

PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMINISTRATION  
WASHINGTON, DC 20590

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In the matter of:	§	
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Wolverine Pipe Line Company	§	CPF No. 3-2019-5016
	§	
Respondent	§	
	§	

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**PETITION FOR RECONSIDERATION  
OF  
WOLVERINE PIPE LINE COMPANY**

**I. INTRODUCTION**

The Pipeline and Hazardous Materials Safety Administration (“PHMSA”), Office of Pipeline Safety (“OPS”), issued a Final Order (“Final Order”) finding two violations and assessing civil penalties upon Wolverine Pipe Line Company (“Respondent” or “Wolverine”).

The subject of the Final Order is the result of a comprehensive inspection of Respondent’s procedures, records, and pipeline facilities conducted by PHMSA over the period of May through July 2017. The Final Order found two violations of the pipeline safety regulations and assessed civil penalties for each; Respondent, however, believes both the findings of violation and the assessed civil penalties to be the result of mistake and/or oversight.

PHMSA’s procedural regulation relating to petitions for reconsideration, 49 C.F.R. § 190.243, requires that a respondent’s petition “contain a brief statement of the complaint and an explanation as to why the order should be reconsidered.”<sup>1</sup>

Respondent believes the findings of violation in the Final Order result from mistake and/or oversight. Further, Respondent believes the Final Order is attended with issues of factual misunderstanding or oversight, due process, arbitrary and capricious agency action, the burden of proof, and fair notice. In addition, certain issues raised by Respondent were not addressed by the Final Order. Respondent asserts, and herein demonstrates, that the Final Order should be reconsidered in a manner that remedies the forgoing issues.

In the sections of this Petition which follow, Respondent reviews the procedural background; reviews the Final Order’s findings and conclusions, as well as the Final Order’s responses to Respondent’s issues and arguments; presents its discussion of the apparent errors and oversights

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<sup>1</sup> 49 C.F.R. § 190.243(a).

in the Final Order; and then addresses issues relating to the civil penalties assessed against Respondent. Each such issue is presented in the alternative.

Two elements of 49 C.F.R. § 190.243 bear treatment at the outset. For reference, 49 C.F.R. § 190.243(b) provides that “[i]f the respondent requests the consideration of additional facts or arguments, the respondent must submit the reasons why they were not presented prior to issuance of the final order.”<sup>2</sup> Respondent submits herewith one new item of evidence which is offered solely for the purpose of allowing precision in the calculation of whether Respondent acted appropriately in the context of Item 5. Further, new arguments asserted herein are for the purpose of illuminating perceived issues raised by the Final Order itself. For convenience, Respondent has attached as exhibits to this Petition several pleadings that have been filed in this proceeding, as well as one item of evidence from the OPS Central Region case file.

## **II. PROCEDURAL BACKGROUND**

By letter dated April 11, 2019, Respondent received a Notice of Probable Violation and Proposed Civil Penalty (“NOPV”) from the Director, Central Region (“Region”), PHMSA, OPS, alleging three violations and proposing civil penalties for those three alleged violations (along with warnings for another six alleged violations). A true and correct copy of the NOPV is attached hereto as Exhibit A.

Following extensions of time to respond granted by the Director, on July 22, 2019, Respondent responded to the NOPV by requesting a hearing and submitting its Statement of Issues. By letter dated August 27, 2019, the Presiding Official set a hearing date of November 5, 2019 at the PHMSA Chicago-area office. Pre-hearing submissions were made by both parties. The hearing was held on November 5, 2019, and, pursuant to the Presiding Official’s instruction, on January 31, 2020, Respondent submitted its Post-Hearing Brief and additional materials in further support of its case.<sup>3</sup> A true and correct copy of the Post-Hearing Brief, without exhibits and addendum, is attached hereto as Exhibit B. By email dated March 27, 2020 and pursuant to 49 C.F.R. 190.209(b)(7), the Director, Central Region, issued its Region Recommendation, and Respondent thereafter submitted its Response to Region Recommendation on April 15, 2020 (“Response to Region Recommendation”). A true and correct copy of the Region Recommendation is attached hereto as Exhibit C, and the Response to Region Recommendation is attached hereto as Exhibit D.

By letter dated September 3, 2020, the Associate Administrator for Pipeline Safety (“Associate Administrator”) issued the Final Order which found violations relating to (1) the temporary reduction of operating pressure for an immediate repair condition, and (2) the evaluation and

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<sup>2</sup> 49 C.F.R. §190.243(b).

<sup>3</sup> See Submission of Hearing Transcript to the Administrative Record dated January 31, 2020 (Transcript of Proceedings before Presiding Official Kristin Baldwin, November 5, 2019 (“Hearing Transcript”).

remediation of two 180-day conditions; and which assessed associated civil penalties. A true and correct copy of the Final Order is attached hereto as Exhibit E.

By letter dated September 18, 2020, counsel for Respondent requested an extension of time to file this Petition. By letter dated September 22, 2020, the Associate Administrator granted Respondent's request and set the due date for filing this Petition as September 28, 2020. As such, this Petition is timely filed.

### **III. DISCUSSION AND ANALYSIS**

#### **A. Item 5**

The Final Order regarding Item 5 found that Respondent had violated 49 C.F.R. § 195.452(h)(4)(i) with respect to the implementation of a temporary reduction of operating pressure in response to an immediate repair condition. The Final Order found that Respondent failed to “evaluate and remediate an immediate repair condition by temporarily reducing the operating pressure ... until the operator completes the repair” of the condition. The Final Order mistakenly bases the finding of violation upon conclusions that are not supported by the evidence in the administrative record; indeed, the conclusions are contradicted by the record. Further, the Final Order violates Respondent's right of due process; specifically, Respondent cannot be found to have had adequate notice of the claim and a meaningful opportunity to be heard. Finally, the Final Order omitted to address certain issues and arguments presented by Respondent in its Post-Hearing Brief.

