PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMINISTRATION
WASHINGTON, DC 20590

In the matter of:	§	
Panhandle Eastern Pipeline Company	§	CPF No. 4-2023-011-NOPV
Respondent	§	

POST-HEARING BRIEF
OF
PANHANDLE EASTERN PIPELINE COMPANY

I. INTRODUCTION

In this case, the Pipeline and Hazardous Materials Safety Administration ("PHMSA"), Office of Pipeline Safety ("OPS"), has alleged that Panhandle Eastern Pipeline Company ("Respondent" or "PEPL") violated the federal pipeline safety regulations, 49 C.F.R. Part 192 ("Part 192"), which are promulgated pursuant to authority granted to the Secretary of the U.S. Department of Transportation ("DOT") by the Pipeline Safety Act, 49 U.S.C. § 60101, *et seq*.[1] By letter dated June 15, 2023, the Director, Southwest Region, PHMSA, OPS (the "Director"), served Respondent with a Notice of Probable Violation, Proposed Civil Penalty and Proposed Compliance Order ("NOPV"). PHMSA alleged three violations, proposed civil penalties for each alleged violation, and proposed compliance measures for two of the alleged violations.

In this Brief, Respondent provides a summary of the case; reviews the procedural background of the case; recites the factual background; addresses the three alleged violations with associated proposed civil penalties (NOPV Item 1, Item 2 and Item 3); sets forth its

[1] The Secretary of DOT has delegated to PHMSA the authority vested in the Secretary under chapter 601 of Title 49, U.S.C., 49 C.F.R. § 1.97(a)(1) (2018).

arguments on the merits and legal arguments; then addresses various issues attending the proposed civil penalties and the Proposed Compliance Order.

A. Executive Summary

At the hearing in this matter, a consensus became evident as to the cause of the incident: a failure to depressurize the cleaning pig receiver (NOPV Item 1). The pressure in the receiver could have been eliminated only through the effective execution of Respondent's lockout-tagout procedure. Absent a failure performing lockout-tagout, as alleged in NOPV Item 1, the incident would not have occurred.

Further, Respondent provided an abundance of testimony and documentary evidence which demonstrates that Respondent acted in full compliance with 49 C.F.R. § 192.605(a)(8) (NOPV Item 2) through its process of (1) reviews of the work of personnel, (2) reviews of the effectiveness and adequacy of procedures through multiple means, then (3) modification of procedures to address effectiveness and adequacy. Significantly, Respondent established that even if it had *not* complied with the regulatory requirements, such non-compliance *could not and would not have prevented the incident*. Last, in addition to an incorrect assessment of per-point values, PHMSA acted punitively and arbitrarily in its assessment of a 10-day, "ongoing" duration of the violation alleged in NOPV Item 2, which amounted to a proposed penalty of $2.19 million dollars. The accident occurred on one day, and though Respondent demonstrates that Item 2 should be withdrawn entirely, one day would be the maximum duration that should apply, one day being consistent with Item 1.

B. Procedural Background

The subject NOPV relates to an investigation following an incident which occurred on March 26, 2020, at Respondent's Borchers Station near Meade, Kansas. PHMSA served

Respondent with the NOPV via letter dated June 15, 2023, wherein PHMSA alleged three violations of the pipeline safety regulations, proposed to impose civil penalties for all three alleged violations, and proposed to order compliance measures for two alleged violations.

Following extensions of time to respond granted by the Director, on August 28, 2023, Respondent responded to the NOPV by requesting a hearing and submitting its Statement of Issues. By letter dated September 22, 2023, the Presiding Official set a hearing date of April 24, 2024, at the PHMSA Southwest Region office in Houston, Texas. Pursuant to 49 C.F.R. § 190.211(d), by letter dated April 15, 2024, Respondent submitted pre-hearing materials for use at the hearing and for inclusion in the administrative record. Additionally, under same cover, Respondent submitted its First Amended and Restated Statement of Issues. PHMSA likewise submitted pre-hearing materials on April 15, 2024.

The hearing was held on April 24, 2024. In this Brief, Respondent refers to various exhibits used during the hearing in the following manner:

- Exhibits from PHMSA's Case File are referred to as a "Case File Exhibit"[2]
- Exhibits from among Respondent's pre-hearing submissions are referred to as a "Pre-Hearing Submission."

The hearing was transcribed by a court reporter, and the transcript is submitted to the administrative record simultaneously with this Brief.[3] This Brief and its exhibits, along with the hearing transcript, constitute Respondent's post-hearing submission.

In its pre-hearing submissions, Respondent requested that the Director's "written evaluation of response material submitted by the respondent and recommendation for final

[2] 49 C.F.R. § 190.209(b)(7) (2018).
[3] *See* Submission of Hearing Transcript to the Administrative Record (Transcript of Proceedings before Presiding Official Lawrence White, April 24, 2024 ("Hearing Transcript")).

action" ("Region Recommendation") be provided to Respondent and that Respondent be provided an opportunity to respond to the Region Recommendation.[4] Respondent reaffirms each of those requests pursuant to the Pipeline Safety Act.[5]

C. Factual Background

On March 26, 2020, two long-time, experienced PEPL fieldmen, Mr. Kenneth Porter ("Mr. Porter") and Mr. Everett Leon Rogers ("Mr. Rogers") (Mr. Porter and Mr. Rogers collectively, the "Fieldmen"), were engaged in launching and receiving four cleaning pigs at the Borchers Station.[6] One of the four cleaning pigs was launched that morning on the East 10-inch pipeline (the "East 10-Inch Pipeline"), and the pig was received at the Borchers Station at approximately 12:00 p.m.[7] At approximately 2:00 p.m., the Fieldmen began the process of retrieving the cleaning pig from the East 10-Inch pig receiver ("East 10-Inch Receiver").[8] Prior to and after the East 10-Inch Receiver door was opened, Mr. Porter was positioned on the east side of the receiver barrel and Mr. Rogers was positioned on the west side of the receiver barrel. Mr. Rogers was attempting to dislodge the cleaning pig by chipping hydrates using a 10.5-foot stainless-steel pull rod. The cleaning pig became dislodged and traveled out of the East 10-inch Receiver barrel, striking Mr. Rogers. As a result of Mr. Rogers' injuries, he later passed away at the local hospital.

The impact of this unfortunate and tragic incident was felt throughout all levels of Energy Transfer, PEPL's parent company. Respondent takes very seriously the passing of Mr. Rogers and has gone to great lengths to investigate the cause of the incident and to make the necessary

[4] 49 C.F.R. § 190.209 (b)(7) (2018).
[5] *See* 49 U.S.C. § 60117(b)(1)(D).
[6] Cleaning "pigs" are used to sweep debris, scale, water, and other materials from the interior of a pipeline; *see* Prehearing Submission Exhibit 7, DNV Report at 8-9.
[7] *Id*.
[8] A receiver is a vessel attached to a pipeline for catching and retrieving cleaning pigs and other types of pigs; *see* Prehearing Submission Exhibit 7, DNV Report at 8.

improvements to its processes and procedures to prevent any recurrence of an incident of this nature.[9]

Despite Respondent's good faith efforts to comply with the pipeline safety regulations, this regrettable incident occurred. Importantly, however, the fact of an incident does not lead to the foregone conclusion that Respondent violated the pipeline safety regulations.[10] Here, we must apply the regulations cited in the NOPV to the facts in the administrative record and determine (1) whether PHMSA carried its burden of proof, and (2) whether PHMSA observed Respondent's legal rights in the process.

II. NOPV ALLEGED VIOLATIONS

Respondent herein contests the allegations of violation and, subsequently, the proposed assessment of civil penalties for NOPV Item 1, Item 2 and Item 3.

A. NOPV Item 1

PHMSA alleges that Respondent failed to "follow its manual of written procedures for conducting operations and maintenance activities and for emergency response in four areas in accordance with § 192.605(a)."[11]

PHMSA specifically alleges that Respondent:

(1) Failed to follow *Safety Procedure S-230, Hazardous Energy Control (Lockout Tagout) (Effective 08/01/2017).*

(2) Failed to follow *Safety Procedure S-370, Work Permits (Effective 8/1/2017).*

(3) Failed to follow Section 7.2 and 7.5 in *Standard Operating Procedures, Pigging and Pig Trap Operation, Procedure: I.13 (Effective 5/1/2015).*

[9] Hearing Transcript 23:6-25:24 (statement by D. Minielly).
[10] *ExxonMobil Pipeline Co. v. U.S. Dep't of Transp. et al.,* 867 F.3d 564 (5th Cir. 2017).
[11] Case File Exhibit 1, NOPV at 2.

(4) Failed to follow *Best Practice Clearing Freezes BP I.17 (Effective 6/1/2013).*[12]

PHMSA also asserts that Respondent's "failure to follow its written procedures was a causal factor in the incident that occurred on March 26, 2020."[13]

Respondent has shown, and sets forth in detail below, that (1) the failure to follow three of the four written procedures played no role in the cause of the incident; and (2) following those three procedures would not have prevented the incident.

1. The Root Cause

Through testimony at the hearing, from both PHMSA and Respondent witnesses, a clear consensus emerged, that the root cause of the incident was a failure to depressurize the receiver, *i.e.*, to relieve stored hazardous energy behind the cleaning pig.

PHMSA's lead investigator, Mr. Gregory Ochs, testified that "[t]he primary cause, [is] they did not relieve the pressure before continuing work."[14] Respondent's expert, Mr. John Godfrey, reached the independent conclusion that "the top event was failure to control hazardous pressure."[15] That consensus was crystalized when the Presiding Official inquired of PHMSA whether the agency had any disagreement about the "main factor" being the pressure behind the pig.[16] Mr. Ochs responded "no," explaining that "[t]he pressure being behind that pig caused it to shoot out there. That was the main item."[17]

Thus, while different terms than "root cause" may have been used, *i.e.* primary cause, top event, main factor or main item, the terms are synonymous, and the evidence and the testimony at the hearing led to the conclusion that the sole cause of the incident was failure to depressurize

[12] Case File Exhibit 1, NOPV at 2-3.
[13] Case File Exhibit 1, NOPV at 3.
[14] Hearing Transcript 148:5-7 (testimony of G. Ochs).
[15] Hearing Transcript 170:14-16 (testimony of J. Godfrey).
[16] Hearing Transcript 226:13 (inquiry of L. White).
[17] Hearing Transcript 226:21-23 (testimony of G. Ochs).

the receiver. Absent stored pressure behind the pig, there would have been no propelling force present, without which the pig would have stayed in the receiver until physically removed by the pull rod, as is normally the case, and the incident would not have occurred.

2. Respondent Expert Opinions Regarding the Allegations

To explain the "causal analysis" applied in the DNV Report, Mr. Godfrey testified that he identified potential causes, along with barriers that would preempt each potential cause, concluding "essentially it was the element that didn't have a barrier that turned out to be the root cause."[18] Mr. Godfrey summarized his conclusion thusly: "the root cause of the incident was failure to depressurize the receiver."[19] The importance of lockout-tagout in this particular case, Mr. Godfrey testified, is that lockout-tagout is "going to control the stored energy in the system."[20] Effective execution of lockout-tagout would have eliminated the energy in the system and removed any pressure from within the receiver. Under questioning by the Director regarding whether "… we all agree that there was no lockout-tagout applied in this specific case," Respondent witnesses Mr. David Minielly and Mr. Ferguson both answered "yes."[21]

The purpose of lockout-tagout was described at the hearing by Respondent expert Mr. Godfrey as "affixing… devices… to prevent unexpected energization, start-up or release of stored energy in order to prevent injury to employees."[22] Respondent's lockout-tagout procedure, *Safety Procedure S-230, Hazardous Energy Control,* directs personnel through such

[18] Hearing Transcript 170:25-171:2 (testimony of J. Godfrey); *see* Prehearing Submission Exhibit 7, DNV Report at 6.
[19] Hearing Transcript 191:4-6; (testimony of J. Godfrey).
[20] Hearing Transcript 177:16-17 (testimony of J. Godfrey).
[21] Hearing Transcript 314:2-6 (testimony of D. Minielly and K. Ferguson).
[22] Hearing Transcript 176:22-177:5 (testimony of J. Godfrey); *see* Prehearing Submission Exhibit 7, DNV Report at 6.

preventive actions.[23] In the case of effective execution of lockout-tagout, Respondent personnel remove the danger by relieving and controlling the hazardous energy.

