

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

	)	
In the Matter of	)	
	)	CPF No. 1-2019-5006
Sunoco Pipeline, L.P.	)	Notice of Probable Violation
	)	
Respondent.	)	
	)	

**Sunoco Pipeline, L.P. Mariner East Pipeline System
Post-Hearing Brief**

The Office of Pipeline Safety of the Pipeline and Hazardous Materials Safety Administration (PHMSA or the Agency) held an administrative hearing on the above referenced matter in West Trenton, New Jersey on November 7, 2019. The Respondent, Sunoco Pipeline, L.P. (SPLP or the Company), requested the Hearing to contest two alleged violations of 49 C.F.R. Part 195. Following the Hearing, the Presiding Official allowed SPLP to submit this Post-Hearing Brief on or before December 23, 2019, thus this filing is timely. As set forth below, SPLP continues to believe that Notice of Probable Violation (NOPV) Item 1 is without legal or factual basis, but following further consideration, the Company is withdrawing its challenge of NOPV Item 2.

The violations were alleged in an NOPV issued to SPLP on May 17, 2019, following inspections and discussions regarding SPLP's Mariner East pipeline system in Pennsylvania. Item 1 of the NOPV alleged a violation of 49 C.F.R. Part 195.106 asserting that the specified minimum yield strength (SMYS) of the Glen Riddle Junction to Elverson Junction (GRE) main line pipeline was not "known." Item 2 of the NOPV alleged that SPLP did not consider tailoring its communications coverage area to certain highly volatile liquids (HVL) pipeline locations and release consequences under API RP 1162 incorporated by reference in 49 C.F.R. Part 195.440(c). NOPV Items 1 and 2 were also addressed in a Proposed Compliance Order (PCO).

With respect to NOPV Item 1, the parties agree that the pipe at issue is Grade B with a SMYS of 35,000 psi. The parties further agree that SPLP has satisfied the associated PCO that would require it to validate SMYS. Where the parties disagree, however, is the question of whether the pipe SMYS was "known" at the time maximum operating pressure (MOP) was increased to 1,200 psi. As set forth in the record for this matter, in the Hearing, and further below, the pipe grade (and therefore SMYS) has always been "known," is well documented, and there is no basis for a finding of violation or compliance order. PHMSA has not met its burden of proof otherwise. As to NOPV Item 2, SPLP elects to withdraw its challenge and notes that it is already in the process of addressing the associated PCO item.

I. Background

SPLP's Mariner East pipeline system transports natural gas liquids (also known as HVLs) through Pennsylvania, West Virginia, and Ohio by way of several pipelines including Mariner East 1 (ME1), Mariner East 2 (ME2), and Mariner East Expansion (ME2X). Portions of that system are still being constructed and due to certain delays, SPLP repurposed a 25 mile portion of the existing GRE pipeline, known as the 12 inch PTBR to MNTL, to serve as a temporary bypass around a segment of the ME2 pipeline. SPLP has owned the GRE since it was acquired from Atlantic Pipe Corporation in 1989. The pipeline was originally installed by Keystone Pipeline Company in 1937 and constructed with 12.75 inch diameter, 0.375 inch wall thickness, API Grade B seamless pipe manufactured by National Tube. Since original construction, maintenance activities and pipeline relocations have replaced roughly half of the GRE, with only 14 miles of original Grade B pipe remaining. Historically, the pipeline operated in refined product service with a MOP of 950 psi until SPLP reversed flow and changed to HVL service in 2018 and increased the MOP to 1,200 psi in January 2019.

II. NOPV Item 1: SMYS of the GRE is Known

It is the remaining 14 miles of the GRE that are at issue in NOPV Item 1. Despite original, historical, and other documentation confirming and reconfirming the SMYS of the GRE, PHMSA contends that the SMYS was not "known" under 49 C.F.R. Part 195.106, at least until SPLP performed tensile testing of forty-three (43) samples along the segment.¹ This testing was voluntarily performed and it confirmed what SPLP had "known" all along—that the pipe was Grade B with a SMYS of 35,000 psi. In sum, SPLP validated its current MOP through un rebutted evidence that uniformly demonstrates that the SMYS of the GRE was "known" from original and historical records as well as two subsequent hydrostatic pressure tests that were performed without failure. As set forth in the record and filings associated with this appeal, this documentation has been shared with PHMSA and discussed in multiple meetings with the Agency.

A. Part 195.106 Relies on SMYS

The regulatory text of 49 C.F.R. Part 195.106(b) is clear and unambiguous:

The yield strength to be used in determining the internal design pressure under paragraph (a) of this section is the specified minimum yield strength. If the specified minimum yield strength is not known, the yield strength to be used in the design formula is [providing for options to identify the yield strength including performing API 5L tensile tests on randomly selected specimens depending on the pipe diameter at 195.106(b)(1)(i)]. (emphasis added)

PHMSA does not define "known" in the Part 195 regulations or guidance. In interpreting undefined regulatory terms, PHMSA has relied on the common dictionary definition of certain

¹ Notably, PHMSA agrees that the tensile testing of the forty-three (43) samples "confirmed proper Grade B pipe." *Hearing Transcript, Klesin, p. 60, lines 6-7.*

terms, and Merriam-Webster's definition specifically.² Merriam-Webster's dictionary defines "known" to mean "generally recognized."³ SPLP has always "known" the grade of the GRE pipe at issue (and therefore the SMYS) and this has been confirmed time and time again. Further, with respect to the flow reversal, change of product, and MOP substantiation at issue, the pipe grade was reconfirmed yet again through multiple hydrostatic pressure tests and voluntarily performed tensile testing of forty-three (43) samples along the fourteen miles at issue.

