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

In the Matter of	)	
Colonial Pipeline Company	)	CPF 1-2017-5015
Respondent	)	Petition for Reconsideration

Petition for Reconsideration

The Pipeline and Hazardous Materials Safety Administration (PHMSA or the Agency) issued an Amended Final Order to Colonial Pipeline Company (Colonial or the Company) on August 20, 2019, in connection with a Notice of Probable Violation (NOPV) issued to the Company on July 25, 2017. The Amended Final Order finds that Colonial violated 49 C.F.R. Part 195.505(a) for failure to identify removal of a casing as a covered task in its Operator Qualification (OQ) program, assesses a civil penalty of $29,300, and imposes a Compliance Order that requires corrective actions within sixty (60) days.

Colonial files this Petition for Reconsideration of the Agency's Amended Final Order pursuant to 49 C.F.R. Part 190.243 to respectfully request that PHMSA reconsider its finding that removal of a casing is an OQ covered task under 49 C.F.R. Part 195.505(a). The Amended Final Order does not comport with the plain language of the rule, enforcement precedent, rulemaking history, and associated regulatory guidance. Instead, PHMSA bases its decision essentially solely on the fact that Colonial maintains a detailed procedure for removal of a casing. For these reasons and as explained further below, the Amended Final Order should be withdrawn in its entirety.

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

I. Background

The NOPV and Amended Final Order follow an inspection of field activities in Woodbine, Maryland in January 2017. During the field inspection, PHMSA observed contractors removing a casing from Line 04 to examine an anomaly on the pipeline. The contractors who removed the

casing were certified welders with numerous qualifications and certifications associated with multiple pipeline repair activities and the identification of abnormal conditions.

The NOPV alleged two violations of the OQ rules at 49 C.F.R. Part 195, proposed a civil penalty of $50,100, and proposed a compliance order with two requirements. Colonial timely filed a Request for Hearing, submitted pre- and post-Hearing briefs, and participated in a Hearing on February 20, 2018. On August 5, 2019, PHMSA issued a Final Order that retains a finding of one violation under 49 C.F.R. Part 195.505(a), assesses a reduced civil penalty of $29,300, and requires corrective action to ensure that removal of a casing is identified as a covered task within 60 days. On August 20, 2019, PHMSA issued an Amended Final Order which contains the same finding, civil penalty and corrective actions as the original Final Order, but which includes one additional paragraph in support of its finding.

II. PHMSA's Amended Final Order Should be Reconsidered and Withdrawn

This matter presents one issue: <u>whether removal of a casing is an OQ covered task under PHMSA regulations</u>. Despite the uncontroverted fact that there is no express law, enforcement precedent, guidance or industry standard that identifies the removal of a casing as an OQ covered task, the Amended Final Order finds otherwise simply because Colonial maintains a detailed procedure regarding the task.

A. Removal of a Casing is not a Covered Task

PHMSA has not promulgated an express list of covered tasks for which OQ qualification is required. Instead, PHMSA requires that operators apply a four-part test under Part 195.501(b)(1)-(4) to determine whether an activity is a "covered task":

1. "Is performed on a pipeline facility;"
2. "Is an operation or maintenance task;"
3. "Is performed as a requirement of [Part 195]; <u>and</u>"
4. "Affects the operation or integrity of the pipeline."

Removal of a casing does not meet these criteria. Specifically, casing removal does not meet the third or the fourth criteria. It is <u>not</u> performed as a requirement of Part 195 and it does not affect the operation or integrity of the pipeline. No PHMSA regulation expressly requires an operator to remove a casing or makes reference to removal of a casing. It is not performed as a method of repair under Part 195.422. As such, it is not a requirement under Part 195. Further, removal of a casing does not involve work performed on the pipeline itself but instead is performed to access the pipe underneath the casing. For these reasons, it does not affect pipeline operations or integrity.

