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June 7, 2024

Mr. Lawrence White
Presiding Official
U.S. Department of Transportation
Pipeline and Hazardous Materials Safety Administration
1200 New Jersey Avenue, S.E.
Washington, D.C. 20590

Re: Beta Offshore, CPF No. 5-2023-011-NOPV

Dear Mr. White:

Please find attached Beta Offshore Operating, LLC, d/b/a Beta Offshore's (Beta) post-hearing filings for the above-referenced matter. By copy of this letter, Beta is also providing these materials to Western Region counsel.

Sincerely,

B K Kurdock

Brianne K. Kurdock

cc: Dustin Hubbard (PHMSA)
Kathleen Maitland, Esq. (PHMSA)
Alexandra Iorio, Esq. (PHMSA)
Eric Willis, Esq. (Beta)

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

In the Matter of	)	
Beta Offshore,	)	**CPF No. 5-2023-011-NOPV**
Respondent.	)	

POST-HEARING BRIEF OF BETA OFFSHORE
JUNE 7, 2024

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I. Introduction

Pursuant to 49 C.F.R. § 190.211(d), Beta Operating Company, LLC d/b/a Beta Offshore (Beta or the Company) respectfully submits this post-hearing brief regarding the Notice of Probable Violation, Proposed Civil Penalty, and Proposed Compliance Order (Notice) that the Office of Pipeline Safety (OPS or the Agency) issued on April 6, 2023.[1] A hearing was held on May 8, 2024, at PHMSA's Western Region office in Lakewood, Colorado (Hearing).

In accordance with 49 U.S.C. § 60117(b)(1)(D), Beta requests that the Pipeline and Hazardous Materials Safety Administration (PHMSA or the Agency) leave the record open beyond July 8, 2024, to allow the Company the opportunity to reply to the Western Region's Post-Hearing Recommendation.

II. Summary

As discussed at the Hearing, Beta seeks removal of certain instances of violation alleged in Item Nos. 3 and 9, modification of the gravity score for Item No. 4, a recalculation of the multipliers in Item Nos. 3 and 4, and a correction to the value per point used to calculate all civil penalty items. Beta also requests a factual clarification for the record.

III. Discussion and Argument

Beta's primary objective is to learn from the events of October 1, 2021 (the Incident) and become a better, safer operator. To that end, the Company is not contesting the majority of the allegations in the Notice[2] and has proceeded with making most of the changes OPS proposed in the Compliance Order ahead of any Final Order in this case. However, Beta is asking the Agency to review, modify, and correct the proposed civil penalty calculation. OPS has proposed a total

[1] *In the Matter of Amplify Energy Corp.*, CPF No. 5-2023-011-NOPV, Notice (Apr. 6, 2023).
[2] Beta is only contesting the substance of Item No. 9 (whether training actually occurred). Otherwise, Beta is only contesting the proposed civil penalty in this case.

civil penalty of $3,389,734, of which $2.6 million is attributable to multipliers. It is critical that OPS has support for these calculations, particularly the multipliers. The Agency's civil penalty must be supported by evidence in the record and consistent with, appropriate, and fair under the penalty assessment criteria in 49 U.S.C. § 60122(b) and 49 C.F.R. § 190.225. As discussed in the Pre-Hearing Brief and at the Hearing, Beta believes there are several defects in OPS's calculation in this case.

A. PHMSA Must Remove One Instance of Violation from Item No. 3.

In Instance #3 of Item No. 3, OPS stated that Beta had violated its Procedure 1.01 by not contacting the National Response Center (NRC) "[a]t the earliest practicable moment following the discovery, and not later than 1 hour following the time of such confirmed discovery..."[3] This type of conduct is also covered in Item No. 1 of the Notice. In Item No. 1, OPS asserted that "Beta Offshore failed to notify the NRC in accordance with section 195.52(a) at the earliest practicable moment following discovery, but no later than one hour after confirmed discovery."[4] OPS has proposed a $50,200 civil penalty for Item No. 1 and a $1,526,800 civil penalty for Item No. 3.[5] These civil penalties are based on the same act, *i.e.,* the failure to timely report.

