U.S. DEPARTMENT OF TRANSPORTATION
PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMINISTRATION
OFFICE OF PIPELINE SAFETY

In the Matter of	)	
Boardwalk Petrochemical Pipeline, LLC,	)	CPF No. 3-2023-020-NOPV
Respondent.	)	

Written Response of Boardwalk Petrochemical Pipeline, LLC
To Notice of Probable Violation, Proposed Civil Penalty,
and Proposed Compliance Order

Pursuant to § 190.208(a) & (b) of the regulations of the Pipeline and Hazardous Materials Safety Administration (PHMSA),[1] Boardwalk Petrochemical Pipeline, LLC (BPP) submits a written response (Response) to the Notice of Probable Violation, Proposed Civil Penalty, and Proposed Compliance Order (Notice) issued on August 11, 2023. On August 22, 2023, the Director of the Central Region approved an extension of time until October 12, 2023 to respond to the Notice.

BPP is committed to public safety and operating its pipeline facilities in accordance with PHMSA's regulations and BPP takes allegations of non-compliance seriously. BPP respectfully disagrees with the allegations of violation, the proposed civil penalties, and the proposed compliance orders for Items 3 and 4. BPP contests these Items in full as unsupported by the evidence, and in the case of Item 4, legally defective. BPP requests that PHMSA withdraw these allegations, their proposed civil penalties, and proposed compliance orders.

Without admitting liability, BPP does not contest the alleged procedural violation in Item 1 but does contest the proposed compliance order associated with this Item and offers an alternative course of action tailored to the actions BPP has taken to address the issue while also meeting PHMSA and BPP's shared goal of pipeline safety. Finally, without admitting liability, BPP has elected not to contest Item 2 or the proposed civil penalty.

Concurrently with this written Response, pursuant to 49 C.F.R. § 190.208(a)(4) and § 190.211,[2] BPP is submitting a Request for a Hearing and a Preliminary Statement of Issues. As permitted under 49 U.S.C. § 60117(b)(1),[3] BPP also requests an informal meeting to discuss

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[1] 49 C.F.R. § 190.208(a) & (b) (2021).
[2] *Id.* §§ 190.208(a)(4), 190.211.
[3] 49 U.S.C. § 60117(b)(1) (2018), as amended by The Protecting our Infrastructure of Pipelines and Enhancing Safety Act of 2020, Pub. L. No. 116-260, div. R, title I, § 108(a)(2), 134 Stat. 2221, 2223 (Dec. 27, 2020).

resolving the contested allegations. BPP requests that the presiding official delay scheduling a hearing to allow the parties sufficient time to convene a meeting to resolve issues through a consent agreement.

I. Executive Summary

Item 1 § 195.402(a) Procedural manual for operations, maintenance, and emergencies. BPP contests the proposed compliance order and offers an alternative approach. BPP proposes that, if the data from an inline inspection (ILI) performed on this pipeline segment in September 2023 shows that the gouge was ground down, then PHMSA would consider the terms of the proposed compliance order satisfied. If the ILI data does not show that the gouge was ground down or is inconclusive, BPP will use a third party to perform Finite Element Analysis (FEA) modeling to calculate if the anomaly poses an integrity threat to the permanently repaired pipeline and submit the report to PHMSA.

Item 2 § 195.440(b) Public Awareness. Without admitting liability, BPP does not contest Item 2 and will remit the proposed civil penalty.

Item 3 § 195.452(d)(2) Pipeline integrity management in high consequence areas. BPP contests Item 3 because (1) the Notice incorrectly alleges that BPP did not include the pipeline segments located in the five geographical areas listed in the Notice in its Baseline Assessment Plan, as BPP performs integrity assessments on those segments at intervals not to exceed five years; (2) the allegation that BPP's analysis, which determined that the five areas are not newly-identified high consequence areas (HCA), did not comply with § 195.452(d)(2) is factually and legally unsupported; (3) the Notice and Violation Report contain no evidence of population growth or changes in population distribution or population density to support designating the five areas as newly-identified HCAs; and (4) PHMSA's attempt to use this enforcement proceeding to impose punitive remedies deprives BPP of its procedural due process rights because it had no fair notice of the agency's compliance expectations. If the allegation is not withdrawn, BPP requests that PHMSA reduce the proposed civil penalty by modifying the gravity civil penalty assessment criterion and giving BPP credit for good faith efforts to comply.

Item 4 §195.452(j)(2) Pipeline integrity management in high consequence areas. BPP contests Item 4 as legally defective because the Notice does not accurately describe the requirement of either the pre-July 1, 2020 version of the regulation or the post-July 1, 2020 version of the regulation. The Notice also does not assert facts relevant to the regulation as required in § 190.207(b)(1).[4] If Item 4 is not entirely withdrawn, then allegations related to any conduct occurring before July 2021 must be withdrawn because compliance with the amended version of § 195.452(j)(2), which became effective July 1, 2020, was not required until July 1, 2021. Item 4 also must be withdrawn because the Notice does not assert any facts relevant to the requirements of the pre-July 1, 2020 version of the regulation.

[4] 49 C.F.R. § 190.207(b)(1).

II. Overview of BPP's Facilities

BPP is a wholly-owned subsidiary of Boardwalk Pipelines, LP, which owns and operates natural gas pipelines and hazardous liquid pipelines that operate in interstate and intrastate commerce. BPP owns and operates the Evangeline pipeline system (BPP-100), a 16-inch diameter pipeline that transports ethylene approximately 176 miles from Port Neches, Texas, to an interconnection with Boardwalk Louisiana Midstream, LLC in Baton Rouge, Louisiana. Certain portions of the pipeline are in, or could affect, high consequence areas (HCA) and are subject to BPP's integrity management program. BPP conducts ILIs on the entire 180-mile pipeline approximately every 5 years as part of its integrity management program.

III. PHMSA Has the Burden of Proving the Alleged Violations.

PHMSA has the burden of proving that BPP violated the pipeline safety regulations.[5] PHMSA has the "'burden of production,' *i.e.*, . . . the obligation to come forward with the evidence at different points in the proceeding," and the "'burden of persuasion,' *i.e.*, which party loses if the evidence is closely balanced."[6] PHMSA "bears the burden of proof as to all elements of the proposed violation."[7] To meet its burden of production, PHMSA must present sufficient evidence to sustain an allegation of violation. Where PHMSA does not produce such evidence, the allegation of violation must be withdrawn.[8] If the cited regulatory provision does not relate to the alleged noncompliance, the alleged violation must be withdrawn.[9]

To meet its burden of persuasion, PHMSA "must prove, by a preponderance of the evidence, that the facts necessary to sustain a probable violation actually occurred."[10] This burden

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5 49 U.S.C. § 60117(b)(1)(F) (2018), as amended by the Protecting our Infrastructure of Pipelines and Enhancing Safety Act of 2020, Pub. L. No. 116-260, div. R, title I, § 108(a)(2), 134 Stat. 2221, 2223 (Dec. 27, 2020). *See* 49 C.F.R. § 190.213(a)(1) (2021). *See, e.g., ExxonMobil Pipeline Co.*, Final Order, CPF No. 4-2017-5027, 2019 WL 3734516, **4, 5 (Apr. 3, 2019) (withdrawing allegation because PHMSA's evidence did not establish a violation); *ExxonMobil Pipeline Co.*, Final Order, CPF No. 5-2013-5007, 2015 WL 780721, *12 (Jan. 23, 2015) (finding that PHMSA failed to meet burden of proving that certain measures were required under regulations).

