

PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMINISTRATION
WASHINGTON, DC 20590

In the matter of:	§	
	§	
EnLink Midstream, LLC	§	CPF No. 4-2020-5006
	§	
Respondent	§	
	§	

**PETITION FOR RECONSIDERATION
OF
ENLINK MIDSTREAM, LLC**

I. INTRODUCTION

The Pipeline and Hazardous Materials Safety Administration (“PHMSA”), Office of Pipeline Safety (“OPS”), issued a Final Order (“Final Order”) imposing a Compliance Order upon EnLink Midstream, LLC (“Respondent” or “EnLink”).

The subject of the NOPV and the Final Order is a segment (IP-1000) of Respondent’s Cajun Sibon NGL Pipeline system which traverses portions of Texas and Louisiana. The one violation found by the Final Order relates to the identification of preventive and mitigative measures for hazardous liquid pipelines which could affect a high consequence area, and the Compliance Order would establish a remedy; however, Respondent believes both the Final Order and the Compliance Order to be the result of mistake.

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

Respondent asserts herein that the Final Order misconstrues the subject regulation and, thus, misapplies the regulation. Further, Respondent believes the Final Order is attended with issues of factual misunderstanding, due process, arbitrary and capricious agency action, the burden of proof, and fair notice. Finally, Respondent believes the Compliance Order to be ambiguous and impermissibly overbroad. Respondent asserts, and herein demonstrates, that the Final Order should be reconsidered in a manner that remedies the forgoing issues.

In the sections of this Petition which follow, Respondent reviews the procedural background; reviews the subject regulations and the regulatory history of same; analyzes the regulations in light of that regulatory history; then presents its discussion of the apparent errors in the Final Order, certain of which issues are addressed in the alternative.

¹ 49 C.F.R. § 190.243(a).

Two points addressed by 49 C.F.R. §190.243 warrant treatment at the outset. For reference, 49 C.F.R. §190.243(b) provides that “[i]f the respondent requests the consideration of additional facts or arguments, the respondent must submit the reasons why they were not presented prior to issuance of the final order.” First, Respondent relies upon facts within this Petition which are not evidenced within the case file (49 C.F.R. § 190.208(c), 190.209); however, evidence of those facts was provided to the PHMSA inspector over the course of the inspection. No facts upon which Respondent relies in this Petition were not in PHMSA’s possession prior to issuance of the Final Order. Second, Respondent presents arguments in this Petition which heretofore have not been lodged. The reason those arguments are presented here for the first time is that the issues addressed by those arguments arise out of the Final Order and therefore could not have been addressed by Respondent prior to receipt of said Final Order. As such, Respondent avers that all such facts and all such arguments should be considered by the Associate Administrator.

II. PROCEDURAL BACKGROUND

By letter dated February 18, 2020, Respondent received a Notice of Probable Violation and Proposed Compliance Order (“NOPV”) from the Director, Southwest Region, PHMSA, OPS, (a) alleging one probable violation of the pipeline safety regulations promulgated at 49 C.F.R. Part 195 and (b) proposing to impose a compliance order which would direct EnLink to perform certain injunctive measures. The NOPV arose from an inspection of Respondent’s Cajun Sibon NGL Pipeline system which occurred between February and July 2019. A true and correct copy of the NOPV is attached hereto as Exhibit A which includes the email by which the case file was provided to Respondent.

EnLink responded to the NOPV by letter dated March 16, 2020, by which EnLink objected to the NOPV and responded to the factual and regulatory bases of the alleged violation, importantly, addressing the alleged violation as it was stated in the NOPV (“Response”). A true and correct copy of the Response is attached hereto as Exhibit B.

By letter dated July 27, 2020, the Associate Administrator for Pipeline Safety issued the Final Order which found that EnLink had violated the pipeline safety regulations and which imposed a Compliance Order directing the injunctive measures generally as proposed in the NOPV. A true and correct copy of the Final Order (which contains the Compliance Order) is attached hereto as Exhibit C.

By letter dated July 31, 2020, counsel for EnLink requested that the Compliance Order be stayed and that EnLink be allowed to file this Petition not later than August 26, 2020. By letter dated August 11, 2020, the Associate Administrator granted Respondent’s request to set the due date for filing this Petition as August 26, 2020 and stayed the Compliance Order pending issuance of a final decision. As such, this Petition is timely filed.

III. DISCUSSION AND ANALYSIS

A. Overview of the NOPV, Final Order and Compliance Order

The NOPV alleged the following:

EnLink’s integrity management program failed to include an element required in § 195.452(f)(6) of identifying preventative and mitigative measures necessary to protect high consequence areas (HCAs). EnLink failed to identify preventative and mitigative measures for its Cajun Sibon NGL Pipeline System to determine if Emergency Flow Restricting Devices (EFRDs) were needed on its pipeline segments to protect high consequence areas in [the] event of [a] hazardous liquid pipeline release. Section 195.452(i)(4) requires operators to take measures to prevent and mitigate the consequences of a pipeline failure in HCAs, including determin[ing] whether EFRDs are needed.²

The NOPV reached the conclusion that “EnLink failed to implement a process for the evaluation, identification, and implementation of preventive and mitigative measures to protect the HCAs of its pipeline system as required by § 195.452(f)(6) and § 195.452(i)(4).”³

The Proposed Compliance Order would require that EnLink “perform a study” which “must consider the factors listed in § 195.452(i)(4) to protect current high consequence area to enhance public safety,” within 90 days of receipt of a final order.⁴

In turn, the Final Order found that EnLink “violated 49 C.F.R. § 195.452(f)(6) by failing to identify P&M measures to protect a HCA in its IMP. Specifically, EnLink did not properly determine if EFRDs were needed on its Cajun Sibon NGL Pipeline System to protect HCAs.”⁵ The basis for the finding of violation is stated as “EnLink has not produced documentation, including a completed ‘EFRD Evaluation, LIMP Form 108,’ showing the specialized EFRD evaluation was conducted for the Cajun Sibon NGL Pipeline System”; and that “EnLink did not produce evidence that it conducted an evaluation focused on the need for EFRDs, nor did the company show it evaluated ‘the feasibility of risk reductions by the relocation or addition of emergency flow restriction devices’ to protect HCAs as required by its own IMP.”⁶

Finally in this regard, the Compliance Order states that, “[w]ith respect to the violation of § 195.452(f)(6) (**Item 1**), Respondent must perform an EFRD study. The study must consider the factors listed in § 195.452(i)(4) to protect current HCAs to enhance public safety.”⁷

² NOPV at 2.

³ *Id.* at 3.

⁴ *Id.* at 5.

⁵ Final Order at 3.

⁶ *Id.*

⁷ *Id.* at 4.

B. Analysis of the Subject Regulation

The PHMSA regulation that was applied in this case is entitled “Pipeline integrity management in high consequence areas,” 49 C.F.R. § 195.452, the purpose of which is to cause pipeline operators “to test, repair and validate through analysis the integrity of ... hazardous liquid pipelines that could affect populated areas, commercially navigable waterways, and areas unusually sensitive to environmental damage.”⁸ The regulatory history of 49 C.F.R. § 195.452 is critical to understanding the agency’s intended application of the provisions in issue in this case.

The Notice of Proposed Rulemaking for 49 C.F.R. § 195.452 (“NPRM”) indicates that the regulatory provisions relating to EFRDs were directed by Congress in the form of 49 U.S.C. § 60102(j).⁹ A true and correct copy of the NPRM is attached hereto as Exhibit D.

