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### **VIA ELECTRONIC DELIVERY**

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### **PRE-HEARING BRIEF OF CHAPARRAL ENERGY, LLC CPF NO. 4-2015-5018**

Chaparral Energy, LLC (“Chaparral”) respectfully submits this Pre-Hearing Brief in support of the withdrawal of the Notice of Probable Violation, Proposed Civil Penalty, and Proposed Compliance Order in CPF No. 4-2015-5018 (collectively, the “NOPV”). Chaparral hereby incorporates by reference all documents and materials contained in CPF No. 4-2015-5017H.

#### **I. Background**

The issues in this case arise from a pinhole leak discovered on Chaparral’s Coffeyville CO<sub>2</sub> pipeline system on August 25, 2015 (the “August 2015 Leak”), and PHMSA’s subsequent issuance of a Corrective Action Order on August 28, 2015 in CPF No. 4-2015-5017H (the “CAO”). Specifically at issue in this case is whether Chaparral complied with the express requirements contained in Corrective Action Item 3 of the CAO. The question of compliance turns on whether the CAO required a pressure restriction at the time the pipeline was shut down,

or at the time the pipeline was returned to service. Because the express language of the CAO made no mention of a reduction in pressure at shutdown (in Corrective Action Item 1), but only at return to service (in Corrective Action Item 3), Chaparral complied with the language of the CAO, despite the fact it may not have complied with the unstated intent of PHMSA, which was expressed only after Chaparral submitted its Restart Plan for approval on September 8, 2015.

**A. The Pipeline Failure and Chaparral's Response Under Part 195**

Chaparral received a landowner call regarding a leak on its Coffeyville pipeline system on the morning of August 25, 2015. After taking immediate action to verify the location of the pipeline failure, Chaparral isolated the pipeline segment containing the leak by closing upstream and downstream block valves and blew down that pipeline segment. Although the leak did not meet any of the Section 195.52 telephonic reporting thresholds, Chaparral telephonically notified the National Response Center ("NRC") of the pipeline failure as a matter of business practice.

In the afternoon of August 25, PHMSA representatives initiated contact with Chaparral regarding the Coffeyville pipeline leak, first by phone and then electronic mail. Chaparral representatives fully cooperated with PHMSA representatives' inquiries about the leak and status of the Coffeyville system. Chaparral informed PHMSA that it had isolated the segment of pipeline containing the leak location, that CO<sub>2</sub> product was not flowing at the time of the NRC notification because the Coffeyville Fertilizer Plant that supplied CO<sub>2</sub> to the system was offline, and that pipeline pressure at the leak location at the time of the leak was approximately 1,100 psig. This information was confirmed by electronic mail to PHMSA on the following day, August 26. Chaparral informed PHMSA that it would remove and replace the failed section of pipe on that day, August 26.

Prior to removing the failed pipe, Chaparral conducted a complete examination of the failure area. Chaparral tested the cathodic protection system at the test station immediately upstream of the failure site, and found the level of cathodic protection in compliance with the requirements of 49 C.F.R. Part 195. Chaparral then exposed the pipeline extending a minimum of approximately 40 feet on either side of the failure location. Chaparral examined the exposed pipeline for corrosion, coating conditions and other issues that may be identified through external inspection. No unusual conditions were identified, and all areas were determined to be acceptable other than the repair of the failure location. The examination on the existing pipe upstream and downstream of the failure location confirmed that the adjacent pipe did not require repair or replacement.

Following these assessment activities, Chaparral cut out and replaced the section of failed pipe. The pipe installed was from tested inventory pipe left over from initial construction, and met API 5L, Grade X-65, 0.219-inch wall thickness specifications. Following these actions, on August 26, 2015, Chaparral returned the Coffeyville pipeline system to service in compliance with 49 C.F.R. Part 195, at approximately 5:30 p.m.

Between August 26 and August 28, 2015, the Coffeyville pipeline system was operated normally at pressures below the system's Part 195 maximum operating pressure. There were no accidents, issues or integrity concerns during this period. On the afternoon of August 26, PHMSA informally notified Chaparral that a Corrective Action Order would be issued, most likely by August 28, and that the CAO would call for the development of a Remedial Work Plan. By telephone on August 26, PHMSA acknowledged that Chaparral was not prevented from returning the pipeline to service, absent receipt of the then presumably-upcoming CAO.

## **B. Corrective Action Order Issued by PHMSA**

On the afternoon of August 28, 2015, PHMSA issued the CAO to Chaparral pursuant to the no-prior-notice provisions of 49 U.S.C. § 60112. The CAO required Chaparral to take a series of corrective actions with regard to the Coffeyville pipeline.

The first required corrective action was the immediate shutdown of the entire Coffeyville pipeline, set forth in Corrective Action Item 1 of the CAO as follows:

“1. ***Shutdown of Pipeline.*** Chaparral must not operate the *Affected Segment* until authorized to do so by the Director.”

There was no pressure restriction placed on the pipeline while it was shut down contained in Corrective Action Item 1, merely a requirement not to operate the *Affected Segment*.

The second corrective action under the CAO required Chaparral to develop a “Restart Plan.” PHMSA approval of the Restart Plan was an explicit prerequisite to resuming pipeline operations, as clearly set forth in Corrective Action Item 2 of the CAO:

“2. ***Restart Plan.*** Prior to resuming operation of the *Affected Segment*, develop and submit a written *Restart Plan* to the Director for prior approval.”