Because SPLP does not have documentation that modern pipe manufacturers now routinely prepare and provide during new construction, PHMSA contends that the pipe's GRE was "unknown."⁴ Part 195 does not require that operators maintain mill test reports, purchase orders, or other material certification records, nor did those documents exist for the GRE in 1937. At the Hearing, PHMSA further stated that the document could have been titled something other than a "mill test report."⁵ Nothing in the regulations restricts evidence of SMYS to manufacturer testing reports or something similar, and the Agency has not established that these particular records are the *only basis* for compliance with 195.106.⁶

Through this enforcement action, PHMSA is effectively reading requirements into the regulations that *do not exist* and requiring SPLP to have maintained mechanical testing documentation that

² PHMSA Eastern Region Pre-Hearing Submission (Oct. 28, 2019); PHMSA Decision on Petition for Reconsideration, *In re: Centurion Pipeline, LP, CPF 4-2014-5028* (Jun. 27, 2019) (relying in part on Merriam-Webster's definition of the term "know" which is not used or defined in the regulations).

³ Merriam-Webster defines "known" to mean "generally recognized." See <https://www.merriam-webster.com/dictionary/known>. PHMSA in its Pre-Hearing submission instead relies on a word that is not included in the regulations, "know," presumably because that definition is more supportive of their argument. An agency may not pick and choose definitions of words to support post-hoc enforcement rationalization. Further, the definition is similar, defining "know" as "to have understanding of" or "to perceive directly." PHMSA nevertheless derived its own definition, stating at the Hearing that "We think for something to be known you have to know it. And in order to know something, it's a hundred percent." *Hearing Transcript, Agboola, p. 38, lines 14-17*.

⁴ PHMSA Engineer Steve Nanney participated in the Hearing by phone and explained that the API 5L code applicable in the 1930s and 1940s "required a tensile test per 100 lots of pipe" and that he has "personally seen tests that have been done to confirm the tensile and chemical properties of the pipe." *Transcript, Nanney, p. 44, line 19 – p. 45, line 7*. Simply because Mr. Nanney may have seen tensile testing for a pipeline of a similar vintage does not mean that National Tube provided these types of reports to the purchaser of the pipe at issue in 1937. The GRE pipe was manufactured at a time before pipe mills even prepared such reports. Even if they had, the regulations do not expressly require this type of record or testing to confirm SMYS or pipe grade.

⁵ *Hearing Transcript, Agboola, p. 44, lines 8-14*.

⁶ While not discussed at the Hearing, in PHMSA Eastern Region's Pre-Hearing Submission, PHMSA cited to a 1994 Federal Register notice where OPS revised 49 C.F.R. Part 195.106(b) to include a maximum SMYS level that operators could use in lieu of tensile testing where SMYS is "not known." *Final Rule, 59 Fed. Reg. 33,388 (Jun. 28, 1994)*. While the preamble discussion in that Final Rule is consistent with the plain language of the regulations, it is irrelevant to the GRE because SPLP has verified, substantiated, and documented yield strength of the GRE pipe segment at issue in historical records, integrity assessments, and material testing. In contrast, the cited preamble discussion mentions an operator of pipelines where documentation of yield strength of tensile testing did not exist, and as such, it was unknown under the regulations. There is also no explicit statement in the cited preamble, the regulations, enforcement or guidance as to what documentation is required to demonstrate that yield strength is known.

did not exist for this pipe.⁷ PHMSA is arguing that SPLP must establish the actual yield strength as opposed to specified yield strength of the manufacturer (or SMYS) as if it were not known or generally understood to SPLP. Courts have routinely struck down administrative agencies for similar actions, including PHMSA,⁸ and the Hearing Officer should do the same.

