

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

	)	
In the Matter of	)	
	)	
Kinder Morgan CO2 Company LLC	)	CPF No. 5-2021-002-NOA
	)	Notice of Amendment
Respondent.	)	
	)	

**Kinder Morgan CO2 Company LLC
Post-Hearing Brief**

I. Introduction

The Pipeline and Hazardous Materials Safety Administration (PHMSA or the Agency) issued a Notice of Amendment (NOA) to Kinder Morgan CO2 Company LLC (KM CO2 or the Company) on August 16, 2021. The NOA alleges seven (7) procedural inadequacies. In response to the NOA, KM CO2 amended its procedures to address six (6) of the seven (7) procedural allegations, which the Agency has since indicated are acceptable. With respect to the remaining allegation, Item 7, KM CO2 contested the allegation and requested a hearing.

In an effort to resolve the contested allegation in lieu of a hearing, the parties convened informal settlement meetings beginning on November 3, 2021, but were unable to reach an agreement. As a result, the parties participated in a hearing on March 3, 2022. At the hearing, the Hearing Officer directed KM CO2 to file post-hearing materials by April 4, 2022. In compliance with this deadline, KM CO2 is submitting this Post-Hearing Brief to further support its request for withdrawal of NOA Item 7. In submitting this Post-Hearing Brief, KM CO2 incorporates by reference its (1) Request for Hearing filed on September 14, 2021, (2) Pre-Hearing Brief and related exhibits (Exhibits A-C) submitted on February 21, 2022, and (3) testimony provided during the March 3, 2022, hearing as reflected in the transcript in the record.¹

This matter turns on a single narrow issue: whether KM CO2 repair procedures meet the regulatory requirements of 49 C.F.R. § 195.404(c)(1) by providing an adequate “description of each repair.” As established during the hearing and reiterated again below, KM CO2’s procedures and related records meet those regulatory requirements. PHMSA has not put forward any factual or legal basis

¹ With this Post Hearing Brief, KM CO2 is filing a transcript of the hearing and a supplemental errata sheet with corrections to the transcript as agreed to by KM CO2 and PHMSA. Additional changes that were identified by the parties are already incorporated into the attached hearing transcript and listed on the errata sheet provided at the end of the transcript.

to demonstrate otherwise and has failed to meet its burden of proof to establish that KM CO2's procedures are inadequate. During the hearing, PHMSA made—for the first time—several post hoc enforcement-driven rationalizations in an attempt to sustain the allegations in NOA Item 7, none of which have any support in the regulations, associated guidance, prior enforcement under the relevant regulation, or the pipeline safety industry standards incorporated at Part 195. PHMSA may not impermissibly expand the already clear requirements of § 195.404(c)(1) through enforcement and without providing fair notice or due process to KM CO2 or the industry. For these reasons, KM CO2 requests that Item 7 be withdrawn.

II. KM CO2's Procedures Comply with the Unambiguous Recordkeeping Requirements at 49 C.F.R. § 195.404(c)(1)

In NOA Item 7, PHMSA alleges that KM CO2's repair procedures are inadequate under 49 C.F.R. § 195.404(c)(1) because its repair records “failed to clearly identify which contractor and/or employee performed specific covered tasks.” *NOA at 5*. To address this alleged deficiency, PHMSA requests that KM CO2 “develop or identify a clear process that will document which qualified personnel performs each covered task.” *Id.* During the hearing, PHMSA clarified that this request “relates only to repair activities under 195.404(c)(1) . . . [and not] to non-repair activities.” *Hr'g. Tr. 10:22-25*. PHMSA's mandate to document which qualified personnel completed a specific OQ covered task while documenting repairs goes well beyond—and constitutes an impermissible expansion of—the requirements at 49 C.F.R. § 195.404(c)(1).

A. The Scope of 49 C.F.R. § 195.404(c)(1) Is Clearly Defined by the Plain Regulatory Text.

The recordkeeping requirements under 49 C.F.R. § 195.404(c)(1) are unambiguous. Pursuant to the plain language of this provision, operators are required to maintain repair records that provide three (3) specific categories of information – (1) the date, (2) the location, and (3) a “description of each repair.” As clarified during the hearing, there is no dispute that KM CO2 adequately documents the date and location of a repair. Instead, this matter turns on PHMSA's allegation that KM CO2 does not provide a complete “description” of a repair in its records.