OPS cannot and should not issue two different penalties for the same conduct. Imposing two penalties for the same act violates the test in *Blockburger v. U.S.*[6] The Agency must determine whether separately alleged violations "each require proof of any additional fact or have their own 'evidentiary basis'."[7] Here, both Item No. 1 and Instance #3 of Item No. 3 are both based on

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[3] Notice, at 8 (citing Beta Procedure 1.01 at 1-2); *See also,* Violation Report, Exhibit S.
[4] Notice, at 4-5.
[5] Instance #3 reflects a portion of this $1,526,800 figure. Beta has not been informed how much of the $1,526,800 is associated with the conduct alleged in Instance #3.
[6] *Blockburger v. U.S.,* 284 U.S. 299, 304 (1932).
[7] *In the Matter of Sunoco Logistics Partners, LP,* CPF No. 4-2016-5022, Corrected Final Order at 18-19 (Dec. 9, 2019) at 6.

whether the NRC report was made within one hour of confirmed discovery.

PHMSA has previously acknowledged that a failure to follow a procedure and a failure to follow the substantive regulation that the procedure implements is duplicative. In *Sunoco Pipeline,* PHMSA acknowledged that a failure to properly qualify welders in accordance with the incorporated standard was the same act as a failure to comply with the operator's specifications for welder qualification.[8] The Agency has also evaluated instances of violation and whether they are duplicative. In *Sunoco Logistics*, PHMSA concluded that an instance of violation in one item was duplicative of a separate allegation in the same case.[9] Likewise, in this case, OPS cannot sustain both allegations and issue two separate penalties for the same conduct. Beta requests that PHMSA remove Instance #3 from Item No. 3 of the Notice and recalculate the total proposed civil penalty for Item No. 3.

OPS also alleged in Instance # 3 that Beta failed to follow its Procedure 1.01 by allowing its contractor to ultimately report the Incident.[10] Beta's procedure does not preclude the use of a contractor to make the NRC report. It merely lists two Beta employees, the PL Supervisor and HS&E Supervisor, who are responsible for the documentation and reporting of pipeline accidents.[11] At the Hearing, Mr. Ortloff explained that while those employees are ultimately responsible for this obligation, the procedure does not restrict the reporting function to only these two individuals and it certainly does not prohibit others from making the report. Mr. Ortloff also discussed the reason Beta uses Witt O'Brien and how having a third-party specialist allows senior offshore personnel to focus on immediate response activities. Beta did not violate its procedure

[8] *In the Matter of Sunoco Pipeline, LP,* CPF No. 4-2016-5011 (Nov. 15, 2019).
[9] *In the Matter of Sunoco Logistics Partners, LP,* CPF No. 4-2016-5022, Corrected Final Order at 18-19 (Dec. 9, 2019) (OPS concluded that Item 14(c) was duplicative).
[10] Notice, at 8.
[11] Violation Report, Exhibit S (Procedure 1.01) at 1.

by relying on Witt O'Brien. In fact, the Agency should support operators reporting accidents as soon as discovery is confirmed, no matter who reports them on behalf of the operator.

Beta also points out that there is no information in the record explaining what portion of the $1,526,800 civil penalty is attributable to Instance #3. At the Hearing, Beta's counsel asked Mr. Dyck, the Director of the Enforcement Division (hereinafter, referred to as Enforcement Director), how much each instance of violation was worth, because this information is not provided in the version of the Civil Penalty Worksheet that the Agency provided to Beta.[12] Mr. Dyck did not provide the value of each instance in this item but said it is a sliding scale.

In the past, in reviewing duplicative allegations in an enforcement case, PHMSA has recognized that "fairness can compel the merging of the proposed penalty for the narrower violation with that of the broader violation under the 'other matters as justice may require'.[13] OPS must either withdraw Instance #3, as discussed above, because it is duplicative of Item No. 1 and Beta did not violate its procedure by using Witt O'Brien, or, in the alternative, withdraw the proposed civil penalty associated with Instance #3 by applying the 'other matters as justice requires' assessment consideration.[14]

B. PHMSA Must Adjust the Civil Penalty Calculation in Item No. 9 to Reflect that Two Individuals Received the Cited Training for Multiple Years.