The third corrective action under the CAO pertained to the pipeline's return to service after submission and approval of the Restart Plan. Corrective Action Item 3 of the CAO required an operating pressure restriction at the time the pipeline was returned to service after approval of the Restart Plan. Specifically, Corrective Action Item 3 of the CAO set forth:

“3. ***Return to Service.*** After the Director approves the *Restart Plan*, Chaparral may return the *Affected Segment* to service but the operating pressure must not exceed eighty percent (80%) of the actual operating pressure in effect immediately prior to the Failure.”

The CAO contained a series of additional corrective actions. Chaparral has put forth its best effort to comply with all of the corrective actions in the CAO.

### **C. Chaparral Complied with the CAO**

Chaparral immediately complied with the CAO upon electronic receipt on the afternoon of August 28. Chaparral implemented Corrective Action Item 1 as directed by immediately shutting down the entire Coffeyville pipeline system on the afternoon of August 28. Chaparral took no other operational action on the pipeline after receiving the CAO. Any operational action, including reducing pressure by blowing out product, would have risked noncompliance with Corrective Action Item 1 of the CAO as written. The Coffeyville pipeline remained shut down with product in the line at the same pressure as it had been operating at prior to the shutdown on August 28.

Although Chaparral requested a hearing regarding the CAO, Chaparral simultaneously took on CAO compliance with purpose and diligence, fully complying with the terms of the CAO while the hearing process was pending. Chaparral developed a Restart Plan that incorporated the requirements of Corrective Action Item 2, and on September 8, 2015, the Restart Plan was submitted for the approval of the Director, Southwest Region. Chaparral's proposed Restart Plan provided for all actions that were needed to ensure the Coffeyville system would be safely returned to service. The Restart Plan provided for a restriction of the pipeline pressure to 80% of the operating pressure at the time of failure. Because the pipeline was at higher shut-in pressures than the restricted operating pressure required upon the return to service under Corrective Action Item 3, Chaparral included in the Restart Plan that the pipeline would be operated to release product CO<sub>2</sub> into the atmosphere until the highest pressure reading along the pipeline system did not exceed 896 psig. On the morning of September 18, 2015, the Director, Southwest Region, approved Chaparral's Restart Plan exactly as proposed.

Following the restart of the Coffeyville pipeline, Chaparral continued to expeditiously comply with the corrective action items in the CAO, including prompt release of product from the pipeline to reduce pressure to meet the Corrective Action Item 3 pressure restriction. To date, Chaparral has undertaken an extensive analysis of the Coffeyville pipeline system, leading to the conclusion that the August 2015 Leak was most likely the result of stray current interference from the Southern Star pipeline that parallels the Coffeyville pipeline in the vicinity of the leak. Among other actions, Chaparral has:

- (i) conducted an in-line inspection ("ILI") of the entire Coffeyville pipeline,
- (ii) performed phased excavations and pipeline repairs based on the results of the ILI,

- (iii) conducted an eight-hour hydrostatic test in excess of 2,369 psig on the western portion of the pipeline system, where the leak occurred and stray current was identified,
- (iv) obtained metallurgical analyses of the August 2015 Leak,
- (v) performed a close interval survey of the pipeline's cathodic protection system and interference testing to identify stray current from the Southern Star pipeline system,
- (vi) worked with Southern Star to coordinate cathodic protection system adjustments and reduce stray current interference,
- (vii) completed and submitted to PHMSA a Root Cause Failure Analysis of the August 2015 Leak, and
- (viii) completed and submitted for approval a Remedial Work Plan detailing further plans for integrity verification of the Coffeyville pipeline system.

Chaparral's actions from the time of discovering the August 2015 Leak to date demonstrate its full compliance with the terms of the CAO as written.

#### **D. NOPV Issued Despite Chaparral's Compliance**

On the afternoon of September 18, 2015, PHMSA issued to Chaparral a Notice of Probable Violation, Proposed Civil Penalty, and Proposed Compliance Order (the "NOPV"). The NOPV contains a single allegation of violation regarding the pressure maintained on the Coffeyville pipeline following PHMSA's issuance of the CAO. The NOPV allegation specifies that Chaparral purportedly violated "Corrective Action 3" of the CAO and cites the verbatim language of that corrective action item:

***"Return to Service – After the Director approves the Restart Plan, Chaparral may return the Affected Segment to service but the operating pressure must not exceed eighty percent (80%) of the actual operating pressure in effect immediately prior to the Failure."***

The CAO language cited by PHMSA explicitly ties the 80% pressure limitation to the pipeline's return to service after the Director approves the Restart Plan submitted by Chaparral. However, PHMSA asserted in its NOPV that the pressure limitation in Corrective Action Item 3 was required at the time Chaparral received the CAO, apparently contemporaneously with the shutdown of the pipeline. This requirement was not stated in the CAO. PHMSA states in an introductory paragraph to the CAO that: "Upon receipt of the CAO on August 28, 2015,

Chaparral shut the line in; however, you did not limit the pressure to the 80% restriction as required by Corrective Action 3 of the CAO.”

PHMSA did not explain or resolve in the NOPV the timing discrepancy between (i) the language in Corrective Action Item 3 explicitly requiring the 80% pressure restriction *upon the pipeline’s return to service* under an approved Restart Plan and (ii) PHMSA’s contention in the NOPV that the pressure restriction applied *at the time the CAO was issued*. PHMSA issued the NOPV despite the fact that it became readily apparent that Chaparral, like any other ordinary reader, could not ascertain PHMSA’s expectation from the language of Corrective Action Item 3 as written. Instead of providing clarification and notice to Chaparral of its intent by appropriately amending the CAO, PHMSA issued the NOPV.

