

**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. 3-2022-026-NOPV
Colonial Pipeline Company)	Notice of Probable Violation
)	CPF No. 3-2022-028-NOA
)	Notice of Amendment
Respondent.)	
_____)	

POST-HEARING BRIEF

I. Introduction

This matter is an attempt by the Pipeline and Hazardous Materials Safety Administration (PHMSA or the Agency) to create precedent where it does not exist. The regulation at issue in the underlying Notice of Probable Violation (NOPV) and Notice of Amendment (NOA) is the straightforward control room management (CRM) obligation to “test and verify an internal communication plan to provide adequate means for manual operation of the pipeline safely, at least once each calendar year, but at intervals not to exceed 15 months.” 49 C.F.R. § 195.446(c)(3) (emphasis added).¹

Without any support in the regulations, guidance, or prior enforcement, the PHMSA Central Region has now devised a new interpretation in this matter, alleging that Colonial Pipeline Company (Colonial or the Company) must annually test and verify its singular and uniform internal communication plan at each of its 11 CRM control rooms across its pipeline system rather than just “once each calendar year” as stated in the governing regulation. The Agency takes this new interpretation even further in this enforcement proceeding and argues for an outsized, unsupported, and punitive penalty of \$846,300, claiming that Colonial made a deliberate decision not to comply. The evidence confirms otherwise, however, showing an operator that made a deliberate decision to comply with the governing regulations as an early industry supporter of PHMSA CRM regulatory development and implementation and through its own development of a CRM program that cites to the governing regulations and closely tracks related PHMSA guidance.

Colonial has been an industry leader for the development and implementation of the CRM regulations. Once the CRM regulations were issued in 2009, the Company prepared its comprehensive CRM plan in adherence to the regulations and implemented it across its control rooms, even electing to participate in PHMSA’s initial pilot inspections and incorporating insights from Agency guidance and numerous inspections over more than a decade. Colonial’s approach to testing and verifying an internal communication plan is part of the Company’s robust CRM program. Under that program, which involves annual training on Colonial’s internal communication plan, Colonial tested and verified its single and uniform internal communication plan consistently, regularly, and timely “once each calendar year,” through actual events at its control rooms consistent with the regulations and prior guidance. Despite numerous PHMSA inspections of the Company’s CRM program over the years, PHMSA has never before raised its new interpretation or suggested that Colonial was required to test and verify an internal communication plan 11 times per year.

Colonial is not required to have presupposed the Agency’s new interpretation articulated for the first time in the inspection underlying this enforcement action. Prior to this proceeding, Colonial was unaware of any potential ambiguity with respect to the regulatory requirement at issue and believes the regulated community was similarly unaware. It is a violation of due process and related fair notice requirements to change the rules on Colonial through enforcement and to go even further by arguing that Colonial “deliberately” violated the regulations. The well-settled test

¹ Based on the inspection underlying this NOPV, PHMSA also issued a NOA (CPF No. 3-2022-028-NOA), Item 5 of which is based on the same facts and legal conclusions as Item 5 of the NOPV and the parties have agreed that the resolution of NOPV Item 5 will resolve both items. See Exh. 1, Colonial Pipeline Co., Notice of Amendment, CPF 3-2022-028-NOA at 4-5 (May 27, 2022); Exh. 2, Colonial Pipeline Co., Response to Notice of Amendment at 6-7 (Jun. 27, 2022).

for fair notice is what the regulations say, not what the Agency could have intended but did not articulate despite guidance to the contrary. Neither an adjudication nor an enforcement action is the appropriate venue for PHMSA to rewrite and/or expand a regulation. The Agency must adhere to the notice and comment rulemaking requirements of the Administrative Procedure Act.

PHMSA has failed to meet its burden of proof to establish a violation of 49 C.F.R. § 195.446(c)(3) and, moreover, clearly cannot support the proposed civil penalty of \$846,300, which is based on an unsupported allegation of a “deliberate” decision by Colonial not to comply. The evidence in this matter overwhelmingly shows otherwise, demonstrating that Colonial made a deliberate attempt to comply. The allegation should be withdrawn in its entirety. At a minimum, the penalty must be drastically reduced given that an operator cannot make a deliberate decision to not comply with a regulatory interpretation for which it had no prior notice.

II. PHMSA’s Allegation is Not Supported by the CRM Regulatory History, Including the Internal Communication Plan Requirement.

A. The CRM Rule Was Designed to Provide Flexibility to Develop CRM Programs Specific to an Operator’s System.

Control rooms serve as the central hub or command center for monitoring and control of pipeline systems through computer-based supervisory control and data acquisition (SCADA) systems that display operational information in real time, such as pressures, flow rates, and valve positions. Controllers are qualified individuals in a control room who remotely monitor and control the safety-related operations of a pipeline through the SCADA system. In response to certain statutory mandates, other controller studies and recommendations made by the National Transportation Safety Board dating back to 1999, PHMSA published the final CRM rule to strengthen control room management and improve controller training in December 2009. *Notice of Proposed Rulemaking, Pipeline Safety: Control Room Management/Human Factors*, 73 Fed. Reg. 53076 (Sep. 12, 2008); *Final Rule, Pipeline Safety: Control Room Management/Human Factors*, 74 Fed. Reg. 63310 (Dec. 3, 2009). A subsequent final rule required operators to develop a program implementing the provisions of the CRM rule by August 1, 2011 and implement certain provisions by October 1, 2011 and others by August 1, 2012. *Final Rule, Pipeline Safety: Control Room Management/Human Factors*, 76 Fed. Reg. 35130 (Jun. 16, 2011) (expediting CRM program implementation deadlines).

In the original CRM rulemaking, PHMSA modified the final rule to allow flexibility to account for the variability and complexity of pipeline operator systems, operations, and “control [room] regimes of differing complexity.” *Final Rule, Pipeline Safety: Control Room Management/Human Factors*, 74 Fed. Reg. 63310, 63311, 63325 (Dec. 3, 2009). The CRM regulation at 49 C.F.R. § 195.446 is a performance-based rule, identifying minimum requirements for an operator’s CRM plan and providing operators with the discretion and flexibility to prepare a plan to meet or exceed the requirements in a manner suitable to their systems. The CRM rules apply “to each operator of a pipeline facility with a controller working in a control room who monitors and controls all or part of a pipeline facility through a SCADA system.” 49 C.F.R. § 195.446(a) (emphasis added). PHMSA intentionally included within the definition of control room, field control rooms and local control panels when they can affect pipeline safety similar to that of a non-local control room. 49

C.F.R. § 195.3 (defining “control room”); *see also Final Rule, Pipeline Safety: Control Room Management/Human Factors*, 74 Fed. Reg. 63310, 63317 (Dec. 3, 2009).

Given the performance-based nature of the CRM regulations, PHMSA did not prescribe how pipeline operators should implement the CRM requirements. Rather, “[e]ach operator must have and follow written control room management procedures that implement the requirements of this section.” 49 C.F.R. § 195.446(a) (emphasis added). The CRM rule requires that an operator’s written CRM plan include procedures that address seven primary components:

1. Define the roles and responsibilities of controllers in normal, abnormal, and emergency operating situations;
2. Provide controllers with adequate information, tools, processes, and procedures necessary to carry out the roles and responsibilities defined by the operator;
3. Implement a controller fatigue mitigation program;
4. Implement an alarm management plan to provide for effective controller response to alarms;
5. Implement change management procedures to require coordination during changes and when emergency conditions exist;
6. Assure that lessons learned from operating experience are incorporated as appropriate into the CRM procedures; and
7. Establish a controller training program that is annually reviewed and updated as needed.