B. SPLP's Documentation Validates the SMYS of the GRE

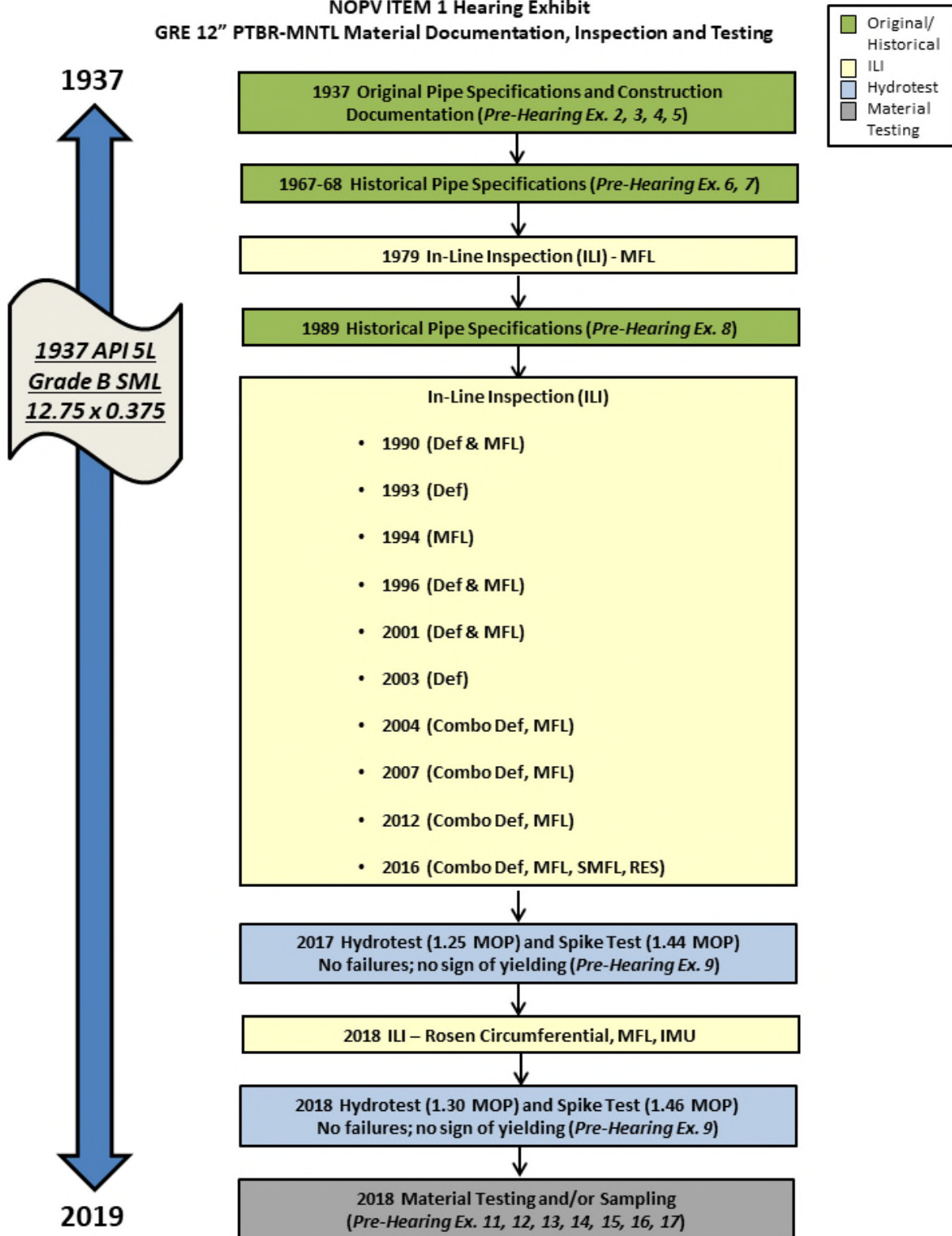
PHMSA admits that the pipe at issue has been validated as Grade B, which correlates to a SMYS of 35,000 psi.⁹ The Agency disagrees, however, with the sufficiency of original, historical, and extensive operation and maintenance history which further validates the pipe specifications, including Grade B. For a pipeline of its vintage, the GRE pipeline information and characteristics are well documented from 1937 original construction to historical and present operation and integrity management documentation. The figure below, introduced as an exhibit at the Hearing, summarizes original and historic pipe specification and material documentation as well as historical inspection and testing of the GRE.

⁷ In doing so, PHMSA violates the Pipeline Safety Act's long-standing statutory prohibition on the retroactive application of design and construction standards to pipelines already in existence when such standards are adopted. 49 U.S.C. § 60104(b). *PHMSA Decision on Petition for Reconsideration, In re: Belle Fourche, CPF 5-2004-5010* (Jul. 15, 2009) (withdrawing an alleged violation of Parts 192.406(a)(1) and 195.106 for a pipeline constructed in 1968 and citing PHMSA predecessor agency letter to API dated Oct. 15, 1976 noting the same).

⁸ Courts have held that the law cannot command the impossible, including the production of documents that never existed. *See, e.g., Evans v. Eaton*, 20 U.S. 356, 413 (1822); *Am. Hosp. Ass'n v. Price*, 867 F.3d 160, 168 (D.C. Cir. 2017).

⁹ *Hearing Transcript, Klesin*, p. 60, lines 5-7.

NOPV ITEM 1 Hearing Exhibit
GRE 12" PTBR-MNTL Material Documentation, Inspection and Testing



The original and historical records regarding the GRE 1937 pipe refer to the same pipe segment, specifications, and characteristics that together validate Grade B pipe and 35,000 psi SMYS. They include:

- evidence of the 1937 construction contract summarizing pipe specifications;
- discussion of 1937 pipe purchase order from manufacturer National Tube;
- 1937 correspondence summarizing inspectors on original pipe installation as well as crossings;
- subsequent owner 1969 system map and summary of pipe specifications, including pipe grade;
- 1967 tracking log of pipe data information from the subsequent owner, including pipe grade; and
- the current owner 1989 line testing report, including pipe grade.¹⁰

Further, the original 1937 GRE pipe has distinctive features, with “bell-end welds with internal chill rings,” a wall thickness of 0.375 an inch, and a weight of 49.562 pounds per foot (as referenced in both 1937 original construction and 1960s historical documentation).¹¹

