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

In the Matter of	)	
	)	CPF No. 4-2013-5027
ExxonMobil Pipeline Company,	)	Notice of Probable Violation
	)	
Respondent.	)	
	)	

RESPONDENT'S
PETITION for RECONSIDERATION

I. Introduction

The Final Order issued for this matter on October 1, 2015, by the Pipeline and Hazardous Materials Safety Administration (PHMSA or the Agency) transforms an enforcement theory invoked by a single PHMSA Region into a rule of law. The decision also ignores or selectively mischaracterizes several material facts to support its findings. As a result, PHMSA's actions violate the Administrative Procedure Act (APA), and the Final Order should be withdrawn or revised.

The central theme and focus of the Final Order is whether ExxonMobil Pipeline Company (EMPCo, the Company, or Respondent) failed to conclude what one Region within the Agency, in the clarity of hindsight, claims it should have: that the segment of low frequency electric resistance welded (LF-ERW) pipe at issue was susceptible to longitudinal seam failure (seam failure) under federal pipeline safety regulations. At no time during prior reviews of Respondent's seam failure susceptibility analysis procedures did the Agency raise any concerns, including a review of Respondent's application of those procedures to the very pipe at issue in 2007. It is only after the incident occurred on March 29, 2013 in Mayflower, Arkansas, that PHMSA, in its Final Order, unequivocally finds deficiencies and regulatory violations in EMPCo's seam failure susceptibility analysis procedures.

It is undisputed that LF-ERW pipe is not prohibited for use in commerce. In fact, roughly one quarter of all oil pipelines in the United States at present were manufactured by LF-ERW processes. The applicable law, 49 C.F.R. Part 195.452, requires in relevant part that operators consider manufacturing information and seam type in identifying integrity threats and assess the integrity of LF-ERW pipe that is "susceptible to longitudinal seam failure" by methods "capable of assessing seam integrity […]." The law neither mandates how operators should determine whether a segment is seam failure susceptible under the integrity management rules, nor does the law dictate a process for operators to follow.

To inform the analysis of whether a pipe is susceptible to seam failure under the federal regulations, the Agency in 2004 commissioned national experts, Dr. John Kiefner and Michael Baker, to prepare a report. That report presented a flow chart of actions and methods recommended to operators, including a process for determining whether the pipeline is seam failure susceptible in the context of federal integrity management regulations. That process considers, among other things, pipe and seam characteristics, prior failures and the cause of those failures, fatigue crack growth and operational pressure cycles to determine whether a given segment is susceptible to seam failure. Only if a segment is determined by the operator to be "susceptible to seam failure" would the operator be obligated to select an assessment method capable of assessing seam integrity.

The undisputed facts in this case demonstrate that EMPCo retained PHMSA's national expert, Dr. Kiefner, to prepare the Company's process for determining whether LF-ERW pipe is susceptible to seam failure under the federal integrity management regulations. The Company then followed the process that was developed by Drs. Kiefner and Baker for PHMSA in 2004 which was built upon Dr. Kiefner's prior work on the subject. EMPCo's analysis concluded that the Pegasus Pipeline, and specifically the Conway to Corsicana segment, was not "susceptible to seam failure" in the context of the federal regulations. The analysis was conducted on four different occasions between 2004 and 2011, reaching the same conclusion each time.

Consistent with the 2004 Baker and associated Kiefner reports, EMPCo continued to evaluate the Pegasus Pipeline for seam failure susceptibility. EMPCo performed reassessments as recommended by the guidance, taking the calculated pipe life (utilizing the tool developed by Dr. Kiefner) and conservatively scheduling reassessments before the 'half the time to failure' point had been reached. The evidence demonstrates, therefore, that the Company performed assessments beyond what is minimally required by law for pipe that is not determined to be seam failure susceptible, including performing a seam-crack tool inspection in 2013, prior to the March 29, 2013 rupture in Mayflower, Arkansas.

In the enforcement action initiated by PHMSA after the pipe failed, the Agency alleged – and the Final Order concludes – that the Company improperly determined that the line was not susceptible to seam failure. As part of the administrative Hearing in this matter, Dr. Kiefner – the same national expert retained a decade ago by the Agency to prepare recommendations for evaluating LF-ERW pipe, recommendations that are still endorsed by the Agency today – stated in an affidavit that "EMPCo's conclusion that the segment was not seam-failure-susceptible under the federal regulations was reasonable, and was consistent with the seam failure susceptibility determination guidance available prior to March 29, 2013." Dr. Kiefner's additional testimony, that the anomaly that failed in 2013 was not capable of reliable detection, is supported by a second PHMSA-commissioned study on LF-ERW pipe led by Battelle Memorial Institute that is now in its fifth year. The final Phase I Battelle report, introduced by EMPCo at the administrative Hearing, states clearly that gaps remain in the industry's understanding of the failure process for this type of pipe. Consequently, neither the applicable law nor the state of expert guidance provide any precise methodology to determine the threat that PHMSA alleges the Company missed.

The Final Order dismisses the conclusions in Dr. Kiefner's affidavit and wholly ignores the Battelle study. Without reference to relevant studies by national experts commissioned by PHMSA, the Final Order simply concludes that the Company failed to properly consider all risk factors on its LF-ERW pipe. That conclusion is contradicted by the evidence and by all expert opinion.

For all of these reasons, the Final Order is not supported by the applicable law or the uncontroverted material facts contained in the underlying record, and its avoidance of the plain language of the law and misstatement of several material facts constitutes an arbitrary and capricious action and an abuse of discretion prohibited by the APA. Reviewing courts in administrative enforcement cases have reversed or remanded agency decisions which misstate material facts and ignore the plain language of applicable law.

The central issue in this matter is whether EMPCo violated existing law in evaluating the threat of seam failure in its LF-ERW pipe. That issue is first asserted in the discussion of Item 1 in the Final Order; Items 2, 3, 4 and 7 derive from, and are all premised on, the incorrect conclusion set forth in the decision's treatment of Item 1. Items 5, 6, 8 and 9 are more fact specific issues that do not directly relate to the question of evaluating seam threat, and the deficiencies for these four findings are treated separately below.

If the Agency's Final Order is allowed to stand, this Company and the entire industry would be required to make significant changes to their pipeline integrity management programs without clear regulations or fair notice as to the Agency's new proposed standardized approach to seam integrity evaluation. It would cost industry hundreds of millions of dollars in applying additional and more frequent seam tools or in performing potentially unnecessary and destructive hydrotests. If PHMSA wants to impose such dramatic and costly requirements, without the support of any technical studies or expert advice, it should do so through the recognized rulemaking process, where public notice and comment, as well as cost-benefit analysis, are required; it should not do so through inconsistent regional enforcement.

Since neither the facts nor the applicable law support the Agency's decision in this matter, Respondent respectfully submits that the Agency is effectively invoking a strict liability theory simply because an incident occurred. Congress did not give that authority to PHMSA, and the Agency cannot enact this strict liability approach on its own. Finally, the Agency's decision implicates other due process concerns, more fully discussed below.

As a result of these legal and factual deficiencies, the Agency's decision should be withdrawn or revised.

II. <u>This Petition is Timely</u>

PHMSA regulations allow, at 49 C.F.R. Part 190.243, a Respondent to submit a Petition for Reconsideration of a Final Order to the Associate Administrator, with copy to the Agency's Chief Counsel. Such Petition must be submitted within 20 days of receipt of a Final Order. The Final Order in this matter was issued on October 1, 2015, thus this Petition is timely. This Petition and accompanying exhibits are submitted in order to respond fully to the statements and

conclusions set forth in the Final Order, in compliance with 49 C.F.R. Part 190.243(b). The Respondent has simultaneously submitted a Motion to Stay Compliance Order, directed to the Associate Administrator with copy to the Chief Counsel.

III. PHMSA Incorrectly Concludes that EMPCo Did Not Properly Consider the Susceptibility of the Pegasus Pipeline to Seam Failure (Items 1-4, 7)

This case presents an important question of law under the Pipeline Safety Act (PSA): whether PHMSA can conclude, after the fact, that an operator has violated Agency regulations when no specific regulation exists to support the government's theory, no precedent supports the theory, no facts support the theory, and the technical guidance commissioned by the Agency undermines the theory. In this case, PHMSA has interpreted and applied regulations in a new way, which could have dramatic impacts on this Respondent as well as the entire industry. Given the complexity of pipeline integrity management, if the Agency wishes to mandate certain operator behavior, it should use the regulatory rulemaking process as contemplated under the APA, and not engage in selective post-incident rulemaking by enforcement. Without the due process afforded by APA rulemaking procedures, the industry faces regulatory uncertainty and is left to speculate about directives the Agency may impose in post-incident enforcement, which are often inconsistent across regions.

