

PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMINISTRATION
WASHINGTON, DC 20590

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| In the matter of: | § | |
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| ExxonMobil Pipeline Company | § | CPF No. 4-2017-5027 |
| | § | |
| Respondent | § | |
| | § | |

**POST-HEARING BRIEF
OF
EXXONMOBIL PIPELINE COMPANY**

I. INTRODUCTION

On August 17, 2017, ExxonMobil Pipeline Company (“Respondent” or “EMPCo”) received a Notice of Probable Violation (“NOPV”) from the Southwest Region of the Pipeline and Hazardous Materials Safety Administration (“PHMSA”), Office of Pipeline Safety (“OPS”), alleging four probable violations of 49 C.F.R. Part 195 (“Part 195”), and proposing civil penalties for three alleged violations and a warning for the other. A hearing was held on May 14, 2018, at the PHMSA Southwest Region office, before a Presiding Official with the PHMSA Office of the Deputy Chief Counsel. At the hearing, PHMSA wholly withdrew one alleged violation and made multiple significant concessions that require a complete withdrawal of the NOPV and associated penalties.¹ In this Brief, Respondent sets forth its arguments against the finding of any violation and against the imposition of any civil penalty. A timeline of relevant events is attached to this Brief as Exhibit A.

The NOPV was issued in response to (and 18 months after) a PHMSA “integrated inspection” of EMPCo procedures, records, and pipeline facilities that was ongoing for almost four years. The integrated inspection covered virtually all of the programmatic elements within 49 C.F.R. Part 195.² The four alleged violations, however, stem from a single historic rectifier installation project that occurred in July 2012, on facilities that were divested by EMPCo in November 2016.³ The employee that performed the rectifier installation project transferred to the new owner of the divested facility at or about that same time.

Despite the all-encompassing integrated inspection, the alleged “probable violations” were discovered only through PHMSA’s mining of EMPCo’s Near Loss Investigation (“NLI”) records. The factual record establishes that PHMSA requested a list of EMPCo’s NLIs,⁴ scanned the listed “Incident Titles” for items with potential regulatory implications, and specifically

¹ A transcript of the hearing (“Hearing Transcript”) was prepared by a court reporter and has been produced to the Presiding Official and all parties.

² Hearing Transcript at 56-59 (testimony of Mr. Matthews).

³ See Respondent’s Pre-Hearing Submissions, May 4, 2018, item E, at 2 (Declaration of Chris Levy).

⁴ See Hearing Exhibit 6.

asked for a copy of the single NLI report for Incident Number 663068, titled, "Lake Washington Rectifier Cathodic Protection Lead Reversal."⁵ This report described an incident where, in July 2012, a rectifier was installed with its wiring connections reversed. As described in the report, the reversed connections were corrected upon discovery in January 2013 – before PHMSA commenced its integrated inspection.⁶ These NLI records were created and maintained by EMPCo for the sole purpose of fostering a safety-oriented culture, focused on continuous improvement through near-miss investigations and identifying potential incident root causes to help prevent similar real incidents in the future.⁷ Rather than encouraging and commending EMPCo's diligence and faithfulness in trying to prevent future incidents, PHMSA, instead, offensively used the NLI reports to punish EMPCo for historic activities that were investigated and addressed by EMPCo more than four years prior. Through its actions, PHMSA is not promoting safety. Rather, PHMSA is essentially forcing operators to choose between conducting and maintaining records associated with NLIs to help promote safety versus avoiding overzealous enforcement by not creating these records.

EMPCo reiterates its objections to PHMSA's use of EMPCo's internal NLI records to form the bases for discovery and prosecution of enforcement matters. PHMSA has publicly encouraged pipeline operators to develop and follow Pipeline Safety Management Systems ("SMS") consistent with API RP 1173.⁸ One of the core principles, fundamental to establishing an effective SMS, is the creation of a learning environment for continuous improvement that is achieved by investigating incidents thoroughly, fostering non-punitive reporting systems, and communicating lessons learned. Through this enforcement, PHMSA has essentially pulled a bait-and-switch on industry: on the one hand strongly encouraging operators (through SMS and otherwise) to be proactive and learn from near losses and document findings; then combing through near loss investigation records during inspections for stale alleged violations that may have occurred and for which no records would exist but for the operators performing the investigation in the first place. Enforcement of this sort completely undermines the supposed shared goal of establishing an effective SMS.

