

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

In the Matter of	)	
	)	
Texas Eastern Transmission, LP	)	CPF No. 4-2021-034-NOPV
	)	Notice of Probable Violation
Respondent.	)	
	)	

Pre-Hearing Brief

I. Introduction

The Pipeline and Hazardous Materials Safety Administration (PHMSA or the Agency) issued a Notice of Probable Violation (NOPV), proposed civil penalty, and proposed compliance order to Texas Eastern Transmission, LP (TETLP or the Company) on December 21, 2021 as the result of its investigation of an incident that occurred on May 4, 2020 in Fleming County, Kentucky. TETLP is a subsidiary of Spectra Energy Partners LP, which is a wholly owned subsidiary of Enbridge. The NOPV alleged two (2) violations of the Part 192 regulations under 49 C.F.R. §§ 192.613 (Item 1 regarding continuing surveillance) and 192.705 (Item 2 regarding patrolling), proposed a total civil penalty of \$640,300 for both items, and proposed a compliance order associated with Item 2. TETLP timely responded to the NOPV on February 21, 2022 to request a hearing on NOPV Item 1¹ and the opportunity to engage in informal settlement meetings.

The parties convened an informal settlement meeting on April 13, 2022 to attempt to resolve this issue in lieu of a hearing but an agreement could not be reached. PHMSA scheduled a hearing for June 8, 2022, with a deadline of May 27, 2022 for the submission of pre-hearing materials. In advance of the hearing, TETLP timely files this pre-hearing brief and supporting exhibits, reiterating its request that NOPV Item 1 and the associated proposed civil penalty of \$552,900 be withdrawn as a matter of fact and law.

This is the first enforcement action issued by PHMSA under this regulation associated with the geohazard threat, and presents two straightforward questions: (1) whether TETLP maintained a continuing surveillance program to monitor and address the threat of geohazards (49 C.F.R. § 192.613(a)) and (2) whether TETLP had initiated a program to recondition, phase out, or reduce maximum allowable operating pressure (MAOP) of pipelines in unsatisfactory

¹ As set forth in its request for hearing, TETLP is – without admission – not contesting NOPV Item 2, the associated proposed civil penalty, or the proposed compliance order.

condition (49 C.F.R. §192.613(b)). As set forth below, TETLP's geohazard program and procedures met and exceeded the general surveillance regulation at 49 C.F.R. § 192.613 and the only guidance PHMSA has ever published related to geohazards, a May 2019 advisory.²

Simply put, PHMSA mischaracterizes the relevant facts and misapplies the applicable law in NOPV Item 1. Despite the facts in the record indicating otherwise, PHMSA alleges that TETLP had not developed a program and implies there was a lack of action by TETLP to identify and address geohazards. The record, however, demonstrates quite the opposite, as follows:

- TETLP had an existing geohazard program in place at the outset of the time period at issue in the NOPV;
- TETLP was actively working to expand and improve its program by developing dedicated procedures to incorporate new information and lessons learned, in coordination with PHMSA, third party geotechnical, and other experts;
- Throughout this time, and as TETLP's program was evolving and continuously improving, the Company continued to diligently address the threat of geohazards across its system;
- Where appropriate based on available information, TETLP was implementing monitoring and mitigation measures, including pressure reductions; and
- TETLP proactively initiated and led a joint industry project (JIP) to develop industry best practices for the management of geohazard risks.

In the face of these extraordinary efforts by TETLP, and without basis in the law or guidance, PHMSA nevertheless attempts to use a performance-based general surveillance regulation, premised on an operator's discretion to manage its system, to allege a violation based on the occurrence of an incident which PHMSA equates to the lack of a program. Under applicable law, PHMSA is prohibited from seeking enforcement based on such post-hoc rationalizations or the fact that an incident occurred. PHMSA cannot ignore the existence of TETLP's program to monitor and address geohazard risks on its system. For all of these reasons, NOPV Item 1 and the associated proposed civil penalty should be withdrawn.

² *Advisory Bulletin, Pipeline Safety: Potential for Damage to Pipeline Facilities Caused by Earth Movement and Other Geological Hazards*, 84 Fed. Reg. 18918 (May 2, 2019). In prior advisory bulletins, PHMSA has instructed operators to consider the impacts of soil subsidence on pipeline safety after heavy rainfall and flooding events. PHMSA's May 2, 2019 advisory is the first detailed guidance published by the Agency that includes specific voluntary actions for operators to consider to address geohazard risks generally.

While it is not relevant to the time period at issue in the NOPV or this enforcement action, the day before this filing, on May 26, 2022, PHMSA issued an "updated" advisory bulletin regarding earth movement and other geological hazards that has not yet been published in the federal register. *See Press Release "PHMSA Announces New Safety Measures to Protect Americans from Carbon Dioxide Pipeline Failures After Satartia, MS Leak"* (May 26, 2022). The updated advisory adds three (3) voluntary actions related to pipeline operations beyond those outlined in the May 2019 advisory – all of which Enbridge and TETLP were already implementing – regarding monitoring environmental conditions and changing weather patterns; using available data and resources to assess vulnerability to landslides; and, considering pertinent research, studies, and reports on impact of changing weather patterns) (Advisory measures 6, 7, and 8).

