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.

ON PETITION FOR REVIEW

BRIEF FOR RESPONDENTS

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ExxonMobil Pipeline Co. v. U.S. Dep't of Trans., et al., No. 16-60448

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of 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 disqualification or recusal.

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STATEMENT REGARDING ORAL ARGUMENT

Oral argument in this case is scheduled for October 31, 2016.

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS

STATEMENT REGARDING ORAL ARGUMENT

INTRODUCTION 1

STATEMENT OF JURISDICTION 3

STATEMENT OF THE ISSUES 4

STATEMENT OF THE CASE 4

A. Statutory and Regulatory Background 4

B. Factual Background 7

1. The Pegasus Pipeline and History of Seam Failures 7

2. The Mayflower Accident and Investigation 8

3. PHMSA's Final Order 9

4. PHMSA's Denial of Reconsideration 16

5. EMPCo's Petition for Review and Stay Motion 18

SUMMARY OF ARGUMENT 19

STANDARD OF REVIEW 22

ARGUMENT 23

I. PHMSA's Determination That EMPCo Violated the Pipeline Integrity Regulations Is Neither Arbitrary Nor Capricious 23

A. The Pegasus Pipeline Was Susceptible To Seam Failure 23

B. EMPCo Has Failed To Show That The Agency's Decision Was Arbitrary Or Capricious 28

II. PHMSA's Regulations Provide Adequate Notice As To What They Require....37

III. EMPCo's Strict Liability Argument Is Baseless....42

IV. This Court Should Affirm The Agency's Compliance Order And Penalty....44

A. This Court Should Defer to the Agency's Penalty 44

B. PHMSA's Compliance Order Is Limited To Directing Compliance With The Regulations 52

CONCLUSION 55

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Cases: **Page(s)**

Anthony v. *United States*,
520 F.3d 374 (5th Cir. 2008) 29

Auer v. *Robbins*,
519 U.S. 452 (1997) 23, 26, 33, 37

Calix v. Lynch,
784 F.3d 1000 (5th Cir. 2015) 48

Chevron U.S.A., Inc. v. NRDC,
467 U.S. 837 (1984) 47, 48

Christopher v. *SmithKline Beecham*,
132 S. Ct. 2156 (2012) 23

Diamond Roofing Co., Inc. v. Occupational Safety & Health Review Comm'n,
528 F.2d 645 (5th Cir. 1976) 37

Employer Sols. Staffing Grp. II, L.L.C. v. Office of Chief Admin. Hearing Officer,
__ F.3d __, 2016 WL 4254370 (5th Cir. Aug. 11, 2016) 37

Fernandez-Vargas v. Gonzales,
548 U.S. 30 (2006) 46

Gulf Restoration Network v. *McCarthy*,
783 F.3d 227 (5th Cir. 2015) 22

Louisiana Pub. Serv. Comm'n v. *FERC*,
761 F.3d 540 (5th Cir. 2014) 22-23

Medina Cty. Envtl. Action Ass'n v. *Surface Transp. Bd.*,
602 F.3d 687 (5th Cir. 2010) 22, 23, 24

Millard Refrigerated Services, Inc. v. *Secretary of Labor*,
718 F.3d 892 (D.C. Cir. 2013) 43

Motor Vehicles Mfrs. Ass'n of U.S., Inc. v. *State Farm Mut. Auto. Ins. Co.*,
463 U.S. 29 (1983) 30, 40

NL Indus., Inc. v. *Dep't of Transp.*,
901 F.2d 141 (D.C. Cir. 1990) 45, 51-52

Salinas v. *Rodriguez*,
963 F.2d 791 (5th Cir. 1992) 40

SEC v. Chenery Corp.,
332 U.S. 194 (1947) 48

Sheridan Corp. v. United States,
95 Fed. Cl. 141 (Fed. Cl. 2010) 54

Southwest Pharmacy Sols., Inc. v. Centers for Medicare & Medicaid Servs.,
718 F.3d 436 (5th Cir. 2013) 41

Spiller v. *White*,
352 F.3d 235 (5th Cir. 2003) 36

Stahl v. *City of St. Louis*,
687 F.3d 1038 (8th Cir. 2012) 41

10 Ring Precision, Inc. v. *Jones*,
722 F.3d 711 (5th Cir. 2013) 23

Thomas Jefferson Univ. v. *Shalala*,
512 U.S. 504 (1994) 19

United States v. *Tuma*,
738 F.3d 681 (5th Cir. 2013) 46

Statutes:

Civil Penalties Inflation Adjustment Act Improvement Act of 2015,
Pub. L. No. 114-74, 129 Stat. 584 7-8

Federal Civil Penalties Inflation Adjustment Act Improvement Act of 2015, Pub. L. No. 114-74, 129 Stat. 584 7-8

Federal Pipeline Safety Laws, 49 U.S.C. § 60101 *et seq.*:
49 U.S.C. § 60102(a)(2) 4-5
49 U.S.C. § 60118(b) 6, 14, 52, 54
49 U.S.C. § 60119(a) 3, 22
49 U.S.C. § 60122 6
49 U.S.C. § 60122(a) 6, 44
49 U.S.C. § 60122(a)(1) 46
49 U.S.C. § 60122(b) 7, 44

Pub. L. No. 112-90, 125 Stat. 1904 (2012) 6

5 U.S.C. § 706(2)(A) 22

Regulations:

49 C.F.R. § 1.97 3

49 C.F.R. pts. 190-199 5

49 C.F.R. § 190.450 5

49 C.F.R. § 190.211 ..... 9, 36

49 C.F.R. § 190.217 ..... 14, 52, 54

49 C.F.R. § 190.223 7

49 C.F.R. § 190.225 ..... 7, 44

49 C.F.R. § 190.243 ..... 3, 22

49 C.F.R. § 195.303(d) 6, 35, 39

49 C.F.R. § 195.450 5

49 C.F.R. § 195.452 50

49 C.F.R. § 195.452(a) 5

49 C.F.R. § 195.452(b)(1) 2, 5, 29

49 C.F.R. § 195.452(b)(3) 5

49 C.F.R. § 195.452(b)(5) ..... *passim*

49 C.F.R. § 195.452(c)(1)(i) 1, 6, 8, 9, 28, 41

49 C.F.R. § 195.452(e) 6

49 C.F.R. § 195.452(e)(1) ..... *passim*

49 C.F.R. § 195.452(e)(1)(i) 9, 32

49 C.F.R. § 195.452(e)(1)(ii) 9

49 C.F.R. § 195.452(e)(1)(iii) 9

49 C.F.R. § 195.452(f)(2)-(5) 5

49 C.F.R. § 195.452(h)(1) 13, 49

49 C.F.R. § 195.452(h)(2) 13

49 C.F.R. § 195.452(j)(3) ..... *passim*

49 C.F.R. § 195.452(j)(3)-(4) 6

49 C.F.R. § 195.452(j)(5) ..... *passim*

Legislative Materials:

S. 2438, 106th Cong. (2000) 48

146 Cong. Rec. S8235 (daily ed. Sept. 7, 2000) 49

Other Authorities:

In re Colorado Interstate Gas Co., CPF No. 5-2008-1005
(PHMSA Nov. 23, 2009) 47

In re ConocoPhillips Pipeline Co., CPF No. 3-2005-5015
(PHMSA Sept. 13, 2010) 43

In re Magellan Midstream Partners, L.P., CPF No. 4-2006-5020
(PHMSA Dec. 23, 2009) 30, 31

Michael Baker Jr. Inc., *Low Frequency ERW and Lap Welded Longitudianl Seam Evaluation: Final Report* (rev. 3, Apr. 2004),
https://primis.phmsa.dot.gov/iim/techreports.htm 33, 34, 35

PHMSA, U.S. Dep't of Transp:

Alert Notice ALN-88-01 (Jan. 28, 1988),
http://www.phmsa.dot.gov/pipeline/regs/advsiory-bulletin 6

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http://www.phmsa.dot.gov/pipeline/regs/advsiory-bulletin 6

INTRODUCTION

In 2013, the Pegasus Pipeline, operated by ExxonMobil Pipeline Company ("EMPCo"), ruptured near the town of Mayflower, Arkansas, releasing several thousand 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, concluded that EMPCo violated a number of federal pipeline safety regulations in its operation of the Pegasus Pipeline. Among those regulations is a requirement that a pipeline operator establish a schedule for assessing the risk of its pipeline based "on all risk factors that reflect the risk conditions on the pipeline segment." 49 C.F.R. § 195.452(e)(1). In making that determination, operators "must consider," among other factors, results of the previous integrity assessment; pipe size, material, and manufacturing information; and leak history. *Id.* If the risk factors show that the pipe is "susceptible to longitudinal seam failure," the pipeline is subject to continual integrity assessments every five years, using methods appropriate for assessing its seam integrity. *Id.* § 195.452(c)(1)(i), (j)(3), (5).

EMPCo's Pegasus Pipeline is manufactured from pre-1970 low-frequency electric-resistance welded ("ERW") pipe, which is known to exhibit an increased risk of longitudinal seam failure. Moreover, the Pegasus Pipeline had experienced numerous seam failures, both during testing and in-service: the pipeline had an in-service seam

leak in 1984, and leaks during hydrostatic testing in 1969, 1991, and 2005-2006. Indeed, the 2005-2006 hydrostatic tests resulted in eleven seam-related failures. Yet, despite the known heightened risk of pre-1970 ERW pipe to seam failure *and* an extensive history of seam failures, EMPCo, due to a flawed risk analysis and testing regime, nevertheless declared that the Pegasus Pipeline was not susceptible to seam failure. The agency correctly determined that that EMPCo's refusal to consider the pipeline susceptible to seam failure was unreasonable, and that EMPCo's integrity management program, including its integrity assessment schedule and risk analysis, did not comply with PHMSA regulations.

EMPCo's attempts to escape responsibility for failing to consider the pipeline susceptible to seam failure are without merit. EMPCo first contends that 49 C.F.R. § 195.452(e)(1) only requires operators to "consider" risk factors, leaving them free to completely discount those factors (an interpretation that would effectively render the regulation unenforceable). Although the regulation plainly gives operators discretion to consider and weigh applicable risk factors, that discretion is not unbounded. The regulation requires operators to develop an integrity management program that "*addresses* the risks on each segment of pipeline." *Id.* § 195.452(b)(1) (emphasis added). As the agency properly concluded here, EMPCo was "required to consider the factors accurately and appropriately, without dismissing probative information." Cert.Index.No.31 at 8 (E.R. Tab 2). The agency's decision that EMPCo failed to

consider and address a crucial risk factor—that the Pegasus Pipeline was susceptible to seam failure—is owed substantial deference given the agency's technical expertise.

