

April 1, 2016

Mr. Gerald S. Frey
Global Pipeline Manager & President
ExxonMobil Pipeline Company
22777 Springwoods Village Pkwy
E3.5A.521
Spring, TX 77389-1425

Re: CPF No. 4-2013-5027

Dear Mr. Frey:

Enclosed is the Decision on the Petition for Reconsideration issued in the above-referenced case. For the reasons explained in the decision, the petition filed by ExxonMobil Pipeline Company is denied. When the civil penalty assessed in the Final Order has been paid and the terms of the compliance order completed, as determined by the Director, Southwest Region, the enforcement action will be closed. This decision constitutes the final administrative action in this proceeding. Service is made pursuant to 49 C.F.R. § 190.5.

Thank you for your cooperation in this matter.

Sincerely,

Jeffrey D. Wiese
Associate Administrator
for Pipeline Safety

Enclosure

cc: Mr. Rod Seeley, Director, Southwest Region, PHMSA
Mr. Bob Hogfoss and Ms. Catherine Little, Hunton & Williams LLP, Bank of America
Plaza, Suite 4100, 600 Peachtree Street, N.E., Atlanta, GA 30308

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

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

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In the Matter of)	
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ExxonMobil Pipeline Company,)	CPF No. 4-2013-5027
)	
Petitioner.)	
)	

DECISION ON PETITION FOR RECONSIDERATION

On March 29, 2013, the Pegasus Pipeline operated by ExxonMobil Pipeline Company (EMPCo, the Company, or Petitioner) experienced a failure near the town of Mayflower, Arkansas. The failure resulted in the release of approximately 5,000 barrels of crude oil in a residential area. Twenty-two households were evacuated. The accident caused property damage of more than \$57 million.¹

Following an investigation by the Pipeline and Hazardous Materials Safety Administration (PHMSA or Agency), Office of Pipeline Safety (OPS), the Director of the Southwest Region issued a Notice of Probable Violation, Proposed Civil Penalty, and Proposed Compliance Order (Notice) on November 6, 2013. The Notice alleged that EMPCo committed nine violations of the pipeline safety regulations in connection with the accident, proposed a civil penalty of \$2,659,200, and proposed corrective action.

EMPCo requested a hearing on the Notice, which was held June 2, 2014, in Houston, Texas. On October 1, 2015, PHMSA issued a Final Order in accordance with 49 C.F.R. § 190.213. The Final Order made findings that EMPCo committed each of the nine violations alleged in the Notice, assessed a modified civil penalty of \$2,630,400, and required corrective action set forth in a Compliance Order.

On October 21, 2015, EMPCo filed a Petition for Reconsideration requesting withdrawal of all nine violations, elimination or reduction of the civil penalty, and withdrawal of the Compliance Order. The filing of the Petition automatically stayed payment of the civil penalty in accordance with 49 C.F.R. § 190.243(c). EMPCo separately requested a stay of the Compliance Order as

¹ For additional information regarding the pipeline accident, *see* pp. 2-4 of the Final Order issued to ExxonMobil Pipeline Co., CPF No. 4-2013-5027, 2015 WL 7175715, at *2 (Oct. 1, 2015). Enforcement decisions can be viewed on PHMSA's website at <http://www.phmsa.dot.gov/pipeline/enforcement> (follow links for enforcement since 2002 and then enforcement actions issued by year).

permitted under the same regulation. A stay was granted by PHMSA on November 4, 2015, and extended on February 4, 2016.

Section 190.243 allows a respondent to petition the Associate Administrator for reconsideration of a final order that has been issued pursuant to § 190.213. Reconsideration is not an appeal or a completely new review of the record. A respondent may ask for correction of an error or, in limited circumstances, may present previously unavailable information.² If a respondent requests consideration of additional facts or arguments, the respondent must submit the reasons they were not presented prior to issuance of the final order. Repetitious information or arguments will not be considered.³ The Associate Administrator may grant or deny, in whole or in part, a petition for reconsideration without further proceedings.

I. Petition to Withdraw Violations in Items 1–9

Item 1 in the Final Order found that EMPCo had violated § 195.452(e)(1) by failing to establish a continual integrity assessment schedule for the Pegasus Pipeline that was based on all the risk factors that reflected the risk conditions of the pipeline.

The pipeline safety regulations at § 195.452(e)(1) require operators of pipelines that could affect a high consequence area (HCA) to develop a schedule for performing integrity assessments. The schedule must be based on risk factors that reflect the risk conditions of the pipeline. Some of the risk factors that must be considered under § 195.452(e)(1) when establishing a continual assessment schedule include the pipe material, manufacturing, seam type, results of previous integrity assessments, and leak history. Pipelines considered to be “susceptible to longitudinal seam failure” must have a continual schedule for integrity assessment that is “capable of assessing seam integrity.”⁴

As determined in the Final Order, these risk factors indicated EMPCo should have considered the Pegasus Pipeline to be susceptible to seam failure and should have developed a schedule for integrity assessments to verify integrity of the seam. The pipeline was constructed in the 1940s with low-frequency electric-resistance welded (ERW) pipe manufactured by Youngstown Sheet and Tube Company. This type of pipe is known to exhibit an increased risk of longitudinal seam failure due to selective seam corrosion and manufacturing defects such as hook cracks and inadequate bonding.⁵ The pipeline safety regulations expressly deem all pre-1970 ERW pipe to be presumptively susceptible to seam failure unless an engineering analysis shows otherwise.⁶

² PostRock KPC Pipeline, LLC, CPF No. 3-2011-1014, at 1, 2013 WL 8284478, at *1 (Dec. 5, 2013).