6 *Schaffer v. Weast*, 546 U.S. 49, 56 (2005) (quoting *Dir., Office of Workers' Comp. Programs, Dep't of Labor v. Greenwich Collieries*, 512 U.S. 267, 272 (1994)); *see also Butte Pipeline Co.*, Final Order, CPF No. 5-2007-5008, 2009 WL 3190794, *1 (Aug. 17, 2009) ("PHMSA carries the burden of proving the allegations set forth in the Notice, meaning that a violation may be found only if the evidence supporting the allegation outweighs the evidence and reasoning presented by Respondent in its defense.") (internal citation omitted).

7 *ANR Pipeline Co.*, Final Order, CPF No. 3-2011-1011, 2012 WL 7177134, *3 (Dec. 31, 2012) (finding that evidence in violation report was insufficient); *see also CITGO Pipeline Co.*, Decision on Reconsideration, CPF No. 4-2007-5010, 2011 WL 7517716, *5 (Dec. 29, 2011) (finding lack of evidence demonstrating all elements of the alleged violation).

8 *See, e.g.*, *ExxonMobil*, 2019 WL 3734516 at **4, 5 (ordering withdrawal of allegations where OPS failed to prove that Respondent engaged in conduct that would constitute a violation); *EQT Corp.*, Final Order, CPF No. 1-2006-1006, 2010 WL 2228558, **6, 7 (May 13, 2010) (finding that OPS did not present evidence or analysis proving that Respondent's actions were inadequate under the regulation); *Bridger Pipeline Co.*, Decision on Reconsideration, CPF No. 5-2007-5003, 2009 WL 2336991, **5, 6 (June 16, 2009) (finding evidence introduced by PHMSA insufficient to establish a violation).

9 *Rocky Mountain Pipeline Sys.*, Final Order, CPF No. 5-2004-5001, 2006 WL 4488857, **6, 8 (Dec. 11, 2006) (withdrawing alleged violations where the cited regulations did not relate to alleged violation).

10 *Alyeska Pipeline Serv. Co.*, Decision on Petition for Reconsideration, CPF No. 5-2005-5023, 2009 WL 5538655, *3 (Dec. 16, 2009) (citing *Butte Pipeline*, 2009 WL 3190794 at *1, n.3; *Schaffer*, 546 U.S. at 56-58).

is carried "only if the evidence supporting the allegation outweighs the evidence and reasoning presented by Respondent in its defense."[11] A respondent will prevail under this standard not by conclusively proving compliance, but where its rebuttal evidence is more persuasive than the evidence provided by PHMSA.[12] If "the evidence is closely balanced," PHMSA has not met its burden of persuasion and the allegation of violation must be withdrawn.[13]

IV. Response of BPP

Item 1: BPP Does Not Contest the Alleged Procedural Violation, But Contests the Proposed Compliance Order Because BPP Performed a Permanent Repair That Addresses the Safety Risk.

Section 195.402(a) requires that an operator prepare and follow a manual of written procedures for conducting normal operations and maintenance activities and for handling abnormal operations and emergencies.[14] Item 1 alleges that BPP "failed to follow its written procedures for pipeline repair."[15] The Notice describes Table 3-2 of BPP's O&M Manual as allowing a repair with a composite sleeve when "'damaged material has been removed by grinding and removal has been verified by inspection.'" The Notice alleges that, based on a review of BPP's maintenance records, "BPP performed a repair on Highway 13 to Port Barre segment of its BPP-100 pipeline by installing a composite sleeve over [a] gouge containing a stress concentrator without grinding the defect down to sound metal."[16] On this basis alone, the Notice alleges that "BPP failed to follow its written procedures," in violation of § 195.402(a).

The proposed compliance order would require that BPP submit a plan, including a timeline, "to appropriately repair the condition within 90 days of receipt of the Final Order."[17]

BPP disagrees with the conclusion in the Notice that BPP's repair records establish that the composite sleeve was installed without grinding down the gouge. Neither the Notice nor the Violation Report contains evidence to support this statement. The repair records in the Violation Report do not affirmatively show that the gouge was not ground out before the composite sleeve was installed. At best, the lack of a record suggests that BPP did not document the visual inspection to verify that the gouge was removed by grinding before the permanent repair with a composite sleeve was completed.

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[11] *Butte Pipeline*, 2009 WL 3190794 at *1 (internal citation omitted).

[12] *See ANR Pipeline*, 2012 WL 7177134 at *3. *In ANR Pipeline*, PHMSA found that ANR's "plausible" explanation regarding the discovery of a reportable condition on its pipeline was sufficient to warrant withdrawal of the allegation of violation because the "Violation Report contain[ed] no evidence which would rebut ANR's argument." *Id. See also City of Richmond, VA*, Final Order, CPF No. 1-2004-0006, 2006 WL 3825337, *4 (Jan. 12, 2006) (stating that the Respondent does not have the burden of proving compliance, rather OPS has the burden of proving the violation).

[13] *Alyeska Pipeline*, 2009 WL 5538655 at *3 (quoting *Schaffer*, 546 U.S. at 56). *Cf. Buckeye Partners, LP*, Final Order, CPF No. 1-2009-5002, 2012 WL 3144486, *7 (May 30, 2012) (where neither party "present[s] sufficient proof to prove its position," the violation must be withdrawn because PHMSA bears the burden).

[14] 49 C.F.R. § 195.402(a).

[15] Notice at 2.

[16] *Id.* at 1.

[17] *Id.* at 7.

BPP is confident that the gouge was ground out before the pipeline was repaired. BPP, however, acknowledges the importance of following its procedures and that its procedures require that it verify that a gouge be ground down before it is repaired with a composite sleeve. BPP's failure was only that it did not document how it verified that the gouge was ground down before the composite sleeve was installed. BPP completed an ILI on this portion of BPP-100 in September 2023. BPP expects that this ILI will confirm that the gouge was ground down before the composite sleeve was installed. In this circumstance, the proposed compliance order would not be necessary.

Even if the ILI data is not conclusive to show that the gouge was ground down, the installation of the composite sleeve, which is a permanent repair consisting of a durable, long-lasting material designed to last the life of the pipeline, is more than sufficient to mitigate any safety risk presented by the gouge.