PHMSA asserted in the NOPV without explanation that “[o]n August 28, 2015, PHMSA issued a CAO (CPF No. 4-2015-5017H) to Chaparral to establish an 80% pressure restriction (from the pressure at the time of the release) on your pipeline.” The plain reading of the CAO does not reveal that an 80% pressure restriction was required upon the shutdown of the pipeline. While PHMSA contends that Chaparral “did not limit the pressure to the 80% restriction as required by Correction Action 3 of the CAO,” Chaparral intently implemented each corrective action requirement in the CAO as written, including Corrective Action Item 3.

As discussed further below, PHMSA’s allegation in the NOPV simply does not reflect the actual language of Corrective Action Item 3. There is no support in the law, i.e., the CAO as written pursuant to PHMSA’s statutory authority, for the NOPV. Further, there is no support in fact. The evidence submitted by PHMSA in support of its allegation is limited to: (a) pressure reading photographs requested and received by PHMSA on September 14, 2015, and (b) the Restart Plan that was submitted on September 8, 2015 and which PHMSA approved without any changes on the morning of September 18, 2015, just hours prior to issuing the NOPV to Chaparral.

Chaparral followed the CAO as written to ensure compliance, including the immediate shutdown of the pipeline and expedient development and implementation of the Restart Plan. As noted, the Director, Southwest Region approved Chaparral’s Restart Plan on the morning of September 18, 2015. This happened *before* the NOPV was issued to Chaparral. The approval included the return-to-service procedure whereby Chaparral would operate the line to reduce the pipeline pressure to a maximum of 896 psig. The approval and implementation of the Restart Plan met the 80% pressure restriction requirement specified in Corrective Action Item 3 of the CAO. PHMSA’s approval of the Restart Plan – before issuance of the NOPV – should be grounds alone for withdrawing the NOPV.

## **II. The NOPV Should be Withdrawn Because it has No Legal or Factual Basis**

As set forth above, Chaparral expended considerable efforts to fully comply with the requirements set forth in the CAO. PHMSA’s allegation in the NOPV does not recognize

Chaparral's compliance with the CAO, nor is it based on the stated terms of Corrective Action Item 3 of the CAO. PHMSA's supporting statement in the Violation Report is telling of the disconnect between the actual language of Corrective Action Item 3 and the allegation in the NOPV: "Chaparral indicated that they did not understand that the CAO required the reduction of pressure, but rather the shut in of their pipeline upon receipt of the order." Violation Report at 13. This is not evidence of Chaparral's non-compliance with Correction Action Item 3. Rather, this is evidence of the vagueness of Corrective Action Item 3.

If PHMSA intended for Chaparral to reduce pressure on the pipeline prior to shutting it down, it should have so stated in the CAO, or in the alternative should have amended the CAO when it determined the pressure on the shut-down pipeline exceeded its desired pressure. Chaparral could then lawfully take action without violating Corrective Action Item 1 as written. The NOPV should not have been issued to Chaparral, and should be withdrawn or stricken, because Chaparral cannot have been expected to discern PHMSA's vague and unexpressed interpretation of Corrective Action Item 3.

**A. The NOPV is Invalid on its Face**

The NOPV is founded on the single allegation that Chaparral violated Corrective Action Item 3 of the CAO. Corrective Action Item 3 appeared, in its plain text and in Chaparral's reasonable belief, clearly drafted to require a pressure restriction when it returned the Coffeyville pipeline to service following PHMSA's approval of a Restart Plan: "After the Director approves the Restart Plan, Chaparral may return the Affected Segment to service but the operating pressure must not exceed eighty percent (80%) of the actual operating pressure in effect immediately prior to the Failure."

PHMSA has broad authority under 49 U.S.C. § 60112. Section 60112(d) enables PHMSA to direct the actions of pipeline operators through the use of Corrective Action Orders. PHMSA also has the ability to enforce a CAO through civil penalties and compliance orders. PHMSA's civil penalty authority under 49 U.S.C. § 60119 provides that the Department of Transportation may levy a civil penalty for the violation of an "order issued under this chapter." However, these statutes do not allow for PHMSA to enforce actions that it did not actually order or to impose a civil penalty unless an order has actually been violated.

Here, PHMSA claims to be enforcing Corrective Action Item 3 through a civil penalty and compliance order. The civil penalty and compliance order are only warranted if Chaparral actually violated Corrective Action Item 3. Here, a significant disconnect exists. Corrective Action Item 3, as written and ordered by PHMSA, required three specific actions: (i) the Director to have approved a Restart Plan; (ii) at which time Chaparral could return the pipeline to service; (iii) but upon the return to service, the pipeline pressure could not exceed 80% of the operating pressure immediately prior to the Failure. The only way that an NOPV alleging Chaparral violated Corrective Action Item 3 is valid is if one of those three required actions was

violated. However, the evidence shows that all three actions were in fact completed in accordance with the requirements of Corrective Action Item 3.

Chaparral complied with Corrective Action Item 3 exactly as drafted and ordered by PHMSA – and following a plan approved by PHMSA. After shutting down the pipeline system immediately upon receipt of the CAO, Chaparral developed the Restart Plan. In compliance with Corrective Action Item 3, Chaparral submitted the Restart Plan to the Director for approval, received such approval, and returned the pipeline to service at an operating pressure limitation of 896 psig (80% of actual operating pressure immediately prior to the failure).

Given these established facts of record, there is no basis to cite Chaparral for a violation of Corrective Action Item 3. There is no evidence in the record that Chaparral failed to follow any of the requirements spelled out in Corrective Action Item 3. The Restart Plan filed in CPF No. 4-2015-5017H provides a record of Chaparral’s proposal to comply with Corrective Action Item 3 that was approved as submitted. The Restart Plan was timely filed while the Coffeyville pipeline remained shut down prior to approval by the Director, Southwest Region.