The logical sequence intended by the proposed rule was described by PHMSA as follows:

The rule proposes that a required element of an integrity management program is for an *operator* to take preventive and mitigative measures to protect a high consequence area. The *operator* must conduct a *risk analysis* to determine what additional protections are needed. Installing *EFRDs* is *one of several mitigative measures* the operator could take to protect a high consequence area.¹⁰

Notably, the NPRM goes on to describe the various measures an operator should *consider* as preventive and mitigative measures:

Required risk actions OPS proposes an operator *consider* include implementing damage prevention best practices, having better monitoring of cathodic protection where corrosion is a concern, establishing shorter inspection intervals, repairing defects other than those required by this proposed rule, installing EFRDs on the pipeline, establishing or modifying the systems that monitor pressure and detect leaks, providing additional training to personnel on response procedures, conducting drills with local emergency responders and adopting other management controls.¹¹

Key among the foregoing provision is that EFRDs are one among numerous measures that an operator is to *consider*. Emphasizing the numerous options from which an operator may choose, PHMSA stated in the NPRM that “[o]ne of the many preventive and mitigative actions an operator may take is to install EFRD’s.”¹²

In the preamble to the Final Rule by which 49 C.F.R. § 195.452 was promulgated (“Final Rule”), PHMSA addressed comments submitted by interested parties.¹³ A true and correct copy of the

⁸ 65 Fed. Reg. 21695 (Apr. 24, 2000); *see, also*, 21705.

⁹ *Id.* at 21696.

¹⁰ *Id.* at 21700-01 (emphasis supplied).

¹¹ *Id.* at 21704 (emphasis supplied).

¹² *Id.* at 21705.

¹³ 65 Fed. Reg. 75378 (Dec. 1, 2000).

Final Rule is attached hereto as Exhibit E. With regard to preventive and mitigative measures and EFRDs, PHMSA first expressed that the proposed rule “did not require an operator to install EFRDs or define the conditions under which an operator should install EFRDs.”¹⁴ In its response to comments in this realm, PHMSA again spelled out the intended logical sequence:

It is up to each operator to conduct a *risk analysis* of the pipeline segment to identify additional actions to enhance public safety or environmental protection. For this *risk analysis*, the rule clarifies that an operator must evaluate the likelihood of a pipeline release occurring, how a release could affect the high consequence area, and what risk factors the operator should consider. The rule continues to list some *additional* preventive and mitigative measures an operator should *consider*.¹⁵

Our study of the issue led us to conclude that the decision to install an EFRD should not be mandatory but should be left to the operator.¹⁶

The final rule does not prescribe the specific conditions under which EFRDs or other preventive or mitigative measures are required. Rather, the final rule requires an operator to develop and apply risk assessment and decision-making processes that reflect pipeline-specific conditions and operating environments. The rule now specifies criteria that an operator must *consider* when conducting the analysis to identify additional protective measures.¹⁷

The portions of the regulation upon which PHMSA bases the agency’s finding of violation reads today, with one unrelated addition, exactly as it read in the Final Rule:

(f) *What are the elements of an integrity management program?* An integrity management program begins with the initial framework. An operator must continually change the program to reflect operating experience, conclusions drawn from results of the integrity assessments, and other maintenance and surveillance data, and evaluation of consequences of a failure on the high consequence area. An operator must include, at minimum, each of the following elements in its written integrity management program:

* * *

(6) Identification of preventive and mitigative measures to protect the high consequence area (see paragraph (i) of this section);

* * *

(i) *What preventive and mitigative measures must an operator take to protect the high consequence area?*—(1) *General requirements*. An operator must take measures to prevent and mitigate the consequences of a pipeline failure that could affect a high consequence area. These measures include conducting a risk analysis of the pipeline segment to identify additional actions to enhance public safety or environmental protection. Such actions may include, but are not limited to,

¹⁴ *Id.* at 75393.

¹⁵ *Id.* at 75393 (emphasis supplied).

¹⁶ *Id.* at 75394.

¹⁷ *Id.* at 75393 (emphasis supplied).

implementing damage prevention best practices, better monitoring of cathodic protection where corrosion is a concern, establishing shorter inspection intervals, installing EFRDs on the pipeline segment, modifying the systems that monitor pressure and detect leaks, providing additional training to personnel on response procedures, conducting drills with local emergency responders and adopting other management controls.

(2) *Risk analysis criteria.* In identifying the need for additional preventive and mitigative measures, an operator must evaluate the likelihood of a pipeline release occurring and how a release could affect the high consequence area. This determination must consider all relevant risk factors, including, but not limited to:

- (i) Terrain surrounding the pipeline segment, including drainage systems such as small streams and other smaller waterways that could act as a conduit to the high consequence area;
- (ii) Elevation profile;
- (iii) Characteristics of the product transported;
- (iv) Amount of product that could be released;
- (v) Possibility of a spillage in a farm field following the drain tile into a waterway;
- (vi) Ditches along side a roadway the pipeline crosses;
- (vii) Physical support of the pipeline segment such as by a cable suspension bridge;
- (viii) Exposure of the pipeline to operating pressure exceeding established maximum operating pressure;
- (ix) Seismicity of the area.¹⁸

* * *

(4) *Emergency Flow Restricting Devices (EFRD).* If an operator determines that an EFRD is needed on a pipeline segment to protect a high consequence area in the event of a hazardous liquid pipeline release, an operator must install the EFRD. In making this determination, an operator must, at least, consider the following factors—the swiftness of leak detection and pipeline shutdown capabilities, the type of commodity carried, the rate of potential leakage, the volume that can be released, topography or pipeline profile, the potential for ignition, proximity to power sources, location of nearest response personnel, specific terrain between the pipeline segment and the high consequence area, and benefits expected by reducing the spill size.¹⁹

Based upon agency intent as expressed during the rulemaking, the logical sequence of the preventive and mitigative measures analysis proceeds as follows:

1. An operator must include in its IMP an element directed to identification of preventive and mitigative measures to protect a high consequence area.
2. An operator must take measures to prevent and mitigate the consequences of a pipeline

¹⁸ Seismicity subsequently was added to the inventory of risk factors at 84 Fed. Reg. 52296 (Oct. 1, 2019). Moreover, since the seismicity factor became effective July 1, 2020, and thus is predated by both the PHMSA inspection and the NOPV, seismicity is not considered in this Petition.

¹⁹ 49 C.F.R. § 195.452(f), (f)(6), (i)(1)-(2), and (i)(4).

failure that could affect a high consequence area, which measures include “conducting a risk analysis of the pipeline segment to identify additional actions to enhance public safety or environmental protection.”

3. Those actions *may* include, but are not limited to, installing EFRDs on the pipeline segment, among a host of alternative measures which an operator is permitted to place into effect.
4. “[I]n identifying the *need* for *additional* preventive and mitigative measures, the operator [must] evaluate the likelihood of a pipeline release occurring and how a release could affect the high consequence area.”²⁰ Factors which an operator must consider include, in short form, terrain, elevation, product characteristics, potential release volume, potential conduits which could facilitate transport of released product, and physical support of the pipeline; additional, relevant factors, if any, also must be considered.
5. If, as a result the risk analysis performed pursuant to 49 C.F.R. § 195.452(i)(2), an operator identifies the *need* for *additional* preventive and mitigative measures, then the operator must implement the measure(s) so identified.
6. To determine whether any additional EFRD is needed on a pipeline, an operator must consider the enumerated factors which relate generally to the volume released, product characteristics, potential consequences, and release mitigation.