Since an initial workshop in 2010, PHMSA has conducted numerous public workshops to inform stakeholders about the rule, primarily in 2011 as well as 2017 and 2021. PHMSA has also performed inspections of operator control rooms, beginning with a round of pilot inspections in 2011 of three operators, including Colonial which elected to participate on a voluntary basis.

In 2011, PHMSA published limited guidance to inform operators of the Agency’s application of the CRM regulation, primarily through “Frequently Asked Questions” (FAQs) and inspection protocols which have been modified or revised over the years. These FAQs further emphasize the performance-based nature of the regulation as well as the fact that operators may have more than one control room, for which operators have the flexibility to manage under a control room-specific CRM program or a single overarching CRM plan. *See, e.g., PHMSA Control Room Management FAQs*, FAQ A.14, dated Jun. 17, 2011 (Jan. 16, 2018) (“Separate control rooms may have their own specific CRM programs. Each control room management program can be tailored to the unique aspects of the control room and its related pipeline system. PHMSA would expect any differences between the CRM programs to be accounted for in the operator’s controller training and qualifications.” (emphasis added)). PHMSA similarly addressed a related point in a 2012 presentation by Byron Coy, one of PHMSA’s key architects of the CRM regulations, which states in that “CRM Inspectors may be able to transfer certain inspection results from one Control Room to another, if an Operator has more than one Control Room using similar or identical programs

and procedures.” *Control Room Management, Roll-Out of Initial Inspection Program* (Apr. 2, 2012).²

B. To Date, PHMSA Has Only Provided Minimal Guidance to Clarify the Requirement to Test and Verify an Internal Communication Plan.

With that background, the requirement at 49 C.F.R. § 195.446(c)(3) to test and verify an internal communication plan is just one aspect of the CRM requirement that operators provide controllers with processes and procedures to carry out the roles and responsibilities that operators have defined. The straightforward requirement remains unchanged since its original issuance in 2009:

(c) ***Provide adequate information.*** Each operator must provide its controllers with the information, tools, processes and procedures necessary for the controllers to carry out the roles and responsibilities the operator has defined by performing each of the following:

. . . .

(3) Test and verify an internal communication plan to provide adequate means for manual operation of the pipeline safely, at least once each calendar year, but at intervals not to exceed 15 months.

49 C.F.R. § 195.446(c)(3) (emphasis added).

The plain language of the internal communication plan testing and verification regulation applies to an “operator” and not an individual control room. The regulation is further based on the controller roles and responsibilities defined by “the operator,” which PHMSA established “because of the many varied circumstances of different pipelines, their control rooms, and their operating practices.” *Final Rule, Pipeline Safety: Control Room Management/Human Factors*, 74 Fed. Reg. 63310, 63320 (Dec. 3, 2009). “Each operator must provide its controllers” with adequate information by annually testing and verifying “an internal communication plan.” 49 C.F.R. § 195.446(c)(3). There is no substantive discussion of the internal communication plan requirement in the CRM rulemaking history beyond its inclusion in the final rule. *Notice of Proposed Rulemaking, Pipeline Safety: Control Room Management/Human Factors*, 73 Fed. Reg. 53076 (Sept. 12, 2008); *Final Rule, Pipeline Safety: Control Room Management/Human Factors*, 74 Fed. Reg. 63310 (Dec. 3, 2009).³

² Available at

https://www.api.org/~media/files/events/conference%20proceedings/pipeline2012/coy_byronleakdetectionphmsa04122012c.pdf.

³ There is also no discussion of the internal communication plan requirement in any legislative history directing various studies or development of the CRM rule. See *Pipeline Safety Improvement Act of 2002*, Sec. 13, Pub. L. 107-1355 (Dec. 17, 2002) (amending 49 U.S.C. § 60131); *Pipeline Inspection, Protection, Enforcement, and Safety Act of 2006*, Sec. 12, Pub. L. 109-468 (Dec. 29, 2006) (adding 49 U.S.C. § 60137).

In 2011, PHMSA issued non-binding voluntary guidance clarifying the internal communication plan requirement which remains unchanged to date in the following key respects:⁴

1. Operators Who Do Not Intend to Manually Operate Are to Maintain Procedures/Plan for a Controlled Shutdown:
 - a. PHMSA FAQ guidance provides that “[i]f an operator does not intend to continue operating the pipeline in the event of a catastrophic SCADA failure, then only procedures to safely perform a controlled shutdown and maintain and monitor pipeline integrity need to be in place.” *PHMSA Control Room Management FAQs*, FAQ C.09, dated Jun. 17, 2011 (Jan. 16, 2018) (emphasis added).
 - b. In the inspection protocols, PHMSA states that “[i]f the operator does not intend to operate in manual mode, then a robust plan for continued manual operation is not required, however, a basic plan is still necessary to affect an orderly shutdown.” *PHMSA Control Room Management Inspection Form* at 22 (Mar. 1, 2012) (emphasis added); *PHMSA Control Room Management Inspection Form* at 22 (Jun. 17, 2011).
2. Operators May Test and Verify Through Actual Events: The PHMSA inspection protocols as well as subsequent enforcement clarify that actual events where the internal communication plan was employed satisfy the testing and verification requirement. *Id.* (“Record of actual events when the plan pressed into service.”); *see also In re: Texas Gas Transmission*, Warning Letter, CPF 3-2021-017-WL (Apr. 9, 2021) (acknowledging that an operator can use actual events to satisfy the requirement to test and verify an internal communication plan).
3. Testing and Verification of Manual Operations Should Verify Effective Communications: The Agency provides FAQ guidance recommending the various functions to be verified for the testing and verifying of an internal communication plan, as applicable for a particular pipeline system, during testing for manual operation of the pipeline. *PHMSA Control Room Management FAQs*, FAQ C.07, dated Jun. 17, 2011 (Jan. 16, 2018).

Nowhere in CRM guidance does PHMSA indicate that testing and verification of an internal communication plan must be performed in every control room across an operator’s system on an annual basis, let alone a single and uniform internal communication plan such as Colonial’s. It has likewise not been advocated in PHMSA interpretations or CRM workshops going back to 2009. Despite the more than 300 “full” CRM inspections that PHMSA has performed since the rule became effective in 2011, PHMSA has not alleged a compliance violation in any enforcement action for an operator who failed to test and verify its internal communication plan in every control

⁴ As expressed by PHMSA itself, FAQs and its guidance generally “are not substantive rules, themselves, and do not create legally enforceable rights, assign duties, or impose new obligations not otherwise contained in the existing regulations and standards, but are provided to help the regulated community understand how to comply with the regulations.” *PHMSA Control Room Management FAQs* (Jan. 16, 2018).

room. *See PHMSA's CRM Initiative Inspection Analytics* at 6 (Apr. 2021);⁵ *see, e.g., In re: Dow Pipeline Co.*, Notice of Amendment, CPF 4-2012-5024M (Jun. 26, 2012) (finding that an operator's procedures described the actions that should be taken in the event of a loss of communications but did not require that the plan be tested and verified); *In re: Portland Pipe Line Corporation*, Warning Letter, CPF 1-2022-071-WL (Nov. 3, 2022) (finding that an operator was unable to produce records to demonstrate testing of its internal communication plan from 2018-2020).

