

**Before the U.S. Department of Transportation Pipeline and Hazardous Materials Safety
Administration Office of Pipeline Safety
Washington, D.C. 20599**

In the Matter of)	
)	CPF No. 5-2017-6017
ExxonMobil Production Company,)	POST-HEARING STATEMENT
)	
Respondent.)	
)	
)	

This case involves a carbon dioxide sales pipeline located near Kemmerer, Wyoming operated by ExxonMobil Production Company (ExxonMobil). On May 24, 2017, the Pipeline and Hazardous Materials Safety Administration (PHMSA) Western Regional Pipeline Safety Office (Petitioner) issued a Notice of Probable Violation (NOPV) alleging ExxonMobil failed to comply with 49 C.F.R. § 195.446, which addresses pipeline control room management (CRM) procedures. 49 C.F.R. § 195.446 contains multiple subparts covering control room activities, such as fatigue management, training, supervisory control and data acquisition (SCADA), and several others. However, PHMSA did not allege that ExxonMobil violated any specific CRM rule subpart, nor did PHMSA allege any facts regarding the CRM rule subparts and ExxonMobil's CRM procedures. In fact, PHMSA did not investigate whether ExxonMobil's CRM procedures complied with the CRM rule subparts. Instead, PHMSA's NOPV contains a single conclusory allegation that ExxonMobil allegedly did not have or implement written control room management procedures.

ExxonMobil requested a hearing and provided a response with a statement of issues on June 30, 2017. PHMSA's Presiding Official held a hearing on November 8, 2017. At the hearing, PHMSA, which has the burden of proof, presented no testimony or documentary evidence

supporting its contention that ExxonMobil had violated *any* subpart of 49 C.F.R. § 195.446. For this reason, and regardless of the sufficiency of the evidence presented by ExxonMobil, the Presiding Official should rule that PHMSA has failed to sustain its burden of proving a violation of the regulations at issue, and should enter judgment in favor of ExxonMobil. Further, ExxonMobil presented both testimony and supporting documentary evidence that its CRM procedures comply with 49 C.F.R. § 195.446, and that those procedures were implemented at the time of the inspection, and continue to this day. PHMSA did not rebut this testimony.

PHMSA's Western Region now says it will submit a "recommendation for final action" where it will "evaluate" the evidence presented by ExxonMobil at the hearing. To the extent this means that the Western Region intends to critique ExxonMobil's CRM procedures against the regulations, such efforts would violate ExxonMobil's Due Process rights and PHMSA's own procedural regulations. The hearing "gives each party an opportunity to offer facts, statements, explanations, documents, testimony or other evidence that is relevant and material to the issues under consideration. The parties may call witnesses on their own behalf and examine the evidence and witnesses presented by the other party." 49 C.F.R. § 190.211. PHMSA did not do this at the hearing regarding ExxonMobil's compliance with the CRM rule. The regulations do not permit PHMSA to do so now, in a "recommendation for final action," and for good reason. The Fourteenth Amendment to the Constitution, the Pipeline Safety Act, and PHMSA's own procedural regulations expressly protect the Due Process rights of the respondent in a PHMSA enforcement case by providing for a fair hearing where the respondent can confront the allegations, offer any affirmative evidence, and provide rebuttal evidence. That already happened here. Due Process fundamentally prohibits any end run around the hearing rights of

ExxonMobil through a post-hearing “recommendation for final action” that attempts to do what PHMSA did not do in an open hearing.

ExxonMobil’s carbon dioxide pipeline is operated in a failsafe manner, and is controlled as part of an extremely sophisticated control room environment that includes a much larger gas processing plant. ExxonMobil takes seriously the risks that prompted PHMSA to enact the CRM rules, and has extensive procedures in place that comply with those rules. That said, Congress gave PHMSA the authority under 49 U.S.C. § 60137(a), to issue CRM regulations only for operators of a “gas or hazardous liquid pipeline.” The carbon dioxide sales pipeline at Shute Creek is not even subject to § 195.446 because carbon dioxide (CO₂) is not defined in statute or Part 195 of the pipeline safety regulations as a “gas” or a “hazardous liquid.”

Finally, Petitioner failed to bring a timely claim for certain provisions of § 195.446 under the applicable statute of limitations, and no civil penalty is warranted because written and implemented control room management procedures are in place at the Shute Creek facility for the CO₂ sales pipeline and PHMSA has failed to meet its burden of demonstrating non-compliance.