Because of EMPCo's flawed analyses, it not only failed to determine that the pipe was susceptible to seam failure—when no other conclusion would have been reasonable—but it also failed to comply with a number of other regulatory requirements. The agency adequately explained the facts supporting each regulatory violation and, consistent with its statutory authority, imposed a civil penalty and issued a compliance order intended to remedy those violations. EMPCo has failed to demonstrate that the civil penalty and compliance order are arbitrary and capricious, or otherwise in violation of law. Accordingly, the agency's final order should be upheld.

STATEMENT OF JURISDICTION

Petitioner invokes the jurisdiction of this Court under 49 U.S.C. § 60119(a), which gives the courts of appeals exclusive jurisdiction to review certain orders issued by the Secretary of Transportation regarding pipeline transportation and pipeline facilities.[1] This petition for review challenges PHMSA's final order, issued October 1, 2015, and its denial of reconsideration of that order, dated April 1, 2016. The petition for review, filed on June 27, 2016, is timely because it was filed within 89 days of the denial of reconsideration. 49 U.S.C. § 60119(a); 49 C.F.R. § 190.243.

[1] The Secretary has delegated his authority to administer the federal pipeline safety laws to PHMSA. 49 C.F.R. § 1.97.

STATEMENT OF THE ISSUES

1. Whether PHMSA's conclusion that EMPCo improperly determined that the Pegasus Pipeline was not susceptible to seam failure, given that the pipeline material was prone to seam failure and that the pipeline had a history of seam failures, was arbitrary or capricious.
2. Whether the text of the applicable regulations, as supplemented by guidance in industry reports, gave EMPCo reasonable notice as to what the integrity management regulations require.
3. Whether PHMSA's civil penalty and compliance order are within the agency's statutory authority because they are both tied to EMPCo's regulatory violations.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

The Federal Pipeline Safety Laws, 49 U.S.C. § 60101 *et seq.*, give the Secretary of Transportation regulatory and enforcement authority to take actions to protect the public against risks to life and property posed by pipeline transportation and pipeline facilities. The statute provides that the Secretary of Transportation "shall prescribe minimum safety standards for pipeline transportation and for pipeline facilities." 49

U.S.C. § 60102(a)(2). Pursuant to that authority, PHMSA has promulgated regulations establishing minimum federal safety standards. *See* 49 C.F.R. pts. 190-199.[2]

Among those regulations are the integrity management regulations, which govern pipelines that, in the event of a leak or failure, could affect high consequence areas. 49 C.F.R. § 195.452(a). High consequence areas include populated areas, areas unusually sensitive to environmental damage, or commercially navigable waterways. *Id.* § 195.450. The integrity management regulations require a pipeline operator to "[d]evelop a written integrity management program that addresses the risks on each segment" of its pipelines. *Id.* § 195.452(b)(1). And the operator must "[i]mplement and follow the program." *Id.* § 195.452(b)(5).

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 "establish an integrity assessment schedule that prioritizes pipeline segments for assessment." *Id.* § 195.452(e)(1). The operator "must base the assessment schedule on all risk factors that reflect the risk conditions on the pipeline segment." *Id.* Among the factors the operator "must consider" are the results of the previous integrity assessment; pipe material, manufacturing, and seam type; and leak history. *Id.*

[2] PHMSA and the Department of Transportation, as well as the Secretary of Transportation and the PHMSA Administrator are referred to collectively as "PHMSA" or "the agency" for purposes of this brief.

Low-frequency ERW pipe manufactured prior to 1970 is known to have an increased risk of longitudinal seam failure due to the method of manufacturing. *See* Alert Notice ALN-88-01 (Jan. 28, 1988) and Alert Notice ALN-89-01 (Mar. 8, 1989);[3] *see also* 49 C.F.R. § 195.303(d) (presuming that all pre-1970 ERW pipe is "susceptible to longitudinal seam failure"). In addition to the integrity assessments required of all pipelines covered by the integrity management regulations, ERW pipe that is "susceptible to longitudinal seam failure" must be periodically assessed with inspection tools or tests that are "capable of assessing seam integrity." 49 C.F.R. § 195.452(c)(1)(i), (j)(5). The schedule for periodic integrity assessments must be based on all risk factors specified in section 195.452(e), but must occur at least every five years or sixty-eight months, unless the operator obtains a variance. *Id.* § 195.452(j)(3)-(4).

In the event of a failure to comply with the Federal Pipeline Safety Laws or PHMSA's safety regulations, PHMSA has authority to issue compliance orders and civil administrative penalties (after notice and a hearing). 49 U.S.C. §§ 60118(b), 60122. The maximum penalty is $200,000 per violation per day, up to a maximum of $2,000,000 for a related series of violations. 49 U.S.C. § 60122(a).[4] In determining the amount of

[3] Both available at http://www.phmsa.dot.gov/pipeline/regs/advisory-bulletin.

[4] These maximum penalties took effect on January 3, 2012. *See* Pub. L. No. 112-90, § 2(a), 125 Stat. 1904, 1905 (2012). Prior to 2012, administrative civil penalties could not exceed $100,000 per violation per day, up to a maximum of $1,000,000 for any related series of violations. The maximum penalties were subsequently increased for inflation. *See* Federal Civil Penalties Inflation Adjustment Act Improvement Act of

civil penalty, PHMSA must consider the following criteria: the nature, circumstances, and gravity of the violation, to include adverse environmental impact; the degree of the person's culpability; the person's prior offenses; the person's good faith in attempting to comply with the pipeline safety regulations; and the effect on the person's ability to continue in business. 49 U.S.C. § 60122(b); 49 C.F.R. § 190.225.

B. Factual Background

1. The Pegasus Pipeline and History of Seam Failures

The relevant segment of EMPCo's Pegasus Pipeline is constructed primarily of pre-1970 low-frequency ERW pipe manufactured by Youngstown Sheet and Tube Company. Cert.Index.No.22 at 9, 17 (R.E. Tab 1). As noted above, such pipe is generally known to have an increased risk of seam failure from manufacturing defects. And the Pegasus Pipeline, in particular, experienced numerous seam failures. Hydrostatic testing in 1969 and again in 1991 showed multiple seam failures. The pipeline experienced an in-service seam leak in 1984. More recently, hydrostatic testing in 2005-2006 resulted in a further eleven seam-related failures. *Id.* at 9. A metallurgical analysis concluded that those seam failures were due to manufacturing defects. *Id.*

Notwithstanding these repeated seam failures on a segment of pre-1970 low frequency ERW pipe, EMPCo steadfastly refused to conclude that the Pegasus Pipeline was "susceptible to longitudinal seam failure." Such a designation would have triggered

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2015, Pub. L. No. 114-74, § 701, 129 Stat. 584, 599-600 (2015); 49 C.F.R. § 190.223. Because that increase occurred after the final order issued, it is not relevant here.

the regulatory requirement to develop a periodic assessment schedule that uses methods capable of assessing seam integrity. 49 C.F.R. § 195.452(c)(1)(i), (j)(5). As a result of EMPCo's flawed analyses, EMPCo did not establish an assessment schedule that properly prioritized pipe segments based on all risk factors, conduct integrity assessments as often as required, or use assessment methods that were capable of assessing seam integrity. Cert.Index.No.22 at 6-19.

2. The Mayflower Accident and Investigation

On March 29, 2013, the Pegasus Pipeline ruptured near the town of Mayflower, Arkansas, spilling several thousand barrels of crude oil into a residential area, and resulting in over $57 million in property damage and the evacuation of twenty-two homes. Cert.Index.No.22 at 1, 3.

In the wake of the Mayflower accident, PHMSA investigated and discovered the cause of the accident was a manufacturing defect in the seam of the ERW pipe. PHMSA also found that EMPCo's integrity management program had not properly accounted for the risk of seam failure, despite a history of seam failures on the Pegasus Pipeline, described above. PHMSA concluded that EMPCo's erroneous determination that the pipeline was not susceptible to seam failure, and its concomitant failure to properly assess the pipe's integrity, was a contributing factor in the Mayflower accident. Cert.Index.No.22 at 4, 9. PHMSA's investigation also revealed that EMPCo's integrity management program was deficient in a number of other respects. *Id.* at 6-31.

Based on its investigation, the agency issued a Notice of Probable Violation, which included a proposed civil penalty and proposed compliance order. Cert.Index.No.22 at 1. Pursuant to EMPCo's request, PHMSA held a hearing in accordance with 49 C.F.R. § 190.211. After the hearing and consideration of both pre-hearing and post-hearing submissions by EMPCo, Cert.Index.No.22 at 1, PHMSA issued a final order.

3. PHMSA's Final Order

PHMSA's final order concluded that EMPCo violated numerous pipeline safety regulations, assessed a civil penalty, and ordered EMPCo to take certain actions to ensure compliance with those regulations.

The agency explained that 49 C.F.R. § 195.452(e)(1) requires an operator to establish an integrity assessment schedule for a pipeline based on consideration of all of the risk factors of that pipeline. Cert.Index.No.22 at 6, 8. Three risk factors that "must" be considered under that regulation are the pipe size, material, manufacturing, and seam type (which would include whether the pipe is constructed of pre-1970 low-frequency ERW pipe); leak history; and results of previous integrity assessments. 49 C.F.R. § 195.452(e)(1)(i), (ii), (iii); *see* also Cert.Index.No.22 at 8. If, after properly assessing all of the relevant risk factors, the operator concludes that the ERW pipe is "susceptible to longitudinal seam failure," then the pipeline is subject to continual integrity assessments that use methods capable of assessing seam integrity. 49 C.F.R. § 195.452(c)(1)(i), (j)(5); *see also* Cert.Index.No.22 at 8.