Until the inspection underlying this May 2022 enforcement action, PHMSA, to Colonial's knowledge, has never indicated that an operator's internal communication plan must be annually tested and verified in each and every control room.

III. Colonial Maintains a Comprehensive CRM Plan with an Internal Communication Plan to Ensure Safety and Continuity of Controllers and Control Rooms Across its System.

Colonial prioritizes pipeline safety and compliance, and its safety-first culture is reflected in the Company's organization as well as in the development and implementation of its comprehensive CRM plan tailored to its unique system.⁶ Colonial plays a key role in the nation's energy supply as one of the largest refined products systems in the U.S. with 5,500 miles of pipeline carrying more than 2.5 million barrels of fuel per day. *See* Attach. A, Colonial System Map. In total, Colonial's system transports more than 86 different types of petroleum products, approximately 20 of which are transported regularly, which are generally batched in five-day cycles, with a mix of products and grades depending on market demand.⁷

Colonial is structured to effectively manage its complex system in a safe and compliant manner, with a Senior Vice President of Operations Services & Chief Risk Officer responsible for overseeing PHMSA compliance, who reports directly to the Company's Chief Executive Officer. Colonial also maintains a separate PHMSA Pipeline Compliance department, the Director of which reports to that Senior Vice President.

A. Colonial Prepared its CRM Plan in Coordination with PHMSA and Participated in PHMSA's Pilot Inspection Process.

Even prior to the issuance of the CRM regulations in 2009, Colonial was an early adopter and industry leader for the program. The Company participated in a focus group and pilot project with PHMSA as part of the initial development of the regulations in 2003-2004, focusing on controller certification issues. Testimony of K. Butler, Hr'g. Tr. 65:7-67:21; *see also Pipeline Safety Improvement Act of 2002*, Pub. L. 107-1355 (Dec. 17, 2002). Once the CRM regulations were

⁵ Available at <https://www.phmsa.dot.gov/pipeline/control-room-management/phmsas-crm-initiative-inspection-analytics-april-2021-powerpoint>.

⁶ Colonial has been recognized for its efforts, most recently as a winner of the 2021 American Petroleum Institute (API) Distinguished Pipeline Safety Award, an award the Company has won in prior years as well.

⁷ Testimony of T. Armitage, Hr'g. Tr. 130:5-9.

promulgated in 2009, Colonial prepared its tailored and comprehensive CRM plan in adherence to 49 C.F.R. § 195.446 and implemented it across its control rooms when the rule became effective in 2011. *See Pipeline Inspection, Protection, Enforcement, and Safety Act of 2006*, Pub. L. 109–468 (Dec. 29, 2006).

Colonial was one of only three operators who elected to participate in the Agency’s pilot inspection program in the spring of 2011. Testimony of A. Kolar, Hr’g. Tr. 191:8-10 (discussing Colonial’s involvement with PHMSA “since CRM was in its early infancy”); Testimony of K. Butler, Hr’g. Tr. 68:6-8. Colonial participated in an extensive inspection of its initial CRM plan, which was developed based on the clear language of the regulations and cites to the regulations throughout. The in-depth pilot inspection lasted three days and was conducted by a 10-person PHMSA team, which included Byron Coy and Karen Butler, who testified in the Nov. 30, 2022 Hearing in this matter. The Colonial CRM plan that was reviewed by the PHMSA team contained the same internal communication plan procedures with which PHMSA now finds fault with in the underlying NOPV. PHMSA never raised any concern or issue about Colonial’s internal communication plan process during the three-day intensive pilot inspection or in subsequent inspections until this matter.

Following the pilot inspection and since the rule went into effect in 2011, PHMSA has inspected Colonial’s CRM plan 12 additional times prior to 2020. These 12 inspections included specific review of the same internal communication plan procedures, and none of the inspections identified the internal communication plan or documentation as a potential deficiency or been the subject of any recommendations for improvement or enforcement. Consistent with its culture of continuing to improve and always comply, in the approximately 12 years since the CRM rule became effective in 2011, Colonial has incorporated updates to its CRM plan in reliance on the plain language of the regulations, available PHMSA CRM guidance, and feedback from PHMSA’s numerous inspections.⁸

B. Colonial Ensures that its Controllers are Provided Adequate Information.

There are 11 CRM control rooms along Colonial’s system, including the central Alpharetta Control Center, which communicates with field controllers as well as other field personnel across the operating system(s). As explained at the Hearing, there is significant overlap across the operating systems between the Alpharetta Control Center and related field locations, including Colonial’s 10 other CRM control rooms along the Company’s pipeline system. *See* Testimony of T. Armitage, Hr’g. Tr. 138: 3-24 (noting that Colonial’s control rooms function more as a “team pipe operation versus an individual operation”); *see also id.* at 128:19-130:15. Each of the 11 control rooms utilize the Company’s comprehensive CRM plan and the same operating procedures, including for controlled shutdowns in the event of abnormal operating and emergency operating conditions. The methods of communication are also the same across the system and control rooms

⁸ As indicated during the Hearing, Colonial has evolved its CRM program based on Agency guidance. Testimony of T. Armitage, Hr’g. Tr. 165:2-9 (“[W]hen the CRM plan was first developed, it was roughly thirty pages and we’re pushing over a hundred now. It’s obviously grown through feedback with PHMSA and working with PHMSA[.]”).

and amongst controllers: landline, cellular, satellite phone, computer network / email, and Cisco analog voice gateway system VG4.

At the Hearing, PHMSA suggested that the Company is unable to verify that its personnel, including controllers at the 11 CRM control rooms, are familiar with the Company's uniform internal communication plan and able to respond to a loss of communication event. This assertion ignores Colonial's extensive training program which, in conjunction with the Company's efforts to test and verify its singular and uniform internal communication plan annually, demonstrates compliance with 49 C.F.R. § 195.446 and that the Company's personnel are well prepared to respond to a loss of communication event.

Colonial's single and uniform CRM plan also contains an extensive formal training program, which includes new hire training as well as annual refresher training based on the CRM plan, detailing the roles and responsibilities of controllers in normal, abnormal, and emergency operating situations. Both the initial training and the annual refresher training include training relevant to abnormal and emergency operating procedures and the controlled shutdown procedures, which include the uniform internal communication plan, in the event of a loss of communication. *See* Testimony of T. Armitage, Hr'g. Tr. 140:17-23, 141:4-16 (describing Colonial's extensive efforts to train controllers and field personnel to respond to abnormal and emergency operating conditions).⁹ The annual training includes computer simulations, tabletop exercises, and drills. All of Colonial's controllers, whether in one of the 11 CRM control rooms or at other non-CRM control rooms along the Company's system, are required to participate in these trainings. Pursuant to PHMSA operator qualification requirements, Colonial also maintains an extensive operator qualification program, which includes a process for qualifying and verifying the performance of controllers as it relates to a variety of their roles and responsibilities, such as responding to abnormal operating conditions and loss of communication events.