If required to "appropriately repair" the condition, as would be required under the proposed compliance order, BPP would have to excavate the pipeline, cut out, and replace the previously repaired section. This would entail evacuating the pipeline of ethylene, flaring the product, and filling the pipe with nitrogen. Returning ethylene to the pipeline requires that it first be heated. This repair process would require two to three weeks to complete and would disrupt service to customers, result in the loss of product and released product to the atmosphere, cause environmental disturbance at the excavation site, and create unnecessary risk to BPP personnel performing the work. The safety risks and adverse environmental impacts associated with having to cut out a permanent repair and replace the pipe are significant and unnecessary.

BPP contests the proposed compliance order because PHMSA has not justified that performing a second repair on the pipeline is appropriate.[18] BPP proposes an alternative approach. BPP completed an ILI on this segment of the pipeline in September 2023. BPP proposes that, if the ILI data shows that the gouge was ground down, then PHMSA will deem the terms of the proposed compliance order satisfied. If the ILI data does not show that the gouge was ground down or is inconclusive, BPP will use the ILI signature and data to conduct stress and strain analysis using FEA modeling which will accurately calculate if the anomaly poses any integrity threat to the pipeline that was permanently repaired. The FEA modeling will be conducted by a third party and the full report would be submitted to PHMSA.

To implement this alternative approach, BPP requests that, in the final order, the proposed compliance order be amended as follows (with new text shown in underline):

> In regard to Item Number 1 of the Notice pertaining to failing to follow applicable procedures when installing a composite sleeve over a gouge containing a stress concentrator, Boardwalk Petrochemical Pipeline, LLC must <u>notify PHMSA of the results of the inline inspection that was conducted in September 2023. Such notification shall be provided no more than 90 days after the ILI is completed. If</u>

[18] *See e.g., Slusser v. Commodity Futures Trading Comm'n*, 210 F.3d 783, 787-88 (7th Cir. 2000); *Gimbel v. Commodity Futures Trading Comm'n*, 872 F.2d 196, 201 (7th Cir. 1989); *Premex, Inc. v. Commodity Futures Trading Comm'n*, 785 F.2d 1403, 1408-09 (9th Cir. 1986); *Bosma v. U.S. Dep't. of Agriculture*, 754 F.2d 804, 810 (9th Cir. 1985).

ILI data shows that the gouge was ground down, then PHMSA will deem the terms of the proposed compliance order satisfied. If the ILI data do not show that the gouge was ground down or are inconclusive, BPP will retain an independent third party to perform finite element analysis (FEA) modeling. BPP will submit the full report of the FEA Analysis to PHMSA~~, including a timeline, to appropriately repair the condition~~ within **90** days of providing the notification to PHMSA ~~receipt of the Final Order~~.

Item 2: BPP Does Not Contest Item 2.

Item 2 of the Notice alleges that BPP failed to assess the unique attributes and characteristics of its BPP-100 pipeline when identifying the stakeholder audience. Specifically, the Notice alleges that, BPP's plume analysis identified a potential impact radius (PIR) of 2,030 feet on either side of the pipeline based on the fact that it transports ethylene, but sent communications to a coverage area of 1,100 feet on each side of the pipeline. The Notice alleges that "BPP failed to consider the unique attributes and characteristics when identifying the stakeholder audience along the entire 176-mile pipeline" in violation of §195.440(b)."[19] The Notice states that, during the inspection, BPP "amended its public awareness procedures and delivered the applicable pipeline information content (mailers) to the newly identified stakeholders."[20]

The Notice proposes to assess a civil penalty of $20,800.[21] The Notice does not propose a compliance order for this item.

Without admitting liability, BPP does not contest Item 2 of the Notice. BPP has delivered the required mailings to stakeholder audiences located within 2,030 feet on each side of the pipeline along the entire length of the pipeline.

Item 3: The Allegation Must Be Withdrawn Because BPP Performs Baseline Assessments on the Pipeline Segments Located in the Five Areas Listed in the Notice and Because PHMSA Has Not Demonstrated That BPP Failed to Identify Newly-Identified HCAs Under § 195.452(d)(2).

Item 3 of the Notice alleges that BPP violated § 195.452(d)(2) by failing to identify five populated areas that would cause the geographic locations around the pipeline to be designated as newly-identified HCAs, and to incorporate the pipeline segments located within those HCAs into BPP's integrity management Baseline Assessment Plan.[22] According to the Notice, the five locations that would cause the area around the pipeline segments in these locations to be newly-identified HCAs are the following:

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[19] *Id.* at 2.
[20] *Id.*
[21] *Id.* at 5.
[22] *Id.* at 3.

Name of Location	Approximate Structure Counts as of 2018	Approximate Length of HCA (ft)	Approximate Initial Construction Year
Shawnee Farms Rd southwest of Opelousas, LA	50	1,400	2006
CBS Mobile Home Park and Grant Place southeast of Opelousas, LA	270	2,900	2009
Three Mile Lake, LA	150	10,000	2010
Lottie, LA	(population 450)	2,000	Unincorporated Town
Calumet Estates in Port Allen, LA	25	2,800	2007

The Notice proposes to assess a civil penalty of $75,500[23] and proposes a compliance order that would require BPP to "incorporate the locations listed in the violation into its Baseline assessment plan within 60 days of receipt of the Final Order."[24]

BPP contests Item 3 because the Notice incorrectly alleges that BPP did not include the pipeline segments located in the five geographical areas listed in the Notice in its Baseline Assessment Plan. BPP performs (and performed prior to the inspection) integrity assessments via ILI runs on those segments at intervals not to exceed five years. PHMSA has not met its burden of proving that BPP's analysis concluding that the five areas were not newly-identified HCAs was a violation of § 195.452(d)(2). The Notice contains no evidence of changes in population density or population distribution that establishes that the five areas should have been designated as newly-identified HCAs. PHMSA's attempt to use this enforcement proceeding to impose punitive remedies deprives BPP of its procedural due process rights because it had no fair notice of the agency's compliance expectations.

The proposed civil penalty should be substantially reduced to reflect the fact that the integrity of the pipeline segments located in these areas have been assessed multiple times, substantially mitigating their risk to the public and the environment. The gravity assessment criteria should be reduced to a finding that pipeline safety was minimally impacted, and BPP should be given additional credit for its good faith in attempting to comply with the regulation for which there is limited compliance guidance.

A. The Allegation That BPP Did Not Include the Pipeline Segments in the Listed Five Areas in Its Baseline Assessment Plan Is Factually Incorrect.

Section 195.452 prescribes integrity management plan requirements for hazardous liquid pipelines that have pipeline segments that are in, or that could affect, an HCA.[25] The underlying purpose of the integrity management regulatory framework is to ensure that pipeline segments in

[23] *Id.* at 5.
[24] *Id.* at 7.
[25] 49 C.F.R. § 195.450. An HCA is defined as "(1) A commercially navigable waterway, which means a waterway where a substantial likelihood of commercial navigation exists; (2) A high population area, which means an urbanized area, as defined and delineated by the Census Bureau, that contains 50,000 or more people and has a population density of at least 1,000 people per square mile; (3) An other populated area, which means a place, as defined and delineated by the Census Bureau, that contains a concentrated population, such as an incorporated or unincorporated city, town, village, or other designated residential or commercial area; (4) An unusually sensitive area, as defined in § 195.6."