Following questioning of Mr. Godfrey by the Presiding Official, Respondent witness Mr. Ferguson offered an analogy to explain in non-pipeline and practical terms how lockout-tagout works:

> In a car, absent somebody sitting in that car with their foot on the accelerator, you feel completely comfortable to walk in front of that car, walk behind that car, or anything else, … because it's the absence of an energy source to propel that car forward. So you feel completely safe to walk around, in front of, or behind that vehicle. A pig would be somewhat similar. In the absence of pressure behind the pig, you could feel confident standing in front of that receiver and feel like the hazard did not exist. [24]

Importantly, Mr. Godfrey also testified that the incident could have occurred *despite* (1) a site-specific pigging procedure, or (2) observance of the clearing freezes procedure, each being ~~the~~ additional procedural infirmities alleged by PHMSA.[25] Mr. Godfrey testified that, even if Respondent had "site-specific [pigging] procedures in place on the day" of the incident, the incident "would have occurred."[26] Additionally, he explained that, if the Fieldmen "didn't follow the lockout-tagout procedure, independent of a site-specific procedure, the same conditions would have presented themselves."[27] All of the evidence presented and all of Mr. Godfrey's analysis and conclusions emphasize and isolate the conclusion that the failure to depressurize the receiver was the top event or root cause of the incident and that lockout tagout, if performed, was performed ineffectively.

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[23] Case File Exhibit A-7, *Safety Procedure S-230, Hazardous Energy Control (Lockout Tagout) (Effective 08/01/2017).*
[24] Hearing Transcript 307:24-308:14 (testimony of K. Ferguson).
[25] Hearing Transcript 220:1-22, 223:8-224:20 (testimony of J. Godfrey).
[26] Hearing Transcript 220:5-14 (testimony of J. Godfrey).
[27] Hearing Transcript 220:17-22 (testimony of J. Godfrey).

Given that the parties have reached identical conclusions that the root cause of the incident was failure to depressurize the receiver, the only logical conclusion is that the Fieldmen failed to follow, or to effectively execute, one procedure: the Lockout-Tagout Procedure (*Safety Procedure S-230, Hazardous Energy Control*.

3. Work Permits

Regarding *Safety Procedure S-370 Work Permits*, Respondent's *Incident Investigation Report S-010E* concluded that "it has not been determined that the presence of a work permit would have prevented this incident, nor has it been determined that the lack of a work permit caused or contributed to this incident."[28] During the hearing, PHMSA did not dispute this conclusion.[29]

4. NOPV Item 1 Conclusion

Respondent has demonstrated that the root cause of the incident was failure to depressurize the pig receiver, *i.e.*, failure to remove the hazardous energy behind the cleaning pig. Additionally, at the hearing, Respondent established the following:

- That a work permit as referenced in *S-370* was not proven by PHMSA to be necessary and would not have prevented the incident;
- That PHMSA did not prove that Respondent did not follow the clearing freezes best practice, and following the best practice would not have prevented the incident;
- That PHMSA did not prove that Respondent did not follow the pigging procedures, and following those procedures would not have prevented the incident; and
- That Lockout-Tagout as required in *S-230*, performed effectively, *would* have prevented the incident.

[28] Case File Exhibit A-10, AID Report, Appendix D. Operator Failure Investigation Report at 5.
[29] Hearing Transcript 138:8-19 (statement by K. Gagnon).

At its core, the NOPV Item 1 case is best summarized by Respondent witness Mr. Minielly:

> I think both sides are in agreement – that the pig dislodged from the trap because the trap wasn't fully depressurized as a result of not following lockout-tagout. And [SOP] I.13, at the time that was in place, clearly addressed lockout-tagout… [A] lot of the emphasis… is with inadequate procedures or inadequate reviews of our procedures. But if the procedure that was in place at the time would have been followed, the incident wouldn't have happened.[30]

Respondent should not be found to have failed to follow three of the four procedures in accordance with 49 C.F.R. § 192.605(a). This allegation should be withdrawn, as to three of the four procedures, along with the associated proposed civil penalties.

B. NOPV Item 2

PHMSA alleges that Respondent "failed to follow its manual of written procedures for conducting operations and maintenance activities and for emergency response in accordance with § 192.605(a)." [31]

PHMSA specifically alleges that Respondent failed to "periodically review the work done by operator personnel to determine the effectiveness, and adequacy of the procedures used in normal operation and maintenance and modify the procedures when deficiencies are found in accordance with" (1) § 192.605(b)(8), (2) *Standard Operating Procedures, Management of Change: A.03 (Effective 8-1-2017),* Section 4.0 Frequency, and (3) *Standard Operating Procedures, Guiding Principles: A.02 (Effective 5/1/2015),* Section 4 Frequency, Section 7.1 Rules, and Section 7.2 Developing an SOP. Additionally, PHMSA alleges that Respondent

[30] Hearing Transcript 384:8-385:2 (testimony of D. Minielly).
[31] Case File Exhibit 1, NOPV at 3.

"failed to review the work performed under its *Standard Operating Procedures, Pigging and Pig Trap Operation, Procedure: I.13, 1.0 Procedure Description (Effective 5-1-2015).*"[32]

PHMSA alleges that, as a result of the above allegations, Respondent "failed to determine the procedures were deficient and failed to modify the procedures to provide guidance to employees for safely addressing ice accumulation during pigging and pig trap operation."[33]

PHMSA also asserts that Respondent's alleged failure "to follow its written procedures increased the severity of the incident that occurred on March 26, 2020."[34]

1. Respondent Has Demonstrated Compliance

PHMSA's central claim in NOPV Item 2 is that Respondent did not conduct the reviews required pursuant to 49 C.F.R. § 192.605(b)(8). However, at the hearing, Respondent affirmatively demonstrated that Respondent acted in thorough and complete conformance with the cited regulation through its collective process of (a) reviews of the work of personnel, (b) reviews for effectiveness and adequacy of procedures through multiple means, and (c) modification of procedures to address effectiveness and adequacy, when necessary. In their testimony, Respondent witnesses Mr. Jeffrey McGill and Mr. Kevin Ferguson provided a detailed description of this collective process consisting of (1) Quality Job Reviews, (2) Annual Work History Reviews and additional methods by which Respondent personnel may request modifications to procedures, and (3) Annual Gas O&M SOP Reviews.

First, Respondent conducts, as part of a company-wide safety program, Quality Job Reviews ("QJRs"). These QJRs involve "supervisors, managers, directors" traveling out into the

[32] *Id.*
[33] *Id.*
[34] Case File Exhibit 1, NOPV at 4.

field to "witness their employees conducting their work."[35] At the hearing, Respondent witness Mr. McGill described QJRs as being either documented "locally" through hard-copies or through uploads to an electronic database, Intelex.[36] Mr. McGill reviewed a list of 1,595 QJRs conducted company-wide over the period of August 2018 through March 2020, and he described that certain fields were highlighted to designate QJRs relating to pigging.[37] The results of conducting the QJRs range from acknowledgement of a "[g]reat job," identification of an "update to procedures," the need for "additional trainings," and "other areas for improvement."[38] Respondent witness Mr. Ferguson's testimony walked through an example QJR form which would be completed by a member of management while observing personnel performing work activities.[39] Importantly, Director Lethcoe acknowledged that "a program like this, executed well, can probably help you tremendously," providing his stamp of approval of Respondent's QJR program.[40]

Second, Respondent conducts, as part of its Operator Qualification ("OQ") program, Annual Work History Reviews of OQ-qualified employees ("AWHRs"). The AWHRs are conducted by supervisors and consist of a review of the OQ tasks performed to determine effectiveness of procedures and identify any questions or need for changes or updates to any of the procedures utilized in performing tasks.[41] At the hearing, Mr. Ferguson described an example AWHR form from 2020, which was the AWHR for Mr. Rogers dated February 28, 2020.[42] During his testimony, Mr. Ferguson emphasized a particular question located at the

[35] Hearing Transcript 324:9-10 (testimony of J. McGill).
[36] Hearing Transcript 325:2 (testimony of J. McGill).
[37] Hearing Transcript 326:5-328:23 (testimony of J. McGill).
[38] Hearing Transcript 329:9-17 (testimony of J. McGill).
[39] Hearing Transcript 330:25-332:11 (testimony of K. Ferguson); Prehearing Submission Exhibit 23.
[40] Hearing Transcript 338:9-11 (statement by B. Lethcoe).
[41] Hearing Transcript 339:8-340 (testimony of J. McGill).
[42] Hearing Transcript 349:19-350 (testimony of K. Ferguson); Prehearing Submission Exhibit 21, 2020 Work

lower part of the AWHR which asks: "Were the SOPs that you use in performance of your job adequate and effective in providing guidance to perform required tasks?" Mr. Rogers responded "yes."[43] Similarly, the AWHR for Mr. Porter dated February 28, 2020 and the AWHR for Mr. Darin Cox dated February 26, 2020, also reflected the response of "yes" to the question regarding effectiveness and adequacy.[44] Notably, those responses were made only one month prior to the incident. Also notable is Mr. McGill's testimony to the effect that approximately 4,000 AWHRs are performed every year across the Energy Transfer operating entities.[45]

In addition to the AWHRs, other processes present Respondent personnel with the opportunity, at any time, to request amendments to procedures. Mr. McGill testified that Respondent provides all employees with the "ability to request a modification to any of the SOPs."[46] At the hearing, Mr. McGill demonstrated the electronic process through which employees may submit such a request through Respondent's SharePoint site.[47] Respondent presented an example of a December 2014 employee request submitted through SharePoint, which resulted in the requested amendments to the "Pigging Procedure."[48]

Third, Respondent conducts Standard Operating Procedure Annual Reviews ("SOP Annual Reviews") wherein the "document owners and volume owners" of the procedures review the SOP "on an annual basis" to identify any changes that may be necessary, along with considering changes offered by other personnel.[49] Mr. McGill walked through the 2018 SOP

History Reviews at 6-7.

[43] Hearing Transcript 315:2-6 (testimony of K. Ferguson); Prehearing Submission Exhibit 21, 2020 Work History Reviews at 7.

[44] Prehearing Submission Exhibit 21, 2020 Work History Reviews at 11-12 and 20-21.

[45] Hearing Transcript 340:13-21 (testimony of J. McGill); T. Nardozzi testified that all Energy Transfer entities use the same procedures. *See* Hearing Transcript 318:8-319:22.

[46] Hearing Transcript 353:23-24 (testimony of J. McGill).

[47] Hearing Transcript 354:18-19 (testimony of J. McGill).

[48] Hearing Transcript 266:17-368:22 (testimony of J. McGill); Prehearing Submission Exhibit 29.

[49] Hearing Transcript 358:24-359:1 (testimony of J. McGill).

Annual Review which lists the procedures which were reviewed in that calendar year and the revisions to procedures which resulted from the review.[50]

The evidence presented at hearing and discussed above demonstrate Respondent's compliance with the regulatory requirements to review the work of personnel, to determine effectiveness and adequacy of procedures, and to modify procedures, as necessary.

Further, in direct contradiction to PHMSA's numerous claims of the enormity of an "ice problem" at Borchers Station, Respondent demonstrated that, though employees were aware of the presence of hydrates, no employee ever reported such as a hazard or requested amendments to related procedures. Additionally, when questioned by Respondent counsel about what harm the "ice caused before March 26th of 2020," PHMSA lead investigator, Mr. Ochs, admitted that "I don't know [the] history of Panhandle, if it's had icing problems before. I don't know."[51] That testimony directly contradicts the assertions found within the NOPV and the Pipeline Safety Violation Report ("PSVR").[52] Respondent had no reason to focus on hydrates as a hazard. As fully discussed above related to NOPV Item 1, the failure to depressurize the receiver caused the incident, and PHMSA has not established any connection whatsoever between the presence of hydrates and the pressure present behind the cleaning pig.