As part of the Company's extensive training program, controllers participate and share in lessons learned developed through the required annual trainings and from actual events. As they relate to loss of communications, these lessons learned are shared with controllers systemwide. *See* Testimony of T. Armitage, Hr'g Tr. 146:14-147:2 (noting that the Company maintains a comprehensive lessons learned program that incorporates lessons learned from actual events, during drills, and communicates those lessons learned to all controllers on a monthly basis). In addition, Colonial maintains processes for sharing lessons learned through "Required Readings" (a method of distributing information related to job function, including notification of procedure changes or incident analysis reports and lessons learned) and "Toolbox Talks" (a process for distributing lessons learned that requires controllers to acknowledge review of information prior to performing a shift change). Further, at the conclusion of training exercises and actual events,

⁹ Testimony of T. Armitage, Hr'g. Tr. 140:17-23 ("So controllers in Hebert and Alpharetta control center, they train on all of their abnormal operating procedures and emergency operating procedures, specifically AOP-J32, which is loss of data communications, and EOP-K30, which is complete loss of communications."); *id.* at 141:4-16 ("So what we've done relative to CRM requirements, we have an AOP, EOP scenarios and Lessons Learned training and they do tabletop exercises. We usually -- every year we change it to a different real scenario that has occurred, and we review that scenario and we incorporate those events, including loss of data, loss of communications and abnormal operating conditions that might happen simultaneously. We include that in the training, a tabletop tested exercise. They have to score a certain percentage to pass or take it again.").

an effectiveness review of the procedures is also performed.¹⁰ For example, when a controller utilizes AOP-CC-J32 to respond to a loss of communication event, Colonial's procedures require the controller to submit a Maximo Event, which includes confirming the procedure's effectiveness.

Through application of its CRM plan alongside extensive associated training programs, Colonial ensures that its controllers clearly understand their roles and responsibilities and have sufficient information, tools, processes, and procedures necessary to carry out those roles and responsibilities, including with respect to controlled shutdown procedures and Colonial's single and uniform internal communication plan provisions that are part of this comprehensive program.¹¹

C. Colonial Maintained, Timely Tested, and Verified an Internal Communication Plan in Adherence with PHMSA Regulation and Guidance.

As noted above, the plain language of the regulation at 49 C.F.R. § 195.446(c)(3) states that an operator must test and verify "an internal communication plan . . . once each calendar year" to provide adequate means for manual operation of the pipeline safely. PHMSA guidance further instructs operators to maintain a "basic" internal communication plan that is commensurate with its intent to manually operate. Colonial did just that.

1. Colonial's Internal Communication Plan is Consistent with its Intent to Operate.

To address the internal communication plan requirement at 49 C.F.R. § 195.446(c)(3), Colonial's CRM plan since its inception clearly stated that Colonial would conduct "[t]esting and verification of internal communications and manual operations procedures for a controlled shutdown of the pipeline(s) in the event of a loss of SCADA and/or voice communications . . . at least once each calendar year, not to exceed (15) months." Exh. 3, Colonial Pipeline, Co., Excerpt of CRM Plan (pp. 25-26), Testing of Internal Communication Plan for Manual Operation, Revision 12.0 at 25 (Jan. 15, 2020). For purposes of the testing and verification and consistent with PHMSA guidance, Colonial provided in its CRM plan that actual events could be used. *Id.* at 26 ("Actual executions of the loss of communication procedures for a controlled shutdown and manual operation may be credited as a test if testing requirements are met.").

Colonial did not, and does not, intend to manually operate its system outside of a controlled shutdown unless warranted by extenuating circumstances. In line with that intent and PHMSA guidance, Colonial developed and maintained controlled shutdown procedures for both abnormal and emergency operations. *See* Pipeline Safety Violation Report (PSVR), Exh. 5-B, AOP-CPC-

¹⁰ As required by its procedures, Colonial does an effectiveness review after the Company employs one of its shutdown procedures in response to an actual event. *See* Attach. B, Administrative Procedure, ADM-CPC-010 at 3 (Mar. 8, 2018) (requiring an effectiveness review of abnormal and emergency procedures that accounts for "evaluating deficiencies").

¹¹ In fact, the Company even uses the same shutdown procedures in facilities that are not considered to be CRM-regulated control rooms. In this way, the Company ensures that all controllers and field personnel are uniformly trained to implement the same procedures.

J32; Exh. 5-C, AOP-CC-J32; Exh. 5-H, EOP-CC-K30; Exh. 5-I, EOP-CPC-K30.¹² Embedded in these procedures is the Company's single and uniform internal communication plan, providing a process for communicating information – including hourly flow and pressure data – during a complete loss of communications.¹³

The Company's CRM plan also included, from the outset, a provision which specified that the Company would not maintain a specific manual operations plan. Further, the plan stated that Colonial would not operate manually without implementing its internal communication plan,

[d]ue to the complexity of CPC's operations system and rarity of such events, CPC does not have a specific internal communication plan for manual operation and will not operate a line or system manually without prior implementation of an internal communication plan.

Exh. 3, Colonial Pipeline, Co., Excerpt (pp. 25-26) of CRM Plan, Testing of Internal Communication Plan for Manual Operation, Revision 12.0 at 25 (Jan. 15, 2020) (emphasis added); *see also* Exh. 4, Colonial Pipeline, Co., Excerpt (pp. 26-27) of CRM Plan, Testing of Internal Communication Plan for Manual Operation, Revision 13.0 at 26 (Jul. 2, 2020).

The reference to the complexity of Colonial's system addresses the complexity for the purpose of conducting manual operations. It does not state and never was intended to indicate that Colonial's system was too complex to comply with the requirement to annually test and verify an internal communication plan. This language evidences a thoughtful and safety-first approach by Colonial, wherein an operator is not put in the position of attempting to implement procedures for manual operations that do not account for the multiple incident-specific factors that need to be considered for manual operations beyond a controlled shutdown. Colonial places a premium on putting its controllers in a position to succeed during an event when decisions need to be made regarding manual operations.

In line with Colonial's intent not to manually operate, commencement of manual operating events by the Company outside of a controlled shutdown are exceedingly uncommon and made on a case-by-case basis. *See* Testimony of T. Armitage, Hr'g. Tr. 163:9-10 (explaining that the Company

¹² During the Hearing, PHMSA suggested that Colonial fails to provide a process for evacuating a control room in the event of an emergency. This position fails to account for the Company's shutdown procedures which, consistent with PHMSA's inspection protocols, provide a process for communication during the evacuation of a control room. *See* PSVR, Exh. 5-H, EOP-CC-K30; Exh. 5-I, EOP-CPC-K30. These shutdown procedures are used in conjunction with the Company's evacuation procedures set forth in EOP-CPC-K20 to provide a process for how controllers should respond if an evacuation becomes necessary. *See* Attach. C, Colonial's Emergency Operating Procedure, EOP-CPC-K20 (Feb. 14, 2017). While the details of where or how controllers may evacuate may vary in each individual control room, the way in which the Company communicates in the event of an evacuation or loss of communication with that control room is uniform across its system. PHMSA's suggestion at the Hearing that the potential need to evacuate a control room somehow demonstrates that an internal communication plan must be tested and verified in each control room is unsupported.

¹³ During normal operations, controllers are in frequent communication (at least hourly) with field personnel to obtain operating information, including flow and pressure data. During abnormal operations or loss of communication events, the same information is being communicated to the relevant control rooms.

