an admittedly separate set of regulations. Its attempt to import and rely on that presumption only underscores the validity of EMPCo's plain-text argument.

Finally, PHMSA did not present substantial evidence in support of its finding of violations. Certainly, there was no evidence that EMPCo did not consider the risk of seam failure. On the subject of whether the Pegasus Pipeline was susceptible to seam failure, the only expert opinions came from Dr. Kiefner, whose affidavits confirmed that EMPCo had properly followed the Baker Report and its Decision Tree. PHMSA identified what it claimed was an inconsistency in the Report, and yet Dr. Kiefner adequately explained why the inconsistency did not exist. PHMSA then suggested that the Baker Report, or certain parts of it, did not apply to brittle or low toughness pipe found in the Pegasus Pipeline, and Dr. Kiefner explained why PHMSA was wrong again. PHMSA's refusal to consider Dr. Kiefner's opinions amounts to arbitrary agency action.

PHMSA Has Either Denied EMPCo Due Process or Has Imposed Strict Liability Without Congressional Authority.

Given EMPCo's compliance with §195.452, PHMSA's findings of violations have two explanations. Neither validates its enforcement action.

First, PHMSA has apparently re-interpreted the IMP regulations as prescriptive rather than performance based, because PHMSA now claims that an operator must take specific actions in order to comply. Yet the regulations do not state what those actions are. And to the extent that the Baker Report and its Decision Tree is somehow part of the regulatory scheme, PHMSA has imposed a new interpretation of what that Report and Decision Tree mean and require. Such unexpected re-interpretations of the IMP regulations in conflict with their plain text are void because they offend the fair notice principles of due process.

Second, without the support of plain text or defensible interpretations of regulations, PHMSA must have found violations and levied substantial fines simply because a release occurred. Imposing such strict liability is within the power of some agencies, but Congress has invested PHMSA with no such power.

PHMSA Has Also Acted Unlawfully in Issuing its Compliance Order and in Levying Fines.

PHMSA issued a Compliance Order in this case, requiring that EMPCo assess seams at least every five years, regardless of risk, on all LF-ERW pipe in the Company's system, not just the pipeline involved in this incident. The regulations require no such actions, and the Agency has not asked any other operator in the industry to take such steps. Further, the Pipeline Safety Act and PHMSA's own rules limit the scope of Compliance Orders to violations found, and the entire Compliance Order far exceeds that limit.

Aside from being based on unsubstantiated violations, the $2.6 million penalty that PHMSA imposed on EMPCo is improper for two reasons. First, PHMSA increased the amount of the penalties based on a supposed causal relationship between the alleged violations and the Mayflower release, even though PHMSA cannot prove any such causal relationship. Even if EMPCo had run the ILI seam/crack tool when PHMSA said it should have (10 months earlier), rather than shortly before the Mayflower release, the result would have been the same. After the release, knowing that a rupture had occurred, the ILI tool vendor still could not identify the highly unusual pipe properties combined with manufacturing-related anomalies that resulted in the release. Second, the violations in this matter are closely related, and the maximum amount of a PHMSA fine for related violations is $1 million.

ARGUMENT

The violations of the 49 C.F.R. §195.452 IMP regulations alleged by PHMSA and challenged by EMPCo rely on a single flawed premise: PHMSA's assertion that EMPCo should have concluded, prior to the Mayflower release, that the Pegasus Pipeline was susceptible to seam failure and, thus, should have examined the Pipeline with a method capable of assessing seam integrity on a five-

year schedule. Those violations (Violations 1-4 & 7-8 in the Final Order at R.E. Tab 1) are unfounded.[11]

EMPCo fully complied with the IMP regulations by correctly following an accepted and PHMSA-endorsed methodology that did not reveal the Pegasus Pipeline to be susceptible to seam failure. Indeed, EMPCo on multiple occasions in the years preceding the release considered the risk factors, in accord with the performance-based IMP regulations' short and clear requirement that an operator *consider* risk factors. Multiple audits of EMPCo's IMP conducted by PHMSA in the years *before* the Mayflower release confirm that EMPCo's IMP complied with PHMSA regulations. That fact did not change, notwithstanding the Agency's new position *after* the release, merely because neither EMPCo, nor the Agency that had repeatedly audited the IMP, was able to foresee the Mayflower release.

PHMSA's findings of violations result from one or both of two unlawful actions by PHMSA: characterization of its regulations in this case in such a way as to deny EMPCo fair notice, or adoption of a post hoc strict liability approach that Congress did not authorize.

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[11] The Final Order based Violations 1 and 4 on §195.452(e)(1); Violation 2 on §195.452(j)(3); and Violations 3, 7, and 8 on §195.452(b)(5). Cert.Index.No.22. The NOPV had alleged a different basis for Violation 8, §195.402(a). Cert.Index.No.3, at 7. But the Final Order did not find any violation of §195.402(a) and based Violation 8 instead on §195.452(b)(5).

Further, EMPCo challenges the entire Compliance Order and the $2.6 million penalty imposed. Not only is the Compliance Order based on unsubstantiated violations, but it also exceeds PHMSA's authority because it is not limited to the violations found and essentially imposes injunctive relief beyond PHMSA's power. The penalty is likewise not only based on unfounded violations, but it was improperly enhanced because of a causal relationship that was not proven and because it exceeds the statutory maximum.

I. EMPCo Complied with the IMP Regulations

According to the Final Order (Cert.Index.No.22), Violations 1 and 4 are based on §195.452(e)(1),[12] which requires operators to consider pipeline risk factors, including seam type and manufacturing information (among many other risks). Violation 2 is based on §195.452(j)(3), which requires am operator to schedule continual assessments of pipelines at five-year intervals. Violations 3, 7, and 8 are based on §195.452(b)(5), which requires operators to establish and implement an integrity management program.