I. Statement of Facts

The Shute Creek CO₂ sales pipeline is downstream of one of the largest carbon dioxide capture plants in the world which has the capacity to capture approximately 365 million cubic feet of carbon dioxide a day—the carbon dioxide equivalent emitted by more than 1.5 million cars.¹ A majority of the CO₂ is not vented to the atmosphere, instead, it is sold to customers who inject the CO₂ for enhanced oil recovery or use it in other industrial capacities. A controller monitors and can remotely operate the Shute Creek CO₂ sales pipeline from a control room

¹ Press Release, ExxonMobil Production Company, ExxonMobil Expands World’s Largest Carbon Capture Plant in Wyoming (Dec. 10, 2010), <http://news.exxonmobil.com/press-release/exxonmobil-expands-worlds-largest-carbon-capture-plant-wyoming>.

located inside the Shute Creek Gas Plant. Hr'g Tr. 26:5-12. The control room not only operates the CO₂ pipeline, but also operates gas plant functions and the Shute Creek Compressor Station which manages flow rates and pressures for the CO₂ pipeline. Hr'g Tr. 19:14-18. Both the Shute Creek Gas Plant and the Shute Creek Compressor Station play an important role in explaining how the Shute Creek CO₂ sales pipeline operates.

i. Shute Creek Gas Plant and Shute Creek Compressor Station

The Shute Creek Gas Plant is a large industrial facility operated by ExxonMobil which separates gas for marketing purposes. Gas is collected upstream from sixteen wells located forty miles north of the facility near LaBarge, Wyoming. Hr'g Tr. 17:16-24. Hydrogen sulfide and a small amount of carbon dioxide are disposed through on-site injection wells while a majority of the carbon dioxide, helium, and methane are separated for sales purposes. Hr'g Tr. 18:4-19:5. Carbon dioxide is separated out in pure form and moved in a low pressure state from the Shute Creek Gas Plant to the Shute Creek Compressor Station approximately two miles east of the facility. Hr'g Tr. 19:6-13. The compressor station compresses the carbon dioxide to approximately 2,400 pounds per square inch before it is introduced into the Shute Creek CO₂ sales pipeline. Hr'g Tr. 19:14-18; 21:20-22:4.

Carbon dioxide is the largest sales stream, by volume, from the Shute Creek Gas Plant which is delivered to customers by the Shute Creek CO₂ sales pipeline. Approximately two miles east of the Shute Creek Plant, the Shute Creek Compressor Station uses equipment, including compressors, to maintain the desired pipeline operating pressures, flow rate, and devices necessary to avoid over pressuring the pipeline system. Ex. 4, 000564. There are five compressors located at the Shute Creek Compressor Station. Hr'g Tr. 19:14-18. To the extent that the U.S. Department of Transportation has jurisdiction over the Shute Creek CO₂ sales

pipeline, jurisdiction begins at the check valves located at the discharge outlets from the Shute Creek Station compressors. Hr'g Tr. 19:19-22. Several hundred meters downstream of the Shute Creek Compressor Station, the Shute Creek Meter Station monitors the flow of CO₂ as it enters the pipeline. Hr'g Tr. 22:23-23:3.

ii. Shute Creek CO₂ Sales Pipeline

The Shute Creek CO₂ sales pipeline consists of two primary segments which largely transects a remote, unpopulated, high desert region. Hr'g Tr. 24:7-12. The first segment is a 24-inch line which stretches forty-seven (47) miles south from the Shute Creek Meter Station to the Rock Springs Meter Station where custody transfers to Chevron. Hr'g Tr. 24:1-3. Halfway along the 24-inch line is the Green River Junction where the second 20-inch segment takes product 112 miles northeast to Bairoil, Wyoming. Hr'g Tr. 23:16-24:5.

The CO₂ sales pipeline is monitored by a control room operator twenty-four hours a day, seven days a week from the control room located at the Shute Creek Plant. Ex. 4, 000565. A supervisory control and data acquisition (SCADA) system is used on the CO₂ sales pipeline to meter the amount of product discharged from the Shute Creek Compressor Station which is compared to the volume of CO₂ metered at each point of delivery. Ex. 4, 000565. Flow computers at metering stations on the pipeline use programmable logic computers to communicate data about flow rate, temperature, and pressure back to the control room. Hr'g Tr. 24:13-25:11. Operators in the control room determine if an abnormal or emergency operating condition exists, and if necessary, responds and notifies the proper pipeline operation or maintenance personnel. Ex. 4, 000564.