A. EMPCo Complied with Applicable Law

There is no applicable law expressly on point for Items 1-4 and 7. The Agency's Notice of Probable Violation (NOPV) and the Final Order cite to 49 C.F.R. Parts 195.452(e)(1); 195.452(b)(5); and 195.452(j)(2-4). None of those provisions directly establish special assessment rules for LF-ERW pipe. As discussed below regarding Item 8, the NOPV was imprudently drafted, and few of its references to the alleged violations are directly on point. The two integrity management regulations that *are* on point regarding LF-ERW pipe – 195.452(c)(1)(i) and 195.452(j)(5) – are relegated to footnotes in the Final Order. *PHMSA Final Order CPF 4-2013-5027, p. 5 note 20, p. 8 note 37, p. 13 note 56 (Oct. 1, 2015)*. Even those rules fail to provide clear requirements regarding a method for determining seam failure susceptibility or to specify a type of tool for assessing those pipelines.

PHMSA regulations set forth minimum standards, often incorporating technical standards and methods, that require operators to prepare procedures to implement those standards. *49 C.F.R. Part 195*. PHMSA rules regarding pre-1970 LF-ERW pipe for liquid pipelines are minimal, vague, and more advisory than prescriptive. The entirety of the law relevant to the issue presented in this case – *whether Respondent evaluated the risk of seam failure on a segment of LF-ERW pipe* – is as follows:

> An operator must base the assessment schedule [of pipe subject to integrity management program (IMP) regulations] on all risk factors that reflect the risk conditions on the pipeline segment. The factors that an operator must consider include, but are not limited to: [results of previous integrity assessments; manufacturing information and seam type; leak history; operating stress level, among other factors.].

49 C.F.R. Part 195.452(e); and

> The methods an operator selects to assess low frequency electric resistance welded pipe or lap welded pipe susceptible to longitudinal seam failure must be capable of assessing seam integrity and of detecting corrosion and deformation anomalies.

49 C.F.R. Parts 195.452(c)(1)(i); 195.452(j)(5).

From that scant regulatory language the Agency layers presumption upon presumption to imply what Respondent ***should*** have done to discover the pipe anomaly that ultimately failed on March 29, 2013. None of those presumptions (converted to findings in the Final Order) were supported by prior Agency rule or guidance, and none are based on precedent or expert opinion. ***All*** of the findings in this matter, however, are based on hindsight and second guessing. This is not the way that law is intended to develop; regulation by enforcement is not something the regulated community can use to guide compliance programs, or apply consistently.

Under the integrity management regulations, PHMSA requires that operators consider manufacturing information and seam type as risk factors in threat identification. *49 C.F.R. Part 195.452(e)(1)(ii)*. The record reflects that EMPCo did that. *Hearing Ex. 8-9, 13-19, 21-22, 29, 34-35*. In addition, where a segment is found to be susceptible to seam failure, an operator must use integrity tools that are capable of assessing seam integrity and of detecting corrosion and deformation anomalies. *49 C.F.R. Part 195.452(j)(5).* Where a segment is not found to be susceptible, it can be assessed by internal inspection tools capable of detecting corrosion and deformation anomalies only (*i.e.,* no tool "capable of assessing seam integrity" is required). *Id.* The record reflects that EMPCo did that. *Hearing Ex. 50, 54*.

To assist the industry in evaluating the risk of LF-ERW pipelines, the Agency commissioned a study that was published in 2004. *Hearing Ex. 3* (*Michael Baker,* "*Low Frequency ERW and Lap Welded Longitudinal Seam Evaluation, Final Report (rev. 3)" (Apr. 2004)*, co-authored by Dr. Kiefner) *("Baker Report")*; *Advanced Notice of Proposed Rulemaking, 76 Fed. Reg. 53,086, 53,097 (Aug. 25, 2011)* (noting that the Baker Report "provided suggested guidelines that can be used to create policy for longitudinal seam testing"). The Baker Report then specifically included a "standardized, systematic approach to evaluation of longitudinal seam integrity," offering a "decision tree [Figure 4.1] that allows one, by supplying appropriate data on a given segment, to determine if a seam-integrity assessment is required based on the federal pipeline integrity management regulations." *Baker Report at pp. 2, 16.*

To date, the Baker Report remains the only guidance that the Agency has provided to the regulated community on this issue. EMPCo followed that guidance and ***retained*** one of the authors of the report, Dr. Kiefner, to apply that guidance to the very pipe at issue in this matter.

Further, the Agency represented in guidance that "operators [should] determine and apply the most appropriate integrity assessment method," and that PHMSA will (through audits) "review operator integrity management programs to be sure the operator selects an appropriate method(s) for addressing the integrity concerns of ERW and lap welded pipe." *PHMSA, Hazardous Liquid Integrity Management: FAQs, FAQ-6.10 (Feb. 18, 2003).*

The Agency reviewed EMPCo's seam susceptibility process multiple times and found no issues, clearly and unmistakably signaling to EMPCo that it had, in fact, selected an appropriate method for addressing the integrity concerns of LF-ERW and lap welded pipe, in accordance with PHMSA guidance. After the incident, Dr. Kiefner stated in an affidavit that "EMPCo's conclusion that the segment was not seam-failure-susceptible under federal regulations was reasonable, and was consistent with the seam failure susceptibility determination guidance available prior to March 29, 2013." *Hearing Ex. 1, Kiefner Affidavit ¶ 19*. Further, Dr. Kiefner concluded, "[t]he seam-integrity assessment activities that EMPCo employed on this segment of pipe were consistent with the Baker Report Flow Chart and IMP regulations and guidance in effect at the time." *Id. at ¶ 21*.

In short, the record shows that the Company did far more than required by existing regulations to assess LF-ERW pipe for seam failure. PHMSA erroneously suggests, however, that the Company's seam failure susceptibility analysis somehow contributed to the Pegasus failure. In doing so, PHMSA disregards the Root Cause Failure Analysis (RCFA) associated with the failure. As noted by Dr. Kiefner, the "pipe at the point of failure [in Mayflower] was unique," and the specific anomaly that caused the failure "was not capable of reliable detection given that it exhibited atypical characteristics not frequently seen before in the industry." *Hearing Ex. 1, Kiefner Affidavit ¶ 24.*

The Agency's decision to the contrary is simply not supported by the law or facts.

B. Strict Liability is not Authorized by the Pipeline Safety Act

The PSA contains no strict liability provision that allows PHMSA to establish liability for a pipeline incident without fault (*i.e.,* liability simply because an incident occurred, as opposed to a violation of existing law). As a result, the Agency must prove alleged violations, not presume them. It has not done so in this case.

It should be clear that the primary focus of this Petition for Reconsideration is the legal and factual bases which PHMSA uses to support its Items 1-4 and 7 violations. This Petition presents a fundamental question of how the Agency implements the authority Congress has granted to it. *FDA v. Brown & Williamson Tobacco Corp, 529 U.S. 120, 125 (2000)* ("Regardless of how serious the problem an administrative agency seeks to address . . . it may not exercise its authority in a manner that is inconsistent with the administrative structure that Congress enacted into law."). Without Congressional authorization, no federal administrative agency is allowed to invoke strict liability for incidents, or create regulatory alleged violations after an incident has occurred, when no applicable law exists. PHMSA is no exception.

C. PHMSA Disregards and/or Mischaracterizes Material Facts

The Agency's Final Order ignores and mischaracterizes material facts and evidence with regard to the Pegasus pipeline and the state of the Agency and the industry's understanding of LF-ERW integrity risks. Indeed, there are well over a dozen material misstatements and inaccuracies throughout the Final Order, many of which are further detailed in *Petition for Reconsideration Ex. 83, PHMSA Final Order Mischaracterizes Material Facts and Evidence*. If allowed to stand, these material misstatements and inaccuracies, which the Agency relies on to support its conclusions in the Final Order, constitute an abuse of discretion under the APA. This after-the-fact enforcement action, which rejects more than a decade of guidance, is arbitrary and capricious. *Gose v. U.S. Postal Service, 451 F. 3d 831, 840 (Fed. Cir. 2006)* (finding agency action to be arbitrary and capricious that was based upon an erroneous interpretation of its own regulations). If PHMSA wants to change how it regulates LF-ERW pipe, the APA requires public notice and comment rulemaking. It is not appropriate to regulate through enforcement.

1. *PHMSA Dismisses LF-ERW Expert John Kiefner*

PHMSA's Final Order dismisses record testimony by Dr. John Kiefner with regard to the process he developed (commissioned by the Agency) as one of the nation's leading experts on LF-ERW pipeline integrity issues with specific knowledge of this matter. *Final Order pp. 10-11*; *see also Petition for Reconsideration Ex. 82, Supplemental Affidavit of John Kiefner*. In direct contradiction to the Final Order, Dr. Kiefner explains in his affidavit that hydrostatic failures alone are not indicative of seam failure susceptibility, in the absence of evidence of fatigue or selective seam weld corrosion. *Hearing Ex. 3, Baker Report, p. 18 and Petition for Reconsideration Ex. 82, Supplemental Affidavit of John Kiefner ¶ 7; cf. to Final Order at pp. 9-11*. Dr. Kiefner concludes that EMPCo's determination that the segment was not seam failure susceptible under the federal regulations was reasonable and consistent with industry guidance. *Hearing Ex. 1, Kiefner Affidavit ¶¶ 19, 21.* After personal examination of the data for the pipe segment at issue, Dr. Kiefner concluded that the segment exhibited "atypical characteristics not frequently seen before in the industry," which were not exhibited in prior hydrostatic test failures on the Pegasus Pipeline. *Id. at ¶ 24.*

PHMSA presented no expert at the Hearing to disagree with Dr. Kiefner's findings. PHMSA's Final Order instead mischaracterizes the LF-ERW seam failure susceptibility analysis process established and outlined by Dr. Kiefner and disregards his statements in the record. Dr. Kiefner's uncontroverted expert opinion directly contradicts the Agency's findings with regard to analysis of the seam susceptibility of the Pegasus Pipeline. Dr. Kiefner reaffirms and supplements his conclusions in the attached Supplemental Affidavit. *Petition for Reconsideration Ex. 82, Supplemental Affidavit of John Kiefner ¶¶ 7-8, 18, 20, 22, 24*. The Final Order does not refute or rebut this expert testimony; it ignores it.