Neither the regulations at Part 192 nor 195 define “description” and PHMSA has not provided any clarification as to the scope of this term in any PHMSA prior enforcement or guidance under this provision. As a result, when determining how to comply with § 195.404(c)(1) and the requirement to provide a “description” of a repair, PHMSA has instructed operators to apply the common dictionary meaning of any undefined terms. *See Final Order, In re: Sunoco Pipeline, LP, CPF 1-2019-5006 (Jun. 26, 2020)* (“In interpreting undefined regulations, we [PHMSA] look to the common dictionary definition.”). In this case, description simply means “kind or character” or “a statement or account giving the characteristics of someone or something.” *Description, Merriam-Webster.com Dictionary*, <https://www.merriam-webster.com/dictionary/description> (last accessed Mar. 23, 2021).²

² An earlier version of Merriam-Webster's website (last accessed by KM CO2 on Dec. 27, 2021) defined “description” as “type or kind.” This is the definition that was cited by KM CO2 in its pre-hearing materials and at the hearing. Although the definition has since been slightly modified on Merriam-Webster's website, the current definition of “kind or character” is substantially the same. More importantly, both definitions reinforce KM CO2's argument that

During the hearing, PHMSA agreed that the recordkeeping requirements at 49 C.F.R. § 195.404(c)(1) must be read in light of the common dictionary definition and cited to the same definition offered by KM CO2. Moreover, PHMSA offered a third definition of “description,” including the “act of describing, specifically discourse intended to give a mental image of something experienced.” *Hr’g. Tr.* 12:23-25. Despite acknowledging that the meaning of description should be tied to its ordinary meaning, PHMSA then offered its view—for the first time during these proceedings—that description should be defined by “the five Ws; who, what, where, when, and why.” *Id.* at 13:20-21. According to PHMSA, KM CO2’s records do not provide an adequate description of repairs merely because KM CO2’s records do not provide the “who” or the specific individual that completed each OQ covered task during a repair.

PHMSA’s novel broadening of the definition of description to include the “five Ws” is clearly an expansion of the ordinary meaning of description. This concept is not provided within the regulatory text, nor is it reasonably discernible from the ordinary meaning of description. Moreover, this expansive interpretation of this regulation has not been articulated through prior enforcement or within any PHMSA guidance. Setting aside PHMSA’s sweeping post hoc explanation of the meaning of description, 49 C.F.R. § 195.404(c)(1) does not include any requirement—express or implied—that an operator maintain records which identify the specific individual(s) who completed the repair, let alone the individual(s) who completed each OQ covered task associated with a repair.

B. KM CO2’s Procedures Satisfy 49 C.F.R. § 195.404(c)(1).

As discussed at the hearing, KM CO2 maintains repair project documentation in its detailed Pipeline Inspection/Repair Report (PIR Report), which the Company considers to be the document of record for purposes of 49 C.F.R. § 195.404(c)(1). *See* Pre-Hearing Brief, Ex. A. During the hearing, PHMSA conceded that this document clearly provides the date and location of repairs as required by 49 C.F.R. § 195.404(c)(1). *Hr’g. Tr.* 13:15-19 (“The regulation already calls out the date and location of the repair. And Kinder Morgan’s pipeline inspection repair report does clearly identify that information.”). PHMSA even acknowledged that the PIR Report provides at least some description of the repair. *Id.* at 14:1-4 (“After reviewing Kinder Morgan’s documentation, we do not dispute that Kinder Morgan does adequately document the what and the why” related to a repair). PHMSA asserts that the description of the repair provided in the PIR Report is insufficient, however, simply because it also does not include the names of the specific individuals that completed each OQ covered task relevant to the repair.