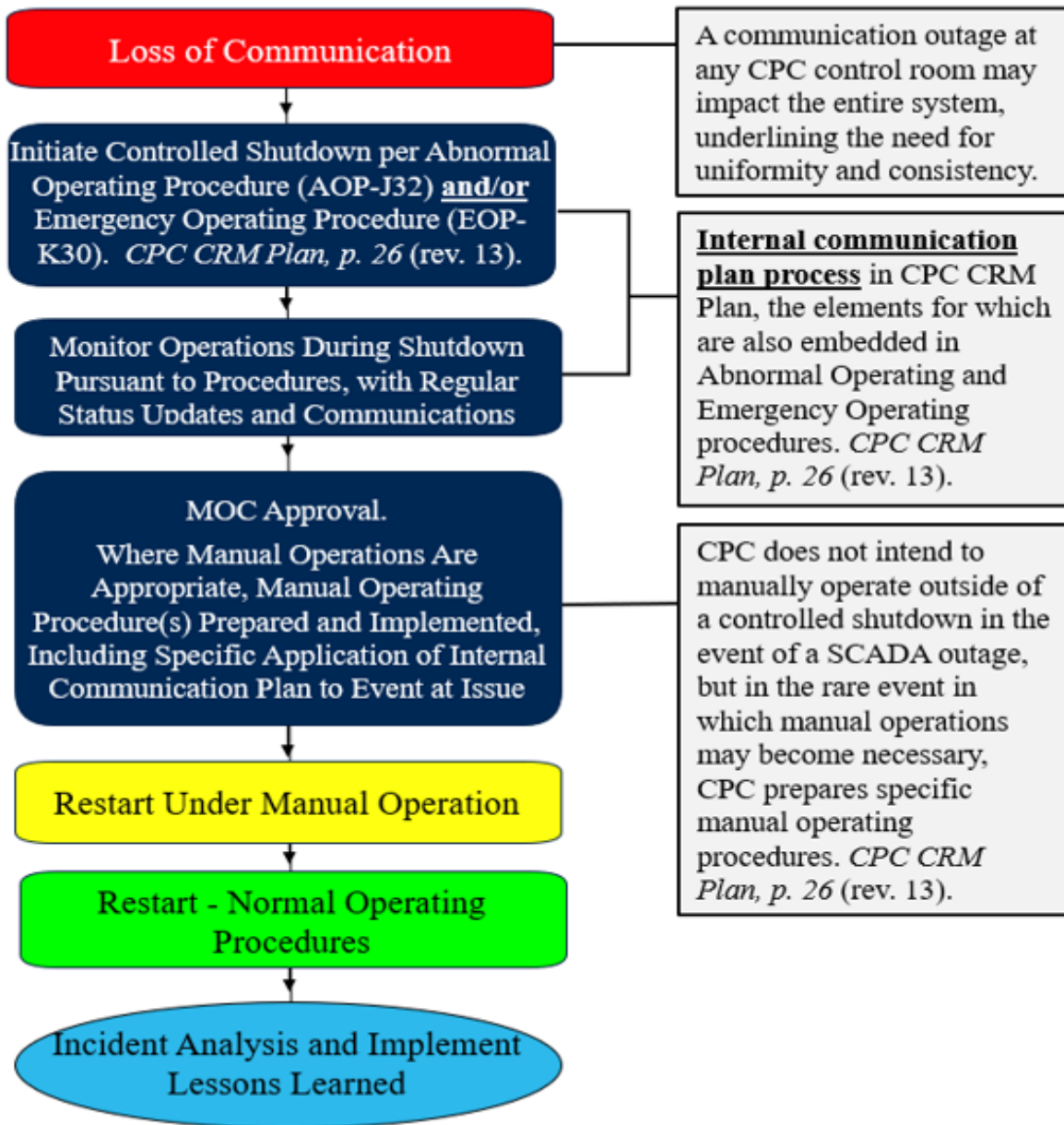
has only elected to manually operate its system in “roughly 1 percent of the total [controlled shutdown] events” in the last 5 years). Further, a plan for manual operations following a communications outage or other emergency event will depend on any number of variables depending upon the extent of the event, the locations at issue, availability of product, market demands, etc.¹⁴ For these reasons, Colonial develops event-specific manual operations procedures only in those rare instances when it is necessary. When an event occurs in which manual operations are necessary, Colonial develops specific manual operations procedures that are implemented in a Management of Change (MOC) notice, which includes the internal communication plan in accordance with the Company’s CRM plan and as expressed in the controlled shutdown procedures.¹⁵ This safety-first approach is consistent with PHMSA’s performance-based regulations that provide operators with appropriate discretion. *See* Figure 1.0.

Colonial’s robust CRM program addresses these procedures as well as actual exercises implementing a controlled shutdown and emergency operations. Colonial’s singular and uniform internal communication plan is part of Colonial’s CRM controller new hire training, annual CRM training (which addresses both CRM procedures and tabletop exercises), control room specific training, and lessons learned review. A controlled shutdown is tested and verified in the CRM tabletop training drills in each of Colonial’s 11 CRM control rooms every year.

¹⁴ *See* Testimony of T. Armitage, Hr’g. Tr. 164:3-7 (describing the number of variables that the Company must consider in the rare event that the Company decides to initiate manual operations of its system and explaining that the Company must develop event-specific procedures for the manual operation of its system in these instances because “no event will be the same, the conditions aren’t the same, the problems in the pipeline are not the same, the available operations are not the same. It’s dependent on those conditions at that time.”).

¹⁵ This same process was used in response to the criminal cyberattack in May 2021. Colonial was prepared to institute manual operations or restart of its pipeline system facilitated by its internal communication plan, as evidenced by the fact that the Company made deliveries to certain markets beginning just two days after the system was shut down and the Company initiated a full restart in just five days, beginning on May 12, 2021. PHMSA did not inspect the Company’s response to the cyberattack and there is no evidence in the record that Colonial was unprepared with respect to its internal communication plan which provided adequate means for manual operations. Testimony of D. Lohoff, Hr’g. Tr. 42:18-20. As such, the Agency’s claims about the Company’s response in the NOPV and in a subsequent press release are unsupported and have no bearing on this enforcement action.

Figure 1.0, CPC Internal Communication Plan Process



2. Colonial Tested and Verified its Internal Communication Plan Through Actual Events At Least Once Each Calendar Year.

The simplicity of Colonial's singular and uniform internal communication plan is intentional and important: a single exercise or actual event covers the same procedures and requirements for all control room locations and the consistency is designed to ensure safety of its pipeline, the public, and employees during an event. This process, in conjunction with the Company's extensive training program, ensures that all personnel appropriately respond to a loss of communication event. Consistent with PHMSA guidance, Colonial relied on actual events to test and verify its

single and uniform internal communication plan for the time period in question under the NOPV. Figure 2.0 outlines Colonial's testing and verification of its internal communication plan based on actual events for the time period in question. Given the Company's consistent application of its internal communication plan, and based on the history of testing and verification of the plan at multiple control rooms through actual events combined with extensive annual controller training, Colonial does not believe that testing at every control room would not provide additional benefit.¹⁶

Figure 2.0, Relevant CPC Internal Communication Plan Testing

CPC Testing and Verification Through Actual Events 2017-2020 (Exhs. 12-19)	
1.	Jan. 2017 (Greensboro)
2.	Jan. 2018 (Alpharetta/Atlanta Junction) and Aug. 2018 (Alpharetta)
3.	Oct. 2019 (Alpharetta/Atlanta)
4.	Apr. 2020 (Alpharetta and Houston) and Nov. 2020 (Hebert)

IV. PHMSA's Internal Communication Plan Regulation Lacks the Specificity the Agency Now Seeks to Support the NOPV and its New Interpretation.