The Remedial Work Plan filed in CPF No. 4-2015-5017H further documents Chaparral’s compliance with Corrective Action Item 3. Specifically, Section 2.3.2 of the Remedial Work Plan provides a record of Chaparral’s compliance with Corrective Action Item 3, as follows:

On September 18, 2015, PHMSA approved Chaparral’s Restart Plan. The Restart Plan described the requisite preparatory actions that needed to be taken prior to and during the Restart. In late September 2015, those preparatory actions were successfully conducted without incident, and the CO<sub>2</sub> Line was restarted according to the Restart Plan. None of the required preparatory actions indicated any integrity issues on the CO<sub>2</sub> Line that required remedial measures to be implemented prior to Restart.

Pursuant to the Restart Plan, operations resumed on the CO<sub>2</sub> Line – subject to the temporary maximum operating pressure (“TMOP”) of 896 psig. After Restart, the ILI inspection ... was then conducted.

The documentation of record in CPF No. 4-2015-5017H provides substantial evidence of the actions taken by Chaparral in good faith to comply with Corrective Action Item 3. It also provides direct proof that Chaparral did not violate Corrective Action Item 3. The documentation shows that the pipeline remained shut down pending the Director’s approval of the Restart Plan.

Chaparral did not “return the pipeline to service” between the time of the shutdown mandated by Corrective Action Item 1, and the time of the approval of the Restart Plan under Corrective Action Item 3. Nor did Chaparral operate the pipeline in any way during this period.

Thus, there is no basis for the alleged violation on grounds related to this requirement of Corrective Action Item 3.

The documentation also shows that Chaparral provided a Restart Plan for the approval of the Director demonstrating its plan to return the pipeline to service with an operating pressure restricted to 80% of the actual operating pressure immediately prior to the failure. Thus, there is no basis for the alleged violation on grounds related to this requirement of Corrective Action Item 3.

The documentation further shows that Chaparral obtained the Director's approval of the Restart Plan on September 18, 2015, prior to returning the pipeline to service. The approval encompassed Chaparral's documented approach to achieving an operating pressure not to exceed 896 psig as of the pipeline's return to service. Thus, there is no basis for the alleged violation on grounds related to this requirement of Corrective Action Item 3.

Finally, the documentation shows that Chaparral performed the pipeline's return to service by operating the pipeline to release CO<sub>2</sub> to the atmosphere and then continuing operation at the limited temporary maximum operating pressure, in conformance with the approved Restart Plan. Thus, there is no basis for the alleged violation on grounds related to this requirement of Corrective Action Item 3.

The documentation of record in CPF No. 4-2015-5017H and in this matter provides substantial evidence that Chaparral was in full compliance with the requirements of Corrective Action Item 3, rendering the NOPV inappropriate and invalid. The NOPV is supported only by factual assumptions and legal allegations that reach beyond the actual scope of Corrective Action Item 3. Those allegations do not support a finding that Chaparral violated Corrective Action Item 3 and do not satisfy PHMSA's authorizing statutes.

The NOPV rests precariously on the allegation that Chaparral violated Correction Action Item 3 because "PHMSA issued a CAO (CPF No. 4-2015-5017H) to Chaparral to establish an 80% pressure restriction (from the pressure at the time of the release) on your pipeline." PHMSA further states that: "The CAO 80% pressure restriction would limit the pressure to 896 psig; however, the current pressure on the pipeline is 1107."

PHMSA's allegation requires the reader of the CAO to assume, despite the explicit language of Corrective Action Item 3, that Item 3 required the "80% pressure restriction" on the pipeline *prior* to the pipeline's return to service and *prior* to the Director's approval of the Restart Plan. However, the plain language of Corrective Action Item 3 explicitly ties the "80% pressure restriction" to the pipeline's return to service *following* the Director's approval of the Restart Plan.

Moreover, Chaparral was explicitly directed by PHMSA in Corrective Action Item 1 to shut down the pipeline and cease operation. As the CAO was drafted, Chaparral could only

comply by immediately ceasing pipeline operation, then submitting and obtaining approval of a Restart Plan, and finally returning the pipeline to service at a restricted pressure in accordance with a Restart Plan approved by the Director. Any other action would have been in violation of the explicitly stated terms of the CAO. To be clear, upon receipt of the CAO, any operation on the pipeline other than shut-down would have constituted a violation of Corrective Action Item 1 – and out of fear of violating the CAO, Chaparral did exactly what was ordered by Item 1. Thus, there is no legal or factual basis to find Chaparral in violation of Corrective Action Item 3.

PHMSA's NOPV also contains a statement that PHMSA representatives were not aware of the operational status of the pipeline *prior* to issuing the CAO. Given that the alleged violation in the NOPV explicitly concerns the requirements of Corrective Action Item 3, which had no legal effect prior to PHMSA's issuance of the CAO, this statement does not support a finding of violation.

Importantly, there was no benefit to Chaparral from noncompliance because it did not matter when Chaparral took the pressure restriction – the pipeline was not operating. Had PHMSA actually ordered Chaparral to reduce the pipeline pressure at the time the CAO was issued (e.g., as an initial corrective action item rather than as a part of returning to service under the approved Restart Plan), Chaparral would have dutifully complied with that requirement. However, the plain language of the CAO required (a) immediate shutdown and (b) implementation of the 80% pressure restriction specifically at the time the pipeline was returned to service under the approved Restart Plan.

PHMSA alleges in its NOPV that Chaparral violated requirements of Corrective Action Item 3 that are not discernable from the language of Corrective Action Item 3. There is no legal or factual basis for the alleged violation. PHMSA should withdraw or otherwise strike the NOPV.