2. *PHMSA Misrepresents Industry ERW Reports*

The Agency's citations to two key reports regarding how operators can evaluate LF-ERW pipe for risks of seam failure are taken out of context and selectively omit relevant portions of those reports. *Petition for Reconsideration Ex. 83, EMPCo Chart - PHMSA Mischaracterizes*

Material Facts and Evidence in the Final Order. The reports are Dr. John Kiefner's "*Dealing with Low Frequency Welded ERW Pipe and Flash-Welded Pipe with Respect to HCA-Related Integrity Assessments" (Feb. 2002) ("Kiefner Report"), Petition for Reconsideration Ex. 93.* and the Baker Report. PHMSA ignores one of the critical questions, and a key analytical step fundamental to the seam failure susceptibility analysis process outlined in those reports—determining whether prior failures were affirmatively caused by fatigue and preferential seam corrosion. *See e.g., Hearing Ex. 3, Baker Report, p. 1.* Indeed, the Baker Flowchart analysis specifically asks whether the prior seam failures were "Fatigue or Grooving Related Failure[s]." If "yes" the segment is "susceptible to seam failure." *Hearing Ex. 3, Baker Report, p. 18, Figure 4.1.* If "no" or "unknown," the operator continues through the flowchart, ultimately ending with either "Baseline needed" or "not susceptible to seam failure." *Id.* PHMSA explicitly acknowledges in the Final Order that, "[t]he failures were analyzed for evidence of pressure cycling induced fatigue and preferential seam corrosion, but neither condition was detected" and "[t]he evidence supports Respondent's assertion that prior seam failures did not exhibit evidence of fatigue." *Final Order at p. 9-10*. Given these factual admissions about the absence of cycling fatigue and seam corrosion, PHMSA cannot, in the same document, ignore them and reach an opposite conclusion to justify its enforcement against EMPCo.

In addition, the Agency completely fails to acknowledge the fact that the process outlined in those reports already accounts for the potential brittle nature of LF-ERW pipe. *Hearing Ex. 3, Baker Report, p. 8* ("It is safe to say that all low-frequency and DC-welded materials possess bondline regions that are prone to low toughness and brittle-fracture behavior."). In focusing on the brittle nature of the pipe at issue, the Agency argues that the Baker process was not appropriate for this type of pipe. *Final Order, pp. 10-11*. That directly contradicts the Baker Report and industry experience. *Petition for Reconsideration Ex. 83, EMPCo Chart - PHMSA Mischaracterizes Material Facts and Evidence in the Final Order*; *see also Petition for Reconsideration Ex. 82, Supplemental Affidavit of John Kiefner, Ex. 82, ¶ 9* ("The Final Order misinterprets the process outlined in the Baker Report and my 2002 report"), *¶ 10* ("I disagree with PHMSA's suggestion [regarding a portion the Baker Report]."), *14* ("The PHMSA Final Order's discussion of brittleness is misleading."), *17* ("In contrast to PHMSA's conclusions, the relevant consideration for a LF-ERW pipeline's fatigue life is not toughness of the bond line region.").

The Agency commissioned these reports and for more than a decade has encouraged operators to use them. *In re Kinder Morgan Energy Partners, CPF No. 1-2004-5004 (Jun. 26, 2006)* (encouraging use of Dr. Kiefner's methodology as guidance); *PHMSA, Hazardous Liquid Integrity Management Enforcement Guidance (Section 195.450 and 452)* (citing the Baker Report as a reference). The Final Order, however, blatantly ignores entire sections of these reports.

3. *PHMSA Does Not Mention Battelle ERW Study or EMPCo RCFA*

The state of expert advice on LF-ERW pipe has not provided any precise methodology for fully mitigating all potential causes of seam failure. The ongoing Battelle study's interim conclusions illustrate that point. *Post-Hearing Ex. 66, Final Summary Report and Recommendations for the*

Comprehensive Study to Understand Longitudinal ERW Seam Failures—Phase I, Battelle (Oct. 23, 2013). That study concluded that "gaps remain both in the understanding of the failure process, and in quantifying the effectiveness of current schemes and technology to manage the ERW pipeline network." *Id. at vi*; *see also Comprehensive Study to Understand Longitudinal ERW Seam Failures, 17th Quarterly Report, Battelle, (Aug. 31, 2015)* (noting that the next phase of the study has been initiated but it has not made any conclusions to date). Even though it was discussed at the Hearing and in the Company's brief, the Final Order does not even address this study, despite its clear relevance to PHMSA's findings against EMPCo.

In describing the cause of the Pegasus incident, PHMSA also completely disregards the Company's RCFA and supporting documentation. *Hearing Ex. 56*. Consistent with the RCFA, Dr. Kiefner noted in his affidavit, the "pipe at the point of failure [in Mayflower] was unique," and the specific pipe anomaly that caused the March 29, 2013 incident "was not capable of reliable detection given that it exhibited atypical characteristics not frequently seen before in the industry." *Hearing Ex. 1, Kiefner Affidavit ¶ 24.* Such a conclusion is entirely consistent with a fundamental fact—the 850 plus mile Pegasus Pipeline operated for more than 60 years without a similar incident. The Agency's Final Order proceeds, however, as if the pipe characteristics and anomaly at issue are commonplace for LF-ERW pipe, should have been obvious to the Company, and would have been easily capable of detection. Those "findings" are not remotely supported by the record.

D. EMPCo's Seam Failure Analyses and Conclusions are Consistent with Applicable Law (Item 1)

The record reflects that EMPCo expressly and properly considered the seam failure susceptibility of the Pegasus Pipeline, in compliance with applicable law. As outlined above, PHMSA Part 195 integrity management regulations do not mandate a particular process for determining whether a pipeline is susceptible to seam failure, or how an operator must conduct its susceptibility analysis. Simply because one Region within the Agency disagrees—after the fact—with EMPCo's conclusion, does not mean that the Company violated any law.

The record shows that the Company did far more than required by existing regulations to assess LF-ERW pipe in its Pegasus Pipeline. The Company, following the Baker and Kiefner reports and its IMP, continuously reevaluated the pipeline's susceptibility to seam failure, starting in 2004-2005, and revisited and reassessed its evaluation based on updated data in 2007, 2009 and 2011. Further, the Company used more conservative intervals and tools than required under the regulations.

1. *Analysis of Hydrotest Failures and In-Service Leak*

Applicable law does not articulate a specific process for analyzing seam failure susceptibility or even provide a set of factors to follow. Instead, operators are required by law to prepare and comply with their own written procedures. *49 C.F.R. Part 195.452(b)(1)*. Under EMPCo's IMP, the Company's process for analyzing seam susceptibility and fatigue analyses is based on the protocol outlined in the PHMSA-commissioned Baker Report that was prepared in consultation with Dr. Kiefner. *Hearing Ex. 4, 53*. As outlined in the Baker Report, seam related in-service failures and hydrostatic test breaks alone are not an indication that a pipeline is susceptible to seam failure. *Baker Report, pp. 1, 18; see also Petition for Reconsideration Ex. 82, Supplemental Affidavit of John Kiefner ¶ 7* ("seam related in-service failures and/or hydrostatic test breaks or leaks by themselves do not indicate that a pipeline is susceptible to seam failure."). Those failures should be analyzed for two primary causes: pressure-cycle-induced fatigue and selective seam corrosion. *Id.* (noting that "no other causes" are mentioned in the Baker Report because those two causes "are the primary causes of ERW seam failures"). Further, Kiefner's methodology is recognized in PHMSA enforcement proceedings as an acceptable means of performing a seam failure susceptibility analysis. *In re Kinder Morgan Energy Partners, CPF No. 1-2004-5004 (Jun. 26, 2006)* (characterizing Dr. Kiefner's methodology as guidance available to the industry for determining the susceptibility of ERW pipe to seam failure).