II. Background

NOPV Item 1 relates to the programs implemented and the activities undertaken by TETLP in the relevant time period between two (2) reportable pipeline incidents that occurred on the TETLP system at locations associated with active landslides (also known as geohazards): a January 21, 2019 incident in Noble County, Ohio³ and a May 4, 2020 incident in Fleming County near Hillsboro, Kentucky.⁴ See Exh. 3, TETLP Geohazard Program Expansion Timeline. The NOPV alleges a violation of general continuing surveillance regulation, 49 C.F.R. § 192.613, for an eleven month period from June 20, 2019, the date when the Noble County incident Investigation Report was finalized, to May 4, 2020, when TETLP formally published dedicated geohazard procedures, which is also the date of the Fleming County incident.⁵

A. TETLP's Geohazard Program

PHMSA does not maintain any express regulations regarding the identification and mitigation of geohazards during pipeline operations.⁶ In the absence of any express agency regulation, enforcement, or industry standard, however, Enbridge and TETLP have been actively working to identify and manage the threat of geohazards for some time given that certain of its pipeline systems are located in eastern Appalachia.⁷ To facilitate that effort, in 2018 Enbridge (and TETLP) engaged a third party geohazard expert, BGC Engineering USA, Inc. (BGC), to assist in developing a geohazard site inventory, conducting field inspections, and other data gathering activities along relevant portions of its system.⁸ TETLP leveraged BGC's expertise and processes and procedures to supplement the Company's work to address geohazards.

³ The incident was caused by "ductile overload from a longitudinal tensile or bending force that exceeded the load carrying capacity of the [girth] weld" which was the result of unintended land movement. Exh. 1, Summary of Enbridge Findings Following its Investigation of the Summerfield Ohio Incident at 1.

⁴ This incident is the subject of an ongoing investigation by the National Transportation Safety Board (NTSB), the root cause failure analysis for which has not yet been completed and/or is not yet publicly available. PHMSA has indicated that "the preliminary failure cause appears to be due to land movement." Second Amended Corrective Action Order, CPF 2-2019-1002H (Jun. 1, 2020). Additionally, the NTSB has explained, "failure occurred [. . .] at location that had been previously identified [. . .] for geotechnical monitoring and mitigation due to an active landslide." Exh. 2, NTSB Pipeline Operations and Integrity Management Factual Report (released Feb. 3, 2022).

⁵ See PHMSA's pipeline safety violation report (PSVR) associated with the NOPV.

⁶ PHMSA integrity management regulations applicable to pipelines located in high consequence areas (HCAs) require operators to consider certain time independent threats, including weather related and outside force damage "to include consideration of seismicity, geology, and soil stability of the area." 49 C.F.R. § 192.917(a).

⁷ Exh. 4, Enbridge Summary of Pre-Accident Geohazard Management Program, Site Assessment, and Multidisciplinary Review at 33 (NTSB Dkt. #20); see also Exh. 5, Geohazard Roundtable Agenda (Apr. 11, 2019).

⁸ Exh. 4, Enbridge Summary of Pre-Accident Geohazard Management Program, Site Assessment, and Multidisciplinary Review at 33 (NTSB Dkt. #20).

During the time period relevant to PHMSA's NOPV, TETLP was implementing a framework of fourteen (14) standard operating procedures (SOPs) with provisions applicable to the identification and evaluation of geohazards.⁹

1. Threat Response Guideline (TRG) 490, Weather-Related and Outside Forces
2. Standard Operating Procedure (SOP) 1-5010, Right-of-Way Maintenance
3. SOP 9-5010, Pipeline Repair Procedures
4. SOP 9-5030, Composite Repair Procedures
5. SOP 1-6010, Pipeline Patrol and Leakage Survey Frequency Criteria
6. SOP 1-6030, Blasting Near Pipelines
7. SOP 1-6040, Aerial Pipeline Patrol
8. SOP 1-6060, Mining Subsidence and Soil Slippage
9. SOP 1-6070, Right-of-Way Encroachments
10. SOP 9-2010, In-line Tool Pipeline Inspection
11. SOP 9-2020, External Corrosion Direct Assessment (ECDA)
12. SOP 9-2030, Dry Gas Internal Corrosion Direct Assessment
13. SOP 9-2040, Stress Corrosion Cracking Direct Assessment
14. SOP 9-3010, Response to In-line Inspection

In direct response to the January 2019 Noble County incident and learnings from that incident investigation finalized on June 20, 2019, TETLP actively worked to improve its existing geohazard program, including a more robust program and dedicated geohazard management procedures.¹⁰ In that effort, TETLP coordinated with experts to conduct a gap analysis¹¹ and identified the significance of comparing internal measurement unit (IMU) in-line inspection (ILI) data and strain analysis to inform risk classification of geohazard sites and mitigation measures.¹² To assist with leading the geohazard program, further development of its existing geohazard program, and field work, TETLP seconded a BGC geoscientist from April 2019 to December 2019, until such time as the Company could hire a qualified Geohazard Program Supervisor.¹³ TETLP hired a dedicated Geohazard Program Supervisor and Geotechnical Specialist in September 2019.