Regarding the "ice problems," at the hearing, Respondent witness Mr. Minielly described relevant sections of the May 2019 Articles of Agreement between the employee union and Respondent. Article XXVIII, Section 1 provides "an avenue for employees to bring forward any type of equipment or inspections that may need to be done through their supervisors."[53] Mr.

[50] Hearing Transcript 363:364-365:11 (testimony of J. McGill).
[51] Hearing Transcript 298:7-10 (testimony of G. Ochs).
[52] Case File Exhibit 1, NOPV; Case File Exhibit 3, PSVR.
[53] Hearing Transcript 374:6-9 (testimony of D. Minielly); Prehearing Submission Exhibit 17, Articles of Agreement at 73.

Minielly also testified that no employees ever have recommended an inspection of equipment at Borchers station.[54] Article XXXII, Section 1 provides for "a quarterly joint safety committee with our bargaining unit members" to discuss "any safety issues that may be going on in the pipeline system."[55] Mr. Minielly further testified that none of the employees at Borchers ever have reported "any unsafe condition related to the east 10-inch receiver" or "an unsafe condition related to ice with respect to" the East 10-Inch Receiver.[56]

As fully demonstrated above, Respondent complied thoroughly and completely with 49 C.F.R. § 192.605(b)(8) through its collective process of (1) reviews of the work of personnel, (2) reviews for effectiveness and adequacy of procedures through multiple avenues, and (3) the modification of procedures, when necessary. Based upon the merits, this alleged violation should be withdrawn, along with the associated proposed civil penalties.

2. Respondent Expert Opinion Regarding PHMSA's Allegations

PHMSA's allegations in NOPV Item 2 are based on the assumption that Respondent's performance of effectiveness reviews would have identified procedural issues which could have been corrected and prevented the incident. Respondent expert Mr. Godfrey adamantly disagreed with PHMSA's assumption and explained that a procedural amendment would not have removed the pressure in the receiver, pointing back to Lockout-Tagout. At the hearing, when asked whether Respondent's performance of effectiveness reviews, along with the creation of a "procedure specific to ice in a receiver," the incident nonetheless could have occurred, Mr. Godfrey responded affirmatively, emphasizing that the incident "ties back to the lockout-

[54] Hearing Transcript 375:4-5 (testimony of D. Minielly).
[55] Hearing Transcript 375:16-18 (testimony of D. Minielly) ; Prehearing Submission Exhibit 17, Articles of Agreement at 75-76.
[56] Hearing Transcript 376:2-11 (testimony of D. Minielly).

tagout."[57] Additionally, he testified that the performance of Lockout-Tagout is the "*one* factor that could have changed things."[58] As to this specific allegation, Mr. Godfrey testified that "… I do not agree that [Respondent] failed to identify their procedures were ineffective and failed to modify their procedures. The procedure at issue here is the control of hazardous energy."[59] Significantly, Mr. Godfrey further testified that, even if Respondent had created a procedure specifically addressing ice in a receiver, the incident nonetheless could have and would have occurred.[60] A procedure for ice would not have led to relief of the pressure in the receiver.

3. PHMSA Absence of Records

PHMSA surprisingly admitted that the violation alleged in NOPV Item 2 is based on an absence of records. PHMSA witness Ms. McDaniel adamantly stated that "[w]e didn't see any evidence that an effectiveness review was done by the company"[61] only to shortly thereafter conclude that "nothing [was] provided" [62] by Respondent in the form of documentary evidence. That situation is readily explained, and in Respondent's favor.

In sharp opposition to PHMSA's assertions regarding evidence related to NOPV Item 2, Respondent asserts that PHMSA *never requested* any records of effectiveness and adequacy reviews from Respondent. At the hearing, Respondent witness Mr. Nardozzi testified to dates of email communications in which PHMSA requested copies of Respondent's effectiveness procedures.[63] Mr. Nardozzi further described the email requests as *only* requesting procedures

[57] Hearing Transcript 224:7-20 (testimony of J. Godfrey).
[58] Hearing Transcript 224:19-20 (testimony of J. Godfrey).
[59] Hearing Transcript 300:16-21 (testimony of J. Godfrey).
[60] Hearing Transcript 223:7-20 (testimony of J. Godfrey).
[61] Hearing Transcript 279:24-280:2 (testimony of M. McDaniel).
[62] Hearing Transcript 282:5-6 (testimony of M. McDaniel).
[63] Hearing Transcript 289:19-290:19 (testimony of T. Nardozzi); *see* Exhibit 1 to Post-Hearing Brief, Declaration of Todd G. Nardozzi.

and not requesting any documentation related to performance of those procedures.[64] Thus, PHMSA did not request documentation and, had PHMSA made the request, Respondent would have submitted evidence of the QJRs, AWHRs and SOP Annual Reviews which were thoroughly described at the hearing.

In an apparent effort to clear the confusion caused by PHMSA's conflicting statements, the Presiding Official asked Ms. McDaniel to clarify whether operators conducting effectiveness reviews create "some form that documents that act?"[65] Ms. McDaniel confirmed that the reviews "would be documented" with "some kind of form."[66] Under questioning about where, within PHMSA's evidence listed in the PSVR, one could find "evidence of failure to review the work of personnel," Ms. McDaniel responded that the case is "void of evidence" and concluded that PHMSA's allegation is based on the absence of evidence.[67]

Pivoting from the topic of evidence to PHMSA's determination of effectiveness, Ms. McDaniel further testified that "we weren't determining whether the procedure was effective or not. That is something that, under this regulation, the operator is supposed to review the effectiveness of its own procedures."[68] "We were not determining whether the procedure was adequate or not."[69] These statements beg the question that, if PHMSA did not make this determination, how could PHMSA reach the conclusion that the procedure was deficient as alleged? Absent a determination of effectiveness, PHMSA has no grounds upon which to judge Respondent's procedures, unless it arbitrarily and without explanation concludes that

[64] Hearing Transcript 290:12-15 (testimony of T. Nardozzi).
[65] Hearing Transcript 280:16-17 (inquiry of L. White).
[66] Hearing Transcript 281:11-19 (testimony of M. McDaniel).
[67] Hearing Transcript 292:5-293:1 (testimony of M. McDaniel).
[68] Hearing Transcript 276:9-15 (testimony of M. McDaniel).
[69] Hearing Transcript 277:18-19 (testimony of M. McDaniel).

Respondent's procedure was deficient. PHMSA's case fails upon that very point, in addition to others.

In addition to PHMSA never requesting records of effectiveness reviews, during interviews of Respondent employees conducted after the incident, PHMSA did not ask the interviewees about effectiveness reviews or the effectiveness of procedures. In fact, the topic of effectiveness reviews and effectiveness of procedures was never broached at any point during any of the Respondent personnel interviews.[70] Respondent counsel asked PHMSA to identify in the Case File evidence of effectiveness reviews, beyond the conclusory statements in the NOPV; Mr. Ochs was unable to identify anything.[71]

As demonstrated above, PHMSA has placed no evidence into the administrative record that would support its allegation in NOPV Item 2. Based upon the mere fact that PHMSA has no evidence to support its allegations, Item 2 should be withdrawn.

4. PHMSA's Arbitrary Preparation of the Enforcement Case – A Pre-Determined Outcome

Issues arose at the hearing regarding PHMSA's sequence of actions of fact-finding related to the incident investigation and the preparation of this enforcement case. The record reveals that PHMSA began preparing its enforcement case before all fact-finding, cause determinations, and the Accident Investigation Division's Failure Investigation Report ("AID Report") were concluded; worse, Mr. Ochs, whose duties include enforcement, was the "lead investigator" for the AID Report.[72] PHMSA's case suffers from a rush to judgment.

PHMSA witness Ms. Terri Binns testified that she started drafting the NOPV and the PSVR in 2020, "before the accident report [AID Report] was issued"; the AID Report is dated

[70] *See* Case File Exhibit A-3, Interview of R. Amparan; Case File Exhibit A-4, Interview of K. Porter; Case File Exhibit A-5, Interview of D. Cox; Case File Exhibit A-6, Interview of J. Johannsen.
[71] Hearing Transcript 149:7-25 (testimony of G. Ochs).
[72] Hearing Transcript 116:15-17 (testimony of G. Ochs).

November 2020.[73] Later in the hearing, Ms. Binns walked back her sequencing and stated that she "looked at my records" and it was actually May 2021 when she started drafting the NOPV.[74] Ms. Binns confusingly added that she "didn't wait for the accident report to come out."[75] Given Ms. Binns's inconsistent and uncorroborated testimony, along with additional factors discussed below, Respondent asserts that, on balance, Ms. Binns did in fact begin drafting the NOPV and the PSVR before the agency had completed its investigation.

PHMSA witness Ms. McDaniel testified that investigations of incidents are performed by PHMSA's Accident Investigation Division ("AID") but that "for compliance determination" the role of Mr. Ochs, at the time a Central Region operations supervisor.[76] PHMSA AID investigator, Mr. Rodriguez, testified to the role of AID, being to "monitor accidents and incidents," "deploy to significant incidents," and capture data and documents throughout any investigations.[77] Ms. McDaniel attempted to alleviate the confusion by adding that the AID Report was "used separate from our creation of the [enforcement] case,"[78] but then stated that the "creation of the case was based off of information received from Mr. Ochs' part of his *compliance* investigation into the incident."[79] Mr. Rodriguez also testified that Mr. Ochs was the "lead" investigator identified within the AID Report.[80] Given that Mr. Ochs was both the lead investigator and the enforcer, he had the opportunity to shape the AID Report to support the pre-determined violation in Item 2, which happens to have a proposed penalty of $2.19 million dollars.

[73] Hearing Transcript 72:1-15 (testimony of T. Binns).
[74] Hearing Transcript 385:25 (testimony of T. Binns).
[75] Hearing Transcript 387:4-5 (testimony of T. Binns).
[76] Hearing Transcript 48:3-12 (testimony of M. McDaniel).
[77] Hearing Transcript 66:22-67:22 (testimony of A. Rodriguez).
[78] Hearing Transcript 388:14-17 (testimony of M. McDaniel).
[79] Hearing Transcript 388:18-21 (testimony of M. McDaniel) (emphasis added).
[80] Hearing Transcript 69:6-9 (testimony of A. Rodriguez).

Interestingly, the AID Report makes no finding about the root cause of the incident, the failure to relieve pressure behind the cleaning pig. Mr. Ochs testified that he "wasn't doing a root cause analysis here" and that he "wasn't going to go too into the depth that you would do for a root cause analysis."[81] As such, the AID Report could not possibly support NOPV Item 1. Alarmingly, however, all of the causes stated in the AID Report support Item 2, and only Item 2. The allegations of Item 2, drafting of which pre-dated completion of the AID Report, flange right up with the conclusions of the AID Report. Respondent argues here that the AID Report was fashioned by Mr. Ochs to support the pre-determined allegations of Item 2. Mr. Ochs, the "Senior Accident Investigator" and the person who supplied Ms. Binns with the information to develop this enforcement case, had every opportunity to influence the investigation to support an enforcement case, ignoring in the process the true cause of the incident, failure to remove pressure behind the pig.[82]

The AID Report itself suffers from infirmities, in that PHMSA has no corroborating evidence in the Case File to support key statements and findings within the report. First, several cleaning pig runs and associated findings are summarized for the years 2018, 2019, and 2020; however, the Case File contains no evidence that would support those assertions.[83] The AID Report speaks to "pressure differentials with other lines" and "leaking interconnect valves"; however, at the hearing, Mr. Ochs was unable to identify those "other lines," and his descriptions of valves, whether "interconnect," "isolation," or otherwise do little to substantiate the purported roles of "pressure differentials" and "leaking interconnect valves" in the formation of hydrates.[84] Those conclusions are key underpinnings of the AID Report, yet they fail. Mr. Ferguson

[81] Hearing Transcript 58:12-21 (testimony of Mr. Ochs).
[82] Case File Exhibit A-10, AID Report at 1.
[83] *Id.* at 3.
[84] Hearing Transcript 109:20-110:24; 121:14-124:25 (testimony of Mr. Ochs).

testified that the East 10-Inch Pipeline had been blown down that very morning (March 27), and thus the East 10-Inch Pipeline was devoid of gas and at atmospheric pressure; the East 10-Inch could not have been leaking gas by the valves because no gas was in the line.[85] The DNV Report identifies additional failings with PHMSA's investigation, including factors that were not investigated (indeed the findings could not be replicated by an expert in the field).[86] The AID Report itself lacking key corroborating evidence, and omitting to address numerous potentially relevant factors, leads to the conclusion that it could not support NOPV Item 2. PHMSA thus fails to carry the burden of proof as to the AID Report and, in turn, NOPV Item 2.