EMPCo further objects to the unreasonable delays associated with PHMSA's inspection, investigation, and enforcement of this matter. As noted, EMPCo divested the relevant assets and records prior to this delayed enforcement and no longer has reasonable access to records or potential witnesses with knowledge of relevant facts.⁹ PHMSA acknowledges that, in May 2013, it identified what it now believes to be a regulatory violation which PHMSA alleges commenced in July 2012,¹⁰ but delayed bringing any enforcement action until August 2017. Even with the "extra" time, PHMSA's NOPV contains baseless allegations, factual inaccuracies, and procedural deficiencies¹¹ such that it cannot be used as a legally sufficient foundation for any

⁵ Hearing Exhibit 5; Hearing Transcript at 65:14-70:11 (testimony of Mr. Matthews). The copy of the report produced to PHMSA, and included in the Violation Report, shows a print date of 5/14/2013, which coincides with the PHMSA inspectors' on-site Headquarters Records Review the week of 5/13/2013.

⁶ Hearing Exhibit 5.

⁷ Hearing Transcript at 12-14.

⁸ See, Respondent's Pre-Hearing Submissions, May 4, 2018, item H, API Recommended Practice 1173 (July 2015).

⁹ Declaration of Chris Levy at 2.

¹⁰ Pipeline Safety Violation Report, August 11, 2017, Hearing Exhibit 3, at 10 ("Violation Report").

¹¹ PHMSA's procedural and enforcement regulations, embodied within 49 C.F.R. Part 190, provide that when the agency issues a Notice of Probable Violation, the notice "*shall include*," among other things, "[n]otice of response

enforcement; *see* NOPV Deficiencies Unchallenged/Admitted by PHMSA at Exhibit B. Also, as a result of PHMSA's refusal to adequately respond to EMPCo's discovery, failure to produce witnesses with knowledge of relevant facts, and unreasonable delays in prosecuting this matter, EMPCo has been prejudiced in its ability to fully and fairly defend the allegations of PHMSA.

In addition to the issues of procedural deficiency and fair notice relating to the manner in which PHMSA identified the alleged violations, each individual NOPV alleged violation item ("NOPV Item") lacks fundamental evidence necessary to support a finding of violation and/or is wholly refuted by available evidence and, therefore, must be withdrawn. Lastly, NOPV Item 3 is time barred by the statute of limitations.

II. THE ALLEGED VIOLATIONS

A. NOPV Item 1

NOPV Item 1 must be withdrawn, primarily because PHMSA has produced no evidence supporting a fundamental element of its alleged violation. NOPV Item 1 alleges that, while EMPCo has a written qualification program, it did not follow a provision in this one instance "to evaluate and requalify an employee after the employee improperly installed a pipeline cathodic protection rectifier, a covered task under the Operator's Qualification program."¹² Specifically, the relevant provision of EMPCo's Qualification of Pipeline Personnel Procedure ("OQ Procedure"), "Requalification," provides:

If an individual's performance is identified to be unsatisfactory, regardless of whether it has resulted in an incident, the individual must be requalified *prior to further performance of the covered task*. An individual's performance may be determined to be unsatisfactory during an incident investigation, observations by Supervisors or other qualified individuals, or a near-miss occurrence.¹³

The NOPV, as the sole basis for the violation, flatly asserts that the "employee was requalified 8 months after the incident only after being questioned by PHMSA staff during the inspection about not following their company procedures. EMPCo must re-evaluate personnel when their performance is unsatisfactory in accordance with the requirements of §195.505 and the Operator's Qualification program."¹⁴

PHMSA has misstated the facts, misapplied EMPCo's OQ Procedure, and failed to satisfy its burden of proof regarding a fundamental element of the alleged violation. The uncontroverted facts show that, following the incorrect rectifier installation in July 2012, the technician was requalified pursuant to the OQ Procedure in October 2012, then again in May 2013.¹⁵ EMPCo discovered the incorrectly installed rectifier in January 2013 and conducted an NLI to determine the cause and to identify corrective measures so that similar errors could be avoided in the

options available to the respondent under §190.208." The actual NOPV issued in this case did not include the "response options available to the respondent." Hearing Transcript at 37:11-38:22 (testimony of Mr. Matthews).

¹² NOPV at 2.

¹³ Hearing Exhibit 9 at Sec. 4.3.3 (emphasis added).

¹⁴ NOPV at 2.

