

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

)	
In the Matter of)	
)	
Lake Charles LNG Company, LLC)	
)	CPF No. 4-2017-3002
Respondent.)	Petition for Reconsideration
)	
)	

**RESPONDENT’S
PETITION FOR RECONSIDERATION and REQUEST FOR STAY**

I. Introduction

Respondent Lake Charles LNG Company, LLC (Lake Charles or the Company) received a Final Order issued by the Pipeline and Hazardous Materials Safety Administration (PHMSA or the Agency) on December 5, 2019, in connection with a Notice of Probable Violation (NOPV) issued to the Company on March 1, 2017. The Final Order finds that Lake Charles violated two of the three alleged NOPV items that the Company challenged, assesses a civil penalty of \$32,400, and imposes a Compliance Order that requires corrective actions within one hundred eighty (180) days.

Lake Charles files this Petition for Reconsideration of the Agency’s Final Order pursuant to 49 C.F.R. Part 190.243, and respectfully requests that PHMSA reconsider its finding with respect to NOPV Item 2. The Final Order finds that above ground metallic components of cryogenic LNG piping must be inspected for corrosion in direct contradiction with existing law. Part 193 provides that where an operator has determined that piping cannot be expected to be subject to corrosion during its intended service life then no additional corrosion protection is required, pursuant to 49 C.F.R. Parts 193.2625(a) and 193.2627.

In this respect, the Final Order does not comport with the plain language of the rule and rulemaking history by rendering Parts 193.2625(a) and 193.2627 essentially meaningless, and would establish contrary enforcement precedent that is the first of its kind. PHMSA incorrectly bases its decision on an improper reading of the regulations and misleading statements from the Southwest Region about the atmospheric environment at the Lake Charles facility without taking into account actual factual data provided by the Company. For these reasons, and other procedural and due process concerns as explained further below, the Final Order with respect to NOPV Item 2 should be withdrawn in its entirety.

Given the significance of this unprecedented finding to Lake Charles and the industry at large, as well as the time and resources necessary to implement the Compliance Order, Lake Charles respectfully requests that PHMSA stay Item 2 of the Compliance Order pursuant to 49 C.F.R. Part 190.243(c) while the Agency considers this petition.

II. Factual and Procedural Background

A. Facility Description

The Lake Charles facility prepares liquefied natural gas (LNG) for transportation as natural gas by pipeline, using a regasification process that utilizes cryogenic equipment. The facility is located 26 miles inland from the Gulf of Mexico (see Figure 1 below excerpted from *Post-Hearing Brief Exhibit 8*). The facility pipes and components used for cryogenic operations are above ground and operate at temperatures between -260 and -50 degrees Fahrenheit. The cryogenic piping is constructed using austenitic stainless steel, due to its retention of mechanical properties at cryogenic temperatures. It also has the additional benefit of preventing corrosion. Most of the pipe is covered with an insulating material because of the extremely low operating temperatures (the material is for temperature insulation, not a “coating” for corrosion prevention). The majority of the facility piping is subject to PHMSA jurisdiction under 49 C.F.R. Part 193, but some of the piping is exempt due to its connection to marine transportation.¹



Figure 1: Map of LC LNG Facility

(<http://lakecharleslng.com/sustainability/environment>)²

¹ 49 C.F.R. Part 193.2001(b).

² Respondent's Post-Hearing Brief Exhibit 8, *Critical Corrosion Temperatures of Stainless Steel, Comparison of Concentrations of Chlorides in Water v. Temperature in LC LNG Facility and the North Sea Platform*; Figure 1.

B. Procedural History

The NOPV and Final Order followed an inspection at the Lake Charles facility conducted by PHMSA Southwest Inspector Jon Manning on September 15-16, 2015. Following the inspection, PHMSA issued an NOPV alleging five probable violations of the LNG regulations at 49 C.F.R. Part 193 (two of which were warning items), proposed a civil penalty of \$32,400, and proposed a compliance order with three requirements. Lake Charles timely requested a hearing on the first three alleged violations, Items 1-3, timely submitted Pre and Post-Hearing Briefs, and participated in the Hearing on October 3, 2017, in which PHMSA Southwest Inspector Jon Manning served as *both* the inspector and the Interim Regional Director. A Region Recommendation was not issued until nearly a year and a half later on March 26, 2019, and it was not provided to Respondent until two months later on May 21, 2019. Lake Charles submitted a reply (Reply) ten days later, on May 31, 2019, requesting that the Region Recommendation be excluded.³ As discussed in Section V further below, that request was denied.

Item 1 of the NOPV alleged that the Lake Charles facility violated Part 193.2629 (and, in turn, Part 192.463, Appendix D), by failing to consider IR drop during its 2015 annual inspection of the facility's cathodic protection system. Item 2 of the NOPV alleged that the Company failed to comply with the Part 193 requirements for atmospheric corrosion inspection of above ground pipelines at least once every three years, pursuant to Part 193.2635(d). Item 3 of the NOPV alleged that Lake Charles failed to comply with training requirements set forth at Parts 193.2707, 193.2713, and 193.2717.

C. Final Order

In its Final Order received by Lake Charles on December 5, 2019, PHMSA found that Respondent violated NOPV Items 1 and 2, while accepting Respondent's arguments with respect to Item 3 and withdrawing the alleged violation regarding 49 C.F.R. Part 193.2707(a). PHMSA also upheld the Proposed Compliance Order applicable to Items 1 and 2, as well as the penalty of \$32,400 for Item 1, and the two uncontested warning items.

