

**Before the  
U.S. Department of Transportation  
Pipeline and Hazardous Materials Safety Administration  
Office of Pipeline Safety**

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In the Matter of	)	
	)	
Colonial Pipeline Company	)	CPF 1-2017-5015
	)	
Respondent	)	<u>Pre-Hearing Brief</u>
	)	
_____	)	

## **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. There is only one issue presented by this matter: whether removal of a casing is an OQ covered task. There is no express law, guidance or industry standard that suggests it should be. Yet the NOPV alleges two separate violations of the operator qualification (OQ) rules at 49 C.F.R. Part 195 for Colonial's 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 timely requested a hearing under 49 C.F.R. Parts 190.208 and 190.211. *Exhibit 1, Colonial Request for Hearing Filing*. PHMSA issued a Notice of Hearing for February 20, 2018 in West Trenton, New Jersey and set a deadline of February 10, 2018 for submission of Pre-Hearing materials. In advance of the Hearing, Colonial timely files this Pre-Hearing Brief and associated Exhibits, reiterating its request that PHMSA withdraw the NOPV, Proposed Civil Penalty and Proposed Compliance Order because removal of a casing is not an OQ covered task. In the alternative, Colonial requests that Item 1 be converted to a Notice of Amendment (without a Proposed Civil Penalty) and that Item 2 of the NOPV be withdrawn as duplicative of Item 1, and the Proposed Compliance Order be revised.

## **II. Background**

PHMSA conducted a field verification inspection of integrity management program activities performed by Colonial on January 23-26, 2017, in conjunction with Colonial's review of prior in line inspection tool run data under Amended Corrective Action Order, CPF 1-2015-5018H. During that field inspection, PHMSA observed Colonial contractors removing a casing to investigate an anomaly on a pipeline beneath the casing. The contractors who removed the casing were certified welders with numerous welding qualifications including, among others, visual inspection of welds and/or welding and recognition of an abnormal operating condition. *Exhibit 1, Colonial Request for Hearing Response, Welder Qualifications, Attachment A; Exhibit 2, Summary of Colonial Contractor Qualifications for Casing Removal in Woodbine, Maryland*.

Colonial's OQ manual sets forth a process for identifying covered tasks. As part of that, Colonial incorporates covered tasks identified in the industry standard for liquid pipelines developed by the American Petroleum Institute, Recommended Practice 1161 (API 1161) and identifies additional tasks that the Company has determined meet PHMSA's definition of covered task. *Exhibit 3, Colonial OQ Manual, Sections 3-4 (rev. Sep 2017); Exhibit 4, API Recommended Practice 1161, Annex A Covered Task List*. Colonial's OQ manual was reviewed by PHMSA in 2015, following which Colonial submitted a revised OQ program manual for PHMSA's review that expressly included revisions to the identified covered tasks. *Exhibit 5, E-mail transmittal to PHMSA with revised Colonial OQ Program Manual (Dec. 28, 2015)*. PHMSA reviewed Colonial's program again in an integrated audit in 2016, where the Agency specifically reviewed Colonial's methodology for determining covered tasks. PHMSA has an express obligation to review (1) an operator's OQ program "and verify ... that it complies with

the inspection protocols and includes all elements of the OQ Rule” and (2) any subsequent modifications “to ensure that an adequate level of safety has been maintained.” *Exhibit 6, PHMSA Summary, OQ Rule – Preamble Language vs. Enforcement Criteria (Conflict Resolution)*, available at <https://primis.phmsa.dot.gov/oq/docs/PreambleLanguage-versus-EnforcementCriteria.pdf>. At no point, however, did PHMSA make any recommendations with respect to Colonial’s identified “covered tasks,” until this enforcement action.

Consistent with PHMSA’s definition of “covered task” under Part 195.501, Agency guidance, industry standard API 1161, as well as its own OQ manual that was explicitly reviewed by PHMSA, Colonial did not require that the contractors maintain OQ qualifications for the removal of the casing.