The agency concluded that EMPCo violated section 195.452(e)(1) "by failing to properly consider the susceptibility of its ERW pipe to seam failure when establishing a continual integrity assessment schedule based on all risk factors on the Pegasus Pipeline." Cert.Index.No.22 at 12. The agency explained that EMPCo's conclusion that the relevant portion of the pipeline was not susceptible to seam failure was "flawed" "[g]iven the history of seam-related failures both in-service and during pressure testing of the pipeline." *Id.* at 9, 10; *see also id.* at 10 ("Given the history of seam-related failures both in-service and during pressure testing of the pipeline, [EMPCo] inappropriately concluded the pipeline was not susceptible to seam failure.").

As further support for its conclusion, the agency cited two industry reports providing guidance on determining seam failure susceptibility in pre-1970 ERW pipe—the Baker Report (Cert.Index.No.16:Ex.3),[5] a study of pre-1970 ERW pipe commissioned by the agency in 2004, and the Kiefner Paper (Cert.Index.No.23:Ex.93), published in 2002 by EMPCo's own expert in this case, Dr. Kiefner. *See* Cert.Index.No.22 at 9, 10. As the agency noted, the Baker Report advises that, "[i]f a seam-related in-service or hydrostatic test failure has occurred on the segment, the segment is considered susceptible." *Id.* at 9 (quoting Baker Report 20). The agency reasoned, therefore, that the eleven seam failures during the 2005-2006 hydrostatic test of the Pegasus Pipeline "strongly suggested the ERW pipe was susceptible to seam

[5] Full report available at https://primis.phmsa.dot.gov/iim/techreports.htm.

failure." *Id.* at 9-10. The agency further noted that the Kiefner Paper likewise counseled that, to be considered not susceptible to seam failure, "a segment should exhibit no test breaks" from pressure testing and have "no recorded seam-related service failure." *Id.* at 10 (quoting Kiefner Paper 7, 9). The agency explained, therefore, that the seam-related failures during hydrostatic tests in 1969 and 1991, as well as the in-service seam leak in 1984, reinforced its conclusion that the Pegasus Pipeline was susceptible to seam failure. *Id.*

The agency further concluded that it was not reasonable for EMPCo to determine that the pipe was not susceptible to seam failure solely because the 2005-2006 hydrostatic test showed no evidence of pressure-cycling fatigue or preferential seam corrosion. Cert.Index.No.22 at 10-11. As the agency explained, the Pegasus Pipeline's ERW pipe was brittle, and brittle pipe "will not exhibit the same evidence of fatigue cracking." *Id.* at 10. 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 pipe material in determining whether a pipe is susceptible to seam failure. *Id.* at 11 (citing Baker Report 1). As a result, the agency concluded that EMPCo erred in "dismissing historical seam failures . . . based solely on the absence of fatigue evidence," without considering whether the absence of fatigue evidence was due to the brittleness of the pipe. *Id.*

Moreover, the agency rejected EMPCo's argument that the pipe was not susceptible to seam failure based on assessments EMPCo conducted in 2004-2005,

2007, 2009, and 2011, using a software program that "showed a safe test interval longer than five years." Cert.Index.No.22 at 7. As the agency explained, that program relied on the behavior of ductile pipe to predict seam failures without taking into account the fact that the pipe was brittle. *Id.* at 11. The agency concluded that such a program was not appropriate to assess the integrity of the Pegasus Pipeline. *Id.*; *see also* Cert.Index.No.31 at 8. In addition, the program did not take into account the history of seam failures. Cert.Index.No.22 at 11.

The agency likewise rejected EMPCo's argument that its 2010 in-line inspection justified a determination that the pipeline was not susceptible to seam failure. Cert.Index.No.22 at 7-8. PHMSA explained that EMPCo's 2010 in-line inspection, using a magnetic flux leakage and deformation tool, was "not suitable for evaluating ERW longitudinal seam integrity due to the orientation of the magnetic field." *Id.* at 11. In addition, the agency noted that in-line inspection was not an appropriate tool for assessing seam integrity for brittle pipe. *Id.* at 7 & n.30 (citing Baker Report 2).

For all these reasons, the agency concluded that EMPCo unreasonably determined that the Pegasus Pipeline was not susceptible to seam failure. As a result, and in combination with other findings, the agency found that EMPCo failed to comply with a number of regulatory requirements related to seam integrity assessments.

Specifically, the agency concluded that EMPCo violated nine regulatory requirements, only six of which petitioner challenges here.[6] The challenged violations are as follows:

1. EMPCo failed to properly consider all risk factors and susceptibility to seam failure when establishing an integrity assessment schedule, in violation of 49 C.F.R. § 195.452(e)(1). Among other things, EMPCo failed to appropriately consider the presence of pre-1970 ERW pipe and its risk of seam failure, the history of seam failures, and the brittleness of the pipe. Cert.Index.No.22 at 6-12.
2. EMPCo failed to perform an appropriate 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 assessment capable of assessing seam integrity did not occur until 2012-2013. Cert.Index.No.22 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). Cert.Index.No.22 at 13-16.

[6] EMPCo does not challenge violation 5 (failure to take prompt action to address conditions discovered through an integrity assessment, in violation of 49 C.F.R. § 195.452(h)(1)), violation 6 (failure to promptly discover condition within 180 days of integrity assessment, in violation of § 195.452(h)(2)), or violation 9 (failure to follow procedures related to management of change, in violation of § 195.452(b)(5)). *See* Petitioner's Brief ("Br.") 3, 29-30, 59.

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 the most extensive history of seam failures. Cert.Index.No.22 at 16-19.

7. EMPCo did not update its risk analyses to account for a two-year delay in performing an inspection, 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. Cert.Index.No.22 at 25-27.

8. EMPCo did not follow its own procedures when assessing risk, contrary to 49 C.F.R. § 195.452(b)(5). 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. Cert.Index.No.22 at 27-29. Specifically, EMPCo stated that it had run the assessment tool in 2011, when in fact it had not run the test and did not do so until 2013. *Id.* at 29.

Based on those nine violations, the agency assessed a civil penalty in the amount of $2,630,400 after considering the civil penalty assessment factors for each violation. Cert.Index.No.22 at 31-41. Pursuant to 49 U.S.C. § 60118(b) and 49 C.F.R. § 190.217, the agency also ordered EMPCo to take a number of actions to comply with the pipeline

safety regulations. Cert.Index.No.22 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 in determining susceptibility to seam failure, in development of seam integrity assessment plans, and in 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 analyses 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 an integrity assessment.

5. Conduct an 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.[7]

Cert.Index.No.22 at 43-45.

4. PHMSA's Denial of Reconsideration

EMPCo sought reconsideration of the agency's order, challenging all nine violations, and seeking elimination or reduction of the civil penalty and withdrawal of the compliance order. The agency denied the petition for reconsideration.

In so doing, PHMSA rejected EMPCo's argument that the Baker Report and Kiefner Paper permitted it to conclude that its pipe was not susceptible to seam failure because the prior seam failures did not exhibit evidence of fatigue or preferential seam corrosion. Cert.Index.No.31 at 3-5. The agency explained that those reports are not

[7] This compliance item is voluntary.

incorporated into the regulations, and the regulations do not "tell operators to disregard previous seam failures if there is no evidence of fatigue or selective seam corrosion." *Id.* at 4. In any event, the agency explained that EMPCo's argument was "not as clearly supported by the industry reports as the Company suggested." *Id.* For example, the agency noted that "the Baker Report states that an absence of fatigue does not necessarily preclude the need for periodic reassessment." *Id.* (citing Baker Report 26).

The agency further rejected EMPCo's assertion that PHMSA had to credit the affidavit of EMPCo's expert, Dr. Kiefner. Cert.Index.No.31 at 5-6. As the agency explained, "Dr. Kiefner's testimony was considered," but the agency concluded that it was "not [] conclusive in light of other information in the record," to include the industry reports and testimony by PHMSA employees. *Id.*

Finally, although PHMSA acknowledged that section 195.452(e)(1) does not prescribe "only one process that must be used by operators for determining seam failure susceptibility," it noted that "the regulation does list the factors that must be considered." Cert.Index.No.31 at 8. Accordingly, given EMPCo's "dismiss[al] [of] probative information" concerning the "history of seam failures on the pre-1970 ERW pipe," PHMSA found that EMPCo failed to comply with section 195.452(e)(1). Cert.Index.No.31 at 8.

5. EMPCo's Petition for Review and Stay Motion

On June 27, 2016, EMPCo filed a petition for review in this Court, challenging the agency's final order and denial of reconsideration. EMPCo also sought a stay of PHMSA's compliance order pending this Court's review.

This Court denied EMPCo's request for a stay pending appeal. The Court concluded that EMPCo failed to show a likelihood of success on the merits. The Court explained that the agency's conclusion regarding susceptibility to seam failure was not unreasonable given the pipeline's construction of "pre-1970 ERW pipe[,] which was widely known to exhibit an increased risk of seam failure," as well as the pipeline's "long history of seam failure." Order Denying Stay 6 (Aug. 11, 2016). The Court also rejected EMPCo's argument that the agency "rewrote" its regulations to impose a new requirement regarding susceptibility to seam failure. As the Court explained, "PHMSA's Final Order relies almost exclusively on either the existing regulations or the relevant technical guidance in the Baker Report." *Id.* at 8. The Court therefore concluded that, "at most, there may exist room for disagreement with the agency's interpretation of the regulations, but disagreement alone is not enough to demonstrate that the agency acted arbitrarily and capriciously." *Id.* at 7.

The Court also rejected EMPCo's arguments that deference was not owed to the agency's interpretation of its regulations, noting that "broad deference is 'all the more warranted when, as here, the regulation concerns a complex and highly technical

regulatory program.'" Order Denying Stay 7-8 (quoting *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994)).

SUMMARY OF ARGUMENT

This case involves a straightforward application of the agency's pipeline safety regulations, which require operators to develop and implement programs to address risk that could result in pipeline failure. The agency here determined that EMPCo unreasonably concluded that its Pegasus Pipeline was not susceptible to seam failure, despite the fact that the pipe material (pre-1970 ERW pipe) was known throughout the industry to have a heightened risk of seam failure and the pipeline had an extensive history of seam failures, both in-service and during testing. Because EMPCo has failed to show that that determination was arbitrary or capricious, this Court should affirm the agency's decision.

EMPCo begins by attempting to bypass the familiar (and deferential) APA standard of review in favor of *de novo* review, asserting that this case involves a legal interpretation of the agency's regulations. But it is well-established that an agency's reasonable interpretation of its own regulations is controlling, and its application of those regulations (which is what is at issue here) is reviewed with substantial deference, especially when it involves substantial technical expertise.