³ Plains All American Pipeline, LP, CPF No. 5-2009-0018, at 4, 2013 WL 5883403, at *3 (Aug. 30, 2013).

⁴ § 195.452(j)(5).

⁵ Final Order at 8. In 1988 and 1989, PHMSA issued notices to warn operators of factors contributing to failures of ERW pipelines. Alert Notice ALN-88-01 (Jan. 28, 1988) and Alert Notice ALN-89-01 (Mar. 8, 1989) *available at*: <http://www.phmsa.dot.gov/pipeline/regs/advisory-bulletin>.

⁶ § 195.303(d).

The Pegasus Pipeline had experienced numerous seam failures during previous integrity assessments. During a hydrostatic test in 2005–2006, approximately 11 failures occurred on the ERW pipe seam. The failures were due to manufacturing defects, including lack of fusion, hook cracks, and low mechanical strength. These types of defects are known to be associated with a higher risk of seam failure on ERW pipe. Other seam failures occurred during earlier hydrostatic tests in 1991 and 1969. In addition to test failures, a small leak occurred on the seam in 1984 while the pipeline was in service.

PHMSA found the results of previous integrity assessments and leak history, together with information about the pipe material, manufacturing, and seam type demonstrated the pipeline was susceptible to seam failure and therefore EMPCo was required to establish a continual assessment schedule that accounted for the risk. The Final Order concluded EMPCo violated § 195.452(e)(1) when it failed to establish an integrity assessment schedule for periodically testing the integrity of the ERW seam. On March 29, 2013, the Pegasus Pipeline failed along the longitudinal ERW seam during operation, which resulted in the Mayflower accident.

The Final Order rejected the reasons EMPCo gave for deciding the pipeline was not susceptible to seam failure. EMPCo had stated that it discounted test failures from 2005–2006 because an analysis showed the failures did not exhibit evidence of pressure cycling induced fatigue or preferential seam corrosion. PHMSA found this conclusion was flawed because the pipe material had low toughness, EMPCo knew this, and the Company should have recognized brittle pipe would not exhibit the same evidence of fatigue cracking because it is less resistant to fracture. Likewise, PHMSA found EMPCo had inappropriately used a computer program for predicting the remaining fatigue life of the pipe to support its susceptibility determination.

In its Petition, EMPCo argued the finding of violation in Item 1 should be reversed because PHMSA improperly considered, ignored, and selectively mischaracterized certain information in the record that supported EMPCo's position. The specific assertions made by Petitioner are addressed below.

a. Assertion That PHMSA Misrepresented Industry ERW Reports

EMPCo argued the Final Order misrepresented two key industry reports that provided guidance for analyzing seam failure susceptibility on ERW pipelines. The reports are *Low Frequency ERW and Lap Welded Longitudinal Seam Evaluation* by Michael Baker Jr., Inc. (April 2004) (Baker Report)⁷ and *Dealing with Low-Frequency-Welded ERW Pipe and Flash-Welded Pipe with Respect to HCA-Related Integrity Assessments* by John F. Kiefner (Feb. 2002) (Kiefner Report).⁸ Petitioner argued the Final Order selectively ignored a requirement in the reports that operators determine if prior seam failures exhibit evidence of fatigue or preferential seam corrosion. This is significant, Petitioner argued, because prior seam failures on the Pegasus

⁷ EMPCo Prehearing Submission, Exhibit 3; OPS Failure Investigation Report (Accident Report), Appendix E, Tab H (Oct. 23, 2013). *Also available at:* <https://primis.phmsa.dot.gov/iim/techreports.htm>.

⁸ OPS Violation Report, Exhibit D. *Also available at:* <https://primis.phmsa.dot.gov/comm/FactSheets/FSHydrostaticTesting.htm>.

Pipeline did not exhibit evidence of either condition, and, therefore, EMPCo was in line with the reports when it concluded the pipeline was not susceptible to seam failure.

At the outset, PHMSA emphasizes the cited reports are not incorporated by reference into § 195.452(e)(1). The regulation does not tell operators to disregard previous seam failures if there is no evidence of fatigue or selective seam corrosion. The regulation states that operators “must consider” the results of previous integrity assessments. The Pegasus Pipeline had a significant number of seam failures on its pipeline during the previous assessment. These prior failures along with information about the type of pipe at issue required EMPCo to establish a continual integrity assessment schedule that accounted for the risk of seam failure.