B. Maintaining Procedures for Removal of a Casing Does Not Mean it is a Covered Task

In the Amended Final Order, PHMSA states that certain tasks, such as removal of a casing, are "so integral to meeting the requirements of the regulation that it must be considered as a separate covered task." In making this statement, PHMSA relies on a 2012 Final Order in a footnote. In

that 2012 Final Order, the Agency found that pipe fittings generally (including the assembly of threaded connections) are an OQ covered task performed as part of a pipe repair because it is "so integral" to safely performing a repair under 195.422. *Final Order, In re: Enterprise Products Operating, LLC, CPF 3-2009-5022 (Aug. 14, 2012).*[1] This 2012 Final Order is distinguishable from the instant case for three important reasons:

> *(1) The activity at issue*: Pipe fittings and the assembly of threaded connections are repair activities performed on a pipeline and in that case the failure to properly perform these methods of repair resulted in a pipeline incident, a release of highly volatile liquid and the closure of a state highway for 5 days. In contrast, removal of a casing is not a repair method performed on a pipeline, and it does not impact pipeline operations or integrity when it is performed. Further, it was performed by personnel qualified in other related covered tasks and without incident.
>
> *(2) Prior enforcement precedent specific to pipe fittings / threaded pipe*: PHMSA had considered pipe fittings and joining threaded pipe as covered tasks in prior enforcement. There is no prior enforcement precedent which finds that removal of a casing is a covered task, however. In fact, Colonial is not aware of any liquid pipeline operator that identifies removal of a casing as an OQ covered task.
>
> *(3) Existence of industry standards to the task*: At least one industry standard identified the joining of threaded pipe as a covered task, indicating that certain operators in the industry also considered joining threaded pipe to be a covered task. As compared to removal of a casing, which is not identified as a covered task in <u>any</u> OQ industry standard developed to assist liquid operators in identifying covered tasks.

The *only* support that PHMSA relies upon in its determination that "removal of a casing" is so integral or essential to a pipeline repair is the fact that Colonial maintains a detailed procedure for removal of a casing. That reasoning is not enough to support the Agency's conclusion. In issuing the OQ regulations, PHMSA's predecessor agency expressly noted that the existence of an operator's maintenance procedure does not in and of itself necessitate an associated covered task. *PHMSA Final OQ Rule, 64 Fed. Reg. 46853, 46860 (Aug. 27, 1999).* Yet this is the sole basis for PHMSA's determination that removal of a casing is a "covered task" in this enforcement action.

C. Amended Final Order is Arbitrary and Capricious

PHMSA's finding in the Amended Final Order is without support in law, prior precedent, regulatory guidance or fact and goes so far as to contradict the plain language of the regulations, the regulatory history, and associated guidance. This Amended Final Order is the <u>first</u> time that PHMSA has ever indicated to the regulated community that removal of a casing is a covered task.

[1] While not cited by PHMSA in its Amended Final Order, there is one other Final Order—issued after the NOPV in this matter—where the Agency found that the "repair method" of buffing and grinding in performing a repair was an "integral part" of repairs required by Part 195 and "considered a 'covered task'." *Final Order, In re: Enterprise, CPF 4-2017-5019 (Oct. 15, 2018).* This Final Order is distinguishable from the instant case and the task of removal of a casing for the same reasons as the 2012 Final Order.

It is also the first time that PHMSA has so broadly applied the four-part test for identifying a covered task.

Such a broad application of 49 C.F.R. Part 195.505(a) that expands the plain language of the rule must be issued through notice and comment rulemaking to provide Colonial as well as the industry notice and an opportunity to respond. *Administrative Procedure Act, 5 U.S.C. § 554(b)*; Appalachian Power Co. v. EPA, 208 F.3d 1015 (D.C. Cir. 2000). As such, the Agency's newly articulated enforcement interpretation is arbitrary and capricious under the Administrative Procedure Act and violates due process and fair notice requirements under the U.S. Constitution. An agency must "state with ascertainable certainty what is meant by the standards [it] has promulgated." ExxonMobil Pipeline v. U.S. DOT, 2017 U.S. App. LEXIS 15144 (5th Cir. 2017). An agency may not enforce regulations according to "what an agency intended but did not adequately express." Gates v. Fox Co., Inc. v. OSHRC, 790 F.2d 154, 156 (D.C. Cir. 1986).