Despite having unreasonably disregarded the history of seam failures on the Pegasus Pipeline, EMPCo relies on isolated statements and figures contained in industry reports, arguing that these statements support its conclusion that the Pegasus Pipeline

was not susceptible to seam failure. As the agency has explained, however, those reports are not incorporated in the regulations, and the regulations, therefore, must prevail if there is any conflict. And nothing in the regulations authorizes an operator to dismiss a history of seam failures, as EMPCo did here, solely because tests do not show evidence of fatigue. In any event, the industry reports, read in context and as a whole, are consistent with the regulations and do not support EMPCo's conclusion that the Pegasus Pipeline was not susceptible to seam failure.

In the alternative, EMPCo argues that an operator complies with the regulation simply by "consider[ing]" risks, no matter the result. But the regulation requires operators to consider *and address* risk factors in establishing an assessment schedule; it does not give operators unlimited discretion to dismiss relevant risks. Thus, EMPCo cannot show that the agency's straightforward application of that interpretation here was arbitrary or capricious. Accordingly, this Court should affirm the agency's conclusion that EMPCo erred in determining that the Pegasus Pipeline was not susceptible to seam failure.

Based in part on the agency's susceptibility determination, in combination with other factual findings, the agency reasonably concluded that EMPCo violated nine separate regulatory provisions (three of which EMPCo does not challenge). EMPCo makes no argument in its brief explaining why the agency's interpretation or application of these specific regulations—except to the extent that some of them relied on the

susceptibility determination—was arbitrary or capricious. Accordingly, EMPCo has waived any challenge to those specific violations, and this Court should affirm them.

EMPCo's assertion that the agency's interpretation of the phrases "susceptible to seam failure" and consideration of "all risk factors" deprived it of fair notice is patently without merit. The agency interpreted those phrases consistent with their plain meaning. EMPCo had adequate notice, therefore, that it was required to consider all risk factors, and that if it did so here, given the presence of pre-1970 ERW pipe and a history of seam failures, it would logically have been required to conclude that the pipeline was "susceptible to seam failure."

EMPCo's contention that the agency applied strict liability is even further afield. The agency based EMPCO's liability on nine explicit regulatory violations, three of which EMPCo does not even challenge. That is not strict liability in any sense.

EMPCo's attack on the agency's civil penalty fares no better. Although EMPCo suggests that the agency should have applied a lower, pre-2012 statutory cap, EMPCo offers no argument that applying the 2012 statutory cap was arbitrary or capricious. And, although EMPCo disagrees with the agency's interpretation of "a related series of violations" for purposes of applying the statutory cap, it has not shown that the agency's interpretation of that phrase, to refer to a series of daily violations of one provision, rather than to a series of separate violations that arise out of a single incident, is not entitled to deference. In addition, EMPCo has failed to show that the agency's determination that three of the violations warranted the highest level of gravity in

calculating the amount of the penalty, was beyond its discretion and expertise. Accordingly, the agency's penalty should be sustained.

Finally, EMPCo is wrong when it asserts that the agency's compliance order must be set aside because it exceeds the agency's authority. The compliance order is limited to correcting EMPCo's regulatory violations. The fact that the compliance order extends to all of EMPCo's pipelines in high consequence areas is merely a consequence of the fact that violations are based on EMPCo's integrity management program, which applies to all of EMPCo's pipelines in high consequence areas.

STANDARD OF REVIEW

Judicial review of PHMSA's order is governed by the standards of the Administrative Procedure Act ("APA"). 49 U.S.C. § 60119(a); 49 C.F.R. § 190.243. Under the APA, PHMSA's actions, findings, and conclusions can be set aside or reversed only if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *Medina Cty. Envtl. Action Ass'n* v. *Surface Transp. Bd.*, 602 F.3d 687, 699 (5th Cir. 2010). That review is "extremely limited and highly deferential." *Gulf Restoration Network* v. *McCarthy*, 783 F.3d 227, 243 (5th Cir. 2015). "Where an agency's particular technical expertise is involved, we are at our most deferential in reviewing the agency's findings." *Medina Cty.*, 602 F.3d at 699.

Moreover, because the agency is entitled to a presumption that its decision is valid, petitioner bears the burden of establishing that the agency's determination was arbitrary and capricious. *Louisiana Pub. Serv. Comm'n* v. *FERC*, 761 F.3d 540, 558 (5th

Cir. 2014); *Medina Cty.*, 602 F.3d at 699. So long as the agency's "reasons and policy choices satisfy minimum standards of rationality," the Court will uphold the agency's action. *10 Ring Precision, Inc.* v. *Jones*, 722 F.3d 711, 723 (5th Cir. 2013).

In addition, where an agency's regulation is ambiguous, the agency's interpretation is "controlling" unless "plainly erroneous or inconsistent with the regulation." *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997); *see also Christopher* v. *SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166 (2012).

EMPCo's plea for *de novo* review is flawed. While it is true that legal issues are generally subject to *de novo* review, this case involves the question of whether the agency properly applied its regulations and its expertise in issuing its order. Thus, EMPCo cannot escape the familiar APA review standard simply by asserting (incorrectly) that the agency has somehow re-interpreted its regulations.

ARGUMENT

I. PHMSA's Determination That EMPCo Violated The Pipeline Integrity Regulations Is Neither Arbitrary Nor Capricious.

A. The Pegasus Pipeline Was Susceptible To Seam Failure.

PHMSA reasonably concluded that EMPCo committed nine violations of the integrity management regulations, only six of which EMPCo challenges here. Those six separate violations involve application of 49 C.F.R. § 195.452(b)(5), which concerns implementation of an operator's integrity management program (violations 3, 7, and 8); subsection (e)(1), which requires consideration of all risk factors when establishing an

assessment schedule (violations 1 and 4); and subsection (j)(3), which concerns assessment intervals (violation 2). Because several of those violations are premised, at least in part, on the agency's determination that EMPCo incorrectly concluded that the Pegasus Pipeline was not susceptible to seam failure, EMPCo's challenge focuses on that determination. The agency's determination, however, is based on a straightforward application of the regulations. EMPCo, therefore, plainly cannot show that the agency's determination was arbitrary or capricious.

As the agency explained in its final order, the evidence available to EMPCo amply demonstrated that the Pegasus Pipeline was susceptible to seam failure, within the meaning of the regulations. The relevant segment of the Pegasus Pipeline consists primarily of pre-1970 ERW pipe, which is well-known by the industry to have an increased risk of longitudinal seam failure. Cert.Index.No.22 at 8-9. In addition, the pipeline suffered a seam failure during hydrostatic testing in 1969; an in-service seam failure in 1984; and three seam failures during hydrostatic testing in 1991. *Id.* at 17. A 2005-2006 hydrostatic test resulted in four seam failures in the initial test sections before the test pressure was reduced. Even after the pressure reduction, the test resulted in seven additional seam failures, for a total of eleven in a single test. *Id.* at 9, 10, 17-18. If EMPCo had properly considered all of the relevant risk factors "that reflect the risk conditions on the pipeline segment," 49 C.F.R. § 195.452(e)(1), to include the presence of pre-1970 ERW pipe, the long history of seam failures, and the results from the 2005-2006 hydrostatic test (including seam failures even after a pressure reduction), EMPCo

would have had to conclude that the pipeline was susceptible to seam failure based on the regulation. Cert.Index.No.22 at 10-12; Cert.Index.No.31 at 8.

Industry reports further support the agency's conclusion that EMPCo should have determined that the pipeline was susceptible to seam failure. As the agency noted, the Baker Report—a technical report focused on the issue of longitudinal seam evaluations—specifically instructs operators that "[i]f a seam-related in-service or hydrostatic test failure has occurred on the segment, the segment is considered susceptible." Cert.Index.No.22 at 9 (quoting Baker Report 20). "Although a single failure does not prove the existence of other similar defects, it is reasonable to assume that defects do exist in the seam." *Id.* Likewise, the Kiefner Paper states that a segment may be excluded from seam integrity assessments only if it "exhibit[s] no test breaks" in hydrostatic testing and has "no recorded seam-related service failure." Cert.Index.No.22 at 10 (quoting Kiefner Paper 7, 9). As the agency explained, the Pegasus Pipeline suffered far more than one failure, including a seam-related in-service failure in 1984. *Id.* Therefore, the industry reports also support the agency's determination that EMPCo "inappropriately concluded the pipeline was not susceptible to seam failure." *Id.*

Moreover, the agency reasonably rejected EMPCo's argument the pipe was not susceptible to seam failure solely because the seam failures that occurred during the 2005-2006 hydrostatic test did not show evidence of fatigue or preferential seam corrosion. Cert.Index.No.22 at 10. The agency acknowledged that the seam failures

"did not exhibit evidence of fatigue," noting that the failures instead "exhibited brittle cracking," showing that the pipeline "had low toughness," which EMPCo admitted. *Id.* As the agency explained, brittle pipe does not demonstrate the same evidence of fatigue cracking, so the absence of fatigue was likely the result of low toughness (*i.e.,* brittleness), rather than because the pipe was not susceptible to seam failure. *Id.* at 10-11. In addition, the Baker Report, consistent with section 195.452(e)(1)'s requirement to consider all risk factors, specifically instructs operators to consider the pipe's toughness in determining seam failure susceptibility. Baker Report 1. The agency reasonably concluded, therefore, that EMPCo, by dismissing the pipeline's extensive history of seam failures, based solely on the lack of fatigue evidence, did not properly consider the pipe's toughness and unreasonably dismissed the extensive evidence of a risk of seam failure. Cert.Index.No.22 at 11.

Accordingly, if EMPCo had properly considered all of the relevant factors that reflect the risk conditions on the pipeline, as required by section 195.452(e)(1), including the presence of pre-1970 ERW pipe, a history of seam failures, and pipe toughness, it would have had to conclude that the pipeline was susceptible to seam failure. EMPCo, therefore, cannot show that the agency's determination that the pipeline was susceptible to seam failure is an incorrect application of the regulations, much less an arbitrary or capricious one, particularly given that the agency's interpretation of its regulations is "controlling." *Auer*, 519 U.S. at 461.