As applied to the Pegasus Pipeline, the Company's analyses expressly considered all available information, including its manufacturing history, pipe materials (including actual toughness values once available), 60-plus years of operating and maintenance history, leak history, and the results of prior pressure tests and integrity assessments (and subsequent metallurgical analysis). *Hearing Ex. 8-9, 21-22, 29; see also Petition for Reconsideration Ex. 84, EMPCo Graphic - Baker Report Long Seam Failure Susceptibility (LSFS) Analysis, Figure 4.1 as Applied to EMPCo's Conway to Foreman Segment (prior to March 29, 2013)* (excerpted below). After its initial analysis in 2004/2005, the Company reevaluated its determination three additional times in 2007, 2009, and 2011, using updated operating information and representative toughness values. *Id.* This included consideration of leak history, a single 1984 two gallon pinhole leak at a seam that was permanently repaired with a two foot wrap. *Petition for Reconsideration Ex. 85, EMPCo Maintenance Report (03/06/1984)*. The Company's analysis also considered seam-related breaks in 1969 and 1991 hydrostatic tests. *Hearing Ex. 22*. In addition, though the pipeline experienced seam-related breaks during the 1969, 1991, and 2006 hydrostatic tests, none of those breaks exhibited evidence of fatigue or selective seam corrosion. *Hearing Ex. 8-9, 21-22, 29; Petition for Reconsideration Ex. 82, Supplemental Affidavit of John Kiefner ¶ 8* ("[T]here were no failures that were known to have been caused by time dependent defects. Further there was no evidence of aggressive pressure cycling."); *Final Order, p. 9.* In addition, the pressure cycle fatigue on the pipeline was never more than light to moderate (as opposed to aggressive). *Id.* As a result, the process did not result in an affirmative finding that the pipeline was susceptible to seam failure. *Id.*

Baker Report Long Seam Failure Susceptibility (LSFS) Analysis, Figure 4.1
As applied to EMPCo 's Conway to Foreman Segment (prior to March 29, 2013)

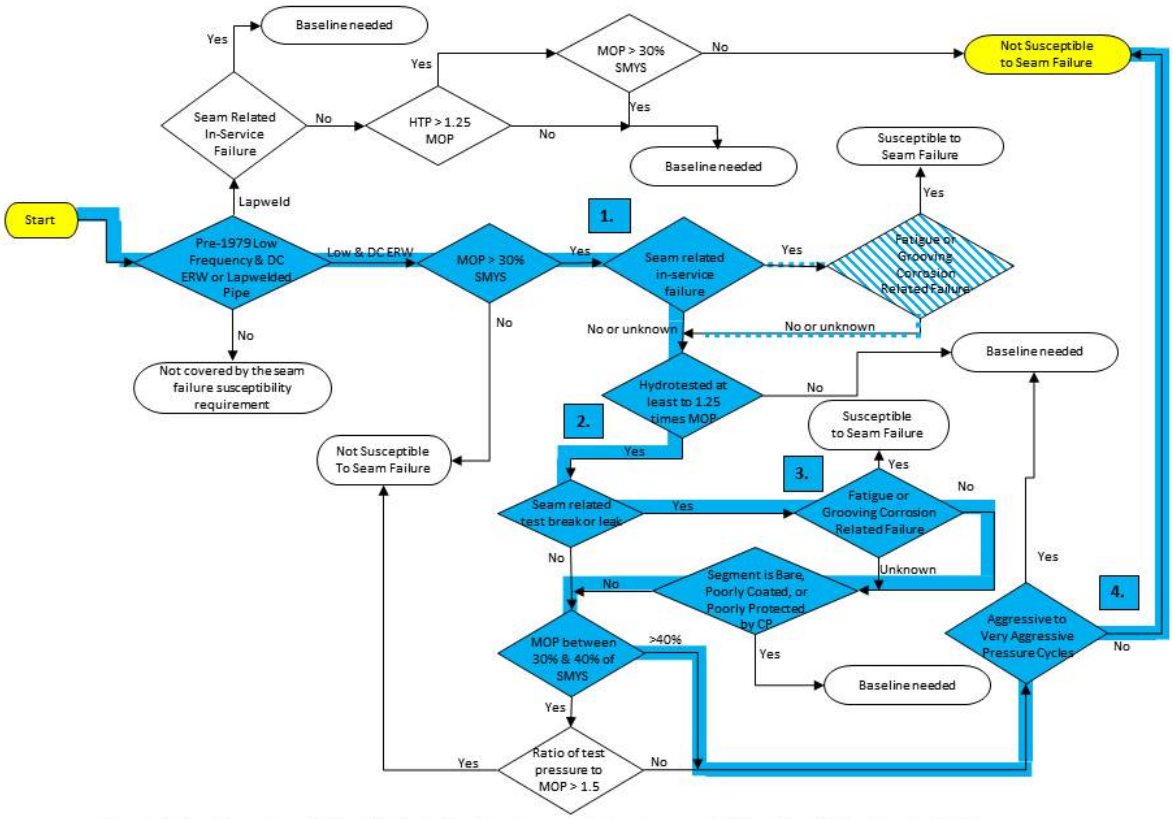
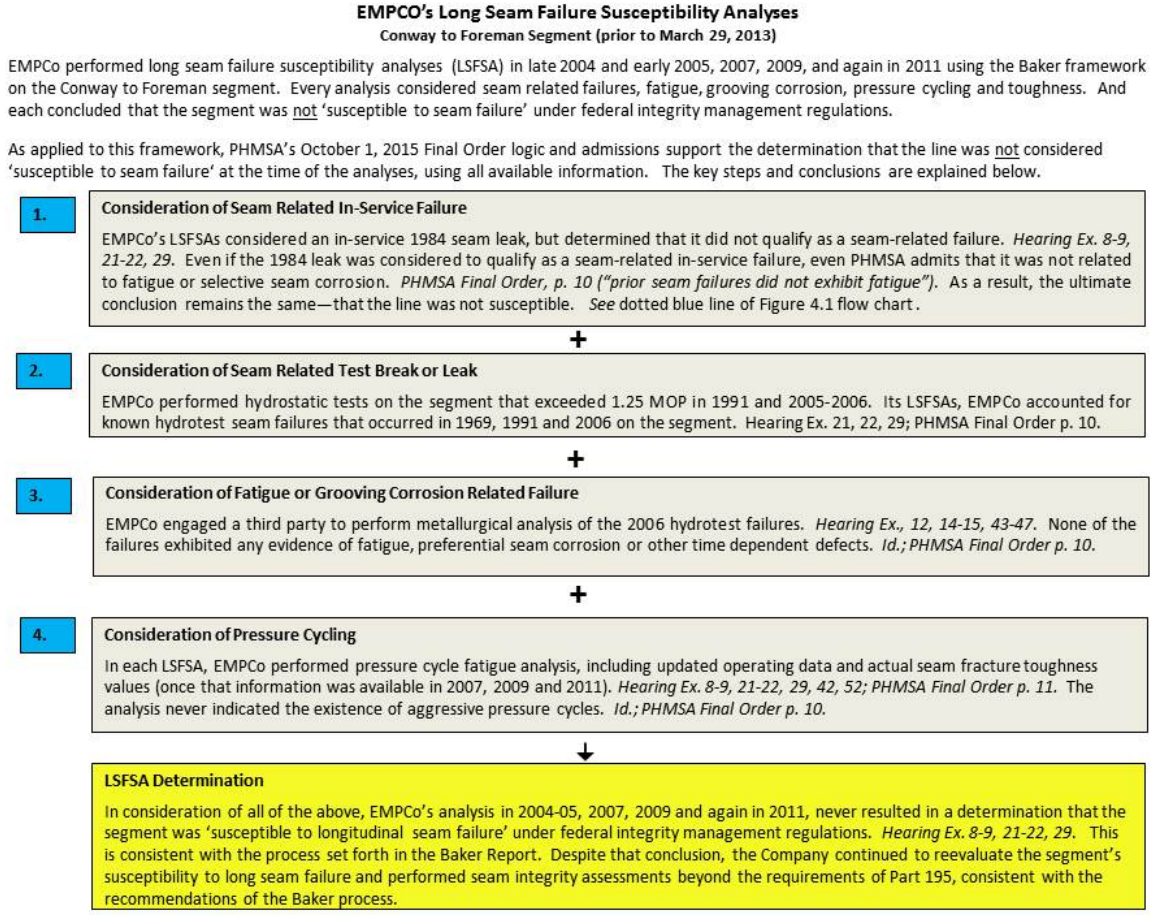


Figure 4.1., Long Seam Susceptibility Criteria For Baseline Assessment, Low Frequency ERW and Lap Welded Longitudinal Seam Evaluation, Final Report rev. 3, M. Baker Jr. Inc. (April 2004) (Hearing Exhibit 3, "Baker Report").

In its IMP, EMPCo explicitly implemented a seam failure susceptibility analysis process that was consistent with the Baker Report and Kiefner Report. *Hearing Ex. 4, 53*. Indeed, the Baker Report is included as an Appendix to the Company's IMP, and Kiefner's "Long Seam Failure Susceptibility Criteria" Flowchart is directly copied and incorporated. *Id.* As evident from the above Flowchart (taken directly from Figure 4.1 of the Baker Report), PHMSA's allegation that EMPCo should have concluded the pipeline was "susceptible to seam failure" under the guidance is insupportable. Every analytical step taken by EMPCo, as highlighted above, is fully supported by the record.

