I. Introduction

The Pipeline and Hazardous Materials Safety Administration (PHMSA or the Agency) issued a Notice of Probable Violation, Proposed Civil Penalty and Proposed Compliance Order (collectively, the NOPV) dated July 25, 2017, to Colonial Pipeline Company (Colonial or the Company) following an inspection of field activities in Woodbine, Maryland, which included removal of a casing. The NOPV alleges two separate violations of the operator qualification (OQ) rules at 49 C.F.R. Part 195 for failure to include removal of a casing as an OQ covered task, proposes a civil penalty of $50,100, and proposes a compliance order with two requirements.

Colonial requested a Hearing to address the one issue presented by the two alleged violations in this matter: whether removal of a casing meets PHMSA’s four-part test for a “covered task,” given that there is no express law, guidance or industry standard that suggests it should be. The Hearing took place at the Eastern Region on February 20, 2018. The PHMSA Hearing Officer set a deadline of March 16, 2018 for submission of a Post-Hearing Brief. Therefore, this submission is timely. In submitting this Post-Hearing Brief, Colonial incorporates by reference the (1) Request for Hearing, Statement of Issues and Written Response filed with PHMSA on October 2, 2017; (2) Pre-Hearing Brief submitted on February 9, 2018; and (3) the exhibits included with both filings as well as those produced during the Hearing itself.

PHMSA and Colonial’s goals are the same: safe operation of the pipeline system. Colonial takes its obligations under the Pipeline Safety Act (PSA) and the regulations promulgated thereunder seriously. In accordance with that, the Company complied with applicable law and regulations, and took all proper precautions, in conducting the work that is central to the NOPV – the removal of a casing – including the use of welder contractors qualified to conduct numerous pipeline repairs and to identify abnormal operating conditions.
It is well established that PHMSA bears the burden of proof of all elements of a proposed violation in an enforcement proceeding. See e.g., In re ANR Pipeline Co, Final Order, CPF No. 3-2011-1011 (Dec. 31, 2012). If PHMSA “does not produce evidence supporting the allegation [which] outweighs the evidence and reasoning presented by Respondent in its defense,” the allegation of violation must be withdrawn. Id. PHMSA has not met its burden in this case.

For all of these reasons, the NOPV should be withdrawn, along with the associated Proposed Civil Penalty and Proposed Compliance Order.

II. Removal of a Casing is Not a “Covered Task”

A. Removal of Casing Does Not Meet Parts 3 and 4 of Four-Part Test

The PHMSA OQ regulations do not identify a list of “covered tasks” under Part 195. Instead, Part 195.501(b)(1)-(4) defines a covered task as an activity that meets all of four elements (referred to as the “four-part test” and summarized in Pre-Hearing Brief Exhibit 7). Operators prepare their own list of covered tasks through application of the Part 195.501(b) four-part test, tailored to their system. Colonial’s OQ Manual defines a covered task accordingly. Pre-Hearing Brief Exhibit 3, Colonial OQ Manual, Sections 3-4 (rev. Sep. 2017).

Colonial acknowledges that the activity of removing a casing meet parts 1 and 2 of the four-part test. Colonial does not agree, however, that removal of a casing meets part 3 or 4. Removal of a casing is neither an activity performed as a requirement of Part 195 (part 3 of the four-part test), nor does it affect the operation or integrity of the pipeline (part 4 of the four-part test). With respect to part 3 of the four-part test, no regulation expressly requires an operator to remove a casing or references removal of a casing and therefore it is not an activity performed as a requirement of Part 195.1

At the Hearing, PHMSA cited to a Final Order, In re: Enterprise Products Operating, LLC, CPF 3-2009-5022 (Aug. 14, 2012), in which the Agency determined that “[i]f Part 195 requires an operator to perform a certain activity, then an operator is obliged to identify the specific covered tasks it performs as part of carrying out that required activity.” That case is distinguishable from the alleged violation at issue. Specifically, that case addressed pipe fittings and the assembly of threaded connections which as the PHMSA Final Order notes “[T]he agency ha[d] considered both pipefitting generally and the assembly of threaded connections specifically as covered tasks for other operators and has required operators to be more specific than simply listing repairs as a single task.” Final Order, In re: Enterprise Products Operating, LLC, CPF 3-2009-5022 (Aug. 14, 2012) (emphasis added). As to part 4 of the four-part test, removal of a casing does not affect the operation or integrity of the pipeline as no work is performed on the pipeline itself and pipeline operations are unaffected while the work is performed.