In summary terms, the foregoing require an integrity management program to have an element for preventive and mitigative measures; require an operator to perform a risk analysis to identify whether additional preventive and mitigative measures are needed; and, if additional measures are needed, determine whether an EFRD is needed by considering the enumerated factors. Attached hereto as Exhibit F is a flowchart which provides a visual representation of the agency’s expressions of its intended application of the regulations in the NPRM and the Final Rule.

Respondent accomplished all the above.

C. Respondent Fulfilled the Requirements of 49 C.F.R. § 195.452(f)(6)

As an initial and fundamental matter, the Final Order did not find Respondent in violation of 49 C.F.R. § 195.452(i)(4); rather, the Final Order found Respondent in violation of 49 C.F.R. § 195.452(f)(6): “After considering all of the evidence, I find that [] Respondent violated 49 C.F.R. 195.452(f)(6) by failing to identify P&M measures to protect a HCA in its IMP.”²¹ The Final Order also provides an alternative conclusion: “Accordingly, after considering all of the evidence, I find Respondent violated 49 C.F.R. § 195.452(f)(6) by failing to identify P&M measures to protect a HCA in its IMP.”²² Those conclusions directly contradict the content of the case file produced by PHMSA, as well as contradicting evidence Respondent provided to PHMSA during

²⁰ 65 Fed. Reg. at 75398.

²¹ Final Order at 3.

²² *Id.*

the inspection but which was omitted from the case file.

Respondent obtained the case file (49 C.F.R. § 190.209) shortly following receipt of the Final Order. Attached to the Pipeline Safety Violation Report, which is within the case file, is an excerpt from the EnLink Hazardous Liquid Integrity Management Plan (“LIMP”) which expressly relates to (1) “P&M Evaluation,” as well as (2) “EnLink LIMP Form 106,” the purpose of which is to “determine if potential actions are to be implemented”; *see Exhibit G*, attached hereto, a true and correct copy of the Pipeline Safety Violation Report. In addition, Respondent employee Mr. Cordell Theriot, Sr. DOT Compliance Specialist, provided the entire LIMP to PHMSA during the inspection; *see Attachment 1-A to the Declaration of Cordell Theriot*, attached hereto as *Exhibit H*. Within the LIMP is the entirety of LIMP Section 7 which outlines Respondent’s process for identifying preventive and mitigative measures. LIMP Section 7 is exactly the element required by 49 C.F.R. § 195.452(f)(6).

On the foregoing basis alone, Respondent has demonstrated that its LIMP does in fact contain the element required by 49 C.F.R. § 195.452(f)(6), “[i]dentification of preventive and mitigative measures to protect the high consequence area...”²³ And on those grounds, that Respondent has refuted both findings of the Final Order, both the Item 1 finding of violation and the Compliance Order should and must be withdrawn.

Respondent believes that reconsideration of the Final Order may end at this point; however, Respondent nonetheless asserts all of the following arguments in the alternative to its argument that it fulfilled the requirements of 49 C.F.R. § 195.452(f)(6) – which is the essential finding of the Final Order.

D. PHMSA Improperly Elevated the Standard of Conduct

Complicating matters, the Final Order also presents the following statement: “Specifically, EnLink did not *properly* determine if EFRDs were needed on its Cajun Sibon NGL Pipeline System to protect HCAs.”²⁴ This statement raises issues of due process; however, nonetheless, Respondent did indeed “properly” determine whether EFRDs were needed on Cajun Sibon NGL Pipeline system segment IP-1000.

i. PHMSA Fails to Provide Respondent Its Right of Due Process

Due process protections provide that a respondent in an enforcement action receive adequate notice and a meaningful opportunity to be heard. The Final Order applied a standard of conduct which was heightened, relative to the NOPV.

The Supreme Court of the United States has instructed that “[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”²⁵ The Secretary of Transportation

²³ 49 C.F.R. § 195.452(f)(6).

²⁴ Final Order at 3 (emphasis supplied).

²⁵ *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 1190, 14 L.Ed.2d 62 (1965).

clearly has informed agency adversarial personnel that “[d]ue process always includes two essential elements for a party subject to an agency enforcement action: adequate notice of the proposed agency enforcement action and a meaningful opportunity to be heard by the agency decision maker.”²⁶ Driving home the point, the Secretary declares that “[i]t is the policy of the Department to provide affected parties appropriate due process in all enforcement actions.”²⁷ Even PHMSA’s pipeline enforcement procedures provide, at least, for notice, in that an NOPV must include a “[s]tatement of the provisions of the laws, regulations or orders which the respondent is alleged to have violated and a statement of the evidence upon which the allegations are based.”²⁸

The NOPV alleged that Respondent failed to include in its integrity management program the *element* of identifying preventive and mitigative measures pursuant to 49 C.F.R. § 195.452(f)(6): “EnLink’s integrity management program *failed to include an element* required in § 195.452(f)(6) of identifying preventative and mitigative measures necessary to protect high consequence areas (HCAs).”²⁹ The NOPV also alleged that “EnLink *failed to implement a process* for the evaluation, identification, and implementation of preventive and mitigative measures to protect the HCAs of its pipeline system as required by §195.452(f)(6) and § 195.452(i)(4).”³⁰ In sum, the NOPV alleged that (1) Respondent failed to “include” an element in its LIMP, and (2) Respondent failed to “implement” the process of identifying preventive and mitigative measures and EFRDs.

The Final Order, on the other hand, goes beyond the allegations stated in the NOPV by stating a new and enhanced standard of conduct: “Specifically, EnLink did not *properly determine* if EFRDs were needed on its Cajun Sibon NGL Pipeline System to protect HCAs.”³¹ Out of the blue, PHMSA raises the bar, moves the goalposts. Going beyond the allegations of the NOPV, of the missing LIMP element and actual “implementation” of 49 C.F.R. § 195.452(f)(6) and 49 C.F.R. § 195.452(i)(4), PHMSA in the Final Order changes the rules by impugning the *quality* of Respondent’s *implementation* pursuant to its LIMP procedures relating to preventive and mitigative measures.

Respondent cannot be brought to bear for a charge of which it had no notice. The NOPV, again, alleges that an element is missing from the LIMP and that Respondent did not “implement” a process for identifying preventive and mitigative measures. The NOPV spoke not a word regarding the *quality* with which Respondent executed any action, any process, or any procedure. Respondent could not have responded – in its Response or otherwise – to a charge of which it was unaware.

PHMSA supports its “proper” implementation theory with statements to the effect that Respondent submitted no evidence of an EFRD evaluation.³² Setting aside, for the present, issues relating to the burden of proof, which are addressed subsequently in this Petition, Respondent could have submitted to the record additional evidence to demonstrate the quality of its execution of its LIMP;

²⁶ 49 C.F.R. § 5.57 (2019); 84 Fed. Reg. 71714, 71729 (Dec. 27, 2019).

²⁷ 49 C.F.R. § 5.59 (2019); 84 Fed. Reg. 71714, 71729 (Dec. 27, 2019).

²⁸ 49 C.F.R. § 190.207(b)(1) (2019).

²⁹ NOPV at 2 (emphasis supplied).

³⁰ *Id.* at 3 (emphasis supplied).

³¹ Final Order at 3 (emphasis supplied).