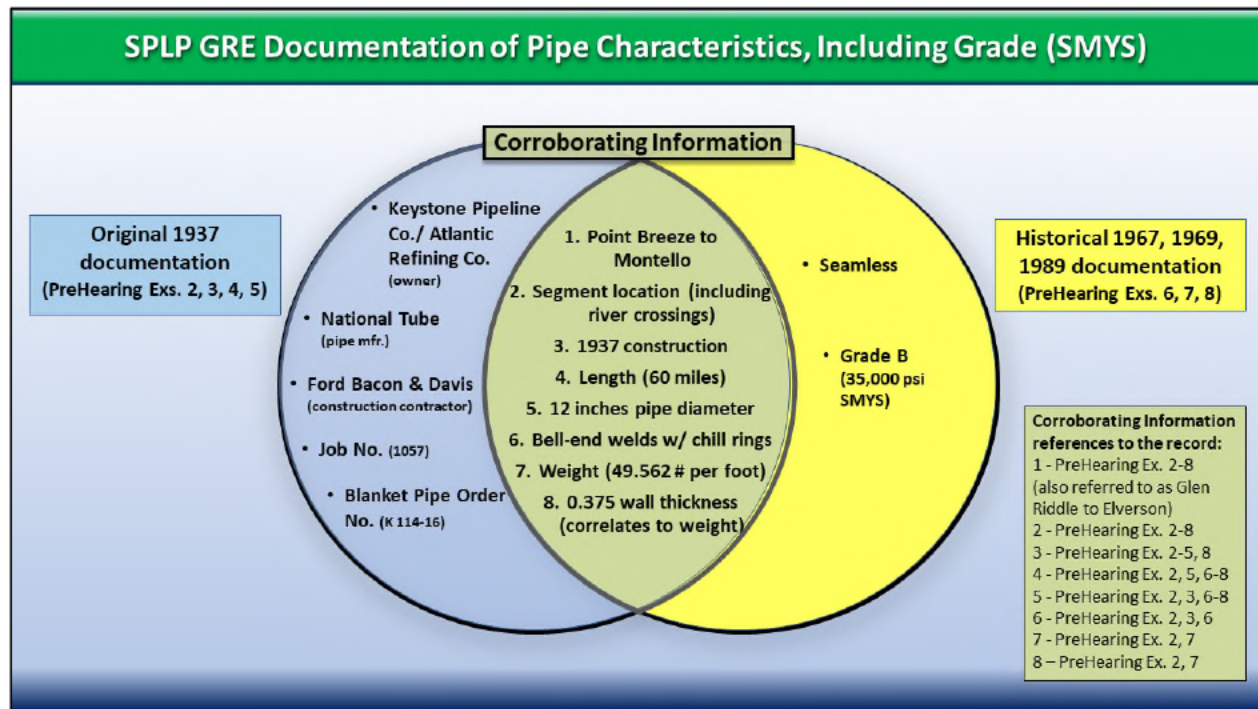
As the PHMSA Hearing Officer noted at the Hearing, “there’s no regulation that says you have to corroborate a record.”¹² Thus, the 1967, 1969, and 1989 documents detailing pipe grade are sufficient by themselves. At the Hearing, however, PHMSA complained that 1937 records and

¹⁰ SPLP Pre-Hearing Brief Exhibit 2, *12 PTBR-MNTL Keystone Pipeline Specifications (Sept. 9, 1937)* (original project construction specifications, describing the pipe on Page 2 under “Pipes, Valves, and Fittings” as 12” pipe weighing 49.562 pounds per foot); SPLP Pre-Hearing Brief Exhibit 3, *Letter to National Tube (Sept. 14, 1937)* (letter to pipe manufacturer National Tube from Keystone Pipeline Company discussing pipe tallies being shipped); SPLP Pre-Hearing Brief Exhibit 4, *12 PTBR-MNTL National Tube Pipe Shipments (Mar. 31, 1937)* (letter from construction contractor detailing pipe shipments from National Tube in 1937); SPLP Pre-Hearing Brief Exhibit 5, *Keystone Pipeline Company Letter (May 28, 1937)* (internal Keystone letter describing information regarding the inspectors on the original installation as well as crossing information); SPLP Pre-Hearing Brief Exhibit 6, *Excerpts, Atlantic Pipeline Line Data and Capacities, Pumping Equipment and Tankage Book (1969)* (including a system map and additional information reflecting historic specifications for the 12” line as 2” x 0.375wt, Grade B, Seamless pipe with bell-end welds, 1937 install, and a ‘Maximum Working Pressure’ out of Pt. Breeze of 950 psi); SPLP Pre-Hearing Brief Exhibit 7, *Atlantic Pipe Data Sheet (Dec. 31, 1967)* (handwritten tracking log of the basic pipeline data information which was updated annually and which shows the majority of the line pipe for the 12” PTBR-MNTL line (noted on this sheet as the 12” South Line) as 12.75”x 0.375, 49.56 #/ft, Grade B pipe) (confirmed through interviews with prior Atlantic/SPLP employee); and SPLP Pre-Hearing Brief Exhibit 8, *Sun Line Company Line Testing Committee Report for 12”PTBR-MNTL (1989)* (pipe listed as constructed in 1937, 12 inch, Seamless, Grade B, SMYS 35,000).

¹¹ SPLP Pre-Hearing Brief Exhibits 2, 3, 6, 7, 8. This documentation makes reference to the pipe end configuration and the pipe weight per foot. According to the pipe manufacturer, National’s Tube’s, relevant listing of 12 inch plain end pipe for water, gas and oil pipelines, a pipe weight per foot of 49.56 corresponds to a 0.375 inch wall thickness. *National Tube Company, Manufacturers of Welded and Seamless Wrought Tubular Products*, p. 87 (1935). Notably, National Tube only manufactured three types of 12-inch pipe grades in 1937—Grade A, Grade B, and Grade C—and there is no indication that SPLP utilized any Grade A or Grade C pipe.

¹² *Hearing Transcript, White*, p. 56.

the 1960 records do not corroborate or connect to one another.¹³ As outlined in the figure below and even though not required by the Part 195 regulations, the documents do corroborate and connect to one another. They discuss the same pipe segment, location, diameter, weight, wall thickness, length, and pipe end configuration (bell-end welds and chill rings). They also reference other specifics regarding the GRE, such as the pipe manufacturer, construction contractor, and pipe grade. PHMSA has no rational basis for excluding this documentation which clearly details the GRE segment as Grade B pipe.