Three controllers are continuously stationed in the Shute Creek control room. Hr'g Tr. 27:10-15. Each controller is assigned to a Bailey console² where Bailey 1 and Bailey 2 are used by controllers to exclusively monitor operations at the Shute Creek Gas Plant. Hr'g Tr. 27:1-4. The Bailey 3 console and its controller monitor both Shute Creek Gas Plant functions and the CO₂ sales pipeline. Hr'g Tr. 27:5-9. Only a small portion of the controller's time on Bailey 3—approximately ten percent—is dedicated to monitoring the CO₂ sales pipeline because the pipeline is largely automated with failsafe systems. Hr'g Tr. 27:5-28:16. For example, high and low pressure settings on the pipeline automatically close valves if triggered. Hr'g Tr. 28:12-16. The three Bailey consoles at Shute Creek operate on an uninterruptible power supply that includes both battery and generator backup systems. Hr'g Tr. 44:6-12.

iii. Shute Creek CO₂ Safety Functions

An emergency shutdown device located at the Shute Creek Meter Station allows the control room operator to remotely shutdown all flow into the CO₂ sales pipeline from the Shute Creek Compressor Station. Hr'g Tr. 29:3-16; *see also* Ex. 4, 000573. Each meter station including the Green River Junction, Rock Springs Meter Station, and Bairoil Meter Station have similar functions where a controller can isolate each meter site or sales point remotely. Hr'g Tr. 29:17-22. In the event of an emergency, the control room operator can also isolate the pipeline at the Green River Junction into three segments: (1) Shute Creek Meter Station to Green River Junction; (2) Green River Junction to Rock Springs Meter Station; and (3) Green River Junction to Bairoil Meter Station. Hr'g Tr. 29:23-30:9; *see also* Ex. 4, 000579. Activating an emergency shutdown device or isolating the pipeline into segments is described as a safety-related function by Shute Creek operating procedures. Hr'g Tr. 30:23-31:1; *see also* Ex. 4, 000573-574 &

² A Bailey distributed control system (DCS) is the manufacturer's name for a digital display system used to monitor and control an industrial system. Hr'g Tr. 26:13-16; *see also* API Recommended Practice for Pipeline SCADA Displays 1165 (2012) at 6.

000579. The emergency shutdown device and valves necessary to isolate the pipeline can be operated manually in the event of a system disruption. Hr’g Tr. 41:6-17. Controllers also have the ability to monitor and operate instruments on the CO₂ pipeline that relate to sales, including flow valves. Hr’g Tr. 30:18-31:4.

II. Standard of Review

PHMSA “bears the burden of proof in an enforcement proceeding and must prove, by a preponderance of the evidence, that an alleged violation occurred, i.e., that an operator had a legal duty to follow a particular regulation, and that it breached that duty by engaging in conduct that did not meet the applicable requirements.” *In the Matter of Citgo Pipeline Co.*, Final Order, CPF No. 4-2007-5010, (Apr. 14, 2011); *see also In the Matter of Butte Pipeline Co.*, Final Order, CPF No. 5-2007-5008, at 2 (Aug. 17, 2009) (“As a preliminary matter, the parties agree that in making findings of violation, PHMSA carries the burden of proving the allegations set forth in the Notice, meaning that a violation may be found only if the evidence supporting the allegation outweighs the evidence and reasoning presented by Respondent in its defense.”); *and In the Matter of Golden Pass Pipeline, LLC*, Final Order, CPF No. 4-2008-1017, (Mar. 22, 2011) (OPS bears the burden of proving by a preponderance of the evidence that its interpretation of the regulations is the correct one.)

49 C.F.R. § 195.446 requires that “each operator must have and follow written control room management procedures that implement the requirements of this section.” The NOPV alleged that “ExxonMobil failed to comply with § 195.466(a) by not having and following written control room management procedures that implement the requirements of § 195.446.”

Therefore, PHMSA carried the burden of proving, at the hearing, that ExxonMobil (1) failed to

have written procedures for each and every subpart of § 195.466(a); and (2) failed to implement those procedures.