As a result of EMPCo's flawed analyses of the pipeline's risk, and in combination with other factual findings (which EMPCo has not challenged), the agency reasonably concluded that EMPCo violated 49 C.F.R. § 195.452(b)(5), (e)(1), and (j)(3). Violation 1 is premised on EMPCo's failure to determine that the pipeline was susceptible to seam failure in establishing a continual integrity assessment schedule, in violation of section 195.452(e)(1). Because the agency determined that the pipeline was susceptible to seam failure, it concluded that EMPCo was required to perform an assessment capable of addressing seam integrity within five years of the 2005-2006 hydrostatic test (violation 2), 49 C.F.R. § 195.452(j)(3), and to notify the agency or obtain a variance if it was going to exceed that timeline (violation 3), 49 C.F.R. § 195.452(b)(5). Because EMPCo cannot demonstrate that the agency's determination of susceptibility to seam failure was arbitrary or capricious, EMPCo cannot prevail in its challenge to violations 1, 2, and 3, each of which is premised, in part, on that determination. Thus, if this Court were to affirm the agency's determination that the pipeline was susceptible to seam failure, this Court should affirm each of those violations.

The agency further concluded that because EMPCo did not properly consider the presence of pre-1970 ERW pipe and the history of seam failures on the Pegasus Pipeline, EMPCo failed to prioritize that segment for assessment (violation 4), 49 C.F.R. § 195.452(e)(1). Likewise, the agency found that because EMPCo delayed an assessment by two years, it should have updated its risk analyses (violation 7), 49 C.F.R. § 195.452(b)(5). Violation 8 was premised on EMPCo's failure to follow its written

procedures when assessing risk, contrary to section 195.452(b)(5). As the agency explained in support of that violation, EMPCo misrepresented, contrary to its procedures, that it had already performed a certain assessment when it entered information into its threat identification and risk assessment program, when it had not. Cert.Index.No.22 at 27-29. These three violations are not dependent upon PHMSA's finding that the Pegasus Pipeline was susceptible to seam failure. Because EMPCo has failed to present any argument that the agency's findings in support of those violations are arbitrary or capricious, it has waived any challenge to them. Violations 4, 7, and 8, must therefore be affirmed.

B. EMPCo Has Failed To Show That The Agency's Decision Was Arbitrary Or Capricious.

As explained above, in light of the presence of pre-1970 low-frequency ERW pipe, which is well-known by pipeline operators to be susceptible to seam failure, and of an extensive history of seam failures—two risk factors that an operator "must consider" when establishing an assessment schedule—the agency reasonably interpreted its regulations to require EMPCo to conclude that the pipeline was "susceptible to longitudinal seam failure," and therefore subject to continual integrity assessments using methods appropriate for assessing seam integrity. 49 C.F.R. § 195.452(c)(1)(i), (e)(1), (j)(5). EMPCo attempts to avoid that obvious and common-sense application of the regulations by arguing: (1) that section 195.452(e)(1) only requires an operator to "consider" factors, but not to reach a particular outcome; and

(2) that EMPCo's application of a flowchart contained in the Baker Report gives petitioner a safe harbor. These contentions are without merit and fail to show that the agency's actions here were arbitrary or capricious.

EMPCo argues (Br. 32-36) that the pipeline safety regulations are performance-based and require an operator only to "consider" certain risk factors; they do not "prescribe any methodology" for doing so (Br. 35), or compel a specific conclusion. Accordingly, EMPCo contends that PHMSA cannot reasonably conclude that EMPCo violated section 195.452(e)(1) merely because the agency reached a different result when it considered whether the pipeline was susceptible to seam failure.

EMPCo's argument takes the term "consider" out of context, giving that term far more weight than is warranted. Regulations, like statutes, must be considered as a whole. *See, e.g., Anthony* v. *United States*, 520 F.3d 374, 380 (5th Cir. 2008). Here, the regulation does not simply tell operators to "consider" risk factors in a vacuum. Rather, the regulation directs operators to consider risk factors in the context of a clear requirement to develop a plan that *addresses* and alleviates the risks: operators must "[d]evelop a written integrity management program *that addresses the risks on each segment of pipeline*." 49 C.F.R. § 195.452(b)(1) (emphasis added). And the regulation goes on to require that "[a]n operator *must base the assessment schedule on all risk factors* that reflect the risk conditions on the pipeline segment." *Id.* § 195.452(e)(1). Thus, when, in the next sentence, the regulation lists the factors that the operator "must consider," it does so in

the context of a rule that requires operators to include those risks in their assessments and to "address" them in their plans. *Id.*

The regulation therefore does not give operators *carte blanche* to ignore relevant risk factors. EMPCo's argument to the contrary would create an unenforceable standard, preventing the agency from stepping in even if the operator reaches an irrational result by "considering" a risk factor, and then discounting it for invalid reasons. Although an operator has discretion under the regulation to consider and weigh risk factors, that discretion is not unbounded. An operator cannot simply dismiss relevant evidence of risk factors. *Cf. Motor Vehicles Mfrs. Ass'n of U.S., Inc.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43-44 (1983) (failure to consider relevant factors or "a clear error of judgment" would render an agency's action arbitrary and capricious). As the agency explained, "while the performance regulation at § 195.452(e)(1) is not limited to only one process that must be used by operators for determining seam failure susceptibility . . . , the regulation does list the factors that must be considered. Operators are required to consider the factors accurately and appropriately, *without dismissing probative information*." Cert.Index.No.31 at 8 (emphasis added). Here, "EMPCo reached a conclusion regarding the Pegasus Pipeline that did not appropriately consider the factors, including history of seam failures on the pre-1970 ERW pipe." *Id.*

Indeed, *In re Magellan Midstream Partners, L.P.*, CPF No. 4-2006-5020 (PHMSA Dec. 23, 2009), relied upon by EMPCo (Br. 13), demonstrates that an operator's discretion to "consider" risk factors is not unlimited. In that case, PHMSA concluded

that the operator's consideration of risk factors "did not adequately reflect the actual risks posed by each pipe segment because it was too heavily weighted toward spill consequences and not enough toward the likelihood of accidents." *Magellan*, Slip op. 8. Accordingly the risk assessment schedule was not based upon an adequate evaluation of all risk factors that "could affect" high consequence areas, as required by section 195.452(e)(1). *Id.*

As the agency explained here, if EMPCo had properly considered all of the relevant risk factors, to include the presence of pre-1970 ERW pipe, a history of seam failures, and the brittleness (*i.e.,* lack of toughness) of the pipe, it would have been unreasonable to conclude that the pipe was not susceptible to seam failure. Cert.Index.No.22 at 9-12; *id.* at 11 ("[b]y dismissing historical seam failures on the Pegasus Pipeline based solely on the absence of fatigue evidence, Respondent did not properly consider the pipe toughness"); *id.* (EMPCo "failed to properly consider the history of seam-related failures and low toughness of the seam"). Moreover, in planning for reassessments of the pipeline's integrity, EMPCo used a program that "predict[ed] the growth of cracks based on the behavior of ductile pipe through pressure cycles." *Id.* Given the brittle nature of the pipe, however, such a program was not appropriate. *Id.* Nor did the program include "any consideration of the history of seam failures." *Id.* In addition, EMPCo's 2010 integrity assessment used a pipeline assessment tool that was "not suitable for evaluating ERW longitudinal seam integrity." *Id.* Thus, the agency reasonably concluded that if EMPCo had properly considered the history of

seam failures and the pipe toughness, EMPCo would have concluded that the Pegasus Pipeline was susceptible to seam failure. EMPCo has failed to show anything arbitrary or capricious about that straightforward application of the regulation.

EMPCo further contends that because it applied one sentence contained in a flowchart in the Baker Report—what EMPCo refers to as the Baker/Kiefner Decision Tree—its susceptibility determination was necessarily correct. Br. 32-34 (citing Baker Report 18 fig 4.1). EMPCo asserts (Br. 33) that, pursuant to that flowchart, "[a] conclusion of susceptibility results *only if* the cause of the failure was pressure cycling induced fatigue or preferential seam corrosion." Because there was no evidence of fatigue or seam corrosion in the previous seam failures on the Pegasus Pipeline, EMPCo contends that it properly concluded that the pipe was not susceptible to seam failure.

That single sentence in the flowchart referenced by EMPCo, however, does not provide EMPCo a safe harbor to ignore repeated seam failures exposed during testing. As the agency explained, the Baker Report is "not incorporated by reference into § 195.452(e)(1)." Cert.Index.No.31 at 4. Thus, to the extent the Baker Report might be inconsistent with the regulations themselves, the regulations control. And, as the agency noted, "[t]he regulation does not tell operators to disregard previous seam failures if there is no evidence of fatigue or selective seam corrosion." *Id.* Indeed, the regulation requires operators to create a program that addresses risk factors, and further states that operators "must consider" specific factors, including the "[r]esults of the previous integrity assessment." 49 C.F.R. § 195.452(e)(1)(i); *see also* Cert.Index.No.31

at 4 ("PHMSA rejects any contention that the cited reports override the applicable regulation by permitting operators to disregard significant seam failure history and other facts required to be considered under §195.452(e)(1), based solely on an absence of fatigue."). The agency's interpretation of its own regulations is "controlling." *Auer*, 519 U.S. at 461.

EMPCo also argues (Br. 41) that it did not need to separately consider pipe toughness because that factor was built into the flowchart. The flowchart, however, says nothing about pipe toughness. Cert.Index.No.22 at 10-11. Moreover, as explained above, the regulations specifically require an operator to consider *all* risk factors, and the Baker Report itself instructs operators to consider toughness. Baker Report 1.

In any event, contrary to EMPCo's assertion (Br. 36), PHMSA did not "dismiss[]" the flowchart without consideration. The agency simply concluded that EMPCo's interpretation and application of that flowchart, in a manner inconsistent with the regulations and the text of the Baker Report as a whole, was incorrect. Cert.Index.No.31 at 4 n.11. The Baker Report does not support EMPCo's interpretation that an operator may disregard a history of seam failures in determining susceptibility to seam failure whenever there is a lack of evidence of fatigue or seam corrosion.