¹⁵ Hearing Transcript at 100:7-101:12; Hearing Exhibit 8.

future.¹⁶ Pursuant to the NLI process, an “IMPACT” report was produced to document the investigation (“NLI Report”).¹⁷ Corrective measures were further documented in a related “Action Item.”¹⁸

To prove NOPV Item 1, PHMSA would need to produce reliable evidence that the individual was not requalified prior to “further performance of the covered task.”¹⁹ PHMSA, however, has not produced any evidence to prove this fundamental element. PHMSA produced the Violation Report purportedly containing all evidence relied upon by PHMSA to support the alleged violations.²⁰ None of the evidence in or attached to the Violation Report indicates that the individual further performed “the covered task” prior to requalification. Indeed, the Violation Report and NOPV are completely silent as to whether the individual ever performed the covered task after July 2012. Moreover, PHMSA not only failed to produce evidence that the individual “further perform[ed] ... the covered task,” PHMSA admitted at the hearing that it has **no such evidence** – “I don’t have evidence to show he performed the covered task...”; “... I do not have evidence in here that shows that he installed another rectifier at that time.”²¹

PHMSA bears the burden of proving the allegations in an NOPV.²² That burden includes both the burden of persuasion (i.e., “which party loses if the evidence is closely balanced”) and the burden of production (i.e., “which party bears the obligation to come forward with the evidence at different points in the proceeding”).²³ To meet its burden of persuasion, PHMSA “must prove, by a preponderance of the evidence that the facts necessary to sustain a probable violation actually occurred.”²⁴ PHMSA satisfies this burden “only if the evidence supporting the allegation outweighs the evidence and reasoning presented by Respondent in its defense.”²⁵ Where “the evidence is closely balanced,” OPS does not meet its burden of persuasion, and PHMSA must withdraw the allegation.²⁶ PHMSA also “bears the burden of proof as to all elements of the proposed violation.”²⁷ Where PHMSA fails to produce evidence in support of its allegation or provides insufficient evidence, the allegation must be withdrawn.²⁸

PHMSA simply does not know whether the individual ever subsequently performed the covered

¹⁶ Hearing Exhibit 5; *see, also*, Declaration of Chris Levy at Sec. 5 and 6.
¹⁷ Hearing Exhibit 5.
¹⁸ Hearing Exhibit 11.
¹⁹ Hearing Exhibit 9 at Sec. 4.3.3. PHMSA conceded that requalification would not be necessary if the individual did not perform the specific covered task again; *see* Hearing Transcript at 111:3-9.
²⁰ 49 C.F.R. § 190.209; Hearing Exhibit 3 (Violation Report).
²¹ Hearing Transcript at 112:10-11, 19-20; and 113:3-6 (testimony of Ms. McDaniel); *see, also*, at 133:18-135:7).
²² *In re Butte Pipeline Co.*, Final Order, CPF No. 5-2007-5008, 2009 WL 3190794, at *1 (DOT Aug. 17, 2009).
²³ *In re Bridger Pipeline Co.*, Final Order, CPF No. 5-2007-5003, 2009 WL 7796887 at *1 (DOT Apr. 2, 2009); *Schaffer v. Weast*, 546 U.S. 49, 56 (2005) (citing *Dir., Office of Workers' Comp. Programs, Dep't of Labor v. Greenwich Collieries*, 512 U.S. 267, 272 (1994)).
²⁴ *In re Alyeska Pipeline Serv. Co.*, Decision on Petition for Reconsideration, CPF No. 5-2005-5023, 2009 WL 5538655, at *3 (DOT Dec. 16, 2009) (citing *Butte Pipeline Co.*, 2009 WL 3190794, at *1, n.3; *Schaffer*, 546 U.S. at 56-58).
²⁵ *Butte Pipeline Co.* 2009 WL 3190794, at *1.
²⁶ *Alyeska Pipeline Service Co.*, 2009 WL 5538655, at *3 (citing *Schaffer*, 546 U.S. at 56).
²⁷ *In re ANR Pipeline Co.*, Final Order, CPF No. 3-2011-1011, 2012 WL 7177134 at *3 (DOT Dec. 31, 2012); *see also In re CITGO Pipeline Co.*, Decision on Pet. for Reconsideration, CPF No. 4-2007-5010, 2011 WL 7517716, at *5 (Dec. 29, 2011).
²⁸ *Alyeska Pipeline Service Co.*, 2009 WL 5538655, at *3.

task, let alone whether he did so prior to being requalified.²⁹ At the hearing, PHMSA inappropriately attempted to rescue its case by shifting the burden of proof to EMPCo to disprove PHMSA's allegation. Specifically, PHMSA argued that, if EMPCo had produced evidence that the individual did not perform the covered task again, it would not have brought the allegation.³⁰ The burden is not on Respondent to prove a negative in order to *disprove* a violation; rather, the burden is on the agency to prove a violation by a preponderance of the evidence.