III. Argument

i. Shute Creek CO₂ Pipeline is not Subject to 49 C.F.R. §195.446(a)

The CRM regulations in Part 195 do not apply to the Shute Creek CO₂ sales pipeline because carbon dioxide is neither a gas nor a hazardous liquid as defined by Part 195. A plain reading of Section 12 of the Pipeline Inspection, Protection, Enforcement, and Safety Act of 2006—which provides the congressional authorization to promulgate the Control Room Management rule—clearly states the requirements only apply to operators of a gas or hazardous liquid pipeline. Part 195 defines hazardous liquid as meaning “petroleum, petroleum products, anhydrous ammonia, or ethanol.” 49 C.F.R. § 195.2. Carbon dioxide is none of these. Instead, carbon dioxide is separately defined as “a fluid consisting of more than 90 percent carbon dioxide molecules compressed to a supercritical state.” *Id.* PHMSA’s interpretation of this unambiguous language is entitled to no deference. *See, e.g., Texas v. EPA*, 829 F.3d 405 (5th Cir. 2016) (interpretation of unambiguous regulation is a legal issue reviewed de novo and for which agency receives no deference).

ii. Petitioner Failed to Meet its Burden of Proving a Violation of 49 C.F.R. §195.446(a)

PHMSA “bears the burden of proof in an enforcement proceeding and must prove, by a preponderance of the evidence, that an alleged violation occurred, i.e., that an operator had a legal duty to follow a particular regulation, and that it breached that duty by engaging in conduct that did not meet the applicable requirements.” *In the Matter of Citgo Pipeline Co.*, Final Order, CPF No. 4-2007-5010, (Apr. 14, 2011). At the hearing, PHMSA offered no testimony or documentary evidence to support its allegation that ExxonMobil had violated 49 C.F.R. §

195.446(a). To the contrary, PHMSA's inspector admitted at the hearing that PHMSA had no such evidence:

·5 ·Q: MR. HARRIS: And I would like PHMSA, as we sit here today,
·6 ·is there some specific provision of 195.446 that PHMSA
·7 ·takes the position that ExxonMobil has not complied
·8 ·with. That is a question that I'd like to answer for
·9 ·the record.
10 ·A: MR. OGIRIMA: I don't think I'm able to
11 ·answer that at this moment.

Hr'g. Tr. 88:5-11. Since PHMSA could not identify any provision of § 195.466 that ExxonMobil allegedly had violated, PHMSA certainly could not and did not provide any *evidence* of a violation. This concession, standing alone and without considering the extensive testimony and written evidence submitted by ExxonMobil, is sufficient to warrant vacatur of the NOPV.

iii. ExxonMobil's Due Process Rights to a Hearing Would be Violated To the Extent PHMSA Intends to Sustain its Burden of Proof in a Subsequent, Post-Hearing "Recommendation" that Argues the "Facts and Evidence"

The Western Region now claims it will submit a "Region Recommendation" that "will be a written evaluation by the Region of *the facts and evidence* presented in the pre-hearing material submissions, *at the hearing*, and in any post-hearing submission. *See* 49 CFR 190.209(b)." The Region notes that this will come "after all of the response material is submitted." Email from Melanie Stevens, PHMSA Counsel, to Colin Harris, ExxonMobil Counsel (Nov. 20, 2017, 08:47 MST) (emphasis added). As noted, PHMSA cites 49 C.F.R. § 190.209(b), but that provision does not authorize PHMSA to avoid completely its burden of proof at the hearing, and then attempt to sustain the burden in a later submittal that "evaluates" the "facts and evidence" in a subsequent unilateral submission to the Presiding Official. 49 C.F.R. § 190.209(b) simply identifies the contents of the case file.

Further, the case file includes “materials submitted by the respondent in response to the enforcement action” and the “Regional Director's written evaluation of response material submitted by the respondent and recommendation for final action, if one is prepared.” 49 C.F.R. § 190.209(b). That list does not authorize the Western Region to try and satisfy its burden of proof for the first time by re-litigating the “facts and evidence” presented at the hearing, particularly in a situation like this one where PHMSA did not present any facts or evidence regarding CRM compliance in the first place. And the “evaluation,” to the extent authorized in the rule, applies on its face only to “materials submitted” by ExxonMobil. It does not authorize any comment on testimony at the hearing, and certainly not adopt the broad “facts and evidence” standard that the Western Region has suggested.

The Western Region notes that the Presiding Official said at the hearing that any recommendation should address “all issues.” Email Communication from Melanie Stevens, PHMSA Counsel, to Colin Harris, ExxonMobil Counsel (Nov. 20, 2017, 8:47 MST). The Presiding Official’s comment was in the context of two legal arguments, and was not the broad authorization to address “facts and evidence.” Furthermore, ExxonMobil requested, and the Presiding Official agreed, that any post-hearing submissions—which *do* address facts and evidence at the hearing—be submitted simultaneously. Hr’g. Tr. 88:16-89:25. The Western Region declined to file a post-hearing simultaneous submission.

