

September 11, 2021

**Via Federal Express and E-mail (Alan.Mayberry@dot.gov; phmsachiefcounsel@dot.gov)**

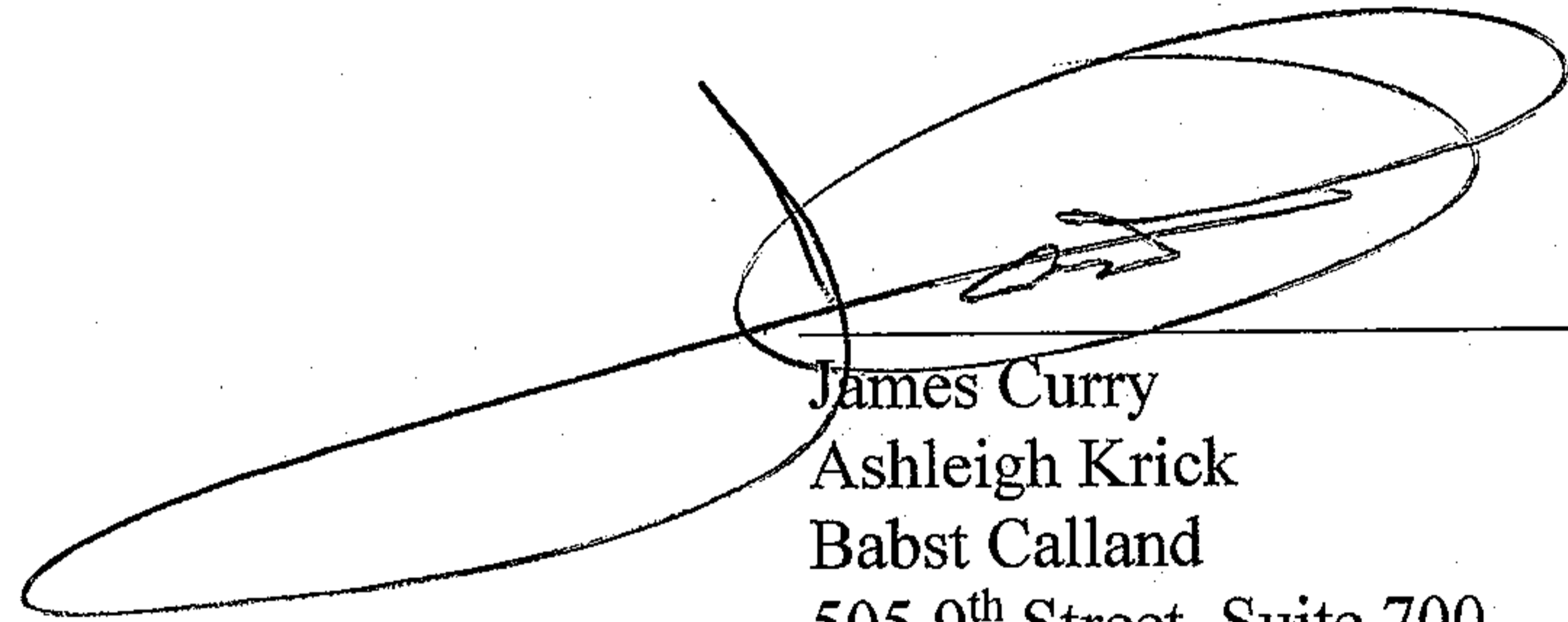
Alan K. Mayberry, P.E.  
Associate Administrator  
U.S. Department of Transportation  
Pipeline and Hazardous Materials Safety Administration  
1200 New Jersey Ave., S.E.  
Washington, D.C. 20590

**Re: CPF No. 3-2020-5021  
Petition for Reconsideration  
Flint Hills Resources, LLC**

Dear Mr. Mayberry:

Pursuant to 49 C.F.R. § 190.243(a), please find attached Flint Hills Resources' Petition for Reconsideration in regard to Item 3 in the above-referenced matter. Please do not hesitate to contact me if you have any questions.