#### **1. Basis of Finding of Violation**

The Final Order, as an initial matter, correctly states the decision framework: “The determination of whether or not Wolverine violated § 195.452(h)(4)(i) hinges on whether, following *discovery* that the dent met the criteria, it implemented a pressure reduction....”<sup>4</sup> The Final Order omits an element in the regulatory decision process by continuing with the statement that, “[t]herefore, the only remaining issue is whether or not the Respondent failed to act on the immediate repair condition....” The missing element is *discovery* of the subject condition.

Respondent agrees that the regulatory obligation to act upon an immediate repair condition, according to the regulations and Respondent's IMP, arises upon discovery of the condition. The subject regulation defines “discovery of a condition” as follows:

Discovery of a condition occurs when an operator has adequate information about the condition to determine that the condition presents a potential threat to the integrity of the pipeline. An operator must promptly, but no later than 180 days

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<sup>4</sup> Final Order at 3 (emphasis supplied).

after an integrity assessment, obtain sufficient information about a condition to make that determination....<sup>5</sup>

The Final Order implies, without expressing, that discovery occurred on June 10, 2015, the date upon which the final in-line inspection (“ILI”) report was received in the email inbox of Respondent’s Risk and Integrity Specialist, Daniel Cooper. In the Final Order discussion attending NOPV Item 6 (the second finding of violation), the Final Order states very clearly the applicable, flexible standard for determining the date of discovery: “After receiving the final ILI report, an operator may use a certain amount of time for data integration and repair plan development.”<sup>6</sup> And, while repair plan development is not in issue, data integration and data verification is. The Final Order proceeds to explain in Item 6 that “OPS has found, in previous cases, that the discovery date is not necessarily the date that the operator receives the final ILI report if the operator can demonstrate that it needed more information in order to formally discover a condition.”<sup>7</sup>

The Final Order thoroughly explains Mr. Cooper’s efforts to achieve discovery in the context of NOPV Item 6; *see* Final Order at 7-8. In the context of Item 5, however, the Final Order repeatedly states that the final ILI report was received on June 10, but the Final Order omits to conclude that discovery occurred on June 10, 2015, the date the final ILI report reached Mr. Cooper’s email inbox. The Final Order never acknowledges that Respondent would have been required to perform data integration to confirm that the *reported* condition indeed was an immediate repair condition. Again, the Final Order does not expressly establish a date of discovery at any point. Discovery is left to inference. The administrative record, however, establishes clearly that data integration was in fact necessary before any declaration of discovery could be made. The disparate treatment of discovery between Item 5 and Item 6 in and of itself is internally inconsistent. Item 6 appropriately states the standard, and, thus, Item 5 must yield.

Mr. Cooper testified at the hearing that, upon identifying a *reported* dent with metal loss, he undertook actions to confirm the finding, considering contradictory historical evidence. As a result of in-line inspections (integrity assessments) conducted in 2005 and 2010, the subject dent was identified as a plain dent, less than two percent, with no metal loss, and thus was not a repair condition under any of the rule criteria.<sup>8</sup> Given the existence of that previous data, Mr. Cooper contacted the ILI vendor “to make sure with the vendor that they truly were seeing metal loss with this because it had been reported twice before with no metal loss.”<sup>9</sup> Mr. Cooper also consulted with Respondent’s corrosion department to confirm that “they had not seen this” during a previous

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<sup>5</sup> 49 C.F.R. § 195.452(h)(2); Respondent would note that, in the absence of any allegation whether Respondent met the 180-day limitation in this regulatory section, that limitation is neither quoted nor addressed in this Petition.

<sup>6</sup> Final Order at 7.

<sup>7</sup> *Id.* at 7-8, citing *In the Matter of Natural Gas Pipeline Co. of America, a subsidiary of Kinder Morgan, Inc.*, Final Order, CPF No. 3-2015-1002, 2017 WL 1363407 (DOT Mar. 20, 2017).

<sup>8</sup> Hearing Transcript at 174:23-175:22.

<sup>9</sup> *Id.* at 206:17-20.

excavation in the vicinity.<sup>10</sup> Upon receiving responses to those inquiries late on Thursday, June 25, Mr. Cooper convened a Friday, June 26 conference call with numerous technical personnel to confirm that the condition was in fact an immediate repair condition.<sup>11</sup>

The Final Order is based upon inference – the inference that discovery occurred on June 10, 2015, the date the final ILI report was delivered to Mr. Cooper’s email inbox. And the finding of violation is based upon that inference, that Respondent had “adequate information” at that very moment on June 10 that the email arrived. The Final Order, however, omits to expressly conclude that Respondent had “adequate information” on June 10, and neither does the Final Order express that June 10 was the date of discovery. No evidence is in the administrative record that would support the inference, or any express finding, of “adequate information” being in-hand on June 10. To the contrary, Respondent’s witness testified credibly and clearly that data integration was necessary to ensure that, upon the establishment of adequate information, the subject condition “present[ed] a potential threat to the integrity of the pipeline.”<sup>12</sup>

PHMSA bears the burden of proof, both the burden of production and the burden of persuasion.<sup>13</sup> PHMSA also “bears the burden of proof as to all elements of the proposed violation.”<sup>14</sup> Not only is no factual finding and no analysis presented in the Final Order that would support the establishment of discovery on June 10, no evidence exists in the administrative record that would support any declaration of discovery on June 10. Respondent’s evidence clearly establishes the fact that data integration was necessary, and in fact was conducted, before discovery could be declared.<sup>15</sup>

Further in this regard, the Region’s witness for Item 5 admitted during the hearing that the agency had no dispute with Respondent’s established date of discovery. An admission against interest is any statement attributable to a party to an action which tends to establish or disprove any material fact in the case.<sup>16</sup> Counsel for Respondent inquired repeatedly whether the witness or the agency disputed Respondent’s June 26 discovery date.<sup>17</sup> Never did any agency representative in the hearing dispute the June 26 discovery date. The date of discovery clearly is a material fact in the determination of this Item 5. As such, the Region’s concession precludes any finding that discovery occurred on any date other than June 26, 2015.