## **B. PHMSA Must Consider Chaparral's Due Process Rights**

This case ultimately concerns the issue of fairness regarding the notice given to Chaparral, or lack thereof, as to PHMSA's expectation for conduct under Corrective Action Item 3. PHMSA's action does not comport with the jurisprudence on fair notice and the void-for-vagueness doctrine. As discussed below, our courts have made clear that regulated entities have a right to notice of the specific conduct expected of them before being subject to enforcement and penalty.

Here, PHMSA seeks to enforce Corrective Action Item 3 against Chaparral based on an expectation of conduct that is not discernible from the plain language of Corrective Action Item 3. This action would directly affect Chaparral's due process interests. *See, e.g., Tennessee Valley Authority v. Whitman*, 336 F. 3d 1236 (11<sup>th</sup> Cir. 2003) (addressing Environmental Protection Agency's administrative compliance orders and imposition of civil and criminal penalties to enforce such orders under Due Process Clause protections).

PHMSA's NOPV suggests that Corrective Action Item 3 directed Chaparral to restrict the pressure on the Coffeyville pipeline system to 80% of pre-failure operating pressure at the time PHMSA issued the CAO to Chaparral. The actual language of Corrective Action Item 3 explicitly required the 80% pressure restriction at the time Chaparral returned the pipeline to service pursuant to an approved Restart Plan. PHMSA's NOPV allegation suggests that PHMSA must have intended that Chaparral take a different course of conduct than was discernible from the actual written language of Corrective Action Item 3. However, Chaparral may not lawfully be required to suffer the penalty for an agency's vagueness in the underlying order.

The long-standing "void for vagueness" doctrine under the 5<sup>th</sup> Amendment of the Constitution prevents the federal government and agencies acting under federal authority from engaging in the type of unfounded enforcement activity present in the current case. The void for vagueness doctrine is founded on the fundamental principle that "laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012) ("*Fox II*"). Under this doctrine, "[a] conviction or punishment fails to comply with due process if the statute or regulation under which it is obtained 'fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.'" *Id.*, quoting *United States v. Williams*, 553 U.S. 285, 304, 128 S. Ct. 1830, 170 L.Ed.2d 650 (2008).

The Supreme Court in *Fox II* explained that "the void for vagueness doctrine addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way." *Fox II*, 132 S. Ct. at 2317. In the *Fox II* case, the Supreme Court determined that the Federal Communication Commission's enforcement actions against Fox Television were invalid because they ran afoul of these fundamental requirements of fair notice and precision/guidance. The jurisprudence articulated by the Supreme Court in *Fox II* is not limited to FCC enforcement activities; rather, it applies generally to federal agency conduct, including the enforcement of regulations and orders issued by agencies. Put simply, a regulated party has the right to know what conduct it must engage in or refrain from prior to being subject to enforcement by the agency, and the agency has the duty to provide fair warning of its expectations with precision and guidance.

The Supreme Court further underscored the importance of fair notice and the void-for-vagueness doctrine in *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156 (2012). In *Cristopher*, the Supreme Court refused to give deference to the Department of Labor's interpretation of its fair labor standard regulations in an instance where the agency's interpretation could have imposed liability on a regulated entity for conduct that occurred before the agency put forth its interpretation. 132 S. Ct. at 2167. The Supreme Court in this case made the broad pronouncement that: "It is one thing to expect regulated parties to conform their conduct to an agency's interpretations once the agency announces them; it is quite another to

require regulated parties to divine the agency's interpretations in advance or else be held liable when the agency announces its interpretations for the first time in an enforcement proceeding and demands deference.” *Id.* at 2168.

The *Cristopher* decision signaled the Supreme Court’s concern over an agency action that “would result in precisely the kind of ‘unfair surprise’ against which our cases have long warned.” *Id.* at 2167; citing *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170-171, 127 S.Ct. 2339, 168 L.Ed.2d 54 (2007) (deferring to new interpretation that “create[d] no unfair surprise” because agency had proceeded through notice-and-comment rulemaking); *Martin v. Occupational Safety and Health Review Comm’n*, 499 U.S. 144, 158, 111 S.Ct. 1171, 113 L.Ed.2d 117 (1991) (identifying “adequacy of notice to regulated parties” as one factor relevant to the reasonableness of the agency's interpretation); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 295, 94 S.Ct. 1757, 40 L.Ed.2d 134 (1974) (suggesting that an agency should not change an interpretation in an adjudicative proceeding where doing so would impose “new liability ... on individuals for past actions which were taken in good-faith reliance on [agency] pronouncements” or in a case involving “fines or damages”).

The Supreme Court’s pronouncements in *Fox II*, *Christopher*, and other precedent warn against the situation presented by the current case. Seeking to achieve compliance with the CAO, Chaparral acted in good-faith reliance on the specific language and directives contained in Corrective Action Item 3 as issued by PHMSA. Chaparral now finds itself in the crosshairs of an enforcement action that is based on PHMSA’s previously unstated interpretation of Corrective Action Item 3. The current situation is exactly what the U.S. Supreme Court in *Christopher* said was completely prohibited: “requir[ing] regulated parties to divine the agency's interpretations in advance” and “the agency announces its interpretations for the first time in an enforcement proceeding and demands deference.”