Based on applicable law and contrary to PHMSA’s assertion, the PIR Report is sufficient for purposes of establishing compliance with 49 C.F.R. § 195.404(c)(1). As established during the hearing by KM CO2 Superintendent of Operations, the form is detailed and provides a variety of information about the relevant repair, including information about the existing pipe (wall thickness, seam, operating pressure, etc.), the origin of the defect (whether it was caused by corrosion, outside force, etc.), how the defect was detected (by air patrol, ground patrol, or some

providing the names of individuals that complete specific covered tasks is not within the scope of the ordinary meaning of “description.”

other method), and the type of repair (steel sleeve, composite sleeve, or replacement pipe).³ *Pre-Hearing Brief, Ex. A at 2*. The report further includes the name of the “person or persons who examined the pipeline and completed the form.” *Id. at 4*. Additionally, the form provides a notes section, where KM CO2 representatives tasked with completing the form are instructed to provide additional information to describe the repair, including

how much pipe was cut and replaced, type of pipe used for replacement, type of coating used to make repairs, whether the coating sample was sent to a lab for determining asbestos content; whether this pipeline location had been excavated before and why; more detail as to the pipeline coating condition; more detail on types of corrosion or mechanical defects found, etc.

Id. at 3.

Taken together, the information included in KM CO2’s PIR Report clearly, as required by the ordinary meaning of description, provides a “mental image” of the repair, explains the “kind or character” of the repair, and “provides the characteristics” of the repair. In short, the information included in the PIR Report provides a comprehensive description of the relevant pipeline repair that exceeds what is required by the ordinary meaning of “description” and the regulatory requirements at 49 C.F.R. § 195.404(c)(1).

III. PHMSA Has Failed to Meet its Burden of Proof to Establish a Violation of 49 C.F.R. § 195.404(c)(1)

PHMSA bears the burden of proof for all elements of a proposed violation in an enforcement proceeding. *Final Order, In the Matter of Butte Pipeline Co., CPF 5-2007-5008 (Aug. 17, 2009)* (“PHMSA carries the burden of proving the allegations set forth in the Notice, meaning that a violation may be found only if the evidence supporting the allegation outweighs the evidence and reasoning presented by Respondent in its defense.”). This includes the burden to demonstrate what measures are actually required by the regulations. *See, e.g., Final Order, In the Matter of ExxonMobil Pipeline Co., CPF 5-2013-5007 (Jan. 23, 2015)* (finding that PHMSA failed to meet its “burden of proving the measures alleged in the Notice were, in fact, required[.]”).

PHMSA has failed to establish that KM CO2’s procedures are inadequate under 49 C.F.R. § 195.404(c)(1) or that the alleged requirement to document the names of specific individuals that complete each OQ covered task is required by the regulation. Instead, PHMSA has offered a

³ As stated during the hearing, Mark McGuire, KM CO2 Superintendent of Operations, testified about the details provided on the PIR Report, including that the form provides:

the date, the repair date. You know, it depends on, like I say, it depends if it’s a B sleeve or clock spring or pipe. It will give you the link, that start station, GPS coordinates and all that for the repairs. If it’s pipe, it would give you the OD, the grade of the pipe, that type of thing. Also the test pressures used to hydro the pipe and all that.

Hr’g. Tr. 41:20-25; 42:1-3. Mr. McGuire explained that the information on the form is provided by the onsite KM CO2 representative and relevant subject matter experts. *Id. at 40:4-8*.

variety of post hoc explanations to support its allegation. These explanations are unpersuasive and insufficient to satisfy PHMSA's burden of proof. As a result, Item 7 must be withdrawn.

A. *PHMSA Cannot Use Separate and Distinct Operator Qualification Requirements to Expand the Repair Recordkeeping Requirements at 49 C.F.R. § 195.404(c)(1).*

Throughout the hearing, PHMSA continually referenced the Operator Qualification (OQ) requirements at 49 C.F.R. Part 195, Subpart G to support its contention that KM CO2's repair recordkeeping procedures were deficient. PHMSA acknowledged that the NOA does not allege that KM CO2 violated the OQ regulatory requirements.⁴ Yet PHMSA simultaneously asserted that the Company's repair records, required under an entirely different section of the regulations in Part 195, are deficient because, without information tying a specific individual to an OQ covered task, KM CO2 is not able to demonstrate compliance with the OQ requirements. PHMSA's circular logic is misplaced, and fails to recognize that KM CO2 is not required to associate specific individuals with completed covered tasks to demonstrate compliance with OQ requirements.

