

January 4, 2021

VIA ELECTRONIC MAIL TO: barry.davis@enlink.com

Mr. Barry E. Davis
Chairman and Chief Executive Officer
EnLink Midstream, LLC
1722 Routh Street
Suite 1300
Dallas, Texas 75201

Re: CPF No. 4-2020-5006

Dear Mr. Davis:

Enclosed is the Decision on the Petition for Reconsideration issued in the above-referenced case. For the reasons explained therein, the Decision grants your Petition in part, affirms Item 1 of the July 27, 2020 Final Order, and issues an Amended Compliance Order. When the terms of the Amended Compliance Order have been completed, as determined by the Director, Southwest Region, this enforcement action will be closed. Service of this Decision by electronic mail is effective upon the date of transmission as provided under 49 C.F.R. § 190.5.

This Decision constitutes the final administrative action in this proceeding.

Thank you for your cooperation in this matter.

Sincerely,

Alan K. Mayberry
Associate Administrator
for Pipeline Safety

Enclosure

cc: Ms. Mary McDaniel, Director, Southwest Region, Office of Pipeline Safety, PHMSA
Mr. William V. Murchison, Counsel, Murchison Law Firm, PLLC
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CONFIRMATION OF RECEIPT REQUESTED

**U.S. DEPARTMENT OF TRANSPORTATION
PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMINISTRATION
OFFICE OF PIPELINE SAFETY
WASHINGTON, D.C. 20590**

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In the Matter of)		
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EnLink Midstream, LLC,)	CPF No. 4-2020-5006	
)		
Respondent.)		
)		

DECISION ON PETITION FOR RECONSIDERATION

From February through July 2019, pursuant to 49 U.S.C. § 60117, a representative of the Pipeline and Hazardous Materials Safety Administration (PHMSA or Agency), Office of Pipeline Safety (OPS), conducted an on-site pipeline safety inspection of the facilities and records of EnLink Midstream, LLC (EnLink or Petitioner) in Lafayette, Louisiana and Dallas, Texas. As a result of the inspection, the Director, Southwest Region, OPS (Director), issued to Petitioner, by letter dated February 18, 2020, a Notice of Probable Violation and Proposed Compliance Order (Notice). In accordance with 49 C.F.R. § 190.207, the Notice proposed finding that EnLink had violated 49 C.F.R. § 195.452 and proposed ordering Petitioner to take certain measures to correct the alleged violation. EnLink responded to the Notice by letter dated March 16, 2020 (Response) contesting the allegation and offering additional information. EnLink did not request a hearing and therefore has waived its right to one.

On July 27, 2020, pursuant to 49 U.S.C. §§ 60118 and 60122 and 49 C.F.R. § 190.213, the Associate Administrator for Pipeline Safety (Associate Administrator) issued a Final Order finding that Petitioner had committed a violation of 49 C.F.R. § 195.452 with respect to its integrity management program (IMP). The Final Order found that Petitioner had failed to evaluate certain preventative and mitigative measures (P&M Measures) to protect a high consequence area (HCA) in its IMP.

Pursuant to the authority of 49 U.S.C. § 60118(b) and 49 C.F.R. § 190.217, the Final Order also included a Compliance Order that required Petitioner to perform an emergency flow restricting device (EFRD) study, including consideration of the factors listed in § 195.452(i)(4). The Final Order did not assess a civil penalty for the violation.

On August 20, 2020, Petitioner filed a petition for reconsideration pursuant to 49 C.F.R. § 190.243 (Petition).¹ In its Petition, EnLink sought reconsideration of the entire Final Order, including the finding of violation and the terms of the Compliance Order.

Section 190.243 allows a respondent to petition the Associate Administrator for reconsideration of a final order that has been issued pursuant to § 190.213. Reconsideration is not an appeal or a completely new review of the record. A respondent may ask for correction of an error or, in limited circumstances, may present previously unavailable information. If a respondent requests consideration of additional facts or arguments, the respondent must submit the reasons they were not presented prior to the issuance of the final order. Repetitious information or arguments will not be considered.² The Associate Administrator may grant or deny, in whole or in part, a petition for reconsideration without further proceedings.

In its Petition, Petitioner presents several grounds for reconsideration. First, Petitioner contends that it did not violate § 195.452(f)(6) as found in the Final Order. Second, Petitioner contends that the Final Order improperly applied the standard of conduct required by the regulation. Third, Petitioner contends that PHMSA did not provide fair notice of the compliance expectations under the cited regulations. Fourth, Petitioner contends PHMSA did not “carry the burden of proof.” Last, Petitioner contends that the Compliance Order should be withdrawn because it is ambiguous and impermissibly broad. This Decision carefully considers and addresses each of Petitioner’s contentions in turn.

I. Finding of Violation

Petitioner contends it did not violate § 195.452(f)(6), based on its reading of the regulation. First, I consider the text of the regulation itself and its plain meaning. Then I consider whether the Final Order was correct in deciding that the evidence supports the finding in the Final Order that Petitioner violated § 195.452(f)(6).

a. Analysis of 49 CFR § 195.452(f)(6)

Item 1 in the Final Order found that EnLink had violated § 195.452(f)(6) by failing to identify P&M Measures to protect an HCA in its IMP. That section states:

§ 195.452 Pipeline integrity management in high consequence areas.

(a) ...

(f) *What are the elements of an integrity management program?* An integrity management program begins with the initial framework. An operator must continually change the program to reflect operating

¹ On August 11, 2020, the Associate Administrator granted EnLink additional time to file a petition for reconsideration.