Building on its existing program and procedures, TETLP decided to adopt and adapt the established geohazard program utilized by Enbridge's Liquids Pipeline business unit on September 4, 2019 (only three (3) months after finalizing its investigation of the Noble County incident).¹⁴ In October 2019,

⁹ See PSVR Exh. B; *see also* Exh. 6, Enbridge Procedures in Effect Prior to Accident (Excerpts) (Jul.1, 2021).

¹⁰ See Exh. 7, TETLP's Implementation of Noble County Incident Failure Investigation Report Recommendations; *see also* Exh. 8, Presentation - Texas Eastern Pipeline Ohio Landslide Response (Feb. 25, 2019).

¹¹ See Exh. 9, Independent Pipeline Integrity Program Review - Phase I Summary (Jul. 17, 2019).

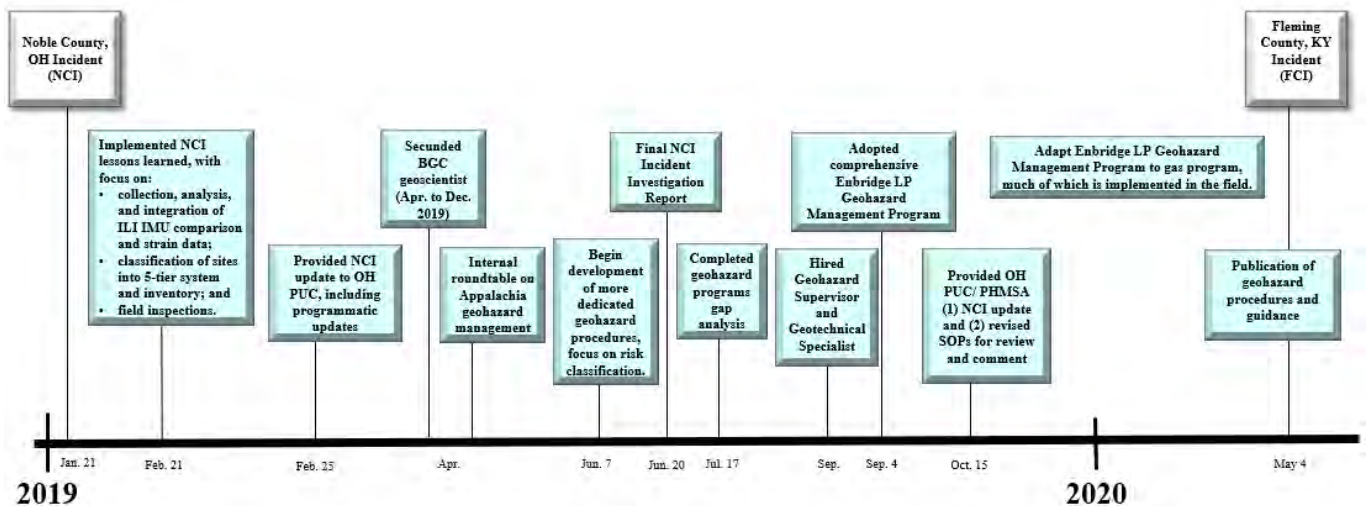
¹² See Exh. 10, BGC Executive Summary_2019 Geohazard Program at 13 (Mar. 9, 2020).

¹³ See Exh. 11, Service Release Order – Original Secondment (Apr. 5, 2019); Exh. 12, Service Release Order – Secondment Extension (Jul. 16, 2019).

¹⁴ The Enbridge's Liquids Pipeline geohazard program had previously been reviewed and acknowledged by PHMSA as an industry leading program. As part of its analysis and before electing to adopt the geohazard program utilized by Enbridge's Liquids Pipeline business unit, TETLP evaluated other programs and risk classifications systems. *See*,

TETLP met with PHMSA and the Ohio Public Utilities Commission to provide an update on the Noble County incident lessons learned, including expansion of the geohazard management program and providing the dedicated geohazard procedures for review and comment.¹⁵ With PHMSA's feedback from that meeting, TETLP worked to finalize and publish its dedicated procedures, a majority of which the Company was already implementing in the field,¹⁶ on May 4, 2020, the same day of the Fleming County, Kentucky incident.¹⁷

Figure 1.0 TETLP Geohazard Program Development



B. TETLP Geohazard Management Activities and the Fleming County Site

In addition to the programmatic updates, TETLP undertook extensive actions to identify and evaluate the risks of geohazards on its system, which met and exceeded the surveillance requirements at 49 C.F.R. § 192.613. In particular, the Company engaged the assistance of third party experts in LiDAR (Quantum Spatial), geohazards (BGC, Geosyntec), and strain (SSD, Inc.) to perform the following: (1) actively collect and integrate additional geohazard data; (2) refine risk classification criteria; (3) conduct field visits and site assessments based on that data; (4) install strain gauges and other monitoring instruments; and (5) mitigate appropriate identified geohazard sites on its system based on the information available at the time.¹⁸ TETLP leveraged this expertise to expand its existing

e.g., Exh. 13, Email - IPIPR – Geohazard Classification Systems (Aug. 21, 2019); Exh. 14, Email - IPIPR – Geohazard Convergence – Initial Draft HMP (Aug. 21, 2019).