HCAs are assessed more frequently than segments that are not located in HCAs. The required elements of an operator's integrity management plan are described in § 195.452(f) and include the requirement that an operator establish a process for identifying which pipeline segments are in, or could affect, an HCA.[26] To make that determination, an operator must obtain information about the areas around its pipeline segments. An operator must develop a baseline assessment plan for assessing the integrity of line pipe that is located in or that could affect HCAs.[27]

Item 3 alleges that BPP failed to incorporate into its Baseline Assessment Plan those segments of the BPP-100 pipeline that are in the five geographical areas listed in the Notice. BPP contests this allegation because it is incorrect. These pipeline segments are included and have been included in BPP's Baseline Assessment Plan. Each segment has been assessed multiple times.

The pipeline segments located near Shawnee Farms and CBS Mobile Home Park and Grant Place were assessed in spring 2015 using a caliper tool and a circumferential magnetic flux leakage (CMFL) tool, and again in 2019 using a CMFL tool. The integrity of the pipeline segments located near Three Mile Lake, Calumet Estates, and Lottie, Louisiana, was assessed using a caliper tool and a CMFL tool in both 2015 and 2019. BPP plans to perform an ILI integrity inspection for all of these segments again in spring 2024.

BPP requests that PHMSA withdraw Item 3 because the allegation that BPP did not incorporate into its Baseline Assessment Plan the pipeline segments that are located in the five areas identified in the Notice is factually incorrect. Neither the Notice nor the Violation Report contains evidence proving this allegation.[28] BPP also requests that the proposed civil penalty and proposed compliance order be withdrawn.

B. The Notice Does Not Prove That BPP's Analysis Determining That the Areas Listed in the Notice Are Not Newly-Identified HCAs Violates § 195.452(d)(2).

1. BPP's Process for Determining Whether Areas Around the Pipeline Are Newly-Identified Segments Relied on Geographic Information Systems (GIS) Data and Aerial Imagery.

One of the definitions of an HCA under Part 195 is an "*other populated area* which means a place, as defined and delineated by the Census Bureau, that contains a concentrated population, such as an incorporated or unincorporated city, town, village, or other designated residential or commercial area."[29] In the final rule adopting this definition, PHMSA explained that an "other populated area" is the same as a populated area designated by the Census Bureau as a "census

[26] 49 C.F.R. §§ 195.452(f)(1). Section 195.452(c) describes the requirements for a baseline assessment plan. *Id.* § 195.452(c).
[27] 49 C.F.R. § 195.452(f)(2).
[28] *Tennessee Gas Pipeline Co.*, Final Order, CPF No. 1-2018-1001, 2019 WL 7943664, **4, 5 (Nov. 14, 2019) (withdrawing alleged violation because "OPS did not meet its burden of proving a violation"); *ExxonMobil*, 2019 WL 3734516 at **4, 5 (withdrawing allegation because PHMSA's evidence did not establish a violation).
[29] 49 C.F.R. § 195.450 (definition of HCA).

designated place."[30] PHMSA described Census Bureau data as "the recognized expert and source for general population data in the communities of the United States."[31] PHMSA added to the definition of "other populated area" the phrase "concentrations of people and include incorporated or unincorporated cities, towns, villages, or other designated residential or commercial areas,"[32] which are not terms used or defined by the Census Bureau.

In addition to initially identifying HCAs along a pipeline, an operator is required to continually identify newly-identified HCAs and incorporate them into its integrity management plan.[33] Section 195.452(d)(2) states that, if an operator "obtains information (whether from the information analysis required under paragraph (g) of this section, Census Bureau maps, *or any other source*) demonstrating that the area around a pipeline segment has changed to meet the definition of a high consequence area (see § 195.450)" the operator must include that newly-identified HCA in the operator's baseline assessment plan within one year from the date of identification.[34] The operator must complete the baseline assessment for the newly-identified HCA within five years of identification.[35]

To determine whether an area around a pipeline segment has changed such that the area should be deemed a newly-identified HCA based on population, PHMSA guidance instructs that that "[o]ver time, new HCAs may be identified as population distribution changes," and that operators must "look for HCAs on their own by monitoring local population growth."[36] Before it was amended in 2019, former § 195.452(d)(3)(1) expressly instructed operators to examine whether "population density around a pipeline segment has changed."[37] The 2019 amendment did not modify the substance of this requirement.[38]

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[30] Pipeline Safety: Pipeline Integrity Management in High Consequence Areas (Hazardous Liquid Operators With 500 or More Miles of Pipeline), Final Rule, 65 Fed. Reg. 75,378, 75,391 (Dec. 1, 2000) (2000 Final Rule). *See also* NPMS, https://www npms.phmsa.dot.gov/PopulationData.aspx. (last visited Sept. 18, 2023).

[31] 2000 Final Rule, 65 Fed. Reg. at 75,391.

[32] *Id.* *See also* National Pipeline Mapping System, https://www npms.phmsa.dot.gov/PopulationData.aspx. (last visited Sept. 18, 2023).

[33] 49 C.F.R. § 195.452(d)(2).

[34] *Id.* (emphasis added).

[35] *Id.*

[36] Liquid Integrity Management Rule Frequently Asked Questions, FAQ 3.9 (Revision Date Aug. 31, 2016), https://www.phmsa.dot.gov/pipeline/hazardous-liquid-integrity-management/hl-im-faqs. (Hazardous Liquid IM FAQs).

[37] 49 C.F.R. § 195.452(d)(3)(i) (2018).

[38] The 2019 amendments to § 195.452(d) eliminated obsolete deadlines and "clarify[ied] the requirements for newly identified HCAs." Pipeline Safety: Safety of Hazardous Liquid Pipelines, Final Rule, 84 Fed. Reg. 52,260, 52,289 (Oct. 1, 2019) (hereinafter, "2019 Final Rule"). The 2019 Final Rule combined two subparagraphs that previously had comprised then-existing § 195.452(d)(3), but did not modify the regulation's requirement. The previous version of the regulation stated:

> "(3) *Newly-identified areas.* (i) When information is available from the information analysis (see paragraph (g) of this section), or from Census Bureau maps, that the population density around a pipeline segment has changed so as to fall within the definition in § 195.450 of a high population area or other populated area, the operator must incorporate the area into its baseline assessment plan as a high consequence area within one year from the date the area is identified. An operator must complete the baseline assessment of any line pipe that could affect the newly-identified high consequence area within five years from the date the area is identified. (ii) An operator must incorporate a new unusually sensitive area into its baseline assessment plan within one year from the date the area is identified. An operator

The starting point in BPP's analysis under § 195.452(d)(2) was to identify HCAs that had been newly identified by PHMSA in the National Pipeline Mapping System (NPMS). Under § 60132(d) of the Pipeline Safety Act, PHMSA is required to update HCAs in the NPMS biennially.[39] The most recent data layer uploaded by PHMSA to the NPMS was dated 2020. None of the five areas identified in the Notice is designated as an HCA.