² Plains All American Pipeline, LP, CPF No. 5-2009-00118, 2013 WL 5883403, at *3 (Aug. 30, 2013).

experience, conclusions drawn from results of the integrity assessments, and other maintenance and surveillance data, and evaluation of consequences of a failure on the high consequence area. An operator must include, at minimum, each of the following elements in its written integrity management program: . . .

(6) Identification of preventive and mitigative measures to protect the high consequence area (see paragraph (i) of this section); . . .

(i) *What preventive and mitigative measures must an operator take to protect the high consequence area?*—(1) *General requirements.* An operator must take measures to prevent and mitigate the consequences of a pipeline failure that could affect a high consequence area. These measures include conducting a risk analysis of the pipeline segment to identify additional actions to enhance public safety or environmental protection. Such actions may include, but are not limited to, implementing damage prevention best practices, better monitoring of cathodic protection where corrosion is a concern, establishing shorter inspection intervals, installing EFRDs on the pipeline segment, modifying the systems that monitor pressure and detect leaks, providing additional training to personnel on response procedures, conducting drills with local emergency responders and adopting other management controls.

(2) *Risk analysis criteria.* In identifying the need for additional preventive and mitigative measures, an operator must evaluate the likelihood of a pipeline release occurring and how a release could affect the high consequence area. This determination must consider all relevant risk factors, including, but not limited to:

(i) Terrain surrounding the pipeline segment, including drainage systems such as small streams and other smaller waterways that could act as a conduit to the high consequence area;

(ii) Elevation profile;

(iii) Characteristics of the product transported;

(iv) Amount of product that could be released;

(v) Possibility of a spillage in a farm field following the drain tile into a waterway;

(vi) Ditches alongside a roadway the pipeline crosses;

(vii) Physical support of the pipeline segment such as by a cable suspension bridge;

(viii) Exposure of the pipeline to operating pressure exceeding established maximum operating pressure;

(ix) Seismicity of the area.

(3) *Leak detection.* An operator must have a means to detect leaks on its pipeline system. An operator must evaluate the capability of its leak detection means and modify, as necessary, to protect the high consequence area. An operator's evaluation must, at least, consider, the following factors—length and size of the pipeline, type of product carried, the pipeline's proximity to the high consequence area, the swiftness of leak detection, location of nearest response personnel, leak history, and risk

assessment results.

(4) *Emergency Flow Restricting Devices (EFRD)*. If an operator determines that an EFRD is needed on a pipeline segment to protect a high consequence area in the event of a hazardous liquid pipeline release, an operator must install the EFRD. In making this determination, an operator must, at least, consider the following factors—the swiftness of leak detection and pipeline shutdown capabilities, the type of commodity carried, the rate of potential leakage, the volume that can be released, topography or pipeline profile, the potential for ignition, proximity to power sources, location of nearest response personnel, specific terrain between the pipeline segment and the high consequence area, and benefits expected by reducing the spill size.

Section 195.452(f) requires operators of pipelines that could affect an HCA to create a written IMP that the operator must “continually change the program” to reflect operating experience; conclusions drawn from results of the integrity assessments and other maintenance and surveillance data; and evaluation of the consequences of a failure on HCAs. Section 195.452(f)(6), in particular, requires that operators include identification of P&M Measures to protect HCAs in their written integrity management programs. Section 195.452(f)(6) specifically refers to § 195.452(i) for the requirements regarding identifying and taking such P&M Measures.

As quoted above, § 195.452(i) requires operators to conduct three analyses regarding the identification of necessary P&M Measures. First, § 195.452(i)(1) contains the general requirement to take P&M Measures to prevent and mitigate the consequences of a pipeline failure that could affect an HCA, as well as the requirement to conduct a risk analysis of pipeline segments to identify actions to enhance public safety or environmental protection. Subparagraph (i)(2) lists the risk analysis criteria that an operator must use in identifying the need for any additional P&M Measures that the operator has not already implemented on a line that could affect an HCA. Second, subparagraph (i)(3) requires operators of pipelines that could affect HCAs to have a means to detect leaks on its pipeline system and requires that operators consider a different set of criteria to determine the capability of the leak detection system to protect each HCA. Third, subparagraph (i)(4) requires operators to determine whether EFRDs are needed on a pipeline segment to protect an HCA in the event of a hazardous liquid pipeline release. This subparagraph lists still another set of 10 specific factors that an operator must at least consider when determining the need for EFRDs. Each of these analyses is set forth in a separate subparagraph of § 195.452(i), indicating they are distinct requirements.

The Petition centers on the notion that operators must perform the EFRD analysis pursuant to § 195.452(i)(4) *only if* the general risk analysis provided at § 195.452(i)(1) and (2) first identifies a need for additional P&M Measures. This interpretation, however, is inconsistent with the plain

language of the regulation.³ A close reading of the regulation reveals nothing in the text of the regulation that indicates that either the evaluation of leak detection systems or the analysis of the need for EFRDs are contingent on the results of the general risk analysis conducted pursuant to § 195.452(i)(1) and (2).

In fact, if one considers the entire text and structure of § 195.452(i) as a whole, it is evident that one must read the whole paragraph in its entirety to be applied properly and that one cannot pick and choose the individual words or subparagraphs to fit one's own ends.⁴ PHMSA's integrity management program for hazardous liquid pipelines is contained entirely within § 195.452, so the constituent parts of that section should be read holistically to properly interpret the purpose and meaning of individual paragraphs and subparagraphs. The alleged violation here revolves entirely around the concept of P&M Measures that pipeline operators must consider periodically,⁵ taking into account constantly changing circumstances to determine what additional protections they should develop and implement "to prevent and mitigate the consequences of a pipeline failure that could affect a high consequence area."⁶ Nowhere in § 195.452 does one find a single instance where any one particular P&M Measure is prescribed, including EFRDs; instead, we find that operators are required to follow prescribed analytical *processes* that consider specific factors in order to develop and implement their own unique P&M Measures to prevent and mitigate releases. It is not a particular result that is generally prescribed, but, rather, a process by which a valid result can be achieved and documented.