Yet another issue with PHMSA's case preparation presented itself at hearing when PHMSA witness Ms. Binns testified that the procedures cited in the NOPV were not requested from Respondent until 2023, three years after the incident and only months before issuing the NOPV. In an email dated April 20, 2023, PHMSA investigator Mr. Rodriguez requested "written procedures regarding the effectiveness review of normal operations and maintenance that were in place at the time of the incident" on March 26, 2020.[87] Respondent provided the requested procedures via email on May 15, 2023.[88] The NOPV was served on June 15, 2023. The requested procedures, *Standard Operating Procedures, Management of Change: A.03 (Effective 8-1-2017)* and *Standard Operating Procedures, Guiding Principles: A.02 (Effective 5/1/2015)*, serve as the basis for PHMSA's Item 2 allegations. The only conclusion that may be drawn from the sequence of drafting the NOPV years before requesting supporting procedures is that PHMSA prepared its case based upon information it never requested, then scrambled to find

[85] Hearing Transcript 229:8-232:4 (testimony of Mr. Ferguson).
[86] Prehearing Submission Exhibit 7, DNV Report at 3, 12.
[87] *See* Attachment A to Exhibit 1 to Post-Hearing Brief, Declaration of T. Nardozzi.
[88] *See* Attachment B to Exhibit 1 to Post-Hearing Brief, Declaration of T. Nardozzi.

support for the alleged violation. Such rush to judgment creates grave concern as to the arbitrariness of PHMSA's preparation of this case.

If PHMSA had neither the AID Report nor the procedures which it alleges were not followed, the agency could not have rationally and logically prepared its case. Instead, it appears clear that the AID Report was fashioned to support an alleged violation with the maximum penalty allowed by law. PHMSA pre-determined that Respondent would pay, and it fashioned its investigation to achieve that result. On these grounds alone, NOPV Item 2 should be withdrawn in its entirety.

5. NOPV Item 2 Conclusion

Respondent has demonstrated:

- That Respondent did in fact
  - Review the work of personnel in the years prior to the incident;
  - Review effectiveness of procedures annually in the years prior to the incident, including review with the Fieldmen involved in the incident; and
  - Implement procedure amendments, based upon personnel input.

- That a procedure amendment to address hydrates in the receiver would have made no difference to the outcome, in that it would not have addressed the pressure in East 10-Inch Receiver barrel.

- That PHMSA arbitrarily pre-determined the outcome of its investigation and wrote an investigation report to support the maximum penalty, all the while omitting to reach any conclusion about the actual cause of the incident.

- That PHMSA's 10-day duration for this alleged violation was based upon an assumption of non-compliance, in that PHMSA requested only procedures for effectiveness reviews, but omitted to request records of effectiveness reviews.

Based on the voluminous evidence presented by Respondent, and the absence of any evidence by PHMSA, coupled with PHMSA's arbitrary and punitive approach to the enforcement case, Respondent cannot be found in violation of 49 C.F.R. § 192.605(b)(8), and

NOPV Item 2 should be withdrawn, in its entirety, along with the associated proposed civil penalties.

C. NOPV Item 3

PHMSA alleges in NOPV Item 3 that Respondent "failed to have and follow a written Operator Qualification (OQ) Program that identified all covered tasks in accordance with § 192.805(a)." Specifically, PHMSA alleges that Respondent's *Standard Operating Procedures, Operator Qualification Plan (Effective 5/1/2018) "*failed to include the operation and maintenance task of launching and receiving pigs as a covered task in its plan."[89]

1. PHMSA Has Already Decided This Issue for Respondent

NOPV Item 3 was decided long ago. In 2010, PHMSA accepted Respondent's position that loading and unloading ILI tools, *i.e.*, launching and receiving pigs, was not an OQ covered task but, rather, was a process that involved a number of individual covered tasks.

In July 2008, PHMSA issued a Notice of Amendment to Respondent alleging inadequate written OQ procedures.[90] The 2008 NOA, among other allegations, alleged that Respondent "did not identify all applicable covered tasks as required by the OQ rule and PHMSA position" and specifically, that the Respondent did not identify "loading and unloading ILI tools" as a covered task.[91] As an initial matter, the 2008 process of "loading and unloading ILI tools" is the same process which Respondent described in 2020 with the current nomenclature of "launching and receiving pigs."

Respondent requested a hearing in that case which was held on January 29, 2009, which hearing discussions were summarized in Respondent's Post-Hearing Submittal explaining that

[89] Case File Exhibit 1, NOPV at 4.
[90] *In the Matter of Panhandle Eastern Pipeline* Company, Notice of Amendment, CPF No. 4-2008-1013M (July 1, 2008) (the "2008 NOA"). The 2008 NOA is attached hereto as Exhibit 2 to Post-Hearing Brief.
[91] Exhibit 2 to Post-Hearing Brief, 2008 NOA at 1-2.

loading and unloading ILI tools "was a Process that had several Procedures associated with it and each Procedure included the OQ requirements for the Tasks necessary to perform that Process."[92] Respondent further argued that loading and unloading ILI tools is a process and not a task and that it "was not specifically required by [Part] 192, and so did not meet the 4-part test requirements to make it a covered task."[93] Respondent submitted to the administrative record procedures associated with the described process, which did *not* identify loading and unloading ILI tools as a covered task. Respondent's Post-Hearing Submittal described its understanding that "PHMSA accepted the explanation provided during the Hearing and stated that this item was successfully resolved."[94] Respondent requested confirmation from PHMSA that this issue, as well as other remaining issues, were in fact resolved.[95]

By letter dated January 7, 2010, PHMSA inspector, Mr. Patrick Guame, issued a recommendation to Mr. Rod Seeley, then the Director, Southwest Region, stating that the updated OQ procedures were "reviewed and found to be adequate."[96] By letter dated January 11, 2010, Mr. Seeley recommended that the case be closed stating that "no further action is necessary and this case is now closed."[97]

The 2010 Closure Letter confirmed for Respondent that PHMSA accepted its position that loading and unloading ILI tools indeed was *not* a covered task because it was (1) part of a process and (2) did not meet the four-part test. Thus, Respondent reasonably relied upon the

[92] *In the Matter of Panhandle Eastern Pipeline* Company, Post Hearing Submittal, CPF No. 4-2008-1013M (March 18, 2009) (the "NOA Post Hearing Submittal"). The NOA Post Hearing Submittal is attached hereto as Exhibit 3 to Post-Hearing Brief.
[93] Exhibit 3 to Post-Hearing Brief, NOA Post Hearing Submittal at 3-4.
[94] *Id.*
[95] *Id.*
[96] *In the Matter of Panhandle Eastern Pipeline* Company, Recommendation, CPF No. 4-2008-1013M (January 7, 2010) (the "NOA Recommendation"). The NOA Recommendation is attached hereto as Exhibit 4 to Post-Hearing Brief.
[97] *In the Matter of Panhandle Eastern Pipeline* Company, Closure Letter, CPF No. 4-2008-1013M (January 11, 2010) (the "NOA Closure Letter"). The NOA Closure Letter is attached hereto as Exhibit 5 to Post-Hearing Brief.

outcome of the 2008 NOA enforcement case and, on a going-forward basis, did not identify "launching and receiving pigs" as a covered task; rather, Respondent identified launching and receiving pigs as a process made up of several covered tasks. Respondent should not be found in violation based upon an issue which PHMSA decided some ten years prior. As a result, NOPV Item 3 should be withdrawn in its entirety, along with the proposed civil penalty.

III. LEGAL ISSUES

A. Applicable Legal Standards

The Administrative Procedure Act sets the boundaries for agency action, providing that a reviewing court shall hold unlawful and set aside agency action, findings, and conclusions found, among other things, to be --

> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> * * *
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [or]
>
> (D) without observance of procedure required by law.[98]

Below, Respondent summarizes the legal standards under which the current case should be reviewed.

1. Burden of Proof

PHMSA bears the burden of proving the allegations in an NOPV.[99] Recently, Congress directed the Secretary, when implementing enforcement procedures under the Pipeline Safety Act, and under 49 C.F.R. Part 190, to "require that the agency have the burden of proof, presentation, and persuasion in any enforcement matter."[100]

The burden of proof includes both the burden of persuasion (*i.e.*, "which party loses if the

[98] 5 U.S.C. § 706(2)(A), (C) and (D).
[99] *In re Butte Pipeline Co.*, Final Order, CPF No. 5-2007-5008, 2009 WL 3190794, at *1 (DOT Aug. 17, 2009).
[100] Protecting our Infrastructure of Pipelines and Enhancing Safety Act of 2020; Pub. L. 116-260, 134 Stat. 1182 (Dec. 27, 2020); codified at 49 U.S.C. § 60117(b)(1)(F).

evidence is closely balanced") and the burden of production, or presentation (*i.e.*, "which party bears the obligation to come forward with the evidence at different points in the proceeding").[101] To meet its burden of persuasion, PHMSA "must prove, by a preponderance of the evidence that the facts necessary to sustain a probable violation actually occurred."[102] PHMSA satisfies this burden "only if the evidence supporting the allegation outweighs the evidence and reasoning presented by Respondent in its defense."[103] Where "the evidence is closely balanced," PHMSA does not meet its burden of persuasion, and must withdraw the allegation.[104] PHMSA also "bears the burden of proof as to all elements of the proposed violation."[105] If PHMSA fails to produce evidence in support of its allegation or provides insufficient evidence, the allegation must be withdrawn.[106]

2. The Rebuttable Presumption

When PHMSA has no affirmative evidence to support its position, PHMSA at most has a rebuttable presumption that the absence of evidence of an action indicates the action did not occur. However, a "presumption is not evidence" and "when an opposing party puts in proof to the contrary of that provided by the presumption, and that proof meets the requisite level, the presumption disappears."[107]

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[101] *In re Bridger Pipeline Co*., Final Order, CPF No. 5-2007-5003, 2009 WL 7796887 at *1 (DOT Apr. 2, 2009); *Schaffer v. Weast*, 546 U.S. 49, 56 (2005) (citing *Dir., Office of Workers' Comp. Programs, Dep't of Labor v. Greenwich Collieries*, 512 U.S. 267, 272 (1994)).
[102] *In re Alyeska Pipeline Serv. Co.*, Decision on Petition for Reconsideration, CPF No. 5-2005-5023, 2009 WL 5538655, at *3 (DOT Dec. 16, 2009) (citing *Butte Pipeline Co.*, 2009 WL 3190794, at *1, n.3; *Schaffer*, 546 U.S. at 56-58).
[103] *Butte Pipeline Co.* 2009 WL 3190794, at *1.
[104] *Alyeska Pipeline Service Co.*, 2009 WL 5538655, at *3 (citing *Schaffer*, 546 U.S. at 56).
[105] *In re ANR Pipeline Co.*, Final Order, CPF No. 3-2011-1011, 2012 WL 7177134 at *3 (DOT Dec. 31, 2012); *see also In re CITGO Pipeline Co.*, Decision on Pet. for Reconsideration, CPF No. 4-2007-5010, 2011 WL 7517716, at *5 (Dec. 29, 2011).
[106] *Alyeska Pipeline Service Co.*, 2009 WL 5538655, at *3.
[107] *Routen v. West*, 142 F.3d 1434, 1439-40 (1998); citing *Texas Dep't of Community Affairs v. Burdine,* 450 U.S. 248, 254-55, 1010 S.Ct. 1089, 1094-95, 67 L.Ed.2d 207 (1981)*;* citing Fed. R. Evid. 301.