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<sup>10</sup> *Id.* at 206:20-24.

<sup>11</sup> *Id.* at 206:24-207:5; 215:10-20.

<sup>12</sup> 49 C.F.R. § 195.452(h)(2).

<sup>13</sup> *In the Matter of Bridger Pipeline Co. LLC*, Final Order, CPF No. 5-2007-5003, 2009 WL 7796887 at \*1 (DOT Apr. 2, 2009) (citing *Dir., Office of Workers' Comp. Programs, Dep't of Labor v. Greenwich Collieries*, 512 U.S. 267, 276 (1994)).

<sup>14</sup> *In the Matter of ANR Pipeline Co.*, Final Order, CPF No. 3-2011-1011, 2012 WL 7177134 at \*3 (DOT Dec. 31, 2012); *see also In the Matter of CITGO Pipeline Co.*, Decision on Pet. for Reconsideration, CPF No. 4-2007-5010, 2011 WL 7517716, at \*5 (DOT Dec. 29, 2011).

<sup>15</sup> *Natural Gas Pipeline Co.*, CPF No. 3-2015-1002 at \*3.

<sup>16</sup> *US v. Steward*, 793 Fed.Appx.188 (4th Cir. 2019); Fed. R. Evid. 804(B)(3)(A).

<sup>17</sup> *See* Response to Region Recommendation at 4; Hearing Transcript at 149:5-11, 21-24.

Respondent requests that the finding of violation for this Item 5 be reconsidered in light of the evidence, in light of the burden of proof, and in light of the Region's admission against interest.

## 2. Timing to Achieve Discovery

Respondent here establishes that Respondent's date of discovery, June 26, 2015, was not in contravention of 49 C.F.R. § 195.452(h)(2); that Mr. Cooper acted promptly; and that the data presented to him was "analyzed quickly."<sup>18</sup>

As the discovery regulation states, "[a]n operator must promptly, but no later than 180 days after an integrity assessment, obtain sufficient information about a condition to make [the] determination" "that the condition presents a potential threat to the integrity of the pipeline."<sup>19</sup> The Final Order echoes the complaints of the Region regarding Mr. Cooper's inability to access and address the final ILI report until Tuesday, June 23, upon which date he identified the *reported* dent with metal loss.

The integrity assessment which generated the final ILI report occurred in April 2015.<sup>20</sup> An excerpt from the final ILI report, presented at Exhibit F attached hereto, establishes that the in-line inspection commenced (ILI tool launched) on April 13 and concluded (ILI tool received) on April 14, 2015. The date that falls 180 days after April 14 is October 11. The date upon which discovery was declared was June 26 which is 73 days following the conclusion of the integrity assessment, thus 107 days prior to the outer limit set by 49 C.F.R. § 195.452(h)(2). Respondent did not run afoul of the regulatory requirement.

Mr. Cooper also acted "promptly" upon identifying the *reported* dent with metal loss, and he "analyzed quickly" the data. Having identified the *reported* dent with metal loss on Tuesday, June 23, Mr. Cooper first compared the finding against the data resulting from the integrity assessments in 2005 and 2010.<sup>21</sup> Finding a discrepancy, in that no prior assessment had identified metal loss within the dent, Mr. Cooper prudently followed-up with the ILI vendor and Respondent's corrosion department to confirm, respectively, that metal loss actually had occurred and that the condition had not previously been addressed.<sup>22</sup> Receiving responses within two days, on Thursday evening, Mr. Cooper on the following morning convened the panel of technical personnel to

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<sup>18</sup> Final Order at 4-5.

<sup>19</sup> 49 C.F.R. § 195.452(h)(2).

<sup>20</sup> Hearing Transcript at 167:19-22.

<sup>21</sup> Hearing Transcript at 214:16-19; 174:23-175:20; to rely solely upon the ILI vendor's designation of the condition as an immediate repair condition would be in contravention of agency guidance, 67 Fed. Reg. 1650, 1655 (Jan. 14, 2002) (the operator is responsible for determining whether a condition meets regulatory criteria, not the ILI vendor).