As to NOPV Item 1, the Final Order (1) fails to acknowledge that PHMSA presented its arguments only with respect to the 2015 annual survey, and (2) accepts PHMSA's suggestion that failure to consider the IR drop could "result in a failure to provide adequate cathodic protection to the pipe."⁴ Putting aside the fact – as accepted in the Final Order – that Lake Charles presented evidence that it considered IR drop for the 2015 survey, it is also important to note that these surveys are specific to fire prevention equipment, not product pipelines, as set forth in the record.⁵ In the spirit of cooperation, Lake Charles has nevertheless elected to accept the Agency's finding for Item 1. The Company has already satisfied the associated Compliance Order obligation to revise and

³ *Lake Charles Reply to Region Recommendation (May 31, 2019) (copy attached as Attachment 1).*

⁴ *Final Order, p. 2; Region Recommendation at 3.*

⁵ *See, e.g., Respondent's March 22, 2017, Written Response, Attachments A-E.*

implement procedures to require consideration of IR drop⁶ and paid the penalty of \$32,400 on December 16, 2019.⁷ Lake Charles is seeking review of the Agency’s finding concerning NOPV Item 2, however, which is the subject of this Petition.

III. PHMSA’s Final Order as to NOPV Item 2 Should be Reconsidered and Withdrawn

This matter presents one issue with respect to NOPV Item 2: whether above ground LNG piping must be inspected for corrosion under 49 C.F.R. Part 193.2635(d) where an operator has determined that the piping in question cannot be expected to be subject to corrosion pursuant to 49 C.F.R. Parts 193.2625(a) and 193.2627. Despite the plain language of the applicable regulations and factual evidence presented in the Hearing and without any support in the law, enforcement, guidance, or industry standard, the Final Order finds that it must be.

A. PHMSA Regulations Unambiguously Allow an Operator to Determine Susceptibility to Corrosion

Contrary to the conclusion in the Final Order, the Part 193 rules clearly provide that “[e]ach operator shall determine which metallic components could, unless corrosion is controlled, have their integrity or reliability adversely affected by external, internal, or atmospheric corrosion during their intended service life.”⁸ Consistent with this rule, PHMSA limits atmospheric corrosion control requirements to “[e]ach exposed component that is subject to atmospheric attack.”⁹ The rules further specify that “components whose integrity or reliability could be adversely affected by corrosion must be ... protected from corrosion in accordance with §§ 193.2627 through 193.2635, as applicable,” meaning through use of “[m]aterial that has been designed and selected to resist the corrosive atmosphere involved.”¹⁰

When the Office of Pipeline Safety (OPS) promulgated the Part 193 LNG rules in 1980, it stated clearly that “corrosion does not occur at cryogenic temperatures or where the metal is continually in contact with liquid LNG or LNG vapors. At extremely low temperatures, the chemical reaction necessary to cause corrosion does not occur.”¹¹ This is consistent with industry standards and practice in use since 1980, and PHMSA representatives at the Hearing concurred on this point. The Part 193 rulemaking preamble further provides that internal corrosion monitoring requirements at 49 C.F.R. Part 193.2635(e) do not apply to components operated at cryogenic temperatures

⁶ *Id.*

⁷ *See Attachment 2* (Wire Transfer Detail Report confirming payment of penalty on December 16, 2019).

⁸ 49 C.F.R. Part 193.2625(a).

⁹ 49 C.F.R. Part 193.2627.

¹⁰ 49 C.F.R. Part 193.2625(b); 193.2627(a).

¹¹ *Exhibit 6 to Respondent’s Pre-Hearing Brief, 45 Fed. Reg. 70,390, 70,396 (Oct. 23, 1980)* (emphasis added) (agreeing with the Technical Pipeline Safety Standards Committee on this point).

“because corrosion control would not be required by § 193.2625.”¹² The same conclusion applies to atmospheric corrosion control requirements based on a determination under Part 193.2625. As discussed in Respondent’s Pre-Hearing and Post-Hearing Brief and at the Hearing, where a component is not continuously in contact with cryogenic temperatures, the applicability of Part 193 corrosion control monitoring depends on the findings of an operator’s determination under Part 193.2625.

Finally, the drafters of the regulation clearly anticipated there would be instances where components were not at cryogenic temperatures – as has occurred at Lake Charles – and addressed the possibility by allowing an operator the flexibility to make a determination under Part 193.2625 as to the susceptibility of the components to corrosion. Specifically, in the 1980 preamble, the PHMSA predecessor agency explained that “parts of. . . a component that are not continually at cryogenic temperatures may, however, have to be protected against corrosion and thus monitored under § 193.2635, depending on the findings made under § 193.2625 regarding the effects of corrosion to those parts and the overall effect on the component.”¹³ The agency also expressly noted that “[s]uch components would have to be protected only if the findings under § 193.2625 indicate that adverse consequences from corrosion may occur.”¹⁴

The Final Order incorrectly interprets the regulations otherwise, however, with no precedent to support the legal conclusion that an operator cannot determine that a three-year inspection is not needed. The regulations on their face provide otherwise as does the rulemaking history.¹⁵

B. Lake Charles’ LNG Facility is Not Susceptible to Corrosion

As with other cryogenic LNG facilities, Lake Charles has operated for decades with the understanding that its stainless steel pipe is exempt from PHMSA’s Part 193 corrosion inspection requirements. The Company’s determination under Part 193.2625 is reflected in its corrosion procedures, including those in effect at the time of the PHMSA inspection.¹⁶ Further, there has not been an OPS enforcement action since the inception of the regulations in 1980 that alleged a

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* (*emphasis added*).

¹⁵ The Final Order specifically states that the regulations – 49 C.F.R. Parts 193.2625, 193.2627 and 193.2635(d) – “must be read in a cohesive manner in order to arrive at a logical application of the inspection requirement that is consistent with the purpose and intent of the corrosion control regulation.” *Final Order*, p. 5. Lake Charles agrees with this statement, but the Final Order misses its mark entirely: to find a violation under NOPV Item 2, the Final Order is reading Section 193.2635 *outside* of the context of the regulations, by *ignoring* Sections 193.2625 and 193.2627, and in particular, the very clause contained in prefatory text of Section 193.2635 that clearly states “Corrosion protection provided as required by this subpart.”