The Baker Report itself describes the section in which the flowchart appears as only "a description of how *some operators* are deciding what 'susceptible' means." Baker Report 16 (emphasis added). Moreover, the Baker Report explains, "[i]f a seam-related

in-service or hydrostatic test failure has occurred on the segment, *the segment is considered susceptible*." Baker Report 20 (emphasis added). Although PHMSA recognized that the Baker Report contains an isolated statement that if there are no fatigue-related failures during a hydrostatic test, the operator might be reasonable in concluding that the pipe is not susceptible to seam failure, Cert.Index.No.22 at 9 n.41; Cert.Index.No.31 at 4, that does not mean the operator may disregard a history of seam failure that demonstrates that the pipeline is, in fact, susceptible to seam failure, in violation of the regulations and contrary to the rest of the Baker Report. Thus, as the agency reasonably concluded, the fact that "[t]he Pegasus Pipeline had multiple seam-related failures and an absence of fatigue does not necessarily preclude the need for periodic assessment." Cert.Index.No.31 at 4 (citing Baker Report 26).

Ultimately, the Baker Report is a detailed technical report commissioned by PHMSA, and PHMSA's reasonable interpretation of the report is entitled to deference. *See Medina Cty.*, 602 F.3d 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."). That EMPCo offers a conflicting interpretation does not demonstrate that PHMSA's interpretation of that report was arbitrary and capricious.

Moreover, even if EMPCo's interpretation of the Baker Report were correct (*i.e.,* that fatigue can be considered as the only relevant factor in the susceptibility determination), EMPCo nevertheless failed to properly examine fatigue in its analysis.

The regulations make clear that operators should consider "all risk factors that reflect the risk conditions on the pipeline segment," 49 C.F.R. § 195.452(e)(1), and the Baker Report itself specifically instructs operators to consider fracture toughness in determining seam failure susceptibility, Baker Report 1. But, as the agency explained, EMPCo never considered that the lack of fatigue evidence could be due to the toughness of the pipe, rather than because the pipe was not susceptible to seam failure. Cert.Index.No.22 at 10-11; Cert.Index.No.31 at 5. As the agency explained, brittle pipe will not exhibit the same evidence of fatigue fracture as ductile pipe.

And contrary to EMPCo's suggestion (Br. 37-38), PHMSA did not apply a presumption of susceptibility for pre-1970 ERW pipe based on 49 C.F.R. § 195.303(d). Section 195.303(d), which is separate from the integrity management regulations, provides that all pre-1970 ERW pipe is "susceptible to longitudinal seam failure" unless an engineering analysis proves otherwise. As PHMSA explained in its final order, PHMSA concluded that the pipeline was susceptible to seam failure after analyzing the history of seam failures, pipe toughness, and other applicable risk factors listed in section 195.452(e)(1). Cert.Index.No.22 at 9-12. Although PHMSA cited § 195.303(d), that was solely for the proposition that operators were on notice that pre-1970 ERW pipe is prone to seam failure. Cert.Index.No.22 at 8 & n.36.

Finally, EMPCo asserts (Br. 39-43) that the agency's final order is not supported by substantial evidence because PHMSA rejected the affidavit of EMPCo's expert Dr. Kiefner without offering any expert testimony of its own. EMPCo suggests that the

agency, therefore, had to accept Dr. Kiefner's opinions. PHMSA, however, is not required to present expert testimony at an administrative hearing in response to an operator's submission of such evidence. 49 C.F.R. § 190.211. Nevertheless, the agency did consider expert opinions from employees of the Office of Pipeline Safety, who "possessed significant technical expertise in pipeline safety, integrity management, and ERW pipe." Cert.Index.No.31 at 6; *see generally* Cert.IndexNo.18. The agency was well within its authority to rely on its own experts, rather than hire an outside expert. *Spiller* v. *White*, 352 F.3d 235, 243 (5th Cir. 2003).

As the agency explained, PHMSA considered Dr. Kiefner's expert opinion, but ultimately disagreed with his "assertion that brittle cracking at the accident site was atypical," finding instead "that it is not unusual for pre-1970 ERW pipe to exhibit brittle failures." Cert.Index.No.31 at 6; *see also* Cert.Index.No.22 at 11. In addition, Dr. Kiefner's affidavit, opining that seam failures do not demonstrate a susceptibility to seam failure unless there is evidence of fatigue, is inconsistent with both the industry reports, as explained above (*supra* pp. 33-34), and section 195.452(e)(1), which does not authorize operators to disregard a history of seam failures solely because of a lack of evidence of fatigue. 49 C.F.R. § 195.452(e)(1). Thus, the agency properly considered Dr. Kiefner's opinion, but chose instead to give greater weight to other evidence, including the testimony of agency employees who participated in the administrative hearing. Cert.Index.No.18 at 97-102. Accordingly, it was not arbitrary or capricious

for the agency to accept the views of its own experts over EMPCo's hired expert, whose opinion the agency found to be "not ultimately persuasive." Cert.Index.No.31 at 6.

In sum, EMPCo has failed to demonstrate that the agency's decision was arbitrary or capricious. The agency offered rational explanations, based on a reasonable interpretation of its regulations, to support its conclusions that the Pegasus Pipeline was susceptible to seam failure and that EMPCo violated numerous statutory requirements. That decision, particularly in light of the agency's technical expertise, is owed great deference. This Court, therefore, should affirm the agency's final order.

II. PHMSA's Regulations Provide Adequate Notice As To What They Require.

EMPCo contends (Br. 44-49) that it lacked adequate notice of PHMSA's interpretation of its pipeline regulations, and that PHMSA's interpretation of those regulations is therefore not entitled to deference under *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997). But the agency's application of those regulations here is straightforward and consistent with their text. Faced with persistent seam failures of pre-1970 ERW pipe, which is known to be susceptible to seam failure, EMPCo nevertheless doggedly insisted that the Pegasus Pipeline was not susceptible to seam failure. As a result, PHMSA reasonably concluded that EMPCo failed to comply with the agency's regulations requiring EMPCo to properly consider all risk factors as part of its integrity management program, perform an appropriate integrity assessment within five years or sixty-eight months, properly prioritize pipeline segments for assessment, and update its

risk analyses based upon current information. The fact that EMPCo seeks to justify its contrary determination *post hoc*, solely by reference to one sentence within one of several flowcharts contained in the Baker Report, does not mean that EMPCo lacked adequate notice of what the regulations require.

"[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[]. . . ." *Employer Sols. Staffing Grp. II, L.L.C. v. Office of Chief Admin. Hearing Officer*, __ F.3d __, 2016 WL 4254370, at *5 (5th Cir. Aug. 11, 2016) (alterations in original) (quoting *Diamond Roofing Co. v. Occupational Safety & Health Review Comm'n*, 528 F.2d 645, 649 (5th Cir. 1976)).

EMPCo had fair warning in this case because PHMSA's interpretation of the phrases "susceptible to longitudinal seam failure" and consideration of "all risk factors" is consistent both with the plain meaning of those regulatory phrases and common sense. 49 C.F.R. § 195.452(e)(1), (j)(5). If an operator properly considers the presence of pre-1970 ERW pipe, which is prone to seam failure, and a history of actual seam failures spanning multiple decades, including eleven during the most recent hydrostatic test, it would logically conclude that the pipe is "susceptible" to seam failure. EMPCo

accordingly had fair warning that it was subject to the regulatory requirements that apply to pipelines susceptible to seam failure.[8]

EMPCo suggests (Br. 45-46) that the agency applied a legal presumption of susceptibility gleaned from 49 C.F.R. § 195.303(d), without adequate notice. That is incorrect. As explained above (*see supra* p. 35), PHMSA did not apply a presumption here, but merely cited that provision to show that operators were on notice that pre-1970 ERW pipe is prone to seam failure.

EMPCo further argues (Br. 46-47) that PHMSA is reinterpreting its regulations by requiring the use of the Baker Report, but not permitting use of a flowchart within that report to satisfy the regulations. The regulations, however, do not require application or use of the Baker Report. Cert.Index.No.31 at 4 (explaining that the Baker Report is not incorporated by reference into the pipeline safety regulations). Nor is the Baker Report intended to substitute for, or override, the regulations. *Id.* ("PHMSA rejects any contention that the cited reports override the applicable regulation"). Although the Baker Report is intended to provide helpful guidance to operators determining seam susceptibility, compliance with or use of the Baker Report does not automatically render an operator's actions compliant with the regulations. Indeed, to the extent there is any inconsistency, the regulations must prevail. Contrary to

[8] EMPCo does not raise any similar due process argument specific to the other regulatory provisions that the agency determined EMPCo violated (*i.e.,* 49 C.F.R. § 195.452(b)(5), (j)(3)).

EMPCo's suggestion (Br. 47), that is not a "new interpretation" by PHMSA; that is black letter law. *See, e.g., Salinas* v. *Rodriguez*, 963 F.2d 791, 793 (5th Cir. 1992) (per curiam) (regulation has force of law).

EMPCo's further assertion (Br. 47-48) that PHMSA's interpretation of its regulation has converted the regulation from performance-based to prescriptive is mistaken. PHMSA is not interpreting its regulation to require operators to "consider risks in a certain way." Br. 48. Rather, PHMSA is requiring EMPCo to apply the regulation as written, which requires operators to consider all relevant risks and then reach a reasonable or logical conclusion. Such a regulation cannot reasonably be construed, as EMPCo would have it, to permit operators to consider, and then completely discount, applicable risk factors to reach an irrational result. *Cf. Motor Vehicles Mfrs. Ass'n*, 463 U.S. at 43-44 (failure to consider relevant factors or make "a clear error of judgment" is arbitrary and capricious). Here, EMPCo suggests that it "considered" the history of numerous seam failures as required by the regulation, but could nevertheless conclude that the pipeline was *not* susceptible to seam failure. Such a conclusion defies the regulation, as well as logic and common sense. As the agency aptly explained:

> The Pegasus Pipeline experienced a significant number of seam failures during hydrostatic testing due to defects from manufacturing. Such defects were specifically known to be a risk associated with the type of pre-1970 ERW pipe used on the Pegasus Pipeline. The hydrostatic test failures had increased in number over the years and were occurring at lower test pressures, both indicating a likelihood that seam degradation was taking place. All of this information demonstrated the Pegasus

> Pipeline had a susceptibility to future longitudinal seam failure . . . .To conclude otherwise, regardless of exhibited evidence of fatigue, ignored the risks of the pipeline under factors that must be considered pursuant to § 195.452(e)(1).