<sup>22</sup> Hearing Transcript at 206:16-207:5.

review the condition, and discovery was declared on Friday, June 26, between 10:00 and 10:30 a.m.<sup>23</sup>

On the factual grounds described above, Mr. Cooper, and in turn Respondent, cannot stand accused of failing to act promptly or of failing to analyze quickly the data. Three days is appreciably less than the five-day requirement of Respondent's integrity management program.<sup>24</sup> And, on that basis, no regulation was violated, and no procedure was breached. Respondent would add that the finding of violation is, in part, supported by the conclusion that Mr. Cooper failed to "analyze quickly" the data before him.<sup>25</sup> Respondent asserts, however, that the NOPV states no allegation of any failure to follow procedure, nor was any relevant regulatory provision stated in the NOPV. Lack of notice and lack of an opportunity to be heard would deprive Respondent of its rights of due process.<sup>26</sup> As such, the "act promptly" and "analyze quickly" support to the finding of violation should be disregarded upon reconsideration.<sup>27</sup>

### **3. Adequate Notice and a Meaningful Opportunity to Be Heard**

Considering the Region Recommendation and the Final Order, this Item 5 effectively and practically has much more to do with discovery than with a pressure reduction. The Final Order accurately states that the outcome "hinges on whether, following discovery that the dent met the criteria," a pressure reduction was implemented.<sup>28</sup> To determine whether Respondent is in violation of 49 C.F.R. § 195.452(h)(4)(i)(C), first the date of discovery must be established. The following elements from the administrative record demonstrate that this Item 5 is more about discovery than a pressure reduction:

1. The Final Order cites Wolverine Integrity Management Program ("IMP") Section 2.3.6.4.4 – which relates to discovery.<sup>29</sup>
2. The Final Order recites the Region Recommendation, a recitation which is oriented not to a pressure reduction, but to the timing of Mr. Cooper directing his attention to the final ILI report, i.e., the timing of determination of an immediate repair condition, i.e., discovery.<sup>30</sup>

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<sup>23</sup> Hearing Transcript at 215:10-20; *see* Hearing Exhibit 29 (minutes of the Friday, June 26, 10:00-10:30 a.m. conference call).

<sup>24</sup> Final Order at 4.

<sup>25</sup> *Id.* at 5.

<sup>26</sup> *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S. Ct. 1187, 1191, 14 L.Ed.2d 62 (1965).

<sup>27</sup> The regulatory construction of the integrity management rule directive to take "prompt action" relates not to review of integrity assessment results but to remediation of a given condition, same toward avoiding "a potential compliance and enforcement nightmare" surrounding receipt and review of ILI reports (*see* 67 Fed. Reg. 1650, 1654 (Jan. 14, 2002)).

<sup>28</sup> Final Order at 3.

<sup>29</sup> *Id.* at 4.

<sup>30</sup> *Id.* at 4-5; *see* Region Recommendation at 4-5.

3. “Whatever Mr. Cooper was doing at the time he received the final ILI report is immaterial to the question of whether the information was treated as an immediate repair condition that had to be acted upon ‘as soon as practicabl[y].’”<sup>31</sup>
4. The Region questioned Mr. Cooper at length about various factors surrounding receipt of the final ILI report, filling numerous pages in the hearing transcript.<sup>32</sup>
5. The Region Recommendation belabors discovery:
  - a. “Specifically, both PHMSA’s testimony and the [NOPV] stated that Wolverine *claimed* that the date of discovery was June 26, 2015. PHMSA did not concede to this date, but merely noted it as Wolverine’s *claimed* discovery date.”<sup>33</sup>
  - b. “Wolverine was in possession of the final ILI report on June 9, 2015, and did not act upon the findings of the report until June 23, 2015 at the earliest. \* \* \* Had the report been opened and reviewed when it was received, Wolverine would have been aware of a potential immediate repair condition on June 9, 2015....”<sup>34</sup>

The Final Order goes so far as to acknowledge that “Wolverine capably argued that, even when a condition is identified as an immediate repair, a pressure reduction cannot be implemented immediately.”<sup>35</sup> “Nevertheless, the time that elapsed between receipt of the ILI report on June 10, and the repair made on June 26, was too long....”<sup>36</sup> Missing from that conclusion is the event of discovery – the missing element to the Final Order’s finding of violation.

Discovery is governed by 49 C.F.R. § 195.452(h)(2), yet the NOPV says nothing about that regulatory provision. The NOPV does in fact state that Respondent “claimed discovery” on June 26, but that is all it says about discovery, nothing more.

For the government to ensure due process in the enforcement context, a party accused of a violation of law must be afforded adequate notice and a meaningful opportunity to respond and defend its interests. Yet, here, in this Item 5, which effectively and for all practical purposes is focused on discovery, Respondent received no notice of a discovery issue or claim, and Respondent could not have prepared for the hearing. Respondent could not have surmised that Item 5 was a discovery issue until it received the Region Recommendation. In its Response to Region Recommendation, perhaps overlooked by the Region, Respondent illustrated clearly that the Region was changing its position and its original allegation.<sup>37</sup>

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<sup>31</sup> *Id.* at 5; Respondent would reinforce that discovery of an immediate repair condition must occur before any regulatory requirement to act upon that determination arises.

<sup>32</sup> Hearing Transcript at 204:24-207:9; 211:19-212:12; 214:9-215:21; 216:6-22.

<sup>33</sup> Region Recommendation at 4 (emphasis in original; citations omitted).

<sup>34</sup> *Id.* at 4-5.

<sup>35</sup> Final Order at 5.

<sup>36</sup> *Id.*

<sup>37</sup> Response to Region Recommendation at 4-5.

Further to due process, 49 C.F.R. § 190.207 requires that a notice of probable violation include a “[s]tatement of the provisions of the laws, regulations or orders which the respondent is alleged to have violated and a statement of the evidence upon which the allegations are based.” Neither 195.452(h)(2), the regulation relating to discovery, nor any statement of the evidence upon which the Item 5 allegations are based, is presented in the NOPV.<sup>38</sup> Similar to the Order Directing Amendment issued to Respondent in case CPF No. 3-2019-5015M, and with regard to Item 4 in that case which was withdrawn for pleading inadequacies attending the initial Notice of Amendment, this NOPV Item 5 should be withdrawn for similar procedural flaws, in particular since discovery was not an element in the original allegation.<sup>39</sup>

Upon reconsideration of Item 5, Respondent requests the following:

1. That the Associate Administrator reconsider the Final Order considering the foregoing, to include review of Respondent’s Response to Region Recommendation; and
2. That the fundamental issue of due process – whether Respondent in fact received adequate notice and a meaningful opportunity to respond to the Region’s discovery claim – be addressed upon reconsideration.