BPP also reviewed Census Bureau maps for digital data on census designated places. None of the five geographic areas listed in the Notice was "defined and delineated" by the Census Bureau as a census designated place.

As directed by Appendix C of Part 195,[40] BPP undertook further analysis to determine whether changes "may have occurred around the pipeline"[41] and to identify changes in population growth, population distribution, and population density that would warrant designating any additional areas as newly-identified HCAs.

Consistent with PHMSA's Guidance to assess changes in population growth or population distribution, BPP analyzed the number of structures and changes to structures located around the pipeline as an indicator of population change. Since 2017, BPP has counted structures and gathered specific information about the structures that are located in an area that extends 2030 feet from either side of the pipeline's centerline. BPP performed these structure surveys in 2017, 2018, 2019, 2020, and 2022.

This structure-counting information-gathering process begins with a third-party consultant using Google Maps to take aerial images of the structures located around the pipeline. After collecting aerial imagery, the consultant's personnel go into the field and confirm the existence of each structure around the pipeline. These personnel verify the existence of newly constructed buildings, identify buildings not reflected on aerial imagery, and note any updates to existing structures. The consultant records the collected structure data spatially on a tablet and then sends the data to BPP so that the information can be imported into BPP's GIS.

After updating its GIS with the revised and confirmed data on structures around the pipeline, BPP generates heat maps which show the highest density of new structures by color. Red areas on the heat maps indicate the presence of new structures. The darker the shade of red, the greater the density of new structures. BPP personnel then analyze the heat maps. BPP first lays

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must complete the baseline assessment of any line pipe that could affect the newly-identified high consequence area within five years from the date the area is identified." 49 C.F.R. § 195.452(d)(3) (2018).

[39] 49 U.S.C. § 60132(d) ("The Secretary shall (1) maintain, as part of the National Pipeline Mapping System, a map of designated high-consequence areas (as described in section 60109(a) in which pipelines are required to meet integrity management program regulations, excluding any proprietary or sensitive security information; and (2) update the map biennially")). *See also*, 49 C.F.R. Part 195, App. C ("The Office of Pipeline Safety (OPS) will map these areas on the National Pipeline Mapping System (NPMS). . . . OPS will maintain the NPMS and update it periodically.) Hazardous Liquid IM FAQ 3.9 ("PHMSA Pipeline Safety will periodically update the HCA maps and make them available on the National Pipeline Mapping System for operator use").

[40] 49 C.F.R. Part 195, App. C.

[41] *Id.*

the heat maps over the most recent map of HCAs that have been identified by PHMSA in the NPMS and the most recent Census Bureau-identified census designated places. BPP's analysis demonstrated that most of the areas in the heat maps showing higher structure densities were already located within PHMSA-identified HCAs or Census Bureau census designated places.

BPP then analyzed other areas shown in the heat maps looking for structure densities that indicate a change in population growth, population distribution, or population density. With respect to the five areas listed in the Notice, the heat maps did not show changes in structure density, so BPP determined that there had been no changes in population growth, distribution or density. Therefore, BPP did not identify any of these five geographic areas as an other populated area or a newly-identified HCA.

2. The Allegation That BPP's Analysis Did Not Comply with § 195.452(d)(2) Lacks Factual and Legal Support.

The Notice alleges that BPP failed to incorporate newly-identified HCAs into its integrity management baseline assessment in violation of § 195.452(d)(2).[42] The Notice asserts that BPP did not perform the analysis necessary to identify five "populous areas" that allegedly meet the HCA definition of an "other populated area." The Notice alleges that BPP "did not utilize available information from its geographic information systems (GIS) as well as other sources including aerial observation from its pipeline patrols, and did not adequately perform an information analysis that included the populated locations" identified in the Notice as being HCAs.[43]

BPP contests these allegations because they are incorrect. First, BPP relied on HCAs identified by PHMSA in the NPMS, which PHMSA is required to update biennially, and census designated places identified by the Census Bureau, which PHMSA describes as "the recognized expert and source for general population data in the communities of the United States."[44] In addition, BPP relied on a verified inventory of structures located around the pipeline that were identified through aerial photography and then confirmed on the ground. This information is loaded into BPP's GIS which is then used to generate heat maps to evaluate changes in the density of structures as a proxy for measuring changes in population density and distribution.

During PHMSA's inspection, BPP and the inspectors extensively discussed BPP's process for identifying newly-identified HCAs, including BPP's approach to gathering and analyzing data, which involves use of aerial imagery and on-the-ground verification of structures around the pipeline, and BPP's reliance on GIS to generate heat maps based on this data. The Notice incorrectly describes BPP's process and approach to gathering and analyzing data. The allegations lack any factual support.

The allegation that BPP did not use aerial images from pipeline patrols should be rejected as irrelevant. Neither § 195.452(d)(2) nor Appendix C require that an operator use aerial images, let alone images solely from pipeline patrols, when determining whether the area around a pipeline

[42] Notice at 3.
[43] *Id.*
[44] 2000 Final Rule, 65 Fed. Reg. at 75,391.

has changed for purposes of identifying a newly-identified HCA.[45] Section 195.452(d)(2) permits using data "from any other source." The Notice does not explain why the aerial imagery used by BPP was inadequate or inaccurate. The aerial imagery used by BPP to gather information regarding building structures around the pipeline was verified by on-the-ground observations and was more than adequate to enable BPP to identify changes in population growth, population distribution, and population density around the pipeline and to locate newly-identified HCAs.

PHMSA has not carried its burden of showing that BPP's analyses of changes around the pipeline did not comply with § 195.452(d)(2), and the allegation must be withdrawn.[46] Alternatively, the allegation must be withdrawn because PHMSA's evidence does not outweigh the evidence and reasoning presented by BPP.[47]

C. The Notice and Violation Report Do Not Establish That the Five Geographical Areas Listed in the Notice Experienced Changes in Population Growth or Population Distribution to Justify Designating Them as Newly-Identified HCAs.

The Notice states that PHMSA used "aerial imagery confirmed by field observations, as well as publicly available information" to identify five "populous areas" that PHMSA asserts meet the definition of an HCA.[48] The Notice also states that "the age of the structures indicated that they had been in existence for several years, and that the structures were within the potential impact radius of the BPP-100 pipeline."[49] The Violation Report contains photographs depicting aerial imagery[50] and ground-level photographs[51] of the five areas listed in the Notice, and a report entitled "Release and Dispersion Consequences for HVL Pipelines."[52]

This information does not establish that any of the five areas listed in the Notice should have been identified as a newly-identified HCA. The reason this evidence is insufficient to prove a violation of § 195.452(d)(2) is that the photographs are merely snapshots taken on one day on July 29, 2022.[53] The aerial imagery contained in the Violation Report contains no comparison to imagery from previous years. The ground-level photographs of Lottie, Louisiana, CBS Mobile

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[45] *ExxonMobil*, 2015 WL 780721 at *12 (finding that PHMSA failed to meet burden of proving that certain measures were required under regulations).