¹⁵ See Exh. 15, Presentation – Enbridge Gas Geohazard Response - Updates (Oct. 15, 2019).

¹⁶ For example, in January 2020, TETLP provided a detailed training related to its Geohazard Management Program and the procedures that were finalized on May 4, 2020. Exh. 16, Geohazard Management Program Training (Jan. 9, 2020).

¹⁷ See Exhs. 17 – 25 (updated geohazard procedures).

¹⁸ See Exh. 10, BGC Executive Summary 2019 Geohazard Program at 13 (Mar. 9, 2020); Exh. 26, BGC Executive Summary 2020 Geohazard Program (Mar. 8, 2021).

geohazard program. In 2019, TETLP conducted 777 field inspections on Lines 10, 15, and 25 to assess geohazard risks and implemented strain mitigation where warranted.¹⁹

Shortly after the Noble County incident, TETLP completed helicopter flyovers of Lines 10, 15 and 25, including the Fleming County geohazard site, in January 2019.²⁰ Through its investigation, TETLP identified the significance of IMU comparison data in identifying potential land movement. In June 2019, TETLP conducted an ILI IMU survey on Line 10 and compared the historical strain data to further identify and assess geohazard risks.²¹ After receiving a priority strain notification related to the Fleming County site, TETLP performed a field visit and ground inspection to further assess the site.²²

On September 23, 2019, TETLP received additional strain information which confirmed there was less strain growth at the Fleming County site than previously understood based on the field visit measurements. Using this data and other available data, TETLP performed an additional assessment of the Fleming County site in October 2019.²³ At that time, TETLP, in coordination with geotechnical experts, confirmed that no urgent action was required at the site, and elected to continue monitoring and planned installation of monitoring instrumentation in 2020.²⁴ As a follow-up in February 2020, TETLP convened a multidisciplinary meeting with various subject matter experts, including BGC, to determine the scope of work for the instrumentation and mitigation measures.²⁵ After that meeting, BGC developed a scope of work for the installation of strain gauges and drainage measures that would provide additional information about the site to inform and finalize the scope of any required additional mitigation measures.²⁶

¹⁹ See PSVR Exh. B-16; *see also* Exh. 27, 2019 TETLP Geohazard Mitigation Activities.

²⁰ Exh. 28, Email - RE Helicopter Flyovers and 2018 Land Movement Inventory (Jan. 18, 2022).

²¹ Exh. 4, Enbridge Summary of Pre-Accident Geohazard Management Program, Site Assessment, and Multidisciplinary Review at 39 (providing an overview of work completed at the Fleming County site).

²² *Id.* at 43; *see also* Exh. 29, Email – Privileged and Confidential: OWV_10 (2018 V. 2017) High Strain Feature (Jun. 27, 2019); Exh. 30, Geotechnical Inspection - FCI Slope (8800); Exh. 31, Email - RE OWSV_10 high strain - field map (Jul. 25, 2019).

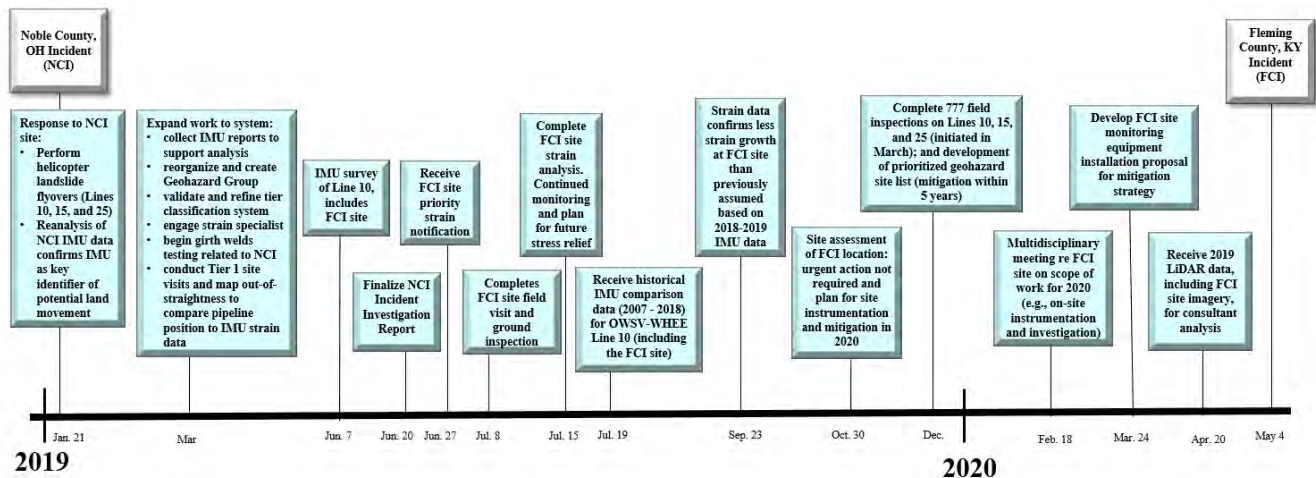
²³ Exh. 4, Enbridge Summary of Pre-Accident Geohazard Management Program, Site Assessment, and Multidisciplinary Review at 46-48 (providing an overview of work completed at the Fleming County site); *see also* Exh. 32, OWSV 10 Strain Report (Sep. 23, 2019).