The Western Region’s approach would also deny ExxonMobil its fundamental Due Process rights to a meaningful hearing and opportunity to present evidence, question witnesses, and contest unproven allegations. “The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.” *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (citation omitted). Accordingly, an evidentiary hearing before a neutral factfinder is

the heart of the Due Process guarantee to a recipient of a NOPV. 49 C.F.R. § 190.211 (the hearing “gives each party an opportunity to offer facts, statements, explanations, documents, testimony or other evidence that is relevant and material to the issues under consideration. The parties may call witnesses on their own behalf and examine the evidence and witnesses presented by the other party.”).

A hearing is the key forum for “balancing ... the competing interests at stake” in a given dispute and resolving disputed issues of material fact. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985). In an administrative agency hearing, contested ideas are challenged, weighed, and measured. As the Administrative Procedure Act provides, “[a] party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.” 5 U.S.C. § 556(d). Because administrative agencies are, “at once, the accuser, the prosecutor, the judge and the jury, [administrative agencies] must remain alert to observe accepted standards of fairness.” *Giant Food, Inc. v. FTC*, 322 F.2d 977, 984 (D.C. Cir. 1963) (citation omitted). To that end, “reviewing courts must ... be alert to ascertain that the true substance of a fair hearing is not denied to a party.” *Id.*

If the Western Region now intends, for the first time and not in the hearing, to attempt to dispute or rebut the “facts and evidence” presented by ExxonMobil at the hearing, this would violate ExxonMobil’s Due Process rights. The time for any such give and take was at the hearing, so that ExxonMobil could have “offer[ed] facts, statements, explanations, documents, testimony or other evidence” and “examine[d] the evidence and witnesses presented by” PHMSA. 49 C.F.R. § 190.211. PHMSA issued the NOPV months after an inspection and alleged wholesale noncompliance with the CRM rule. PHMSA possessed, in advance of the

hearing, the materials that ExxonMobil submitted to demonstrate compliance. The hearing ensued and PHMSA elected not to address substantive compliance with the regulations. Due Process does not allow—and expressly prohibits—an extra-hearing process where PHMSA, shielded from hearing procedures and from examination of its witnesses, positions, and exhibits, now tries to prove a violation.

iv. ExxonMobil Did not Violate the Control Room Management Rules

a. Roles and Responsibilities

Each operator must define the roles and responsibilities of a controller during normal, abnormal, and emergency operating conditions. 49 C.F.R. § 195.446(b). ExxonMobil's Operator Qualification for Pipeline Personnel Manual (OQ Manual) defines a pipeline controller's duties during normal operations which include—but are not limited to—maintaining pipeline pressure within allowable limits, manually or remotely operating valves, monitoring control devices, monitoring flow rates, and monitoring for leak detection. 49 C.F.R. § 195.446(b)(1); *see* Ex. 5, 000773; *see also* Hr'g Tr. 33:18-34:12. The LaBarge Liquid Site Specific Operations, Maintenance & Emergency Manual (LaBarge OME Manual) contains written normal operating procedures including the specific operational steps necessary for startup, routine operations, and shutdown. Ex. 4, 000575-576; *see also* Hr'g Tr. 33:21-34:24. These procedures are implemented and apply to both pipeline controllers and field technicians performing work on the pipeline system. *Id.*

Written procedures to address abnormal operating conditions are incorporated in the LaBarge OME Manual and describe how a controller responds and notifies responsible personnel in the event of an unintended valve closure, abnormal pressure or flow rate, loss of communication, operation of a safety device, or other deviation from routine operations. 49 C.F.R. §

195.446(b)(2); *see* Ex. 4, 000612-615; Hr’g Tr. 36:2-25. In the event an abnormal operating condition is detected, the controller is also responsible for notifying a supervisor and any responsible personnel necessary to correct the condition. *Id.* If necessary, controllers at Shute Creek have the discretion to activate the emergency shutdown device if an abnormal condition escalates. Hr’g Tr. 36:13-18.

Similar written procedures exist in the LaBarge OME Manual to describe a controller’s duties in responding to an emergency condition. 49 C.F.R. § 195.446(b)(3); *see* Ex. 4, 000616-622. Any occurrence which may cause harm to personnel, property, or the environment and requires immediate attention is considered an emergency condition. *Id.* Controllers are responsible for responding to an emergency condition and must immediately notify the site supervisor of the event. *Id.*; *see also* Hr’g Tr. 37:7-20.