¹⁶ *Post-Hearing Brief Exhibit 5, Lake Charles LNG Company, Technical Procedures Manual, Corrosion Control Procedures, Section 8.1 Component Identification (rev. 8/24/2015)* (provided during PHMSA inspection).

violation of Part 193.2635 against a cryogenic LNG operator of stainless steel pipe, nor could PHMSA bring one to our attention at the Hearing or since.

The Lake Charles LNG facility is designed to transport LNG at cryogenic temperatures, using austenitic stainless steel pipe. Austenitic stainless steel pipe (in contrast to carbon steel pipe) is an alloy that is resistant to corrosion due to the build-up of the chromium oxide layer, with the particular ability to “self-repair.”¹⁷ Because the facility’s pipe components used in cryogenic transport are in continuous cryogenic service during normal operation, the pipe is covered with insulation wrap. The only time that these pipe components are not at cryogenic temperatures is when the facility is shut down for maintenance, repair or other reasons.

As presented in the Hearing and reflected in the record, the facility has been out of service and at ambient temperatures since 2012, without any indication of corrosion. Although not required by Part 193, the LNG pipe has been and is inspected when the facility is out of cryogenic operation, including in 2012 and 2013 and again in 2017.¹⁸ Further, it is also possible to visually monitor thousands of feet of uninsulated stainless steel pipe in the facility, which comprises roughly 25% of the stainless steel piping at the facility, which the Company does routinely. Since the facility went into service in 1982, Lake Charles has not observed any visual indication of corrosion on any of its stainless steel piping. The Company’s additional inspections, evaluation of data, and current pipe conditions further confirm that the stainless steel piping systems under insulation “have no indications of any type of corrosion” and the Company concluded that “no additional review of austenitic stainless steel piping is required and that these pipes are suitable for continued operations without further inspection.”¹⁹

Despite the extensive additional data collection and analysis conducted by Lake Charles in support of its determination that the stainless steel pipe at its facility is not susceptible to corrosion, PHMSA alleged in the NOPV and continued to aver in the Hearing and Region Recommendation that the information provided by Lake Charles during the PHMSA inspection in issue “...does not support the argument that corrosion of stainless steel can be predicted solely on the basis of operating

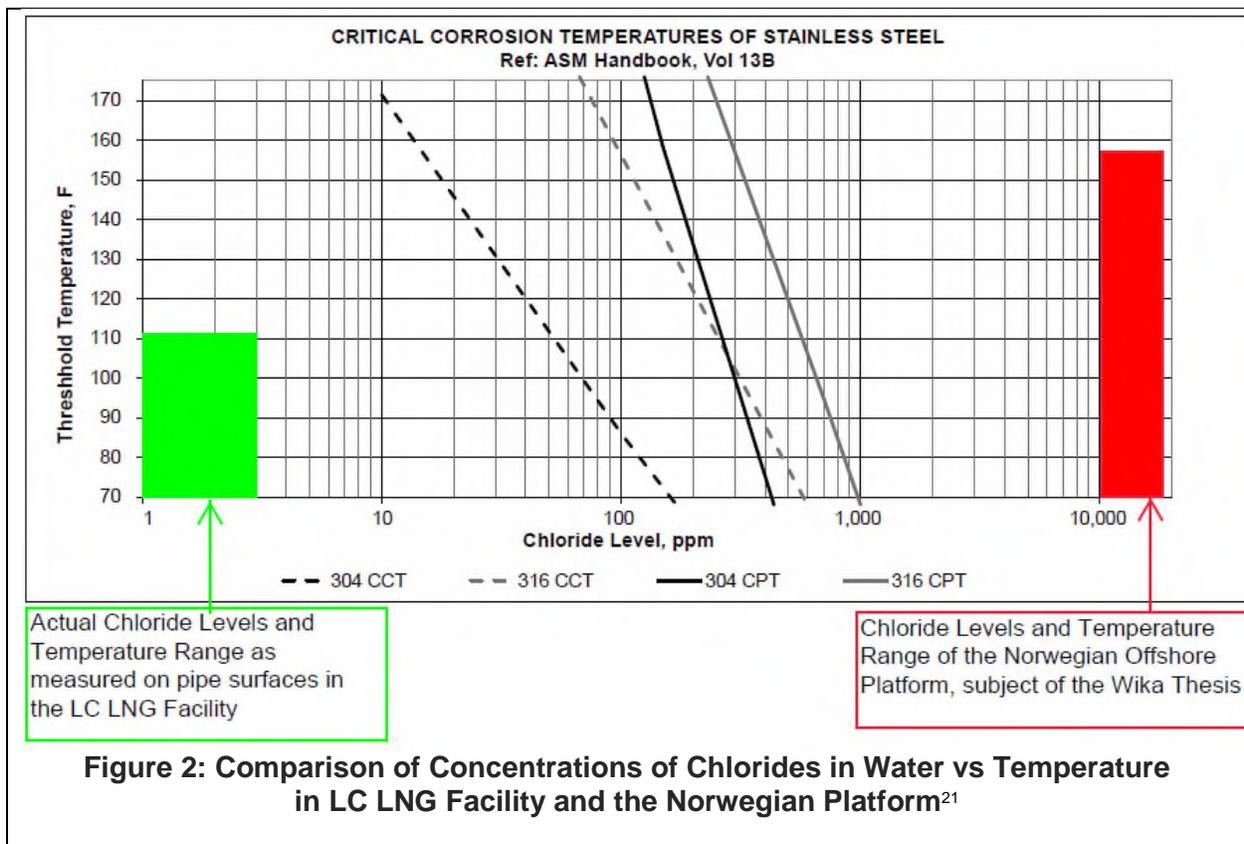
¹⁷ See Respondent’s Pre-Hearing Brief Exhibit 7.