3. Arbitrary and Capricious Agency Action

The rules by which agency action is evaluated pursuant to the arbitrary and capricious standard are set out below. Agency action:

> may be set aside if found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." (Citations omitted.)
>
> The scope of review under the "arbitrary and capricious" standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice made." (Citation omitted.) In reviewing that explanation, [a court] must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." (Citations omitted.)
>
> Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. The reviewing court should not attempt itself to make up for such deficiencies: "We may not supply a reasoned basis for the agency's action that the agency itself has not given." (Citation omitted.) We will, however, "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." (Citations omitted.)[108]

4. Fair Notice

Before a government agency deprives a person of property, the person must first have received a minimum level of "fair notice" as to what constitutes a violation of law. "Due process requires that parties receive fair notice before being deprived of property."[109] "In the absence of notice—for example, where the regulation is not sufficiently clear to warn a party about what is expected of it—an agency may not deprive a party of property by imposing civil or criminal

[108] *Motor Vehicle Mfr.'s Ass'n v. State Farm Mut. Auto. Ass'n of U.S., Inc. et al.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 2865-67, 77 L.Ed.2d 443 (1983).
[109] *Gen. Elec. Co. v. U.S. EPA*, 53 F.3d 1324, 1328 (D.C. Cir. 1995), citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950).

liability."[110] An administrative agency such as PHMSA must give "fair warning of the conduct it prohibits or requires," and an agency "must provide a reasonably clear standard of culpability to circumscribe the discretion of the enforcing authority and its agents."[111]

When an agency interprets a regulation through enforcement rather than pre-enforcement efforts, the issue of notice rests on –

> [w]hether the regulated party received, or should have received, notice of the agency's interpretation in the most obvious way of all: by reading the regulations. If, by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with "ascertainable certainty," the standards with which the agency expects parties to conform, then the agency has fairly notified a petitioner of the agency's interpretation.[112]

The U.S. Court of Appeals for the Fifth Circuit has "warned that fair notice requires the agency to have 'state[d] with ascertainable certainty what is meant by the standards [it] has promulgated.'"[113] "[T]he relevant inquiry is whether the agency's interpretation of the pipeline … regulations could have been understood with 'ascertainable certainty' … at the time [respondent] engaged in the conduct that allegedly exposed it to [an] enforcement action."[114] Such "ascertainable certainty" may not be possible where an agency has given conflicting public interpretations of a regulation.

> Even if an agency does not issue contradictory public statements, it may fail to give sufficient fair notice to justify a penalty if [1] the regulation is so ambiguous that a regulated party cannot be expected to arrive at the correct interpretation using standard tools of legal interpretation, [2] must therefore look to the agency for guidance, and [3] the agency failed to articulate its interpretation before

[110] *Id.* at 1328-29 (citations omitted); *see also Trinity Broad. of Fla., Inc. v. FCC*, 211 F.3d 618, 628 (D.C. Cir. 2000); *United States v. Chrysler Corp.*, 158 F.3d 1350, 1354 (D.C. Cir. 1998).
[111] *ExxonMobil Pipeline Co.*, 867 F.3d 564, 578 (quoting *Diamond Roofing Co. v. OSHARC*, 528 F.2d 645 (5th Cir. 1976).
[112] *Id.* at 578-579 (citing *General Elec. Co.*, 53 F.3d at 1329); *see also Diamond Roofing Co.*, 528 F.2d at 649.
[113] *Id.* at 578-579.
[114] *Id*.

imposing a penalty.[115]

As PHMSA found in the enforcement context not so long ago, "[u]nder circumstances where an agency is using an enforcement proceeding that would penalize an operator and seeks to change the status quo[,] … that agency is obligated to provide notice to affected operators."[116]

B. Respondent's Arguments

1. NOPV Item 1

NOPV Item 1 raises issues of arbitrary and capricious agency action and burden of proof.

a. Arbitrary and Capricious Agency Action

Respondent argues that, in light of a clear consensus on the root cause of the incident, failure to depressurize the receiver, and the shortfall in evidence supporting PHMSA's allegation of failure to follow three of the four procedures, Respondent is being unjustly penalized for the unfortunate outcome of the incident. PHMSA attempts to take Respondent to task on three procedures, yet PHMSA has not articulated any rational connection between the facts, the root cause of the incident, and the alleged failure to follow three procedures. Finally, PHMSA has presented no evidence and has not clearly articulated a reasoned basis for how failure to follow the three procedures could have caused the incident.

On the foregoing grounds, NOPV Item 1 should be withdrawn, along with the proposed civil penalty.

b. Burden of Proof

PHMSA has failed to carry its burden of proof, in that it has produced no evidence that Respondent failed to follow the procedures which PHMSA alleges were not followed.

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[115] *United States v. Lachman*, 387 F.3d 42, 57 (1st Cir. 2004) (citation omitted) (numbering added).
[116] *In the Matter of Ohio River Valley Pipeline, a subsidiary of EnLink Midstream*, Final Order, CPF No. 3-2015-5009, 2018 WL 1365571, at *6 (DOT Jan. 18, 2018).

As an initial matter, nothing in PHMSA's AID Report supports the allegations of NOPV Item 1. Further, both the NOPV and PSVR are riddled with conclusory statements which are unsupported and/or uncorroborated – PHMSA has provided no evidence to support the conclusion that Respondent "failed to follow" three of the four procedures. First, PHMSA asserts that Respondent failed to create a work permit pursuant to Respondent procedure *Safety Procedure S-370, Work Permits,* but PHMSA has no evidence in the record to support the conclusion that running a cleaning pig in the East 10-Inch Pipeline required that a work permit be created.[117]

Next, PHMSA asserts that Respondent personnel failed to follow the provision within Respondent procedure *Standard Operating Procedures, Pigging and Pig Trap Operation, Procedure: I.13,* which states that personnel should not stand in front of a receiver door "while opening" the door.[118] In the NOPV and PSVR, PHMSA states that "on the day of the incident a PEPL technician was standing in front of the receiver while trying to dislodge ice" which completely ignores that the cited provision relates to the action of *opening* the receiver door, *not* to any action that may follow, *i.e.* removal of a pig.[119] PHMSA has presented no evidence that Mr. Rogers was standing in front of the receiver door "while opening" the door, while evidence in the record supports the conclusion that Mr. Rogers was standing to the side of the receiver.[120] The Fieldmen thought the pressure had been relieved.[121]

Additionally, PHMSA claims that personnel did not follow the *SOP I.13* procedure to "[v]erify the trap is depressured" based on Mr. Ochs's assumption that "the valves to this

[117] Case File Exhibit 3, PSVR at 4-6.
[118] Case File Exhibit 1, NOPV at 2.
[119] Case File Exhibit 1, NOPV at 2; Case File Exhibit 3, PSVR at 5-6.
[120] Case File Exhibit A-4, Interview of K. Porter at 2.
[121] Case File Exhibit A-10, AID Report at 3; Hearing Transcript 112:20-113:20 (testimony of G. Ochs).

receiver were leaking which created pressure … behind the cleaning pig."[122] PHMSA made no effort to investigate this leaking valve assumption and has no evidence of the extent to which any valve may have been leaking. Variables unknown to PHMSA are pressure and volume of any reputed leak, rendering the claim of leaking valves being involved in the incident unsubstantiated. Mr. Godfrey states that, even if the valve was leaking and if the 1-inch blowdown valve was locked and tagged open, "there would have been no pressure behind the pig" in the East 10-Inch Receiver.[123] PHMSA did not test any valves, and PHMSA did not direct Respondent to test any valves.[124]

Moreover, Mr. Ochs's testimony that the East 10-Inch Receiver valve was leaking the day after the incident could not be true. First, as Mr. Ferguson testified, the East 10-inch Pipeline had been blown down, was devoid of gas, and was at atmospheric pressure on the day Mr. Ochs was present.[125] Second, as may be discerned from photos in the AID Report, the blowdown valves both upstream and downstream of that East 10-Inch Receiver valve were locked in the open position.[126] Given that the blowdown valves were open to the atmosphere, the East 10-Inch Receiver valve had atmospheric pressure on both sides and, thus, with the absence of a pressure differential across the East 10-Inch Receiver valve, no leaking sound could have been created or heard. As such, even the sounds that Mr. Ochs heard on the day after the incident could not have been the East 10-Inch Receiver valve. More likely than not, those sounds were from the side gate valve or the bypass valves which were under *downstream* pressure. PHMSA's allegations, to the extent that they purport to support Item 2, must fail.

[122] Case File Exhibit A-10, AID Report at 9; Hearing Transcript 150:5-155:4 (testimony of G. Ochs).
[123] Hearing Transcript 198:6-17 (testimony of J. Godfrey).
[124] Hearing Transcript 140:15-25 (testimony of G. Ochs).
[125] Hearing Transcript 233:14-234:12 (testimony of K. Ferguson).
[126] Case File Exhibit A-10, AID Report at 7, 8 (photos).

Last, PHMSA asserts that Respondent did not follow the steps within Respondent procedure, *Best Practice Clearing Freezes BP I.17*, which require the maintenance of a "differential of 50 psi or less across the freeze."[127] PHMSA's only basis for this assertion is that "[n]o pressure gauge was mentioned during the [Respondent personnel] interviews."[128] PHMSA failed to investigate or determine whether the use of a pressure gauge would have prevented a pressure differential on the East 10-Inch Receiver. PHMSA further has offered no explanation for how the use of a pressure gauge would have prevented a pressure differential on the East 10-Inch Receiver and thus prevented the incident. At the hearing, Respondent witness Mr. Ferguson testified that, due to the configuration of the East 10-Inch Receiver, any pressure readings provided by the pressure gauges would not have averted the incident.[129] Mr. Ferguson explained that when Fieldmen prepare to blow down a trap, they will take a pressure reading on the trap "you would open [the] 2-inch and then you would open the 1-inch [valve]. Opening the 1-inch is going to vent any kind of pressure… and a [pressure] gauge being on that is going to basically tell you the same thing that you're observing."[130] Further, Mr. Ferguson concluded that a pressure gauge is not appropriate in this situation given that, "in a proper lockout-tagout procedure, you're always going to leave that [valve] open. You're not going to close it up and put a gauge on it."[131]

As to PHMSA's purported evidence of the allegations in NOPV Item 2, though the PSVR lists three of the four Respondent personnel interviews with comments related to hydrates,

[127] Case File Exhibit 1, NOPV at 3.
[128] Case File Exhibit 3, PSVR at 6.
[129] Hearing Transcript 235:14-22 (testimony of K. Ferguson).
[130] Hearing Transcript 238:2-239:2 (testimony of K. Ferguson).
[131] Hearing Transcript 248:17-21(testimony of K. Ferguson).

notably PHMSA does not list the fourth interview, that of Mr. Darin Cox, as "evidence."[132] Yet, during Mr. Cox's interview, he stated that only a "minimum of gas [was] bypassing isolation valves on occasion."[133] At the hearing, Mr. Ochs discounted Darin Cox's interview response related to leaking valves stating that "he wasn't there all the time."[134] Rebutting this incorrect assertion, Respondent witness Mr. Ferguson testified that Mr. Ochs was incorrect and explained that the Borchers employees rotated activities at various locations, *i.e*. the compressor station and the storage field, which means that "no one person spends the majority of their time doing one activity."[135] Further, Mr. Ferguson referenced Mr. Porter's interview question no. 14, wherein Mr. Porter confirms the nature of rotating activities at Borchers.[136] Mr. Cox's responses in his interviews are based off a similar amount of time at the Borchers station as each of the other interviewees and should not have been set to the side or discounted by PHMSA, however unfavorable to the agency's case.

Based upon the foregoing, PHMSA clearly lacks evidence proving any failure by Respondent to follow procedures. PHMSA does not establish any connection whatsoever between the root cause, failure to depressurize the receiver, and three of the procedures, *Safety Procedure S-370, Work Permits, Standard Operating Procedures, Pigging and Pig Trap Operation, Procedure: I.13,* and *Best Practice Clearing Freezes BP I.17, nor* does PHMSA explain the manner in which a failure to follow the three procedures caused the incident. Additionally, PHMSA has failed to carry the burden of production – no evidence is in the record – and has failed to carry the burden of persuasion – the agency has presented no analysis which

[132] Case File Exhibit 3, PSVR at 6.
[133] Case File Exhibit A-5, Interview of D. Cox at 3.
[134] Hearing Transcript 160:16-17 (testimony of G. Ochs).
[135] Hearing Transcript 382:11-13 (testimony of K. Ferguson).
[136] Case File Exhibit A-4, Interview of K. Porter at 2.

leads to the conclusion that the three referenced procedures were not followed. PHMSA provides only unsubstantiated and uncorroborated, conclusory statements.