Further, while PHMSA asserted in the NOPV and again at the Hearing that some records depicted discrepancies in the pipe specifications,¹⁴ PHMSA has not submitted any documentation

¹³ Discussing SPLP Pre-Hearing Brief Exhibits 6, 7, and 8 and noting that the records do discuss grade, PHMSA faults them because: “the documents are not corroborated because there was no original 1937 test records from the company or documentation” (*Hearing Transcript, Klesin, p. 42, lines 11-14*); “you have records that suddenly have a grade on them but there’s nothing connecting these batches of records. There’s no testing that was done to substantiate those – the records of 1969 and 1967 with the grade” (*Hearing Transcript, Agboola, p. 42, lines 22-24*); “[n]one of the 1937 documents discuss grade. So the fact that these 1960 documents suddenly discuss grade, there’s nothing connecting the two. Those original documents do not discuss grade.” (*Hearing Transcript, Agboola, p. 54, lines 19-24*; see also *p. 69, lines 18-21*). When pressed as to why the Agency takes issue with the 1969 documents discussing grade, PHMSA explained: “Essentially there is nothing to corroborate them. There is nothing to say that at any point prior to that the grade had been known. [...] There needs to be something that connects it to a fact. Not just an assumption.” *Hearing Transcript, Agboola, p. 56, lines 14-23*.

¹⁴ PHMSA’s NOPV states “review of integrity management records noted several discrepancies and/or omissions with respect to pipe material records, including validation of pipe grade or [SMYS] for the 1937 vintage pipe.” *NOPV at p. 2*. At the Hearing, PHMSA noted “other records that depicted 24,000 SMYS” or “settlements within the GRE that we questioned based on ILI data. There was also wall thickness deviations on pipe that was in the GRE that was supposed to be 0.375 wall but there was records that support something other than that. 450 if my memory serves.” *Hearing Transcript, Springer, p. 59, lines 7-13*. SPLP believes that PHMSA may be referring to an ILI report that

substantiating the purported “discrepancies and/or omissions.” Moreover, the evidence in the record supports the opposite. Time and time again, the pipe has been confirmed to be Grade B, 35,000 psi SMYS. This has been true for SPLP’s operation and maintenance of this pipeline since 1989, which included numerous in-line inspections and subsequent pipe excavations and repairs, all of which confirmed the pipe wall thickness, grade, and other specifications.

C. SPLP Twice Reconfirmed MOP and Adhered to Agency Non-Binding Guidance

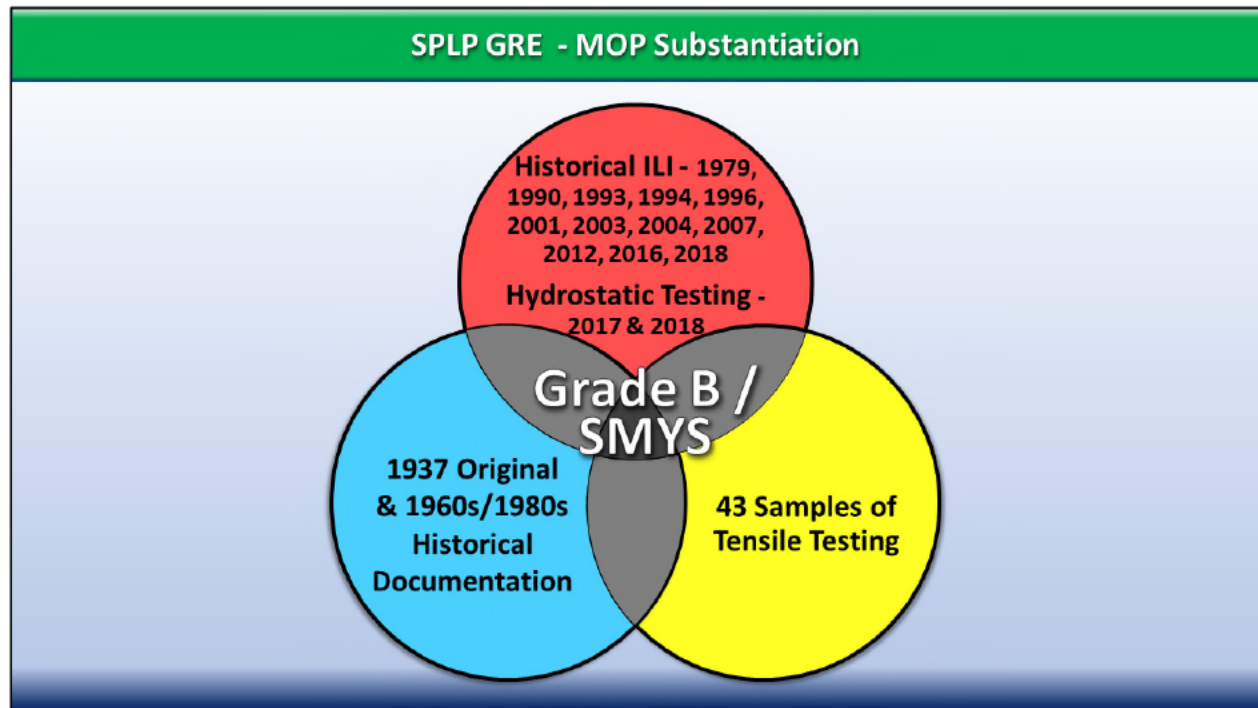
Through this enforcement, PHMSA is impermissibly holding SPLP to a standard that is not expressed in its regulations, enforcement, or guidance. Where the pipe SMYS is “known,” there is no regulatory requirement to perform material/tensile testing under Part 195.106(b)(1)(i). Nonetheless, even though not required, SPLP voluntarily performed tensile testing as described above which further corroborated the SMYS.¹⁵ In addition, SPLP had already conducted two hydrostatic pressure tests in 2017 and 2018, notably without any failures, in order to reconfirm MOP.¹⁶ Both the confirmatory tensile testing and MOP substantiation efforts were conducted in advance of the initial start-up of the GRE on December 29, 2018 at 950 psi. Following a meeting

included a typo listing the SMYS for a single joint of pipe, which was notably located outside of the original 1937 14 miles of GRE pipe at issue in this NOPV. SPLP excavated this 1960s replacement pipe joint and confirmed the wall thickness (0.432 inches) and grade. These records were made available to PHMSA on November 16, 2018.