²⁴ *See* Exh. 4, Enbridge Summary of Pre-Accident Geohazard Management Program, Site Assessment, and Multidisciplinary Review at 10; Exh. 33, Email - RE Review needed 2019 growth on OWSV-10 biggest strain - total 1% GW0.5% (Oct. 30, 2019) (stating that the geotechnical expert did not “see any signs that requires urgent action” at the Fleming County site and recommending continued monitoring at the site and “geotechnical improvement of the site to reduce the movement rate”).

²⁵ *See* Exh. 4, Enbridge Summary of Pre-Accident Geohazard Management Program, Site Assessment, and Multidisciplinary Review at 49 (presentation describing the multidisciplinary meeting).

²⁶ *Id.*; *see also* PSVR Exh. D-9.

Figure 2.0 TETLP Geohazard Program Activities



C. Industry Leadership

During the timeframe in question neither PHMSA nor the industry had developed any recommended best practices to mitigate the threat of geohazards, and it was not until May 2019 (four (4) months after the Noble County incident) that PHMSA published any guidance specific to geohazards.²⁷ In immediate response to the Noble County incident, Enbridge (and TETLP) sought to proactively fill this gap in February 2019 by initiating a JIP through the Interstate Natural Gas Association of America (INGAA) to engage a consortium of subject matter experts to review existing data and research and prepare a framework that pipeline operators could use in the development and implementation of their landslide hazard management programs or the improvement of existing programs.²⁸ From the outset, Enbridge (including TETLP) has been a lead sponsor and key participant in the JIP effort.²⁹ The JIP issued internal guidelines in April 2020 (less than a month before the Fleming County incident), which were further refined and published for the pipeline industry in August 2020 (three (3) months after the Fleming County incident).³⁰

²⁷ In May 2019, PHMSA issued a general advisory to remind operators of the potential for damage from earth movement and other geological hazards and which identified voluntary general actions for operators to consider for addressing that risk. *Advisory Bulletin*, 84 Fed. Reg. 18919 (May 2, 2019). TETLP was already implementing these measures where appropriate on its system. See Exh. 34, TETLP's Geohazard Program as Compared to PHMSA's Advisory Bulletin Voluntary Considerations (comparing the voluntary actions referenced in PHMSA's advisory bulletin to TETLP's ongoing work to address geohazards).

²⁸ See Exh. 35, INGAA, Pipeline Safety Committee Presentation (Feb. 21, 2019). These efforts were preceded by benchmarking and a JIP through INGAA, which identified the need for more specific management of geohazards.

²⁹ See Exh. 36, Landslide JIP Meeting Minutes (Dec. 11, 2019).

³⁰ See Exh. 37, JIP - Guidelines for Management of Landslide Hazards for Pipelines (Aug. 17, 2020).

It is also notable that despite the allegations in the NOPV, PHMSA invited Enbridge representatives to give multiple presentations at PHMSA's February 2020 Research and Development forum during the exact timeframe at issue in NOPV Item 1. Those presentations focused on the Company's geohazards program and a company representative led the working group related to geohazards. *See* Exh. 38, Presentation - PHMSA R&D Forum Geohazard Management - An Operator's Perspective (Enbridge) (Feb. 2020); Exh. 39, Presentation - PHMSA R&D Forum - Changes in Line pipe Specifications to Prevent Girth Weld Failures in Newly Constructed Pipelines (Enbridge) (Feb. 2020); Exh. 40, Presentation - PHMSA R&D Forum - Preventing and Mitigating Geo-Forces on Pipelines & Facilities (BGC) (Feb. 2020); *see also* Exh. 41, Working Group #2 – Preventing and Mitigating Geo-Forces on Pipelines and Facilities (Feb. 2020) (summarizing the R&D gaps related to geohazards identified by the working group).