On these grounds alone, NOPV Item 1 should be withdrawn, along with the proposed civil penalty.

2. NOPV Item 2

NOPV Item 2 raises issues of arbitrary and capricious action, burden of proof and a rebuttable presumption.

a. Arbitrary and Capricious Agency Action

As an initial matter, Respondent has affirmatively demonstrated its compliance with 49 C.F.R. § 192.605(b)(8) through its collective process of QJRs, AWHR and other means for procedural amendments, and SOP Annual Reviews to implement amendments. Further, as revealed at the hearing and demonstrated herein, PHMSA did not request from Respondent any of the records which would have documented compliance with the cited regulation. Respondent asserts that PHMSA arbitrarily selected procedures which it alleged were not followed and, in an effort to cobble together a case, focused on unsubstantiated "issues" at Borchers, *i.e.* leaking valves, pressure gauges and the prior presence of ice. PHMSA's own witness testified to its case being "void of evidence."[137]

To allege a violation based on a complete absence of evidence is the epitome of arbitrary agency action. On these grounds alone, NOPV Item 2 should be withdrawn.

b. Burden of Proof

PHMSA fails to carry the burden of proof on NOPV Item 2. PHMSA has offered not a scintilla of evidence that Respondent did not perform the reviews required under 49 C.F.R. §

[137] Hearing Transcript 292:22-23 (testimony of M. McDaniel).

192.605(b)(8). PHMSA witness Ms. McDaniel goes so far as to affirm that PHMSA has a case that is "void of evidence" and concluded that its case has an absence of evidence.[138] Additionally, Respondent presented an abundance of records and testimony at the hearing to support its position that Respondent did in fact fulfill the regulatory requirements of 49 C.F.R. § 192.605(b)(8). PHMSA has not proven its affirmative case and has carried neither its burden of production nor its burden of persuasion.

On these grounds alone, NOPV Item 2 should be withdrawn, along with the proposed civil penalty.

c. Rebuttable Presumption

To the extent that PHMSA's allegations in NOPV Item 2 create a rebuttable presumption that the effectiveness and adequacy reviews were not performed, Respondent has robustly and overwhelmingly rebutted that presumption with the testimony and record evidence described above. Thus, any presumption supporting PHMSA's allegations in NOPV Item 2 disappears, and on these grounds alone, NOPV Item 2 should be withdrawn, along with the proposed civil penalty.

3. NOPV Item 3

NOPV Item 3 raises issues of arbitrary and capricious agency action, burden of proof and PHMSA's failure to prove all elements of its claim.

a. Arbitrary and Capricious Agency Action

PHMSA ignores its own prior decision issued to Respondent related to the process of launching and receiving pigs. In the months and years following the issuance of the 2008 NOA, Respondent availed itself of the judicial process and engaged PHMSA on this specific issue until

[138] Hearing Transcript 292:22-293:1 (testimony of M. McDaniel).

PHMSA issued its decision and closed the case in 2010. PHMSA's acceptance of Respondent's position, that launching and receiving pigs was a process and did not meet the four-part test, served as the foundation for Respondent's continued performance on that basis. To reverse course and allege a violation on the same topic decided over a decade prior constitutes arbitrary agency action.

On these grounds alone, NOPV Item 3 should be withdrawn, along with the proposed civil penalty.

b. Burden of Proof

PHMSA fails to carry the burden of proof on NOPV Item 3. PHMSA has not offered any evidence by which one could conclude that Respondent should have identified launching and receiving pigs as a covered task. PHMSA alleges that pigging meets the OQ four-part test. Of great significance, however, no evidence has been offered to which the 49 C.F.R. § 192.801(b) four-part test could be applied, and certainly PHMSA could not explain how the four-part test is satisfied. PHMSA makes no attempt to demonstrate satisfaction of the four-part test.

On these grounds alone, NOPV Item 3 should be withdrawn, along with the proposed civil penalty.

c. Failure to Prove All Elements

PHMSA fails to prove all elements of the alleged violation. A covered task is defined at 49 C.F.R. § 192.801 as "an activity, identified by the operator, that: (1) Is performed on a pipeline facility; (2) Is an operations or maintenance task; (3) Is performed as a requirement of this part; and (4) Affects the operation or integrity of the pipeline."[139] PHMSA alleges that Respondent did not identify "launching and receiving pigs" as a covered task but made no

[139] 49 C.F.R. § 192.801(b)(1)-(4) (1999).

demonstration whatsoever that "launching and receiving pigs" satisfied the regulatory four-part test. Further, despite Mr. Lethcoe's opening remarks at the hearing that "[l]aunching and receiving a pig is an activity that satisfies all prongs of the four-part test," PHMSA has provided no evidence and no singular explanation of how any one of the required four prongs has been satisfied.[140] PHMSA has no factual basis and no evidence to support its allegations in NOPV Item 3. Therefore, PHMSA has failed to prove all elements of its claim. Indeed, PHMSA has failed to prove *any* element of its claim.

On these grounds alone, NOPV Item 3 should be withdrawn, along with the proposed civil penalty.

IV. PROPOSED CIVIL PENALTIES

PHMSA proposed a total of $2,473,912 in civil penalties in connection with NOPV Item 1, NOPV Item 2, and NOPV Item 3. Based upon the foregoing arguments on the merits and, in the alternative, Respondent's legal issues, all proposed penalties should be withdrawn. If any of the alleged violations is sustained, however, Respondent argues that the penalties should be reduced as described hereinbelow.

A. Regulatory and Legal Standards

PHMSA is obligated by its procedural regulations to consider the following penalty assessment considerations:

1. The nature, circumstances and gravity of the violation, including adverse impact on the environment;
2. The degree of the respondent's culpability;
3. The respondent's history of prior offenses;
4. Any good faith by the respondent in attempting to achieve compliance;
5. The effect on the respondent's ability to continue in business.[141]

[140] Hearing Transcript 379:17-21 (statement by B. Lethcoe).
[141] 49 C.F.R. § 190.225(a)(1)-(5) (2018).

B. Due Process

The Supreme Court of the United States has instructed that "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice… and [to] afford [interested parties] an opportunity to present their arguments."[142] The Supreme Court has consistently expressed that "[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'"[143]

To the proposed civil penalties, PHMSA's continued refusal to produce the native, Excel, version of its civil penalty worksheet amounts to a denial of due process by denying Respondent the opportunity to understand and challenge the manner in which PHMSA calculated the significant civil penalties PHMSA proposes to impose. Respondent thus is denied both notice and a full and fair opportunity to be heard.

In Don *Ray Drive-A-Way Co v. Skinner*, a U.S. District Court found that the Federal Highway Administration ("FHWA") was obligated to disclose to the public the algorithm it used to compute the safety ratings of motor carriers.[144] The motor carriers were provided a series of factors against which their safety performance was judged, but FHWA refused to explain how it weighed each factor.[145]

> The weighting of the various factors is crucial to the carriers' understanding of why they are being assigned a particular legal status. Without that information, their right to appeal the agency action is severely impaired, in that they will not know the reason for their rating and hence cannot direct their attack to facts crucial to a successful appeal. A person should not have to guess why he is being punished, even if the government ultimately says that the punishment is attributable to one or more of several reasons.[146]

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[142] *Armstrong v. Manzo*, 380 U.S. 545, 550, 85 S.Ct. 1187, 1190, 14 L.Ed.2d 62 (1965).
[143] *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) citing *Armstrong v. Manzo*, 380 U.S. 545 at 552.
[144] *Don Ray Drive-A-Way Co v. Skinner*, 785 F.Supp. 198, 200 (D.D.C. 1992).
[145] *Id.* at 200.
[146] *Id.*

Similarly here, Respondent has been deprived of an understanding of how it is being assessed various points in the civil penalty worksheet and therefore cannot adequately and fully defend itself against the worksheet's algorithms and calculations, or against any potential errors. Respondent must feel its way forward, blind in one eye.

PHMSA's refusal to provide the worksheet amounts to a refusal to include in the case file "all agency records pertinent to the matters of fact and law asserted," an action which directly contravenes the Congressional directive of the PIPES 2020 act.[147] Congress clearly felt that respondents should receive all relevant (pertinent) evidence held by PHMSA in pipeline enforcement adjudications, and by way of PIPES 2020, Congress granted that right, yet PHMSA denies Respondent that right. PHMSA refusal to include "all agency records pertinent to the matters of fact and law asserted" also violates the Administrative Procedure Act given that PHMSA acted "without observance of procedure required by law," that being the procedures directed by Congress in PIPES 2020.[148]

At the hearing, following lengthy discussions regarding the calculations found in the Civil Penalty Worksheet, Respondent's position was restated as such: "[w]e maintain that our due process rights are being ignored, if not denied, by not having that [native Excel] spreadsheet."[149] Thus, Respondent asserts that all alleged violations must be withdrawn on the grounds that PHMSA has denied Respondent its right to a full and fair adjudication, a clear violation of the Constitutional right of due process.[150]

[147] PIPES Act of 2020, Pub.L. 116-260, 134 Stat. 1182 (Dec. 27, 2020); 49 U.S.C. 60117(b)(1)(C).
[148] 5 U.S.C. § 706(2)(A) and (D).
[149] Hearing Transcript 491:22-25 (statement of V. Murchison).
[150] Respondent is aware of that certain Final Order issued in case CPF No. 4-2022-032-NOPV; Respondent, however, asserts that this issue was decided incorrectly in that case.

C. Stipulation

Prior to the hearing, Respondent inquired whether PHMSA would stipulate to the fact that the incident did not occur in a High Consequence Area ("HCA"). At the hearing, Respondent Counsel followed-up on the prior inquiry, asking "can [we] go ahead and stipulate that Borchers [Station] is not in an HCA with respect to the entire case."[151] PHMSA Region Counsel and PHMSA Director, Southwest Region, both responded in the affirmative.[152] Thus, as appropriate, the Civil Penalty Worksheet for NOPV Item 1, Item 2 and Item 3 should be revised to reflect the accurate "Gravity" consideration of "[t]he violation occurred NOT within an HCA."[153]

D. Timing Considerations and Inflated Penalties

As seen in the NOPV and PSVR, and as thoroughly discussed during the hearing, the amount of a civil penalty which PHMSA may impose increases over time as the potential range of dollar values assigned pursuant to the civil penalty assessment considerations increases over time.[154] The exact "per-point values" are found within the Excel spreadsheet which PHMSA has refused to provide to Respondent.[155]

Respondent asserts that, without the Excel spreadsheet, the only means to understand the applicable "per-point" value is to review the Civil Penalty Summaries posted to PHMSA's website which "provide[] a general overview to assist the public in understanding civil penalty calculations."[156] The Civil Penalty Summary which corresponds to the date of the alleged violations, March 26, 2020, is the Civil Penalty Summary dated February 7, 2020, which notifies

[151] Hearing Transcript 392:21-393:1 (inquiry of V. Murchison).
[152] Hearing Transcript 393:9-12 (testimony of K. Gagnon and B. Lethcoe).
[153] Case File Exhibit 2, Proposed Civil Penalty Worksheet.
[154] Case File Exhibit 1, NOPV; Case File Exhibit 3, PSVR.
[155] Hearing Transcript 455:2-11; 465:19-466:4 (testimony of R. Dyck).
[156] Prehearing Submission Exhibits 13, 14 and 15.

regulated parties of a "per-point" value of $1,440.[157] PHMSA, however, apparently utilized the Civil Penalty Summary dated January 23, 2023, which corresponds to the time period when the NOPV was issued (June 15, 2023) and applies a "per-point" value of $1,862, rather than the value of $1,440 found in the 2020 Civil Penalty Summary.[158] In an attempt to understand this discrepancy, at the hearing, Respondent posed numerous detailed questions to the Director of the PHMSA Enforcement Division, Mr. Rod Dyck. When asked whether he agrees that in the 2023 Civil Penalty Summary points are "worth $1,862 per point," Mr. Dyck responded "yes."[159] He also testified to his agreement that the "per-point values inside the Civil Penalty Worksheet" in this case are based on the value of "1,862."[160]

Confusingly, when asked whether he agrees that in the 2020 Civil Penalty Summary points are worth $1,440, Mr. Dyck responded "no" and, in contradiction to his response regarding the 2023 per-point values, he now stated that "no dollars per point [are] shown on the Civil Penalty Summary."[161] In further baffling testimony, when referencing a 2022 Civil Penalty Summary, Mr. Dyck testified that a per-point value of $1,728 is "right" and "…it appears to be dollars per point" adding that, though the Civil Penalty Summary "doesn't say it [] it sure seems that way from this [ ] document."[162] Thus, Mr. Dyck agreed to discernable per-point values for 2023 and 2022 but <u>not</u> for 2020. Mr. Dyck's disingenuous testimony undermines any assertion that PHMSA's penalty assessment process is fair and transparent.