¹⁵ SPLP Pre-Hearing Brief Exhibit 11, *Kiefner Final Report No. 0461-1813 “Materials Properties Evaluation of Twelve Pipe Samples from Energy Transfer’s Point Breeze to Montello 12-inch Pipeline”* (Oct. 28, 2018); SPLP Pre-Hearing Brief Exhibit 12 *Kiefner Final Report No. 18-116* (Aug. 23, 2018); SPLP Pre-Hearing Brief Exhibit 13 *DNV GL Final Report O-AP-FINV/CPAPE (PP189465) “Metallurgical Analysis of Leak on PTBR-BOOT 12-Inch Diameter Pipeline at Bend”* (Jan. 31, 2018) (provided to PHMSA); SPLP Pre-Hearing Brief Exhibit 14, *Applus RTD perform in-situ materials testing at pipe dig site 12PTBR-MNTL-18-B06*; SPLP Pre-Hearing Brief Exhibit 15, *SPLP (A. Kravatz) Letter to PHMSA and PA PUC re GRE Pipe Sampling and Analysis Data Request* (Jan. 15, 2019); SPLP Pre-Hearing Brief Exhibit 16, *Evaluation of 32 Pipe Samples from Energy Transfer’s Point Breeze to Montello 12-inch Pipeline* (Jan. 15, 2019). SPLP subsequently provided alignment sheets that reflected the tensile testing that it had performed along the relevant GRE pipeline. SPLP Pre-Hearing Brief Exhibit 17, *SPLP GRE Alignment Sheet Submission* (Aug. 23, 2019).

¹⁶ SPLP Pre-Hearing Brief Exhibit 9, *Justification of 12” Glen Riddle Junction to Elverson Junction Pressure Test Plan* (Sep. 27, 2018). Additionally, PHMSA Engineer, Steve Nanney, also testified regarding “uprating” of the GRE pipeline. *Hearing Transcript, Nanney, pp. 48-51, lines 48-51*. Uprating is a term used in Part 192 and which is only mentioned once in Part 195, related to the National Pipeline Mapping System. Mr. Nanney also referenced 49 C.F.R. Part 195.5 regarding conversion of service, which is not applicable to the pipeline at issue for which product was changed from refined liquid service to HVL service. As explained at the Hearing, Mr. Nanney’s discussion as it relates to the GRE and pressure testing is simply not relevant to the enforcement action at issue. *Hearing Transcript, Nanney, pp. 50, line 18 – p. 53, line 17*.

with PHMSA discussing the results of the confirmatory testing, SPLP raised the MOP of the GRE to its substantiated level on January 11, 2019.



PHMSA has not established any Part 195 regulations regarding substantiation of MOP for purposes of integrity verification after a flow reversal and/or change of product. Nor has the Agency issued any enforcement precedent that further clarifies what is required to substantiate MOP under 49 C.F.R. Part 195.406 (and 195.106), much less specific to flow reversal and change of product. In lieu of regulations, the Agency has only issued non-binding advisory guidance that includes “recommendations” for substantiating MOP where records may be missing and for pipelines where operators reverse flow, change product, or make conversions of service.¹⁷ The guidance specifically states that it “does not create legally enforceable rights or obligations. This guidance is explanatory in nature.”¹⁸

It is all the more surprising, then, that PHMSA holds SPLP to a more stringent standard than is expressed in guidance, much less regulations or prior enforcement. PHMSA did not concede this

¹⁷ SPLP Pre-Hearing Brief Exhibit 10, *PHMSA Advisory Bulletin*, 79 Fed. Reg. 56121 (Sep. 18, 2014) (including guidance for operators to consider in reversing the flow of a pipeline, changing product, or conversion of service) and *PHMSA Guidance for Pipeline Flow Reversals, Product Changes, and Conversion to Service* (Sep. 2014); (referenced in Sep. 18, 2014 Advisory). See also *PHMSA Advisory Bulletin*, 76 Fed. Reg. 1504 (Jan. 10, 2011) (recommending that records substantiating MOP be “traceable, verifiable, and complete”); *PHMSA Advisory Bulletin*, 77 Fed. Reg. 26822 (May 7, 2012) (reminding operators to review their records to “determine whether they are adequate to support operating parameters and conditions on their pipeline systems.”).

¹⁸ *PHMSA Guidance for Pipeline Flow Reversals, Product Changes, and Conversion to Service at 1* (Sep. 2014).

point in the Hearing, stating that the Agency “didn’t say the operator violated the guidance. We said the operator failed to comply with the regulation.”¹⁹ To the contrary, however, the NOPV itself relies heavily on the Advisory in its description of the alleged violation of Item 1.²⁰ While SPLP understands that there is a role for guidance to play, as recognized by the Department of Transportation’s (DOT’s) recent policy memo and stated by PHMSA at the Hearing,²¹ that memo also admonishes DOT modal agencies from using guidance in enforcement proceedings and clarifies that in enforcement PHMSA should “ensure that the law is interpreted and applied according to its text.”²² DOT also directs its model agencies to follow Department of Justice memorandum regarding the permissible use of agency guidance and expressly quoting the DOJ memorandum’s statement that it “should not treat a party’s noncompliance with an agency guidance document as presumptively or conclusively establishing that the party violated the applicable statute or regulation.”²³ But that is precisely what PHMSA has done here, and given that there is no applicable law, the Agency has unacceptably relied on guidance to bolster its alleged violation.