Indeed, as to this particular analysis, PHMSA concedes the most important criteria that essentially distinguishes the "Susceptible to Seam Failure" result from the other two options—"Baseline needed" or "Not Susceptible to Seam Failure." *Hearing Ex. 3, p. 18, Figure 4.1*. When evaluating prior in-service or hydrostatic failures, the process clearly asks whether such failures were affirmatively "fatigue or grooving corrosion related failure[s]." *Id.* If, and only if, the answer is "yes," the segment is considered "Susceptible to Seam Failure." *Id.* Where the answer is "No" or "Unknown," then the segment cannot be found "Susceptible to Seam Failure" on the Flowchart. *Id.* PHMSA explicitly acknowledges that "The failures were analyzed for evidence of pressure cycling induced fatigue and preferential seam corrosion, but neither condition was detected" and "The evidence supports Respondent's assertion that prior seam failures did not exhibit evidence of fatigue." *Final Order, p. 9-10*. As indicated by the above

chart, and all evidence in the record, PHMSA's concessions in the Final Order would similarly lead to a conclusion of "Not susceptible to Seam Failure."



This process and conclusion are consistent with the guidance provided by Dr. Kiefner. *Hearing Ex. 1*, ¶¶ *13-14, 17-19* (noting in particular "EMPCo's conclusion that the segment was not seam-failure-susceptible under federal regulations was reasonable, and was consistent with the seam failure susceptibility determination guidance available prior to March 29, 2013."); *Petition for Reconsideration Ex. 82, Supplemental Affidavit of John Kiefner* ¶ *18* ("[T]he Company correctly followed the guidance described in the Baker Report, which would not have resulted in a finding that the failed segment was 'susceptible to seam failure in the context of the Part 195 IMP regulations.'").

2. *Consideration of Pipeline Toughness*

In addition to analyzing the hydrostatic test failures for evidence of time dependent defects such as fatigue and grooving corrosion, the above-referenced metallurgical reports measured and reviewed the pipe's toughness properties (*i.e.,* the measure of the pipe's brittleness). *Hearing Ex. 12, 14-15, 43-47*. When the Company conducted remaining pressure-cycling fatigue life analysis, the Company used those actual representative toughness values in its PipeLife software (developed by Dr. Kiefner) to account for the pipe's toughness consistent with the program

manual. *Petition for Reconsideration Ex. 86, PipeLife User Manual, Kiefner & Associates, Inc. (October 2004), p. 8; Hearing Ex. 8-9, 21-22, 29, 42, 52*. Under the PipeLife analysis, the segment always reflected a conservative remaining theoretical life.

As explained in more detail in the attached Exhibit 83, PHMSA's focus on brittleness and toughness is misplaced and contrary to the Baker Report. *Petition for Reconsideration Ex. 83, EMPCo Chart - PHMSA Mischaracterizes Material Facts and Evidence in the Final Order*. The Final Order focuses on brittle cracking evidenced by the 2006 hydrostatic test failures and low toughness values of the bond line. *Final Order, p. 10*. Yet all LF-ERW materials possess bond line regions that are prone to low toughness and brittle fracture. *Baker Report, p. 8; Petition for Reconsideration Ex. 82, Supplemental Affidavit of John Kiefner, ¶ 11*. Because small brittle defects will rarely fail in service and larger defects are typically discovered through hydrostatic tests, brittle defects are not an indication that pipe is susceptible to seam failure (unless they exhibit evidence of fatigue or seam corrosion). *Id.* The toughness of the pipe seam "is simply not relevant to this analysis." *Id. at 13*.

The Final Order also finds that due to the brittle nature of the pipe, it was "not appropriate" to base a conclusion regarding seam failure susceptibility on the PipeLife fatigue analysis program because it relied upon ductile behavior. *Final Order, p. 10*. Pressure-cycle-induced fatigue failures do not initiate in the bond line, but initiate in the heat affected base metal that tends to exhibit ductile behavior. *Petition for Reconsideration Ex. 82, Supplemental Affidavit of John Kiefner, ¶ 14*. As such, the PipeLife software is based on the toughnesses associated with ductile behavior and is appropriate to analyze LF-ERW pipe (with brittle seams). *Id.* Such fatigue calculations "are not invalidated simply because a bond line region exhibits low toughness/brittle fracture behavior." *Id. at 15; see also 17* (noting that toughness is only relevant to fatigue "to establish an initial defect size for the PipeLife analysis.").

EMPCo therefore considered all relevant factors, including low toughness, in analyzing the susceptibility of the Pegasus pipeline to seam failure. In addition to accounting for the history and characteristics of the pipeline in its analysis, the Company incorporated available guidance and resources from leading industry experts on LF-ERW pipe evaluation.

E. EMPCo's Integrity Assessment of the Segment Met Applicable Law and Guidance

EMPCo acted consistently with applicable law and available guidance in scheduling and conducting assessments under PHMSA integrity management rules, as reflected in the record.

1. *EMPCo's Assessment Interval and Tool Selection Complied with Part 195 (Items 2, 3)*

As a result of EMPCo's conclusion that the segment was not "susceptible to seam failure," an integrity assessment was only required once every five years by inline inspection (ILI) tools capable of detecting corrosion and deformation anomalies only (*i.e.*, no tool "capable of assessing seam integrity" was required), a hydrotest, external corrosion direct assessment, or other technology. *49 C.F.R. Parts 195.452(j)(3); 195.452(j)(5).* The Company performed a

hydrotest in 2005-2006, and an MFL (corrosion tool) and deformation ILI in 2010. *Hearing Ex. 40, 50, 51*.

If and only if an operator determines that a segment is susceptible to seam failure, is it required to assess that segment by a method capable of assessing seam integrity (generally referred to as a "seam tool"), in addition to detecting corrosion and deformation anomalies every five years. *49 C.F.R. Parts 195.452(j)(3); 195.452(j)(5)*. Because the line was never determined to be susceptible to seam failure, however, EMPCo was not required to run a seam tool every five years. *Hearing Ex. 8-9, 21-22, 29.* As a result, there was no need to extend the five year reassessment interval and no need to request a variance from Part 195 or its own procedures. Going beyond the requirements of the regulation, however, EMPCo assessed the pipeline with a tool capable of assessing seam integrity (TFI ILI) in 2012/2013. *Hearing Ex. 54*.

2. *EMPCo's Assessment Prioritization and Updating (Items 4 and 7)*

Even though EMPCo determined that the segment was not "susceptible to seam failure," and the next five year reassessment would not, therefore, have required a tool "capable of assessing seam integrity," it voluntarily elected to run an ILI TFI seam/crack tool in 2012. *Hearing Ex. 54*. The IMP rules do not mandate how operators assign risk scores to each risk factor or prioritize assessments, but require that operators consider a number of regulatory factors and conduct a meaningful analysis. *In re Magellan Midstream Partners, CPF No. 4-2006-5020 (Dec. 29, 2009)* ("[195.452(e)(1)] leaves it up to the operator to determine what other factors need be considered, how to assign risk scores to each factor and pipe segment, and how to prioritize assessments."); *see also Petition for Reconsideration Ex. 83, EMPCo Chart - PHMSA Mischaracterizes Material Facts and Evidence in the Final Order, at pp 17-19*. Further, the regulations do not require an operator who voluntarily elects to reassess a line with a seam tool to prioritize that tool run over other segments with higher risk scores.

Based on the information available at the time, the Company's decision to assess the Patoka to Conway segment before the segment at issue (Corsicana to Conway) was based on an analysis that the Patoka to Conway segment presented a higher integrity risk in light of the following key factors: (1) risk scores, (2) hydrostatic seam failures, (3) pressure reversals, (4) theoretical fatigue life, and (5) girth weld leaks. *Hearing Ex. 19, 22 40, 43-47*. As outlined below, all other factors being relatively equal, the lower theoretical fatigue life and the higher number of girth weld leaks in the Patoka to Conway led EMPCo to prioritize that segment for seam assessment. *Id.; see also Petition for Reconsideration Ex. 87, EMPCo Integrity Assessment Data (IAD) Form 3.2 Doniphan to Patoka (06/23/06); Ex. 88, EMPCo IAD Form 3.2 Conway to Doniphan (07/07/06); Ex. 89, EMPCo IAD Form 3.2 Corsicana to Foreman (08/16/06); Ex. 90, EMPCo Patoka to Corsicana LFSA Review (2009).*

Key Factors Considered in Scheduling 2010 ILI Assessment

Factors (based on information available in 2009)	**Patoka to Conway**		**Conway to Corsicana**	
	Patoka to Doniphan	***Doniphan to Conway***	***Conway to Foreman***	***Foreman to Coriscana***
Segment miles	318.17 miles		330.26 miles	
HCA Mileage	315.32 miles		318.59 miles	
Miles of LF-ERW	≤ 318 miles		≤ 314 miles	
2006 TIARA Risk Scores	D3	D3	D3	D3
Hydrotest Seam Failures (2005-2006)	5	1	6	0
Hydrotest Girth Weld Failures (2005-2006)	3	0	0	0
Hydrotest Pressure Reversals (2005-2006).	2	0	2	0
2007 PipeLife Failure Analysis Reassessment Interval	37.36 years	18.1 years	30.5 years	38.15 years

Similarly, the Company was not required by Part 195 or its own procedures to update its risk assessment when the voluntary TFI tool run was moved from 2011 to 2012 - 2013. The Company performed its seam failure susceptibility analysis again in March 2011, which once again indicated that the line was not susceptible. *Hearing Ex. 29*. There was no requirement to update the risk assessment because the ultimate due date as recommended by PipeLife analysis had not changed or been reached. The reassessment interval from the last integrity assessment (the 2010 ILI) was conservative, no changes had occurred that would impact the risk assessment, and the seam failure susceptibility was to be reviewed again in 2013.