Here, the structure of paragraph (i) is particularly telling. The paragraph is titled: *(i) What preventive and mitigative measures must an operator take to protect the high consequence area?* What follows are four subparagraphs that must be read individually in order to understand how they fit together. Subparagraph (1) sets forth the general requirements, which includes a "risk analysis" of the relevant pipeline segment to identify additional P&M Measures designed "to enhance public safety or environmental protection." One of these measures is the possible installation of EFRDs. Subparagraph (2) then lists the set of minimum criteria or factors that must be employed to determine whether additional measures are needed, aimed at the unique physical characteristics of a particular segment and its operation.

³ See *Statewide Bonding, Inc. v. U.S. Dep't of Homeland Sec.*, 980 F.3d 109, 116 (D.C. Cir. 2020) ("Where [] an agency's regulation is unambiguous, the court must give effect to the regulation's plain meaning."); *Kisor v. Wilkie*, 139 S.Ct. 2400, 2415 (2019) (explaining that to determine whether a regulation is ambiguous, "a court must 'carefully consider' the text, structure, history and purpose of a regulation...."). See also, *Gen. Elec. Co. v. U.S. E.P.A.*, 53 F.3d 1324, 1329 (D.C. Cir. 1995), as corrected (June 19, 1995) ("[W]e must ask whether the regulated party received, or should have received, notice of the agency's interpretation in the most obvious way of all: by reading the regulations.").

⁴ See *Statewide Bonding* 980 F.3d at 117, ("A basic principle of statutory and regulatory interpretation is that the statute or regulation should be read in context.").

⁵ The concept of periodic integrity assessments of an operator's pipeline system and its IM program is intrinsic to 49 C.F.R. § 195.452. For more details, see § 195.452(f) and (j).

⁶ 49 C.F.R. § 195.452(i)(1).

A separate required element in this overall consideration of P&M Measures is leak detection, which is an important process for the timely detection of oil spills. Subparagraph (3), entitled “*Leak detection*,” requires that every operator with pipeline segments that could affect a HCA “must have a means to detect leaks on its pipeline system.” It does not mandate a particular method of leak detection, but provides that the “means” chosen must be based on an evaluation of the capability of the operator’s leak detection system, considering certain specific factors. The subparagraph dictates that an operator must be able to show that the *process* used to evaluate and use a particular leak-detection system has considered certain specific factors.

A similar requirement is found in subparagraph (4), entitled “*Emergency Flow Restricting Devices (EFRD)*.” This subparagraph is even less prescriptive than the preceding subparagraph on leak detection and does not dictate that an operator employ EFRDs at all. On the contrary, it merely requires every operator with pipeline segments that could affect HCAs to determine whether EFRDs are needed, based on the actual consideration of 10 specific factors (see regulation cited above).

The regulatory history of 49 CFR § 195.452(i) also supports the textualist reading outlined above. In July 1994, Congress specifically required PHMSA to prescribe standards for the use of EFRDs to minimize product releases from hazardous liquid pipeline facilities.⁷ Pursuant to that mandate, PHMSA issued a Notice of Proposed Rulemaking (NPRM)⁸ seeking public comments on the use of EFRDs in high-risk areas. In December 2000, publication of § 195.452(i) codified the Congressional mandate that PHMSA require operators to evaluate the specific need for EFRDs on their systems. The preamble to the Final Rule, by which § 195.452(i) was promulgated,⁹ states:

Another protective measure the rule identifies is for an operator to install an EFRD on the pipeline segment. The final rule does not prescribe the specific conditions under which EFRDs or other preventative and mitigative measures are required. Rather, the final rule requires an operator to develop and apply risk assessment and decision-making processes that reflect pipeline-specific conditions and operating environments.

The preamble to the Final Rule supports a plain language reading of the regulatory text, that operators of pipelines that could affect HCAs must follow a defined process to make a

⁷ 49 USC 60102(j) states that the Secretary of DOT “shall prescribe standards on the circumstances under which an operator of a hazardous liquid pipeline facility must use an emergency flow restricting device or other procedure, system, or equipment described in paragraph (1) of this subsection on the facility.”

⁸ Pipeline Safety: Pipeline Integrity Management in High Consequence Areas, Notice of Proposed Rulemaking, 65 FR 21695 (April 24, 2000).

⁹ Pipeline Integrity Management in High Consequence Areas (Hazardous Liquid Operators With 500 or More Miles of Pipeline) (Final Rule), 65 Fed. Reg. 75378 (Dec. 1, 2000) (codified at 49 C.F.R. §§ 195.450-195.452).

determination regarding whether EFRDs are needed on their systems to minimize product releases from hazardous liquid facilities. The preamble explains the process that must be followed in making this determination:

The rule also specifies factors that an operator must consider in making this determination. OPS will review during inspection *the adequacy of the analysis and the appropriateness of the operator's decision* on the need to install an EFRD (emphasis added).¹⁰

In its Petition, EnLink repeatedly contends that the Notice and Final Order misinterpret and misapply § 195.452(f)(6) and (i)(4). Petitioner argues that the analysis required by § 195.452(i)(4) only needs to be completed if the analysis required by § 195.452(i)(1) and (2) identify a need for additional P&M Measures. This interpretation of the regulations, however, is inconsistent with the plain language and context of the regulation, which clearly indicate that operators must determine, *based on a specific set of criteria*, whether additional EFRDs are necessary on their pipeline system. As discussed above, the plain language of the regulations requires operators to conduct three separate analyses regarding the identification of necessary P&M Measures, each with separate subparagraphs of § 195.452(i), indicating they are distinct requirements. The EFRD analysis has a separate set of specific criteria from the general risk analysis criteria that must be considered in making the determination regarding the need for EFRDs. The factors relevant to the need for EFRDs are in § 195.452(i)(4), not under § 195.452(i)(1) and (2), so the general risk analysis required under (i)(1) and (2) would not be effective or sufficient in evaluating the need for EFRDs.