### **III. Removal of a Casing is Not a Covered Task**

Removal of a casing is not a covered task under PHMSA’s definition of “covered task” at Part 195.501(b) because it is not performed as a requirement of Part 195 and it does not affect the operation or integrity of the pipeline. For either of these reasons, both Items of the NOPV fail.

#### **A. PHMSA Regulations Establish a Four-Part Test to Identify Covered Tasks**

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 the following four elements (referred to as the “four-part test” and summarized in *Exhibit 7*).

1. “Is performed on a pipeline facility;”
2. “Is an operation or maintenance task;”
3. “Is performed as a requirement of [Part 195]; and”
4. “Affects the operation or integrity of the pipeline.”

Operators must prepare their own list of covered tasks through application of the Part 195.501(b) four-part test, which should be tailored to encompass operations, maintenance and repair tasks used by the operator which meet this test.

#### **B. PHMSA Inexplicably Expands the Four-Part Test in this NOPV Without Basis**

Under PHMSA’s NOPV issued to Colonial, the alleged violation in both Items 1 and 2 is based on the inaccurate conclusion that removal of a casing is a “covered task” under Part 195.501. *PHMSA NOPV, Item 1* (alleging a violation of 49 C.F.R. Part 195.505(a) for failing to “have and follow a written qualification program that identified removing a casing as a covered task”); *Item 2* (alleging a violation of 49 C.F.R. Part 195.505(a) for failing to have and follow a written qualification program that ensured through evaluation that individuals who performed the “covered task” of removing a casing were qualified under Part 195.505(b)).

PHMSA’s NOPV inappropriately expands the definition of a “covered task” beyond the plain language of the rule to support its position that removal of a casing qualifies in this manner (see underlined and italicized text):

- “1. It is performed on a pipeline facility;

2. *It is done in the course of* pipeline operation and maintenance *activities*;
3. It is performed as a requirement of 49 C.F.R. Part 195 (*e.g. §§195.402(a) and (c); 195.422; 195.452(b)(5) or 195.452(h)(3) which includes removing the casing on Line 04 to evaluate and possibly remediate the anomaly*); and
4. *If not properly removed* it will affect the operation or integrity of the pipeline.”

*PHMSA NOPV, p. 10 (emphasis added).*

C. Removal of a Casing Does Not Meet Either Part 3 or Part 4 of the Four-Part Test

Removal of a casing, however, is not an activity performed as a requirement of Part 195 (part 3 of the “covered task” test at 195.501(b)(3)). The broad general duty provisions cited by PHMSA in the NOPV do not reference or even contemplate removal of a casing. *49 C.F.R. Parts 195.402* (requiring that operators prepare and maintain operations, maintenance, and emergency response procedures); *195.422* (outlining requirements for performing pipeline repairs); *195.452(b)(5)* (requiring that operators follow and implement an integrity management plan); *195.452(h)(3)* (requiring that operators adhere to a schedule for evaluation and remediation on integrity conditions).

Further, no regulation expressly requires an operator to remove a casing and therefore it is not an activity performed as a requirement of Part 195. To the extent that PHMSA is seizing on the fact that Colonial maintains a procedure for removal of a casing, Agency rulemaking preamble guidance makes clear that 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).*

In addition, removal of a casing does not affect the operation or integrity of the pipeline (part 4 of the “covered task” test at 195.501(b)(4)). The pipeline itself is located underneath the casing and removing a casing does not involve any work on the pipeline or pipeline components. During removal of a casing, pipeline operations—including the pipeline operating pressure—are unaffected.

D. PHMSA’s Position is Without Support in Law, Guidance or Fact

There is no regulation or prior PHMSA enforcement that identifies removal of a casing as a “covered task,” nor any interpretive guidance (preamble, Advisory Bulletin, etc.), to support the Agency’s interpretation articulated in this enforcement action. Moreover, removal of a casing is not included in any industry standard developed to assist liquid operators in identifying covered tasks in their OQ programs.

PHMSA provides limited guidance on the identification of a covered task, beyond what is already noted above. In its OQ Enforcement Guidance, PHMSA provides a nonexhaustive but fairly extensive list of covered tasks. *PHMSA Operator Qualification Enforcement Guidance (Aug. 25, 2016), p. 12.* Notably, this list does *not* include the removal of a casing.