D. PHMSA has Not Met its Burden of Proof

It is well established that PHMSA bears the burden of proof of all elements of a proposed violation in an enforcement proceeding. *See e.g., In re ANR Pipeline Co, Final Order, CPF No. 3-2011-1011 (Dec. 31, 2012).* If PHMSA “does not produce evidence supporting the allegation [which] outweighs the evidence and reasoning presented by Respondent in its defense,” the allegation of violation must be withdrawn. *Id.* PHMSA has produced no evidence, legal or factual, to support its allegation that the GRE pipe SMYS was not “known.” In contrast, SPLP has been able to do both.

¹⁹ *Hearing Transcript, Agboola, p. 69, lines 5-8.*

²⁰ *NOPV, p. 3.*

²¹ *Id.*

²² *DOT Memo Procedural Requirements for DOT Enforcement Actions, p. 10* (Feb. 15, 2019); see also *DOT Memo Review and Clearance of Guidance Documents, p. 3 note 5* (Dec. 20, 2018) (“Because guidance documents are not regulations promulgated in accordance with the requirements of the Administrative Procedure Act, they cannot set forth binding obligations that limit the legal rights or augment the legal duties of parties outside the Executive Branch.”). (emphasis added),

²³ *Id. at 2* (also defining advisories as “guidance documents”).

III. PHMSA Must Provide Fair Notice and Due Process

To finalize PHMSA’s enforcement-derived application of Part 195.106—without properly accounting for the legal and factual information that has been presented—would violate the fundamental concepts of due process and fair notice. Fair notice requires an administrative agency to have “state[d] with ascertainable certainty what is meant by the standards [it] has promulgated.”²⁴ A surprise *sub silentio* amendment to regulations deprives an operator of fair notice and due process in violation on the U.S. Constitution and the Administrative Procedure Act.²⁵ If PHMSA’s NOPV Item 1 is upheld as a violation, the Final Order will effectively revise the relevant regulations to include express requirements that do not exist and which are unsupported by enforcement precedent or guidance.²⁶

Further, DOT itself as well as the President have recently directed administrative agencies to (1) apply statutes and regulations fairly and reasonably according to their text; (2) provide regulated entities with transparency and fair notice about the same; and (3) avoid relying on guidance to adopt overly broad or expensive interpretations.²⁷

PHMSA too has publicly recognized these mandates as “common sense,” indicating that due process and prompt disclosure of compliance issues are critical. Further, PHMSA has expressed disapproval of “overly broad or unduly [burdensome] interpretations of regulations to guide enforcement.”²⁸ PHMSA also stressed the need to limit the agency’s reliance on guidance documents, noting that “enforcement actions should derive from the four corners of a regulation

²⁴ *ExxonMobil Pipeline Company v. U.S. Dep’t of Transp.*, 867 F.3d 564, 578 (5th Cir. 2017) (alterations in original) (citing *Diamond Roofing Co. v. OSHA*, 528 F.2d 645, 649 (5th Cir. 1976)).

²⁵ 5 U.S.C. § 554(b).

²⁶ More specifically, the nature of this enforcement action—and particularly the stringent standard being applied by PHMSA that is unsupported by any regulation, enforcement, or guidance—bears striking resemblance to the integrity verification process (IVP) that was introduced via guidance to the natural gas pipeline industry and recently codified in the Part 192 regulations. 35 *Fed. Reg.* 13,428 (Aug. 19, 1970 (*eff. date July 1, 2020*)). That process was codified to address traceable, verifiable, and complete records for the gas industry, not the liquid pipeline industry. To the extent PHMSA is using this matter as an opportunity to through enforcement effectively codify and apply the natural gas pipeline integrity verification process to SPLP, that is wholly beyond the bounds of the Agency’s authority without prior notice and comment rulemaking.

²⁷ *DOT Memo Procedural Requirements for DOT Enforcement Actions*, pp. 6, 10 (Feb. 15, 2019) (DOT modal agencies “must not adopt or rely upon 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,” and enforcement decisions should be based upon “a reasonable interpretation of the law about which the public has received fair notice and should be made with due regard for fairness.”) (emphasis added); *Executive Order on Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication* (Oct. 9, 2019) (“The rule of law requires transparency. Regulated parties must know in advance the rules by which the Federal Government will judge their actions.”) (emphasis added).

²⁸ *Joint GPAC & LPAC Meeting Transcript*, p. 115, *Statement of Paul Roberti* (Nov. 14, 2019) (“Due process, prompt disclosure of compliance issues – I think that’s critical to have feedback to the industry. No overly broad or unduly interpretations of regulations to guide enforcement.”).

or statute”²⁹ and that there is a larger government effort to avoid regulating by guidance.³⁰ By proceeding with this action, PHMSA disregards its statutory mandates, applicable executive orders, and its own commitments.