Responsibilities for handing over a shift to the next pipeline controller are documented in the Hitch/Shift Hand Over Policy. 49 C.F.R. § 195.446(b)(4); *see* Ex. 6, 000659-660; *see also* 37:24-38:21. The Hitch/Shift Hand Over Policy implements a list of issues controllers discuss during the scheduled half-hour overlap between shifts at Shute Creek. *Id.* Supervisors, known as Plant Foreman, are on duty during each controller shift at Shute Creek and are authorized to supersede the actions of pipeline controllers. 49 C.F.R. § 195.446(b)(5); *see* Hr’g Tr. 38:22-39:6. Plant Foreman must know the same emergency procedures and receive training in the same basic level of competencies as pipeline controllers. Ex. 7, 000294-295; *see also* Hr’g Tr. 39:14-41:5.

b. Provide Adequate Information

Operators must provide controllers with the information, tools, processes and procedures necessary for the controllers to carry out the roles and responsibilities defined by the operator including how to perform point-to-point verification between SCADA systems when equipment

is replaced or added and how to test communication plans and backup SCADA systems. 49 C.F.R. § 195.446(c). PHMSA does not identify SCADA equipment which was added, expanded, or replaced on the CO₂ sales pipeline since the enactment of the CRM rule nor allege ExxonMobil's existing change management procedures are not practical for ensuring controllers have adequate information regarding proposed and implemented changes to the pipeline system. 49 C.F.R. § 195.446(c)(1).

Shute Creek pipeline controllers communicate with field personnel and equipment by using satellite communications, cellular phones, land lines, and two-way radios mounted in response trucks. Hr'g Tr. 41:18-25; *see also* Ex. 4, 000565. The LaBarge OME Manual details the internal communication plan in place at Shute Creek which allows control room operators to share information and direct field personnel. Ex. 4, 000565. Field and maintenance technicians are also required to notify control room operators when personnel access a pipeline site, perform any changes, and when personnel leave the site. Hr'g Tr. 42:20-25. This includes when SCADA equipment is removed or changed on the CO₂ sales pipeline. 49 C.F.R. § 195.446(c)(2). Regular maintenance-related exercises occur where pipeline controllers and field technicians verify the data transmitted between pipeline equipment and the data received by the control room. Hr'g Tr. 42:15-18. Backup equipment for SCADA systems is tested annually and spot tests occur on a monthly basis. Hr'g Tr. 44:1-5. Any change to pipeline equipment or ongoing maintenance activity is communicated between shifts using the shift hand over checklist. Ex. 10, 000658.

c. Fatigue Mitigation

Each operator must implement methods to reduce the risk associated with controller fatigue including: (1) establish shift lengths and schedule rotations that provide controllers off-duty time sufficient to achieve eight hours of continuous sleep; (2) educate controllers and supervisors in

fatigue mitigation strategies and how off-duty activities contribute to fatigue; (3) train controllers and supervisors to recognize the effects of fatigue; and (4) establish a maximum limit on controller hours-of-service. 49 C.F.R. § 195.446(d).

The Fatigue Risk Management Program establishes a maximum shift length for controllers and is implemented to ensure controllers receive eight continuous hours of rest in a 24-hour period. 49 C.F.R. § 195.446(d)(1); *see* Ex. 11, 000185; *see also* 45:14-46:2. ExxonMobil also regularly impresses upon controllers the importance of getting rest during time off and trains new controllers using the Fatigue Risk Management Program. 49 C.F.R. § 195.446(d)(2); *see* Hr’g Tr. 46:3-13. Fatigue management is addressed during safety meetings and emphasized throughout the entire organization. Hr’g Tr. 46:14-20. As a fatigue mitigation technique, three controllers are continuously stationed in the Shute Creek control room and can physically observe fatigue in other controllers if it occurs. 49 C.F.R. § 195.446(d)(3); *see* Hr’g Tr. 46:21-47:4. Employees under the Fatigue Risk Management Program have a duty to report fatigue in other employees and supervisors must approve any exceedance of the maximum hours of service limit. 49 C.F.R. § 195.446(d)(4); *see* Ex. 11, 000185-186; *see also* Hr’g Tr. 47:5-8.

d. Alarm Management

Operators using a SCADA system must have a written alarm management plan to provide for effective controller response to alarms. 49 C.F.R. § 195.446(e). The LaBarge Alarm Management Philosophy establishes a systematic method to ensure alarms on the pipeline are properly prioritized, configured, and that operators can understand and respond to alarms. Ex. 12, 000633; *see also* Hr’g Tr. 48:1-7.