Sincerely,



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Enclosure: Flint Hills Resources, Petition for Reconsideration, September 11, 2021

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

In the Matter of	)	
	)	
Flint Hills Resources,	)	CPF No. 3-2020-5021
	)	
Respondent.	)	
	)	

**PETITION FOR RECONSIDERATION**

Pursuant to 49 C.F.R. § 190.243(a), Flint Hills Resources (FHR or the Company) respectfully submits this Petition for Reconsideration of Item 3 in the August 23, 2021 Final Order in the above-captioned proceeding. In accordance with § 190.243(c), the filing of this petition stays the requirement that FHR pay the \$19,000 civil penalty assessed in the Final Order.

**I. Procedural History**

On December 15, 2020, the Pipeline and Hazardous Materials Safety Administration (PHMSA or the Agency) issued a Notice of Probable Violation and Proposed Civil Penalty (Notice) to FHR. On January 14, 2021, FHR responded to the Notice by filing a written response (Response) contesting the allegation in Item 3 and requesting that PHMSA withdraw the allegation and associated civil penalty. On March 10, 2021, the Central Region submitted its Region Recommendation, and on April 9, 2021, FHR submitted its Response to the Region Recommendation. PHMSA issued the Final Order on August 23, 2021, finding that FHR violated 49 C.F.R. § 195.412 with respect to one of the two locations cited in the Notice and issued a reduced civil penalty of \$19,000 for Item 3.

In accordance with § 190.243(a), a petition of reconsideration of a final order must be received no later than 20 days after receipt of the order by the Respondent. FHR received the Final Order on August 23, 2021. Therefore, this petition is timely.

**II. PHMSA did not Meet its Burden of Proof to Demonstrate a Violation of § 195.412 at the MP 182, Stevens Point, Wisconsin Location.**

FHR respectfully requests that PHMSA reconsider whether the Central Region met its burden of proof regarding the alleged violation of § 195.412 in Item 3 of the Final Order, concerning the MP 182 location. FHR provided arguments in its Responses to the Notice and Region Recommendation that demonstrate PHMSA has not met its burden, or alternatively, demonstrates that PHMSA has not met its burden of persuasion.<sup>1</sup> FHR provides additional detail

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<sup>1</sup> *In the Matter of Bridger Pipeline Co.*, CPF No. 5-2007-5003, Final Order at 1 (Apr. 2, 2009); *In the Matter of Alyeska Pipeline Serv. Co.*, CPF No. 5-2005-5023, Decision on Petition for Reconsideration at 4-5 (Dec. 16, 2009);

and argument here to support a finding that the Central Region has not met its burden of proof in finding a violation of § 195.412 at the MP 182, Stevens Point, Wisconsin location (MP 182 location). FHR did not provide this additional detail earlier because it believed that the evidence in this case demonstrated that PHMSA did not meet its burden of proof.

#### **A. The Burden of Proof for a § 195.412 Violation.**

PHMSA has “the burden of proof, presentation, and persuasion in any enforcement matter.”<sup>2</sup> PHMSA may only find a violation where “the evidence supporting the allegation outweighs the evidence and reasoning presented by Respondent in its defense.”<sup>3</sup> PHMSA has explained that “a performance-based regulation must be carried out in a manner that is effective in achieving the purpose.”<sup>4</sup> And, PHMSA has found that for a performance-based regulation, PHMSA has the added burden of proving why the operator’s method was not effective.<sup>5</sup>

Section 195.412 is a performance-based regulation. It does not specify the types of vegetation, or specific combinations or features of vegetation, that would obscure the right of way such that an aerial patrol would not be an appropriate method of complying with the patrol requirement.<sup>6</sup> The purpose of the patrol requirement, as PHMSA explains in its Operations & Maintenance Enforcement Guidance, is to observe the surface conditions of the right of way for indications of leaks (dead vegetation or product), construction activity (tree clearing or heavy equipment), the presence of any marking flags or paint, storage of material or any unauthorized activities on the right of way, exposed pipe or evidence of earth movement, and damaged or missing line markers, among other factors affecting safety.<sup>7</sup>

Therefore, to meet its burden of proof, PHMSA must introduce evidence and arguments to prove why the level of vegetation at a specific location was excessive enough that aerial patrols

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*Schaffer v. Weast*, 546 U.S. 49, 56 (2005) (citing *Dir., Office of Workers' Comp. Programs, Dep't of Labor v. Greenwich Collieries*, 512 U.S. 267, 272 (1994)).