Here, PHMSA is the party seeking relief, but the agency has admitted it has no evidence that the individual performed the covered task ever again. PHMSA, instead, inappropriately premises the violation on the absence of exculpatory evidence.³¹ PHMSA had over four years to identify and produce evidence showing that the individual again performed the covered task prior to requalification, but PHMSA has not so done. PHMSA has no evidence to support the elements of the claim and, thus, has failed to carry its burden of proof. NOPV Item 1 should be withdrawn, along with the proposed civil penalty.

B. NOPV Item 2

PHMSA withdrew NOPV Item 2 during the hearing.³² On that basis, NOPV Item 2 must be withdrawn, along with the associated proposed civil penalty.

C. NOPV Item 3

NOPV Item 3 alleges that "EMPCo *could not have* met one of the required cathodic protection criterion required by §195.571 (and the referenced standard) on the segment of pipeline intended to be protected primarily by the reversed rectifier and associated ground bed during the 6-month period the rectifier leads were reversed."³³ At the hearing, however, PHMSA conceded that its allegation was insupportable and fatally deficient. When questioned by the Presiding Official – "The 'could not' is not really accurate, correct?", Ms. McDaniel conceded, "Correct."³⁴ Based upon the rest of the discussion at the hearing, PHMSA's allegation was reduced to simple speculation that the required criterion "may not" have been met. NOPV Item 3, therefore, should be withdrawn on the grounds that PHMSA again has failed to carry its burden of proof.³⁵

PHMSA's alleged violation is fatally deficient in several other respects as well. In NOPV Item 3, PHMSA alleges that EMPCo failed to meet cathodic protection criteria during the time the rectifier was wired incorrectly. The criteria for determining the adequacy of cathodic protection

²⁹ Hearing Transcript at 133:4-6, 112:9-11, 113:3-6 (testimony of Ms. McDaniel); *see, also*, 133:18-135:7.

³⁰ Hearing Transcript at 113:3-114:11, 138:17-24 (comments of Mr. Phillips and testimony of Ms. McDaniel).

³¹ Hearing Transcript at 113:3-114:11 (comments of Mr. Phillips).

³² Hearing Transcript at 20:8-21:5; 133:13 (comments of Mr. Phillips and testimony of Ms. McDaniel).

³³ NOPV at 3 (emphasis added).

³⁴ Hearing Transcript at 205:19-21 (testimony of Ms. McDaniel).

³⁵ During the hearing, PHMSA admitted that its description of the conduct that allegedly violated the regulation needed to be revised to remove the following statements: "The reversed rectifier connection . . . would have made the pipeline anodic, cause current to be discharged off of the pipeline and result in probable corrosion. The reversed connection would also result in the polarity of measurements made to confirm that one of the required criterion was being met using the normal test connections." Hearing Transcript at 199:21-200:3; 203:23-204:17.

are established by NACE Standard Practice SP0169 (“NACE SP0169”).³⁶ NACE SP0169 sets three criteria: (1) negative 0.850 volts with current applied and voltage error (“IR drop”) considered; (2) negative 0.850 volts “instant off” reading; and (3) a 100 millivolt shift whether formation or decay of polarization (i.e., 100 mV change in the positive or negative direction).³⁷ Meeting such criteria means that cathodic protection is “adequate.”³⁸ All evidence in the record, contrary to the allegations in the NOPV, demonstrates that cathodic protection was adequate when EMPCo performed annual cathodic protection surveys in May 2012 and May 2013 (bracketing the time period over which the rectifier was connected incorrectly).³⁹ PHMSA concedes as much.⁴⁰ Further, PHMSA has no evidence of any other cathodic protection potential measurements during the relevant time period.⁴¹ Nevertheless, PHMSA “assumes” that cathodic protection was inadequate merely because the rectifier was connected incorrectly.⁴²