Three decades after the repair records regulation at 49 C.F.R. § 195.404(c)(1) was established, PHMSA issued OQ regulations under 49 C.F.R. Part 195, Subpart G, which include processes for ensuring that individuals that complete certain covered tasks are properly qualified. Subpart G includes its own recordkeeping requirements. 49 C.F.R. § 195.507(a). Pursuant to these requirements, operators must maintain records that include: (1) identification of qualified individual(s); (2) identification of the covered tasks the individual is qualified to perform; (3) date(s) of current qualification; and (4) qualification method(s). *Id.* Most significantly, these recordkeeping requirements do not require operators to maintain records that connect specific individuals to completed covered tasks in order to demonstrate compliance with the OQ regulations.

While not at issue here, even if PHMSA had alleged an OQ violation in this instance, it would not have salvaged PHMSA's case. In compliance with the OQ requirements and as described during the hearing, KM CO2 maintains a robust OQ program that complies with the requirements in Subpart G and maintains appropriate records to document its compliance with these requirements as required by 49 C.F.R. § 195.507(a). As part of its program, KM CO2 maintains records that identify the individuals that are qualified to complete covered tasks and the dates and methods that those individuals were qualified. At a project site, a KM CO2 inspector uses these records to confirm that the appropriate personnel are properly qualified to perform the required covered tasks and that those individuals actually complete those tasks.⁵ KM CO2 presented evidence related to

⁴ PHMSA specifically acknowledged during the hearing that it has not alleged that KM CO2 violated any OQ requirements. *Hr'g. Tr. 61:9-12* ("I agree with Kinder Morgan. We did not bring this notice of amendment under OQ. We believe it has relevance to OQ. However, it is under 195.404(c)(1)."). The Hearing Officer likewise recognized that the OQ requirements are outside of the scope of the violation alleged in the NOA. *Id. at 19:6-9* ("But that's not what the allegation is. Your allegation involves a records issue. You didn't allege if a person wasn't qualified.").

⁵ During the hearing, Jaime Hernandez, Director of Codes and Standards for KM CO2, provided a description of KM CO2's compliance with OQ requirements, including that:

Kinder Morgan does have a robust OQ program when it comes to projects regardless of the type, if there is OQ process involved.

a Safety Sign-in sheet and a Job Hazard Analysis form, which are used by the Company to document the individuals that enter and exit a project repair site. *See Pre-Hearing Brief, Exs. B & C.* As explained during the hearing, if necessary, KM CO2 can use these forms to discern what qualified individuals were onsite during a repair and completed various OQ covered tasks. All of these records are kept in job books related to the relevant repair and were provided to PHMSA during the underlying inspection.

KM CO2's process complies with the OQ regulatory requirements and KM CO2 is not required to document any additional information, including the names of individuals that complete specific covered tasks, to demonstrate compliance with these requirements.

B. PHMSA Misapplies Principles of Regulatory Interpretation.

During the hearing, PHMSA asserted that its interpretation of the regulatory requirements at 49 C.F.R. § 195.404(c)(1) is supported by the larger context of the pipeline safety regulations, which is to promote pipeline safety. KM CO2 agrees that the goal of the federal pipeline safety regulations at Part 195 is to promote pipeline safety, but this context does not change the plain meaning of the repair recordkeeping requirements within § 195.404(c)(1) nor does it support PHMSA's attempt to expand those requirements.

It is well established that “the rules of statutory construction apply when interpreting an agency’s regulations.” *Roberto v. Dep’t of Navy*, 440 F.3d 1341, 1350 (Fed. Cir. 2006). “When construing a regulation, it is appropriate first to examine the regulatory language itself to determine its plain meaning.” *Goodman v. Shulkin*, 870 F.3d 1383, 1386 (Fed. Cir. 2017) (citing *Meeks v. West*, 216 F.3d 1363 (Fed. Cir. 2000)). “If the regulatory language is clear and unambiguous, the inquiry ends with the plain meaning.” *Id.* As discussed above, KM CO2 submits that the regulatory requirements of § 195.404(c)(1), as clarified by the ordinary meaning of “description,” are unambiguous. PHMSA should not be able to utilize the larger context of the pipeline safety regulations in another after the fact attempt to substantively alter the ordinary meaning of these requirements.

Moreover, the purpose of applying the rules of statutory construction is to discern the intent behind the regulation when it was first implemented. *See Morgan v. Gay*, 466 F.3d 276, 277

In the preliminary stage, the assigned project manager has what we utilize in our OQ plan as the project manager's OQ covered task checklist. And it identifies all of the tasks that Kinder Morgan has at its disposal. They identify the appropriate tasks for the project at hand. If they are going to use contractors, they provide that checklist to the contractors to make sure that on day one that the contractor has the appropriate personnel to perform that task and that they have OQ records on hand.