¹⁸ See Exhibit 8 to Respondent’s Pre-Hearing Brief, Lake Charles LNG Stainless Steel CUI Inspection Summary (2012-2013) (explaining that “The objective of the inspection was to take advantage of the terminal downtime to assess the overall condition of the cryogenic piping and insulation systems.”); see also Exhibit 6 to Respondent’s Post-Hearing Brief, Lake Charles LNG Stainless Steel CUI Insulated Pipe Inspection Summary (2012-2013) (showing inspection data for stainless steel insulated pipe only). In 2012, one hundred and thirty-two (132) points were examined at fifty-four (54) locations, fifty-two (52) of which included original 1980s pipe. *Id.* In 2013, eighty-four (84) points were examined at thirty-nine (39) locations, thirty-two (32) of which included original 1980s pipe. *Id.* There was no indication of any impacts to wall thickness or visual indication of corrosion. *Id.*

¹⁹ See Respondent’s Pre-Hearing Brief Exhibit 8, Lake Charles LNG Stainless Steel CUI Inspection Summary (2012-2013); see also Exhibit 6 Post-Hearing Brief, Lake Charles LNG Stainless Steel CUI Insulated Pipe Inspection Summary (2012-2013) (updated to depict inspection data for insulated stainless steel pipe only). This information was available for review at the time of the PHMSA inspection in 2015 (but was not requested) and remains available for review along with updated verification data from 2017 (including underlying data and photographs).

temperature.”²⁰ This statement directly contradicts the preamble to Part 193, decades of precedent, and substantial factual data and analysis provided by the Company. As the record reflects, Lake Charles gathered field data from the facility regarding temperatures and chloride levels over the summer of 2017 and retained John Smart Consulting Engineers to assist in additional analysis – of both the 2017 data as well as 7 years of prior data with respect to insulation type, temperature, environmental salinity readings and more – to supplement Lake Charles’ prior determination.

At the Hearing, Lake Charles provided the Agency with a graph illustrating the Company’s and Dr. Smart’s additional analysis and findings:



In particular, the graph illustrates that the piping at the facility is not subject to temperature or chloride at levels that would potentially result in corrosion. *Id.* The Company took readings of both, and with respect to temperatures, took readings on the hottest days, and examined both exposed and

²⁰ Respondent’s Pre-Hearing Brief Exhibit 1, NOPV, at 3 (Mar. 1, 2017).

²¹ Respondent’s Post-Hearing Brief Exhibit 8, Critical Corrosion Temperatures of Stainless Steel, Comparison of Concentrations of Chlorides in Water v. Temperature in LC LNG Facility and the North Sea Platform; see also John Smart Consulting, Figure 5 to Post-Hearing Brief Exhibit 4 (Nov. 3, 2017) (updated from the version shared at the Hearing to reflect in the green text box that measurements were taken from pipe surfaces at Lake Charles, not just “insulated” pipe surfaces).

insulated pipe, both at varying distances away from water sources. The temperatures not exceeding 115°F combined with the low chloride levels of 1 ppm to 3 ppm (in part, because the Lake Charles facility is 26 miles inland from the Gulf Coast) give confidence that the piping is not subject to corrosion from crevice or pitting corrosion.

As presented and discussed in the report prepared by Dr. Smart, “**for both atmospheric exposure and exposure under insulation, austenitic stainless steel components are immune from atmospheric corrosion under all foreseeable operating and environmental conditions in the LC LNG Facility.**”²² More specifically, this evaluation concludes that the Lake Charles facility stainless steel piping whether insulated or uninsulated: (1) will not corrode based on the measured conditions of pipe surface temperature and chloride concentrations; and (2) is “immune” to pitting corrosion, crevice corrosion, and stress corrosion cracking.²³ Further, when the facility is operating, the stainless steel is not subject to corrosion because there is no electrolyte in contact with the steel. For these reasons, “the facility is not required to undergo aboveground inspection” for atmospheric exposure or for corrosion under insulation.²⁴

It is against this backdrop and data taken specifically from the Lake Charles facility regarding temperature and chloride levels that it is particularly difficult to understand how the Final Order finds the Region’s broad unsubstantiated statement to be persuasive, stating that:

Lake Charles facility ... is serviced by ocean going LNG tankers traversing the ship channel from the Gulf of Mexico. Consequently, the Lake Charles facility is immediately adjacent to the Calcasieu Ship Channel, which is continuous with Calcasieu Lake, both of which are saline bodies of water in direct contact with the Gulf of Mexico. Thus, the Lake Charles LNG facility is not 26 miles from water, but sits immediately adjacent to a chloride rich saline bodies of water.²⁵

The Company presented PHMSA with scientific data on these very issues that the Final Order simply ignores and instead accepts an unsupported statement related only to proximity to various bodies of water, without taking into account the contrary factual evidence presented by Respondent. Lake Charles did not indicate that it was located 26 miles from water, rather, the facility is located 26 miles inland from the Gulf of Mexico, as reflected in the map contained in Dr. Smart’s report and excerpted as Figure 1 above in Section II.

Similarly, as if to support the conclusions in the Final Order further, footnote 12 states that “OPS noted that surface corrosion was already beginning on the metallic pipe cladding.”²⁶ This is simply

²² Respondent’s Post-Hearing Brief Exhibit 4, *Evaluation of Susceptibility of Stainless Steel LNG Pipe to Corrosion Under All Operating Conditions at the Lake Charles LNG Facility*, John Smart Consulting Engineers (Nov. 3, 2017).

²³ *Id.*

²⁴ *Id.*

²⁵ *Final Order*, p. 5.