As the Final Order noted, Petitioner’s assertions were also not as clearly supported by the industry reports as the Company suggested. For example, Petitioner asserted that operators must determine if previous seam failures have evidence of fatigue or selective seam corrosion, but the Baker Report states that an absence of fatigue does not necessarily preclude the need for periodic reassessment, and that it should be calculated “using the best available information.”⁹ PHMSA recognizes the same passage also states that if no fatigue-related failures occurred during a hydrostatic test, it is reasonable to assume the pipe is not susceptible to seam failure.¹⁰ The report also states that if time-dependent growth (e.g., fatigue) is shown in the failure, reassessment becomes necessary, but the preceding sentence in that passage states that if a seam-related failure occurs, the pipeline “is considered susceptible” to seam failure.¹¹ The Pegasus Pipeline had multiple seam-related failures and an absence of fatigue does not necessarily preclude the need for periodic reassessment.

Likewise, the Kiefner Report states that to be excluded from a seam-integrity-assessment plan, the pipeline must “have no recorded seam-related service failure,” unless the failure was the result of accidental overpressure beyond 125% maximum operation pressure (MOP).¹² The Pegasus Pipeline had seam-related failures at pressures that did not exceed 125% MOP. Elsewhere the report states that a seam-integrity-assessment plan should be developed if fatigue failures have occurred.¹³

The Final Order did not misrepresent these reports, but rather noted EMPCo had a different reading of them.¹⁴ PHMSA rejects any contention that the cited reports override the applicable regulation by permitting operators to disregard significant seam failure history and other factors required to be considered under § 195.452(e)(1), based solely on an absence of fatigue. The hydrostatic test that took place on the Pegasus Pipeline in 2005–2006 resulted in 11 seam-related

⁹ Baker Report at 26.

¹⁰ Baker Report at 26.

¹¹ Baker Report at 20. EMPCo also referenced a flowchart at p.18 of the Baker Report. OPS argued that flowchart had been expanded, citing p. 91 of the Baker Report.

¹² Kiefner Report at 7.

¹³ Kiefner Report at 8.

¹⁴ Final Order at 9, n. 41.

failures and the pipeline experienced other seam failures before that. Under PHMSA's reading of the regulation (and the cited industry reports), these seam failures along with the other factors in § 195.452(e)(1) indicated the pipeline was susceptible to seam failure.

Even were PHMSA to accept on reconsideration that more than one reading of the reports is possible, and that the presence or absence of fatigue and selective seam corrosion is relevant to a susceptibility determination, the record demonstrates EMPCo's conclusion was not reasonable. As explained in the Final Order, the failures during the 2005–2006 hydrostatic test exhibited brittle cracking. Brittle pipe, or pipe with low toughness, is less resistant to fracture when stressed and will not exhibit the same evidence of fatigue cracking as ductile pipe. EMPCo acknowledged its pipeline had low toughness, and although the Company originally attributed the low toughness to colder hydrostatic test temperatures, the temperatures were actually within the range of normal operations.¹⁵ It was not appropriate for EMPCo to rely on the absence of fatigue without considering the reason why fatigue was not exhibited.

The Pegasus Pipeline experienced a significant number of seam failures during hydrostatic testing due to defects from manufacturing. Such defects were specifically known to be a risk associated with the type of pre-1970 ERW pipe used on the Pegasus Pipeline. The hydrostatic test failures had increased in number over the years and were occurring at lower test pressures, both indicating a likelihood that seam degradation was taking place. All of this information demonstrated the Pegasus Pipeline had a susceptibility to future longitudinal seam failure, which pre-1970 ERW pipe is already presumed to have. To conclude otherwise, regardless of exhibited evidence of fatigue, ignored the risks of the pipeline under factors that must be considered pursuant to § 195.452(e)(1). Accordingly, Petitioner's argument regarding the ERW reports is rejected.

b. Assertion That PHMSA Improperly Considered Expert Testimony

Secondly, Petitioner argued it was improper for the Final Order to dismiss the testimony of EMPCo's expert witness, notably because OPS had not offered an expert witness of its own. The testimony at issue was prepared by Dr. John Kiefner in an affidavit submitted by EMPCo prior to the hearing. Dr. Kiefner testified in support of the Company that hydrostatic failures alone are not indicative of seam failure susceptibility without evidence of fatigue or selective seam weld corrosion. He also testified that the 2013 accident exhibited unusual characteristics, and EMPCo's determination that the segment was not susceptible to seam failure was reasonable and consistent with industry guidance.

Dr. Kiefner's testimony was considered in the Final Order, although the testimony was found not to be conclusive in light of other information in the record.¹⁶ For example, the Final Order found Dr. Kiefner's primary assertion—that seam failures without evidence of fatigue do not indicate susceptibility to seam failure—was not entirely consistent with the cited industry reports. In addition, the Final Order found it was not reasonable for EMPCo to conclude its pipeline was not

¹⁵ Final Order at 10.

¹⁶ Final Order at 7, 10, 11.

susceptible to seam failure based on the absence of fatigue when appropriate consideration was not given to the reason why fatigue was not present.