Colonial plainly met the requirements of 49 C.F.R. § 195.446(c) during the relevant timeframe as set forth in its CRM plan: (1) to timely test and verify an internal communication plan through actual events throughout its system, and (2) in the event of the rare need for manual operations, to develop event-specific manual operating procedures. Colonial intentionally aligned its internal communication plan procedures in its CRM plan to also be consistent with the FAQ and inspection protocol guidance issued by PHMSA in 2011, which distinguish between operators who intend to operate manually and those who do not.

It was not until the Agency's inspection underlying this enforcement action issued in May 2022 that, to Colonial's knowledge, PHMSA has ever asserted that the regulation requires testing of an operator's singular internal communication plan in each and every control room on an annual basis. PHMSA is unable to cite to any express support that sets forth the newly devised interpretation articulated in this enforcement action. Because there is no legislative or regulatory text, guidance, or enforcement supporting its interpretation, PHMSA's testimony at the Hearing instead focused on a broad and detailed overview of the general purpose and history of the CRM regulations and implementation workshops.¹⁷ This background provides no support, however, for the Agency's

¹⁶ In an effort to address PHMSA's new interpretation and related concerns and in the spirit of continual improvement, and without admission of any violation of applicable requirements, Colonial has now (1) revised its CRM plan to better clarify its internal communication plan requirements and (2) tested and verified its internal communication plan at all of its CRM control rooms in 2022. From Colonial's perspective and given the uniformity of the Company's internal communication plan, testing and verification exercises at all control rooms yielded no additional benefit than Colonial's prior practice of testing and verifying Colonial's internal communication plan annually and based on actual events.

¹⁷ PHMSA's testimony often included references to development and events unrelated to control room management. *See, e.g.*, Testimony of K. Butler, Hr'g. Tr. 68:18-22 (discussing an unrelated special permit).

newly devised interpretation that the regulation at issue requires operators to test and verify a uniform internal communication plan in every control room.

A. PHMSA Fails to Establish that Colonial’s Internal Communication Plan is Insufficient.

Since the inception of its CRM plan, Colonial has followed the plain language of the regulation and PHMSA’s established guidance, which clarified the expected content of an internal communication plan, i.e., that an operator is required to maintain a “basic plan” with “only procedures to safely perform a controlled shutdown.” In the NOPV underlying this enforcement action, PHMSA accepted multiple historical testing events conducted by Colonial, underscoring that the Company’s singular and uniform internal communication plan is, in fact, sufficient. *PHMSA NOPV* at p. 8 (alleging that Colonial only failed to test and verify its internal communication plan at facilities and in years where Colonial did not experience an actual event that required the Company to shut down operations in a specific control room); *PHMSA PSVR* at p. 37. Yet PHMSA claimed during the Hearing that Colonial’s plan is insufficient suggesting that a “more specific” plan is required without further explication articulating a “we’ll know it when we see it” approach. Testimony of J. Hainline, Hr’g. Tr. 54:6-17 (“What we [PHMSA] are suggesting is that you have to have something more than what they [Colonial] did.”).

In the Hearing, PHMSA attempted to use its FAQ C.07 to argue that Colonial’s internal communication plan was inadequate. Colonial’s CRM plan and its implementation, however, squarely meets PHMSA’s guidance as summarized in Attachment D, Colonial’s Compliance with FAQ C.07. To support its claim that Colonial’s plan is insufficient and to impose the Agency’s new expanded interpretation, PHMSA incorrectly intimated in both the NOPV and at the Hearing that the Company manually operates more frequently than intended outside of a controlled shutdown, reflecting the Agency’s failure to understand Colonial’s operations and procedures. For example, during the five-year period from 2017-2022, only three events required a manual restart operation. In support of its suggestion that Colonial engages in more frequent manual operations, PHMSA incorrectly cited to events involving automatic shutoff valves. Colonial clarified that the references in its AOP-CPC-J32 procedure to automatic shutdowns only refers to shipper owned assets. Testimony of T. Armitage, Hr’g. Tr. 147:14-18.¹⁸

B. Other CRM Regulations Provide No Implication That an Internal Communication Plan Must be Tested and Verified in All Control Rooms.

Without any basis for its interpretation in the regulation at issue, PHMSA is left to argue as it did at the Hearing that the requirement to test and verify an internal communication in every control room is implied in the CRM regulations. Aspects of the rule, such as defining roles and responsibilities, providing training and ensuring that controllers are properly qualified, and providing controllers with adequate information, provide no implication or insinuation whatsoever

¹⁸ As made clear in regulations and guidance, the internal communication plan and manual operations are related but separate concepts. PHMSA’s new interpretation as reflected in the NOPV and the Hearing conflates manual operations with the internal communication plan, is inconsistent with its established CRM FAQ guidance, and would appear to require manual operations despite the established FAQ guidance to the contrary. See, e.g., Testimony of M. Williams, Hr’g. Tr. 105:2.

that the requirement to test and verify an internal communication plan is applicable in every control room.

At the Hearing, PHMSA attempted to argue that the recordkeeping requirement at 49 C.F.R. § 195.446(j)(1) supports the Agency's position that the internal communication plan must be tested and verified in every control room. Testimony of K. Butler, Hr'g. Tr. 113:4-12.¹⁹ The requirement at 49 C.F.R. § 195.446(j)(1) to maintain "records that demonstrate compliance with the requirements" does not, however, provide any basis whatsoever for interpreting the internal communication plan testing requirement to apply at every control room. As noted previously, PHMSA has clarified in guidance that operators may maintain a CRM plan that can be applied across an operator's system under 49 C.F.R. § 195.446(a).

C. Neither PHMSA Guidance Nor Enforcement State or Imply that an Internal Communication Plan Must be Tested in Every Control Room.

Colonial is not aware of any statement or implication in PHMSA guidance or existing enforcement precedent that testing and verification of the internal communication plan is required in every control room. PHMSA has issued little guidance specific to the internal communication plan requirement, save for two key FAQs noted above (FAQ C.07 and C.09). Existing guidance clarifies that "only procedures to safely perform a controlled shutdown and maintain and monitor pipeline integrity need to be in place" is what is required for operators who do not intend to manually operate,²⁰ which has been confirmed in enforcement. *See In re: Buckeye Partners LP*, Notice of Amendment, CPF 1-2014-5001M (Apr. 2, 2014) (indicating that if the operator "does not intend to operate in a manual mode then that should be addressed in the Control Room Management Plan and a basic plan should be included as well"); *In re: IMTT-Pipeline*, Notice of Amendment, CPF 1-2015-5020M (Nov. 19, 2015).