PHMSA’s assumptions are contradicted by EMPCo’s expert witness, Kevin Garrity.⁴³ Mr. Garrity testified that he found no evidence that would indicate cathodic protection was inadequate; that he found no evidence that the polarity of electric potential was reversed; that “it is entirely feasible” that adjacent rectifiers could provide protective current by overwhelming the subject rectifier; that “it is entirely possible that ... [cathodic protection] still may have had a hundred millivolts of polarization, ... rendering adequate protection...”; and that in-line inspection (“ILI”) data, taken shortly after discovery and correction of the incorrectly wired rectifier, gave no indication that the reversed rectifier connections rendered cathodic protection inadequate.⁴⁴ Indeed, Mr. Garrity testified that, based on the ILI data, it was impossible that the protection did not meet criteria:

Based upon the ILI data that I’m relying upon, I believe that it is impossible that it didn’t meet criteria because if it hadn’t met criteria over that [] six-month period and it was subjected to a forced drainage condition, my opinion is we would have seen coincident metal loss anomalies. And my opinion is also that we would see pretty deep anomalies.⁴⁵

Mr. Garrity also testified that he recently has seen a case of a rectifier being reversed, and cathodic protection was *found to be adequate* due to the influence of adjacent rectifiers.⁴⁶

PHMSA has not met its burden of persuasion or production.⁴⁷ Outside of speculation, PHMSA has produced nothing in support of its position that cathodic protection was inadequate: no

³⁶ 49 C.F.R. § 195.571.

³⁷ Hearing Exhibit 15 at Sec. 6.2.2; Hearing Transcript at 181:2-182:8 (testimony of Mr. Garrity).

³⁸ Hearing Exhibit 15 at Sec. 6.1.2; *see, also*, Hearing Transcript at 182:20-183:11 (testimony of Mr. Garrity).

³⁹ Hearing Exhibit 10.

⁴⁰ Hearing Transcript at 147:22-149:15; 161:10-17 (testimony of Ms. McDaniel).

⁴¹ Hearing Transcript at 155:21-156:7 (testimony of Ms. McDaniel).

⁴² Hearing Transcript at 151:17-21; 156:4-6; 157:14-16; 160:13-16 (testimony of Ms. McDaniel).

⁴³ Mr. Garrity is the only expert that was qualified and offered as an expert in this matter. PHMSA offered no expert of its own. *See* Hearing Transcript at 34:25; 85:16 (comments of Mr. Phillips); 145:5-7 (testimony of Ms. McDaniel); 146:8-21 (exchange with the Presiding Official).

⁴⁴ Hearing Transcript at 183-192 (testimony of Mr. Garrity).

⁴⁵ Hearing Transcript at 196:3-10 (testimony of Mr. Garrity).

⁴⁶ Hearing Transcript at 184:5-19 (testimony of Mr. Garrity)..

⁴⁷ *See Butte Pipeline; Bridger Pipeline; Schaffer; and Alyeska Pipeline Serv.; supra.*

cathodic protection measurements; no testing data; and no expert opinion. In fact, in response to the Hearing Officer's questioning, PHMSA admitted that its characterization that EMPCo "could not" have met one of the required cathodic protection criteria required by §195.571 was "stretched" and not accurate.⁴⁸ PHMSA did not carry its burden of proof, neither production, nor persuasion, on the allegation that cathodic protection was inadequate.⁴⁹ As a result, NOPV Item 3 must be withdrawn along with the proposed civil penalties.

Finally, even if PHMSA could demonstrate that the referenced criteria were not met, PHMSA is misapplying 49 C.F.R. §195.571 and converting a reference criterion into a strict liability requirement without fair notice to EMPCo and industry. Nothing in the regulation suggests that a strict liability violation occurs every time cathodic protection falls outside the referenced criteria. If that was the case, every electrical outage, every repair, and every replacement project would result in a regulatory violation. Instead, as the heading of 49 C.F.R. §195.571 provides, the regulation is intended to advise operators "what criteria must [be used] to determine adequacy of cathodic protection."