²⁶ *Id.*

incorrect, and stems from PHMSA's misguided reliance on a photo included as Figure 2 to the Region Recommendation to suggest (for the first time during the course of the enforcement action) that there are indications of corrosion on metallic insulation sheathing, which are in turn indicative of corrosion on piping beneath the sheathing. As shown at the Hearing and addressed in Respondent's Reply, when seen in its original color photograph format – as attached to the Agency's own Pipeline Safety Violation Report – there is no sign of any such corrosion.²⁷

IV. PHMSA Has Not Met Its Burden of Proof

PHMSA bears the burden of proof of all elements of a proposed violation in an enforcement proceeding.²⁸ If PHMSA “does not produce evidence supporting the allegation [which] outweighs the evidence and reasoning presented by Respondent in its defense,” the allegation of violation must be withdrawn.²⁹ PHMSA has produced no evidence, legal or factual, to support its allegation.

Both the regulation at issue and rulemaking preamble guidance promulgating this rule expressly allow for an operator to make a determination that a corrosive environment does not exist and thereby preclude routine corrosion monitoring under 193.2635. Further, PHMSA has not issued any prior enforcement alleging a violation of 49 C.F.R. Part 193.2635 against a cryogenic LNG operator of stainless steel pipe. The Agency has not been able to provide *any* examples for stainless steel corrosion observed or violations alleged at other LNG facilities.

In order to meet its burden in issuing this enforcement action, the Agency must show that Lake Charles's conclusion that the stainless steel pipe is not susceptible to corrosion is unreasonable. PHMSA has not provided *any* evidence in support of its allegations in both the NOPV and the Region Recommendation. The allegations are also expressly contradicted by the site specific evidence presented by the Company and overlooked by the Agency in the Final Order. Thus, the Agency has not met its burden of proof.

²⁷ *Lake Charles Reply to Region Recommendation, p. 3 (Attachment 1).*

²⁸ See 49 C.F.R. § 190.213(a)(1). See also *In re Williams Partners Operating, LLC, Final Order, CPF No. 5-2018-3001 at 4-5 (May 16, 2019)* (finding that there was insufficient evidence to demonstrate that Respondent violated Part 193 regulations and withdrawing the alleged violations and associated penalties); *In re Inland Corp., Final Order, CPF No. 1-2017-5003, at 3 (Mar. 7, 2018)* (finding that “OPS bears the burden of proof in demonstrating that an operator violated the pipeline safety regulations” and that “OPS did not carry its burden.”); *In re Exxon Pipeline Co., Final Order, CPF No. 52013-5007, at 12 (Jan. 23, 2015)* (PHMSA failed to meet burden of proving that certain measures were required under regulations). Further, any final agency action must be supported by substantial evidence. 5 U.S.C. § 706(2)(E).

²⁹ See *In re ANR Pipeline Co., Final Order CPF No. 3-2011-1011, at 3 (Dec. 31, 2012)* (PHMSA recognizes that it “bears the burden of proof as to all elements of the proposed violation[.]”); see also *In re CITGO Pipeline Co., Decision on Petition for Reconsideration, CPF No. 4-2007-5010, at 5 (Dec. 29, 2011)* (noting that “OPS bears the burden of proof in an enforcement action and must prove, by a preponderance of the evidence, that all of the elements necessary to sustain a violation are present in a particular case.”).

V. Procedural Irregularities, Due Process, and Policy Concerns

The multiple and lengthy delays on PHMSA's part associated with this matter have prejudiced Respondent. It has been four years since the inspection underlying this action took place, and now more than two years since the Hearing. Moreover, the *context* in which the Hearing took place as well as the *content* of the Region Recommendation and the Final Order with respect to NOPV Item 2 are concerning from both an Administrative Procedure Act and due process perspective.

A. PHMSA Failed to Adhere to Procedural Obligations

At the Hearing, the inspector testifying with respect to the alleged violations was also the PHMSA Southwest Region Director, raising questions of fairness and compliance with PHMSA Part 190 procedural guidance.³⁰ Further, Lake Charles was allowed only one month from the date of the Hearing to submit a Post-Hearing brief. In contrast, the Region did not submit its Post-Hearing Region Recommendation until over a year and a half after the Hearing. Lake Charles first received a copy of the Region Recommendation by electronic mail on May 21, 2019, although the Region Recommendation was dated almost two months earlier on March 26, 2019. As described in Lake Charles' Reply, the Region's Recommendation inappropriately raised new facts, issues and arguments that were not previously part of the proceeding and neglected to account for evidentiary information and discussions from the Hearing.³¹

Lake Charles submitted its Reply for the record to address the Region Recommendation, and to request that the additional allegations and arguments presented be excluded from the record, consistent with PHMSA regulations and the Agency's Part 190 enforcement guidelines. PHMSA denied Respondent's request to exclude the Region Recommendation, however, and the Final Order in several notable respects simply accepts the Region Recommendation's unsubstantiated arguments without providing proper analysis and weight to Lake Charles's contrary legal support and scientific evidence.³²

B. Final Order is Inconsistent with the Administrative Procedure Act and the U.S. Constitution

PHMSA's finding in the Final Order with respect to NOPV Item 2 constitutes a new interpretation of existing rules that conflicts with the plain language of those rules and the regulatory history and is unsupported by prior enforcement precedent. Such an action violates requirements under the

³⁰ In the Lake Charles LNG enforcement action and administrative Hearing, the inspector preparing the case was the same as the Director reviewing and approving of the inspection report, information requests, alleged violations, violation report, identifying path forward in whether to proceed with the NOPV, and participating in the Hearing as the ultimate decisionmaker at the Region. This eliminated a critical level of oversight and review that is required by PHMSA internal procedures. Further, it allows for an unfair and partial enforcement process and Region decision-making. *See generally, PHMSA Pipeline Enforcement Procedure Manual Sec. 4, pp. 18-30 (Dec. 12, 2018).*

³¹ *See Attachment 1.*

³² *See, e.g., Final Order, pp. 2 and 5.*

Administrative Procedure Act for fair notice and the U.S. Constitution for due process.³³ The NOPV and this Final Order is the first time that PHMSA has ever indicated to the regulated community that the three-year atmospheric corrosion inspection requirement at 49 C.F.R. Part 193.2635(d) applies without consideration of the express allowance under Part 193.2625 for an operator to determine that the piping in question cannot be expected to be subject to corrosion.