At the Hearing, PHMSA pointed to the inspection protocols to support its new interpretation based on a statement "... at the top of the protocol document that ... says 'this is to be completed per control room.'" Testimony of K. Butler, Hr'g. Tr. 80:17-20. This is a mischaracterization of what the inspection protocol actually states: "[t]his form is intended to be used for one control room. If an operator has more than one control room, then separate forms are necessary." *PHMSA Control Room Management Inspection Form* at 2 (Mar. 1, 2012). The Agency's mischaracterization is also contrary to the plain language of the rule which allows an operator to maintain a single CRM plan applicable to multiple controls rooms.²¹ Further, the Agency has

¹⁹ Ms. Butler stated "Yeah, when you look at the regulation itself, the 195.446, records that demonstrate compliance. So if you have a plan that is applicable to multiple control rooms, which you clearly state that at the beginning of your plan, you have to have records that demonstrate how each one of those has complied with that."

²⁰ *PHMSA Control Room Management FAQs*, FAQ C.09, dated Jun. 17, 2011 (Jan. 16, 2018); *PHMSA Control Room Management Inspection Form* at 22 (Mar. 1, 2012) (providing that "a robust plan for continued manual operation is not required" and "a basic plan is still necessary to affect an orderly shutdown").

²¹ *See also PHMSA Presentation, Control Room Management, Roll-Out of Initial Inspection Program* (Apr. 2, 2012) ("CRM Inspectors may be able to transfer certain inspection results from one Control Room to another, if an Operator has more than one Control Room using similar or identical programs and procedures."), available at https://www.api.org/~media/files/events/conference%20proceedings/pipeline2012/coy_byronleakdetectionphmsa04122012c.pdf.

never raised a comment regarding Colonial’s approach to its uniform and singular internal communication plan in the 12 inspections prior to 2020, despite using the inspection protocols at every inspection. If PHMSA meant something beyond the plain language of the regulation, it should be articulated to the regulated community. Operators are not required to guess at the import of a regulation through statements taken out of context in inspection protocols.

V. PHMSA Inappropriately Expands the Underlying Regulation Without Fair Notice.

With this enforcement action, PHMSA now desires to require that an internal communication plan be tested and verified at each control room on a pipeline system. There is no basis in the 49 C.F.R. Part 195 regulations for PHMSA’s newly derived interpretation. To Colonial’s knowledge, PHMSA has never articulated this interpretation previously – not in rulemaking, guidance nor enforcement. As such, there is no basis from which PHMSA can reasonably suggest that Colonial’s plan was out of compliance or that its program was deficient.

The Administrative Procedure Act (APA) prohibits federal agencies from unfairly changing the regulations, especially in the context of an enforcement action, without fair notice to the regulated community. When interpreting an administrative regulation, “we apply the same rules we use to interpret statutes. We begin by examining the plain language of the text, giving each word its ordinary and customary meaning. If, after engaging in this textual analysis, the meaning of the regulations is clear, our analysis is at an end.” *Peabody Twentymile Mining, LLC v. Sec’y of Lab.*, 931 F.3d 992, 997 (10th Cir. 2019) (citing *Mitchell v. Comm’r*, 775 F.3d 1243, 1249 (10th Cir. 2015)). PHMSA’s sole task, then, is to enforce the plain language of the regulation. The plain language of the regulation does not permit PHMSA’s interpretation.

A. PHMSA Regulations Must Clearly State the Conduct They Require.

The Agency has a duty under the APA to promulgate clear regulations. The U.S. Constitution and the APA require that a regulation provide a regulated entity with fair notice of the obligations it imposes and be issued pursuant to notice and comment rulemaking. The Constitution of the United States, Amendment 5; 5 U.S.C. § 554(b).

Courts have found that fair notice requires the agency to have “state[d] with ascertainable certainty what is meant by the standards [it] has promulgated [, . . .] must give [a party] fair warning of the conduct it prohibits or requires, and it must provide a reasonably clear standard of culpability to circumscribe the discretion of the enforcement authority and its agents.” *ExxonMobil Pipeline Co. v. U.S. Dep’t of Transp.*, 867 F.3d 564, 578 (5th Cir. 2017) (citing *Diamond Roofing Co, Inc. v. OSHRC*, 528 F.2d at 645, 649 (5th Cir. 1976)).

B. Section 195.446(c)(3) Does Not Unambiguously State What PHMSA Now Wants.

Fair notice is met when the regulation unambiguously compels a single interpretation. Specifically, “[a] party necessarily has fair notice of how a statute or regulation will be interpreted if only one interpretation is unambiguously compelled by the provision at issue.” *See Sec’y of Labor v. Beverly Healthcare-Hillview*, 541 F.3d 193, 197-98 (3d Cir. 2008) (emphasis added) (“Before we assess ... whether Beverly had fair notice of that interpretation, we must determine

whether the meaning of regulatory language is ‘free from doubt.’ ... If Beverly is correct [that the language is unambiguous], our inquiry would be at an end.”).

In addition, a regulation provides fair notice when it plainly notifies the regulated community of how it will be applied. *Id.* at 113 n. 19 (“That is not to say that a party can never raise a fair notice challenge to unambiguous laws. For example, a provision may plainly require a certain legal standard that itself does not provide fair notice of how it will be applied. A fair notice challenge would be appropriate in that circumstance to contest the required standard.” (emphasis added)).

C. PHMSA Has Not Provided Fair Notice When It Enforces a Regulation Based on an Interpretation that is Not Adequately Expressed.

It is not permissible for an agency to 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) (internal citation omitted). “The test is ‘not what [the agency] might possibly have intended, but what [was] said.’” *U.S. v. Trident Seafoods Corp.*, 60 F.3d 556, 559 (9th Cir. 1995) (citing *Phelps Dodge Corp. v. Federal Mine Safety and Health Review Comm’n*, 681 F.2d 1189, 1193 (9th Cir. 1982)).

Regulated entities are not obligated to “divine the agency’s interpretations in advance or else be held liable when the agency announces its interpretations for the first time in an enforcement proceeding and demands deference.” *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 159 (2012). “Even if the [Agency’s] interpretation were reasonable, announcing it for the first time in the context of this adjudication deprives Petitioners of fair notice. Where, as here, a party first receives actual notice of a proscribed activity through a citation, it implicates the Due Process Clause of the Fifth Amendment.” *Fabi Constr. Co. v. Sec’y of Labor*, 508 F.3d 1077, 1088 (D.C. Cir. 2007).

D. Pointing to Policy Behind a Regulation is No Substitute for the Requirement to Issue Clear Regulations.

Merely directing to an unwritten policy behind a regulation, assuming there was such a policy, is not enough to establish fair notice. “Thus, reliance on policies underlying a statute cannot be treated as a substitute for the agency’s duty to promulgate clear and definitive regulations.” *Trident Seafoods Corp.*, 60 F.3d at 559 (citing *Phelps Dodge Corp.*, 681 F.2d at 1193). An agency has not provided fair notice where a “regulation inadequately expresses an intention to reach the activities to which [the agency] applied it.” *Phelps Dodge Corp.*, 681 F.2d at 1193 (finding that the Federal Mine Safety and Health Review Commission did not provide fair warning regarding applicability of a regulation to certain actions and that the Commission abused its discretion in applying the regulation to justify issuance of citation and fine).