PHMSA's new interpretation contradicts 49 C.F.R. §195.573(e), which directly addresses corrective action for "any identified deficiency in corrosion control" (i.e., cathodic protection) by directing operators to follow 49 C.F.R. § 195.401(b) or § 195.452(h). PHMSA has not suggested that EMPCo failed to follow any of these provisions. Put simply, EMPCo, upon discovery of the reversed rectifier lead condition, immediately corrected the condition, to ensure consistency with the cathodic protection criterion of 49 C.F.R. § 195.571 and the referenced criteria. Long-standing PHMSA precedent provides that operators are allowed up to the next-scheduled inspection to correct discovered cathodic protection deficiencies.⁵⁰ EMPCo corrected the rectifier condition prior to the next-scheduled inspection.⁵¹ PHMSA's new *post hoc* litigation-derived interpretation of 49 C.F.R. § 195.571, therefore, deprives EMPCo (and industry) of fair notice of the new strict-liability requirements and does not provide a clear standard of culpability to circumscribe the discretion of PHMSA's enforcement authority.⁵²

⁴⁸ Hearing Transcript at 204:22-23; 205:19-21 (testimony of Ms. McDaniel) (emphasis added).

⁴⁹ *In re CITGO Pipeline Co.*, Decision on Reconsideration, CPF No. 4-2007-5010, 2011 WL 7517716, at *5 (DOT Dec. 29, 2011) (withdrawing violation finding, in a matter with virtually identical facts, because "the record does not contain any additional evidence, such as test results or an expert opinion, to demonstrate that the breakout tank was not receiving adequate cathodic protection from the three remaining beds."); *see, also, In re Inland Corp.*, Final Order, CPF No. 1-2017-5003, 2018 WL 2229383, at *3 (DOT March 7, 2018) (alleged violation withdrawn for lack of evidence).

⁵⁰ *In re: Plains Pipeline, L.P.*, Final Order, CPF No. 4-2013-5007, 2015 WL 4397455, at *11 (DOT May 22, 2015); *see, also In re: Holly Energy Partners, L.P.*, Final Order, CPF No. 4-2010-5007, 2010 WL 6539186, at *2 (DOT Oct. 18, 2010).

⁵¹ Hearing Exhibit 5; Hearing Transcript at 77:17-79:9 (testimony of Mr. Matthews).

⁵² *In re: Ohio River Valley Pipeline*, Final Order, CPF No. 3-2015-5009, 2018 WL 1365571, at *6 (DOT Jan. 18, 2018) ("Under circumstances where an agency is using an enforcement proceeding that would penalize an operator and seeks to change the status quo..., that agency is obligated to provide notice to affected operators," and the agency is "bound by the 'fair notice' standard."); *see, also, ExxonMobil Pipeline Company v. PHMSA*, 867 F.3d 564, 577 (5th Cir. 2017).

D. NOPV Item 4

PHMSA categorized NOPV Item 4 as a warning item. Respondent again denies any culpability with regard to the timing of in-line inspections in the context of 49 C.F.R. § 195.452(j)(2).

III. STATUTE OF LIMITATIONS

In addition to the foregoing arguments, NOPV Item 3 must fall to the statute of limitations. PHMSA asserts that the alleged violation commenced in July 2012.⁵³ The applicable statute of limitations provides in relevant part that “an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued....”⁵⁴ “[A]n action, suit or proceeding to assess or impose a civil penalty must be commenced within five years of the date of the violation giving rise to the penalty.”⁵⁵ The time span between July 2012 and August 11, 2017 is greater than five years. NOPV Item 3 is time barred, and Respondent may not be held liable. NOPV Item 3 and the associated proposed civil penalty must be withdrawn.

IV. PHMSA CATEGORICALLY FAILS TO PROVIDE FAIR NOTICE

Respondent objects to PHMSA’s use of Respondent’s internal NLI records to form the bases for discovery and prosecution of this enforcement matter. Prior to PHMSA’s inspection, Respondent already had identified the alleged cathodic protection deficiency, corrected the alleged deficiency, conducted an NLI, and generated the NLI Report and Action Item for the sole purpose of fostering a safety-oriented culture focused on non-punitive reporting and continuous improvement.⁵⁶ This approach is entirely consistent with the directives of API RP 1173, Pipeline SMS, the implementation of which PHMSA strongly encourages.⁵⁷

On numerous occasions, high-level PHMSA administrators have publicly encouraged industry implementation of Pipeline SMS. Examples of such promotion are reflected in Exhibit C.

PHMSA inspectors, notwithstanding the agency’s promotion of Pipeline SMS, mined Respondent’s safety management system records to search for situations that could be converted into violations. At the hearing of this case, PHMSA’s fact witness admitted having reviewed a list of NLI reports for the purpose of identifying violations.⁵⁸ Moreover, despite the fact that an integrated inspection covers almost all programmatic elements of Part 195, the *only* violations

⁵³ Violation Report at 25.