#### **4. Issues and Arguments Not Addressed by the Final Order**

Respondent has stated several issues, and asserted related arguments, which remain unaddressed by the Final Order; no response may be found in the Final Order. Respondent requests that said issues and arguments be addressed upon reconsideration. Consider the following:

1. Respondent presented the issue of fair notice and presented arguments which would establish that Respondent could not be found to have had fair notice of the agency’s regulatory expectations with ascertainable certainty. The Final Order alludes to fair notice: “Wolverine explained that ... it believed that OPS has issued vague guidance that deprives the regulatory community of the certainty that it needs to determine exactly when and how an immediate repair condition must be addressed.”<sup>40</sup> But the words “fair notice” are not found in the Final Order. Further, that statement is the end of the subject – the Final Order does not counter its own statement of Respondent’s issue and arguments.
2. Respondent’s Response to Region Recommendation asserts the issue that the NOPV omitted to cite the proper regulatory provision as to which the Region took it to task, 49

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<sup>38</sup> Black’s Law Dictionary defines evidence as “something (including testimony, documents, and tangible objects) that tend to prove or disprove existence of an alleged fact.” Black’s Law Dictionary (11<sup>th</sup> Ed. 2019), evidence.

<sup>39</sup> *In the Matter of Wolverine Pipe Line Company*, Order Directing Amendment, CPF No. 3-2019-5015M at 6, (DOT Apr. 11, 2019).

<sup>40</sup> Final Order at 4.

C.F.R. § 195.452(h)(2). Yet, the Final Order omits to address the issue and the related arguments.

Respondent requests that the forgoing issues and arguments be addressed upon reconsideration. Respondent submits that, upon reconsideration of Item 5, and considering the errors identified hereinabove, Item 5 and the associated civil penalty should be withdrawn.

## **B. Item 6**

The Final Order found with regard to Item 6 that Respondent violated 49 C.F.R. § 195.452(h)(4)(iii)(D) with respect to two 180-day conditions identified on the Joliet to Kennedy Avenue pipeline segment, known as Dig 7 and Dig 31. The Final Order found that Respondent “exceeded the 180-day time limit for two of the four dig sites cited in the Notice, Dig 7 and Dig 31,” thereby “failing to schedule evaluation and remediation of 180-day conditions within 180 days of discovery of the condition.”<sup>41</sup>

Respondent seeks reconsideration of the Item 6 finding of violation on several grounds, including (1) that the subject conditions were not in fact 180-day conditions; (2) that the finding appears to be based upon evidence which cannot be used to prove fault; (3) that the finding of violation appears to be supported by misdirected factual statements; and (4) that certain evidence in the case file is misconstrued adversely to Respondent’s interest.

### **1. The Conditions Were Not 180-Day Conditions**

The Final Order reflects a correct decision element in that it poses as the first question whether the “four anomalies [were] 180-day conditions.”<sup>42</sup> Respondent’s program for evaluation and remediation of the conditions applied both the B31G methodology and the RSTRENG methodology (known also as the “effective area” method) at the time the final ILI report was received, as demonstrated by evidence within the Region’s case file. *See* Respondent’s JO-KA Repair Plan, 10-19-2015, attached hereto as Exhibit G, which was provided to Respondent by the Region. Both the applicable regulation and Respondent’s IMP allow an operator to determine whether a given condition is a 180-day condition using methods including, but not limited to, the B31G and RSTRENG methodologies. The B31G methodology determined that the conditions be treated as 180-day conditions. Application of the RSTRENG methodology, however, resulted in the conditions being determined not to be 180-day conditions, as Respondent demonstrated at the hearing.<sup>43</sup>

Respondent defended in the hearing and in its Post-Hearing Brief on the grounds that, since both B31G or RSTRENG are allowed by the regulation, Respondent had proved that the conditions

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<sup>41</sup> *Id.* at 8.

<sup>42</sup> *Id.* at 6.

<sup>43</sup> Hearing Transcript at 250:7-253:18.

were not 180-day conditions and that PHMSA had not argued persuasively that the RSTRENG method could not be applied. The Region has not proved – by a preponderance of the evidence – that the conditions were 180-day conditions, and, as such, that element of the Region’s claim has not been established.<sup>44</sup>

The Final Order concluded in summary terms that, since “the regulation offers the upfront choice between calculation methods, an operator is held to its choice of calculation methodology.”<sup>45</sup> The Final Order continues by concluding that “Wolverine should be held to its decision to use the B31G methodology, and therefore, the subject conditions were 180-day conditions.”<sup>46</sup> A review of the regulatory text should prove informative:

A calculation of the remaining strength of the pipe shows an operating pressure that is less than the current established maximum operating pressure at the location of the anomaly. Suitable remaining strength calculation methods include, but are not limited to, ASME/ANSI B31G and PRCI PR-3-805 (R-STRENG).<sup>47</sup>

Respondent asserts that several aspects of the Final Order contradict the language of the regulation. First, the regulation does not direct that an operator choose between B31G and RSTRENG; neither does any other provision of 49 C.F.R. § 195.452.<sup>48</sup> Indeed, however, 49 C.F.R. § 195.452 demonstrates that PHMSA knows how to offer a choice and then direct an operator’s conduct pursuant to that choice.<sup>49</sup> That 49 C.F.R. § 195.452(h)(4)(iii)(D) omits any such “choice directive” directly infers that PHMSA made the conscious choice not to require any such choice. Second, the regulatory provision does not express, nor does it imply, that an operator, once it applies a given methodology, is bound to that methodology; and neither does any other provision of 49 C.F.R. § 195.452.