E. Agency Deference Does Not Apply to an Interpretation First Articulated in Enforcement.

PHMSA is entitled no deference in this matter. “[D]eference is due when an agency has developed its interpretation contemporaneously with the regulation, when the agency has consistently applied the regulation over time, and when the agency’s interpretation is the result of thorough and reasoned consideration.” *Perez v. Loren Cook Co.*, 803 F.3d 935, 939 (8th Cir. 2015) (emphasis

added). There is no evidence whatsoever that the Agency’s interpretation has been developed in this matter along with the promulgation of the regulations, that it has been consistently applied over time, or that it is the result of any reasoned consideration until this enforcement action. No deference is owed to interpretations that are mere “convenient litigating position[s]” or interpretations that generate “unfair surprise.” *Kisor v. Wilkie*, 139 S. Ct. 2400, 2418 (2019); *Suncor Energy (U.S.A.), Inc. v. U.S. Env’t Prot. Agency*, 50 F.4th 1339, 1354 (10th Cir. 2022).

VI. Proposed Civil Penalty Must be Withdrawn.

The proposed civil penalty cannot be supported in this matter. PHMSA has not met its burden to prove a violation in this case and the proposed civil penalty should be withdrawn. Even if PHMSA has met its burden – which it has not – the proposed penalty is patently unreasonable and an outlier, explained only by PHMSA’s apparent need for precedent.

A. PHMSA’s Proposed Civil Penalty Fails to Appropriately Apply the Required Penalty Factors.

The proposed civil penalty bears no resemblance to the mandatory statutory and regulatory penalty criteria or the facts at issue. 49 U.S.C. § 60122(b) (outlining civil statutory penalty factors); 49 C.F.R. § 190.225 (detailing civil penalty assessment considerations). As summarized in Table 1.0, the following factors are not accurately considered and applied in the Agency’s proposed civil penalty worksheet: culpability, number of instances of violation, history of prior offenses, good faith, and “other matters as justice may require.” *See* Exh. 26, Colonial’s Comments on PHMSA’s Proposed Civil Penalty Worksheet.

Most notably, PHMSA’s allegation that the Company made a deliberate decision not to comply with the regulation is simply incorrect and without basis. It is beyond the pale to suggest that there was a deliberate decision not to comply when Colonial’s CRM plan expressly requires annual testing and verification of its uniform and singular internal communication plan and the record includes documentation of those tests. Further, Colonial’s CRM plan has been subject to inspection by PHMSA numerous times without any cited deficiencies for its internal communication plan approach. It is more accurate to state that Colonial made a deliberate attempt to comply and, in fact, did comply.

Table 1.0, Misapplied Civil Penalty Factors

Penalty Factor	PHMSA Civil Penalty Allegation	PHMSA Assigned Value	CPC Response
Culpability	The alleged violation was a “deliberate decision not to comply.”	400	Colonial’s CRM plan expressly requires regular testing and verification of its uniform internal communication plan, and the record includes documentation of those tests, which evidence a deliberate decision to comply. The point range for the culpability factor, at a minimum, should be significantly reduced from 400 to two. Colonial was actively complying with the requirements

Penalty Factor	PHMSA Civil Penalty Allegation	PHMSA Assigned Value	CPC Response
			relevant to an internal communication plan as articulated by PHMSA in prior guidance and enforcement. ²²
Number of Instances of Violation	Failure to test the plan in 18 instances.	18	PHMSA's allegation is based on its newly-derived argument – which to Colonial's knowledge has never before been articulated in the regulations, guidance, or enforcement – that verification of the singular internal communication plan is required at each and every control room.
History of Offenses	4-5 Prior Findings of Violation	7	The Agency inaccurately included within the “history of prior offenses” an enforcement action that was reversed following a petition for reconsideration. ²³ This error reduces the number of prior violations from “4-5” to “2-3” on the worksheet, with an overall factor adjustment from seven to five.
Good Faith	NA	0	PHMSA failed to properly account for Colonial's good faith efforts to comply with 49 C.F.R. § 195.446(c)(3), starting with the fact that the Company supported and participated in the development of the CRM program, including as one of the three companies to be part of PHMSA's 2011 pilot inspection program coupled with the Company's approach to test and verify internal communication plans during prior actual events. Additionally, PHMSA failed to account for the Company's extensive efforts to train controllers and field personnel to appropriately respond to loss of communication events to maintain the safety and integrity of Colonial's system.
Other Matters as Justice May Require	NA	0	It is simply unreasonable to issue a penalty 37 times higher than the other penalty issued by PHMSA for the same alleged violation, particularly considering the Company's efforts to address PHMSA's concerns prior to the issuance of the NOPV.

B. The Proposed Civil Penalty is Markedly Inconsistent with Prior Enforcement Precedent.

The proposed civil penalty of \$846,300 bears no resemblance to prior enforcement precedent. With one exception, PHMSA's prior enforcement for alleged violations of the internal communication plan requirement at 49 C.F.R. § 195.446(c)(3) has been issued as Notices of Amendments, Warning Letters, or at most NOPVs with no penalty and a PCO (typically directing

²² See Testimony of A. Kolar, Hr'g. Tr. 191:20-192:24 (“And I think that the engagement with PHMSA and the improvements in the program that we've made along the way, as Thomas has demonstrated, really indicates our intent as an operator to comply. It's our belief, in fact, that we did comply along the way.”).

²³ This was acknowledged by PHMSA at the Hearing. See Testimony of J. Hainline 183:4-14.

operators to perform the test). Before the issuance of this NOPV to Colonial, the only other proposed civil penalty ever issued under 49 C.F.R. § 195.446(c)(3) – and which was issued just two months prior – sought only \$22,800 in proposed civil penalties for two years of missed testing verifications.²⁴ In contrast, the civil penalty proposed to be assessed to Colonial is 37 times higher.

In addition to being unsupported and an outlier, the penalty sought in this matter clearly contradicts the stated purpose of PHMSA’s enforcement procedures which is to “improve PHMSA’s consistency in implementing the pipeline enforcement program” and with an emphasis on “fairness during an inspection.” *PHMSA’s Pipeline Safety Enforcement Procedures*, Sec. 3, Selection of Administrative Enforcement Actions at 1 (Sep. 15, 2020).

VII. Request for Relief

PHMSA bears the burden of proof by a preponderance of the evidence for all elements of a proposed violation. PHMSA’s entire case is unsupported and unfounded by law. As such, the Agency has not met its burden under 49 C.F.R. § 195.446(c). PHMSA’s allegation of noncompliance in this enforcement, including the outsized proposed civil penalty, is arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with law in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2). PHMSA has no reasonable basis for its allegations and is using this enforcement action to provide precedent where none exists to expand its authority. For all these reasons, and in consideration of other matters as justice may require, Colonial respectfully requests that NOPV Item 5 and the associated civil penalty and NOA Item 5 should be withdrawn. At a minimum, in the event there is a finding that PHMSA met its burden to prove a violation, any penalty must be drastically reduced to align with prior precedent under CRM related enforcement proceedings.

Colonial incorporates by reference its (1) Request for Hearing filed on June 8, 2022, (2) Pre-Hearing Brief and related exhibits (Exhibit Nos. 1-26) submitted on October 6, 2022, and (3) testimony provided during the November 30, 2022, Hearing as reflected in the transcript in the record.

²⁴ *In re: Navajo Nation Oil and Gas*, Notice of Probable Violation, CPF 3-2022-037-NOPV (Mar. 1, 2022) (alleging a violation of 49 C.F.R. § 195.446(c)(3) for failure to perform inspections in 2019 and 2020 and proposing an associated civil penalty of \$22,800).

Date: January 13, 2023

Respectfully submitted,

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