The site inspector that was referred to earlier then collects all of those records and marries up the project manager checklist with the individual person's OQ qualifications, and those two are entered into the project book that was also referred to earlier. It should be noted that we weren't cited for not having qualified individuals. That wasn't an issue. And, again, we can, if it's a single project, link the personnel that had the appropriate OQ task to the function at hand.

Hr'g. Tr. 58:23-25; 59:1-22.

(3d Cir. 2006) (discussing that the “purpose in statutory interpretation is to discern legislative intent”). In this instance, 49 C.F.R. § 195.404(c)(1) was enacted in 1969 – 30 years before the OQ regulations were enacted.⁶ The regulatory requirements within § 195.404 have remained unchanged since they were first implemented. PHMSA cannot reasonably argue that the meaning of the requirements at § 195.404(c)(1) should now be influenced by regulations that were not in existence at the time they were implemented.

Finally, the regulatory requirements at 49 C.F.R. § 195.404(c)(1) should be viewed from the perspective that the federal pipeline safety regulations, by design, are performance-based standards. When promulgating § 195.404, PHMSA emphasized that

These proposed regulations are general “performance” type requirements rather than detailed “specification” type requirements of the type previously issued for the transportation of hazardous materials. By proposing regulations in this manner, the desired safety objective can be reached without impeding future industry innovations. The goal is the safe transportation of certain materials through pipelines; the regulation relates to the goal, not the means used to achieve the goal.

Notice of Proposed Rulemaking, 33 Fed. Reg. 10213, 10214 (Jul. 17, 1968). Under these performance-based standards, operators are permitted to design their processes and procedures to best fit their unique systems and operating conditions to promote pipeline safety. KM CO2’s repair recordkeeping procedures and separate OQ processes are compliant with these performance-based requirements and PHMSA has not demonstrated otherwise.

C. PHMSA Has Failed to Establish That Including the Names of Individuals Who Complete Covered Tasks is an Industry Standard.

As a final post hoc rationalization, PHMSA asserted during the hearing that it is standard practice for operators across the industry to include the names of individuals that complete specific OQ covered tasks when documenting repairs under § 195.404(c)(1). *Hr’g. Tr.* 23:2-5. Given that there is no published industry consensus standard that supports the Agency’s contention regarding repair records,⁷ PHMSA based its belief on general discussions related to how other operators document repairs through the Agency’s participation in “an internal OQ committee” and internal director meetings. To support this argument, PHMSA offered an example form purportedly used by a

⁶ Compare *Final Rule, Requirements for Design, Construction, Operation, and Maintenance*, 34 Fed. Reg. 15473 (Oct. 4, 1969) with *Final Rule, Pipeline Safety: Qualification of Pipeline Personnel*, 64 Fed. Reg. 46853 (Aug. 27, 1999).

⁷ When asked by the Hearing Officer whether “there [is] a published OQ industry – published industry OQ standard that speaks to your point?,” clarified to be a standard published by an industry consensus body, PHMSA responded “There’s not an FAQ. [. . .] I do not believe I have seen one [published by an industry consensus body]. I can look into that, though.” *Hr’g. Tr.* 23:24-25; 24:1-8. In its own review, KM CO2 has not identified any published industry standard that provides guidance on this topic. ASME B31.4 (2006), incorporated by reference at 49 C.F.R. § 195.3, only broadly provides that pipeline operators should maintain “pipeline repair records,” but does not provide any detail as to what information those records should provide, including whether those records should provide the names of specific individuals that complete covered tasks. *ASME B31.4 (2006) at 68.*

“large liquid operator” to document repairs. Neither of these arguments is sufficient to meet PHMSA’s burden of proof.