The Final Order also considered Dr. Kiefner's assertion that brittle cracking at the accident site was atypical. It found, however, that it is not unusual for pre-1970 ERW pipe to exhibit brittle failures. The Final Order further found that the seam failures in 2005–2006 were caused by manufacturing defects, which are a known risk of pre-1970 ERW pipe. For these reasons, Dr. Kiefner's opinion about the reasonableness of the Company's actions was not ultimately persuasive.

Petitioner argued that OPS never offered its own expert witness, but OPS staff members who participated at the hearing possessed significant technical expertise in pipeline safety, integrity management, and ERW pipe. Unlike Dr. Kiefner, the staff members attended the hearing in person, which allowed them to answer questions and to more fully explain their statements. Dr. Kiefner was not present at the hearing and, therefore, could not answer questions, including specific questions that were raised about his apparent inconsistency with the Baker Report,¹⁷ and questions about the data he reviewed in preparing his affidavit.¹⁸ Petitioner enclosed a new affidavit by Dr. Kiefner with its Petition to reaffirm and supplement the witness's earlier statements.

Under § 190.243(b), there must be a justifiable reason for submitting new information after issuance of the Final Order. On occasion, PHMSA has found good cause to consider new information, such as where it concerned PHMSA's statutory authority,¹⁹ a new company name of a respondent,²⁰ or where additional records were discovered.²¹ PHMSA is aware of no instance in which newly created testimony was considered on reconsideration when that evidence could have been introduced prior to issuance of the Final Order.

Given that the Pegasus Pipeline was constructed with pipe known to be presumptively susceptible to seam failure and, in fact, had suffered previous seam failures during testing and while in service, PHMSA continues to find unpersuasive Dr. Kiefner's opinion regarding the reasonableness of EMPCo's actions. Accordingly, Petitioner's argument regarding the expert testimony is rejected.

¹⁷ Hearing Transcript at 97-101.

¹⁸ Hearing Transcript at 113-114. EMPCo indicated that Dr. Kiefner is semi-retired.

¹⁹ Plains All American Pipeline, LP, CPF No. 5-2009-0018, at 4, 2013 WL 5883403, at *3 (Aug. 30, 2013) (finding new information that relates to PHMSA's authority to regulate the pipeline).

²⁰ PostRock KPC Pipeline, LLC, CPF No. 3-2011-1014, at 2, 2013 WL 8284478, at *2 (Dec. 5, 2013) (finding new information that the respondent had been purchased by another company).

²¹ ExxonMobil Pipeline Co., CPF No. 4-2011-5016, at 3, 2014 WL 4635422, at *2 (Jul. 9, 2014) (considering new charts that were previously unavailable).

c. Assertion That PHMSA Omitted Other Evidence

Thirdly, Petitioner argued that the Final Order failed to mention another ERW study and failed to mention EMPCo's Root Cause Failure Analysis (RCFA).

The ERW study referenced by Petitioner is the *Final Summary Report and Recommendations for the Comprehensive Study to Understand Longitudinal ERW Seam Failures—Phase I, Battelle* (Oct. 23, 2013) (Battelle Report). Petitioner did not provide a copy of the report for the record, but noted it was publically available.²² EMPCo referenced the report for its position that current technologies and methods are still unable to address or predict all ERW pipeline risks.²³ Like the Battelle Report, EMPCo's RCFA was referenced in earlier submissions, but a copy was not submitted for consideration.²⁴ Petitioner contended the RCFA supported its position that the anomaly which led to the March 29, 2013 pipeline accident was unique and could not readily be detected.

The question of whether current technologies would have detected the anomaly that ultimately led to the Mayflower accident was not an issue decided in connection with the findings of violation in the Final Order. It is not clear how the Battelle Report and RCFA supported EMPCo's position that it complied with the pipeline safety regulations. Also, the Battelle Report was issued after the relevant facts of this case transpired. Given their relevance was not apparent with regard to the determinative issues, Petitioner's argument is rejected.

d. Assertion That EMPCo Complied with § 195.452(e)(1)

Finally, Petitioner argued the Final Order is flawed because the record reflected that EMPCo properly considered the susceptibility of the Pegasus Pipeline to seam failure in accordance with the regulation and industry reports.

As already discussed in the Final Order and above, EMPCo did not properly consider the factors in § 195.452(e)(1). Results of the previous assessments, pipe material, manufacturing information, seam type, and leak history pointed to seam failure susceptibility. EMPCo based its own conclusion largely on the absence of fatigue associated with prior seam failures, but that was not an acceptable basis for its conclusion, particularly since it did not fully consider the reasons fatigue may not have been present. Petitioner's assertion that the toughness of the pipe seam was "not relevant" to this analysis is rejected for the reasons set forth in the Final Order and this Decision.²⁵

²² The document is referenced as EMPCo Hearing Exhibit 66 on a list of exhibits included by reference only. Post-hearing Submission Index of Attached Exhibits at 2.