In summary, neither the regulatory text nor the preamble to the Final Rule supports Petitioner's interpretation of § 195.452(i)(4). In fact, Petitioner attempts to subvert the required EFRD analysis by construing the regulation as a sequence of events and concluding that its conduct was sufficient to complete the sequence. However, the regulation plainly sets out a list of individual analyses, each of which must be completed to achieve compliance. The Petitioner's proposed procedure is simply not reflected in the text of the regulations. On the contrary, the text and structure of § 195.452(i) itself, as well as the language in the statute and regulatory measures describing the leak detection and EFRD analyses, provide that operators must evaluate their systems in light of two unique sets of factors pursuant to § 195.452(f)(6) and (i)(3) and (4).

As discussed in more detail in Section III below, subsequent guidance published by PHMSA on this regulation, as well as enforcement actions issued by the Agency based on violations of § 195.452(f)(6) and (i)(4), show that PHMSA has consistently applied this plain language reading of the regulation.

¹⁰ 65 Fed. Reg. at 75393.

b. Evidence and Finding of Violation

The Final Order found that Petitioner violated § 195.452(f)(6) by failing to identify P&M Measures to protect a HCA in its IMP. Specifically, the Order found that Petitioner failed to determine if EFRDs were needed on its Cajon Sibon NGL Pipeline System in accordance with § 195.452(i)(4), which is incorporated into § 195.452(f)(6). As discussed in the Final Order, EnLink admitted that it did not conduct an EFRD analysis specific to determining whether additional EFRDs were needed on the IP-1000 segment of the Cajon Sibon NGL Pipeline System. In its Response, EnLink stated that “[t]he need for additional EFRD analysis was evaluated but not recommended since these lines were identified to be most affected by the Third Party threat.”¹¹

Further, as noted above, there is no documentary evidence showing that EnLink actually performed the required EFRD analysis. EnLink submitted a blank copy of its LIMP Form 108, titled “EFRD Evaluation Form.” This form outlines the factors listed in § 195.452(i)(4) that are supposed to be used for determining whether EFRDs are needed, but it was not completed by EnLink. In its Response and in the Petition, EnLink cites to an entirely different form, LIMP Form 106, to argue that it complied with the regulations; however, the LIMP Form 106 also does not reflect any analysis of the factors listed in § 195.452(i)(4).¹² The form instead indicates simply that “further EFRD/Leak Detection Evaluation” was not recommended.¹³ In other words, EnLink’s own admissions and documents show that EnLink used the risk analysis process that is used for a general assessment of the need for additional P&M Measures as a short-cut or substitute for performing the required EFRD analysis.

Accordingly, the evidence, including EnLink’s own admissions and records, clearly supports the finding in the Final Order that EnLink did not evaluate the need for additional EFRDs on the IP-1000 segment in accordance with § 195.452(f)(6).

EnLink’s Response and Petition also contend that EnLink considered the factors listed under § 195.452(i)(4) while conducting the general risk analysis for the IP-1000 segment, and therefore, it complied with the regulations.¹⁴ EnLink, however, has never been able to produce, either during the inspection, in its Response, or with its Petition, any evidence that it evaluated all of the factors listed in § 195.452(i)(4).¹⁵ EnLink’s Response discussed the factors, but the

¹¹ Petitioner’s Response to the Notice (Response), at 4-5.

¹² *Id.*, at 15.

¹³ *Id.*

¹⁴ Response, at 2; Petitioner’s Petition for Reconsideration (Petition), at 13.

¹⁵ Section 195.452(l)(1)(ii) requires operators to keep records to demonstrate compliance with the integrity management regulations, including “documents to support the decisions and analyses, including any modifications, justifications, deviations and determinations made, variances, and actions taken, to implement and evaluate each

supporting documentation only included a blank copy of LIMP Form 108, graphs of liquid volume release, a risk table for the IP-1000 System, the LIMP Form 106, and other apparent outputs from its risk model, none of which shows that EnLink considered the required factors, including swiftness of leak detection and pipeline shutdown capabilities, the potential for ignition, proximity to power sources, location of nearest response personnel, or specific terrain between the pipeline segment and the HCA. The Petition listed the factors that EnLink ostensibly evaluated as part of its IM program, but several factors required under § 195.452(i)(4), noted above, were not included. Even if the regulations could be interpreted to allow one analysis that evaluates all of the factors listed in § 195.452(i)(1) through (4) together, as Petitioner argues, EnLink would still be in violation of the code since the evidence shows EnLink did not evaluate all of the factors required by § 195.452(i)(4).