As applied to this matter, PHMSA has never before considered removal of a casing, generally or

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1 To the extent that PHMSA is relying on the fact that Colonial maintains a procedure for removal of a casing as evidence that it meets the four-part test, Agency rulemaking preamble guidance makes clear that the existence of an operator’s maintenance procedure does not in and of itself necessitate an associated covered task. PHMSA Final OQ Rule, 64 Fed. Reg. 46853, 46860 (Aug. 27, 1999).
specifically, or even identified other tasks that could be analogous, as covered tasks for other operators. For that reason, neither Colonial nor the industry has had any notice of the Agency’s position that removal of a casing should be a covered task.

B. **PHMSA’s Interpretation of Part 3 of the Four-Part Test is Overreaching**

In the NOPV and in the Hearing, PHMSA inexplicably expands the third prong of the 4-part test such that if a task performed is an “integral component” of a required Part 195 obligation, it is a “covered task.” There is no prior PHMSA enforcement decision that suggests removal of a casing should be a covered task. Further, it is significant to note that (1) no other operator in the industry is known to Colonial to have identified it as a covered task; and (2) no vendors – of all of the vendors nationwide that provide OQ qualifications and training – provide qualification for removal of a casing on a liquids pipeline.

At the Hearing, the Agency argued that it considers activities “integral” to Part 195 obligations to be covered tasks. Unfortunately, and as discussed at length in the Hearing, the Eastern Region’s view of “integral” tasks is expansive and never-ending; any task or activity performed by a pipeline operator could potentially be perceived as “integral” to a Part 195 obligation. That is contrary to the plain language of the regulation and the intent of the OQ rule.

With this interpretation, PHMSA would impermissibly expand the relevant plain language of the rule without notice and comment rulemaking. S. U.S.C. § 554(b); Appalachian Power Co. v. EPA, 208 F.3d 1015, 1024-25 (D.C. Cir. 2000) (it is “well-established that an agency may not escape...notice and comment requirements by labeling a major substantive legal addition to a rule a mere interpretation.”). As such, an agency cannot promulgate regulation through enforcement.

In addition, fair notice under the APA dictates that an agency must “state with ascertainable certainty what is meant by the standards [it] has promulgated.” ExxonMobil Pipeline Co v. U.S. DOT, No. 16-60448, 2017 U.S. App. LEXIS 15144 (5th Cir. Aug. 14, 2017) (citing Diamond Roofing Co, 528 F.2d at 649). The expansive interpretation articulated in the NOPV and the Hearing creates vagueness in the four-part test; consequently, operators will be unable to determine whether they comply with the regulation.

III. **Colonial’s Contractors Maintained Qualifications Appropriate to the Task**

At the Hearing, PHMSA emphasized that qualification could be “easily demonstrated as part of another OQ task” and the Agency has “never said they had to be separate.” To that very point, and as conveyed in Colonial’s Pre-Hearing submissions and during the Hearing itself, the contractors who removed the casing were certified welders with numerous qualifications and certifications that ensured they were qualified to conduct a multitude of various pipeline repairs, protect pipeline integrity and that they were knowledgeable of abnormal operating conditions. See Pre-Hearing Exhibit 2, Summary of Colonial Contractor Qualifications for Casing Removal in Woodbine, MD.