EMPCo has complied with all of those regulations. The challenged Violations, though, depend on PHMSA's contention that, in considering pipeline risk factors, EMPCo should have determined that the Pegasus Pipeline was

[12] Section 195.452(e) is the mechanism through which an operator complies with the §195.452(j)(3) requirement to prioritize pipeline segments for continual integrity assessments.

susceptible to seam failure, which would have then required EMPCo to use in its every-five-year assessments a method capable of assessing seam integrity. Yet PHMSA did not allege and the Final Order did not find violations of the only two IMP regulations that refer to susceptibility to seam failure and methods capable of assessing seam integrity—§195.452(c)(1)(i) & (j)(5).

A. As Required by §195.452, EMPCo Did Properly "Consider" Pipeline Risk Factors

By its plain text, and because it is a performance-based regulation, §195.452(e) grants the operator discretion to schedule assessments according to the relative importance, as determined by the operator, of multiple risk factors. *See* 49 C.F.R. §195.452(e) (prescribing that "[a]n operator must establish an integrity assessment schedule that prioritizes pipeline segments for assessment" and then granting discretion to the operator by providing that it is the "operator [that] must base the assessment schedule on all risk factors" and providing a non-exhaustive list of "[t]he factors *an operator* must *consider*" (emphasis added)). PHMSA recognizes this fundamental feature of the regulation, under which what is required is *consideration* of factors, not specific outcomes:

> Section 195.452(e)(1) lists nine factors that must be considered in establishing a schedule but leaves it up to the operator to determine what other factors need to be considered, how to assign risk scores to each factor and pipe segment, and how to prioritize assessments.

In re Magellan Midstream Partners, L.P., CPF No. 4-2006-5020, at *7. Therefore, to sustain the challenged violations, PHMSA must prove either that (1) EMPCo somehow did not "consider" the §195.452(e) risk factors or (2) §195.452(e) means something other than what its plain text dictates and so requires something other than "consider[ation]" of risk factors. PHMSA can prove neither proposition.

1. EMPCo Properly Evaluated the Pegasus Pipeline for Susceptibility to Seam Failure

As summarized in the Statement of Facts, undisputed facts in the record reflect that EMPCo did, *on multiple occasions*, conduct analyses that never revealed the Pegasus Pipeline to be susceptible to seam failure. Each time, it did so using the Baker/Kiefner Decision Tree endorsed by PHMSA, and relying on the expertise of Dr. Kiefner, a renowned pipeline engineering expert who largely developed the methodology that the Decision Tree represents. Based on those analyses, EMPCo decided how to assign risk scores and how to prioritize assessments. That is precisely what §195.452(e) requires.

In its opposition to EMPCo's request for a stay pending review, the Agency pointed to past seam failures experienced in the line. These past seam failures are incapable of establishing a regulatory violation in these circumstances. Specifically, in 2005-2006, EMPCo hydrostatically tested the Pegasus Pipeline, a test method that PHMSA believes "is a method typically capable of assessing seam integrity." Cert.Index.No.22 at 13.

Applying the Baker/Kiefner Decision Tree, EMPCo found no susceptibility to seam failure. A conclusion of susceptibility results *only if* the cause of the failure was pressure cycling induced fatigue or preferential seam corrosion. Both causes were ruled out by analyses done on the prior seam failures by a third-party expert metallurgist—in fact, the same metallurgist that PHMSA authorized to analyze the ruptured pipe in 2013. *See* Cert.Index.No.10; Cert.Index.No.16:Exs.12, 14 & 15.

Accordingly, based on EMPCo's lengthy, repeated, and in-depth consideration of seam failure risk, utilizing available guidance, sound engineering judgment, and assistance from a national expert on LF-ERW pipe, EMPCo concluded on multiple occasions that the Pegasus Pipeline was not susceptible to seam failure. Cert.Index.16:Exs.9, 14, 21, 22, 29. Although not required by those repeated engineering analyses, and in advance of the 2015 due date for the next reassessment on the Conway to Corsicana segment, the Company ran the seam/crack tool in 2012-13 because it often exceeds minimum requirements and was seeking additional ILI data and more information for its risk assessments. Cert.Index.No.16:Exs.34, 35.

In sum, EMPCo considered the risk factors, as required under §195.452(e). The Baker/Kiefner Decision Tree establishes that a conclusion of seam-failure susceptibility does not follow merely because failures occur during a hydrotest or in service. What the Decision Tree requires is for an operator to determine whether

such failures resulted from cycling fatigue or selective corrosion.[13] And the fact that an incident later occurred does not mean EMPCo failed to "consider" any risk factors. If it did, then an operator that experiences a seam-related pipeline leak on its pipeline system could never escape liability under IMP rules, thus nullifying the IMP regulations and creating a strict-liability regime that Congress has not authorized.

In a supplemental affidavit in the proceedings below, Dr. Kiefner verified that the Baker/Kiefner Decision Tree is "our recommended decision tree process for operators to follow to determine if a particular pipeline segment is susceptible to seam failure in the context of the regulations." Cert.Index.No.24:Ex.82 ¶6. He added that EMPCo was "consistent and compliant with" and "correctly followed the guidance described in the Baker Report." *Id.* ¶¶10, 18.