³² *Id.* at 3.

however, absent any notice of PHMSA’s newly crafted charge, Respondent had no knowledge that such evidence could have made a difference. That lack of evidence, regarding the quality with which Respondent implemented its LIMP, provides the support for the finding of violation which in turn supports the Compliance Order. On the grounds that PHMSA has denied Respondent its right of due process by failing to provide adequate notice of the charge and a reasonable opportunity to be heard, both the finding of violation and the Compliance Order should and must be withdrawn.

ii. PHMSA Mis-Applies the Regulation

The NOPV reflects agency misapplication of the relevant regulations. The NOPV concludes that “EnLink failed to implement a process for the evaluation, identification, and implementation of preventive and mitigative measures to protect the HCAs of its pipeline system *as required by* §195.452(f)(6) and § 195.452(i)(4).”³³ Several issues are raised by that statement. First, 49 C.F.R. § 195.452(f)(6) does not *require* preventive and mitigative measures; rather, that section requires that an integrity management program include an “element” for “[i]dentification of preventive and mitigative measures....” Second, 49 C.F.R. § 195.452(i)(4) does not *require* that EFRDs be installed *unless* the risk analysis performed pursuant to 49 C.F.R. § 195.452(i)(2) identifies that additional preventive and mitigative measures are needed; moreover, by the provisions of 49 C.F.R. § 195.452(i)(1), EFRDs are but one among eight potential such measures identified by the regulation. Neither is any one of the stated preventive and mitigative measures expressly required; rather, an operator “may include” but is not limited to implementing the suggested measures. The word “may” invokes a permissive action, in that an operator is permitted, but not required, to implement any one or more of such measures.

The Final Order likewise impliedly mis-applies the regulation. There, PHMSA expresses that “Section 195.452(i)(4), however, requires operators to conduct an evaluation to determine whether EFRDs are needed to protect HCAs regardless of what the operator determines to be a top threat to the line.”³⁴ The regulation, however, requires only that an operator determine whether additional preventive and mitigative measures are needed by way of the risk analysis performed pursuant to 49 C.F.R. § 195.452(i)(1) and (2). In the NPRM, PHMSA expressed that “[r]equired risk actions OPS proposes an operator *consider* include” those same preventive and mitigative measures identified at 49 C.F.R. § 195.452(i)(1).³⁵ And, as PHMSA stated when promulgating the Final Rule: “The rule continues to list some additional preventive and mitigative measures an operator should *consider*.”³⁶ PHMSA emphasized that operators must “consider” implementation of preventive and mitigative measures: “The rule now specifies criteria that an operator must *consider* when conducting the analysis to identify additional protective measures.”³⁷

PHMSA’s pleadings in this case would impose a different standard than the agency previously expressed during the rulemaking. The Final Order is telling in this regard with the statement that “EnLink has failed to provide evidence that it performed an evaluation specific to the need for and

³³ NOPV at 3 (emphasis supplied).

³⁴ Final Order at 3.

³⁵ 65 Fed. Reg. at 21704 (emphasis supplied).

³⁶ *Id.* at 75393 (emphasis supplied).

³⁷ *Id.*

use of EFRDs in accordance with § 195.452(f)(6)...”³⁸ The error in that statement is that 49 C.F.R. § 195.452(f)(6) does not even mention EFRDs – the cited provision relates to an integrity management program having an element for identification of preventive and mitigative measures. EFRDs do not arise until we are referred to 49 C.F.R. § 195.452(i) – those preventive and mitigative measures that an operator must “consider” and “may” employ but which are not mandated. PHMSA passes right by (1) 49 C.F.R. § 195.452(i)(1) with its permissive “may,” as well as (2) the risk analysis to be performed pursuant to 49 C.F.R. § 195.452(i)(2), both of which lead the operator to identify any additional preventive and mitigative measures which may be needed.³⁹

Another mistake in PHMSA’s case would appear to be the agency’s interpretation of the word “consider.” As found in the regulatory history of 49 C.F.R. § 195.452, operators are obligated to consider – but only to consider – the implementation of preventive and mitigative measures (only one of which is EFRDs). The Final Rule spells it out plainly: “The rule now specifies criteria that an operator must *consider* when conducting the analysis to identify additional protective measures.”⁴⁰

“We interpret regulations in the same manner as statutes, looking first to the regulation’s plain language.”⁴¹ Where the language of the regulations is unambiguous, we do not look beyond the plain wording of the regulation to determine its meaning.⁴² Given that 49 C.F.R. Part 195 does not define the word “consider,” we must look to the plain and ordinary meaning of the word. Merriam-Webster defines “consider” as “to think about carefully.”⁴³ The Cambridge Dictionary defines “consider” as “to spend time thinking about a possibility or making a decision.”⁴⁴ The definitions, generally prompting careful thought, do not relate to any outcomes – they merely indicate contemplation prior to reaching any conclusion. This case would not evidence PHMSA’s first encounter with the word “consider” within 49 C.F.R. § 195.452.

The United States Court of Appeals for the Fifth Circuit reviewed a PHMSA final order involving ExxonMobil Pipeline Company (“EMPCo”). In that case, PHMSA argued that EMPCo’s consideration of certain factors led to an outcome which the agency found unreasonable. After reviewing similar definitions of the word “consider,” the Court advised:

The regulation’s requirement to consider certain factors unambiguously requires pipeline operators to carefully undergo an informed decision-making process in good faith, reasonably taking into account all relevant risk factors in reaching a decision. Contrary to the agency’s assertion, the term “consider” does not compel a certain outcome, but rather it serves to inform the pipeline operator’s careful decision-making process.⁴⁵

³⁸ Final Order at 4.

³⁹ See Final Order at 2 which omits two operative provisions in the context of identifying preventive and mitigative measures, 49 C.F.R. § 195.452(i)(1)-(2).

⁴⁰ 65 Fed. Reg. at 75393 (emphasis supplied).

⁴¹ *Anthony v. United States*, 520 F.3d 374, 380 (5th Cir. 2008).

⁴² *Copeland v. C.I.R.*, 290 F.3d 326, 332–33 (5th Cir. 2002).

⁴³ <https://www.merriam-webster.com/dictionary/consider> (last accessed Aug. 9, 2020).

⁴⁴ <https://dictionary.cambridge.org/us/dictionary/english/consider> (last accessed Aug. 9, 2020).

⁴⁵ *ExxonMobil Pipeline Co. v. U.S. Dep’t of Transp.*, 867 F.3d 564, 573 (5th Cir. 2017).

PHMSA has recognized that pipeline operators have wide latitude in how they weigh various factors in making determinations under 49 C.F.R. § 195.452.⁴⁶

Mindful of the Fifth Circuit’s advice, Respondent asserts that it did indeed “consider” whether any or all of the possible preventive and mitigative measures identified by 49 C.F.R. § 195.452(i)(1) might be needed on segment IP-1000 of the Cajun Sibon Pipeline. That is evidenced by LIMP Form 106 and LIMP Section 7.⁴⁷ Indeed, attachment 1 to LIMP Form 106 (Appendix D to Exhibit B) identifies some 68 preventive and mitigative measures which may be considered. But neither 49 C.F.R. § 195.452(f)(6), (i)(1)-(i)(2), (i)(4) nor the LIMP direct any given outcome, as would PHMSA.