[46] *ExxonMobil*, 2019 WL 3734516 at **4, 5 (ordering withdrawal of allegations where OPS failed to prove that Respondent engaged in conduct that would constitute a violation).

[47] *Butte Pipeline Co.*, 2009 WL 3190794 *1 ("PHMSA carries the burden of proving the allegations set forth in the Notice, meaning that a violation may be found only if the evidence supporting the allegation outweighs the evidence and reasoning presented by Respondent in its defense.") (internal citation omitted).

[48] Notice at 3.

[49] *Id*.

[50] Violation Report, Exhibit C, BBP Unidentified HCA Locations, 7-29-2022.

[51] Violation Report, Exhibit C, Calumet Estates Binder, 7-29-2022; Exhibit C, Grant Place Binder, 7-29-2022; Exhibit C, Lottie Binder, 7-29-2022; Exhibit C, Three Mile Lake Binder, 7-29-2022; and Exhibit C, Shawnee Farms Binder, 7-29-2022.

[52] Violation Report, Exhibit C, ROW 10 HQ Request Canary Study, 7-29-2022 (report entitled "Quest Consultants Inc., Release and Dispersion Consequences for HVL Pipelines," Prepared for Boardwalk Pipelines, LP (Aug. 18, 2015)).

[53] Violation Report, Exhibit C, Calumet Estates Binder, 7-29-2022; Exhibit C, Grant Place Binder, 7-29-2022; Exhibit C, Lottie Binder, 7-29-2022; Exhibit C, Shawnee Farms Binder, 07-29-2022, and Exhibit C, Three Mile Lake Binder, 7-29-2022.

Home Park, Grant Place, and Three Mile Lake show no new building construction or other indicators of population growth. These photographs and aerial imagery do not show how population growth or population distribution may have changed over time to suggest the possible existence of a newly-identified HCA based on population. The photographs of Calumet Estates depict one new house under construction, hardly enough to establish a change in population density or population distribution to warrant designating this area a newly-identified HCA. Merely identifying a "populous area" or identifying a structure that has "been in existence for several years"[54] reveals nothing about changes to population growth or population distribution in the area around the pipeline over time, which is the requirement under § 195.452(d)(2).[55]

The allegations in the Notice ring especially hollow when none of the areas listed in the Notice is identified as an HCA in the NPMS, and the Census Bureau does not identify them as census designated places.

BPP emphasizes that the allegation in the Notice is not that BPP failed to initially identify HCAs under § 195.542(f)(1) or § 195.452(b), but that BPP did not identify *newly-identified HCAs* under § 195.452(d)(2). That allegation requires that PHMSA show changes to the areas around the pipeline that would warrant designating them as newly-identified HCAs.[56] The Notice and Violation Report do not make that showing.[57]

The statement in the Notice that structures "were within the potential impact radius" of the pipeline should be disregarded as legally irrelevant. Under Part 195, the pipeline's PIR is not used to define an HCA under § 195.450 or to determine whether an area is a newly-identified HCA based on changes to population growth, population distribution, or population density.

PHMSA has provided no proof that the five areas listed in the Notice experienced any changes in population growth, population distribution, or population density such that they should have been named newly-identified HCAs. PHMSA has failed to meet its burden of proving a violation and BPP requests that Item 3 be withdrawn along with the proposed civil penalty and proposed compliance order.[58]

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[54] Notice at 3.

[55] Section 195.452(d)(2) states that, if an operator "obtains information (whether from the information analysis required under paragraph (g) of this section, Census Bureau maps, or any other source) demonstrating that the area around a pipeline segment has changed to meet the definition of a high consequence area (see § 195.450)" the operator must include that newly-identified HCA in the operator's baseline assessment plan. PHMSA's guidance states that "[o]ver time, new HCAs may be identified as population distribution change[s]," and that operators must "look for new HCAs on their own by monitoring local population growth." Hazardous Liquid IM FAQ 3.9, https://www.phmsa.dot.gov/pipeline/hazardous-liquid-integrity-management/hl-im-faqs.

[56] 49 C.F.R. § 195.452(d)(2); Hazardous Liquid IM FAQ 3.9.

[57] *Bridger Pipeline*, 2009 WL 2336991 at **5, 6 (finding evidence introduced by PHMSA insufficient to establish a violation).

[58] *ExxonMobil*, 2019 WL 3734516 at **4, 5 (withdrawing allegation because PHMSA's evidence did not establish a violation); *Air Prods. & Chems., Inc.*, Final Order, CPF No. 4-2013-1001, 2015 WL 6758819, *3 (Aug. 10, 2015) (withdrawing alleged violation because PHMSA did not produce "any evidence to support its position" and thereby did not meet its burden of proof).

D. PHMSA Did Not Provide BPP Fair Notice of the Compliance Expectation Under § 195.452(d)(2).

Before a governmental agency can deprive a person of property through an administrative penalty, the person has a constitutional procedural due process right to receive "fair notice" as to what constitutes a violation of law.[59] When an agency interprets a regulation through enforcement rather than pre-enforcement efforts, "fair notice requires the agency to have 'state[d] with ascertainable certainty what is meant by the standards [it] has promulgated.'"[60] When an agency has authority to assess monetary penalties for violations, the agency "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 enforcing authority and its agents."[61]

PHMSA has not satisfied that obligation here. PHMSA's compliance guidance under § 195.452(d)(2) instructs that, to determine whether changes in an area around a pipeline warrant designating it as a newly-identified HCA based on population, an operator is to examine population growth and population distribution.[62] The previous version of the regulation required an examination of population density.[63] PHMSA provides no further implementation guidance, and the regulation permits an operator to rely on information from "any other source."[64]

In reliance on that guidance and the regulatory text, BPP undertook a thorough aerial and ground-based analysis of the structures around the pipeline as a proxy for determining whether changes in population justified identifying any of the five areas listed in the Notice as newly-identified HCAs. PHMSA rejected BPP's approach and suggested that there were other measures, such as relying on aerial images taken from pipeline patrols and using PIR data, that BPP should have taken in order to comply.

If PHMSA does not withdraw the allegation in Item 3 on the bases described in previous sections of this Response, then BPP requests that Item 3 be withdrawn because BPP had no fair notice of the agency's compliance expectations for § 195.452(d)(2). The measures identified in the Notice that the inspector asserts are required for compliance are not identified in the text of § 195.452(d)(2), Appendix C to Part 195, compliance guidance or any enforcement decision. PHMSA has provided no fair notice to BPP regarding its compliance expectation under § 195.452(d)(2) because BPP could not have had ascertainable certainty regarding PHMSA's compliance expectations.[65]

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59 *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1328-29 (D.C. Cir. 1995) (reversing agency's finding of liability and fine where regulation did not clearly warn a party what was expected).