Finally, in its Petition, EnLink contends that it fulfilled the requirements of § 195.452(f)(6) because it demonstrated that its IMP identified P&M Measures to protect the HCAs.¹⁶ Petitioner argues, on this basis alone, that the finding of violation in the Final Order and the Compliance Order should be withdrawn.¹⁷ As discussed above, § 195.452(f)(6) *includes* the EFRD process outlined in paragraph (i) for how an operator must identify and implement necessary P&M Measures and conduct a separate EFRD analysis under subparagraph (i)(4). Simply listing P&M Measures and ignoring the requirements in § 195.452(i)(4), which is clearly and plainly referenced by § 195.452(f)(6), is not sufficient to comply with the entirety of the regulation.¹⁸ Here, it is appropriate to find Petitioner violated § 195.452(f)(6) since paragraph (f)(6) requires the completion of paragraph (i) in its entirety.¹⁹

For the above reasons, I affirm the finding in the Final Order that Petitioner violated the pipeline safety regulations by not conducting an EFRD analysis, in violation of § 195.452(f)(6). This Decision further clarifies the violation is based on EnLink's failure to conduct the EFRD analysis on the IP-1000 segment, rather than for the entire Cajun Sibon NGL Pipeline System, as discussed in more detail in Section V below. Having addressed the fundamental questions of the

element of the integrity management program listed in paragraph (f) of this section." EnLink provided no records to demonstrate compliance.

¹⁶ Petition, at 8.

¹⁷ *Id.*

¹⁸ The Petition itself acknowledges that at least some of paragraph (i) must be completed. Petition, at 6-7, 12.

¹⁹ EnLink's IMP reflects a process that is not consistent with the regulations. EnLink's LIMP Form 108 states: "Triggering events for EFRD evaluations include follow-up to P&M evaluation or other event that in the judgment of the IMP Team Chairman necessitates additional EFRD analysis." EnLink's LIMP Form 106 allows personnel to "make a recommendation to perform/not perform leak detection and EFRD evaluations." EnLink's IMP process therefore is not in accordance with § 195.452(i)(4) because it makes the EFRD analysis and evaluation of the factors in subparagraph (i)(4) contingent on the results of the general risk analysis or at the discretion of EnLink personnel. EnLink's IMP, which applies to all of EnLink's hazardous liquid lines subject to § 195.452, is not consistent with the requirements of the regulations.

regulation's requirements and evidence proving EnLink violated the regulation, I now turn to the remaining arguments presented in the Petition.

II. Standard of Conduct

a. Use of Word "Properly" in the Final Order

Petitioner alleges that the Final Order applied a standard of conduct different than what was alleged in the Notice, and therefore, violated Petitioner's right to due process because Petitioner did not have adequate notice of that standard of conduct and constitutes an arbitrary and capricious agency action. Petitioner argues that the statement in the Final Order that EnLink "did not properly determine if EFRDs were needed on its Cajun Sibon NGL Pipeline System to protect HCAs" constituted a heightened standard of conduct and that Petitioner was not given fair notice of this standard.

I disagree. The only standard by which Petitioner's conduct has been judged during this proceeding is the plain language of the regulation. The Notice alleged that "EnLink failed to implement a process for the evaluation, identification, and implementation of preventative and mitigative measures to protect the HCAs of its pipeline system as required by § 195.452(f)(6) and § 195.452(i)(4)."²⁰ The Final Order likewise found the Petitioner "violated § 195.452(f)(6) by failing to identify P&M Measures to protect a high consequence area in its IMP."²¹ The Final Order also stated, EnLink "did not properly determine if EFRDs were needed on its Cajun Sibon NGL Pipeline System to protect HCAs."²² Use of the word "properly" did not create some new standard, as Petitioner claims, but rather described Petitioner's failure to follow the regulation. The Merriam-Webster dictionary defines "properly" to mean "in an accurate or correct way."²³ Use of the term was appropriate in describing Petitioner's violation of § 195.452(i)(4). By its own admission, Petitioner failed to conduct an EFRD evaluation and the evidence proved that it failed to evaluate the factors required to be considered at § 195.452(i)(4). Thus, Petitioner failed to accurately or correctly determine if EFRDs were needed as required by the regulation. Since this language was entirely appropriate, its usage can hardly be said to violate Petitioner's right to due process or that it constitutes some sort of arbitrary and capricious action. Accordingly, this argument is rejected.

b. Application of the Regulations

²⁰ Notice of Probable Violation and Proposed Compliance Order (Notice), at 3.

²¹ Final Order and Compliance Order (Final Order), at 2.

²² *Id.*, at 2.

²³ Properly, Merriam-Webster.com Dictionary, Merriam-Webster, <https://www.merriam-webster.com/dictionary/properly> (last visited Nov. 16, 2020).

Petitioner next argues that the Final Order is deficient because it: imposes a new standard by “misapplying” the regulations; bases its finding “upon an erroneous interpretation of its own regulations”; and applies an “*ad hoc* re-interpretation of its own regulations,” constituting an arbitrary and capricious agency action.²⁴ Petitioner bases these arguments again on its contention that the regulation does not require operators to perform an EFRD analysis pursuant to § 195.452(i)(4) because it “requires only that an operator determine whether additional preventative and mitigative measures are needed by way of the risk analysis performed pursuant to [§ 195.452(i)(1) and (2)].”²⁵ As explained in detail in Section I, Petitioner’s argument regarding the construction of §§ 195.452(f)(6) and (i)(1), (2), and (4) is refuted by the plain language of the regulation, and is not supported by any Agency statements on the regulations, including those made in the preamble to the Final Rule when the regulation was first promulgated. Therefore, PHMSA did not misapply or “re-interpret” its regulations in finding that EnLink violated § 195.452(f)(6).

Petitioner makes several other arguments that are equally unpersuasive. First, Petitioner argues that § 195.452 does not require operators to install P&M Measures or EFRDs. I find this argument irrelevant. The Final Order never determined that Petitioner violated the regulations by failing to install any P&M Measure that should have been installed. In fact, it is not possible to know if EFRDs are needed on Petitioner’s pipeline to protect the HCA until the operator has performed the specific analysis required by § 195.452(i)(4). The Compliance Order does not require the operator to install any P&M Measure at all to come into compliance with the regulations, but rather requires the completion of a distinct EFRD analysis that considers all the factors enumerated in subparagraph (i)(4).