As noted in the Violation Report, PHMSA’s assertion that Corrective Action Item 3 was intended to mandate the 80% pressure restriction at a time prior to the pipeline’s return to service under the approved Restart Plan was a complete and total surprise to Chaparral. This fact is also obvious from Chaparral’s good faith conduct to achieve compliance with the entirety of the CAO, including all of the actions discussed in Chaparral’s Remedial Work Plan submission and summarized in Section I.C. above. Chaparral’s surprise at this enforcement action without fair notice was further punctuated by PHMSA’s approval of Chaparral’s Restart Plan prior to issuing the NOPV, since that meant approval of Chaparral’s return to service and pressure restriction actions under Corrective Action Item 3.

In this instance, PHMSA’s enforcement action was neither necessary nor appropriate under the void for vagueness principles. The language of Corrective Action Item 3 was not sufficiently precise for Chaparral to determine the conduct that PHMSA now says it expected of Chaparral. Under the guiding Supreme Court jurisprudence, Chaparral had the right to know – and PHMSA had the duty to clearly provide notice of – the conduct that PHMSA was expecting

of Chaparral to comply with Corrective Action Item 3. Instead, Chaparral now faces arbitrary and discriminatory enforcement and civil penalty liability for failing to divine the interpretation of Corrective Action Item 3 posited by PHMSA in the NOPV.

PHMSA had options to provide fair notice to Chaparral of its interpretation of Corrective Action Item 3 put forth in the NOPV, including clarifying the CAO by amending it. This could have been a curative remedy for the inappropriately issued NOPV; however, the pipeline is now operational with the 80% pressure restriction in effect under the approved Restart Plan, exactly as mandated by Corrective Action Item 3 as written. It is unclear to Chaparral why PHMSA chose enforcement by NOPV rather than pursuing a clarification that would satisfy due process. However, the facts and law in this case show that PHMSA's action does not comport with the jurisprudence on fair notice and the void-for-vagueness doctrine.

Accordingly, the NOPV should be withdrawn or stricken. Sustaining the NOPV in a final order would run afoul of Chaparral's constitutionally protected due process rights.

**C. PHMSA's Position in the NOPV is Unacceptable Under the Administrative Procedure Act**

PHMSA's action in this case will result in a final order subject to the Administrative Procedure Act, 5 U.S.C. § 551 et seq. ("APA"). Even if this proceeding is classified as an informal adjudication subject only to the "ancillary matters" protections of the APA (5 U.S.C. § 555), PHMSA's final action on the NOPV must be guided by the jurisprudence regarding what constitutes acceptable agency action under the APA.

Congress specifically added a provision to 49 U.S.C. § 60119 in the Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011 clarifying that "judicial review of agency action under this section shall apply the standards of review established in section 706 of title 5." 49 U.S.C. § 60119(a)(3). Thus, any court reviewing a PHMSA final order would take into consideration whether PHMSA met the standards of 5 U.S.C. § 706. These standards are determinative of whether the agency action is valid and capable of withstanding judicial scrutiny.

Section 706(2) of the APA requires a court reviewing an agency action to "hold unlawful and set aside agency action, findings, and conclusions" that it determines to be, among other things,

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

*See also Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1573-74 (10th Cir. 1994); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 US 402, 413-14, 91 S.Ct. 814, 822 (1971) (holding that informal agency action must be set aside if it fails to meet statutory, procedural or constitutional requirements or if it was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”).

Chaparral established above that PHMSA’s NOPV is not founded on fair warning, which is required to satisfy constitutional due process protections. This due process issue in turn would implicate 5 U.S.C. § 706(2)(B) if PHMSA issued a final order based on the NOPV allegation.

In addition, the NOPV raises significant concerns under the APA review standards in 5 U.S.C. § 706(2)(A) and (C). The position taken by PHMSA in the NOPV would lead to an arbitrary and capricious decision if it is sustained. Under the APA review standard, an agency must “examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.” *Alpha, Inc. v. Leavitt*, 460 F.3d 1, 6 (D.C. Cir. 2006) (quoting *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983)). Arbitrary and capricious agency actions include those where the agency “entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *State Farm*, 463 U.S. at 43.

Here, PHMSA does not consider the plain record before it showing Chaparral’s compliance with Corrective Action Item 3 as written. Instead, PHMSA relies on a position that is not supported by the language of Corrective Action Item 3. The discrepancy between the NOPV allegation and the actual content of Corrective Action Item 3 is fundamentally problematic given that “[a]dministrative orders, like statutes, are not to be given strained and unnatural constructions.” *Belco Petroleum v. FERC*, 589 F.2d 680, 686 fn. 5 (D.C. Cir. 1978) (quoting *Barron Coop. Creamery v. Wickard*, 140 F.2d 485, 488 (7th Cir. 1944)). Courts have struck down as arbitrary and capricious agency orders that “depart, sub silentio, from its usual rules of decision to reach a different, unexplained result in a single case.” *Western States Petroleum Ass’n v. EPA*, 87 F.3d 280, 284 (9th Cir. 1996) (quoting *California Trucking Ass’n v. ICC*, 900 F.2d 208, 212 (9th Cir.1990)).

In this instance, the allegation that Chaparral violated Correction Action Item 3 can survive only from a strained and unnatural construction of the language in that Item. The NOPV allegation requires PHMSA to depart from its norm of enforcing a CAO corrective action requirement as actually issued and inexplicably penalize Chaparral for failing to meet an unstated expectation without prior notice. A final agency order based on the position taken by PHMSA in the NOPV, which is at odds with the plain language of Corrective Action Item 3, would be arbitrary and capricious under the controlling case law.