Further, when asked how the Enforcement Division makes changes or adjustments to the point values within the Civil Penalty Summaries, Mr. Dyck testified that "improvements" are

[157] Prehearing Submission Exhibits 13, Civil Penalty Summary dated February 7, 2020.
[158] Prehearing Submission Exhibits 15, Civil Penalty Summary dated January 23, 2023.
[159] Hearing Transcript 424:25-426:5 (testimony of R. Dyck).
[160] Hearing Transcript 454:22-455:11 (testimony of R. Dyck).
[161] Hearing Transcript 426:10-22; 427:14-18 (testimony of R. Dyck).
[162] Hearing Transcript 43:26-432:10 (testimony of R. Dyck).

made considering various factors such as feedback from operators, fairness in penalties and deterrence.[163] Notably, Mr. Dyck responded in the affirmative when asked "so no particular event [ ] prompts a change in the per-point value within the Civil Penalty worksheet?"[164] Thus, Respondent and the regulated community are left in the dark as to when and how point values are determined, which in this case add up to a significantly increased civil penalty. PHMSA increases point values, without any demonstrable basis and without any transparency, then imposes those increased point values upon unsuspecting operators, an arbitrary agency action.

PHMSA provides the regulated community with Enforcement Guidance, including Civil Penalty Summaries and yet, the PHMSA Director of Enforcement, Mr. Dyck, testified that the Civil Penalty Summaries cannot be relied upon.[165] If this statement is correct, not providing the regulated community with notice that it should *not* rely on agency guidance documents broaches issues of fair notice and constitutes arbitrary and capricious agency action.

To demonstrate the effect of PHMSA's error, NOPV Item 3 was assigned "total points" of 37. 37 points multiplied by $1,862 equals $68,894 and 37 multiplied by $1,440 equals $53,280. Thus, as to NOPV Item 3 only, the arbitrarily high per-point value equates to PHMSA proposing excessive civil penalties in an amount of $15,614. Even if all other arguments in this Brief fail, PHMSA should reduce all civil penalties assessed for NOPV Item 1, Item 2 and Item 3 to assign the correct "per-point" value of $1,440 for 2020, the year the incident occurred and the year in which the violations were alleged to have occurred.

Moreover, in 2020, an operator would know only that a transgression might be penalized at $1,440 per point. Nowhere in agency guidance are operators alerted that a per-point value

[163] Hearing Transcript 440:20-13 (testimony of R. Dyck).
[164] Hearing Transcript 446:17-21 (testimony of R. Dyck).
[165] Hearing Transcript 424:14-435:19 (testimony of R. Dyck).

greater than $1,440 could be applied. Yet, through mere agency delay, an operator can face a significantly increased penalty of which it had no notice. In this case, PHMSA allowed three years to pass before issuing the NOPV and imposing penalties at $1,862 per point. If such arbitrary approach is allowed to continue, PHMSA will be incentivized to wait as long as possible to bring enforcement cases so that it may impose greater penalties. Yet, operators have no notice and no means to avoid the higher penalties.

To impose a civil penalty under such uncertain and discordant circumstances would be a denial of Respondent's right to fair notice and would constitute arbitrary and capricious agency action. On these grounds alone, the proposed civil penalties should be withdrawn in their entirety. In the alternative, and with regard to each of NOPV Item 1, Item 2 and Item 3, to the extent Respondent is found in violation, the "per-point" value must be reduced to reflect the known, 2020, per-point value of $1,440.

E. NOPV Items 1 and 2

PHMSA's Civil Penalty Worksheet contains "consequence factors" which apply multipliers to the "Base Civil Penalty."[166] An example of a consequence factor is a reportable incident (2X). In this case, Respondent's Base Civil Penalty was increased 12 times (12X) given the fatality involved. Those multipliers come with no explanation whatsoever about the manner in which the agency determines the magnitude of the multipliers. Respondent attempted to question Mr. Dyck about the genesis of those factors and focused upon the 12X multiplier for a fatality. Mr. Dyck, however, answered only with generalities relating to consistency and fairness.[167] Mr. Dyck at no time provided any explanation of the manner in which the 12X multiplier is determined.

[166] *See* Case File Exhibit 2, Proposed Civil Penalty Worksheet at 2.
[167] Hearing Transcript 478:4-15 (testimony of R. Dyck).

A 12X penalty enhancement is significant – in this case, the Base Civil Penalty for Item 2 is increased by $1,340,640 (12 x $111,720). Yet, the Director of Enforcement, in position since 2008, evaded the questions, in the end providing the responses that, (a) "I don't know when this determination was made" and (b) I don't recall making this determination."[168] Further, "… I do not recall our discussion"; "I'm not sure how long ago it was we put a 12 in there." "I don't know." [169] When asked if he could look up the manner in which the 12X was determined, Mr. Dyck amazingly responded "I don't have the capability to look it up."[170]

The result of the foregoing discussion is that respondents in PHMSA enforcement cases face significantly increased penalties but without any rational basis that has been articulated by the agency. The Director of Enforcement, in the same position for 16 years, was unable to provide any basis, any explanation, for how that 12X multiplier is determined. Respondent has demonstrated that the per-point dollar values and the consequence factor multipliers are generated out of sight of the regulated community. Notice and comment rulemaking is not performed, and no publicly available guidance explains anything about consequence factors which drastically increase penalties that are assessed.

The above failings amount to (a) a denial of due process, in that Respondent lacks notice and a meaningful opportunity to be heard about the consequence factor multipliers, and (b) an abject absence of fair notice, in that PHMSA has provided to Respondent zero guidance about the consequence factor multipliers. On said grounds, the 12X multiplier should be re-set to "1" such that no multiplier is applied to the Base Civil Penalty for the fatality.

[168] Hearing Transcript 485:21-486:15 (testimony of R. Dyck).
[169] Hearing Transcript 486:12-15 (testimony of R. Dyck).
[170] Hearing Transcript 487:14-20 (testimony of R. Dyck).

F. NOPV Item 1

PHMSA proposes a civil penalty in the amount of $218,647 for NOPV Item 1. As an initial matter, the proposed penalty should be reduced given that PHMSA has not proven a violation of 49 C.F.R. § 192.605(a) with regard to three of the four subject procedures. In the alternative to the foregoing, and only to the extent a violation is found, the proposed penalty should be significantly reduced on the following grounds:

1. Causal Factor

PHMSA alleges that the alleged violation represented in NOPV Item 1 was a causal factor in the incident. This conclusion that "failure to follow its written procedures was a causal factor" was affirmed at the hearing by PHMSA witness Ms. Binns.[171] Ms. Binns further testified that PHMSA demonstrated the designation of causal factor "through documentation and procedures," but Ms. Binns identified no specific documentation and no specific procedures.[172] Certainly, she provided no description of any analysis of the cause of the incident. And, the AID Report provides no basis. The agency has identified not one fact and not one analysis that might support its claim that the failure to follow one procedure was a causal factor in the incident, other than "demonstrated through the case we've developed."[173] Given the opportunity to explain the agency's position, Ms. Binns declined.[174]

PHMSA's Case File, by way of the NOPV and PSVR is silent as to *how* the alleged failure to follow procedures was a causal factor in the incident. Further, PHMSA provided no explanation or analysis for its determination of causal factor and, significantly, has identified no "documentation and procedures" in the record that would support this claim. In an attempt to

[171] Hearing Transcript 400:2-10 (testimony of T. Binns).
[172] Hearing Transcript 401:17-402:3 (testimony of T. Binns).
[173] Hearing Transcript 404:15-405:5 (testimony of T. Binns).
[174] Hearing Transcript 405:3-5 (testimony of T. Binns).

gain clarity and "any explanation of how it is that the failure to follow [a] procedure led to" the incident, counsel for Respondent asked Ms. Binns at the hearing whether she wanted to add to her prior statements, to which, in a revealing bit of testimony, Ms. Binns responded "no."[175]

PHMSA articulates no rational connection between the facts stated and the conclusion that a violation under NOPV Item 1 was a causal factor, and PHMSA lacks any evidence, discussion or analysis that would support the allegation. PHMSA has established correlation, nearness in time, but it has not established causation. Based on the foregoing, the Civil Penalty Worksheet for NOPV Item 1 should be revised from "violation was a causal factor," to reflect the accurate "Gravity" consideration of "[t]he violation occurred NOT within an HCA…."

2. Number of Instances

The Proposed Civil Penalty Worksheet reflects four instances of violation for NOPV Item 1, one instance for each of four identified procedures. PHMSA has failed to carry its burden of proving all four instances of violation. As demonstrated herein, Respondent can only logically be found to have failed to follow one procedure, *S-230 Lockout-Tagout*, which is tied directly to the root cause of the incident, failure to depressurize the receiver.

Thus, to the extent any civil penalty ultimately is imposed, NOPV Item 1 should be reduced to a single instance, and the Civil Penalty Worksheet for the NOPV Item 1 "Gravity" consideration should be revised to reflect the accurate "Number of instances of violation" as "1."

G. NOPV Item 2

PHMSA proposes a civil penalty in the amount of $2,186,465 for NOPV Item 2. As an initial matter, no penalty should be assessed given that Respondent has proved that it did not violate 49 C.F.R. § 192.605(b)(8).

[175] Hearing Transcript 404:19-405:5 (testimony of T. Binns).

In the alternative to the foregoing, and only to the extent a violation is found, the proposed penalty should be significantly reduced on the grounds set out below.

1. Duration of the Alleged Violation

PHMSA asserts in the PSVR that the duration of the violation is "≥10 days."[176] PHMSA would appear arbitrarily to have noted that the violation as "ongoing" which is not supported by any facts and is based on forward-looking assumptions.

With regard to the "start date" and "end date" for NOPV Item 2, Ms. Binns confirmed in her testimony that both dates are stated as March 26, 2020, and agreed that this date is the same as those noted for NOPV Item 1.[177] Respondent counsel inquired how, if NOPV Item 1 was assigned a duration of one day, NOPV Item 2 was assigned a duration of ≥10 days. Ms. Binns testified that the ≥10 day duration is based on the violation being "ongoing."[178] Ms. Binns further testified that "ongoing" was selected for NOPV Item 2 because "I don't know if it's corrected or not. It *could* still be going on."[179] Upon inquiry as to when the "ongoing" status of this alleged violation allegedly *started*, Ms. Binns responded "it started [ ] the date that the incident happened."[180] Upon inquiry as to when the "ongoing" status of this alleged violation allegedly *ended*, Ms. Binns responded "I don't know if it's ended."[181] PHMSA at no time requested information which would have informed the presumed duration of this alleged violation. PHMSA has not proven whether the alleged violation started 10 days before the incident or ended 10 days after the incident, or whether the incident occurred somewhere in the middle, and, as such, the 10-day duration is unsupported in the record. Additionally, Mr.