D. Amended Final Order Creates Serious Policy Concerns

Colonial is not aware of a single liquid pipeline operator who identifies removal of a casing as a covered task. No third party OQ vendor has developed qualifications for removal of a casing. Thus, if Colonial is required to hire contractors who are OQ qualified for this task, it will have to prepare its own qualification verifications or engage a third party vendor to create qualification verifications for this task since no vendor currently offers any such verifications and it is a time intensive process to prepare them.

In 2006 in response to numerous pipeline incidents caused by issues associated with excavation practices, PHMSA issued an advisory bulletin to (1) "recommend" that operators integrate OQ regulations into their marking, trenching, and backfilling operations to prevent similar incidents in the future and (2) to remind operators that even though it is not expressly listed in Part 195 or 192, excavation is a covered task. *Advisory Bulletin, 71 Fed. Reg. 2613 (Jan. 17, 2006).* Industry standard API Recommended Practice 1161 has listed excavation related tasks as covered tasks (associated with 195.442 damage prevention rules) since issuance of its first edition in 2000. In addition, for the incidents referenced in that advisory, we are not aware that PHMSA issued any enforcement under the four part test identifying a "covered task," but instead focused more generally on whether the excavators were sufficiently qualified or follow procedures. By contrast, no OQ industry standards developed for liquid operators include removal of a casing as a covered task and PHMSA has not so much as issued *any* guidance, let alone a formal Advisory Bulletin, to announce to the industry that it recommends that removal of a casing should be a covered task under 49 C.F.R. Part 195.505(a).

PHMSA's interpretation in the Amended Final Order renders both the third and fourth parts of the four-part test essentially meaningless. All tasks that an operator performs associated with a repair (whether prior to, during, or after a repair) and for which an operator maintains procedures would now be a covered task. Under PHMSA's rationale, tasks such as meter reading would be a covered task if performed in conjunction with a repair; a task which PHMSA has expressly stated is not a covered task. *PHMSA Final OQ Rule, 64 Fed. Reg. 46853, 46861 (Aug. 27, 1999) (meter reading)*; *Final Order, In re: Enterprise Products Operating, LLC, CPF 3-2009-5022 (Aug. 14, 2012) (reading a voltmeter).*

Further, the Amended Final Order disincentivizes, and in this case penalizes, operators from proactively developing robust procedures for activities that are not expressly required by Part 195. Such a finding creates significant policy concerns and expressly contradicts recent U.S. Department of Transportation (DOT) policy memorandum regarding enforcement actions. The DOT General Counsel has instructed PHMSA and other DOT modal agencies that,

> in exercising discretion to initiate an enforcement action and in the pursuit of that action, agency counsel must not adopt or rely upon overly broad or unduly expansive interpretations of the governing statutes or regulations, and should ensure that the law is interpreted and applied according to its text.

DOT Memo re: Procedural Requirements for DOT Enforcement Actions (Feb. 15, 2019), p. 6 (emphasis added).

III. Request for Relief

PHMSA has not met its burden in this case. If left in place, the Amended Final Order is arbitrary and capricious and presents substantial policy concerns for the industry.

For the reasons identified in this Petition for Reconsideration, as well as Colonial's Request for Hearing, Pre-Hearing Brief, and Post-Hearing Brief, Colonial respectfully requests that PHMSA withdraw the Amended Final Order, the Civil Penalty, and the Compliance Order.

As the Agency considers this Petition for Reconsideration and given the significance of this Final Order for both Colonial and the industry, Colonial respectfully requests that PHMSA stay the Compliance Order pursuant to 49 C.F.R. Part 190.243(c).

Respectfully submitted,

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