For the above reasons, PHMSA has not proven violations for Items 1, 2, 3, 4 and 7 and they should be withdrawn. More to the point, for PHMSA to find a regulatory violation based upon the segment order in which the Company conducted an early and accelerated ILI tool run is arbitrary and capricious.

IV. PHMSA Failed to Prove Items 5, 6, 8 and 9

A. EMPCo Properly Addressed Immediate Repairs and Implemented Timely Discovery (Items 5-6)

1. *Immediate Repairs (Item 5)*

Similar to its treatment of the facts and law underlying its conclusions in the Final Order for Items 1-4 and 7, PHMSA also failed to adequately consider the record on Item 5 and failed to follow applicable law. EMPCo's procedures and its actions in this instance are fully compliant with the law.

In 2007, EMPCo delivered a multi-faceted presentation to PHMSA during the IMP audit, one part of which specifically addressed the Company's process for addressing certain anomalies as safety-related conditions in the context of unvalidated preliminary reports. *Petition for Reconsideration Ex. 91, EMPCo Integrity Management Program Remedial Action Review Presentation (April 2007), p. 7.* In addition, EMPCo's IMP contains the straightforward requirement for immediate repairs, the Company has "5 days maximum to complete the Immediate Repairs or complete the pressure reduction and file Safety-Related Condition Report from the time that an Immediate Repair Conduction is determined to be real." *Hearing Ex. 4 and 53, Section 4.2.2; see also 49 C.F.R. Parts 195.452(h)(4)(i)* (regarding immediate repairs); *49 C.F.R. Part 195.56(a)* (regarding safety related conditions)**.**

The Agency's follow-up to the audit was notably silent in its critique as to how quickly the Company addressed those items or whether additional action (such as a pressure reduction) should be taken. *Petition for Reconsideration Exhibit 94, In re Exxon Mobil Pipeline Co., CPF No. 4-2007-5030M (Aug. 7, 2007); CPF No. 4-20075029W (Aug. 2, 2007).* The Agency has endorsed consideration of safety-related conditions as they relate to immediate repairs. *See e.g.*, *Hearing Ex. 80, In re: Cenex Pipeline Co., CPF 5-2011-5018M (July 26, 2011)* (citing an operator under 49 C.F.R. Part 195.452(h) for failure to reference its safety-related condition report procedure in its IMP manual related to immediate conditions to require a safety-related condition report where a repair cannot be made within 5 days of determination or 10 days of discovery).

EMPCo concurs with the Agency's statement in the Final Order that "[w]hen immediate repair conditions are discovered, an operator must take prompt action to address the condition, which includes repairing the condition as soon as practicable and temporarily reducing operating pressure or shutting down the pipeline until the repair is completed." *49 C.F.R. Parts 195.452(h)(1), (h)(4)(i).* The Agency is incorrect in its ultimate conclusion in regard to Item 5, however, as a matter of fact and law, because both of the conditions at issue were *not* identified as immediate repair conditions in a *preliminary report* from the tool vendor received by EMPCo on August 9, 2010, as alleged by PHMSA in the NOPV, the Hearing and in the Final Order. Further, in both instances, EMPCo repaired the anomalies more quickly than a pressure reduction could have been implemented.

As a matter of record, the preliminary report was received by the Company on August 23, 2010, as acknowledged in the Final Order. *Final Order, note 81, p. 21; Hearing Ex. 24.* As explained by EMPCo, the first condition (at Site MP 164.051) was estimated to be a less than 80% wall loss anomaly on that preliminary vendor report and was therefore *not* identified as an "immediate condition" by the tool vendor. *Hearing Ex. 23; 24.* As a matter of law, an anomaly is not classified as an immediate condition unless and until it is greater than 80% wall loss. *49 C.F.R. Part 195.452(h)(4)(i)(1).* Despite both the applicable law and the fact that a preliminary report is just that – preliminary – and not yet validated, the Company classified this condition as safety-related and repaired it within 5 days, as required by 49 C.F.R. Part 195.55 and consistent with PHMSA guidance. While EMPCo recognizes the regulations do not specifically contain the term "potential immediate," the Company's procedures go beyond the regulations to allow the Company to be proactive in responding to unvalidated vendor reports. Since the anomaly did not

meet the criteria for an immediate condition, PHMSA cannot substantiate the violation found in Item 5.

Also as a matter of record, with respect to the second anomaly at Site MP 142.394 (as well as MP 274.09, which was not alleged in the NOPV but nevertheless raised by PHMSA in the Hearing and improperly included in the Final Order, despite its irrelevance to this proceeding), that anomaly was not identified until receipt of the final report from the vendor on January 10, 2011, *not* August 9, 2010, as alleged by the Agency in both the NOPV and the Hearing. *Hearing Ex. 30; cf. PHMSA Hearing Transcript (Jun. 11, 2014), p. 17*. It was repaired two days later on January 12, 2011, upon excavation (not January 13, 2011, as stated in the Final Order). *Hearing Ex. 31*. The Agency's factual allegation in the NOPV relied on an incorrect date of discovery of August 9, 2010, thus the violation has no basis in fact and therefore none in law. The anomaly at MP 274.09, not alleged in the NOPV, was similarly resolved in a timely manner.

Because there is no basis in fact or in law for the Agency to sustain the allegations in Item 5 of the NOPV, they should be withdrawn.

2. *Timely Discovery (Item 6)*

In its Final Order, the Agency expressly acknowledges that there is no regulation or guidance governing the length of a tool run. *Final Order, p. 24.* There is also no regulation and only minimal guidance regarding the meaning of "impracticability." Yet PHMSA rests its rejection of EMPCo's argument regarding Item 6 that discovery was impracticable solely on the Agency's conclusion that EMPCo's tool run was simply too long. Thus the Agency concluded that the Company itself was responsible for the delay, despite the lack of applicable law on lengths of tool runs, and the fact that the vendor made express commitments to the contrary. There is simply no law or fact to support the Agency's conclusion.

An operator is necessarily dependent upon its tool vendors to conduct ILI runs in order to meet its integrity management obligations. *See, e.g., NTSB Accident Report, "Hazardous Liquid Pipeline Rupture and Release, Marshall, Michigan," at 87 (July 26, 2010)* ("The NTSB recognizes that the tool vendor has a role in the operator meeting the deadlines that are established by the 'discovery of condition' rule . . ."). PHMSA has exercised no authority over tool vendors, and if a vendor contractually commits to a schedule, an operator should indeed be able to rely on that commitment.

EMPCo received express commitments by the vendor that it would provide preliminary data in ample time to allow the Company to validate and integrate the data within the regulatory timeframe. *See e.g., Hearing Ex. 64* (noting that "standard ILI reporting specification for Exxon states that reports should be delivered no later than 90 days" and committing to 90-120 days for the 2013 tool run). The vendor was unable to meet its obligations, however, despite its express commitments and repeated demands from EMPCo. *See e.g., Hearing Ex. 61-63*. Having received the reports late, the Company did not have sufficient time to validate and integrate the data within the regulatory timeframe. Accordingly, as allowed by law**,** the 180-day period was extended for acknowledged reasons and properly documented in accordance with EMPCo's IMP Plan and the regulations. *49 C.F.R. Part 195.452(h)(2)*; *Hearing Ex. 4, 38-39*.

The Agency did not dispute the Company's documentation, but instead arbitrarily chose to lay blame on the Company for the vendor's failure to timely provide the data which the Company demanded and the vendor committed it would provide. The Agency's rationale for finding a violation in Item 6 goes against public policy by undermining the provisions of a bargained for contract. *See, e.g., Tymshare, Inc. v. Covell, 727 F.2d 1145, 1152 (D.C. Cir. 1984)* (explaining the historical emphasis placed by courts and other authorities on "honor[ing] the reasonable expectations created by the autonomous expressions of the contracting parties").

In light of the factual record, the absence of any applicable law governing lengths of tool runs, EMPCo's procedures and its actions in this instance were fully compliant with the applicable law. PHMSA has no legal basis to determine otherwise, and its findings regarding Item 6 should be withdrawn.

B. PHMSA Failed to Properly State a Claim (Item 8)

The Agency improperly alleged Item 8 under 49 C.F.R. Part 195.402 (which addresses operations and maintenance manuals), instead of Part 195.452 (which is specific to integrity management requirements). In the Final Order, the Agency refers to 49 C.F.R. Part 195.402(c), which generally cross-references the subpart under which the integrity management regulations appear (in addition to many other regulations), and concludes that this allegation was, therefore, properly pleaded. PHMSA made no reference whatsoever to Part 195.402(c) in its NOPV or in the Hearing. As set forth in EMPCo's Post-Hearing Brief, the entirety of the discussion at the Hearing centered on the IMP rules at 49 C.F.R. Part 195.452.