Further in this regard, for an agency to base action upon an erroneous interpretation of its own regulations constitutes arbitrary and capricious agency action.⁴⁸

PHMSA may sincerely believe that operators should install additional EFRDs, but an *ad hoc* re-interpretation of the regulation is not the accepted pathway. Notice and comment rulemaking is the pathway.

iii. Respondent Fulfilled the Regulation in Conformance with Agency Intent

Respondent further argues that it fulfilled the requirements of 49 C.F.R. § 195.452(f)(6) and 49 C.F.R. § 195.452(i) precisely in the manner described by PHMSA during the agency’s promulgation of 49 C.F.R. § 195.452. Respondent has meticulously parsed the rulemaking history and the language of the regulation, as reflected above at Section III.B of this Petition.

Chief among that discussion are the following facets of the high consequence area regulation:

1. 49 C.F.R. § 195.452(f)(6) requires that an integrity management program have an element relating to “identification of preventive and mitigative measures” pursuant to 49 C.F.R. § 195.452(i).⁴⁹
2. 49 C.F.R. § 195.452(i) provides for the following:
 - a. “An operator must take measures to prevent and mitigate the consequences of a pipeline failure that could affect a high consequence area,” (i) which measures include “conducting a risk analysis to identify additional actions to enhance public safety or environmental protection,” and (ii) which actions “may include, but are not limited to” a host of possible actions, among which is “installing EFRDs on the pipeline segment.”
 - b. “[I]dentifying the need for additional preventive and mitigative measures” by evaluating “the likelihood of a pipeline release occurring and how a release could affect the high consequence area”; that “determination must consider all relevant risk factors”

⁴⁶ *In the Matter of Magellan Midstream Partners, L.P.*, Final Order, CPF No. 4-2006-5020, 2009 WL 7820524 at *7 (DOT Dec. 23, 2009) (“Section 195.452(e)(1) lists nine factors that must be considered in establishing a schedule but *leaves it up to the operator* to determine what factors needs to be considered, how to assign risk scores to each factor and pipe segment, and how to prioritize assessments.”) (emphasis supplied).

⁴⁷ LIMP Form 106 is within the case file and is denoted as Appendix D to Respondent’s Response, Exhibit B.

⁴⁸ *Gose v. U.S. Postal Service*, 451 F. 3d. 831, 840 (Fed. Cir. 2006).

⁴⁹ 49 C.F.R. § 195.452(f), (f)(6).

which are listed at 49 C.F.R. § 195.452(i)(2)(i)-(vii).⁵⁰

3. If the risk analysis identifies the need for additional preventive and mitigative measures, the operator must perform the EFRD analysis provided at 49 C.F.R. § 195.452(i)(4).⁵¹

Respondent has documented in the administrative record that it fulfilled the requirements stated above. First, Respondent's LIMP contains provisions for performing identification of preventive and mitigative measures required by 49 C.F.R. § 195.452(f)(6), same found at LIMP Section 7.

Second, Respondent has demonstrated that it performed the risk analysis by evaluating the factors to be considered in such risk analysis pursuant to 49 C.F.R. § 195.452(i)(2). During the inspection, Respondent employee Mr. Theriot provided to the PHMSA inspector the entirety of the LIMP.⁵² And, LIMP Section 6.4 identifies the information, the factors, to be evaluated in such risk analysis, the totality of which far exceeds the factors required by 49 C.F.R. § 195.452(i)(2). Those LIMP factors are presented below, along with indications of those identified expressly by 49 C.F.R. § 195.452(i)(2):

- Pipeline centerline (shapefiles) (route; §195.452(i)(2))
- Start station and end station
- HCA analysis results
- Soils data (§195.452(i)(2))
- Topographic crossings (water crossings; §195.452(i)(2))
- Elevations (§195.452(i)(2))
- Pipe design data
- Diameter
- Wall thickness
- Grade
- Seam type
- Coating
- Installation date
- Valve locations, valve types and valve size
- Product type, product temperature (§195.452(i)(2))
- MOP and flow rate (bbls/day) (§195.452(i)(2))
- Response time to rupture (§195.452(i)(2))
- Performance Data
- Pressure Test (§195.452(i)(2))

⁵⁰ 49 C.F.R. § 195.452(i)(1), (2).

⁵¹ 65 Fed. Reg. at 21700-01.

⁵² See Attachment 1-B to the Declaration of Cordell Theriot, attached to this Petition as Exhibit H.

- ILI data
- Cathodic Protection Data⁵³

Just as provided by 49 C.F.R. §195.452(i)(2), Respondent’s risk analysis considers all relevant risk factors, including but not limited to those enumerated in 49 C.F.R. §195.452(i)(2). The LIMP at Section 6 guides the performance of the risk analysis; *see* LIMP Sections 6.1–6.9. That risk analysis informs the process for identifying whether additional preventive and mitigative measures are needed.

The risk analysis having been performed, LIMP Form 106 Section 9 guides the evaluation of existing mitigative measures toward determining whether other potential preventive and mitigative measures should be considered: “Determine whether existing measures are comprehensive for threats identified and list other potential P&Ms for further consideration.”⁵⁴ Respondent’s Response to the NOPV presents, at Appendix D, a LIMP Form 106 for Cajun Sibon Pipeline system segment IP-1000; *see* Exhibit B. LIMP Form 106 is titled “Liquid P&M Evaluation FORM,” and the form refers to the *results* of the 49 C.F.R. § 195.452(i)(2) risk analysis in both Sections 4 and 5. Considering the results of that risk analysis directly infers that the risk analysis was performed, as otherwise the LIMP Form 106 could not have been completed.

LIMP Form 106 does not identify that any additional preventive and mitigative measures are needed, and in fact LIMP Form 106 determines that existing preventive and mitigative measures are adequate for preventing releases and mitigating the potential consequences of a release to a high consequence area. Further, LIMP Form 106 concludes that no “Further EFRD/Leak Detection Evaluation” is recommended. Below is an image of Section 10 of LIMP Form 106 which sets out the following directive: “Make a recommendation to perform/not perform leak detection and EFRD evaluations” – exactly what PHMSA expressed as its intended application of the risk analysis.

10 EFRD/LEAK DETECTION ANALYSIS	
Review pipeline risk and HCA receptors to identify if a potential benefit could be gained from enhanced leak detection or added EFRDs. Make a recommendation to perform/not perform leak detection and EFRD evaluations. Document decision basis for recommendation.	
Further EFRD/Leak Detection Evaluation Recommended	Decision Basis
<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	Real Time Transient Model (Energy Solutions International), along with SCADA system alarms, provide leak detection and response comparable to EFRD’s. Response time by personnel for an event is less than 1 hour.
If “yes” complete ENLINKForm107, <i>Leak Detection Evaluation</i> , and ENLINKForm108, <i>EFRD Evaluation</i> .	

Notably, had the answer to further EFRD/leak detection evaluation been “yes,” Form 106 would direct the completion of EnLink Form 108, EFRD evaluation; *see* LIMP Form 106 at 3; *see also*

⁵³ *See* Attachment 1-A to the Declaration of Cordell Theriot, attached to this Petition as Exhibit H.

⁵⁴ *See* Exhibit B, LIMP Form 106 at 2.