2. Section 195.452(e) Requires "Consideration" of Risk Factors, But Does Not Anticipate an Outcome or Require Particular Methodology

Section 195.452(e)'s plain, short, and clear text defies any argument that something other than "consider[ation]" of risk factors is required to comply with the regulations. *See, e.g.*, *Texas v. EPA*, __ F.3d __, No. 16-60118, 2016 WL 3878180, at *12 (interpretation of unambiguous regulation is a legal issue

[13] Cycling fatigue can occur as a result of changes in operating pressures over time, and selective seam corrosion (also known as "grooving corrosion") refers to isolated metal loss on pipe. These concepts appear in the Baker Report. *See* Cert.Index.No.16:Ex.3, at 24, 29.

reviewed *de novo* and for which agency receives no deference). Moreover, PHMSA's prior recognition that "how to assign risk scores to each factor and pipe segment, and how to prioritize assessments" is something the regulation "leaves [ ] up to the operator" only confirms that §195.452(e) means what it says when it calls only for an operator to "consider" risk factors. *In re Magellan Midstream Partners, L.P.*, CPF No. 4-2006-5020, at *7. Therefore, §195.452(e) is a performance-based rule that does not prescribe any methodology for "considering" the risk of seam failure.

Rather than prescribing a particular outcome or methodology, the cornerstone of §195.452(e), as applicable here, is instead that an operator "consider" the risk of seam failure. To "consider" a regulatory factor relevant to a decision is to "bear[] it in mind and allow[] it to inform and shape one's reflections on a matter." *William D. v. Manheim Twp. Sch. Dist.*, No. 04-4535, 2007 WL 2825723, at *5 (E.D. Pa. Sep. 27, 2007) (relying on dictionary definition of "consider"); *Cent. Valley Chrysler-Jeep v. Witherspoon*, 456 F. Supp. 2d 1160, 1173 (E.D. Cal. 2006) (use of the term "consider" in a statute requires an actor to merely investigate and analyze the specified factor, but not necessarily act upon it). EMPCo's scheduling of continual assessments was clearly "informed by" the risk of seam-failure susceptibility.

Notwithstanding the absence of any prescriptive instruction on how an operator must "consider" seam failure susceptibility, PHMSA issued a NOPV that accused the Company of having more than adequate information for the pipe to be considered susceptible to seam-failure. Cert.Index.No.3, at 2. At the hearing, PHMSA rejected the Baker/Kiefner Decision Tree's application to the Pegasus Pipeline and questioned Dr. Kiefner's explanation of his own methodology as set out in the Baker Report. Cert.Index.No.18, at 98-101. Ultimately, PHMSA found that EMPCo's "consideration" of seam-failure susceptibility in 2005-2006 was "incorrect" and not "proper." Cert.Index.No.22 at 5; 12.

PHMSA's dismissal of the Baker/Kiefner Decision Tree because it is not in §195.452(e)(l) is contrary to the language and intent of the regulation. Section 195.452(b)(6) specifically instructs operators to "[f]ollow recognized industry practices." Further, EMPCo had to select *some* method to assess susceptibility to seam failure (since none is specified in the regulation), and EMPCo chose the Baker Report and the Baker/Kiefner Decision Tree because they represent the very method that PHMSA implicitly adopted when it commissioned the Report and to this day references in its enforcement manual. To penalize EMPCo now for properly following the Baker/Kiefner Decision Tree is arbitrary and capricious.

B. No Presumption of Susceptibility to Seam Failure Exists under IMP Regulations

The IMP regulations contain no presumption of susceptibility to seam failure. In the Agency's Final Order, PHMSA recognized that another regulation regarding pressure testing, Part 195.303, is "separate from integrity management." Cert.Index.No.22 at 8.36. In denying EMPCo's Petition for Reconsideration (Cert.Index.No.31 at 2), PHMSA generalized that "[t]he pipeline safety regulations expressly deem all pre-1970 LF-ERW pipe to be presumptively susceptible to seam failure unless an engineering analysis shows otherwise," citing 49 C.F.R. §195.303(d). PHMSA's opposition to a stay in this Court also cited, at pages 4 and 19, the supposed presumption, which the motion panel's opinion apparently accepted at page 6 of its opinion, without addressing EMPCo's reply to the contrary.

The presumption that appears in 49 C.F.R. §195.303(d), issued in 1998 in Subpart E of the pipeline safety regulations entitled "Pressure Testing," is distinct from and was promulgated prior to the IMP rules. Under this regulation, operators must conduct a one-time hydrostatic pressure test of certain categories of pipelines. 59 Fed. Reg. 29379 (June 7, 1994). Section 195.303(d) allowed operators to elect by December 1998 if they wanted to use risk-based criteria rather than a hydrostatic test in circumstances not relevant here. That one-time election was unavailable for pre-1970 LF-ERW pipe "deemed susceptible to longitudinal

seam failure unless an engineering analysis shows otherwise." 49 C.F.R. §195.303(d).

Part 49 C.F.R. §195.303(d) had no further applicability after the December 1998 deadline. When the Office of Pipeline Safety promulgated the Subpart F IMP regulations in 2000, entitled "Operation and Maintenance," it did not create a similar rebuttable presumption regarding pre-1970 LF-ERW pipe in Subpart F, despite creating just such a presumption two years earlier in §195.303(d) for an entirely different purpose.

Notably, PHMSA did not charge EMPCo in this matter with violating Subpart E or §195.303. Subpart E is not part of the IMP regulations, which PHMSA's Final Order recognizes by stating that §195.303 is "separate from integrity management." Cert.Index.No.22 at 8.36. PHMSA further knows that it could not charge EMPCo with violating Subpart E or §195.303 because EMPCo performed several hydrostatic pressure tests on the Pegasus Pipeline. Thus, §195.303(d) is irrelevant, and PHMSA cannot now justify its conclusions about alleged violations by resorting to the Subpart E regulations. *E.g.*, *Texas v. EPA*, __ F.3d __, No. 16-60118, 2016 WL 3878180, at *12 (agency action must be evaluated "solely on the basis of the agency's stated rationale at the time of its decision").