It was not until the post-Hearing Region Recommendation that the Agency attempted to connect 49 C.F.R. Part 195.402 to the integrity management requirement at issue. It is abundantly clear from the focus of the pleadings and from the Hearing, however, that the Agency's allegation relates to the Company's compliance with the integrity management regulations at Part 195.452, a point which even the Final Order concedes. *Final Order, p. 28*. As such, this allegation should not be permitted to stand, because the Agency failed to properly state a claim at the outset in the NOPV. PHMSA acknowledges that enforcement actions must meet the basic relevance tests for pleadings that apply to all adjudications, both administrative and judicial. *Hearing Ex. 76, In re Rocky Mountain Pipeline System, LLC, CPF 5-2004-5001 (Dec. 11, 2006) p. 7* (withdrawing the alleged violation "because the regulation cited does not relate to the alleged problem").

Even assuming the Agency properly pleaded this allegation as a matter of law – which we dispute – the Agency is still incorrect as a matter of fact because the record clearly demonstrates EMPCo properly implemented its own threat identification and risk assessment (TIARA) analysis. In the Final Order, the Agency determined that the Company selectively used its IMP TIARA process in violation of its own IMP manual, resulting in the failure to characterize the risk of a release to certain areas. To the contrary, the record reflects that the Company precisely followed its own procedures and there was no failure to accurately characterize the risk of a release to certain areas. *Hearing Ex. 7, 28, 34, 36-37*. This is supported by nationally recognized integrity management expert, Kent Muhlbauer, with whom the Company consulted in preparing and implementing its IMP, who stated that EMPCo "properly recognized the issues

associated with LF-ERW pipe, reacted to the threats on the Pegasus pipeline, and complied with the Part 195 IMP regulations." *Hearing Ex. 2, ¶¶ 11-12*.

There is simply no support in fact or law for the Agency's conclusions in regard to Item 8, and they should be withdrawn.

C. EMPCo Followed its Management of Change Procedures (Item 9)

The Final Order selectively considers the facts with respect to Item 9 and therefore draws a legal conclusion without an appropriate factual basis. PHMSA alleged that the Company failed to follow its own IMP procedures by not creating Management of Change (MOC) documentation when the decision was made to merge test segments for ILI purposes. Item 9 asserts a violation of 49 C.F.R. Parts 195.452(b)(5) and (j)(1). In the Final Order, the MOC documentation issue was reviewed by itself, without consideration of the facts that were presented at the Hearing with respect to the inability of the Company's threat identification and risk assessment process to dilute risk over the merged segments. *Final Order, p. 30-31, cf. Transcript p. 69, line 23-p. 70, line 12.* As a result, the Agency does not fully consider the facts and misapplies the law.

As clearly reflected in the record and further discussed at the Hearing, EMPCo created two different MOC forms to support its decision, following a 2005 risk analysis that *specifically* considered the impact of the merger of testable segments on IMP ILI assessments. *Hearing Ex. 10; 11*. Moreover, EMPCo concluded that there would be no negative impact to the integrity risk assessment process. *Id.* This analysis is reflected in the two MOC forms that Respondent produced to PHMSA, fully consistent with the Company's Operations Integrity Management System (OIMS) procedure 7.2. *Id.* The Final Order, however, capriciously ignores or dismisses the prior risk analysis conducted by the Company, and erroneously concludes there were no "relevant discussion or analysis of the merger of the testable segments." *Final Order, p. 31*.

As such, PHMSA's decision on Item 9 should not be allowed to stand.

V. PHMSA's Compliance Order Should be Withdrawn

Consistent with the arguments set forth above, the Final Order Compliance Order should be withdrawn because Respondent complied with the IMP regulations. As a result, there is no basis for a finding of violation that would allow a Compliance Order. In the alternative, the Compliance Order is overbroad and constitutes an abuse of agency discretion.

The Compliance Order directs EMPCo to undertake activities on "all assets," not just the Pegasus Pipeline. *Final Order, p. 43*. There is no authority under the PSA or the Agency's regulations that authorize application of (alleged) incident-specific corrective actions in a NOPV to other company assets. In addition, established federal case law requires that injunctive relief be narrowly tailored to the specific harm alleged—not potential harm—and that an overbroad scope of injunctive relief is an abuse of discretion. *Ahearn ex rel. N.L.R.B. v. Remington Lodging & Hospitality, 842 F. Supp. 2d 1186, 1205-06 (D. Alaska 2012) (appeal dismissed Apr. 6, 2012) (citing Stormans, Inc. v. Selecky, 586 F.3d 1109, 1140 (9th Cir. 2009))*.

The Compliance Order does just that by applying its requirements to "all assets." Consequently, the Compliance Order should be withdrawn or, at a minimum, modified to tailor the corrective actions to the assets at issue in this enforcement action.

VI. PHMSA Should Withdraw or Reduce the Penalty

The Agency has not proven the findings in the Final Order and has based them upon material mistakes of fact and mistakes of law. As a result, the penalty should be withdrawn or reduced. Additionally, the penalty should be reduced because: (1) Items 1-4 and 7 constitute a related "series of violations" that should be limited to a penalty of $1 million under the PSA, and (2) PHMSA has not proven that Items 1, 2 and 8 were a causal factor of the Mayflower incident.

PHMSA has taken one potential regulatory violation (Item 1) and plead it under four additional regulations. Items 2-4 and 7 are unquestionably a "related series of violations" to Item 1, given that those Items depend on PHMSA's (erroneous) determination that EMPCo improperly concluded the failed segment was not seam failure susceptible. Stated conversely, if Item 1 were to be withdrawn, then Items 2-4 and 7 could not themselves be sustained. While Respondent concedes that Items 2-4 and 7 require proof of additional facts, under the particular facts of this case, the Agency must find as a condition precedent a violation of Item 1 before it can conclude that EMPCo violated Items 2-4 and 7. Consequently, in the context of this case, Items 2-4 and 7 logically constitute a "related series of violations" emanating solely from a violation of Item 1.

PHMSA's Final Order alleged Items 1, 2 and 8 were a causal factor of the incident at issue and warrant the highest level of gravity. *Final Order, pp. 34-34, 38*. In assessing penalties that are greatly impacted by this factor (by how much is not known as discussed in the due process section below), the Agency ignores several undisputed facts. First, the results of the 2012-2013 crack tool assessment did not detect the anomaly. *Hearing Ex. 54*. In addition, the Company's RCFA and expert opinion indicate that the cause was atypical, unique, "not frequently seen before in the industry" and in Dr. Kiefner's analysis "not capable of reliable detection." *Hearing Ex 1, ¶ 24*. For these reasons, PHMSA's penalty should at a minimum be greatly reduced.

While it is generally accepted that "[a]n administrative agency is entitled to substantial deference in assessing the civil penalty appropriate for a violation of its regulations," the agency's choice of a sanction is subject to review, if "it is unwarranted in law or without justification in fact." *NL Indus., Inc. v. Dept. of Trans., 901 F.2d 141, 144 (D.C. Cir. 1990).* Accordingly, while EMPCo believes that Items 2-4 and 7 should be withdrawn, and therefore no penalty should attach, EMPCo maintains in the alternative that these Items are a "related series of violations" subject to the $1 million cap set by statute and that there is no proof that they caused the 2013 incident.

VI. PHMSA Failed to Comply with Due Process

A. Failure to Articulate a Penalty Policy

PHMSA has never provided the pipeline industry with a comprehensive explanation as to how it applies the penalty assessment factors set forth in both the statute and the regulations, at 49 U.S.C. § 60122(b) and *49 C.F.R. Part 190.225*. The Agency has acknowledged the value of a

uniform and publicly available penalty policy, and though it oversees both pipeline safety and hazardous material transportation, the Agency has only issued guidelines for civil penalty assessments in hazardous materials enforcement cases. *49 C.F.R. Part 107, Subpart D, Appendix A*. PHMSA has stated that the purpose of these guidelines is to serve as a "standard to promote consistency" and to "provide the regulated community and the general public with information about PHMSA's hazardous materials penalty assessment process and the types of information or documentation that respondents in enforcement cases can provide to justify possible reductions of proposed penalties." *78 Fed. Reg. 60726, 60727 (Oct. 2, 2013).* Yet PHMSA has not developed any comparable guidelines for the regulated pipeline industry.