There are two industry standards that have been developed to assist operators in identifying “covered tasks” – API RP 1161 and ASME B31.Q – although neither have been adopted or incorporated by reference in PHMSA Part 195 rules. Both are, however, cited to as references for additional guidance in PHMSA’s Operator Qualification Enforcement Guidance. *Id. at p. 10*. Of the two industry standards, API 1161 is primarily relied upon by the liquid pipeline industry whereas ASME B31.Q is directed to the natural gas pipeline industry. *Exhibit 4, API RP 1161, Annex A Covered Task List*. PHMSA itself sits on the API OQ Committee and the Agency has been an invitee to the API 1161 Committee and has been attending for the past year. Notably, PHMSA at times relies on these external industry standards as support for its assertion that a particular activity is a “covered task.” *See, e.g., In re: Enterprise, PHMSA NOPV, CPF 4-2017-5019 (May 10, 2017); In re Buckeye Partners, PHMSA Final Order CPF No. 3-2010-5006 (Nov. 19, 2012)* (noting that, while not dispositive, API 1161 standards and industry committee policies may be supportive of PHMSA’s interpretation and application of its regulations).

Despite the Agency’s involvement with the industry generally on OQ matters, and its specific review and approvals of Colonial’s program in 2015 and 2016 including the Company’s methodology for determining covered tasks, it was not until the issuance of this NOPV that PHMSA communicated its determination that removal of a casing is an OQ “covered task.” As a result, it should come as no surprise that to Colonial’s knowledge no other liquid pipeline operator identifies removal of a casing as a covered task, nor has any third party OQ vendor developed qualifications for removal of a casing.

#### **IV. If Not Withdrawn, the NOPV Items Should Have Been Alleged as a Single Notice of Amendment or, Alternatively, a Single Violation**

Notwithstanding the fact that removal of a casing does not fall within PHMSA’s regulatory definition of a “covered task” that would trigger OQ qualification requirements, the NOPV is also procedurally flawed. If not withdrawn, Items 1 and 2 should have been issued as a Notice of Amendment without a Proposed Civil Penalty. This alleged violation is precisely the type of alleged procedural inadequacy that PHMSA guidance indicates should be issued as a Notice of Amendment. *Exhibit 8, PHMSA Pipeline Safety Enforcement Procedures, Section 3, pp. 5-6 (Jun. 29, 2017)* (noting the example where an operator’s procedures do not provide an adequate basis for personnel training).

If both Items 1 and 2 are not withdrawn, Item 2 of the NOPV should be withdrawn because it is duplicative of Item 1. The alleged violation is based on the same regulation, the same alleged omission to consider casing removal to be a “covered task,” and the exact same evidence. *Exhibit 9, Pipeline Safety Violation Report p. 6, 14*. As such, Items 1 and 2 constitute a single violation and should not be cited as multiple violations. *See PHMSA Final Order, In re Colorado Interstate Gas Co., CPF No. 5-2008-1005 (Nov. 23, 2009) (citing 284 U.S. 299, 304 (1932))* (“where the same act or omission constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not.”); *Exhibit 10, PHMSA Pipeline Safety Enforcement Procedures, Section 4, p. 25 (Mar. 23, 2016)* (noting that inspectors should “use caution before citing the same code section or subsection for more than one Item in a NOPV letter because if the items are based on the same evidence, it may result in a single violation being inappropriately alleged as multiple violations”).

## **V. PHMSA’s New Enforcement Interpretation is Arbitrary and Capricious**

PHMSA’s new interpretation that a “covered task” includes removal of a casing violates the Administrative Procedure Act requirements as well as due process and fair notice requirements under the U.S. Constitution. A regulation must provide a regulated entity with fair notice of the obligations it imposes and be issued pursuant to notice and comment rulemaking. 5 U.S.C. § 554(b).