Moreover, PHMSA's position in the NOPV runs afoul of the APA prohibition on abuse of discretion. While PHMSA has statutory authority and discretion to enforce its orders, its discretion has limits. The APA review standards protect against a situation such as this, where the agency threatens to levy penalties against a regulated entity for failure to comply with a purported requirement that was first articulated by the agency within the enforcement action. In this instance, PHMSA promulgated the specific language in Corrective Action Item 3. PHMSA's discretion to enforce Corrective Action Item 3 was limited by the terms of that Item as promulgated in the CAO. Chaparral has demonstrated full compliance with Corrective Action Item 3 as written, such that PHMSA does not have discretion to institute an enforcement action against Chaparral for failing to comply with Corrective Action Item 3. Accordingly, PHMSA must withdraw or strike the NOPV because it cannot be supported by findings or conclusions tied to the actual requirements in Corrective Action Item 3.

Finally, a final action supported by the claim in the NOPV would not be in accordance with the law, i.e., the language of Corrective Action Item 3 issued under statute. PHMSA's position reaches well beyond the explicit requirements of Corrective Action Item 3. The CAO itself is a creature of a single-purpose statute, and is to be tailored to direct specific action from a specific operator under the force of law. This is a very powerful statutory tool that thus must be wielded carefully and with consideration.

Sustaining the NOPV would require making findings and conclusions that are beyond the scope and limitations explicitly established by Corrective Action Item 3. Specifically, despite Chaparral's compliance with Corrective Action Item 3 as written, the allegation in the NOPV expands the scope of Corrective Action Item 3 to implement the pressure restriction requirement at the time the CAO was issued. This view extends beyond the explicit language of Corrective Action Item 3 with no legal basis, and is thus not in accordance with law.

Accordingly, the NOPV should be withdrawn or stricken. Sustaining the NOPV in a final order would conflict with the principles for agency actions under the APA judicial review standards.

### **III. The Proposed Compliance Order Should Be Withdrawn**

The NOPV includes a Proposed Compliance Order ("PCO") that would require the following action:

In regard to Item Number 1 of the Notice pertaining to the failure to reduce the pressure on the Coffeyville 8" carbon dioxide pipeline, Chaparral must reduce the pressure on the pipeline to the 80% restricted pressure of 896 psig.

Chaparral implemented the 80% pressure restriction (896 psig) commensurate with the Coffeyville pipeline's return to service pursuant to the Restart Plan approved by the Director,

Southwest Region. Chaparral's plan for implementing the 80% pressure restriction was approved as a part of the Restart Plan on September 18, 2015, before PHMSA issued the NOPV to Chaparral. Thus, in addition to Chaparral already achieving compliance with the PCO pressure restriction, PHMSA's approval of the Restart Plan rendered the later-issued PCO (which did not have immediate force of law unlike the approved Restart Plan) unnecessary and inappropriate.

In addition, on November 13, 2015, PHMSA granted Chaparral's request pursuant to the CAO to modify the pressure restriction to a new temporary maximum operating pressure of 1,671 psig. Issuance of the PCO at this juncture would also be in conflict with PHMSA's later modification of the pressure restriction, which was granted pursuant to the terms of the CAO.

The actions of the parties render the PCO moot. Accordingly, the PCO should be withdrawn or stricken along with the remainder of the NOPV.

#### **IV. The Proposed Civil Penalty Should be Eliminated**

In the event the NOPV is not withdrawn or stricken in its entirety, the Proposed Civil Penalty should be eliminated or significantly reduced. Chaparral contests the Proposed Civil Penalty on the grounds of the penalty considerations in 49 U.S.C. § 60122(b) and 49 C.F.R. § 190.225.

##### **A. Nature, Circumstances and Gravity**

PHMSA must consider the nature, circumstances and gravity of the violation. 49 U.S.C. § 60122(b)(1)(A); 49 C.F.R. § 190.225(a)(1). The nature and circumstances described in the record do not support PHMSA's conclusion that Chaparral violated Corrective Action Item 3 and should be subject to a civil penalty.

PHMSA's NOPV appears to be crafted to place blame on Chaparral for operating the pipeline prior to issuance of the CAO. PHMSA's NOPV and Violation Report preface the ultimate allegation in Item 1 with the statement that "[a]t the time the CAO was issued, it was not known that Chaparral returned the Coffeyville line to service." NOPV at 1; Violation Report at 6. This statement has no bearing on NOPV Item 1 where PHMSA claims that Chaparral did not reduce pipeline pressure "following PHMSA's issuance of a CAO." NOPV at 2 – Item 1. Rather, PHMSA's prefatory statement appears to be a veiled justification for its NOPV Item 1 allegation and the Proposed Civil Penalty.

Chaparral was not prohibited from operating the pipeline in accordance with Part 195 until it received the CAO on August 28, 2015, at which time Chaparral immediately complied with the CAO and shut down the pipeline system. PHMSA's communications with Chaparral regarding the August 25, 2015 leak ceased around mid-afternoon on August 26, 2015. Chaparral returned the pipeline to service during the early evening of August 26, 2015 with no further

inquiry from PHMSA. None of these actions implicate Chaparral's compliance with Corrective Action Item 3 of the CAO.

Moreover, despite PHMSA's inclusion of the prefatory language in the NOPV and Violation Report, PHMSA's states in Part E6 of the Violation Report (Circumstances) its view that the alleged violation began on August 28, 2015. Thus, PHMSA's prefatory statement should have no bearing on the NOPV or the Proposed Civil Penalty thereunder.

The remaining statements in the Violation Report and NOPV also do not support imposing the Proposed Civil Penalty because they are premised on the notion that Corrective Action Item 3 required Chaparral to reduce pipeline pressure "following PHMSA's issuance of a CAO" when the text of Corrective Action Item 3 definitively states that "[a]fter the Director approves the *Restart Plan*, Chaparral may return the Affected Segment to service but the operating pressure must not exceed eighty percent (80%) of the actual operating pressure in effect immediately prior to the Failure." The true nature and circumstances of this situation are that Chaparral took appropriate action to comply with Corrective Action Item 3 as it is was actually written by PHMSA. Thus, the nature and circumstances warrant elimination of the Proposed Civil Penalty, as well as withdrawal of the NOPV.