[176] Case File Exhibit 3, PSVR at 19.
[177] Hearing Transcript 407:5-13 (testimony of T. Binns); *see* Case File Exhibit 3, PSVR at 10, 19.
[178] Hearing Transcript 407:18-408:7 (testimony of T. Binns).
[179] Hearing Transcript 408:7-15 (testimony of T. Binns) (emphasis added).
[180] Hearing Transcript 408:16-409:5 (testimony of T. Binns).
[181] Hearing Transcript 409:6-9 (testimony of T. Binns).

Ferguson's testimony regarding the blowdown of the East 10-Inch Pipeline on the morning March 27, 2020, the day after the incident, further demonstrates that there was no "ongoing" risk because following the blowdown, "no gas under pressure [was] in the pipeline."[182] Thus, a duration of any more than one day is simply not appropriate.

That 10-day duration also is founded upon an uninformed assumption, PHMSA's assumption that no records of effectiveness reviews meant none had been performed. PHMSA, however, *never requested* records of effectiveness reviews from Respondent. PHMSA requested only the procedures. Left unknown is whether that omission was borne of conscious disregard for the facts in the zeal to cement a violation.

Thus, PHMSA is unable to definitively state why or how the duration is "ongoing" and has presented no evidence and no rational explanation that would support any such assertion. Respondent objects to the civil penalty calculations for NOPV Item 2 based upon an "ongoing" duration on the grounds that this designation is not supported by any evidence, and PHMSA fails to provide any explanation. PHMSA lacks support for the notion that a related series of violations has occurred.[183]

This incorrect assessment significantly influences the penalty calculations, resulting in unreasonably inflated civil penalties. Respondent, therefore, moves that the violation "start date" and "end date" be appropriately assessed as "March 26, 2020," with a 1-day duration, not an unsubstantiated "ongoing" duration, and that the civil penalties proposed for NOPV Item 2 be adjusted downward, accordingly.

Further to the duration of any violation pursuant to Item 2, no action desired by PHMSA pursuant to Item 2 would have, or could have, prevented the incident. A procedure for

[182] Hearing Transcript 229:12-231:12 (testimony of K. Ferguson).
[183] 49 U.S.C. § 60118(a); 49 C.F.R. § 190.223(a).

addressing ice would have no effect upon depressurizing the receiver, and such a procedure would be predicated upon the premise that lockout-tagout, *i.e.*, depressurization and de-energizing, would already have occurred. One must depressurize a receiver to open the door and discover ice. To the extent that a violation is found for Item 2, it should have, at most, a 1-day duration similar to Item 1. The incident occurred on one day, and the Item 1 cause was failure to depressurize the receiver. Everything in this case points to failure to depressurize the receiver, and that event occurred on one single day, March 26, 2020.

2. The Alleged Violation Could Not Have Increased the Severity of The Incident

PHMSA offers only conclusory statements, and no discussion whatsoever, of the manner in which a violation in NOPV Item 2 could have increased the severity of the incident. Respondent has wholly corrected the record and undermined PHMSA's case by demonstrating that Respondent did in fact conduct (1) reviews of the work of personnel, (2) reviews for effectiveness and adequacy of procedures through multiple means, and (3) modification of procedures, when necessary.

The issue of increased severity was appropriately addressed by Respondent witness Mr. Godfrey: "I don't see the ice as being something that contributed to the severity. The severity was there when the receiver was not properly blown down."[184] Further, the root cause was determined in NOPV Item 1 to be the failure to depressurize the receiver and the unfortunate outcome of the failure being the passing of Mr. Rogers. PHMSA has not articulated how the allegations in NOPV 2 possibly could have "increased" the passing of Mr. Rogers to be any more severe than death.

Ms. Binns testified that the increased severity relates to a prospective, albeit speculative,

[184] Hearing Transcript 303:7-11 (testimony of J. Godfrey).

belief that "somebody else could get hurt."[185] In an attempt to solidify this assertion, former PHMSA Region Director Ms. McDaniel stated simply that "this case resulted… in a death… so that's the increase in severity."[186] Ms. McDaniel testified incorrectly that the Fieldmen "… didn't know exactly what to do or how to deal with it properly…."[187] None of the fieldmen's interviews, however, have any words to that effect.[188] To the contrary, Mr. Darin Cox stated in his interview that "ice in [the] barrel is sporadic," and that "it would only take 5 minutes to remove ice."[189] Mr. Ramon Amparan stated that there were "No issues with [the] barrel prior to this."[190] Mr. James Johannsen, when asked about historical operational or maintenance issues on the East 10-Inch Pipeline, replied "No. Ice is considered normal."[191] Not a soul said that the Fieldmen "didn't know exactly what to do or how to deal with it."[192] Ms. McDaniel's testimony is unsubstantiated.

Counsel for Respondent reminded Ms. McDaniel that a Gravity designation results from an alleged violation that "increased the severity of the *incident*" and turned the parties' attention to the 49 C.F.R. § 191.3 definition of "incident."[193] Notably, all of the defined criteria focus upon *consequences*. Counsel inquired as to which of the four criteria (*i.e*. release of gas, death or injury, property damage, or judgment of the operator) "resulted in this event being categorized as an incident?"[194] Ms. McDaniel testified in the affirmative that Respondent reported the incident

[185] Hearing Transcript 411:11-12 (testimony of T. Binns).
[186] Hearing Transcript 413:18-22 (testimony of M. McDaniel).
[187] Hearing Transcript 278:20-25 (testimony of M. McDaniel).
[188] *See* Case File Exhibits A-3, A-4, A-5, A-6.
[189] Case File Exhibit A-5, Interview of D. Cox at 2, 3.
[190] Case File Exhibit A-3, Interview of R. Amparan at 5.
[191] Case File Exhibit A-6, Interview of J. Johannsen at 6.
[192] Hearing Transcript 278:20-25 (testimony of M. McDaniel).
[193] Hearing Transcript 416:2-11 (exchange between V. Murchison and M. McDaniel.
[194] Hearing Transcript 416:20-417:17; 49 C.F.R. § 191.3 (2020).

"because of the death of Mr. Rogers."[195] Rather than provide any explanation about how the alleged violation could have increased the severity of a death, Ms. McDaniel then stated that "increase in severity of an incident does not relate directly back to 191.3"[196] Ms. McDaniel, however, was unable to identify any alternative definition of "incident" that should be applied in the enforcement context. The term "incident" is defined in the Pipeline Safety Regulations for a reason – so that all involved may work with the same definition, and was the subject of notice and comment rulemaking.[197]

Thus, PHMSA lacks a rational connection between the statements in the NOPV and PSVR and its conclusion that any violation of 49 C.F.R. § 192.605(b)(8) increased the severity of the incident. As to NOPV Item 2, PHMSA has established neither correlation nor causation – PHMSA's conclusion is not a logical result of the facts. To find otherwise would constitute arbitrary and capricious agency action. To the extent a violation is found, the proposed penalty for NOPV Item 2 should be reduced to reflect the accurate "Gravity" consideration of "[t]he violation occurred NOT within an HCA…"

H. NOPV Item 3 – The Incident Did Not Occur In An HCA

PHMSA proposes a civil penalty in the amount of $68,800 for NOPV Item 3. As an initial matter, no penalty should be assessed given that Respondent was not in violation of 49 C.F.R. § 192.805(a), and PHMSA has not proved all elements of its alleged violation.

In the alternative to the foregoing, and only to the extent a violation is found, the proposed penalty should be significantly reduced to reflect the accurate "Gravity" consideration of "[t]he violation occurred NOT within an HCA…"

[195] Hearing Transcript 419:3-16 (testimony of M. McDaniel).
[196] Hearing Transcript 419:13-16, 420:16-18 (testimony of M. McDaniel).
[197] Establishment of Minimum Standards, 35 Fed. Reg. 13248 (Aug. 19, 1970).

V. THE PROPOSED COMPLIANCE ORDER

A. Item 2

The Proposed Compliance Order at Section A, relating to Item 2, would order Respondent to perform the following actions:

1. Conduct an effectiveness review of its procedures for Pigging and Pig Trap Operations and Clearing Freezes Best Practice by reviewing employees' experiences at each of the PEPL facilities and identifying the facilities where employees may encounter ice in the PEPL system within 60 days of issuance of the Final Order;
2. Identify specific locations on the pipeline at each facility where icing may occur;
3. Create and implement new procedures for each specific location and detailed guidelines for employees encountering ice build-up when launching and receiving pigs and submit the new procedures to the Director, Southwest Region, PHMSA within 240 days of issuance of the Final Order; and
4. Train all PEPL employees responsible for following the site-specific procedures within 365 days of issuance of the Final Order.

In light of Respondent's arguments on the merits and its arguments on the legal issues for NOPV Item 2, above, no Compliance Order should issue; however, in the alternative, if a violation is found, any Compliance Order should be tailored specifically to the findings of the Final Order.

B. Item 3

The Proposed Compliance Order at Section B, relating to NOPV Item 3, would order Respondent to perform the following actions:

1. Amend its written operator qualification program to include launching and receiving pigs as a covered task;
2. Identify and qualify all PEPL employees responsible for performing the new covered task; and
3. Submit the amended Operation Qualification Plan and qualification records to the Director, Southwest Region, PHMSA within 210 days of issuance of the Final Order.

In light of Respondent's arguments on the merits and its arguments on the legal issues for NOPV Item 3, above, no Compliance Order should issue; however, in the alternative, if a

violation is found, any Compliance Order should be tailored specifically to the findings of the Final Order.

VI. CONCLUSIONS

A. NOPV Item 1

1. On the merits, PHMSA has failed to carry the burden of proof regarding whether Respondent personnel failed to follow three of the four procedures in question;
2. Finding violations as to three of the four procedures in question would constitute arbitrary and capricious agency action;
3. PHMSA must reduce any civil penalty imposed to align with the per-point penalty values applicable at the time the violations allegedly occurred;
4. PHMSA has not proven that failure to follow any procedure was a causal factor in the incident; and
5. PHMSA has denied Respondent's rights granted by PIPES 2020 and Respondent's right of due process by failing and refusing to include in the case file all pertinent agency records.

B. NOPV Item 2

1. On the merits, Respondent has demonstrated that it thoroughly and completely complied with 49 C.F.R. § 192.605(b)(8);
2. PHMSA has failed to carry the burden of proof in that the agency supplied no evidence that would prove a violation and in fact failed even to request any such evidence;
3. PHMSA must reduce any civil penalty imposed to align with the per-point penalty values applicable at the time the alleged violation occurred;
4. PHMSA assessed an "ongoing" violation but has provided no evidence or rational explanation that would support a related series of violations;
5. Respondent has demonstrated that the duration of any violation should be no more than one day;
6. Respondent has proven that any violation could not have increased the severity of the incident;
7. PHMSA has denied Respondent's rights granted by PIPES 2020 and Respondent's right of due process by failing and refusing to include in the case file all pertinent agency records; and
8. On the merits and legal issues, Respondent has demonstrated that no Compliance Order should issue.

C. NOPV Item 3

1. Respondent has demonstrated that the issue was decided in Respondent's favor 14 years ago.
2. PHMSA has failed to carry the burden of proof in that the agency (a) provided no evidence that would support the four-part test and (b) failed to prove all elements of its claim in that no evidence and no analysis support the finding that four-part test was satisfied;
3. That PHMSA must reduce any civil penalty imposed to align with the per-point penalty values applicable at the time the alleged violation occurred;
4. That PHMSA has denied Respondent's rights granted by PIPES 2020 and Respondent's right of due process by failing and refusing to include in the case file all pertinent agency records; and
5. On the merits and legal issues, Respondent has demonstrated that no Compliance Order should issue.

COUNSEL FOR RESPONDENT PANHANDLE EASTERN PIPELINE COMPANY

May 31, 2024

William V. Murchison
Texas Bar No. 14682500
Murchison Law Firm, PLLC
325 N. St. Paul Street, Suite 2700
Dallas, Texas 75201
(214) 716-1923 – Telephone
(844) 930-0089 – Facsimile
Vince.Murchison@PipelineLegal.com

Roina Rivera Baker
Texas Bar No. 24108006
Murchison Law Firm, PLLC
325 N. St. Paul Street, Suite 2700
Dallas, Texas 75201
(214) 716-1923 – Telephone
(844) 930-0089 – Facsimile
Roina.Baker@PipelineLegal.com