Fair notice requires the agency to have “state[d] 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 (5<sup>th</sup> Cir. Aug. 14, 2017) (citing *Diamond Roofing Co*, 528 F.2d at 649). “In the absence of notice—for example, where the regulation is not sufficiently clear to warn a party about what is expected of it—an agency may not deprive a party of property by imposing civil or criminal liability.” *Id.* (citing *Gen Elec. Co. v. EPA*, 53 F.3d 1329 (D.C. Cir. 1995)); see also *Gates v. Fox Co., Inc. v. OSHRC*, 790 F.2d 154, 156 (D.C. Cir. 1986) (explaining that an agency may not enforce regulations according to “what an agency intended but did not adequately express.... [The agency] as enforcer...has the responsibility to state with ascertainable certainty what it meant by the standards [] [it] has promulgated.”).

Prior to this enforcement action, the regulated community and Colonial had no notice that PHMSA’s definition of a covered task included removal of a casing, a task which is not performed as a requirement of Part 195 and which does not affect the operation or integrity of the pipeline. No prior enforcement or Agency guidance supports PHMSA’s allegations. Such a broad definition that expands the relevant plain language of the rule must be issued through notice and comment rulemaking.

## **VI. Proposed Penalty Should be Withdrawn or Reduced**

As explained above, the OQ regulations do not apply to the task at issue and Colonial did not violate Part 195.505. For that reason, the Proposed Civil Penalty should be withdrawn entirely. If not withdrawn, the alleged violation under Item 1 and Item 2 should have been brought as a Notice of Amendment without an associated Proposed Civil Penalty based on PHMSA Enforcement Procedures (described in Section V above).

Notwithstanding that Colonial did not violate PHMSA OQ rules, the Proposed Civil Penalty of \$50,100 fails to properly account for the statutory and regulatory penalty factors of nature, gravity, culpability, and good faith. *Exhibit 11, Revised PHMSA Proposed Civil Penalty Worksheet*. To the extent that PHMSA now interprets the OQ rule to include removal of a casing as a “covered task,” that interpretation was not clearly communicated to Colonial specifically or the regulatory community at large until this enforcement action. Further, the contractors who removed the casing did in fact maintain numerous qualifications and pipeline safety was not impacted. *Exhibit 2, Summary of Colonial Contractor Qualifications for Casing Removal in Woodbine, Maryland*. For these reasons, both the culpability and good faith penalty factors should be reduced.

## **VII. 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. Colonial's OQ procedure sets forth a process for identifying covered tasks, which has been reviewed by PHMSA multiple times without recommended improvements. *Exhibit 3, Colonial OQ Manual, Sections 3-4* (rev. Sep. 2017) (defining the process for identifying a covered task).

In the alternative, the Proposed Compliance Order should be revised to be limited to requiring that Colonial's OQ program identify the single covered task of removal of a casing (as opposed to including "any and all" associated subtasks) with an appropriate timetable of at least 1 year (60 days is not sufficient time to implement OQ program changes, including the time required for vendors to develop the qualified training programs and to be able to qualify workers to the task). As drafted, the Proposed Compliance Order goes beyond the alleged inadequacy — failure to include removal of a casing as a covered task — and broadly requires Colonial to develop a process to identify subtasks to all Part 195 requirements as "covered tasks." These requirements are neither necessary nor warranted under the OQ regulations.

Further, the Proposed Compliance Order is not consistent with prior PHMSA OQ enforcement precedent where the Proposed Compliance Order is *limited* to the covered task that is allegedly lacking from the OQ program. *See e.g., PHMSA Final Order, In re Marathon Pipe Line LLC, CPF 4-2010-5013* (requiring that the operator add the covered task at issue to its OQ manual); *Consent Agreement and Order, In re Kinder Morgan Liquid Terminals, LLC, CPF 1-2011-5008* (requiring that the operator add the covered task at issue to its OQ manual). Such a broad directive and expansion of OQ covered tasks should be issued through notice and comment rulemaking and in development with the industry.

## **VIII. Request for Relief**

For the reasons identified in this Pre-Hearing Brief, in Colonial's Request for Hearing filing, 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,



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TROUTMAN SANDERS LLP  
Catherine D. Little, Esq.  
Robert E. Hogfoss, Esq.  
600 Peachtree Street NE, Suite 5200  
Atlanta, GA 30308  
(404) 885-3055