Further, the gravity of the situation at issue is minimal considering the actual facts of record. The August 25, 2015 leak did not meet the immediate reporting requirements under 49 C.F.R. § 195.52. Rather, Chaparral reported the leak as a matter of business practice. The pressure on the pipeline was returned to pre-leak levels when Chaparral restarted the line on August 26, all in compliance with Part 195. The pipeline was then safely operated without any issues until Chaparral received the CAO. The pipeline was shut down immediately upon Chaparral's receipt of the CAO and was not operated again until Chaparral returned the pipeline to service pursuant to the approved Restart Plan.

In addition, the gravity of the situation is minimized by the nature of the materials transported. As shown in the record of CPF No. 4-2015-5017H, which is incorporated herein by reference, the following statement appears in the Post-Hearing Decision Confirming Corrective Action Order (Oct. 8, 2015): "PHMSA agrees the information presented by [Chaparral] demonstrates CO<sub>2</sub> does not pose the same risk as hazardous liquids that are flammable or toxic. PHMSA notes the pipeline safety regulations in 49 C.F.R. Part 195 define hazardous liquids to include petroleum, petroleum products, anhydrous ammonia, and ethanol, but supercritical CO<sub>2</sub> is not included in that definition." The nature of CO<sub>2</sub> weighs against the gravity of the situation.

The lack of gravity presented by the actual facts pertaining to the NOPV allegation warrants elimination of the Proposed Civil Penalty, as well as withdrawal of the NOPV.

## **B. Culpability, History of Offenses, and Continuation in Business**

PHMSA must consider the degree of culpability and history of prior violations of the company, as well as the effect of the penalty on the company's ability to continue in business. 49 U.S.C. § 60122(b)(1)(B); 49 C.F.R. § 190.225(a)(2),(3) and (5). Although ability to continue in business does not appear to be an issue, and is not noted in the Violation Report, PHMSA did note in the Violation Report (at 7) that the alleged violation was not a repeat violation.

Chaparral also has no culpability in the present matter. Chaparral had no intent to violate the CAO, and followed Corrective Action Item 3 exactly as written by PHMSA. Chaparral had no fair warning that PHMSA would subsequently interpret the language of Corrective Action Item 3 to require a restriction of the operating pressure at the time the CAO was issued rather than prior to the return to service under an approved Restart Plan, as actually written in Corrective Action Item 3. It is clear from Chaparral's good faith actions to comply with the CAO that, had Chaparral been adequately and fairly warned about PHMSA's unstated intention, Chaparral would have complied with PHMSA's directive.

Accordingly, Chaparral's lack of culpability warrants elimination of the Proposed Civil Penalty, as well as withdrawal of the NOPV.

## **C. Good Faith**

PHMSA must consider "good faith in attempting to comply." 49 U.S.C. § 60122(b)(1)(C); 49 C.F.R. § 190.225(a)(1). Chaparral demonstrated the utmost good faith in attempting to achieve compliance with the CAO. Had Chaparral done anything in response to the CAO other than immediately shutting down the pipeline, such as operating the pipeline to implement a pressure restriction, Chaparral would have been in violation of the express terms of Corrective Action Item 1 as written. Accordingly, Chaparral's good faith actions warrant elimination of the Proposed Civil Penalty, as well as withdrawal of the NOPV.

## **D. Economic Benefit**

PHMSA may consider economic benefit gained from an alleged violation. 49 U.S.C. § 60122(b)(2)(A); 49 C.F.R. § 190.225(b)(1). Here, however, Chaparral has incurred only economic losses. Chaparral's business of consistently delivering CO<sub>2</sub> to its customer at the west end of the Coffeyville pipeline was completely shut down as a result of the CAO. It did not matter whether the pipeline was shut down at 896 psig, 1000 psig, or some other number because Chaparral could not continue its business operation. As noted above, Chaparral was purely attempting to comply with the CAO as written by PHMSA. In essence, this economic benefit consideration serves to illustrate the inappropriateness of the NOPV because it would serve no purpose whatsoever for Chaparral to disregard any mandate in the CAO. In fact, Chaparral's business interests were best served by complying with the CAO as intently as possible so as to safely return to service. Unfortunately, the NOPV is based on an expectation that was so vague

as to be indiscernible from Corrective Action Item 3 as written, but that in no way warrants issuing an NOPV to Chaparral.

**E. Justice**

PHMSA may also consider “[s]uch other matters as justice may require.” 49 U.S.C. § 60122(b)(2)(B); 49 C.F.R. § 190.225(b)(2). There would be no justice or equity in fining Chaparral for achieving compliance with Corrective Action Item 3 as directed. The injustice here is grave, considering that PHMSA’s allegation in the NOPV is at odds with the explicit language of Corrective Action Item 3 and is based on impermissible vagueness. Given the potential impact of this matter on Chaparral’s constitutional due process rights, justice requires not only the elimination of the civil penalty but the complete withdrawal or striking of the NOPV.

**V. Conclusion and Relief Sought**

For the reasons set forth above, the NOPV (including Item1, the Proposed Civil Penalty and the Proposed Compliance Order) should be withdrawn or stricken. Notwithstanding the invalidity of the NOPV, the Proposed Civil Penalty must be eliminated or significantly reduced.

Respectfully submitted,

/s/

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Enclosure: Exhibits anticipated to be presented at the March 31 hearing