C. PHMSA Offered No Substantial Evidence of Non-Compliance with §195.452

As discussed, PHMSA ruled that EMPCo violated §195.452(e) because it allegedly failed to consider past seam failures and because certain failures exhibited "low toughness." Cert.Index.No.22, at 9-11. There is no substantial evidence to support either allegation. *See Ass'n of Data Processing v. Bd. of Governors*, 745 F.2d 677, 683 (D.C. Cir. 1984) (there is no "substantive difference" between the arbitrary and capricious and substantial evidence test when a reviewing court "is performing that function of assuring factual support").

PHMSA grounds its case in the seam-failure-susceptibility analysis that EMPCo performed with the 2005-2006 hydrotest of the Pegasus Pipeline. As noted, the results of that test revealed 11 seam failures in LF-ERW pipe. PHMSA—and its counsel—would have this Court believe that EMPCo simply ignored that test data. *See, e.g.*, Respondent's Opposition to Stay at 7 ("Among other things, EMPCo *failed to consider* the presence of LF-ERW pipe and its risk of seam failure, *the history of seam failures*, and the brittleness of the pipe." (emphasis added)). This is incorrect. The Baker/Kiefner Decision Tree expressly does consider seam failures, by requiring that the operator determine if the failures exhibit evidence of fatigue-related failures, selective seam corrosion or other time dependent defects (such as stress corrosion cracking). It is undisputed, as shown in the Final Order at page 9, that EMPCo evaluated these factors for each of the seam

failures, and therefore unquestionably "considered" seam failures in its susceptibility analysis. Cert.Index.No.16:Ex1 ¶13. Dr. Kiefner explained in his supplemental affidavit why those seam failures did not mean that the Pegasus Pipeline was susceptible to seam failure. Cert.Index.No.24:Ex.82 ¶¶7-8.

PHMSA raised a new issue at the hearing, not part of any allegation in the NOPV, and certainly not mentioned in any of the applicable regulations, that the Baker/Kiefner Decision Tree in the very Report commissioned by PHMSA apparently no longer applies because it supposedly does not address the "toughness" or brittle cracking of pipe. Cert.Index.No.18, at 99, 101. PHMSA further claimed that brittle pipe, or pipe with low toughness, will not exhibit the same evidence of fatigue cracking, which is the end point of the Baker/Kiefner Decision Tree. PHMSA did not offer expert testimony to support these positions. Instead, a PHMSA representative whose qualifications were not part of the record, disagreed with Dr. Kiefner's interpretation of his own methodology. In its Final Order, PHMSA relied on fragmented passages in the Baker Report (ignoring the actual methodology in the Baker/Kiefner Decision Tree). Cert.Index.No.22, at 11. PHMSA claimed that EMPCo did not consider "that the absence of fatigue was a result of the low toughness of the pipe." *Id.* PHMSA presented no evidence in support of its speculation.

EMPCo did answer all such claims, including through affidavits of Dr. Kiefner, W. Kent Muhlbauer, and the Baker Report itself. Cert.Index.No.16:Exs.1-3. All LF-ERW pipe is prone to low toughness and brittle cracking, so those factors are built into the process for analyzing seam-failure susceptibility represented by the Baker/Kiefner Decision Tree. Cert.Index.No.16:Ex.3, at 8 ("It is safe to say that all low-frequency and DC-welded materials possess bondline regions that are prone to low toughness and brittle-fracture behavior."). Dr. Kiefner explained why PHMSA was incorrect on this exact point: "The PHMSA Final Order's discussion of brittleness is misleading." Cert.Index.No.24:Ex.82 ¶14 "In contrast to PHMSA's conclusions, the relevant consideration for an LF-ERW pipeline's fatigue life is not toughness of the bond line region." *Id.* ¶17. "The toughness of the pipe seam is simply not relevant to [the] analysis." *Id.* ¶13. Further, Dr. Kiefner found "no suggestion in the Baker Report that the proposed seam failure susceptibility analysis process in . . . [the] Figure 4.1 Flowchart [*i.e.*, Baker/Kiefner Decision Tree] should not be used for low toughness or brittle pipe." *Id.* ¶11. Likewise, Dr. Kiefner explained that the prior in-service and hydrotest leaks in the Pegasus Pipeline did not meet the criteria that would lead to the conclusion of seam-failure susceptibility because two factors were missing; there was no time-dependent fatigue or corrosion and no aggressive or very aggressive pressure cycles. *Id.* ¶8.

Finally, Dr. Kiefner added, the never-seen-before material properties or defect that caused the Mayflower release, attributable to the manufacturing process, were not detected by EMPCo's 2005-2006 hydrotest or by the vendor that conducted EMPCo's voluntary 2013 ILI tool run. Cert.Index.No.16:Ex.1 ¶20 ("[n]o anomalies whatsoever were reported at the point of failure"); Cert.Index.No.24:Ex.82 ¶22-24 ("In all of the failure investigations that I have analyzed over the past 25 or 30 years, I have not seen a heat affected zone hardness as high as the pipe that caused this incident." "[T]he pipe at the point of failure was "unique.")*; see also* Cert.Index.No.10, at 33; Cert.Index.No.16, at 13 (Figure 3); *id*.Exs.50 & 54.

Thus, PHMSA's explanation that pipe exhibiting evidence of brittle cracking is susceptible to seam failure runs counter to the evidence before it, namely the Baker/Kiefner Decision Tree, which considers fatigue, and the affidavits of Dr. Kiefner, that the relevant consideration of fatigue is not brittleness. PHMSA's failure to consider this substantial evidence is arbitrary and capricious. *Texas v. EPA*, 16-60118, 2016 WL 3878180, at *12. Here, PHMSA did not "test its hypothesis against competing hypotheses" and "take account of competing evidence and inferences." *Caterpillar Logistics Servs., Inc. v. Solis*, 674 F.3d 705, 709 (7th Cir. 2012). It instead simply ignored them. An agency, however, cannot "simply ignore" key evidence or "strong indications that its favored witness got

things wrong." *Id.* (citing *Morgan Stanley Capital Group Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cty.*, 554 U.S. 527, 552 (2008)). Ultimately, PHMSA is saying that because it has general expertise in pipeline regulation, PHMSA is right and EMPCo is wrong. This is not substantial evidence. *ASG Indus., Inc. v. United States*, 548 F.2d 147, 154 (6th Cir. 1977) (an agency cannot "assert expertise as a defense for all seasons").