Such a broad application of the regulation would render the plain language of the regulations (most notably 49 C.F.R. 193.2625(a) and 193.2627) effectively meaningless. Further, revisions to the regulations that impose compliance obligations on operators must be issued through notice and comment rulemaking, particularly a change of this significance, in order to provide both Lake Charles and the industry with notice and an opportunity to respond.³⁴ As such, the Agency's newly articulated enforcement interpretation is arbitrary and capricious under the APA and violates due process and fair notice requirements under the U.S. Constitution.³⁵ An agency must "state with ascertainable certainty what is meant by the standards [it] has promulgated."³⁶ An agency may not enforce regulations according to "what an agency intended but did not adequately express."³⁷ If PHMSA's policy with respect to these regulations has changed, it should be addressed in conjunction with its pending review and revision of 49 C.F.R. Part 193, not through ad hoc enforcement.

C. Policy Concerns

For the same reasons, the finding of violation under Item 2 of the Final Order violates recent Department of Transportation (DOT) policy memorandum directives and Presidential Executive Orders. DOT policy memos provide that DOT modal agencies, including PHMSA, "must not adopt or rely upon overly broad or unduly expansive interpretations of the governing statutes or regulations, and should ensure that the law is interpreted and applied according to its text."³⁸ In keeping with that, PHMSA Chief Counsel recently commented during advisory committee meetings that "Enforcement actions should derive from the four corners of a regulation or statute."³⁹

Further, DOT provides that enforcement decisions:

³³ *Administrative Procedure Act*, 5 U.S.C. § 554; and the U.S. Constitution, U.S. Const. amend. V.

³⁴ *Administrative Procedure Act*, 5 U.S.C. § 554(b); *Appalachian Power Co. v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000).

³⁵ *Administrative Procedure Act*, 5 U.S.C. § 554; U.S. Constitution, U.S. Const. amend. V.

³⁶ *ExxonMobil Pipeline v. U.S. DOT*, 2017 U.S. App. LEXIS 15144 (5th Cir. 2017).

³⁷ *Gates v. Fox Co., Inc. v. OSHRC*, 790 F.2d 154, 156 (D.C. Cir. 1986).

³⁸ *DOT Memo Procedural Requirements for DOT Enforcement Action at 6* (Feb. 15, 2019) (emphasis added).

³⁹ *Joint GPAC & LPAC Meeting Transcript*, pp. 116, *Statement of P. Roberti*.

should be based upon a reasonable interpretation of the law about which the public has received fair notice and should be made with due regard for fairness.⁴⁰

Similarly, a recent Presidential Executive Order focused on promoting the rule of law through transparency and fairness provides, “The rule of law requires transparency. Regulated parties must know in advance the rules by which the Federal Government will judge their actions.”⁴¹

VI. Request for Relief

PHMSA has not met its burden of proof in this case. If left in place, the Final Order as it applies to NOPV Item 2 is arbitrary and capricious, disregards the Agency’s obligations under APA and U.S. Constitution, and presents significant legal and policy concerns for the industry. For the reasons identified in this Petition for Reconsideration, as well as Respondent’s Request for Hearing, Pre-Hearing Brief, Post-Hearing Brief, Reply to Region Recommendation and associated exhibits, Lake Charles respectfully requests that PHMSA withdraw the Final Order as to NOPV Item 2 and the associated Compliance Order obligations.

As the Agency considers this Petition for Reconsideration and given the significance of this Final Order for both Respondent and the industry, Lake Charles respectfully requests that PHMSA stay the Compliance Order as it pertains to NOPV Item 2 pursuant to 49 C.F.R. Part 190.243(c).

Respectfully submitted,



Troutman Sanders, LLP
Catherine Little, Esq.
Annie Cook, Esq.
600 Peachtree Street NE, Suite 3000
Atlanta, GA 30308
(404) 885-3056

Date: December 23, 2019

⁴⁰ *Id. at 10* (consistent with current Department of Justice policy) (emphasis added).

⁴¹ *Executive Order on Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication* (Oct. 9, 2019) (emphasis added).

Catherine D. Little
catherine.little@troutman.com

May 31, 2019

By Electronic Mail

Lawrence White, Esq., Presiding Official
Office of Chief Counsel
Pipelines and Hazardous Materials Safety Administration
U.S. Department of Transportation
1200 New Jersey Avenue, SE
Room E26-206
Washington, DC 20590

Re: PHMSA Notice of Proposed Violation CPF No. 4-2017-3002 Lake Charles LNG Company, LLC Region Recommendation

Dear Larry:

On behalf of Lake Charles LNG Company, LLC (Lake Charles or the Company), thank you for your email and for providing a copy of the Regional Recommendation submitted by the Southwest Region of the Pipeline and Hazardous Materials Safety Administration (PHMSA). As you know, the Hearing in the above referenced matter took place before you on October 3, 2017. Lake Charles was allowed one month from the date of the Hearing to submit a Post Hearing Written Response. The Agency did not request time to submit a Post Hearing submittal. Instead, more than a year and a half after the Hearing, the Region submitted its Post Hearing Region Recommendation. We first received a copy of the Region Recommendation by electronic mail on May 21, 2019, from Heather Myrga at PHMSA, and then another copy from you one day later, via electronic mail on May 22, 2019. The Region Recommendation is inexplicably dated almost two months earlier, however, on March 26, 2019.

The multiple and lengthy delays in prosecuting this matter have prejudiced the Respondent. It has been nearly 4 years since the inspection underlying this action took place, and more than 18 months since the Hearing. The Region's Recommendation is 18 pages long, raises new facts, issues and arguments not previously part of this proceeding, and neglects to take into account both evidentiary information and discussions from the Hearing. Lake Charles submits this statement for the record to address the Region Recommendation, and to request that the additional allegations and arguments presented be excluded from the record, consistent with PHMSA regulations and the Agency's Part 190 enforcement guidelines.