LIMP Form 108 at Section 8, attached to Mr. Theriot’s declaration at Exhibit H. Respondent notes that Section 8 of LIMP Form 108 reflects the factors to be considered, under 49 C.F.R. § 195.452(i)(4) – *if the risk analysis identifies that additional preventive and mitigative measures are needed (which was not the outcome for segment IP-1000).*

Respondent would, for the sake of convenience, reiterate certain of PHMSA’s expressions of agency intent:

- PHMSA expressed that 49 C.F.R. § 195.452(f)(6) (and by reference 49 C.F.R. § 195.452(i)(1)-(2)) did “not require an operator to install EFRDs or define the conditions under which an operator should install EFRDs.”⁵⁵
- “The rule continues to list some additional preventive and mitigative measures an operator should consider.”⁵⁶
- “Our study of the issue led us to conclude that the decision to install an EFRD should not be mandatory but should be left to the operator.”⁵⁷

As demonstrated above and on the basis of evidence in PHMSA’s possession, not all of which evidence was included in the case file, Respondent performed exactly as provided by the language of the regulation and as informed by agency expressions of its intended application of 49 C.F.R. § 195.452(f), (f)(6), and (i)(1)-(2).

Respondent would add that, from a policy perspective, the application of the rules relating to EFRDs is misdirected. Given that the integrity management regulation was developed in the late 1990s and promulgated in 2000, and given that the Cajun Sibon NGL Pipeline system was constructed and commissioned in 2013, the regulation fails to consider that operators incorporate EFRDs in the design phase of new pipeline systems, as was done with Cajun Sibon. The policy concern is that the rule approaches EFRDs from a 20-year-old perspective, from a time when many pipelines probably could have benefitted from additional EFRDs. If, however, a newly designed pipeline has addressed EFRD considerations in the system design, the probability of a system needing additional EFRDs, barring changes to high consequence areas, is extremely low. An analysis of preventive and mitigative measures for a modern system is quite unlikely to identify EFRDs as a needed additional measure. Put simply, PHMSA’s inspection and enforcement practices would appear to disregard contemporary design practices. Respondent’s Response attempted to express just that – all necessary EFRDs on the Cajun Sibon NGL Pipeline system were installed during original construction. *See Exhibit B* at 4 (item 5 and Appendix A). Respondent would urge that PHMSA exercise its discretion and withdraw this case.

E. Fair Notice

In the alternative to its foregoing arguments, Respondent asserts that PHMSA has failed to provide “fair notice” of its compliance expectations under the cited regulations, and, thus, to find a violation and impose the Compliance Order would constitute arbitrary and capricious agency action. Given Respondent’s arguments, in light of the due process principles of fair notice,

⁵⁵ 65 Fed. Reg. at 75393.

⁵⁶ *Id.*

⁵⁷ *Id.* at 75394.

PHMSA should and must withdraw the finding of violation and the Compliance Order.

i. Standard of Review

Agency action will be upheld unless those actions are determined to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, upon which outcome such action will be set aside.”⁵⁸ “Arbitrary and capricious review focuses on whether an agency articulated a rational connection between the facts found and the decision made.”⁵⁹ To be upheld, if at all, agency action will be upheld upon “the basis articulated by the agency itself.”⁶⁰ Agency action must be “based upon consideration of the appropriate factors.”⁶¹

ii. Fair Notice

Before a government agency deprives a person of property, the person must first have received a minimum level of “fair notice” as to what constitutes a violation of law. “Due process requires that parties receive fair notice before being deprived of property.”⁶² “In the absence of notice—for example, where the regulation is not sufficiently clear to warn a party about what is expected of it—an agency may not deprive a party of property by imposing civil or criminal liability.”⁶³ An administrative agency such as PHMSA must give “fair warning of the conduct it prohibits or requires,” and an agency “must provide a reasonably clear standard of culpability to circumscribe the discretion of the enforcing authority and its agents.”⁶⁴

When an agency interprets a regulation through enforcement rather than pre-enforcement efforts, the issue of notice rests on –

[w]hether the regulated party received, or should have received, notice of the agency’s interpretation in the most obvious way of all: by reading the regulations. If, by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with “ascertainable certainty,” the standards with which the agency expects parties to conform, then the agency has fairly notified a petitioner of the agency’s interpretation.⁶⁵

The U.S. Court of Appeals for the Fifth Circuit has “warned that fair notice requires the agency to have ‘state[d] with ascertainable certainty what is meant by the standards [it] has promulgated.’”⁶⁶ “[T]he relevant inquiry is whether the agency’s interpretation of the pipeline ... regulations could

⁵⁸ 5 U.S.C. § 706(2)(A) (2018).

⁵⁹ *Pension Benefit Guar. Corp. v. Wilson N. Jones Mem’l Hosp.*, 374 F.3d 362, 366 (5th Cir. 2004).

⁶⁰ *Motor Vehicle Mfr.’s Ass’n v. State Farm Mut. Auto. Ass’n of U.S., Inc. et al.*, 463 U.S. 29, 50, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983).

⁶¹ *Id.* at 42-43.

⁶² *Gen. Elec. Co. v. U.S. EPA*, 53 F.3d 1324, 1328 (D.C. Cir. 1995), citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950).

⁶³ *Id.* at 1328-29 (citations omitted); see also *Trinity Broad. of Fla., Inc. v. FCC*, 211 F.3d 618, 628 (D.C. Cir. 2000); *United States v. Chrysler Corp.*, 158 F.3d 1350, 1354 (D.C. Cir. 1998).

⁶⁴ *ExxonMobil Pipeline Co.*, 867 F.3d at 578 (quoting *Diamond Roofing Co. v. OSHARC*, 528 F.2d 645 (5th Cir. 1976).

⁶⁵ *Id.* at 578-579 (citing *General Elec. Co.*, 53 F.3d at 1329); see also *Diamond Roofing Co.*, 528 F.2d at 649.

⁶⁶ *ExxonMobil Pipeline Co.*, 867 F.3d. at 578-579.

have been understood with ‘ascertainable certainty’ ... at the time [respondent] engaged in the conduct that allegedly exposed it to [an] enforcement action”⁶⁷ “Such ‘ascertainable certainty’ may not be possible where an agency has given conflicting public interpretations of a regulation. In addition, even if an

agency does not issue contradictory public statements, it may fail to give sufficient fair notice to justify a penalty if [1] the regulation is so ambiguous that a regulated party cannot be expected to arrive at the correct interpretation using standard tools of legal interpretation, [2] must therefore look to the agency for guidance, and [3] the agency failed to articulate its interpretation before imposing a penalty.”⁶⁸

As PHMSA recently found in the enforcement context, “[u]nder 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.”⁶⁹

iii. PHMSA Failed to Provide Fair Notice of its Novel Interpretation

Respondent has described PHMSA’s expressions of agency intent upon promulgation of 49 C.F.R. § 195.452(f)(6), (i)(1)-(2), and (i)(4); *see* Section III.B of this Petition. Over the years, PHMSA has issued various forms of guidance relating to the relevant regulatory provisions, and that guidance supports Respondent’s interpretation of the regulations.