²³ Post-hearing Submission at 4 and 15; Petition at 9.

²⁴ The document is reference as EMPCo Hearing Exhibit 56 on a list of exhibits included by reference only. Prehearing Submission Index of Attached Exhibits at 3.

²⁵ Petition at 12. *See* Hearing Transcript at 120-126 (discussing metallurgical reports finding no evidence of fatigue, but noting there was low toughness that would not be associated with fatigue).

Petitioner also argued that it appropriately used the PipeLife fatigue analysis program to form its conclusion regarding seam failure susceptibility. The program, Petitioner explained, was based on the toughness associated with ductile pipe and that fatigue failures “initiate in the heat-affected base metal that tends to exhibit ductile behavior.”²⁶

PHMSA affirms its finding that the fatigue analysis program was not appropriately used for the purpose of determining seam failure susceptibility. While the software program may be acceptable for determining reassessment intervals, including reassessment intervals for pipe with varying levels of toughness, calculating a reassessment interval is not the same as determining a pipeline’s susceptibility to seam failure. A calculated reassessment interval greater than five years does not necessarily mean the pipeline is not susceptible to seam failure or is not required to be assessed for seam integrity.

In conclusion, while the performance regulation at § 195.452(e)(1) is not limited to only one process that must be used by operators for determining seam failure susceptibility in connection with a continual assessment schedule, the regulation does list the factors that must be considered. Operators are required to consider the factors accurately and appropriately, without dismissing probative information. Because PHMSA finds EMPCo reached a conclusion regarding the Pegasus Pipeline that did not appropriately consider the factors, including history of seam failures on the pre-1970 ERW pipe, PHMSA affirms the finding in the Final Order that Petitioner violated § 195.452(e)(1) by failing to establish an integrity assessment schedule that accounted for the risk of seam failure.

Item 2 in the Final Order found that EMPCo violated § 195.452(j)(3) by failing to perform an integrity assessment of the Pegasus Pipeline at an interval not to exceed five years or 68 months using a method capable of assessing seam integrity.

In its Petition, EMPCo argued the pipeline was not determined to be susceptible to seam failure, and, therefore, the Company was not required to perform an integrity assessment within five years using a method capable of assessing seam integrity. Petitioner’s arguments for withdrawing the violation in Item 2 and for withdrawing most of the other violations duplicate the arguments the Company raised in response to the Notice, which were addressed in the Final Order. EMPCo is advised that it is not an appropriate use of a petition for reconsideration to repeat arguments that were already made by Petitioner in the hearing stage and addressed in the Final Order. Finding no reason to disturb the finding in the Final Order with respect to Item 2, PHMSA affirms the violation of § 195.452(j)(3).

Item 3 in the Final Order found EMPCo violated § 195.452(b)(5) when it failed to notify OPS that the Company planned to exceed the five-year interval for performing a seam integrity assessment.

In its Petition, EMPCo contended the pipeline was not determined to be susceptible to seam failure, and, therefore, the Company was not required to notify OPS when it decided to reschedule the seam integrity assessment. Again, this argument was raised in response to the

²⁶ Petition at 13.

Notice and has already been addressed in the Final Order. PHMSA affirms the violation that Petitioner did not comply with § 195.452(b)(5).

Item 4 in the Final Order found that EMPCo violated § 195.452(e)(1) by failing to properly prioritize its pipeline segments for reassessment when it performed a seam integrity assessment of the Patoka to Conway segment in 2010, but waited until 2012–2013 to perform the same assessment on the Conway to Corsicana segment where the Mayflower accident occurred.

In its Petition, EMPCo argued that the regulation allows operators to decide how to assign risk scores and how to prioritize assessments. Petitioner argued the lower theoretical fatigue and higher number of girth weld leaks on the Patoka to Conway segment justified its decision to prioritize that segment for assessment.

This argument was raised in response to the Notice and was addressed in the Final Order. PHMSA determined the segments were improperly prioritized because the Conway to Corsicana segment had experienced more than double the number of seam failures from 1969 to 2006, recent failures had occurred on the segment at lower test pressures, and the segment had significantly more higher-risk ERW pipe. Finding no reason to disturb the findings in the Final Order, PHMSA affirms the violation of § 195.452(e)(1).

Item 5 in the Final Order found that EMPCo violated § 195.452(h)(1) by failing to temporarily reduce operating pressure or shut down its pipeline until certain repairs were completed. In its Petition, EMPCo contended the finding of violation is in error because the conditions were not identified as immediate repair conditions and, furthermore, were repaired “more quickly” than the Company could have implemented a pressure restriction.²⁷

As discussed in the Final Order, once an immediate repair condition is identified, the regulation imposes a mandatory duty on the operator to temporarily reduce operating pressure or shut down the pipeline until the condition is repaired. Upon reconsideration, PHMSA continues to find the evidence demonstrates EMPCo discovered three immediate repair conditions as a result of an integrity assessment, and failed to temporarily reduce operating pressure or shut down the pipeline until the repairs were completed several days later. Finding no reason to disturb the findings in the Final Order, PHMSA affirms the violation of § 195.452(h)(1).