Agency action which is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” will be set aside.<sup>50</sup> An “agency must explain why it decided to act as it did.”<sup>51</sup> “When an agency ‘fails to provide a reasoned explanation’” for its action, that action

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<sup>44</sup> Respondent’s Post-Hearing Brief at 20-31.

<sup>45</sup> Final Order at 6.

<sup>46</sup> *Id.* at 7.

<sup>47</sup> 49 C.F.R. § 195.452(h)(4)(iii)(D).

<sup>48</sup> In addition, the Final Order civil penalty discussion suggests that 49 C.F.R. § 195.452(h)(4)(iii)(D) provides for an operator “election”; no such “election” is express or implied by the text of the regulation; *see* Final Order at 9.

<sup>49</sup> 49 C.F.R. § 195.452(c)(1)(i)(D) (providing that, should an operator choose “other technology” for conducting an integrity assessment, the operator must notify PHMSA).

<sup>50</sup> 5 U.S.C. § 706(2)(A).

<sup>51</sup> *Water Quality Ins. Syndicate v. U.S.*, 225 F.Supp3d 41, 63 (D.D.C. 2016) (quoting *Butte Cty. v. Hogen*, 613 F.3d 190, 194 (D.C. Cir. 2010)).

cannot stand.<sup>52</sup> At minimum, an agency must articulate a satisfactory explanation establishing a ‘rational connection between the facts found and the choice made.’<sup>53</sup>

Respondent raised a pivotal issue in its Response to Region Recommendation which is that the Region (in its Region Recommendation) cited no legal, regulatory or other authority for the proposition that an operator is bound once it applies the first of either B31G or RSTRENG.<sup>54</sup> Respondent reasserts that such agency action would be arbitrary and capricious on the grounds that no rational connection has been articulated that would lead to the conclusion that an initial application of B31G would bind the operator. Before the agency may evaluate Respondent’s conduct, first it must interpret the regulation. The Final Order offers no interpretation or explanation that relates to the regulatory language. Rather, the Final Order reaches conclusions in the context of Respondent’s actions as if such an interpretation actually exists. At best, the interpretation of the regulation is left to inference.

Moreover, Respondent contends that the Final Order’s conclusion, that an operator is bound to a choice between B31G and RESTRENG, fails to accord Respondent, and the regulated community as a whole, fair notice of the agency’s regulatory expectations. Toward avoiding repetition, Respondent refers the Associate Administrator to the legal foundations which define the principles of fair notice; *see* Post-Hearing Brief at 31-33.

The concept of an operator being bound to an initial application of B31G vs. RSTRENG is rather novel in the realm of PHMSA’s integrity management regulation (49 C.F.R. 195.452). The Pipeline Safety Act says nothing of being so bound. The entire regulatory history of the integrity management regulation is devoid of any such concept, express or implied.<sup>55</sup> No agency guidance suggests that, and no other Final Order and no Decision on Reconsideration reaches any such conclusion. And no judicial opinion reaches such a conclusion. Neither does PHMSA’s entire regulatory regime offer the operator such a choice and then *bind* the operator. Considering the dearth of authority to support the Final Order’s conclusion, Respondent cannot be found to have known of the agency’s compliance expectations with ascertainable certainty. Irrefutably, Respondent lacked fair notice of the implied interpretation PHMSA would apply in this Item 6.

The degree of weight to be accorded an agency judgment depends “‘upon the thoroughness evident in its consideration, the validity of its reasoning, ‘and its consistency with earlier and later

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<sup>52</sup> *Id.* at 63 (quoting *Cty. of L.A. v. Shalala*, 192 F.3d 1005, 1021 (D.C. Cir. 1999)).

<sup>53</sup> *Id.* at 63 (quoting *Ark Initiative v. Tidwell*, 816 F.3d 119, 127 (D.C. Cir. 2016); *Burlington Truck Lines v. US*, 371 U.S. 156, 158, 83 S.Ct. 239, 245-246, 9 L.Ed.2d 207 (1962)).

<sup>54</sup> Response to Region Recommendation at 7-8; *see* Region Recommendation at 7 (“Once it had made this [B31G] determination, Wolverine had a legal obligation to address the corresponding integrity threat”).

<sup>55</sup> 84 Fed. Reg. 52260 (Oct. 1, 2019); 82 Fed. Reg. 7972 (Jan. 23, 2017); 80 Fed. Reg. 12762 (Mar. 11, 2015); 80 Fed. Reg. 168 (Jan. 5, 2015); 75 Fed. Reg. 48593 (Aug. 11, 2010); 73 Fed. Reg. 61334 (June 3, 2008); 72 Fed. Reg. 39012 (July 17, 2007); 70 Fed. Reg. 61571 (Oct. 25, 2005); 68 Fed. Reg. 69778 (Dec. 15, 2003); 67 Fed. Reg. 2136 (Jan. 16, 2002); 67 Fed. Reg. 1650 (Jan. 14, 2002); 67 Fed. Reg. 75378 (Dec. 1, 2000).

pronouncements.”<sup>56</sup> Similar to the Region Recommendation, the Final Order provides no analysis or discussion of the Pipeline Safety Act, the subject regulation, the relevant regulatory history, agency precedent, or agency guidance in reaching the conclusion that Respondent is bound to B31G. The Final Order’s conclusion, wanting for legal basis supporting that Respondent is bound to B31G, may be accorded no deference and must be reconsidered.