60 *ExxonMobil Pipeline Co. v. U.S. Dept of Transp.*, 867 F.3d 564, 578 (5th Cir. 2017) (quoting *Diamond Roofing Co. v. OSHRC*, 528 F.2d 645, 649 (5th Cir. 1976)); *Gen. Elec.*, 53 F.3d at 1329.

61 *ExxonMobil*, 867 F.3d at 578 (quoting *Diamond Roofing*, 528 F.2d at 649).

62 Hazardous Liquid IM FAQ 3.9.

63 49 C.F.R. § 195.452(d)(3) (2018).

64 49 C.F.R. § 195.452(d)(2) (2021).

65 *ExxonMobil*, 867 F.3d at 578 (quoting *Diamond Roofing*, 528 F.2d at 649); *Gen. Elec.*, 53 F.3d at 1329.

E. If Item 3 Is Not Withdrawn, the Proposed Civil Penalty Should Be Reduced in Recognition of the Fact That BPP Included the Areas Listed in Notice in Its Baseline Assessment Plan and They Have Been Inspected Multiple Times, Substantially Mitigating the Safety Risk.

PHMSA is required by the Pipeline Safety Act to apply certain assessment considerations when determining the amount of a civil penalty for a pipeline safety violation.[66] Those factors include:

(1) The violation's nature, circumstances, and gravity, including any adverse impact on the environment;
(2) The degree of the violator's culpability;
(3) Any good faith by the violator in attempting to achieve compliance; and
(4) Whether the operator self-disclosed and corrected the alleged violation.

PHMSA bears the burden of proof in demonstrating the appropriateness of a civil penalty for a pipeline safety violation.[67] PHMSA has not met that burden here. BPP has demonstrated that the five areas listed in the Notice were included in BPP's Baseline Assessment Plan and have been assessed multiple times since 2015. The safety risk to the public and the environment associated with the alleged violation is substantially mitigated.

BPP requests that the proposed civil penalty be reduced under the gravity and good faith assessment factors. Under the "gravity" assessment factor, the Violation Report states that the violation occurred within an HCA or in an area that could affect an HCA. BPP requests that the gravity assessment criteria be reduced to a finding that "pipeline safety was minimally impacted" in recognition of the fact that BPP has included all five areas in its Baseline Assessment Plan and inspected them multiple times since 2015.

Given the extensive efforts BPP undertook to evaluate population growth and population distribution changes and to identify newly-identified HCAs based on population, BPP should be given additional credit for its good faith in attempting to comply with the regulation.

Item 4: PHMSA Has Not Satisfied Its Burden of Proving That BPP Failed to Verify Risk Factors Used in Identifying Pipeline Segments That Could Affect an HCA.

Item 4 of the Notice alleges that BPP "failed to complete its annual verification of two covered segments."[68] The Notice states further that "[b]y failing to verify these segments as covered under its integrity management program for calendar years 2018 through 2022, BPP is in

[66] 49 U.S.C. § 60122(b). These factors are codified in PHMSA's regulations at 49 C.F.R. § 190.225.
[67] *See, e.g., Slusser v. Commodity Futures Trading Comm'n*, 210 F.3d 783, 787-88 (7th Cir. 2000); *Gimbel v. Commodity Futures Trading Comm'n*, 872 F.2d 196, 201 (7th Cir. 1989); *Premex, Inc. v. Commodity Futures Trading Comm'n*, 785 F.2d 1403, 1408-09 (9th Cir. 1986); *Bosma v. U.S. Dep't. of Agriculture*, 754 F.2d 804, 810 (9th Cir. 1985).
[68] Notice at 4.

violation of § 195.452(j)(2).”[69] The Notice proposes to assess a civil penalty of $56,600[70] and to impose a compliance order that would require BPP to “[a]mend its Integrity Management Program to include the requirements of 49 CFR 195.452, effective as of July 1, 2020, within 60 days of receipt of the Final Order;” and “[c]omplete the requirements of 49 CFR 195.452(j) for the facilities listed in the violation within 180 days of receipt of the Final Order.”[71]

BPP contests Item 4 because the Notice does not accurately describe the requirements of either the pre-July 1, 2020 version of § 195.452(j)(2) or the post-July 1, 2020 version of § 195.452(j)(2). Item 4 is legally defective and must be withdrawn. If Item 4 is not completely withdrawn, then allegations pertaining to conduct occurring before July 1, 2021 must be withdrawn because newly-amended § 195.452(j)(2) was not effective until that date. Alleged violations pertaining to the period before July 1, 2020 also should be withdrawn because the Notice does not assert any facts relevant to the previous, pre-July 2020 version of § 195.452(j)(2). This failure also violates § 190.207(b)(1).[72]

A. The Requirements of § 195.452(j)(2) Were Amended in 2019.

The history of § 195.452(j)(2) demonstrates why the allegation in Item 4 is legally defective and cannot be sustained.

Section 195.452(j) was first adopted in the 2000 Final Rule establishing the original integrity management regulations for hazardous liquid pipelines.[73] The original version of §§ 195.452(j)(1) and (j)(2), which must be read together, stated the following:

> “(j) *What is a continual process of evaluation and assessment to maintain a pipeline’s integrity?* - (1) *General.* After completing the baseline integrity assessment, an operator must continue to assess the line pipe at specified intervals and periodically evaluate the integrity of each pipeline segment that could affect a high consequence area.
> (2) *Evaluation*. An operator must conduct a periodic evaluation as frequently as needed to assure pipeline integrity. An operator must base the frequency of evaluation on risk factors specific to its pipeline including the factors specified in paragraph (e) of this section. The evaluation must consider the results of the baseline and periodic integrity assessments, information analysis (paragraph (g) of this section), and decisions about remediation, and preventive and mitigation actions (paragraphs (h) and (i)) of this section.”[74]

The 2000 Final Rule explained the purpose of these two sections: “The rule requires an operator to conduct a periodic evaluation of each pipeline segment, as frequently as needed, to assure the pipeline’s integrity. An operator would determine frequency based on specified risk factors plus

[69] *Id.*
[70] *Id.* at 5.
[71] *Id.* at 7.
[72] 49 C.F.R. § 190.207(b)(1).
[73] 2000 Final Rule, 65 Fed. Reg. at 75,408.
[74] 49 C.F.R. §§ 195.452(j)(1) & (j)(2) (2018).

other factors specific to the pipeline segment."[75] As originally drafted, § 195.452(j)(2), entitled "*Evaluation*," instructed an operator how to perform the periodic evaluation required in § 195.452(j)(1).