Second, Petitioner argues that § 195.452(i)(4) only requires operators to “consider” the factors listed and does not require operators to install EFRDs. Again, there is no statement in the Notice, Final Order, or Compliance Order that alleges Petitioner was required to install EFRDs. All of the actions are based on the requirement to conduct the EFRD analysis outlined in § 195.452(i)(4).

c. Agency Intent

Petitioner next argues that PHMSA “intended” for the requirement to conduct an EFRD analysis pursuant to § 195.452(i)(4) to be contingent on the results of the risk analysis conducted pursuant to § 195.452(i)(1) and (2).²⁶ Petitioner’s interpretation again is refuted by the plain language of

²⁴ Petition, at 10-12.

²⁵ *Id.*, at 10-14.

²⁶ Petitioner also contends that, from a policy perspective, PHMSA has “misdirected” the application of § 195.452(i)(4) since circumstances have supposedly changed since the regulation was first promulgated in 2000, approximately 13 years before EnLink’s pipeline was commissioned. “Newly designed systems,” Petitioner argues, all address EFRDs in system designs so no additional EFRDs would need to be added to these systems at a later time. I disagree. By its terms, § 195.452(i)(4) applies equally to pipelines such as EnLink’s that may have been

the regulations and is not supported by any statement made by the Agency, including those made in guidance documents, which are described in more detail in Section III below.

For the reasons stated in Section I and reiterated again above, Petitioner's interpretation of §§ 195.452(f)(6) and (i) is erroneous and, therefore, I find there is no violation of due process on any of the bases alleged by Petitioner.

III. Fair Notice

Petitioner argues that PHMSA failed to provide Petitioner with "fair notice" of its compliance expectations and, therefore, the findings in the Final Order and Compliance Order constitute an arbitrary and capricious action.²⁷ Petitioner cites to PHMSA guidance regarding § 195.452(i)(4), including the Frequently Asked Questions (FAQs) related generally to § 195.452²⁸ and PHMSA Enforcement Guidance,²⁹ to support Petitioner's argument. For the reasons discussed below, I find that Petitioner had fair notice of the requirements of §§ 195.452(f)(6) and (i), and that neither the Final Order nor the Compliance Order constitutes an arbitrary and capricious action.

In the administrative context, fair notice requires that an agency have stated with "ascertainable certainty what is meant by the standards it has promulgated."³⁰ Thus, if by reviewing the regulations themselves as well as other public statements issued by the agency, a regulated party acting in good faith could identify, with "ascertainable certainty," the standards with which the agency expects parties to conform, then the agency has fairly notified a regulated party of the agency's interpretation.³¹ As discussed in detail in Section I, the plain language of the regulation in this instance is clear and unambiguous that an operator must perform an EFRD analysis that satisfies § 195.452(i)(4). The regulation is not ambiguous and thus the regulation itself provides adequate notice to regulated entities.³² In this case, the regulated party, if acting in good faith,

designed and constructed after the effective date of the regulation, which was March 31, 2001. The regulation clearly applied to Petitioner's pipeline in this case, as intended, and Petitioner's policy argument is purely speculative.

²⁷ Petition, at 15-16.

²⁸ Hazardous Liquid Integrity Management FAQs (HL IM FAQs), *available at* <https://www.phmsa.dot.gov/pipeline/hazardous-liquid-integrity-management/hl-im-faqs> (last accessed November 12, 2020).

²⁹ Hazardous Liquid Integrity Management Enforcement Guidance (HL IM Enforcement Guidance), *available at* https://www.phmsa.dot.gov/sites/phmsa.dot.gov/files/docs/Hazardous_Liquid_IM_Enforcement_Guidance_12_7_2015.pdf (last accessed November 12, 2020).

³⁰ *ExxonMobil Pipeline Co. v. United States Dep't of Transportation*, 867 F.3d 564, 578 (5th Cir. 2017).

³¹ *Id.*, at 578-579, quoting, *Gen. Elec. Co. v. U.S. E.P.A.*, 53 F.3d 1324, 1329 (D.C. Cir. 1995), as corrected (June 19, 1995).

³² *See, Gen. Elec. Co.*, 53 F.3d at 1329 ("[W]e must ask whether the regulated party received, or should have received, notice of the agency's interpretation in the most obvious way of all: by reading the regulations.").

could identify with “ascertainable certainty” the standard the being imposed by simply reading the regulations.

Other public statements made by PHMSA provide further notice to regulated parties of the Agency’s compliance expectations. The statements made in the rulemaking actions related §§ 195.452(f)(6) and (i)(4) support the plain language reading of the regulations, as described above. Petitioner attempts to use PHMSA’s own published guidance on EFRDs to undercut the allegation of violation, arguing that two FAQs and PHMSA’s Enforcement Guidance fail to provide fair notice of the Agency’s own interpretation of §§ 195.452(f)(6) and (i)(4). I have reviewed all three documents and find, in fact, that they *support* a finding here that Petitioner had fair notice of the Agency’s interpretation of the Code. I will discuss each document separately.

First, Petitioner cites HL FAQ 9.7 for the proposition that EFRDs are not needed if a risk analysis under § 195.452(i)(1) shows there is no need for additional P&M Measures.³³ However, FAQ 9.7 makes neither an express statement to this effect nor any implication that an EFRD analysis is somehow contingent on the results of the general risk analysis. It states:

9.7 What preventive and mitigative actions must be taken to protect HCAs?

Operators must conduct risk analyses for the line segments that could affect HCAs. These analyses should identify and evaluate the need for additional preventive and mitigative actions to protect HCAs. The rule does not specify which actions must be taken. A list of some measures which might be taken includes:

- implementing damage prevention best practices,
- enhanced cathodic protection monitoring,
- reduced inspection intervals,
- enhanced training,
- installing EFRDs,
- modifying the systems that monitor pressure and detect leaks,
- conducting drills with local emergency responders, and
- other management controls.