As an initial matter, PHMSA did not provide any specificity to legitimize its assertion that documenting the names of individuals who complete covered tasks in repair documentation is an industry standard. Based on PHMSA’s broad description of its discussions while participating in internal committees and meetings, it is impossible to discern whether these discussions involved an actual review of other operators’ procedures or how many operators allegedly implement this practice. Further, and as KM CO2 testified at the hearing, KM CO2 understands the exact opposite to be true. Through its own participation in numerous established industry committees⁸ and information exchanges with other operators, KM CO2 believes that it is not standard industry practice to document the names of specific individuals completing OQ covered tasks when documenting repairs.⁹

The alleged example repair record offered by PHMSA is likewise unpersuasive. The form is heavily redacted and, as a result, it is unclear how the form is used and whether it is used to document repairs as required by 49 C.F.R. § 195.404(c)(1). Moreover, a single record cherry-picked from a single operator is insufficient to establish that this type of documentation represents an industry standard.

The federal pipeline safety standards are designed to implement performance-based requirements. General internal Agency discussion about this issue and a single record allegedly demonstrating how one operator documents its repairs have no legal merit and fail to support any argument that KM CO2’s procedures are deficient. To establish a violation of 49 C.F.R. § 195.404(c)(1), PHMSA cannot rely on other operators and their practices. Rather, PHMSA must demonstrate that KM CO2’s procedures actually violate the regulatory requirements at § 195.404(c)(1). PHMSA has failed to comply with this burden of proof and Item 7 must be withdrawn.

IV. PHMSA’s Expansion of the Repair Recordkeeping Requirements Violates Basic Tenants of Fair Notice and Due Process

PHMSA’s attempt to unreasonably expand the requirements of 49 C.F.R. § 195.404(c)(1) is impermissible and violates the requirements of fair notice and due process. As KM CO2 reiterated during the hearing, fair notice requires that an agency must “state[] with ascertainable certainty what is meant by the standards [it] has promulgated. . . . [] must give [a party] fair warning of the conduct it prohibits or requires, and it must provide a reasonably clear standard of culpability to circumscribe the discretion of the enforcement authority and its agents.” *ExxonMobil Pipeline Co. v. U.S. DOT*, 867 F.3d 564, 578 (5th Cir. 2017) (citing *Diamond Roofing Co., Inc. v. OSHRC*, 528 F.2d at 645, 649 (5th Cir. 1976)). Regulated entities are not obligated to “divine the agency’s interpretations in advance or else be held liable when the agency announces its interpretations for

⁸ As explained by Yvette Abraham, Director of Compliance Codes and Standards for KM CO2, these committees include the API Committee, the B31 Committee, the MEA Committee, and the INGAA Committee, and smaller contractor committees. *Hr’g. Tr.* 56:21-24.

⁹ *Hr’g. Tr.* 56:11-25; 57:1-25; 58:1-12.

the first time in an enforcement proceeding and demands deference.” *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 159 (2012).

KM CO2 prepared and implements the relevant procedures and associated PIR Report documentation in reliance on the requirements set forth at 49 C.F.R. § 195.404(c)(1). During the hearing, PHMSA asserted that there is no fair notice issue in this case because the Agency is relying on the plain meaning of the regulatory text.¹⁰ KM CO2 disagrees. PHMSA’s position—that the requirement at § 195.404(c)(1) to provide a description of a repair includes the “five Ws” or the name of a specific individual that competes a OQ covered task—exceeds what is reasonably ascertainable from the regulatory text or the ordinary meaning of the word description. PHMSA’s attempt to expand this regulatory requirement to mean what PHMSA now wants it to through this enforcement action, as opposed to notice and comment rulemaking, violates standards of fair notice and due process required by the Administrative Procedure Act and the United States Constitution. As a result, NOA Item 7 must be withdrawn.

V. Conclusion and Request for Relief

KM CO2 believes that NOA Item 7 should be withdrawn because its procedures and related records adequately include the information required to document repairs in compliance with 49 C.F.R. § 195.404(c)(1), by providing an adequate description of those repairs. PHMSA has not met its burden of proof in this case to demonstrate that KM CO2’s procedures are deficient or that § 195.404(c)(1) requires the Company to document the names of specific individuals that complete OQ covered tasks on repair documentation. As a result, and for the reasons identified in this Post-Hearing Brief and in consideration of other matters as justice may require, KM CO2’s Pre-Hearing Brief, and Request for Hearing, the Company respectfully requests that PHMSA withdraw NOA Item 7.

Respectfully submitted,



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¹⁰ *Hr’g. Tr.* 52:19-21 (“We are relying on the plain meaning of the regulatory text. We don’t need to reach fair notice.”).

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