Cert.Index.No.31 at 5. EMPCo "has not provided any evidence that [the agency] has previously applied the [regulatory language] in a manner inconsistent with" the interpretation applied here in the agency's final order (and denial of reconsideration). *Southwest Pharmacy Sols., Inc.* v. *Centers for Medicare & Medicaid Servs.*, 718 F.3d 436, 442 (5th Cir. 2013).

EMPCo's reliance (Br. 47) on *Stahl* v. *City of St. Louis*, 687 F.3d 1038 (8th Cir. 2012), is misplaced. In that case, the Eighth Circuit concluded that an ordinance violated the Due Process Clause because it criminalized "activity based primarily on often unpredictable reactions of third parties rather than directly on a person's own actions, and it excessively chills protected First Amendment activity." *Id.* at 1042. No similar concerns are present here. The agency's regulation here requires an operator to consider all risk factors relevant to the pipeline and, in establishing a schedule for integrity assessments, determine whether the pipeline is susceptible to longitudinal seam failure. 49 C.F.R. § 195.452(c)(1)(i), (e)(1), (j)(5). The fact that the agency has authority to review an operator's compliance with those regulations, including whether the operator has improperly dismissed or discounted relevant risk factors, does not mean that the regulations fail to provide notice of what is required.

III. EMPCo's Strict Liability Argument Is Baseless.

EMPCo mistakenly contends that PHMSA imposed liability here solely because an accident occurred. At bottom, EMPCo's argument is essentially that, because it did not violate the regulations, the agency must be imposing strict liability. That argument is circular. As demonstrated by the agency's final order, liability is premised on PHMSA's findings that EMPCo violated nine regulatory provisions, three of which EMPCo does not even challenge. Thus, EMPCo's argument about strict liability is a red herring. To prevail in its challenge to liability, EMPCo must show that the agency's determination that it violated the regulations was arbitrary and capricious.

EMPCo suggests (Br. 49) that liability is inappropriate because: (1) PHMSA did not find fault with EMPCo's susceptibility determination prior to the accident, and (2) even if EMPCo had performed other integrity assessments (which it asserts that it did), the defect that caused the Mayflower accident would not have been detected. Neither of these theories, however, invalidates the agency's conclusion that EMPCo should have concluded that the Pegasus Pipeline was susceptible to seam failure and that, because EMPCo's risk analyses of the pipeline were flawed, it violated numerous regulatory requirements.

EMPCo repeatedly notes (Br. 9, 17, 20-21, 29) that, prior to the Mayflower accident, PHMSA periodically audited EMPCo's integrity management program, including in 2007, and never found fault with EMPCo's process for determining susceptibility to seam failure. But those audits do not absolve EMPCo of its

responsibility to properly consider and address risk factors in its integrity management program. As an initial matter, PHMSA's inspections of a pipeline operator's records and procedures do not result in agency approval of its operations. *See ConocoPhillips Pipeline Co.*, Final Order, CPF No. 3-2005-5015, 2010 WL 6531628, at *2 (PHMSA Sept. 13, 2010) ("review of procedures during an inspection [does not] constitute an approval of procedures by [the Office of Pipeline Safety]").

In any event, PHMSA's 2007 inspection of EMPCo extended only to EMPCo's written integrity management program, and not to EMPCo's implementation of that program. Moreover, most of the actions that were addressed in the notice of proposed violations occurred after the 2007 PHMSA investigation. *See generally* Cert.Index.No.3. And, even if the agency failed to uncover an existing regulatory violation during a previous inspection, that does not in any way preclude or estop the agency from later taking enforcement action against that violation. *See Millard Refrigerated Services, Inc.* v. *Secretary of Labor*, 718 F.3d 892, 898 (D.C. Cir. 2013) (holding that the Occupational Safety and Health Administration was not estopped from finding regulatory violations because its inspectors had failed to cite the company during a previous inspection).

Alternatively, EMPCo suggests (Br. 22-23, 24-25) that it should not be held accountable because, even if it had conducted the additional tests the agency says it should have, it would not have detected the seam failure that caused the accident. But as discussed above, PHMSA's liability finding is based on its determination that EMPCo's integrity management procedures violated nine regulatory provisions, not on

the fact that the Mayflower accident occurred. It is therefore irrelevant for liability purposes whether those tests would have prevented the specific accident here.[9]

IV. This Court Should Affirm The Agency's Compliance Order And Penalty.

A. This Court Should Defer to the Agency's Penalty.

At the time the agency issued its final order, PHMSA was authorized to issue a civil administrative penalty up to $200,000 per violation per day, with a statutory cap of $2,000,000 for "a related series of violations." 49 U.S.C. § 60122(a). In determining the penalty amount, PHMSA must consider: the nature, circumstances, and gravity of the violation, to include adverse environmental impact; the degree of the person's culpability; the person's prior offenses; the person's good faith in attempting to comply with the pipeline safety regulations; and the effect on the person's ability to continue in business. *Id.* § 60122(b); 49 C.F.R. § 190.225.

Here the agency assessed a total penalty of $2,630,400 against EMPCo based on a detailed analysis of those statutory factors. In so doing, the agency concluded that the statutory cap enacted in 2012 applies because each of the violations (except violation 5, which petitioner does not challenge) occurred or continued to occur after that cap was enacted. Cert.Index.No.22 at 32 & n.109. The agency also explained that

[9] As noted below, *see infra* pp. 50-51, the agency found that the tests EMPCo chose to run "would not likely" have detected the defects that caused the seam failure. PHMSA suggested, however, that a hydrostatic test would have been more appropriate in the circumstances, since such tests had previously detected defects in the Pegasus Pipeline. Cert.Index.No.31 at 12.

EMPCO's conduct did not amount to "a related series of violations" under the statutory cap provision, since that phrase "refers to a series of daily violations" and does not apply simply because violations may arise out of a single accident. *Id.* at 32-33. Thus, the agency rejected EMPCo's assertion that violations 1-4 and 7 were a single, related series of violations subject to the statutory cap. *Id.* at 33-34. The agency explained that each of those violations "concerns a separate regulatory requirement and requires proof of additional facts." *Id.* at 33. The agency's order also explained the analysis and basis for the penalty assessed for each violation. *Id.* at 34-40.

The agency "is entitled to substantial deference in assessing the civil penalty appropriate for a violation of its regulations"; "[t]he agency's 'choice of a sanction is not to be overturned unless it is unwarranted in law or without justification in fact.'" *NL Indus., Inc.* v. *Department of Transp.*, 901 F.2d 141, 144 (D.C. Cir. 1990) (quotation marks omitted).

EMPCo now challenges that penalty on three grounds—that the penalty exceeds the statutory cap, that all of the violations are "a related series of violations," and that EMPCo's violations did not contribute to the Mayflower spill. None has merit.

1. EMPCo attempts (Br. 52 & n.14) to apply the lower, pre-2012 statutory cap to its violations because the alleged violations "commenced" before Congress increased those penalties in January 2012. But nowhere in its brief does EMPCo even acknowledge, much less challenge, the agency's conclusion that the 2012 cap applies. Indeed, EMPCo's only reference (Br. 52 n.14) to the 2012 statutory cap is in a footnote

that does not address the agency's reasoning for applying it. That is plainly insufficient to preserve the issue for this Court's review. *See, e.g., United States* v. *Tuma*, 738 F.3d 681, 692 (5th Cir. 2013) (declining to address argument raised in footnote in brief that provided no legal or factual analysis).

In any event, because "each of the violations except Item 5 occurred (or continued to occur) after" the 2012 cap took effect, the agency reasonably applied the 2012 statutory cap. Cert.Index.No.22 at 32 n.109. For example, the violation charged in Item 2—that EMPCo failed to perform a seam integrity assessment within five years as required by 49 C.F.R. § 195.452(j)(3)—first occurred when the five-year period expired in 2010 or 2011, but it continued at least until EMPCo performed an integrity assessment in 2013. Cert.Index.No.22 at 14, 25. EMPCo raises no argument in its brief that application of the 2012 statutory cap was arbitrary or capricious.

Moreover, PHMSA's interpretation that the 2012 cap should apply to violations that continued after the amendment is both correct and entitled to deference. The agency's interpretation is consistent with Congress's decision to define each day a violation continues as a *separate* violation. 49 U.S.C. § 60122(a)(1). Under the plain meaning of this provision, each day a violation continued after the amendment was a separate violation subject to the amended penalty. *Cf. Fernandez-Vargas* v. *Gonzales*, 548 U.S. 30, 46 (2006) (upholding "the application of new law to continuously illegal action within [the regulated party's] control both before and after the new law took effect"). EMPCo makes no attempt to explain why this interpretation is impermissible.

2. EMPCo asserts (Br. 54) that all of its violations constitute "a related series of violations" because they are all related to a single incident. But the agency's reasonable interpretation of the ambiguous statutory phrase "related series of violations" is entitled to deference. *See Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 843 (1984). As PHMSA explained, it has previously "rejected the suggestion that all violations related to a single accident are necessarily a related series." Cert.Index.No.22 at 33. Instead, it has, in a host of prior decisions, "explained that the phrase refers to a series of daily violations." *Id.* at 32 & n.112. In other words, "if [an] individual violation continued for a series of days, the number of [days] multiplied by the per-day amount" cannot exceed $2,000,000. *Id.* at 33 n.113 (quoting *In re Colorado Interstate Gas Co.*, CPF No. 5-2008-1005, slip op. at 12 (PHMSA Nov. 23, 2009) (2009 WL 5538649, *9)).

Although the agency recognized that "separately alleged violations may be so related that they should be considered a single offense for the purpose of assessing a civil penalty," Cert.Index.No.22 at 33, the agency reasonably determined that violations are separate if "they each require proof of an additional fact, or have their 'own evidentiary basis.'" *Id.* at 33 (quoting *Colorado Interstate Gas*, slip op. at 12).

Applying that interpretation here, the agency properly concluded that EMPCo's violations are not "a related series of violations." Rather, the violations are separate because "each violation concerns a separate regulatory requirement and requires proof of additional facts." Cert.Index.No.22 at 33. For example, Item 3 "required . . . proof that [EMPCo] failed to notify" the agency that it did not follow the five-year assessment

schedule, whereas Item 4 "required proof that [EMPCo] improperly prioritized segments for assessment." *Id.* at 34.