An operator must implement the appropriate preventive and mitigative actions to address the risks unique to each specific line segment or facility.

Petitioner is correct that nothing in § 195.452 requires any operator to install one or more EFRDs or where to place them, but PHMSA has never asserted that it does. In fact, this FAQ is consistent with the plain language of the regulation that notifies operators they must perform *analyses* to determine whether any P&M Measure they have not already implemented is needed.

³³ Petition, at 17.

EFRDs are on the list of possible P&M Measures that operators may need to implement, but nothing in the FAQ can be construed to imply that the separate analysis required by § 195.452(i)(4) is satisfied by completing the analysis required under § 195.452(i)(1) and (2). On the contrary, the regulation singles out EFRDs as being a P&M Measure that requires its own independent analysis.

Second, Petitioner argues that HL IM FAQ 9.2 supports its argument that the decision to install EFRDs is entirely discretionary with each operator. While it is true that EFRDs are one of a menu of P&M options that an operator may select to protect HCAs, it is not unfettered discretion. This is abundantly clear if one reads the entire text of the FAQ:³⁴

9.2 What criteria must an operator use in determining whether emergency flow restricting devices are required to protect HCAs?

Operators must make these determinations using criteria that they define, considering the circumstances of each HCA and the pipeline segments that may affect it. The rule includes specified factors that must be considered in these evaluations. They include:

- the swiftness of leak detection and pipeline shutdown capabilities,
- the type of commodity carried,
- the rate of potential leakage,
- the volume that can be released,
- topography or pipeline profile,
- the potential for ignition,
- proximity to power sources,
- location of nearest response personnel,
- specific terrain between the pipeline and the high consequence area, and
- benefits expected by reducing the spill size.

An operator is required to install an emergency flow restricting device if the operator determines one is needed to protect an HCA. PHMSA Pipeline Safety will be reviewing operator analyses for technical justification and thoroughness. Because of the significant variation in pipeline design and operation, the physical characteristics of the land and waterways near pipelines, and the different nature and location of HCAs, PHMSA Pipeline Safety believes specific EFRD installation criteria are neither desirable nor appropriate.

Contrary to Petitioner's argument, this FAQ makes no statement that could be read to suggest that operators can avoid making a separate EFRD determination by simply conducting a broader,

³⁴ HL IM FAQs, *supra*, note 30.

more generalized risk analysis pursuant to § 195.452(i)(1) and (2). Instead, the FAQ affirms that operators have great flexibility in making the decision whether to install EFRDs, but that decision must consider, at a minimum, all of the factors listed in § 195.452(i)(4).

Third, Petitioner argues PHMSA's HL IM Enforcement Guidance³⁵ supports its argument. Petitioner quotes from the guidance that subparagraph (i)(4) "goes on to describe specific factors that must be considered in the determination of whether or not an EFRD is needed."³⁶ Once again, Petitioner latches on to the word "*considered*" but fails to recognize the rest of the guidance on (i)(4) in that document. The Enforcement Guidance specifically instructs PHMSA inspectors to allege a violation of § 195.452(i)(4) "[i]f an operator performs no evaluation of the need for additional EFRDs, or the evaluation has some inadequacies or deficiencies."³⁷ Finally, this same guidance cites multiple enforcement actions by PHMSA that have applied and reinforced the plain language of the regulation.³⁸ Conversely, EnLink has not cited a single enforcement action under subparagraph (i)(4) that accepts its reading of the Code.

As discussed above, the plain language of the regulation is unambiguous and Petitioner had fair notice of the requirements by reading the text itself. Further, there is no evidence that PHMSA has ever adopted a position consistent with Petitioner's assertion. On the contrary, prior PHMSA enforcement decisions and guidance are consistent with PHMSA's application of the regulation in the present matter. Accordingly, I find that by reviewing the regulations as well as other public statements issued by PHMSA, Petitioner, if acting in good faith, could have identified with "ascertainable certainty" the standards with which PHMSA expected it to conform. Petitioner's contention that it did not have fair notice is therefore rejected.

³⁵ HL IM Enforcement Guidance, *supra*.

³⁶ *Id.*, at 123.

³⁷ *Id.*

³⁸ *E.g.*, Plains Exploration and Production Co., Final Order, C.P.F. No. 5-2004-7002, 2007 WL 1498997, at *3 (May 22, 2007), finding that the operator failed to implement a proper process for determining the placement of EFRDs by relying solely on the original construction design; Buckeye Partners, LP, C.P.F. No. 1-2009-5002, 2012 WL 3144486, at *9-10 (May 30, 2012), finding that the operator failed from 2005 to 2009 to determine whether EFRDs were needed to protect against failures that could affect HCAs along its pipeline; CHS Inc., C.P.F. No. 5-2007-5015, 2008 WL 8430580, at *2 (Aug. 26, 2008), finding the operator failed to complete an evaluation to determine whether additional EFRDs were needed on any segment of its pipeline system; Williams Field Services, C.P.F. No. 4-2006-5027, 2007 WL 1202575, at *1 (Jan. 9, 2007), finding a violation based on the operator failing to perform determinations of the need for EFRDs on the assets currently under their IM program. *See also* DCP Midstream, LP, Final Order, C.P.F. No. 4-2017-5032, 2018 WL 2229416, at *2 (Apr. 12, 2018), finding the operator failed to perform an initial evaluation for determining the placement of EFRDs; ONEOK NGL Pipeline, LLC, Final Order, C.P.F. No. 4-2017-5028, 2018 WL 8058077, at *1-2 (Dec. 12, 2018), finding the operator failed to complete the process to determine if EFRDs were needed on 17 pipeline segments to protect HCAs.