PHMSA published a set of “Frequently Asked Questions” (“FAQs”) relating to 49 C.F.R. § 195.452.⁷⁰ In FAQ 9.7, PHMSA addresses the question of “What preventive and mitigative actions must be taken to protect HCAs?” The response is telling: “These analyses should identify and evaluate the *need* for *additional* preventive and mitigative actions to protect HCAs. The rule does not specify which actions must be taken.”⁷¹ Another FAQ, FAQ 9.2, addresses the criteria an operator must use in determining whether EFRDs are required. In response, PHMSA states the criteria of 49 C.F.R. § 195.452(i)(4), then explains that “[a]n operator is required to install an emergency flow restricting device *if the operator determines one is needed to protect an HCA.*”⁷²

PHMSA’s enforcement guidance is likewise informative. Regarding 49 C.F.R. § 195.452(f)(6), PHMSA’s “Guidance Information” section refers the regulated public to 49 C.F.R. § 195.452(i), which the guidance states “provides more specifics on what should be *considered* in identifying these additional measures.”⁷³ And, regarding 49 C.F.R. § 195.452(i)(1), the “Guidance Information” section indicates that “§195.452(i)(1) lists some *possible* measures that *might be*

⁶⁷ *Id.*

⁶⁸ *United States v. Lachman*, 387 F.3d 42, 57 (1st Cir. 2004) (citation omitted) (numbering added).

⁶⁹ *In the Matter of Ohio River Valley Pipeline, a subsidiary of EnLink Midstream*, Final Order, CPF No. 3-2015-5009, 2018 WL 1365571, at *6 (DOT Jan. 18, 2018).

⁷⁰ Liquid Integrity Management Rule Frequently Asked Questions (Aug. 31, 2016); <https://www.phmsa.dot.gov/pipeline/hazardous-liquid-integrity-management/hl-im-faqs> (last accessed Aug. 12, 2020).

⁷¹ *Id.* at 9.7.

⁷² *Id.* at 9.2.

⁷³ Hazardous Liquid Integrity Management Enforcement Guidance: Sections 195.450 and 452, at p. 69 “Guidance Information” (12/7/2015); <https://www.phmsa.dot.gov/pipeline/enforcement/hazardous-liquid-integrity-management-enforcement-guidance> (last accessed Aug. 12, 2020).

considered. However, each operator must determine the measures that best address the unique risks on its pipeline system(s).”

Yet, now, in the Final Order, PHMSA conflates the regulation to literally omit 49 C.F.R. § 195.452(i)(1) and (2). That omission removes the risk analysis from consideration, as well as the potential outcome that an operator could determine that no additional preventive and mitigative measures are needed, thereby obviating the need for any evaluation pursuant to 49 C.F.R. § 195.452(i)(4). The discussion leading to the finding of violation clearly exhibits a novel interpretation, that 49 C.F.R. § 195.452(f)(6) immutably drives an analysis pursuant to 49 C.F.R. § 195.452(i)(4). That never has been the agency’s express expectation.

Harkening back to the promulgation of 49 C.F.R. § 195.452, PHMSA positioned the risk analysis at the point of determining whether additional preventive and mitigative measures are needed. That concept permeates the agency’s expressions of its intended application of the regulation. That concept is carried forward in agency guidance. And, Respondent heeded that advice by structuring its LIMP precisely in the form such agency pronouncements would direct and then executing in conformance with the LIMP.

Now, however, PHMSA conflates the logical sequence in a manner that would ignore the plain language of the regulation, the plain language of the regulatory history, and the plain language of agency guidance by holding Respondent’s feet to the fire of a novel interpretation, perhaps one borne out of mistake, but nonetheless an interpretation of which Respondent cannot be found to have known with ascertainable certainty. The interpretation reflected in the NOPV and the Final Order would no doubt mark a change to the status quo.

On the grounds that PHMSA failed to provide fair notice of its new interpretation, both the finding of violation and the Compliance Order should and must be withdrawn.

F. PHMSA Fails to Carry the Burden of Proof

An additional mistake attending the Final Order is PHMSA’s failure to carry the burden of proof, whether in part or in whole.

PHMSA bears the burden of proving the allegations in an NOPV.⁷⁴ 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”).⁷⁵ 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.”⁷⁶ PHMSA satisfies this burden “only if the evidence supporting the allegation

⁷⁴ *In the Matter of Butte Pipeline Co.*, Final Order, CPF No. 5-2007-5008, 2009 WL 3190794, at *1 (DOT Aug. 17, 2009).

⁷⁵ *In the Matter of 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)).

⁷⁶ *In the Matter of 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).

outweighs the evidence and reasoning presented by Respondent in its defense.”⁷⁷ Where “the evidence is closely balanced,” PHMSA does not meet its burden of persuasion, and PHMSA must withdraw the allegation.⁷⁸ PHMSA also “bears the burden of proof as to all elements of the proposed violation.”⁷⁹ Where PHMSA fails to produce evidence in support of its allegation or provides insufficient evidence, the allegation must be withdrawn.⁸⁰

i. The Evidence Does Not Support the Final Order

The Final Order contains broadly worded findings of violation. “After considering all of the evidence, I find that [] Respondent violated 49 C.F.R. 195.452(f)(6) by failing to identify P&M measures to protect a HCA in its IMP.”⁸¹ The Final Order also provides an alternative conclusion: “Accordingly, after considering all of the evidence, I find Respondent violated 49 C.F.R. § 195.452(f)(6) by failing to identify P&M measures to protect a HCA in its IMP.”⁸²

To the extent a finding of violation were upheld on reconsideration, Respondent asserts that the finding must be narrowly tailored to the evidence in the case file. The Cajun Sibon NGL Pipeline system is comprised of eleven individual segments as reflected in the map attached to Mr. Theriot’s declaration (*see Exhibit H* at Attachment 3). As to whether Respondent properly performed pursuant to its LIMP, segment IP-1000 is the subject of LIMP Form 106 which was among the documents provided in Respondent’s Response. PHMSA, however, has proffered no evidence regarding any other segment of the Cajun Sibon NGL Pipeline system, and, thus, the agency cannot prove that Respondent failed to perform any LIMP actions as to those segments, nor can the agency prove that Respondent failed to implement any such action “properly.”

Further, for the agency to find that Respondent did not “properly” determine whether EFRDs were needed begs the question of what would constitute proper determination. “To the extent the agency contends that proper consideration mandates a particular outcome, this is not supported by the text of the regulation nor the industry guidance.”⁸³ A finding that Respondent did not “properly” determine whether EFRDs were needed, simply because Respondent reached a different determination than the agency, is contradicted by the record in this case. To find that Respondent made an “improper” determination, without any rational connection between the record in this case and said finding, would constitute arbitrary and capricious agency action.

Agency action will be upheld unless those actions are determined to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, upon which outcome such action will be set aside.”⁸⁴ “Arbitrary and capricious review focuses on whether an agency articulated a

⁷⁷ *Butte Pipeline Co.*, 2009 WL 3190794, at *1.

⁷⁸ *Alyeska Pipeline Service Co.*, 2009 WL 5538655, at *3 (citing *Schaffer*, 546 U.S. at 56).

⁷⁹ *In the Matter of ANR Pipeline Co.*, Final Order, CPF No. 3-2011-1011, 2012 WL 7177134 at *3 (DOT Dec. 31, 2012); *see also In the Matter of CITGO Pipeline Co.*, Decision on Pet. for Reconsideration, CPF No. 4-2007-5010, 2011 WL 7517716, at *5 (Dec. 29, 2011).

⁸⁰ *Alyeska Pipeline Service Co.*, 2009 WL 5538655, at *3.

⁸¹ Final Order at 3.

⁸² *Id.*

⁸³ *ExxonMobil Pipeline Co.*, 867 F.3d at fn. 8.