III. Applicable Law – Continuing Surveillance

PHMSA has not developed or promulgated any regulations specific to the identification and management of geohazards. The regulation at issue in NOPV Item 1, 49 C.F.R. § 192.613, does not reference geohazards or land movement and this is the first enforcement action issued by PHMSA under this regulation associated with the geohazard threat. For pipelines located in HCAs, operators must consider certain time independent threats, including weather related and outside force damage “to include consideration of seismicity, geology, and soil stability of the area.” 49 C.F.R. § 192.917(a). For pipelines located outside HCAs, there are no similar requirements or specific geohazard regulations.³¹ Moreover, PHMSA has published a single guidance document, in May 2019, regarding the threat of geohazards, which only includes general voluntary actions for pipeline operators to consider based on the unique aspects of their systems. The voluntary actions in the guidance — issued in the months following the Noble County incident — were being implemented by TETLP and Enbridge, many of which were being implemented *prior to* the issuance of the guidance.

A. Continuing Surveillance

PHMSA's continuing surveillance regulation, 49 C.F.R. § 192.613, requires (1) that operators maintain a procedure for continuing surveillance of facilities to identify and take appropriate action concerning, among other things, “other unusual operating and maintenance conditions” and (2) if a segment is determined to be in an “unsatisfactory condition, the operator must initiate a program to recondition or phase out the segment involved, or if the segment cannot be reconditioned or phased out, reduce maximum allowable operating pressure [MAOP].”³² This regulation has remained unchanged since its original issuance in 1970. 35 Fed. Reg. 13248, 13272 (Aug. 19, 1970). In that rulemaking, PHMSA's predecessor agency emphasized the “inten[t] to state the Federal safety standards in performance terms, rather than as detailed specifications, whenever it is possible to do so to” in order to provide pipeline operators with the flexibility and discretion to

³¹ The Noble County incident and the Fleming County incident occurred in non-HCA areas.

³² PHMSA does not define and has never defined “other unusual operating and maintenance conditions” or “unsatisfactory condition.”

determine the most appropriate methods for compliance depending on the specific pipeline facilities and circumstances at issue. *Id.* at 13250.³³

The regulation is based on the 1968 version of industry standard ASME, Section 850.5, Continuing Surveillance, which required studies of “unusual and maintenance conditions such as failures, leakage history, drop in flow efficiency due to internal corrosion or substantial changes in cathodic protection requirements” that would inform whether a facility was in “unsatisfactory condition.” 35 Fed. Reg. 5482 (Apr. 2, 1970). The regulation only changed slightly when codified into Part 192 in 1970, to remove reference to drop in flow efficiency due to internal corrosion and add “class location” and “or other unusual operating and maintenance conditions.” *Id.*; 35 Fed. Reg. 13248, 13272 (Aug. 19, 1970).

As noted above, there has been no prior enforcement issued by PHMSA under this regulation associated with landslides or geohazards. Unsurprisingly, most PHMSA enforcement issued under this provision focuses on whether an operator has a procedure for identifying one of the conditions expressly identified in the regulation and is usually issued in the form of Notices of Amendment (NOAs). *See, e.g.*, Notice of Amendment, In re: Midway Sunset Cogeneration Co., CPF 5-2012-1001M (Feb. 21, 2012). Further, when PHMSA has directed operators to amend their procedures to comply with § 192.613, PHMSA has accepted very broad high-level procedures. *See, e.g.*, Notice of Amendment, In re: Dominion, CPF 1-2019-1009M (Apr. 17, 2019).

B. Guidance

Through interpretive guidance, PHMSA has recognized that 49 C.F.R. § 192.613 is a performance-based regulation which “does not specify how the standards are to be met.” *OPS Interpretation, No. PI-89-023 to M. Henry from R. Beam* (Oct. 18, 1989). PHMSA acknowledged that the regulation “allows pipeline operators to use whatever means are suitable to achieve compliance.” *Id.* The only guidance PHMSA has ever published to the industry that specifically addresses geohazards is a May 2019 advisory bulletin that contains voluntary measures for operators to consider. *PHMSA Advisory Bulletin*, 84 Fed. Reg. 18919 (May 2, 2019).

IV. NOPV Item 1 Should be Withdrawn as a Matter of Fact and Law

TETLP believes that NOPV Item 1 should be withdrawn as a matter of fact and law. Through this allegation, PHMSA is effectively and subjectively transforming the performance-based regulation at 49 C.F.R. § 192.613 to impose prescriptive requirements beyond the text of the regulation. In an effort to support its manipulation of the regulation in this manner, PHMSA has mischaracterized and/or omitted relevant facts at issue. The facts clearly demonstrate that TETLP had procedures in place during the relevant time period to address the threat of geohazards on its system based on available information and discretion provided under 49 C.F.R. § 192.613, with limited guidance and in the complete absence of express regulations, enforcement, or industry standards regarding geohazards.

³³ *See also PHMSA Operations & Maintenance Enforcement Guidance* at 164 (Jul. 21, 2017) (“In 49 C.F.R. Part 192, our goal is to set standards for what must be accomplished leaving the operator discretion to develop specific methods of complying that fit conditions on the pipeline and permitting the use of appropriate new, or improved technology.”).