<sup>2</sup> 49 U.S.C. § 60117(b)(1)(F); 5 U.S.C. § 556(d). *See also In the Matter of CITGO Pipeline Co.*, CPF No. 4-2007-5010, Decision on Reconsideration at 7 (Dec. 29, 2011) (“OPS bears the burden of proof in an enforcement action and must prove, by a preponderance of the evidence, that all of the elements necessary to sustain a violation are present in a particular case.”); *In the Matter of Golden Pass Pipeline LLC*, CPF No. 4-2008-1017, Final Order at 6 n.26 (Mar. 22, 2011) (“Although PHMSA’s enforcement proceedings under 49 C.F.R. Part 190 are not ‘formal adjudications’ under the APA (5 U.S.C. §§ 554 and 556), the Supreme Court has found that the burden of proof in formal adjudications includes the burden of persuasion and that the standard of proof is the preponderance-of-the-evidence standard. (citing *Dir., Office of Workers' Comp. Programs, Dep't of Labor*, 512 U.S. at 276 and *Steadman v. SEC*, 450 U.S. 91, 102 (1981)); *In the Matter of Bridger Pipeline Co.*, CPF No. 5-2007-5003, Final Order at 2 (“PHMSA carries the burden of proving the allegations set forth in the [NOPV]. This includes both the burden of production and the burden of persuasion.”) (footnote omitted).

<sup>3</sup> *In the matter of Butte Pipeline Co.*, CPF No. 5-2007-5008, Final Order at 1 (Aug. 17, 2009).

<sup>4</sup> *In the Matter of Tennessee Gas Pipeline Co.*, CPF No. 1-2018-1001, Final Order at 5 (Nov. 14, 2019)

<sup>5</sup> *See Id.*

<sup>6</sup> *See* PHMSA Letter of Interpretation to Mr. O. L. Birchfield, PI-72-021 (May 26, 1972) (explaining that “[t]he regulations require patrolling of pipelines, but it is the responsibility and choice of the operator as to how this regulation is met.”).

<sup>7</sup> PHMSA, Operations and Maintenance Enforcement Guidance, Part 195 Subpart F at 54-55 (July 21, 2017).

were not effective in meeting the purposes of the patrol requirement.<sup>8</sup> While there will always be a subjective element in judging compliance with § 195.412, PHMSA must assert something more than that the vegetation is excessive. In order to meet its burden, PHMSA must evaluate whether the vegetation at the MP 182 location was so excessive that a pilot could not see potentially harmful activities or conditions affecting safety from the air. As explained more fully below, when analyzed in this way, PHMSA did not meet its burden of proof regarding the right of way at MP 182 because it never established what kinds of activities the pilot was allegedly unable to observe at this location given the nature of the modest vegetation in the right of way.

**B. The Final Order Erred in Finding PHMSA met its Burden of Proof.**

In the Notice, PHMSA alleged that the right of way at the MP 182 location was excessive “ma[king] it impossible to complete effective aerial patrols of the right-of-way.”<sup>9</sup> The only evidence in the record to support the alleged violation is a single photo, provided below, and FHR’s aerial patrol records from 2019.

The Final Order concluded that this single photograph shows “excessive vegetation, specifically brush and overgrown grass” and that “the excessive vegetation is not limited to tree canopy in the background of the photograph, which Respondent claims is not on the right-of-way.”<sup>10</sup> FHR respectfully contends that PHMSA erred in finding that the Central Region met its burden of proof with respect to Item 3 at the MP 182 location. PHMSA never demonstrated why FHR’s aerial patrols were not effective at discharging the purposes of the patrol requirement given the modest vegetation depicted in the photograph. FHR requests that PHMSA reevaluate the available evidence in determining whether PHMSA met its burden.