⁸⁴ 5 U.S.C. § 706(2)(A) (2018).

rational connection between the facts found and the decision made.”⁸⁵ To be upheld, if at all, agency action will be upheld upon “the basis articulated by the agency itself.”⁸⁶ Agency action must be “based upon consideration of the appropriate factors.”⁸⁷

A rational connection between the facts found and the conclusion reached simply cannot be established in the absence of any evidence whatsoever about any Cajun Sibon pipeline segment other than segment IP-1000. As such, if the finding of violation is upheld on reconsideration, it must be narrowly tailored to the IP-1000 segment and cannot be extended to any other segment of the Cajun Sibon NGL Pipeline system; to find otherwise would constitute arbitrary and capricious agency action in light of PHMSA’s lack of evidence with which to establish any facts.

ii. PHMSA Fails the Burden of Persuasion

Regarding PHMSA’s burden of persuasion, Respondent asserts that, in the absence of evidence regarding any pipeline segment other than the IP-1000 segment, PHMSA cannot carry the burden of persuasion.

Where “the evidence is closely balanced,” PHMSA does not meet its burden of persuasion, and PHMSA must withdraw the allegation.⁸⁸

Respondent argues the following in this regard:

1. As to the IP-1000 segment, the administrative record actually does contain evidence that supports Respondent’s “proper” evaluation of the IP-1000 segment. At best, the evidence is closely balanced, in which circumstance PHMSA could not have carried its burden of persuasion.
2. As to the remainder of the Cajun Sibon NGL Pipeline system, the administrative record holds no evidence regarding identification of preventive and mitigative measures. As such, PHMSA could not carry its burden of persuasion as to those remaining segments.

Upon the foregoing grounds, the finding of violation and the Compliance Order should and must be withdrawn.

G. The Compliance Order is Ambiguous and Impermissibly Broad

As an initial matter, the agency has not established that “the nature of the violation and the public interest” warrant the issuance of a compliance order, as required by 49 C.F.R. § 190.217. Further, Respondent asserts that, on the grounds that a violation has not been proven in this case, the Compliance Order should and must be withdrawn. In past enforcement cases, PHMSA’s practice has been to withdraw a Compliance Order where the underlying alleged violation was not proven

⁸⁵ *Pension Benefit Guar. Corp.*, 374 F.3d at 366.

⁸⁶ *Motor Vehicle Mfr.’s Ass’n*, 463 U.S. at 50.

⁸⁷ *Id.* at 42-43.

⁸⁸ *Alyeska Pipeline Service Co.*, 2009 WL 5538655, at *3 (citing *Schaffer*, 546 U.S. at 56).

and itself was withdrawn.⁸⁹

To the extent a finding of violation were upheld on reconsideration, Respondent raises issues relating to the scope of the Compliance Order. Respondent argues that the injunctive directives of the Compliance Order are ambiguous and impermissibly broad. To order compliance with same would constitute arbitrary and capricious agency action and an abuse of discretion.

Under the Pipeline Safety Act (“PSA”), PHMSA⁹⁰ is authorized to “issue orders directing compliance” with a regulation promulgated by the agency and such orders must “state clearly the action a person must take to comply.”⁹¹ Here, the Compliance Order is ambiguous in directing that “[r]espondent must perform an EFRD study.” The Compliance Order states that the “EFRD study” must consider the factors found at 49 C.F.R. § 195.452(i)(4), but the Compliance Order omits to provide any direction or instruction as to what is meant or expected by a “study.” Notably, the subject regulations do not use the term “study” in any form or fashion. As such, Respondent is left to guess what the agency means by a “study.” If PHMSA upholds the Compliance Order on reconsideration, the agency should describe with precision exactly the actions Respondent is obligated to accomplish. In light of the fact that Respondent already has performed according to agency intent, Respondent should not be left to guess of the manner in which it would comply with any Compliance Order.

Further, the Compliance Order is overly broad in the scope of its directive, in that it provides no information identifying the specific pipeline segment to which the “EFRD study” must be directed. Respondent is left to guess at the manner in which it would fulfill the obligations of the Compliance Order. Should Respondent “study” the IP-1000 segment, the only segment for which PHMSA submitted evidence to the case file? Should Respondent “study” all of the Cajun Sibon NGL Pipeline system? Or should Respondent “study” all of its pipeline systems, even though the agency has proved nothing relating to those other systems? Injunctive relief must be narrowly tailored to address the particular harms at issue.⁹² By extending the Compliance Order to any segment other than segment IP-1000, PHMSA would be exceeding the authority granted by the PSA by “issuing vague directives applicable to portions of [a] pipeline system where specific regulatory violations have not been established.”⁹³

The regulation is clear: a Compliance Order is limited to “directing compliance” with the alleged violation(s).⁹⁴ Thus, Respondent argues that any directive must be limited to the IP-1000 pipeline segment based upon the evidence in the case file which, at best, would support the finding of violation only as to the IP-1000 segment. Absent evidence supporting a broader finding, the Compliance Order should not and cannot extend to any other of Respondent’s pipeline segments or pipeline systems. To direct EnLink to perform an EFRD study on any other pipeline segment

⁸⁹ *In the Matter of Buckeye Partners, LP*, Final Order, CPF No. 1-2013-5007, 2013 WL 8284476 (DOT Dec. 11, 2013).

⁹⁰ 49 C.F.R § 1.97 delegates to PHMSA the Secretary of Transportation’s duties under the PSA.

⁹¹ 49 U.S.C. § 60118(b).

⁹² *Ahern ex rel. N.L.R.B. v. Remington Lodging & Hospitality*, 842 F. Supp. 2d 1186, 1205-06 (D. Alaska 2012), quoting *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1140 (9th Cir. 2009) (“An overbroad injunction is an abuse of discretion.”).

⁹³ *ExxonMobil Pipeline Co.*, 867 F. 3d at 58.

⁹⁴ 49 C.F.R. § 190.217.

or pipeline system would constitute arbitrary and capricious agency action.

Agency action will be upheld unless those actions are determined to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, upon which outcome such action will be set aside.”⁹⁵ “Arbitrary and capricious review focuses on whether an agency articulated a rational connection between the facts found and the decision made.”⁹⁶ To be upheld, if at all, agency action will be upheld upon “the basis articulated by the agency itself.”⁹⁷ Agency action must be “based upon consideration of the appropriate factors.”⁹⁸

If PHMSA upholds the finding of violation on reconsideration and, further, upholds the Compliance Order, the agency should clearly articulate its compliance expectations and craft a Compliance Order that details precisely the task Respondent is expected to accomplish. Particularly in light of the fact Respondent has performed precisely according to agency’s express intent, Respondent should not be left to guess how it would comply with an agency order.

PHMSA has not articulated a rational connection between the evidence presented for segment IP-1000 and the broad and ambiguous order to “perform an EFRD study.” To order Respondent to comply with the Compliance Order as written in the Final Order would constitute arbitrary and capricious agency action.

IV. CONCLUSION

Based upon the foregoing authorities, evidence and arguments, the finding of violation (Item 1) should be withdrawn, and the Compliance Order should be withdrawn. To the extent the finding of violation is not withdrawn, the Compliance Order should be narrowly tailored to identify the specific actions required of Respondent, but only as to the IP-1000 segment of the Cajon Sibon NGL Pipeline system; and no more.

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⁹⁵ 5 U.S.C. § 706(2)(A) (2018).

⁹⁶ *Pension Benefit Guar. Corp.*, 374 F.3d at 366.

⁹⁷ *Motor Vehicle Mfr. 's Ass'n*, 463 U.S. at 50.

⁹⁸ *Id.* at 42-43.