IV. Burden of Proof

Petitioner next argues that “PHMSA fails to carry the burden of proof,” including the “burden of persuasion” and the “burden of production.”³⁹ Petitioner states that PHMSA has “proffered no evidence” regarding any segment other than the IP-1000 segment of the Cajun Sibon NGL Pipeline System, and therefore, PHMSA cannot prove that Petitioner failed to perform any IM actions as to those other segments.

The Violation Report completed by OPS states that PHMSA’s inspection was performed on the Cajon Sibon Pipeline System.⁴⁰ As discussed in Section I above, the Violation Report contains evidence clearly proving the violation of § 195.452(i)(4) for the IP-1000 segment, which is a portion of the Cajun Sibon NGL Pipeline System, so I find that PHMSA has met its burden of proof for this one violation.⁴¹ The Compliance Order, however, did not clearly state whether the corrective actions were meant to apply to the IP-1000 segment alone or the entire Cajun Sibon NGL System. Given that there is no other evidence pertaining to the remainder of EnLink’s larger system, I find that it is appropriate to amend the Compliance Order to specify that the corrective actions apply only to the IP-1000 segment.

V. Compliance Order

Finally, Petitioner argues that the Compliance Order is “ambiguous and impermissibly broad,” is not warranted by the nature of the violation and the public interest, and must be withdrawn because the violation has not been proven.⁴²

Petitioner argues that the Compliance Order is impermissibly broad because it does not specify whether the EFRD study must be performed for the IP-1000 segment or the entire Cajun Sibon Pipeline NGL System. I agree that the Compliance Order should have more clearly articulated the portion of Petitioner’s pipeline system to which it applied. Therefore, an Amended Compliance Order is included with this Decision that applies the corrective actions to Petitioner’s IP-1000 segment, not the entire Cajun Sibon NGL Pipeline System, consistent with Section I, above.

Petitioner also argues that the corrective actions of the Compliance Order are ambiguous because the Order does not explain what is meant by a “study.” The Compliance Order states the Petitioner “must perform an EFRD study. The study must consider the factors listed in

³⁹ Petition, at 18-20.

⁴⁰ Pipeline Safety Violation Report (Violation Report), (February 18, 2020) (on file with PHMSA), at 1.

⁴¹ *Id.*, at 14-17.

⁴² *Id.*, at 20.

§ 195.452(i)(4) to protect current high consequence areas to enhance public safety.” The word “study” in this context is synonymous with an “analysis” or “evaluation.” To clarify any possible ambiguity however, the Amended Compliance Order being issued with this Decision uses the word “analysis” instead of “study.”

Last, Petitioner argues that the Compliance Order is not warranted by the nature of the violation and the public interest, and must be withdrawn because the violation has not been proven in this case. To the contrary, the Compliance Order is warranted by the nature of the violation and the public interest because it directs the Petitioner to correct a violation of the Pipeline Safety Regulations. As discussed in detail in Section I, the evidence supports the finding of violation, but the Compliance Order is amended as set forth below.

AMENDED COMPLIANCE ORDER

The Final Order included a compliance order with respect to Item 1 in the Notice for a violation of 49 C.F.R. § 195.452(f)(6). Under 49 U.S.C. § 60118(a), each person who engages in the transportation of hazardous liquids or who owns or operates a pipeline facility is required to comply with the applicable safety standards established under chapter 601.

For the reasons provided above, the Compliance Order is amended as set forth below.

Pursuant to the authority of 49 U.S.C. § 60118(b) and 49 C.F.R. § 190.217, Petitioner is ordered to take the following actions to ensure compliance with the pipeline safety regulations applicable to its operations:

1. With respect to the violation of § 195.452(f)(6) (Item 1 of the Final Order), Petitioner must perform an EFRD analysis for the IP-1000 segment of the Cajun Sibon NGL Pipeline System. The analysis must consider all of the factors listed in § 195.452(i)(4) to determine whether one or more EFRDs are needed to protect high consequence areas in the event of a hazardous liquid pipeline release.
2. Petitioner must complete Item 1 and submit documentation to the Director within 90 days after receipt of the Decision on the Petition for Reconsideration.

The Director may grant an extension of time to comply with any of the required items upon a written request timely submitted by the Petitioner and demonstrating good cause for an extension.

It is requested (not mandated) that Petitioner maintain documentation of the safety improvement costs associated with fulfilling this Amended Compliance Order and submit the total to the Director. It is requested that these costs be reported in two categories: (1) total cost associated with preparation/revision of plans, procedures, studies and analyses; and (2) total cost associated with replacements, additions and other changes to pipeline infrastructure.

Failure to comply with this Order may result in the administrative assessment of civil penalties not to exceed \$200,000, as adjusted for inflation (49 C.F.R. § 190.223), for each violation for each day the violation continues or in referral to the Attorney General for appropriate relief in a district court of the United States.

VI. Conclusion

For the reasons stated above, the Petition is granted in part and denied in part. This Decision affirms the finding that Petitioner violated § 195.452(f)(6), which incorporates § 195.452(i)(4), by failing to conduct an EFRD analysis for the IP-1000 segment of the Cajun Sibon NGL Pipeline System and issues an Amended Compliance Order to provide clarifications regarding the meaning and scope of the required corrective actions.

This Decision on Reconsideration is the final administrative action in this proceeding.

January 4, 2021

Alan K. Mayberry
Associate Administrator
for Pipeline Safety

Date Issued