Item 6 in the Final Order found that EMPCo violated § 195.452(h)(2) by failing to obtain information about the condition of its pipeline no later than 180 days after an integrity assessment, unless the 180-day period was impracticable. EMPCo acknowledged that information was obtained weeks or months after the 180-day deadline, but argued it was impracticable because the results of the assessment were not timely received from the tool vendor. The Final Order rejected this argument, finding the Company bore the risk of its decision to double the length of its tool runs thereby increasing the amount of information that would have to be processed and reported within the regulatory deadline.

²⁷ Petition at 16.

In its Petition, EMPCo argued the regulation at issue does not dictate the length of a tool run and the tool vendor had contractually agreed to provide the information within the required time. EMPCo also argued that the Final Order is contrary to public policy “by undermining the provisions of a bargained for contract.”²⁸

Although PHMSA has previously suggested that delay by a tool vendor might render discovery within 180 days impracticable, an operator’s claim of impracticability requires considering all the relevant facts of the delay. Where an operator’s actions contributed to the delay, as in the present case, PHMSA does not find the operator is excused from compliance due to an impracticability.

PHMSA also rejects Petitioner’s contention that this would impact the ability of operators to rely on contractual commitments with their vendors. The pipeline safety regulations already resolve this issue by making it clear that when an operator arranges with another person for the performance of an action required under the regulations, the operator “is not thereby relieved from the responsibility for compliance.”²⁹ Moreover, PHMSA has previously explained to Petitioner that employment of a contractor does not shield EMPCo from liability for failing to comply with the regulations.³⁰ Finding no reason to change the findings in the Final Order, PHMSA affirms the violation of § 195.452(h)(2).

Item 7 in the Final Order found that EMPCo violated § 195.452(b)(5), which requires pipeline operators to implement and follow provisions in their IMP. The Final Order determined that EMPCo violated the regulation by failing to follow its procedures for identifying changed conditions and its procedures for determining if changes require updating the risk assessment.

In its Petition, EMPCo contended that its procedures did not require updating the risk assessment because the Company was not required to perform a TFI tool run. This argument was raised in response to the Notice and was rejected in the Final Order. Finding no reason to modify the finding in the Final Order, PHMSA affirms the violation of § 195.452(b)(5).

Item 8 in the Final Order found that EMPCo violated §§ 195.402(a) and 195.452(b)(5). Section 195.402(a) requires operators to follow their operations and maintenance procedures, including procedures for integrity management. Section 195.452(b)(5) requires operators to follow their integrity management procedures specifically. The Final Order found EMPCo had failed to follow procedures associated with its integrity management program when it did not follow instructions for using its Threat Identification and Risk Assessment (TIARA) program.

In its Petition, EMPCo argued the violation was improperly alleged, and moreover, the Company properly recognized the risks associated with ERW pipe on the Pegasus Pipeline. These

²⁸ Petition at 18.

²⁹ § 195.10.

³⁰ ExxonMobil Pipeline Co., CPF No. 4-2004-5004, at 4, 2009 WL 7796890, at *3 (May 18, 2009), *citing* Williams Gas Pipeline - Transco, CPF No. 1-2005-1007, at 4, 2007 WL 2475903, at *4 (Jul. 18, 2007) (finding an operator “is responsible for the acts and omissions of its employees, agents, and contractors, including surveyors and inspectors.”)

arguments were raised in response to the Notice and were already addressed in the Final Order. PHMSA affirms its finding that EMPCo violated §§ 195.402(a) and 195.452(b)(5).

Item 9 in the Final Order found that EMPCo violated § 195.452(b)(5) by failing to implement and follow provisions of its IMP related to documenting management of change (MOC) when merging four testable segments into two.

In its Petition, EMPCo contended that the violation is in error because EMPCo created two MOC forms to support its decision to merge the testable segments, and the forms addressed the merger's impact on integrity assessments. EMPCo also argued that PHMSA did not consider the inability of the Company's TIARA system to dilute risk over merged segments, and that PHMSA ignored the 2005 risk analysis that concluded the merger of testable segments would not impact the integrity management process.

These arguments were raised in response to the Notice. As discussed in the Final Order, the evidence submitted for Item 9 was reviewed to determine whether EMPCo created MOC documentation for the merger of the testable segments. Another review of the MOC forms reveals no discussion or analyses relevant to the merger of the testable segments at issue. PHMSA continues to find EMPCo failed to implement and follow provisions of its IMP related to MOC in violation of § 195.452(b)(5).

II. Petition to Withdraw or Reduce Civil Penalty and Compliance Order and Other Arguments

In its Petition, EMPCo raised several additional arguments concerning the Compliance Order, civil penalty, and fairness of the proceeding. These arguments are addressed below.

a. Compliance Order

EMPCo argued the Compliance Order should be withdrawn because the Company committed no violations. In the alternative, EMPCo argued the Compliance Order is overbroad and an abuse of discretion because some provisions apply to all pre-1970 ERW pipe subject to the Company's IMP, not just the Pegasus Pipeline.