IV. **NOPV Item 2: Withdrawal of Challenge**

PHMSA’s public awareness regulation, 49 C.F.R. Part 195.440(c), requires operators to follow the baseline and supplemental requirements of API RP 1162 “unless the operator provides justification [...] as to why compliance with all or certain provisions [...] is not practicable and not necessary for safety.”³¹ In incorporating the API standard, PHMSA stated that it is not attempting to “define the method or approach operators must use (or not use) to achieve effective [public awareness] programs” and that each operator “must consider the unique characteristics of its pipelines.”³² More specifically, with respect to communication coverage areas (also called a buffer), neither the regulations nor API RP 1162 mandate a specific distance for extending coverage in high populated areas along an HVL pipeline, instead instructing operators to “consider” a number of factors.³³

In compliance with the regulations that require that an operator to consider the pipeline location, release consequences, and areas of consequence in support of its communications coverage area, SPLP began using the Energy Transfer (ET) Public Awareness Program (ET Standard Operating Procedure HLA.17) in May 2018.³⁴ The ET Public Awareness Program used a 660-foot coverage area for the Affected Public along HVL pipelines. Following discussions with PHMSA and the PA PUC in August of 2018, and prior to the next scheduled mailing to the Affected Public along the Mariner East HVL pipelines (including the ME2), the coverage area was increased to 1,000

²⁹ *Id.* at 116 (“We don’t want to regulate through documents that are loaded up into the -- on our website. Enforcement actions should derive from the four corners of a regulation or statute.”) (emphasis added).

³⁰ *Joint GPAC & LPAC Meeting Transcript, pp. 134-135, Statement of Alan Mayberry* (Nov. 14, 2019) (“[In] issuing enforcement action, we have to be careful The goal is not to, you know, exercise sort of artistic license, if you will, on what the regulation means or that if there is some very specific, you know, guidance that might need more comment and deliberation on, that we have a way of -- a transparent way of vetting that guidance, and that’s really a big part of what the -- you know, the current initiative is all about. It’s just making sure the guidance -- you know, it’s not PHMSA, but throughout the government -- is well vetted and well understood, in that we don’t regulate inadvertently by doing that.”) (emphasis added).

³¹ 49 C.F.R. *Parts 195.440(c), 195.3* (incorporating by reference portions of API RP 1162, Public Awareness Programs for Pipeline Operators, 1st edition, Dec. 2003).

³² *Final Rule, 70 Fed. Reg. 28,833 (May 19, 2005)* (emphasis added).

³³ SPLP Pre-Hearing Brief Exhibit 18, *API RP 1162, Sec. 3, Sec. 6.3.1. p. 17, 25 (2003)*. Specifically, API RP 1162 instructs operators to: (1) “consider” tailoring the coverage area based on a pipeline location and release consequences; (2) “consider” integrity management areas of consequence; (3) expand coverage “as appropriate” where a wider coverage may be suggested under the circumstances; and (4) “consider” extending the 660-foot area under certain circumstances, such as HVL pipelines located in high population areas. *Id.*

³⁴ SPLP Pre-Hearing Brief Exhibit 19, *Energy Transfer Equity (ETE) HLA.17 Public Awareness Plan* (effective Apr. 1, 2018); *SOP HLI.40 Public Awareness Plan – Communication with API RP 1162-defined Stakeholders* (effective Apr. 1, 2018).

feet on either side of the pipeline centerline.³⁵ In addition, following the placement of the GRE pipeline into service in December of 2018, SPLP voluntarily undertook further reevaluation of the coverage area and made the decision to increase the buffer area. SPLP then provided additional notice to the Affected Public along all HVL pipelines operated by SPLP in Pennsylvania to the extent of the maximum lower flammable limit (LFL) distance as identified by hazard analysis reports.³⁶ This was communicated in a letter to the PA PUC and PHMSA, which expressly stated on the first page that “SPLP [has] agreed to undertake further review of its public awareness program and will be voluntarily supplementing it to include additional buffer distances along the routes of active HVL Lines in Pennsylvania.”³⁷ Notably, the letter was copied to PHMSA Eastern Region Director Robert Burrough and PHMSA Associate Administrator Alan Mayberry in order to keep them informed.³⁸

In an effort to reach an amicable resolution, however, SPLP has elected to withdraw its challenge of NOPV Item 2, even though it continues to believe that it is without legal or factual basis. Further, SPLP has already begun to address its obligations under the associated PCO item. Specifically, internal evaluation at the Company is ongoing and revisions to its Public Awareness Plan are underway. The draft changes will be submitted for internal review and approval following the Company’s Management of Change (MOC) process. Once approved, the changes will be submitted within 60 days of the Company’s receipt of the Final Order.

V. Conclusion and Request for Relief

For the reasons identified in this Post-Hearing Brief, in the Hearing, in SPLP’s Request for Hearing and Pre-Hearing Brief, and for other reasons as justice may require, SPLP respectfully requests that PHMSA withdraw NOPV Item 1 and the associated PCO obligation in their entirety. SPLP complied with PHMSA regulation 49 C.F.R. Part 195.106 and the Agency has not met its burden of proof that a violation occurred. Principles of fair notice and due process require that the NOPV and the PCO be withdrawn.

³⁵ SPLP Pre-Hearing Brief Exhibits 20-22, *SPLP Public Awareness White Paper*, p. 1 (Jun. 14, 2018); *SPLP Public Awareness White Paper*, p. 1 (Aug. 10, 2018); and *Energy Transfer Summary of Public Awareness Program Changes* (July 2019) (noting the August 18, 2018 expanded buffer to 1,000 feet).

³⁶ SPLP Pre-Hearing Brief Exhibit 23, *SPLP Letter to PA PUC re: NC-41-18*, pp. 3-4 (Jan. 16, 2019) (summarizing SPLP’s consideration of the Pennsylvania Public Utility Commission’s request and review of affected public in conjunction with hazard analysis and agreeing to voluntarily supplement its Public Awareness Program).

³⁷ *Id.*

³⁸ *Id.*

Respectfully submitted,

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December 23, 2019