NOPV Item 1 (IR Drop)

In the underlying Notice of Probable Violation (NOPV), PHMSA asserts that Lake Charles “failed to consider IR drop when interpreting cathodic protection readings from their annual survey.” *NOPV*, p. 2. In the Hearing and as demonstrated by documents included in the record, however, the issue was already being addressed prior to the PHMSA inspection and PHMSA did not first bring this issue to Lake Charles’s attention. The Company explained and provided documentation at the Hearing and in its submittals that it expressly did consider IR drop in the 2015 Annual Cathodic Protection Survey in advance of the PHMSA inspection, and that the Company retained a corrosion control contractor *prior to the PHMSA inspection* to conduct, among other activities, an interrupted survey for the very purpose of considering IR drop in assessing its cathodic protection.

In the Region Recommendation, PHMSA goes beyond the confines of the NOPV and the evidence to (1) assert that the Agency was the one to make Lake Charles aware of the need to consider IR drop during the course of the inspection (rather than acknowledge as reflected in the evidence that Lake Charles was already addressing it) (*Region Recommendation*, pp. 2, 4); and (2) assert for the first time that Lake Charles has never been in compliance with the relevant regulations (*Region Recommendation*, p. 4). PHMSA cannot now support the NOPV on different and erroneous facts, and ignore the evidence and discussion presented during the Hearing and on the record. *See Respondent’s Post-Hearing Written Submittal pp. 3-4 and referenced exhibits.*

NOPV Item 2 (Above Ground Corrosion Inspections)

The Region Recommendation takes issue with a comprehensive report prepared by Dr. John Smart Consulting Engineers that was provided in full with Lake Charles’s Post Hearing Written Submittal, implying that the data and opinion is untimely. The graph illustrating Dr. Smart’s analysis and findings, however, was shared with the Agency and the Hearing Officer at the Hearing. In addition, PHMSA asserts for the first time that “localized corrosion” is present on pictures of piping that the Agency took at the time of the 2015 inspection. *Region Recommendation*, Figure 2. From these previously reviewed photos, PHMSA now concludes it “believes it has met the regulatory requirement to show that corrosion of the stainless-steel piping could occur and consequently periodic inspections of the piping for [AC] are required.” *Region Recommendation*, p. 10.

PHMSA erroneously states that Lake Charles referenced a Norwegian study as part of its Pre-Hearing Submittal, citing to an exhibit to PHMSA’s Pipeline Safety Violation Report. *Id.*, pp. 5-6. The Norwegian study was addressed by Lake Charles in *post-inspection correspondence* with PHMSA, however. The only subsequent reference to the study in any Hearing-related submittals by Lake Charles was in the Dr. Smart report, expressly for the purpose of highlighting the divergent conditions between the North Sea platform addressed in the Norwegian study as compared to the far more benign conditions at Lake Charles. *See Lake Charles Post-Hearing Brief Exhibit 4, Evaluation of Susceptibility of Stainless-Steel LNG Pipe to Corrosion Under All Operating Conditions at the Lake Charles LNG Facility, John Smart Consulting Engineers (Nov. 3, 2017) (Dr. Smart Report), pp. 10, 14-16.*

While the Region elects to characterize the Dr. Smart report as “limited ... to the summer months of August” and is critical of its findings, the Dr. Smart report speaks for itself. The report is comprehensive, reviewing approximately seven years of data and considering all the critical factors identified by the Agency in the Region Recommendation (such as insulation type, temperature, environment, salinity readings, etc.). *Region Recommendation*, pp. 5, 7. For example, although the Region Recommendation emphasizes that the facility “sits immediately adjacent to a chloride rich saline body of water” and provides a map as Figure 1 (*Region Recommendation* pp. 7-8), in reality the water is brackish. The *actual* salinity readings from both water adjacent to the Lake Charles facility and rainwater collected within the facility demonstrate that the water contains a mere fraction of the chlorides present in sea water. See *Lake Charles Post-Hearing Brief Exhibit 4, Dr. Smart Report at Appendices B and C (as provided in the Corrosion Under Insulation (CUI) Study Report)*.

Similarly, temperature readings at the facility, including under insulation, were also thoroughly analyzed at Lake Charles, including the analysis of data taken beginning in 2011, one year prior to warm up of the facility and for 6 years following that date. *Id. at Appendix D*. PHMSA nevertheless suggests that only a limited data set from August 2017 was reviewed. *Region Recommendation*, p. 9. To the contrary, the data referenced above in Appendix D to the Dr. Smart Report thoroughly examines both maximum and minimum temperatures over a *seven-year* period, and includes the measurement method and locations of all temperature readings. *Dr. Smart Report at Appendices D*.

The Region Recommendation then goes on to assert that PHMSA was unable to directly inspect any stainless-steel piping at Lake Charles because it was covered with insulating material and metallic sheathing. As discussed and demonstrated at the Hearing, however, there are thousands of feet of uninsulated stainless-steel piping at the facility, none of which has exhibited signs of corrosion since the facility went into operation in 1982. In addition, PHMSA relies on a photo included as Figure 2 to the Region Recommendation to suggest that there are indications of corrosion on metallic sheathing, which are in turn indicative of corrosion on piping beneath the sheathing. When seen in its original color photograph format – attached to the Agency’s Pipeline Safety Violation Report – there is no sign of any such corrosion. Regardless, corrosion on a metal band is not an indication of the condition of austenitic stainless-steel piping beneath the insulation.