The Final Order addressed both of these arguments and explained how the provisions are within the authority of PHMSA to issue orders directing compliance with the integrity management regulations. The Final Order also found the corrective actions were appropriately tailored to ensure EMPCo considers the risk of seam failures on its pre-1970 ERW pipe covered by the regulation. PHMSA finds no reason to modify the Compliance Order.

b. Civil Penalty

EMPCo argued that the civil penalty should be withdrawn or reduced because a number of the allegations constituted a single "series of violations" for which their combined penalties must be capped under 49 U.S.C. § 60122. This argument is addressed in the Final Order and Petitioner did not submit anything new in this regard. The decision in the Final Order regarding related violations is not modified.

EMPCo also argued the civil penalty should be withdrawn or reduced because there is no proof that Items 1, 2 and 8 were causal factors of the Mayflower accident. To support this assertion, Petitioner noted that no actionable anomaly was detected on the pipeline at the location of the failure when the Company performed an integrity assessment in 2012–2013. In addition, EMPCo argued the cause of the failure was unique and not capable of reliable detection.

Although no anomaly was previously detected at the failure location using a TFI tool, there were questions raised during the proceeding about the appropriateness of using a TFI tool in the first place, given that the types of defects detected by hydrostatic tests in 2005–2006 would not likely be detected with a TFI tool.³¹ The evidence also suggested the test pressure during the 2005–2006 hydrostatic test may not have reached recommended levels for evaluating seam integrity at the location of the failure.³² While the Final Order did not decide if hydrostatic testing would have detected the anomaly that failed, the fact that it was not detected does not negate the contributory impact of the violations.

Failure by EMPCo to recognize the risks of seam failure, to carry out an assessment schedule based on those risks, and to follow its procedures for assessing the risk of the pipeline, are all regulatory violations representing an overall failure by EMPCo to take preventative actions to avoid the specific type of accident that eventually occurred on the Pegasus Pipeline.³³ For these reasons, PHMSA affirms the finding in the Final Order that the violations contributed to the accident.

c. Due Process

EMPCo argued the Final Order violates due process and the Administrative Procedure Act (APA) because PHMSA does not provide meaningful guidance about how it assesses civil penalties and because the Agency did not provide a copy of the Presiding Official's recommended decision.

“Without the benefit of a published penalty policy,” Petitioner argued, “pipeline operators have no means of contesting the various considerations that may inform a PHMSA penalty assessment.”³⁴ EMPCo noted that many other federal agencies have implemented public

³¹ Region Recommendation at 9. *See* Accident Report, Appendix E, at b (Oct. 23, 2013) (asserting the most effective assessment method was hydrotest until it could be shown that in-line inspection tools were capable of detecting the type of ERW seam flaws present on the Pegasus Pipeline).

³² The test in 2005–2006 was to 125% MOP. Final Order at 3. This is the minimum test pressure for establishing MOP under § 195.304, but hydrostatic tests to assess integrity commonly use 139% MOP or 153% MOP. *See* Accident Report, Exhibit E, Tab E at i (stating if lower stress level tests are chosen, a factor of 1.39 should be used). *See also Spike Hydrostatic Test Evaluation* by Michael Baker Jr., Inc. (July 2004) at 57 (stating that two values of test pressure commonly used are 1.39 times MOP and 1.53 times MOP) *available at*: <https://primis.phmsa.dot.gov/iim/techreports.htm>.

³³ *See, e.g.*, Accident Report at 8 (stating that if the IMP requirements were “executed properly, it would have been far less likely for the accident to occur, and thus [the actions by EMPCo] are found to be contributory to the primary cause of the accident”).

³⁴ Petition at 22.

policies that describe their civil penalty assessment processes, yet the PHMSA Office of Pipeline Safety has never adopted comparable guidelines.

PHMSA responded to this argument in the Final Order. The civil penalty assessment factors that must be considered are set forth in 49 U.S.C. § 60122 and 49 C.F.R. § 190.225. PHMSA has given additional definition to these factors by explaining what type of conduct, evidence, and facts are relevant to each factor. The explanations appear in previously-issued final orders, in the Violation Report provided to EMPCo in this case, and in a three-page Civil Penalty Summary document that EMPCo acknowledged receipt of.³⁵

In the Violation Report, each required assessment factor is considered separately using a list of possible descriptions that range in severity. In preparing the report, OPS selected one description under each assessment factor that allegedly represented the relevant facts supported by evidence for that violation. For example, under gravity for Item 9, OPS selected the description that “pipeline safety or integrity was significantly compromised in an HCA or an HCA could affect segment.”³⁶ This description is slightly more than halfway between the least and most severe gravity descriptions in the Violation Report and Civil Penalty Summary document.

The Civil Penalty Summary document also discusses the penalty assessment factors. It explains the range of penalties that may be assessed under each factor and the type of evidence or facts that will result in higher or lower penalties under each assessment factor. This information corresponds directly to the particular facts noted in the Violation Report, which contained the factual allegations and description selections for each violation.