Although it’s labeled an Alarm Management Philosophy, the LaBarge alarm procedures operate as an integrated alarm management plan. Hr’g Tr. 48:11-18. The LaBarge Alarm

Management Philosophy ensures controllers understand how to recognize alarms, identify the source of alarms, prioritize alarms, document alarms, and how to respond to alarms. Hr'g Tr. 49:10-22. The Philosophy also ensures alarms are accurate. 49 C.F.R. § 195.446(e)(1); *see also* Hr'g Tr. 49:23-50:1.

The Bailey 3 console operating the CO₂ pipeline has a system of recording, documenting, and regularly reviewing safety-related alarms. 49 C.F.R. § 195.446(e)(2)-(4). Each Bailey console captures every alarm point in a Key Performance Indicator (KPI) Report which is produced weekly and reviewed regularly by controllers, weekly by DCS technicians, and monthly by site engineers. Ex 12, 000643-644; *see also* 51:3-52:10. In particular, KPI Reports are analyzed monthly to address bad actor and false alarms. Ex. 12, 000640, Hr'g Tr. 51:14-25. Controllers are also actively involved in identifying bad actor alarms. *Id.* To address deficiencies, alarm set points are reviewed during routine calibration activities by supervisors, DCS technicians, and site engineers. 49 C.F.R. § 195.446(e)(6); Ex. 12, 000642; Hr'g Tr. 52:11-15.

Alarm prioritization procedures in the LaBarge Alarm Management Philosophy ensure controllers have sufficient time to respond to alarm floods. 49 C.F.R. § 195.446(e)(5); *see* Hr'g Tr. 53:1-24. Prioritization is designed so controllers can recognize higher-priority alarms and address the root cause of an alarm flood—the LaBarge Alarm Management Philosophy divides alarms into seven priority areas. Ex. 12, 000645-648; *see also* Hr'g Tr. 53:1-9.

e. Change Management

Each operator must assure that changes that could affect control room operations are coordinated with the control room personnel. This includes requiring field personnel to contact

the control room when emergency conditions exist and when making field changes that affect control room operations. 49 C.F.R. § 195.446(f).

ExxonMobil implements a Management of Change (MOC) Manual which is the written procedure describing how to evaluate, approve, implement, and communicate physical changes within both the Shute Creek Gas Plant and on the Shute Creek CO₂ sales pipeline. Hr'g Tr. 55:10-25; *see also* Ex. 13, 000126. Personnel seeking to initiate a change enter the request digitally into an eMOC form. Hr'g Tr. 56:20-24. The request is reviewed by the appropriate employees or supervisors and if no additional information is necessary, the request is approved or rejected. Hr'g Tr. 57:3-12. If approved, the project proceeds to the design and implementation/installation phase.³ *Id.* An example of an eMOC form addressing a physical equipment change to the CO₂ sales pipeline is provided in Exhibit 14. *See* Ex. 14, 000114-124.

The Management of Change Manual and eMOC process is designed to ensure proposed and implemented changes to pipeline equipment are communicated to pipeline controllers. 49 C.F.R. § 195.446(f)(1); *see* Hr'g Tr. 57:14-19; *see also* Ex. 13, 000173. Communication plans also require field technicians to notify the control room as personnel access a pipeline site, perform any changes, and when personnel leave a pipeline site. Hr'g Tr. 42:5-25. Field personnel who discover an emergency or are informed of a possible emergency on the pipeline must immediately notify the control room and site supervisors. 49 C.F.R. § 195.446(f)(2); Ex. 4, 000616. As an additional safeguard, change management is also incorporated into the shift change-over process which provides controllers arriving for a new shift not only a checklist of work performed on the pipeline but detailed notes about proposed or completed changes. Hr'g Tr. 56:1-11; *see also* Ex. 10, 000658.

³ Management of change workflow is described in complete detail from the 'Initiation' through 'Approval for Closure' phase in the ExxonMobil U.S. Production MOC Manual. *See* Ex. 13, 000162-178.

f. Operating Experience

Operators must assure that lessons learned from its operating experience are incorporated, as appropriate, into its control room management procedures. 49 C.F.R. § 195.446(g).

Any incident that occurs on the pipeline is investigated and includes an assessment of whether the control room contributed to the incident and to what extent deficiencies with field equipment, a relief device, procedures or the configuration of a SCADA system was responsible for the incident. 49 C.F.R. § 195.446(g)(1); Hr'g Tr. 59:21-60:5; *see also* Ex. 7, 000343-346. Lessons learned from incidents are subsequently incorporated into the training curriculum for pipeline controllers. 49 C.F.R. § 195.446(g)(2); Hr'g Tr. 60:11-15. The failure investigation process at Shute Creek is designed to minimize the potential for hazards and reduce the recurrence of accidents at pipeline facilities. Ex. 7, 000343; *see also* 60:16-23.

g. Training

Controller training programs must review content and identify potential improvements at least once each year and provide for training each controller to carry out the roles and responsibilities defined by the operator. 49 C.F.R. § 195.446(h).