During the relevant time period and in light of its operational experiences, including the lessons learned following the Noble County incident, TETLP was actively collecting and integrating data, performing field assessments, and implementing monitoring and mitigation where appropriate based on available information. Further, TETLP was implementing the voluntary recommendations contained in PHMSA's only published industry guidance regarding geohazards, even before it was issued in May 2019. *See* Exh. 34, TETLP's Geohazard Program as Compared to PHMSA's Advisory Bulletin. In response to learnings from the Noble County incident and in keeping with the goal of continual improvement, TETLP was improving upon its existing program, expanding it, and incorporating lessons learned from the incident and in the field, all of which had to occur before the new program could be formalized and published in written procedures. *See* Exh. 7, TETLP's Implementation of Noble County Failure Investigation Report Recommendations.

While programmatic changes were under development and in transition, TETLP leveraged established procedures from Enbridge Liquids LP and third party experts, in particular BGC, to collect, review and analyze data and conduct risk assessments/site investigations. TETLP's decision to adopt and adapt the procedures used by Enbridge Liquids LP to build on its existing geohazards program occurred just three (3) months after the Noble County incident investigation report was finalized and modified draft procedures were shared with PHMSA and Ohio PUC representatives in October 2019. The further development of TETLP's program was informed by substantial input from the leading industry technical experts as well as experience from other operators. It also involved incorporating knowledge gained through TETLP's initiation of and involvement with the JIP and developing the program based on discussions with PHMSA. As demonstrated by the record, TETLP worked diligently and expeditiously to expand its existing geohazard program after the Noble County incident, in the absence of express regulations or industry standard.³⁴

While its procedures were being finalized for formal adoption, TETLP was proactively implementing many of these procedures in the field with direction and approval from the Geohazard Supervisor and TETLP senior management. This included numerous monitoring and mitigation measures to address the threat of geohazards in applicable areas on its system, including Line 10 and the Fleming County site. With respect to the Fleming County site, TETLP's inspection and subsequent assessment of strain demand confirmed that urgent action was not required. Based on recommendation by geotechnical experts, TETLP elected to continue monitoring and planning for future stress relief at the site. At the time of the Fleming County incident, TETLP was actively developing a plan for the installation of strain gauges and drainage measures that would provide additional information about the site.

Through all of these actions, TETLP was meeting and exceeding 49 C.F.R. § 192.613 and the recommendations in the only guidance PHMSA had issued related to the threat of geohazards.

³⁴ Significant programmatic changes cannot happen overnight. As PHMSA has acknowledged repeatedly in its regulations and rulemakings, programmatic updating of procedures takes considerable time for operators to prepare revised procedures, incorporate input from technical experts and internal stakeholders, and review, approve, and finalize the updated procedures. *See, e.g.*, 49 C.F.R. § 192.605(a)(requiring annual review and updating of an operator's procedures, not to exceed 15 months but at least once every calendar year); *see also* 49 C.F.R. § 192.624(b) (providing operators with 12 months from the effective date of the regulation to develop and document procedures for MAOP reconfirmation and 20 months from publication of the final rule in the federal register).

V. The Pipeline Safety Act Does Not Authorize Strict Liability

PHMSA may not find that TETLP failed to comply with 49 C.F.R. § 192.613 based on the fact that an incident occurred. The Pipeline Safety Act (PSA) does not authorize a finding of liability simply because an incident occurred. 49 U.S.C. § 60101 et seq. While Congress has in some instances provided for strict liability in other statutes; the PSA is not one of them. *ExxonMobil Pipeline Co. v. U.S. Dep't of Transp.*, 867 F.3d 564, 577-78 (5th Cir. 2017) (“The fact that the [a] release occurred, while regrettable, does not necessarily mean that [the operator did not] abide by the pipeline integrity regulations in considering the appropriate risk factors. If it did, then an operator that experiences a seam-related pipeline leak on its pipeline system could never escape liability under pipeline integrity regulations, thus nullifying the regulations and creating a strict-liability regime that Congress has not authorized. [. . .] The unfortunate fact of the matter is that, despite adherence to safety guidelines and regulations, oil spills still do occur.”). Moreover, NOPV Item 1 potentially undermines the Agency’s goal of continuous learning and improvement.

VI. PHMSA May Not Require More than the Law Provides

PHMSA has not provided the regulated community with fair notice of its new and novel interpretation of 49 C.F.R. § 192.613, articulated for the very first time through this enforcement action under NOPV Item 1 with regard to the management of geohazards. The U.S. Constitution and the Administrative Procedure Act require that a regulation provide a regulated entity with fair notice of the obligations it imposes and be issued pursuant to notice and comment rulemaking. The Constitution of the United States, Amendment 5; 5 U.S.C. § 554(b). Courts have found that fair notice requires the agency to have “state[d] with ascertainable certainty what is meant by the standards [it] has promulgated [, . . .] must give [a party] fair warning of the conduct it prohibits or requires, and it must provide a reasonably clear standard of culpability to circumscribe the discretion of the enforcement authority and its agents.” *ExxonMobil Pipeline Co.*, 867 F.3d at 578 (citing *Diamond Roofing Co, Inc. v. OSHRC*, 528 F.2d at 645, 649 (5th Circ. 1976)).