To summarize—EMPCo complied with §195.452 when it repeatedly and thoroughly considered susceptibility to seam failure through adoption and use of a PHMSA-commissioned methodology, which was reviewed in multiple audits by PHMSA. Even though the methodology did not reveal the Pegasus Pipeline to be susceptible to seam failure, EMPCo ran a seam/crack tool, which did not reveal the anomaly that led to the Mayflower release. EMPCo did not, therefore, violate §195.452. In fact, EMPCo went beyond what the regulations required.

II. The Violations Found by PHMSA Represent an Unlawful Exercise of Agency Power

As shown above, EMPCo complied with all provisions in 49 C.F.R. §195.452. That leaves two explanations for PHMSA's finding of violations relating to the risk of susceptibility to seam failure. Both of those explanations reflect unlawful agency action: PHMSA has adopted new, litigation-related interpretations of IMP regulations that denied EMPCo fair notice, or PHMSA has adopted a post hoc strict liability approach that Congress did not authorize.

A. The Challenged Violations Depend on Regulatory Interpretations that Offend Due Process and Fair Notice

De novo review applies to the issue of whether an agency's interpretation of its regulations violates due process by failing to give fair notice. *See FCC v. Fox Television Stations, Inc*., 132 S. Ct. 2307, 2317 (2012). That is consistent with the limitations placed on the principle of deference under *Auer v. Robbins*, 519 U.S. 452, 461 (1997)—which is applicable here rather than *Chevron* deference as explained in the Standard of Review section. *Auer* deference does not apply when the agency's interpretation is plainly erroneous, inconsistent, or otherwise creates unfair surprise. *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. at 2166-67.

The principles undergirding due process/fair notice requirements in the regulatory context cannot be stated more aptly than this Court did recently in *Employer Solutions Staffing Group II, L.L.C. v. Office of Chief Administrative Hearing Officer*, __ F.3d __, 2016 WL 4254370 (5th Cir. Aug. 11, 2016):

> [S]tatutes and regulations which allow monetary penalties against those who violate them . . . must give [a regulated party] fair warning of the conduct [they] prohibit[ ] or require[.]" *Diamond Roofing Co., Inc. v. Occupational Safety & Health Review Comm'n*, 528 F.2d 645, 649 (5th Cir. 1976). Recently, the Supreme Court cited favorably to *Diamond Roofing* for the proposition "that agencies should provide regulated parties 'fair warning of the conduct [a regulation] prohibits or requires.'" *Christopher v. SmithKline Beecham Corp.*, ––– U.S. ––––, 132 S.Ct. 2156, 2167 & n.15, 183 L.Ed.2d 153 (2012) (alterations in original) (quoting *Gates & Fox Co. v. Occupational Safety & Health Review Comm'n*, 790 F.2d 154, 156 (D.C. Cir. 1986)). The Court also quoted favorably this summary from a treatise: "[I]n penalty cases, courts will not accord substantial

> deference to an agency's interpretation of an ambiguous rule in circumstances where the rule did not place the individual or firm on notice that the conduct at issue constituted a violation of a rule." *Id.* at 2167 n.15 (quoting 1 R. Pierce, ADMINISTRATIVE LAW TREATISE § 6.11, at 543 (5th ed. 2010)).
>
> Fair notice requires that the agency have "state[d] with ascertainable certainty what is meant by the standards [it] has promulgated." *Diamond Roofing*, 528 F.2d at 649. This rule requires that a statute or agency action "give . . . fair warning of the conduct it prohibits or requires, and it must provide a reasonably clear standard of culpability to circumscribe the discretion of the enforcing authority and its agents." *Id.* The challenged statute or agency action must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972).

Emp'r Solutions Staffing Grp. II, L.L.C., 2016 WL 4254370 at *5. PHMSA did not follow those due process/fair notice requirements in several respects.

PHMSA belatedly attempts to justify its actions by relying on an entirely different set of regulations, Subpart E of Part 195 and specifically §195.303(d). PHMSA cannot import and rely on a rebuttable presumption of susceptibility to seam failure from another regulation, and particularly not from a section in that regulation whose purpose expired in 1998. *See* §II.B *supra*. Given that the IMP regulations do not refer to §195.303(d), any fair reading of these regulations is that PHMSA decided not to carry over such a presumption to §195.452.

Indeed, PHMSA appears to be expanding the irrelevant presumption into an across-the-board requirement of using methods capable of seam assessment on all LF-ERW pipe. That too is plainly inconsistent with the IMP rules. In fact, it is

inconsistent with §195.303(d) itself, whose presumption is rebuttable by engineering analysis, which EMPCo conducted a number of times. Thus, a requirement to categorize all LF-ERW pipe as susceptible to seam failure deserves no deference. *Christopher*, 132 S. Ct. at 2166. Moreover, if PHMSA wants to issue a regulation aimed at requiring the use of seam-assessment methods on all LF-ERW pipe, it can do so only through the Administrative Procedure Act's notice and comment process involving all operators, not an enforcement action against a single operator.

Perhaps the essential fair-notice problem in this matter is that PHMSA has reinterpreted the IMP rules as prescriptive rather than performance based. This fundamental notice problem surfaces from a comparison of what EMPCo did and what PHMSA says it should have done.