## 2. Evidence of Subsequent Remedial Measures

Among the bases for the Final Order’s finding of violation is that the Pipeline Safety Violation Report, quoting a purported written response from Respondent, indicates that “new procedures were in place to ensure that future deadlines would be met.”<sup>57</sup> Subsequent remedial measures cannot be introduced into evidence to prove culpability.<sup>58</sup>

PHMSA’s sister agency, the FAA, understands the policy which underlies the exclusion of evidence of subsequent remedial measures, which “avoids discouraging individuals from taking actions that may improve safety.”<sup>59</sup>

Respondent acknowledges that PHMSA hearings are conducted “without strict adherence to the rules of evidence.”<sup>60</sup> In the present instance, however, the statement that Respondent implemented new procedures is used as direct support for the finding of violation. In this context, any evidence of subsequent remedial measures should be excluded from consideration as inadmissible for the purpose of establishing fault, i.e., for the purpose of supporting a finding of violation.

## 3. Misdirected Factual Statements

The finding of violation for this Item 6 appears to be supported by misdirected factual statements. The Final Order states that “there is no indication that Wolverine intended to rely on any other calculation [than B31G] until this matter was contested by hearing.”<sup>61</sup>

Though the pipeline safety regulations largely are performance-based, 49 C.F.R. § 195.452(h)(4)(iii)(D) is not. The regulation very clearly provides that a condition that is found to be a 180-day condition (subject to the methodology that is applied) must be evaluated and remediated.<sup>62</sup> Were that provision performance-based, the subjective intent of an operator might

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<sup>56</sup> *Water Quality*, 225 F.Supp.3d at 72 (quoting *United States v. Mead*, 533 U.S. 218, 219, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001); *Skidmore v. Swift*, 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124 (1944)).

<sup>57</sup> Final Order at 7.

<sup>58</sup> *Miesner v. General Motors*, 924 F.Supp. 130, 133 (D. Utah 1996).

<sup>59</sup> *In the Matter of Horizon Air Industries, Inc.*, Decision and Order, Docket No. CP94NM0228, 1996 WL 509933 (FAA Aug. 12, 1996).

<sup>60</sup> 49 C.F.R. § 190.211(e).

<sup>61</sup> Final Order at 7.

<sup>62</sup> 49 C.F.R. § 195.452(h)(4)(iii)(D).

factor into compliance; however, intent cannot play a role in determining compliance with a prescriptive regulation. No form of the word “intent” is found in the subject regulation, and neither may the concept of operator intent be implied from the regulatory text.

To the point of the Final Order indicating that Respondent raised its RSTRENG facts and arguments at the hearing, but not before, the Final Order would seem to suggest that an operator should refrain from defending itself in a hearing by introducing evidence into the record and presenting arguments in its defense. That position would eviscerate the procedural rules found at 49 C.F.R. Part 190, Subpart B – Enforcement. Examples of the Part 190 provisions which afford respondents the right to mount a fulsome defense are set out below:

1. Among the response options provided to an operator is to “submit a written explanation, information, or other materials the respondent believes may warrant mitigation or elimination of the proposed civil penalty.”<sup>63</sup>
2. “[S]ubmit a written response in answer to the allegations.”<sup>64</sup>
3. A respondent may object to allegations of proposed violation by submitting “written explanations, information, or other materials in answer to the allegations in the notice of probable violation.”<sup>65</sup>
4. A respondent may make pre-hearing submissions in the form of “records, documents, and other exhibits not already in the case file.”<sup>66</sup>
5. A respondent “may request the opportunity to submit further written material after the hearing for inclusion in the record.”<sup>67</sup>

Admonishing Respondent for submitting evidence and arguments in its defense would imply a denial of due process, the right to a meaningful opportunity to be heard. Among the purposes of the Part 190 procedural regulations is to ensure that respondents have an opportunity to supplement and/or correct the record, argue their position, and otherwise defend against agency enforcement action. Such statements must be excluded upon reconsideration.

#### **4. Evidence in the Administrative Record Is Not Best Evidence and Is Misconstrued Adversely to Respondent’s Interest**

In more than one instance, the Final Order misrepresents and/or misconstrues evidence in the administrative record. First, the Final Order speaks to an entry in the Pipeline Safety Violation Report to the effect that Respondent purportedly submitted a written response “admitting that the deadlines had not been met.”<sup>68</sup> Not only would any such Respondent statement be directed to

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<sup>63</sup> 49 C.F.R. § 190.208(a)(2).

<sup>64</sup> 49 C.F.R. § 190.208(a)(3).

<sup>65</sup> 49 C.F.R. § 190.208(b)(3).

<sup>66</sup> 49 C.F.R. § 190.211(d).

<sup>67</sup> 49 C.F.R. § 190.211(g).

<sup>68</sup> Final Order at 7.

B31G and not RSTRENG, the best evidence would be the actual writing by Respondent, which is not within the administrative record. Second, the Final Order indicates that “Wolverine elected to use B31G, the method used in the final ILI report.”<sup>69</sup> That statement is not wholly accurate. The final ILI report presented RSTRENG values as well as B31G values, as Mr. Cooper testified at the hearing.<sup>70</sup>

All such statements should be excluded upon reconsideration, and any factual finding based upon hearsay should be considered unreliable and therefore should be disregarded upon reconsideration.