In the 2019 Final Rule, § 195.452(j)(1) was not changed, but PHMSA amended § 195.452(j)(2) to eliminate instruction regarding how to perform the periodic evaluation required in § 195.452(j)(1) and to add a new, different requirement. Section 195.452(j)(2) now requires a verification of the risk factors that the operator used to identify pipeline segments that could affect an HCA. Amended § 195.452(j)(2), which now has a new heading, states as follows:

> "(j)(2) *Verifying covered segments.* An operator must verify the risk factors used in identifying pipeline segments that could affect a high consequence area on at least an annual basis not to exceed 15 months (Appendix C of this part provides additional guidance on factors that can influence whether a pipeline segment could affect a high consequence area). If a change in circumstance indicates that the prior consideration of a risk factor is no longer valid or that an operator should consider new risk factors, an operator must perform a new integrity analysis and evaluation to establish the endpoints of any previously identified covered segments. The integrity analysis and evaluation must include consideration of the results of any baseline and periodic integrity assessments (*see* paragraphs (b), (c), (d), and (e) of this section), information analyses (*see* paragraph (g) of this section), and decisions about remediation and preventive and mitigative actions (*see* paragraphs (h) and (i) of this section). An operator must complete the first annual verification under this paragraph no later than July 1, 2021."[76]

The 2019 Final Rule adopting amended § 195.452(j)(2), explains the new requirement and the reason it was adopted:

> "PHMSA is requiring operators to verify their pipeline segment identification (as HCAs or otherwise) annually by determining whether factors considered in their analysis have changed. Section 195.452(b) currently requires that operators identify each segment of their pipeline that could affect an HCA in the event of a release, but there is no explicit requirement that operators assure that their identification of covered segments remains current. As time goes by, the likelihood increases that factors considered in the original identification of covered segments may have changed. Construction activities or erosion near the pipeline could change local topography in a way that could cause product released in an accident to travel farther than initially analyzed. Changes in agricultural land use could also affect an operator's analysis of the distance released product could be expected to travel. Changes in the deployment of emergency response personnel could increase the time required to respond to a release and result in a release affecting a larger area if the original segment identification relied on emergency response in limiting

[75] 2000 Final Rule, 65 Fed. Reg. at 75,339. *See also id.* at 75,397-98 ("The final rule requires an operator to periodically evaluate the integrity of each pipeline segment that could affect a high consequence area by analyzing all available information about the integrity of the entire pipeline and the consequences of a failure.")

[76] 49 C.F.R. § 195.452(j)(2) (2021).

> the transport of released product. Therefore, PHMSA has determined that operators should periodically re-visit their initial analyses to determine whether they need updating; operators might identify new HCAs in subsequent analyses.
>
> The change that PHMSA is adopting does not automatically require operators to re-perform their segment analyses. Rather, it requires operators to first identify the factors considered in their original analyses, determine whether those factors have changed, and consider whether any such change would likely affect the results of the original segment identification. If so, the operator is required to perform a new segment analysis to validate or change the endpoints of the segments affected by the change."[77]

PHMSA's FAQs for the 2019 Final Rule confirm the new requirement under § 195.452(j)(2):

> **"FAQ-8. Do I necessarily have to redo my segment analysis under § 195.452(j)(2)?**
>
> No. The change to § 195.452(j)(2) requires operators to verify their pipeline segment identification annually. As PHMSA explained in the Final Rule (85 FR 52260, 52272), however, the change that PHMSA adopted does not automatically require operators to re-perform their segment analyses. Rather, it requires an operator to first identify the factors considered in their original analyses, determine whether those factors have changed, and consider whether any change would likely affect the results of the original segment identification. If so, the operator is required to perform a new segment analysis to validate or change the endpoints of the segments affected by the change."[78]

The amended regulations adopted in the 2019 Final Rule became effective July 1, 2020. Amended § 195.452(j)(2) states that an operator was not required to complete its first annual verification until July 1, 2021.[79]

B. Item 4 Must Be Withdrawn as Legally Defective and Factually Unsupported.

Item 4 alleges that "BPP failed to complete its annual verification of two covered segments . . . . By failing to verify these segments as covered under its integrity management program for calendar years 2018 through 2022, BPP is in violation of § 195.452(j)(2)."[80]

Item 4 must be withdrawn as legally defective because the allegation does not correctly describe the requirement of either version of § 195.452(j)(2). The current version of § 195.452(j)(2) does not require BPP to "verify these segments as covered under its integrity

[77] 2019 Final Rule, 84 Fed Reg. at 52,271-72. *See also id.* at 52,286-87.

[78] PHMSA, Frequently Asked Questions for the Final Rule titled, "Pipeline Safety: Safety of Hazardous Liquid Pipelines," published October 1, 2019, FAQ-8, (Nov. 30, 2020), https://www.phmsa.dot.gov/sites/phmsa.dot.gov/files/2020-12/Final%20HL_Rule_FAQs.%20%20revised_0.pdf.

[79] 49 C.F.R. § 195.452(j)(2) (2021).

[80] Notice at 4.

management program."[81] Section 195.452(j)(2) requires that BPP "verify the risk factors used in identifying pipeline segments that could affect a high consequence area."[82] The purpose of this requirement is to make sure that an operator's "identification of covered segments remains current" in light of factors around the pipeline that may have changed over time.[83] The Notice does not reflect this requirement correctly. The Notice also does not explain how the assertions about BPP's conduct establish a violation of § 195.452(j)(2).

The pre-July 1, 2020 version of § 195.452(j)(2) also did not require that an operator "verify these segments as covered under its integrity management program."[84] The earlier version of § 195.452(j)(2) required that an operator "conduct a periodic evaluation as frequently as needed to assure pipeline integrity."[85] Item 4 must be withdrawn because it does not correctly describe the pre-July 1, 2020 regulatory requirement, rendering the Notice legally defective.

If Item 4 is not withdrawn because it is legally defective, then allegations related to any conduct occurring before July 2021 must be withdrawn. Amended § 195.452(j)(2) did not become effective until July 1, 2020 and compliance was not required until July 1, 2021. An operator cannot be found to have violated a regulation that was not in effect at the time the alleged conduct occurred.

Allegations of non-compliance with the pre-July 1, 2020 version of § 195.452(j)(2) also must be withdrawn as legally defective. The Notice does not mention the term "periodic evaluation," and asserts no facts to support an allegation of noncompliance with the pre-July 2020 requirement. Item 4 also fails to include "a statement of the evidence upon which the allegations are based" as required under § 190.207(b)(1).[86] An alleged violation of the pre-July 2020 version of § 195.452(j)(2) cannot be sustained.

BPP requests that PHMSA withdraw Item 4, its proposed civil penalty and proposed compliance order.

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[81] *Id*.
[82] 49 C.F.R. § 195.452(j)(2).
[83] 2019 Final Rule, 84 Fed Reg. at 52,271-72.
[84] Notice at 4.
[85] 49 C.F.R. § 195.452(j)(2) (2018).
[86] 49 C.F.R. § 190.207(b)(1).

V. CONCLUSION

For the reasons set forth above, BPP requests that PHMSA revise the compliance order proposed for Item 1 and withdraw Item 3 and Item 4, including their proposed compliance orders and proposed civil penalties.

Respectfully submitted,

October 03, 2023