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<sup>8</sup> *In the Matter of Flint Hills Resources*, CPF No. 3-2020-5021, Final Order at 3 (Aug. 23, 2021); *In the Matter of Plains Pipeline, LP*, CPF No. 4-2016-5015, Final Order at 2 (Mar. 7, 2018); *In the Matter of Buckeye Partners, LP*, CPF No. 1-2015-5001, Final Order at 3 (July 6, 2015); *In the Matter of Colonial Pipeline Co.*, CPF No. 1-2011-5004, Final Order at 2 (Dec. 29, 2011).

<sup>9</sup> NOPV at 2. *See also* Violation Report at 14.

<sup>10</sup> *In the Matter of Flint Hills Resources*, CPF No. 3-2020-5021, Final Order at 4.



**1. The Trees Shown in the Photograph do not Obscure the Right of Way.**

PHMSA’s photograph shows a line-of-sight from the air to the surface of the right of way, with no tree canopy or large bushes that would prevent a pilot from seeing the surface conditions. As previously explained in FHR’s Responses, the trees in the background are not in or covering the right of way. In FHR’s Response to the Notice, the Company provided a satellite photograph in Attachment 7 showing the pipeline route compared to the viewing angle of PHMSA’s photograph.<sup>11</sup> The satellite photograph shows that the trees in the background of PHMSA’s photograph are outside of the right of way, because the pipeline makes a right turn in the midground of the photograph.

PHMSA has failed to demonstrate how the trees shown in the photograph prevented FHR from performing effective aerial patrols, or why they would obscure the pilot’s view of the right of way. These trees are not in the right of way and do not have an overhanging canopy that prevents observation of the right of way by aerial patrol.<sup>12</sup> The photograph does not demonstrate the distance of the trees from the right of way or that the trees where the pipeline changes direction

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<sup>11</sup> FHR Response at 8, Attachment 7.

<sup>12</sup> See *contra In the Matter of Plains Pipeline, LP*, CPF No. 4-2016-5015, Final Order at 2 (finding a violation where “high overgrowth vegetation and large trees with canopies overhanging the ROW” obscured observation of the right of way); *In the Matter of Citgo Pipeline Co.*, CPF No. 4-2007-5010, Final Order at 5 (Apr. 14, 2011) (finding a violation where large tree overhangs formed a canopy over the pipeline that obscured the surface conditions from observation by aerial surveillance).

obscure the right of way. Therefore, PHMSA erred in finding that the trees obscure the right of way. On the other hand, FHR's evidence shows that due to the pipeline route, the trees do not obscure the right of way.

## **2. The Grass Shown in the Photograph does not Obscure the Right of Way.**

PHMSA's photograph also fails to demonstrate how the grass in the photograph obscures the right of way. First, the line marker is clearly visible and not obscured by the grass.<sup>13</sup> Second, the photograph shows modest grass and brush on the right of way behind the line marker, but as explained below, this vegetation is not excessive such that observation of the right of way by aerial patrol would be ineffective. While there is no scale provided in PHMSA's photograph, it certainly appears that the brush and grass behind the line marker is below the height of the marker itself. This modest level of vegetation is not typically cited as the basis for findings of violation in the numerous PHMSA final orders concerning obscured rights of way.<sup>14</sup> For example, in *Colonial Pipeline Co.*, PHMSA found a violation of § 195.412 where areas of dense vegetation and excessive tree canopy obscured pipeline markers, which prevented effective inspection by aerial patrol.<sup>15</sup> Similarly, *Targa Midstream Services LP* involved a violation of § 195.412 where overgrown vegetation obscured pipeline markers making it difficult to determine the pipeline location and route.<sup>16</sup> And other than saying that the vegetation is excessive, PHMSA has failed to demonstrate why grass and small amounts of brush that fall below the height of an ordinary line marker would prevent a pilot from discerning the location of the right of way, or viewing potentially harmful activities or conditions affecting safety.

The activities and conditions listed in PHMSA's O&M Enforcement Guidance could all be viewed at this location from an aerial patrol. For example, any heavy equipment, encroachments, or unauthorized activity on the right of way would not be obscured by the grass or brush because it is not tall enough at any location in PHMSA's photograph to hide heavy equipment, or even people working in the right of way. Similarly, because the grass is not very tall, the pilot would have been able to see if third-party activity, flood, or other occurrence involving ground disturbance had led to exposed pipe. And, evidence of a leak, such as dead vegetation or product in the right of way, would be visible to the pilot because the ground level vegetation is modest in height (again, below the height of the line marker in the photograph).