Finally, Respondent avers that, in light of the factual and evidentiary matters stated above, the Final Order has no remaining support upon which to conclude that Respondent’s actions, to the extent relevant in the first instance, bind it to the initial application of B31G.

## **5. Arguments Left Unaddressed by the Final Order**

Respondent has stated an argument which remains unaddressed by the Final Order. Regarding the “choice” between B31G and RSTRENG, Respondent argued in its Post-Hearing Brief that the agency’s position would raise troubling policy issues; *see* Post-Hearing Brief at 28-29. The policy issue is that operators would (and very may will) be discouraged from applying the overly conservative B31G methodology, in favor of RSTRENG, thereby applying only the minimum standard of care. This argument merits a response upon reconsideration.

## **IV. CIVIL PENALTIES**

Respondent reviews below legal principles which are applicable in the penalty realm, then addresses a number of apparent issues in the Final Order which affect the assessment of civil penalties.

In addition to the principles of due process (notice and an opportunity to be heard; fair notice) which are reviewed in this Petition (*see also* Respondent’s Post-Hearing Brief), the U.S. Court of Appeals for the D.C. Circuit has advised that “[t]raditional concepts of due process incorporated into administrative law preclude an agency from penalizing a private party for violating a rule without first providing adequate notice of the substance of the rule.”<sup>71</sup> An agency interpretation of its regulation, even when reasonable, nonetheless will not support the imposition of penalties in the absence of adequate notice of that interpretation.<sup>72</sup>

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<sup>69</sup> *Id.* at 6-7.

<sup>70</sup> Hearing Transcript at 252:1-3.

<sup>71</sup> *Rollins Environmental Services (NJ) Inc. v. U.S. EPA*, 937 F.2d 649, 654 (DC Cir. 1991) (quoting *Satellite Broadcasting v. FCC*, 824 F.2d 1 (D.C. Cir. 1987); *see also* Post-Hearing Brief at 31-33.

<sup>72</sup> *Id.*

### **A. Item 5**

The apparent errors attending the finding of violation for Item 5 directly affect the assessment of civil penalties. Given that the finding of violation omitted to address, or to find, an erroneous application of discovery, and further that Item 5 was brought pursuant to 49 C.F.R. § 195.452(h)(4)(iii)(D), due process concerns compel reconsideration of Item 5 along with the withdrawal of the assessed civil penalties.

As to Respondent's good faith arguments which were rejected by the Final Order, Respondent avers that it has demonstrated herein that it reasonably interpreted 49 C.F.R. § 195.452(h)(4)(i) and that, as the Final Order acknowledges, a pressure restriction cannot be implemented immediately.<sup>73</sup> In addition, given the infirmities of the Final Order's finding of violation, based upon a conclusion that omits to acknowledge or apply the role of discovery in evaluating Respondent's performance, and given that Respondent actually performed within the bounds of 49 C.F.R. 195.452(h)(2) (discovery of a condition) and then proceeded to address the immediate repair condition within the bounds described at Item 6 of the Final Order, Respondent requests reconsideration and withdrawal of the civil penalty assessment associated with Item 5.

### **B. Item 6**

Respondent cannot and thus does not concede that the Final Order presents a reasonable interpretation of 49 C.F.R. § 195.452(h)(4)(iii)(D), to the effect that Respondent's initial application of B31G was binding. Bearing in mind that the Final Order does not directly interpret the regulation and then apply that interpretation to Respondent's conduct but, rather, implies an interpretation by way of an *ad hoc* evaluation of Respondent's conduct, the finding of violation for Item 6 finds no legal support.

The civil penalty assessment for this Item 6 addressed five issues asserted by Respondent, and Respondent addresses herein three of the responses in the Final Order which appear to be in error. The first issue is that "the regulation offers each operator an election among various calculation methods," and that [o]nce [an operator] has determined which method to use, the operator is bound by those calculations."<sup>74</sup> Upon the same discussion presented in III.B of this Petition, Respondent reasserts that OPS erred in finding that Respondent violated 49 C.F.R. § 195.452(h)(4)(iii)(D).

The second issue addressed herein is the Final Order conclusion that Respondent is not deserving of a penalty reduction for "such other matters as justice requires," on the grounds that any factual findings contrary to the NOPV had already been applied to reduce the proposed penalty and, as a result, "Respondent is not prejudiced in any way that deprives it of any due process rights or

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<sup>73</sup> Final Order at 5 ("There are a number of intervening steps that an operator must take to capably and safely implement a pressure restriction.").

<sup>74</sup> *Id.* at 9.

offends standards of fair play and justice.”<sup>75</sup> Respondent’s due process rights have not fared well in this proceeding as discussed hereinabove.

The third issue addressed herein is Respondent’s request for good faith credit given its contention that “it is being judged per a novel interpretation of this regulation.”<sup>76</sup> To express that the Final Order presents a novel interpretation understates the matter. As Respondent has demonstrated in this Petition, the novel interpretation is not express but implied; is supported by no agency interpretation, guidance, or statement of intent; and lacks any legal foundation to the extent of falling short of reasonableness. And, in the alternative, if reasonable, PHMSA has provided no notice, much less adequate notice, of that novel interpretation. On the grounds stated herein, the good faith penalty assessment consideration should be revisited no matter the result on the finding of violation, same according to the dictates of *Rollins*.<sup>77</sup>

## V. CONCLUSION

Based upon the foregoing, Respondent believes that the findings of violation and assessed civil penalties should be withdrawn upon reconsideration.

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September 28, 2020



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<sup>75</sup> *Id.* at 10.

<sup>76</sup> *Id.*

<sup>77</sup> *Rollins*, 937 F.2d at 654.