EMPCo conducted a hydrotest in 2006, a method capable of assessing susceptibility to seam failure. Based on the results from the hydrotest, EMPCo considered susceptibility to seam failure using the methodology from the PHMSA-commissioned Baker Report, and it then concluded that the threat did not exist. The only way that PHMSA can classify such as a violation of the IMP regulations for failing to consider the applicable risk factors is to re-interpret the rules as not only requiring the use of the Baker Report, but also as requiring the use of the Report in a particular way that Dr. Kiefner says is improper. Yet, because the IMP

rules are performance based, the rules do not even reference the Baker Report, much less do they announce PHMSA's new interpretation that using the Baker/Kiefner Decision Tree does not amount to compliance with IMP regulations. And if the Baker Report is now surprisingly part of the newly prescriptive IMP rules, and if the Baker Report is susceptible to differing interpretations based on PHMSA's disagreement with Dr. Kiefner's interpretation of his Report (*see* Cert.Index.No.18, at 99-101), then the Baker Report and its Decision Tree could not give fair notice of how to determine susceptibility to seam failure.

Once PHMSA converts performance-based regulations into prescriptive regulations, special fair notice issues arise. Illustrative of those issues is the Eighth Circuit's opinion in *Stahl v. City of St. Louis*, 687 F.3d 1038 (8th Cir. 2012). A St. Louis ordinance precluded certain conduct if it impeded pedestrian or vehicular traffic. While the statute was not vague in any traditional sense, the Court said, the ordinance failed to provide fair notice because whether traffic would actually be obstructed could not be known until after the conduct was committed. Analogously, a regulation that requires a company to consider a risk is not vague in any traditional sense, but if the agency unexpectedly interprets the regulation as prescriptive, then it becomes an "open-ended regulation[n] that [agencies] can later interpret as they see fit, thereby 'frustrat[ing] the notice and predictability purposes

of rulemaking.'" *Christopher*, 132 S. Ct. at 2168 (quoting *Talk Am., Inc. v. Michigan Bell Tel. Co.*, 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring)).

A regulation must tell "a party . . . what is expected of it" before an agency may impose civil or criminal liability. *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1328-29 (D.C. Cir. 1995). The IMP regulations told EMPCo to consider the applicable risk factors. Now, after the fact, PHMSA tells EMPCo and the industry that it must consider risks in a certain way. More egregiously, PHMSA now faults EMPCo's use of the methodology in the Baker Report, after years of auditing EMPCo without raising any objection about EMPCo's process for analyzing susceptibility to seam failure. This is akin to situations in which fair notice is denied because "agency personnel give conflicting advice to private parties about how to comply." *Rollins Envtl. Servs., (NJ) Inc. v. EPA*, 937 F.2d 649, 653 (D.C. Cir. 1991); *United States v. Hoechst Celanese Corp.*, 964 F. Supp. 967, 980 (D.S.C. 1966).

In short, accepting PHMSA's new interpretation of the IMP rules, the Agency failed "to state with ascertainable certainty what is meant by the standards [it] has promulgated" regarding use of seam-assessment methods in pipe susceptible to seam failure. *Diamond Roofing*, 528 F.2d at 649. And the same is true of PHMSA's Compliance Order.

The Compliance Order requires in section 1(d) that EMPCo assess seam integrity using current knowledge and relevant results, under the guidance of a

third-party expert, with the approval of PHMSA. Cet.Index.No.22, at 43-44. That is essentially what EMPCo has been doing for years. EMPCo has employed state-of-the-art technology in its comprehensive IMP, it has enlisted the guidance of Dr. Kiefner as a third-party expert, and it has done so under the supervision provided by PHMSA's regular audits.

B. PHMSA Lacks Statutory Authorization to Impose Strict Liability

PHMSA found violations in this case only after a release occurred. Over the preceding decade, the Agency failed to raise any objection about EMPCo's engineering analyses that the Pegasus Pipeline was not susceptible to seam failure. The Agency also knew a TFI seam/crack tool run just months before the incident did not identify the defect that caused the Mayflower release, even though the tool run results were reviewed after the incident when they were under significant scrutiny. Finally, the Agency was well aware that a study commissioned by PHMSA and conducted by the Battelle Institute had recently concluded that at present there is no ILI tool available that can reliably and perfectly detect all LF-ERW seam failure anomalies. Cert.Index.No.20:Ex. 66 ("gaps remain in . . . effectiveness of current schemes and technology") & Ex.69 (NTSB letter to PHMSA stating: "The NTSB concludes that the current inspection and testing programs are not sufficiently reliable to identify features associated with longitudinal seam failures of LF-ERW pipe").

Thus, only the occurrence of an incident triggered PHMSA's enforcement in this case. The undisputed facts show that the Company was in compliance with the applicable law. The undisputed facts also show that only months before the incident the Company used a sophisticated seam/crack tool to detect anomalies that could cause an incident and that running the tool 10 months earlier would have made no difference.

Congress has provided some federal agencies with strict liability authority, where a member of the regulated community can be fined and assessed injunctive relief solely because a defined incident occurred. The Clean Water Act, for example, allows the EPA to bring an enforcement action based solely on the release of oil to waters of the U.S., without finding any other violation of a regulation. *See* 33 U.S.C. §1321(b)(6). In fact, EPA did bring a Clean Water Act action relating to the Mayflower release. *See United States v. ExxonMobil Pipeline Co.*, 28 F.Supp.3d 843 (E.D. Ark. June 9, 2014).

Congress has not given that authority to PHMSA. Nowhere in the Pipeline Safety Act, 49 U.S.C. §60101 *et seq.*, is such authority granted. Enforcement by PHMSA must instead be based on a violation of the statute or rule. There is no violation of established regulations and rules here. EMPCo complied with the rules as written, and as previously enforced by the Agency. In this case, PHMSA

effectively asserts that an operator must find all seam anomalies, or be in violation. That is not the law.