Although EMPCo would interpret the statutory language differently, it offers no meaningful argument as to why the agency's interpretation is not owed deference. EMPCo argues (Br. 52) that the agency has not issued any "regulation or policy" explaining its interpretation. But as the agency noted, it has consistently expressed its interpretation in prior adjudications. Cert.Index.No.22 at 32 & n.112. "Interpretations established through adjudication warrant *Chevron* deference so long as they were established prior to the case under consideration." *Calix* v. *Lynch*, 784 F.3d 1000, 1007 (5th Cir. 2015). EMPCo's argument ignores this principle, as well as the principle that agencies may choose to proceed by rulemaking or adjudication. *See SEC* v. *Chenery Corp.*, 332 U.S. 194, 202-203 (1947). EMPCo also argues that Congress could have used different language to avoid any ambiguity, but that misses the point—it is precisely because "the statute is silent or ambiguous with respect to the specific issue" that the agency was empowered to fill the gap and that its reasonable interpretation deserves deference. *Chevron*, 467 U.S. at 843.

EMPCo quotes (Br. 53) a floor statement on a proposed amendment to the Pipeline Safety Act stating that the provision applies to "all violations related to a single incident." But that bill was never enacted into law. *See* S. 2438, 106th Cong. (2000) (failed in House Oct. 10, 2000). Moreover, EMPCo's quotation is misleading because, as the context makes clear, the statement referred only to penalties imposed for

violating a proposed provision governing the production of records after an accident. 146 Cong. Rec. S8235 (daily ed. Sept. 7, 2000) (statement of Sen. Hollings). The quoted statement refers to a limit on "the total amount of civil penalties applicable to a particular incident *for failure to comply with [this] reporting requirement*." *Id.* (statement of Sen. Kerry) (emphasis added). It does not address whether violations of separate regulatory requirements should be treated as related.

Indeed, EMPCo's proposed interpretation would create bizarre and unwarranted results. For example, a PHMSA investigation into an operator's integrity management procedures could reveal a host of violations differing dramatically in place, date, and nature. Yet EMPCo would treat all of these violations as "a related series of violations," subject to a single statutory cap, because of the mere happenstance that the violations were all discovered during an investigation prompted by a single spill. Nothing in the statute requires that result.

EMPCo also argues (Br. 53) that the violations are related because they "all substantively rely on the same regulation (49 C.F.R. § 195.452)." But the final order found that EMPCo violated a host of distinct regulatory requirements—among other violations, it failed to perform a seam integrity assessment within the required five-year period, 49 C.F.R. § 195.452(j)(3); failed to take prompt action to address anomalous conditions in its pipeline, *id.* § 195.452(h)(1); and violated its own integrity management program by entering false input into its risk assessment tool, *id.* § 195.452(b)(5). Whether these violations are "related" cannot turn on the coincidence that all of

PHMSA's integrity management regulations are codified in a single section—one that spans five pages of the Code of Federal Regulations and nearly 100 paragraphs—rather than separate sections.

EMPCo likewise errs in arguing (Br. 54) that the violations are related because several depend on PHMSA's determination that EMPCo should have found the pipeline susceptible to seam failure. It is often the case that the applicability of a set of regulations turns on some prerequisite finding. For example, the pipeline integrity management regulations in 49 C.F.R. § 195.452 apply only to pipelines "that could affect a high consequence area," so a finding on this point is necessarily an element of every violation of these regulations.

3. EMPCo argues (Br. 55) that the agency erred in increasing the assessed penalty on the ground that violations 1, 2, and 8 had a "contributory impact" on the Mayflower spill. EMPCo contends that its violations did not contribute to the accident because compliance with the regulations would not have discovered the specific defect that caused the accident. But, as the agency explained, EMPCo's "regulatory violations represent[] an overall failure by EMPCo to take preventative actions to avoid the specific *type* of accident that eventually occurred on the Pegasus Pipeline." Cert.Index.No.31 at 12 (emphasis added); *see also id.* at 12 n.33 ("[I]f the IMP requirements were 'executed properly, it would have been far less likely for the accident to occur.'"). Moreover, the fact that EMPCo's 2012-2013 integrity assessment did not detect any anomaly at the site of the pipeline's failure may have been because EMPCo

used an inappropriate tool for that assessment. *Id.* at 12. As the agency explained, although the 2005-2006 hydrostatic tests were successful in detecting defects on the Pegasus Pipeline, in 2012-2013 EMPCo instead chose to use a TFI tool, which "would not likely" have detected those same types of defects. *Id.* Thus, the agency reasonably concluded that the "violations contributed to the accident," and that EMPCo's inability to detect the specific flaw that directly caused the accident "does not negate the contributory impact of the violations." *Id.*

In any event, the agency's conclusion that violations 1, 2, and 8 warranted the highest level of gravity was reasonable even without a determination that those violations were causal factors in the accident. In determining the amount of the penalty, PHMSA is required to consider the nature, circumstances, and gravity of the violation. As PHMSA explained in its final order, the gravity of the violations here was severe, considering that EMPCo determined that all four segments of its Pegasus Pipeline were not susceptible to seam failure (despite risk factors to the contrary); failed to reassess those four segments within five years with a proper method for assessing seam integrity; and failed to follow its own procedures when assessing risk by misrepresenting when a tool had been run, which was a factor included in its risk assessment. Cert.Index.No.22 at 34, 35, 38-39. The agency's interpretation that those violations were sufficiently significant to warrant "the highest level of gravity" is owed deference.

As noted above, "[t]he agency's 'choice of a sanction is not to be overturned unless it is unwarranted in law or without justification in fact.'" *NL Indus.*, 901 F.2d at

144 (quotation marks omitted). Although EMPCo disagrees with the agency's application of the "nature, circumstances, and gravity of the violation" factor, it has failed to demonstrate that the agency's application here was arbitrary or capricious. The penalty amount should therefore be sustained.

B. PHMSA's Compliance Order Is Limited To Directing Compliance With The Regulations.

EMPCo argues (Br. 56-58) that PHMSA's compliance order exceeds the agency's authority because it is not limited to directing compliance with a regulation. Not so. [10]

PHMSA is authorized to "issue orders directing compliance" with the integrity management regulations. 49 U.S.C. § 60118(b); *see also* 49 C.F.R. § 190.217. The compliance order at issue targets five of the nine regulatory violations found by PHMSA. Each item of the order specifically identifies the applicable regulatory violation and the actions that must be taken to cure the violation. Cert.Index.No.22 at 43-46.

For example, as the agency explained, item 1 of the compliance order addresses EMPCo's duty to establish an assessment schedule based on all risk factors, which relates to the agency's finding that EMPCo erred by failing to consider relevant risk factors. Item 1 of the compliance order, therefore, requires EMPCo to modify its

[10] EMPCo raised this issue before PHMSA only with respect to Paragraph 1 of the compliance order. *See* Cert.Index.No.16 at 26-27; Cert.Index.No.23 at 19 (challenging portion of Final Order rejecting EMPCo's arguments with respect to Paragraph 1). To the extent EMPCo now seeks to attack other paragraphs of the compliance order on the same grounds, those arguments are waived.

integrity management program "to ensure risks are adequately identified and assessment actions are carried out to address the specific nature of all pre-1970 ERW pipe covered by the IMP." Cert.Index.No.22 at 42.

The remaining items in the compliance order are likewise targeted at specific violations. Item 2 remedies violation 2 (failure to perform an integrity assessment within five years) by requiring assessments to be performed within the regulatory time frames. Cert.Index.No.22 at 44. Items 3, 4, and 5 remedy violations 5 and 6 (failure to promptly discover immediate repair conditions and anomalous conditions)—violations not challenged by EMPCo—by requiring EMPCo to revise its procedures to ensure timely discovery of conditions and to adequately identify and assess the risk of seam failures. *Id.* at 44-45. Items 6 and 7 are directed at violation 8 (failure to follow its own procedures when assessing risk) by requiring EMPCo to revise its risk assessment procedures to ensure that risk assessments are "appropriately conservative" and do not discount identified threats. *Id.* at 45.[11]

As PHMSA explained, the compliance order properly required EMPCo to remedy flaws in its integrity management program that violated PHMSA regulations. Cert.Index.No.22 at 42. Because EMPCo's "[integrity management program] applies to all covered pipelines that could affect [a high consequence area]," these corrective

[11] Item 8, which requests that EMPCo maintain documentation of its costs of compliance, is standard language included in all of the agency's compliance orders and is voluntary.

actions necessarily extend beyond the Pegasus Pipeline to all pipelines covered by EMPCo's integrity management program. That fact, however, does not render the compliance order beyond the agency's authority, as EMPCo suggests (Br. 1, 27, 57). *See* 49 U.S.C. § 60118(b) (authorizing Secretary of Transportation to "issue orders directing compliance" with PHMSA regulations); 49 C.F.R. § 190.217 (authorizing, upon a finding of "conduct that violates" PHMSA regulations, "issuance of an order directing compliance" with such regulations).

Limiting the compliance order to only the Pegasus Pipeline, rather than to EMPCo's integrity management program, as EMPCo suggests, would permit EMPCo to continue applying its integrity management program[12]—a program PHMSA had already found to violate its regulations—with respect to other pipelines. Nothing in the Pipeline Safety Act or the regulations requires PHMSA to allow such violations to continue unabated.

EMPCo's contrary arguments (Br. 57) are unavailing. EMPCo suggests that the agency's authority to issue a compliance order is akin to injunctive relief and must be narrowly tailored. EMPCo also argues that "agency corrective actions" must be "'rationally related to the defect to be corrected.'" Br. 57 (quoting *Sheridan Corp. v. United States*, 95 Fed. Cl. 141, 151 (2010)). The compliance order easily satisfies both of these standards, as it is limited to curing specific violations in EMPCo's integrity

[12] Each operator has only one integrity management program that applies to all of its pipelines that may affect high consequence areas.

management program. The compliance order, therefore, easily passes muster under the arbitrary and capricious standard.

CONCLUSION

For the foregoing reasons, the agency's final order should be affirmed.

Respectfully submitted,

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SEPTEMBER 2016

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I hereby certify that this brief complies with the type and volume limitations set forth in Rule 32 of the Federal Rules of Appellate Procedure. I further certify that the brief was prepared using Microsoft Word 2010, using 14-point Garamond, and that the brief contains 13,288 words.

s/ Catherine H. Dorsey
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CERTIFICATE OF SERVICE

I hereby certify that on September 23, 2016, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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