The only document that even approximates penalty 'guidelines' from the Agency is a minimal one page internal outline document that the Agency recently provided in the course of another enforcement matter. *Petition for Reconsideration Ex. 92, PHMSA Civil Penalty Summary (09/05/12)* (provided to EMPCo at the administrative Hearing associated with PHMSA CPF 5-2013-5007). In this case, it was not until the Final Order that any substantive explanation was provided to the Respondent, with the exception of an undated worksheet in the Pipeline Safety Violation Report. *PHMSA Pipeline Safety Violation Report, CPF 4-2013-5027, pp. 6-64 (Oct. 23, 2013)*. Yet the Agency set forth very specific dollar amounts for the proposed civil penalties in the NOPV, giving the appearance of more analysis and consideration than the facts or law support. *NOPV, In re ExxonMobil Pipeline Co., LP, CPF No. 4-2013-5027 (Nov. 6, 2013)* (proposing penalties for individual violations in varying amounts—$737,200, $56,100, $102,100, $783,300, etc.—without specifying how these numbers were calculated). Further, there are other instances where PHMSA has alleged the same violations yet inexplicably assessed lower or no penalties. *See e.g. Final Order, In re Tesoro Refining and Marketing Company, CPF No. 5-2007-5027 (June 17, 2010)* (finding a violation of 49 C.F.R. Part 195.452(h)(1) but not assessing a civil penalty for the violation); *Final Order, In re Plains Exploration and Production Energy, CPF No. 5-2004-7002 (May 22, 2007)* (same).

Many agencies (including PHMSA, in the hazardous materials context, and several other agencies within the U.S. Department of Transportation) have implemented express policies to guide their assessment of civil penalties. *See, e.g., PHMSA, Guidelines for Civil Penalties (Hazardous Materials Program), 49 C.F.R. Part 107, Subpart D, Appendix A; Federal Motor Carrier Safety Administration (FMCSA), "Uniform Fine Assessment 4.0" (Aug. 12, 2013); Federal Aviation Administration (FAA) "Policy on Enforcement of the Hazardous Materials Regulations: Penalty Guidelines.* The rationale cited for these policies is almost without exception fairness and consistency, including the need to provide notice of potential penalty amounts to which a regulated entity may be subject. *FMCSA, "Uniform Fine Assessment 4.0," at 6* (providing as the policy's rationale, "to promote uniformity and consistency in the assessment of civil penalties"). The U.S. Environmental Protection Agency (EPA), for example, has for many years made published policies available to regulated entities that guide penalty assessments under various regulatory programs of the Agency. *See, e.g. EPA Policy on Civil Penalties, EPA General Enforcement Policy #GM-21 (Feb. 16, 1984)* (citing as one of EPA's goals in penalty assessment "fair and equitable treatment of the regulated community"); *EPA RCRA Civil Penalty Policy (June 2003)* (listing among the purposes of the policy "that penalties are assessed in a fair and consistent manner").

In addition to enhancing clarity and understanding among regulated entities, these policies also provide a basis for courts and agency decision-makers reviewing penalty amounts to understand the reasons behind the penalty amounts assessed and to ensure that the basis for penalty assessment is fair and consistent. *See, e.g., In re ABG Caulking Contractors, Inc., FAA Docket no. CP-05SO-0050 (Nov. 9, 2006)* (decision by a U.S. DOT Administrative Law Judge determining that the FAA's penalty guidelines, while not binding, were "entitled to substantial weight" because they "represent an effort by the agency to produce even-handed and consistent results in similar cases"). Without the benefit of a published penalty policy, pipeline operators have no means of contesting the various considerations that may inform a PHMSA penalty assessment.

B. The Hearing Officer's Recommended Decision Should be Part of the Record

The Hearing Officer, or "Presiding Official" is defined by the regulations as "an attorney on the staff of the Deputy Chief Counsel who is not engaged in any investigative or prosecutorial functions." *49 C.F.R. Part 190.212.* As such, the Presiding Official is not serving as counsel to the Agency. Rather, the Presiding Official is obliged to conduct a "fair and impartial hearing" and to prepare a recommended decision that is provided to the Associate Administrator for review along with the case file. *49 C.F.R. Parts 190.212(c); 190.213(a).* The Associate Administrator issues the Final Order. *49 C.F.R. Part 190.213(a).*

Industry has made prior requests that the Hearing Officer's recommended decision be provided as part of the Agency's case file, but PHMSA has declined, referring to such recommended decisions as "internal and deliberative communication" or "draft" decisions. *Final Rule, 78 Fed. Reg. 58897, 58901 (Sep. 25, 2013)*. It is undisputed that the role of the Hearing Officer is to be fair and impartial in accordance with 49 C.F.R. Part 190.212, and there should be no privilege attached to a recommended decision. The APA prohibits such internal ex parte communications between an agency and its decision maker in an adjudicative matter. *U. S. Lines, Inc. v. Federal Maritime Commission, 584 F.2d 519, 539 (D.C. Cir. 1978)* ("The inconsistency of secret ex parte contacts [with an agency decision-maker] with the notion of a fair hearing and with the principles of fairness implicit in due process has long been recognized.").

Other agencies' procedural rules contain a mechanism for making the initial decision of the presiding officer in an administrative proceeding available to the parties involved before it is finalized. *See, e.g., 40 C.F.R. Part 22.27(c)* (providing for the initial decision of the Presiding Official in EPA adjudications to be served upon the parties and allowing for parties to subsequently move to reopen the hearing or appeal the initial decision before a penalty is assessed). Such procedures afford affected parties an opportunity to review and/or appeal the initial decision before it becomes operative as final agency action. Because the initial decision is part of the information before the PHMSA Associate Administrator in reviewing the case and issuing a Final Order, it becomes part of the record on judicial review. *Banner Health v. Sebelius, 945 F. Supp. 2d. 1, 15 (D.C. Cir. 2013)* ("Courts in this Circuit have interpreted the 'whole record' to include 'all documents and materials that the agency 'directly or indirectly considered' . . . [and nothing] more nor less.") (internal citations omitted).

As part of the administrative record, the Hearing Officer's recommendation should be available to the parties involved in the adjudication when it becomes available. Otherwise, the Respondent does not have the ability at the Agency level to correct, rebut, or refute what is in the recommended decision. In short, PHMSA's failure to provide the Hearing Officer's recommended decision deprives the Respondent of the opportunity to present a complete defense.

VII. Standard of Review

Under the APA, a court reviewing agency action must set aside that action if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *5 U.S.C. § 706(2)(A*). PHMSA's actions in this case would not withstand scrutiny by a reviewing court applying these standards of review.

Agency decision-making in an adjudication must not only be within the lawful scope of its authority, but the process by which it reaches a result must be logical and rational. *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)*. When reviewing whether an agency's decision-making was "arbitrary and capricious" or an "abuse of discretion," a court will ask whether the agency's decision-making process was a reasonable one based upon the information before the agency at the time, and whether the agency articulated adequate reasons for its decision. *463 U.S. at 42*. To withstand judicial review, an agency must articulate a satisfactory explanation for its actions including a "rational connection between the facts found and the choice made." *Burlington Truck Lines v. U.S., 371 U.S. 156, 168 (1962)*.

PHMSA has not carried its burden in establishing the violations in the Final Order. As previously discussed, the Final Order reflects the Agency's dismissal or mischaracterization of relevant facts in the administrative record. The findings of violation articulated in the Final Order are not supported by a clear explanation of any actions by the Company that constituted a violation of applicable legal requirements. A reviewing court is therefore likely to find that PHMSA's findings of violations are arbitrary and capricious, and/or an abuse of discretion within the meaning of the APA, and that they must be set aside.

VIII. Summary and Conclusion

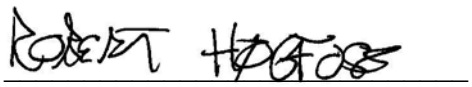
This case is about a regrettable pipeline incident which occurred despite the Company's four comprehensive analyses of the pipeline's susceptibility to seam failure and three integrity risk assessments that were consistent with existing regulations and Agency guidance. It is about an Agency that, despite several previous audits of the Respondent's practices and procedures with respect to LF-ERW pipe which themselves failed to identify the very deficiencies asserted here, only now, in hindsight after the incident, is second guessing a prudent and responsible operator's concerted effort to follow the law. It is about the unlawful application of a strict liability regime being superimposed by PHMSA over an existing regulatory program.

The record in this case shows that PHMSA's allegations concerning EMPCo's analysis of LF-ERW pipe are not supported by any legal requirement, or by the uncontested facts of this case.

The Agency has not proven any violation of applicable law. Instead, the Agency has found violations simply because an incident occurred. Congress did not give PHMSA strict liability authority under the Pipeline Safety Act. To the extent the Agency intends to impose new legal requirements regulating LF-ERW pipe that prescribe more detailed direction on how to conduct threat evaluations, it must promulgate rules. In any event, the Agency should not be permitted to enforce non-existent and unsupported legal requirements.

EMPCo did not violate PHMSA regulations in the manner in which it conducted evaluations of seam integrity on LF-ERW pipe. Neither did the Company violate PHMSA regulations in regard to Items 5, 6, 8 or 9 of the Final Order, as set forth above. Moreover, the Agency has violated Due Process and the APA by its unwillingness to provide meaningful guidance on the application of its penalty authority as well as its failure to provide EMPCo with a copy of the Hearing Officer's recommendation to the Associate Administrator. EMPCo has therefore been deprived of the opportunity to present a complete defense in this matter. Moreover, the Compliance Order exceeds the scope of allowable action, and the penalty imposed is inappropriate and should be withdrawn or substantially reduced.

The Associate Administrator should withdraw or revise his decision of October 1, 2015.



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