III. PHMSA's Penalty and Compliance Order Violate Applicable Law

Even if the Court concludes that PHMSA's enforcement action was properly within the bounds of the Agency's authorizing statute, the Agency's own regulations and precedent, and Constitutional considerations, the amount of civil penalty assessed by the Agency was not consistent with the applicable law. Similarly, should the Court conclude that PHMSA's enforcement action was within the bounds of the Pipeline Safety Act, PHMSA regulations and precedent, and Constitutional considerations, the Agency's Compliance Order is overbroad and inconsistent with the applicable law.

A. PHMSA Exceeded its Authority in Imposing the $2.6 Million Penalty

The Agency's penalty of more than $2.6 million in this matter is not authorized by law. The penalty provisions of the Pipeline Safety Act establish three express limitations on the amount of civil penalties in any PHMSA enforcement proceeding. First, §2 of the PSA establishes factors that the government must ("shall") consider in developing an appropriate proposed civil penalty for a pipeline incident. 49 U.S.C. §60122(b); *see also* 49 C.F.R. §190.225. Second, the violations at issue here cannot exceed $100,000 per day. 49 U.S.C. §60122(a)(1).

Third, any "related series of violations" cannot exceed $1 million. 49 U.S.C. §60122(a)(1).[14]

The statutory language authorizing PHMSA's penalty authority is clear and has not changed since it was enacted more than 30 years ago (other than to increase the maximum amounts available). The Agency has not issued any regulation or policy describing how it will apply its penalty authority, or how it intends to interpret the phrase "a related series of violations." The only document that even approximates penalty 'guidelines' from PHMSA is a minimal one page internal outline document that the Agency recently provided in the course of another enforcement matter. Cert.Index.No.23:Ex.92 (PHMSA Civil Penalty Summary (09/05/12) (provided to EMPCo at the administrative Hearing associated with PHMSA CPF No. 5-2013-5007)).

While it is generally accepted that "[a]n administrative agency is entitled to substantial deference in assessing the civil penalty appropriate for a violation of its regulations," the agency's choice of a sanction is subject to review, if "it is unwarranted in law or without justification in fact." *NL Indus., Inc. v. Dep't of Transp.*, 901 F.2d 141, 144 (D.C. Cir. 1990) (citation and quotation marks

[14] The cited statutory provisions apply to violations occurring before January 3, 2012, and PHMSA alleged that these violations commenced before that date. *See* Cert.Index.No.2 (at Part E6 for each violation). The current maximum for related violations is $2 million, which the penalty in this case also exceeds.

omitted). Congress could have stated (and has, in other statutes) that the penalty cap applied only to "multiple violations of a single requirement," but it did not use that language in the Pipeline Safety Act. Instead, it established a cap on "related series of violations." There is very little legislative history under this provision of the Pipeline Safety Act, but in subsequent statutory reauthorization proceedings, this phrase was interpreted to mean "all violations related to a single incident," and that is the interpretation that it should be given in this proceeding. Cert.Index.No.20:Ex.81 (Congressional Record 146:103 (Sept. 7, 2000)). The statutory language is further supplemented by the Agency's CIG decision where it held that Items in a NOPV may also be "related" (even if no daily violations of the same requirement) if the facts and law for the claims are "so closely related … that they are not separate and should be considered one violation." *In re Colorado Interstate Gas Co*., CPF No. 5-2008-1005, at 10 (Nov. 23, 2009).

B. The Penalty Should be Withdrawn or Reduced

The penalty should be withdrawn because the Agency has not proven the findings in the Final Order. Even though EMPCo maintains that the entire penalty should be withdrawn, regardless of PHMSA's erroneous conclusions in the Final Order, the statutory cap of $1 million should apply to all of the violations. All of the Agency's conclusions in the Final Order flow from the same incident, all substantively rely on the same regulation (49 C.F.R. §195.452), and the majority of

the allegations rely on the same purported evidence. Further, the penalty should be reduced because PHMSA has not proven that certain alleged violations were a causal factor of the Mayflower incident, yet it applied a significant increase to the penalty for certain violations on that basis.

All of the alleged violations stem from one pipeline incident and all of them cite to and/or rely on one PHMSA regulation, 49 C.F.R. §195.452. In addition, PHMSA has alleged one regulatory violation, namely Violation 1 for alleged failure to "consider" certain risk information and conclude that the Pegasus Pipeline was susceptible to seam failure. PHMSA then expanded it to four additional violations (Nos. 2-4 and 7). This unquestionably constitutes a "related series of violations," given that the four additional alleged violations depend solely on PHMSA's erroneous determination that EMPCo improperly concluded the failed segment was seam-failure susceptible. If PHMSA's conclusion is erroneous (and it is), those violations cannot themselves be sustained.

PHMSA's Final Order alleged that certain violations were a causal factor of the incident at issue and warrant the highest level of gravity. Cert.Index.No.22, at 34-38. In assessing penalties that are greatly enhanced by this factor, the Agency ignores several undisputed facts. First, the results of the 2012-2013 seam/crack tool assessment did not detect the anomaly that led to the failure. Cert.Index.No.16:Ex.54. In addition, the Company's root-cause analysis and expert

opinion indicate that the cause was atypical, unique, "not frequently seen before in the industry" and in Dr. Kiefner's analysis "not capable of reliable detection." *Id*.Ex.1, ¶24. For these reasons, PHMSA's penalty should at a minimum be greatly reduced.

Despite the plain language of the statute and testimony in the Congressional record, PHMSA argued that interpreting "a related series of violations" to be tied to a single incident or to a single regulation would be contrary to efforts by Congress to increase maximum penalties for serious violations. Cert.Index.No.22, at 32-33 (noting also that each alleged violation concerns a separate regulatory requirement and requires proof of additional facts). We disagree. When Congress increased penalty maximums in 2011, it could have revised the statutory language to expand or clarify the language "related series of violations" but it chose not to.