An agency may not enforce regulations according to “what an agency intended but did not adequately express.” *Gates v. Fox Co., Inc. v. OSHRC*, 790 F.2d 154, 156 (D.C. Cir. 1986) (internal citation omitted). “Even if the [Agency’s] interpretation were reasonable, announcing it for the first time in the context of this adjudication deprives Petitioners of fair notice. Where, as here, a party first receives actual notice of a proscribed activity through a citation, it implicates the Due Process Clause of the Fifth Amendment.” *Fabi Constr. Co. v. Sec’y of Labor*, 508 F.3d 1077, 1088 (D.C. Cir. 2007). Regulated entities are not obligated to “divine the agency’s interpretations in advance or else be held liable when the agency announces its interpretations for the first time in an enforcement proceeding and demands deference.” *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 159 (2012).

VII. Proposed Civil Penalty Should be Withdrawn

Because TETLP complied with 49 C.F.R. § 192.613, NOPV Item 1 and the associated proposed civil penalty should be withdrawn. In the event that NOPV Item 1 allegation is not withdrawn, the proposed civil penalty of \$552,900 should be substantially reduced because it does not

accurately reflect the mandatory statutory and regulatory penalty assessment criteria. 49 U.S.C. § 60122(b) (outlining civil statutory penalty factors); 49 C.F.R. § 190.225 (detailing civil penalty assessment considerations). In particular, the following factors are not accurately considered and applied in the Agency's proposed civil penalty worksheet: gravity, culpability, good faith, and "other matters as justice requires." See Exh. 42, TETLP Comments on PHMSA Proposed Civil Penalty Worksheet.

Relevant to the gravity and culpability factor, the alleged violation of 49 C.F.R. § 192.613 as articulated by PHMSA was not a causal factor of the Fleming County incident nor did it increase the severity of the incident. Through the process of assessing its system for geohazard threats, TETLP identified the geohazard risk associated with the Fleming County geohazard site in 2018 and was continuing to manage it despite the lack of Agency direction, regulation, enforcement, or any industry standards. TETLP's inspection and subsequent assessment of strain demand confirmed that urgent action was not required and recommended continued monitoring and future mitigation. After the incident, TETLP identified additional information which had not been considered in its analysis that would have impacted the potential geohazard risk at the site. This does not change the fact that TETLP maintained a program and procedures that were designed to identify and mitigate geohazards and that the Company was working to address the risk at this site at the time of the incident.

In addition, PHMSA failed to properly account for TETLP's good faith efforts to comply with 49 C.F.R. § 192.613, which were reasonably justified given the absence of regulations and enforcement, and that it was complying with the only published PHMSA guidance on the subject. After the Noble County incident, TETLP (1) worked to continue to identify and address geohazards on its system and (2) proactively further develop its existing program to address these risks. The record demonstrates that the Company dedicated extensive resources to addressing these risks across its system and at the Fleming County site. Further, PHMSA has also not properly considered mitigating factors relevant to "other factors as just may require," as described above and in light of TETLP's parallel efforts to lead an industry-wide initiative to establish geohazard management best practices.

VIII. Conclusion and Request for Relief

For all of the reasons identified above, and in consideration of other matters as justice may require, TETLP respectfully requests that NOPV Item 1 and the associated penalty be withdrawn. PHMSA bears the burden of proving by a preponderance of the evidence all elements of a proposed violation in an enforcement proceeding. Final Order, In the Matter of Butte Pipeline Co., CPF 5-2007-5008 (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."). This includes both the burden of production and persuasion. In re Bridger Pipeline Co. LLC, Final Order, CPF No. 5-2007-5003 (Apr. 2, 2009). PHMSA has not met its burden of proof with respect to either the legal basis or the factual evidence to support NOPV Item 1. As demonstrated by the record, TETLP (1) maintained a surveillance program to identify and address geohazards on its system

and (2) was actively working to improve its program by implementing lessons learned and through coordination with experts and PHMSA at the time of the Fleming County incident.

For the reasons identified in this Pre-Hearing Brief, in TETLP's Request for Hearing, and for other reasons as justice may require, the Company respectfully requests that PHMSA withdraw NOPV Item 1 and the associated proposed civil penalty of \$552,900.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Catherine Little", with a long horizontal flourish extending to the right.

Troutman Pepper, LLP
Catherine Little, Esq.
Annie Cook, Esq.
600 Peachtree Street NE, Suite 3000
Atlanta, GA 30308
(404) 885-3000
Catherine.Little@troutman.com
Annie.Cook@troutman.com

Texas Eastern Transmission, LP
Karen Stallings, Esq.
Associate General Counsel - Permitting,
ROW and Operations
Enbridge, Inc.
(713) 627-4817
Karen.Stallings@enbridge.com

Date: May 27, 2022