Initial training programs are completed before an individual is certified as a pipeline controller. Hr'g Tr. 60:24-61:7. Controllers also complete annual training programs that include curriculum on responding to abnormal and emergency conditions. 49 C.F.R. § 195.446(h)(1); Hr'g Tr. 61:6-18. Controller training includes the use of table-top scenarios and is documented in each individual employee's training record. *Id.* Training includes the responsibilities a controller has to react and communicate during abnormal and emergency operating conditions. 49 C.F.R. § 195.446(h)(2)-(4); Ex. 4, 000612-622. The list of minimum training protocols that a

pipeline controller receives to operate the Bailey 3 console at Shute Creek is provided in Exhibit 15. 49 C.F.R. § 195.446(h)(5)-(6); *see* Ex. 15, 000655-656.

h. Compliance Validation and Deviations

Upon request, operators must submit their procedures to PHMSA (or appropriate state agency), maintain records that demonstrate compliance and maintain documentation to demonstrate any deviation from procedure was necessary for the safe operation of the pipeline. 49 C.F.R. § 195.446(i)-(j). ExxonMobil requires its LaBarge Regulatory and Engineering Groups to maintain construction records, maps, and operating histories for the pipeline system. Ex. 4, 000564. Documentation includes files to store information such as daily operating pressures, reports on abnormal and emergency operations, and reports on any repairs made to the pipeline. *Id.* Inspector Ogirima acknowledges he did not review or request to review ExxonMobil's manuals or operating procedures as it relates to control room management requirements during his May 2016 inspection. Hr'g Tr. 13:4-14:14.

v. Petitioner's Claims are Barred by the Applicable Statute of Limitations

Petitioner failed to bring a claim against ExxonMobil within the applicable statute of limitations under several provisions of the CRM rule. Administrative enforcement actions for a civil penalty are subject to a five-year limitation period set forth in 42 U.S.C. § 2462. PHMSA expedited several CRM implementation deadlines in June 2011. In particular, operators were to implement the procedures in paragraphs (b) [roles and responsibilities], (c)(5) [shift change], (d)(2)-(3) [fatigue management education and training], (f) [change management], and (g) [operating experience] no later than October 1, 2011.⁴ Petitioner's allegations and Proposed

⁴ Pipeline Safety: Control Room Management/Human Factors, 76 Fed. Reg. 35,130 (June 16, 2011).

Compliance Order are dated May 24, 2017.⁵ Because implementation for paragraphs (b), (c)(5), (d)(2)-(3), (f), and (g) of the CRM rule was required by October 1, 2011, Petitioner's claim is untimely and barred by 42 U.S.C. § 2462 to the extent the CRM rule applies to the Shute Creek CO₂ sales pipeline.

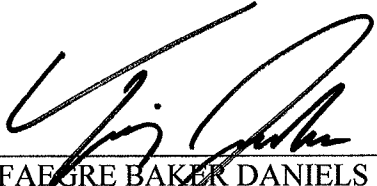
vi. Petitioner's Proposed Civil Penalty Must be Vacated

Petitioner's proposed civil penalty should be dismissed because the CRM rule does not apply to the Shute Creek CO₂ sales pipeline. Even if the CRM rule applies to Shute Creek control room, ExxonMobil has demonstrated it has written and implemented control room procedures required by § 195.446.

Civil penalties under 49 U.S.C. § 60122 requires that the Secretary shall consider: "(A) the nature, circumstances, and gravity of the violation, including adverse impact on the environment; (B) with respect to the violator, the degree of culpability, any history of prior violations, and any effect on ability to continue doing business; and (C) good faith in attempting to comply. To the extent there has been any noncompliance with the CRM rule, it is abundantly clear that ExxonMobil has a failsafe pipeline and robust procedures to guarantee safe operation of its control room. Accordingly, any civil penalty should be reduced to a *di minimis* amount.

⁵ Western Region PHMSA, Notice of Probable Violation, Proposed Civil Penalty and Proposed Compliance Order (May 24, 2017).

Respectfully Submitted,



FAEGRE BAKER DANIELS LLP
Colin G. Harris; CO Bar #18215
Travis S. Jordan; WY Bar #7-5721
3200 Wells Fargo Center
1700 Lincoln Street
Denver, CO 80203

DATE: 12/8/2017