More specifically, Colonial’s welding contractors were operator qualified to perform welding on the pipeline itself under industry standard API 1104 and Colonial procedures, which requires numerous welder qualifications pertaining to different welding electrodes, weld designs and
welding conditions. Post-Hearing Exhibit 1, Colonial Pipeline Maintenance Manual, Sec. 3.1, Welding Procedure and Welder Qualification for Pipeline Maintenance (May 2016). Further, Colonial's contractors were also qualified to utilize welding and cutting equipment to conduct general pipeline repairs, as well as to identify abnormal operating conditions. Pre-Hearing Exhibit 2, Summary of Colonial Contractor Qualifications for Casing Removal in Woodbine, MD. Their general pipeline repair qualifications required performance verifications in 8 different covered tasks, all of which involve using equipment on exposed pipe, as follows:

- CT36.2 - Install Welded Tight Fitting Sleeves
- CT36.3 - Perform Over-sleeve Repair
- CT36.4 - Perform Composite WRAP Sleeve Repair
- CT36.5 - Install Mechanical Split Sleeve Repair
- CT36.6 - Install Mechanical Coupling
- CT36.7 - Perform Hot Tapping
- CT36.8 - Install Pipeline Plugs
- CT36.9 - Install Completion Plugs

Post-Hearing Exhibit 2, Operator Qualifications Solutions Group, CT36.2 – 36.9.

Colonial believes that it has demonstrated that the welding contractors at issue were more than adequately qualified to perform the removal of a casing on the pipeline with the numerous detailed operator qualifications that they maintained, and further that pipeline safety was not impacted. To the extent PHMSA continues to maintain that removal of a casing should be a separate covered task, however, that interpretation has not been clearly communicated to Colonial or the regulatory community at large until this enforcement action.

IV. Proposed Penalty Should be Withdrawn or Significantly Reduced

Because Colonial did not violate Part 195.505, the Proposed Civil Penalty should be withdrawn entirely. If not withdrawn, the Proposed Civil Penalty of $50,100 should be significantly reduced to properly account for the statutory and regulatory penalty factors of nature, gravity, culpability, and good faith. Pre-Hearing Exhibit 11, Revised PHMSA Proposed Civil Penalty Worksheet. A significant reduction is warranted because (1) PHMSA’s interpretation was not clearly communicated to Colonial or the regulatory community at large until this enforcement action; and (2) contractors who removed the casing did in fact maintain numerous applicable qualifications and pipeline safety was not impacted.

V. Proposed Compliance Order Should be Withdrawn or Revised

The Proposed Compliance Order should be withdrawn in its entirety because the OQ regulations do not apply to the task at issue and Colonial therefore did not violate Part 195.505. As further illustration of that point, PHMSA has reviewed Colonial’s OQ Manual multiple times and has provided recommended improvements, but the Agency has not once raised an issue, concern, or recommended improvement to Colonial’s process for identifying covered tasks. Pre-Hearing Exhibit 3, Colonial OQ Manual, Sections 3-4 (rev. Sep. 2017) (defining the process for identifying a covered task).
Alternatively, as articulated in Colonial’s Pre-Hearing Brief and at the Hearing, if not withdrawn, Item 1 should have been issued as a Notice of Amendment (without a Proposed Civil Penalty). Item 2 should be dismissed and the Proposed Compliance Order should be revised. Specifically, if not withdrawn entirely, the Proposed Compliance Order should be revised to (1) require that Colonial’s OQ program identify the single covered task of removal of a casing (as opposed to including “any and all” associated subtasks); and (2) include an appropriate timetable of at least 1 year (60 days is not sufficient time to implement OQ program changes, including the time for a vendor to develop and initiate qualified training programs (as none currently exist at present for liquids pipelines) and to be able to qualify workers to the task).

VI. Conclusion

For the reasons identified in this Post-Hearing Brief, in Colonial’s Request for Hearing and Pre-Hearing Brief filings, and for such other matters as justice may require, Colonial respectfully requests that PHMSA withdraw or the Hearing Officer recommend dismissal of the NOPV, the Proposed Civil Penalty, and the Proposed Compliance Order. At a minimum, Item 1 should have been issued as a Notice of Amendment (without a Proposed Civil Penalty), Item 2 of the NOPV should be dismissed, and the Proposed Compliance Order revised.

Respectfully submitted,

[Signature]

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