When this case is evaluated in light of the various purposes of § 195.412, PHMSA has failed to demonstrate how the vegetation at the MP 182 location makes aerial patrols ineffective for observing the surface conditions of the right of way. Therefore, PHMSA did not meet its

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<sup>13</sup> *In the Matter of Colonial Pipeline Co.*, CPF No. 1-2011-5004, Final Order at 2; *In the Matter of Targa Midstream Servs. LP*, CPF No. 4-2007-5048, Final Order at 3-4 (Apr. 2, 2010); *In the Matter of ConocoPhillips Pipe Line Co.*, CPF No. 4-2008-5011, Final Order at 2 (Dec. 17, 2009).

<sup>14</sup> *See, e.g., In the Matter of Colonial Pipeline Co.*, CPF No. 1-2011-5004, Final Order at 2; *In the Matter of ConocoPhillips Pipe Line Co.*, CPF No. 4-2008-5011, Final Order at 2; *In the Matter of Targa Midstream Servs. LP*, CPF No. 4-2007-5048, Final Order at 3-4.

<sup>15</sup> *In the Matter of Colonial Pipeline Co.*, CPF No. 1-2011-5004, Final Order at 2.

<sup>16</sup> *In the Matter of Targa Midstream Servs. LP*, CPF No. 4-2007-5048, Final Order at 3-4.

burden in proving a violation of § 195.412 for this location, and the Final Order errs in finding that it did.

### **3. PHMSA Did not Meet its Burden of Persuasion.**

PHMSA also did not meet its burden of persuasion. The Final Order erred in finding that FHR's proffered evidence in its Response was unpersuasive. The Final Order should have assigned more weight to the pilot's affidavit, pilot's report and photographs of the right of way nearby with downed trees, and photograph showing the approximate view angle of PHMSA's photograph. When addressed together, PHMSA's lack of explanation for why the vegetation would prevent effective aerial patrol, and FHR's evidence and arguments, show that the vegetation did not impede an effective aerial patrol. FHR's evidence also shows that if vegetation had prevented an effective aerial patrol, the pilot was capable of and would have documented that finding. FHR's evidence counters, and is not outweighed by, PHMSA's single photograph. Therefore, the Final Order erred in finding that PHMSA proved by a preponderance of the evidence that a violation occurred.<sup>17</sup>

### **III. Policy Implications.**

The Final Order creates substantial policy concerns and uncertainty regarding the continued ability of pipeline operators to use aerial patrols to inspect rights of way that contain grass and brush. Without clarification of the standard of proof for a right of way violation, as articulated above, operators may be forced to unnecessarily curtail their aerial patrol programs, or substantially change their right of way clearing programs.

If the Final Order stands, it suggests that any amount of grass and brush, which PHMSA merely asserts are excessive, would render aerial patrols ineffective. This is not a reasonable standard subject to fair and consistent application because it relies entirely on PHMSA's subjective judgments. While some subjectivity is appropriate, in exercising it PHMSA should also be required to engage in an assessment of the purposes of § 195.412 to determine whether any of the typical activities and threats to pipelines are viewable from the air given the height and nature of the vegetation. A purely subjective approach, without these additional considerations around regulatory purpose, would be arbitrary and capricious.

### **IV. Conclusion**

For the reasons set forth in this Petition for Reconsideration of Item 3, FHR respectfully requests that PHMSA withdraw Item 3 in its entirety and the associated \$19,000 civil penalty. In accordance with § 190.243(c), the filing of this petition stays FHR's payment of the \$19,000 civil penalty assessed in the Final Order. FHR requests that PHMSA notify the FAA that the penalty is stayed in this matter.

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<sup>17</sup> *In the Matter of Alyeska Pipeline Serv. Co.*, CPF No. 5-2005-5023, Decision on Petition for Reconsideration at 4 (citing Schaffer, 546 U.S. at 56-58).