The Region Recommendation relies on its general assertion that corrosion of stainless-steel pipe is *possible*, including reliance on a photograph of piping that is notably not attributable to Lake Charles, which as a general statement is not relevant to the facts of this specific matter and was not addressed at the Hearing. *Region Recommendation*, p. 10, Figure 3. To the contrary, as discussed at the Hearing and supported by the evidentiary record as well as records that have long been made available to PHMSA for review, since the facility went into operation in 1982 Lake Charles has not observed any visual indication of corrosion on any of its austenitic stainless-steel piping (insulated and uninsulated). That specific finding (as opposed to a general allegation) is based on an initial determination and supplemental testing, including tests conducted in 2012-2013 and again in 2017. At the Hearing, following further explanation of the extensive testing conducted by Lake Charles in support of its determination, PHMSA counsel acknowledged that the thorough analysis conducted by Lake Charles was consistent with what the Agency wanted.

The regulations clearly provide an exception for the 3-year corrosion inspection requirement if the operator determines that the pipeline in question is not subject to corrosion. 49 C.F.R. Part 193.2625(a). At the Hearing, PHMSA representatives concurred with the proposition that corrosion does not occur at cryogenic temperatures, as expressly set forth in the 1980 preamble to the Part 193 regulations, and that atmospheric corrosion inspection is not required for piping operated at cryogenic temperatures. *Pre-Hearing Brief Exhibit 6, 45 Fed. Reg. 70,3090, 70,396 (Oct. 23, 1980)*. In addition, in that same preamble, the Agency clarified that components not continually subjected to cryogenic temperatures only have to be protected if the operator's findings under 49 C.F.R. Part 193.2625 indicate that adverse consequences from corrosion may occur. *Id.*

PHMSA has not issued any prior enforcement alleging a violation of 49 C.F.R. Part 193.2635 against a cryogenic LNG operator of stainless-steel pipe, nor has the Agency been able to provide any examples for stainless steel corrosion observed or violations alleged at other LNG facilities. As such, PHMSA has not provided any evidence that its allegations in both the NOPV and now the Region Recommendation are correct in general, or as supported by site specific evidence at this facility. Thus, the Agency has not met its burden of proof.

The Agency must show that Lake Charles's conclusion that the stainless-steel pipe is not susceptible to corrosion is unreasonable in order to meet its burden in issuing this enforcement action. If PHMSA finalizes this interpretation in a Final Order, it would constitute a new interpretation of existing rules that conflicts with the plain language of those rules and the Agency's own enforcement precedent. Such an action would violate requirements under the Administrative Procedure Act for fair notice and the U.S. Constitution for due process.

NOPV Item 3 (Training Records)

The NOPV initially asserted that Lake Charles violated 49 C.F.R. Parts 193.2707, 193.2713 and 193.2717, by failing to have initial and refresher training records for the facility. Lake Charles replied in its pleadings and at the Hearing that the rules in question only require records for certain personnel, and that the required records were indeed available at the time of the inspection. PHMSA now asserts in its Region Recommendation that the facility failed to provide training for some personnel (not just failed to produce records) and that the records that were produced during the inspection were "a seemingly random stack." *Region Recommendation, p. 13*. The Recommendation concludes with the statement, "The fact remains that when PHMSA requested training records at the time of the inspection, Lake Charles failed to provide them." *Region Recommendation, p. 14*.

The *facts* and *law* contradict these broad assertions in the Region Recommendation. At the time of inspection, PHMSA did not request all training procedures and records, but instead requested records specific to one employee who was hired in the early 1980s. There was no discussion about current records; rather the focus of the inspection was on vintage 1980s records. Similarly, with respect to security personnel, Lake Charles had both training requirements and records available, and takes issue with the Agency's characterization otherwise. Further, the regulations at issue in Item 3 only apply to certain employees, not all, and the rules only require that a facility maintain training records, not that those records be organized in a certain way. Although Respondent acknowledged at the Hearing that certain records from the 1980s may have been misplaced or missing at the time of the inspection, the

relevant records were available for inspection at the facility at the time of inspection. *See Respondent's Post-Hearing Written Submittal, pp. 9-10 and referenced exhibits.* The allegations in Item 3 are simply unfounded.

Summary

The Region Recommendation generated for this matter is unusual in its discordance with the Hearing itself. It was routed a full year and a half after the Hearing and it asserts new facts, issues and arguments not previously part of the record. The matter is also unusual in that the PHMSA employee who acted as the inspector for the Agency in 2015 was also the Acting Regional Administrator at the time of the Hearing, thus precluding any additional input or insight typically provided in review of enforcement matters. Moreover, the PHMSA counsel present at the Hearing is no longer assigned to the matter.

Beyond these irregularities, the most critical observation is that there is no provision in the law for PHMSA to supplement the record in a case or controversy in this manner. Respondents are limited to specific time limits and rules of procedure in responding to PHMSA enforcement actions. The Agency is also expected to comply with established deadlines and procedures in enforcement matters. There is no provision in PHMSA regulations (nor is there any corollary in judicial procedure) for one party to ignore deadlines and raise new facts, issues or arguments at any time before a decision is rendered (especially more than a year after argument). Despite the fact that the Region recommends simply "issuing the Final Order as written" (presumably meaning issuing an Order consistent with the *NOPV* as written), the 18-page Recommendation raises and addresses new facts, issues and arguments not previously presented in the *NOPV* or at the Hearing.

The Region's Recommendation in this matter should be excluded from the record as untimely and not in compliance with PHMSA procedural regulations. Whether the Region's submittal is excluded or not, the new facts, issues and arguments it raises should not be accorded any weight. For the reasons set forth in a timely manner by Respondent, in both pleadings and at Hearing, the Respondent believes the allegations contained in the original *NOPV* are not consistent with applicable law or facts, and should be dismissed.

Sincerely,



Catherine D. Little
Counsel for Lake Charles LNG Company, LLC

cc: Ahuva Battams, Esq. (PHMSA)
Jeffrey K. Brightwell
Mark Milliken
Greg McIlwain
Dawn McGuire, Esq.