⁵⁴ 28 U.S.C. § 2462.

⁵⁵ *3M Co. v. Browner*, 17 F.3d 1453, 1462 (D.C. Cir. 1994).

⁵⁶ Hearing Transcript at 77:17-79:9 (testimony of Mr. Matthews); Hearing Exhibits 5 and 11.

⁵⁷ API Recommended Practice 1173 (July 2015); *see* Respondent’s Pre-Hearing Submissions, May 4, 2018, item H; *see, also*, National Transportation Safety Board report PAR-12-1, recommendation P-12-17 at <https://www.nts.gov/safety/safety-recs/recletters/P-12-017.pdf>.

⁵⁸ Hearing Transcript at 63-71 (testimony of Mr. Matthews that “this was the one we singled out”; that supervisor Manning directed review of Respondent’s list of Near Loss Investigation Reports (April 19, 2013) which pre-dated the NLI Report (May 14, 2013)).

PHMSA alleged out of its nearly four-year inspection were those that arose from a review of EMPCo's NLI reports.⁵⁹

PHMSA's affirmative use of the NLI Report as the basis for this enforcement action contravenes good public policy and undermines the non-punitive reporting and continuous improvement rationales behind the Pipeline SMS principles. On grounds of fundamental fairness, all four alleged violations should be withdrawn, along with the proposed civil penalties. On the further grounds that PHMSA's administrators set legitimate safety expectations for the regulated public, only to have those expectations eviscerated by inspectors at the Region level, to find a violation and impose a penalty in the manner undertaken in this case constitutes arbitrary and capricious agency action.⁶⁰ Accordingly, all alleged violations in the NOPV should be withdrawn, as should all proposed civil penalties.

V. THE PROPOSED CIVIL PENALTIES

PHMSA proposed \$203,400 in civil penalties in connection with NOPV Items 1, 2, and 3. NOPV Item 2 was withdrawn and the associated penalties also must be withdrawn. The proposed penalties associated with NOPV Items 1 and 3 are \$63,900 each for a total of \$127,800. Based upon the foregoing, all proposed penalties should be withdrawn. If the remaining alleged violations are sustained, however, the remaining penalties should be further reduced as follows.

With regard to NOPV Item 1, PHMSA's allegation in Part E6 of the Violation Report with respect to Gravity is (a) unsupported by the evidence, and (b) is inaccurate and overstates the purported gravity of Respondent's conduct. PHMSA indicated in that section that the "violation occurred in an HCA or in an HCA 'could affect' segment."⁶¹ During the hearing the Director conceded that the Gravity penalty assessment consideration should have been categorized as "pipeline safety was minimally affected."⁶² In addition, given the date of the NLI Report, February 5, 2013, the individual's performance could not have been determined until that time.⁶³ As a result, the six-month duration under the Circumstances consideration should be reduced from six months to three months.⁶⁴ In sum, (a) the text description on Violation Report page 11 should be stricken, and (b) the proposed civil penalty for Item 1 should be reduced if not withdrawn.

With regard to NOPV Item 3, PHMSA's allegation in Part E7 of the underlying Violation Report with respect to Culpability is (a) unsupported by the evidence, and (b) is inaccurate and overstates any such culpability. At the hearing, the Director conceded that EMPCo had

⁵⁹ Hearing Transcript at 56-59 (testimony of Mr. Matthews regarding the scope of the integrated inspection); and at 73-74 (no other violations were alleged regarding any programmatic element of Part 195).

⁶⁰ *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009) (quoting *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983)).

⁶¹ Violation Report at 11.

⁶² Hearing Transcript at 117:16-20 (testimony of Ms. McDaniel); Violation Report at 11.

⁶³ Hearing Exhibit 11.

⁶⁴ Violation Report at 10.

identified the rectifier issue and taken documented corrective measures prior to PHMSA learning of the matter.⁶⁵ As a result, the proposed civil penalty should be reduced if not withdrawn.

VI. CONCLUSION

Based upon the foregoing arguments, all of the alleged violations should be withdrawn. In the alternative, to the extent any alleged violation is not withdrawn, the proposed civil penalties must be reduced if not withdrawn in their entirety.

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June 14, 2018



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⁶⁵ Violation Report at 27; Hearing Transcript at 163:9-164:1.