Through the Violation Report, EMPCo was apprised of the factual material OPS believed to be relevant to the proposed civil penalty. The Company also knew how OPS viewed those facts as to the severity of the gravity, culpability, and other factors. EMPCo had an opportunity to offer its own contrary presentation of any or all of the relevant factual material impacting the penalty. The Final Order considered the information offered by both OPS and EMPCo in deciding an appropriate civil penalty under the assessment factors. Since EMPCo knew the factors that must be considered and the information that was relevant to those factors, the Company had access to sufficient information about the proposed penalty to allow a meaningful and targeted response.

Regarding availability of the Presiding Official’s recommended decision, Petitioner acknowledged that PHMSA has previously declined to make recommended decisions part of the case file because the document is considered to be an “internal and deliberative communication or ‘draft decision.’”³⁷ Petitioner argued the APA “prohibits such internal ex parte communications between an agency and its decision maker in an adjudicative matter.”³⁸ To support its argument, the Company cited *United States Lines, Inc., v. Federal Maritime*

³⁵ See *Administrative Procedures; Updates and Technical Corrections*, 78 Fed. Reg. 58897, 58901 (Sept. 25, 2013) (explaining that a general outline of how penalties are calculated can be provided upon request).

³⁶ Violation Report at 62.

³⁷ 78 Fed. Reg. at 58901.

³⁸ Petition at 22.

Commission, 584 F.2d 519 (D.C. Cir 1978). Petitioner argued that without disclosure of the recommended decision, there is no opportunity for the Company to rebut it.

In the case cited by Petitioner, a court reversed an adjudicatory decision by a federal agency, in part, because the agency had based its decision on *ex parte* communications with only one of the parties. The *ex parte* contacts had introduced new arguments and positions that responded to and rebutted arguments of the other party. The court found use of the secret communications by the decision maker was inconsistent with a fair hearing under the APA.

That case differed, of course, from the current proceeding where there is no allegation of an *ex parte* contact between one of the parties and the Presiding Official or Associate Administrator regarding an issue to be decided in the proceeding. Both parties' final written submissions were made part of the record in the case and shared with the other party. Since no *ex parte* communication occurred, Petitioner's argument is rejected.

Petitioner's implication that the recommended decision itself may constitute an *ex parte* communication must also be rejected. It is the statutory role of the Presiding Official to consider the record in the case and to deliver a recommended decision to the Associate Administrator who issues a final order. The process appropriately falls within the scope of informal adjudication permitted under the APA, even though it may differ from another agency's enforcement process. For example, Petitioner cited to the procedures of the Environmental Protection Agency in 40 C.F.R. Part 22, under which an Administrative Law Judge issues an "initial decision" that becomes the agency's final decision unless one of the parties moves to reopen the record or appeals the initial decision to the Environmental Appeals Board.

PHMSA's informal adjudication process is obviously different. PHMSA has been pointed to no authority that requires modification of its process in the manner Petitioner has suggested. Petitioner had a full opportunity to respond to material in the record, and even sought reconsideration of the Final Order through filing of its Petition. For the above reasons, Petitioner's arguments are rejected.

d. Other Arguments

EMPCo repeated its argument that the Pipeline Safety Act does not create strict liability for pipeline accidents, and argued the Agency failed to meet its burden of proof. These arguments are sufficiently addressed by the Final Order.

III. Conclusion

The Petition for Reconsideration filed by EMPCo is ***denied***. Payment of the \$2,630,400 civil penalty assessed in the Final Order is now due and must be made within 20 days of service of this Decision.

Federal regulations (49 C.F.R. § 89.21(b)(3)) require such payment to be made by wire transfer through the Federal Reserve Communications System (Fedwire), to the account of the U.S. Treasury. Detailed instructions are contained in the enclosure. Questions concerning wire transfers should be directed to: Financial Operations Division (AMK-325), Federal Aviation

Administration, ATTN: Shelby Jones, 6500 S MacArthur Blvd., Oklahoma City, Oklahoma 79169. The Financial Operations Division telephone number is (405) 954-8845.

Failure to pay the \$2,630,400 civil penalty will result in accrual of interest at the current annual rate in accordance with 31 U.S.C. § 3717, 31 C.F.R. § 901.9 and 49 C.F.R. § 89.23. Pursuant to those same authorities, a late penalty charge of six percent (6%) per annum will be charged if payment is not made within 110 days of service. Failure to pay the civil penalty may result in referral of the matter to the Attorney General for action in a district court of the United States.

The stay of the Compliance Order that was issued by PHMSA on November 4, 2015, and extended on February 4, 2016, is hereby terminated. The deadlines within the Compliance Order will be calculated from the date of issuance of this Decision. All other terms of the Final Order, including terms of the Compliance Order not otherwise modified, remain in effect. This Decision constitutes final agency action in this enforcement proceeding.

Jeffrey D. Wiese
Associate Administrator
for Pipeline Safety

Date Issued