Further, the alleged violations all flow from one incident, and they all relate to 49 C.F.R. §195.452. In addition, PHMSA argued for the contributory impact of the violations because had the IMP requirements been executed properly, it would have been far less likely for the accident to occur. Cert.Index.No.31, at 12. The record reflects, however, that EMPCo did perform an integrity assessment with a tool capable of assessing pipeline seams shortly before the Mayflower release, and the anomaly was not detected. Performing such an examination years before the incident similarly would not have discovered the anomaly that caused the release.

C. PHMSA's Limited Authority to Issue Compliance Orders Does Not Encompass any Form of Injunctive Relief

The Agency's authority to issue Compliance Orders is limited to violations of a regulatory or statutory requirement. A Compliance Order is not intended to be an open ended opportunity for the Agency to try new interpretations or ideas, or to impose injunctive relief, and yet that is what the Compliance Order does in this case.

Under the PSA, PHMSA is authorized to "issue orders directing compliance" with a regulation promulgated by the Agency and such orders must "state clearly the action a person must take to comply." 49 U.S.C. §60118(b). Likewise, PHMSA's regulations require that a Compliance Order is limited to "directing compliance" with a "violation" alleged. 49 C.F.R. §190.217. By their plain text, both the statute and the regulation clearly link the relief sought in any Compliance Order to the specific regulatory violations at issue.[15] Indeed, the legislative history to the PSA provision creating this authority suggests that the intent was for the Agency, when issuing a Compliance Order, to provide a "precise description of the noncompliance or violation" in order to "provide the evidentiary framework" for follow up inspections and enforcement. *Pipeline Safety Act of*

[15] Notably, the Compliance Order limitations are quite distinct from—and narrower than—PHMSA's broader authority to impose "other appropriate action" when pursuing other types of enforcement, such as Corrective Action Orders or Safety Orders. 49 U.S.C. §§60112(d)(1); 60117(1)(1).

1979: Hearings on S.B. 411 Before the S. Comm. on Science, Commerce and Transportation, 96th Cong. 22, 33 (1979) (prepared statement of Dr. James Palmer, Administrator, Research and Special Programs Administration). It was not the intent of Congress to provide PHMSA with wide-ranging authority to prescribe generalized corrective actions on portions of an operator's system that are not targeted for enforcement of specific regulatory requirements.[16]

In other contexts, courts have reversed agency corrective actions as unlawful and unreasonable where—as here—they were not "rationally related to the defect to be corrected." *Sheridan Corp. v. U.S.*, 95 Fed. Cl. 141, 151 (Fed. Cl. 2010). In this instance, PHMSA's imposition of detailed corrective measures, such as those required by the Compliance Order, is analogous to a court imposing injunctive relief. In the context of judicial action, it is well established that injunctive relief must be "narrowly tailor[ed] . . . to remedy the specific action which gives rise to the order" as determined by the substantive law at issue. *Scott v. Schedler*, 826 F.3d 207 (5th Cir. 2016). It is also well established that an agency must act within its statutory authority. *Nat'l Pork Producers Council v. U.S. EPA*, 635 F.3d 738,

[16] In keeping with the limitations on its authority in this regard, it has been PHMSA's practice in past enforcement cases to withdraw a Compliance Order where underlying regulatory violation was not proven. *See Final Order, In re Buckeye Partners, LP*, CPF No. 1-2013-5007 (Dec. 11, 2013).

754 (5th Cir. 2011) ("[A]n agency's authority is limited to what has been authorized by Congress.").

PHMSA violated these principles in this case when it went beyond the authority granted it in the PSA, issuing vague directives applicable to portions of EMPCo's pipeline system where specific regulatory violations have not been established. Even presuming that PHMSA established a violation of the regulations at issue, which EMPCo does not concede, the scope of the corrective actions required is unreasonably broad. This Court should therefore reverse the Agency's action as exceeding its statutory authority.

CONCLUSION

EMPCo complied with the IMP regulations. In fact, it did more than it was required to do. Consequently, PHMSA's enforcement action must result from a re-interpretation of the regulations that offends fair notice requirements or from a strict liability approach not authorized by Congress. Given the absence of any validly found violations, both the $2.6 million penalty and the Compliance Order are improper. In addition, the penalty is excessive because it was increased by virtue of an unsupported claim of causal relationship to the Mayflower release and because the penalty exceeds the cap on related violations. The Compliance Order itself violates fair notice principles, and it amounts to the issuance of an injunctive order that exceeds PHMSA's statutory power.

PRAYER

EMPCo respectfully requests that the Court overturn violations 1-4 and 7-8 found by PHMSA; vacate the Compliance Order as to all of the violations or, alternatively, vacate it to the extent it is based on violations 1-4 and 7-8; and order that PHMSA reimburse all or part of the penalty paid by EMPCo.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that:

1. This Petitioner's brief complies with the type-volume limitation in Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 12,965 words, exclusive of the portions of the brief that are excluded from the type-volume limitation by Rule 32(a)(7)(B)(iii), the word count having been obtained through the word processing system used to create this brief, namely Microsoft Word 2010.

2. This brief further complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6), because it was prepared in Microsoft Word 2010 in 14-point, proportionally spaced Times New Roman font, except that 12-point font is used for footnotes as permitted by Fifth Circuit Rule 32.1.

/s/ Reagan W. Simpson
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CERTIFICATE OF FILING AND SERVICE

I certify that this brief was filed with the Court via the court's electronic filing system, on September 1, 2016. A copy of this brief was also sent to Respondents by the court's electronic filing system and/or Federal Express, addressed to:

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