In Item No. 9, PHMSA alleged that Beta "failed to ensure a thorough evaluation that individuals performing covered tasks were qualified."[15] Specifically, PHMSA alleged that Beta could not demonstrate that certain controllers had received specific re-training. The Agency included 13 instances of violation in the Civil Penalty Worksheet for this item.[16] It was not clear

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[12] *See* Pre-Hearing Brief, Attachment 2 (Civil Penalty Worksheet).
[13] *In the Matter of Colorado Interstate Gas Co.,* CPF No. 5-2016-6005 (June 1, 2018) at 6.
[14] 49 C.F.R. § 190.225(b)(2).
[15] Notice, at 16.
[16] *See* Pre-Hearing Brief, Attachment 2 (Civil Penalty Worksheet).

in the Notice or the Civil Penalty Worksheet how OPS concluded that there were 13 instances of missed training. OPS explained during the Hearing that the 13 bullets on pages 80 and 81 of the Violation Report represented the evidence supporting these instances of violation.[17] OPS alleges in Bullet # 3 that "it was discovered that no records to demonstrate that Rick Armstrong did ever take the Control Room Management (CRM01) training".[18] As discussed in the Pre-Hearing Brief[19] and at the Hearing, Beta has provided records of training for Rick Armstrong on CRM01 reflecting training that occurred in 2014, 2016, and 2019. As a result, an allegation that Rick Armstrong has never taken the CRM01 training cannot be supported and must be withdrawn. Likewise, in Bullet #4, OPS alleges that "No records to demonstrate that Alex Ortiz did ever take the Control Room Management (CRM01) training."[20] Beta has provided records of training for Alex Ortiz on CRM01 occurring in 2017. As a result, an allegation that Alex Ortiz never took the CRM01 training cannot be supported and must be withdrawn. Finally, in Bullet #7, OPS alleges that "No records to demonstrate that Alex Ortiz did ever take the AOC training."[21] Beta has provided records of training for Alex Ortiz on AOCs occurring in 2012 and 2017.[22] Based on OPS's explanation of how they calculated the 13 instances, at a minimum, PHMSA should withdraw Instance #s 3, 4, and 7.[23]

C. PHMSA Must Reduce the Gravity Score Assigned to Item No. 4.

In Item No. 4, OPS alleged that Beta failed to complete four documents: a shift change form, and records documenting a deviation from controller schedules, a review of the alarm

[17] Discussion at the Hearing between B. Kurdock of Babst Calland and M. Garcia of OPS.
[18] Violation Report, at 81.
[19] *See* Attachment 1 of Pre-Hearing Brief.
[20] Violation Report, at 81.
[21] *Id.*
[22] *See* Attachment 1 of Pre-Hearing Brief.
[23] *See Violation Report,* at 80-81 (bullets 3, 4, and 7).

management plan, and an evaluation of points taken off scan. These are all recordkeeping issues. OPS applied a gravity score of 40 points to this Item asserting that the failure to have these records increased the severity of the Incident.[24] While records and documentation are important to demonstrate compliance with the pipeline safety regulations, the gap in records did not increase the severity of the Incident. PHMSA has provided no evidence in the record to meet its burden of proof that the violations increased the severity of the Incident. PHMSA has the burden of proof in an enforcement case not only with regard to the allegations but also regarding the positions it takes to support its proposed civil penalty.[25]

At the Hearing, OPS could not support that these four recordkeeping issues increased the severity of the Incident. OPS's witnesses discussed the reasoning behind adding control room management requirements to the regulations and why controller fatigue requirements are important. OPS also stated that fatigue contributed to the Incident, and Beta used practices that were not formalized.[26] None of OPS's statements at the Hearing explain why a lack of documentation increased the severity of the Incident. And many of PHMSA's stated concerns about Beta's practices during the discussion of Item No. 4 were actually addressed in other NOPV items.

Instance #1. As discussed in the Pre-Hearing Brief, failure to complete the Form #304 (shift change form) did not increase the severity of the Incident. Shift change forms are useful to assist the incoming controller in quickly understanding events that transpired on the previous shift. While Beta is not contesting the allegation, the lack of a record did not contribute to the severity

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[24] *See* Pre-Hearing Brief, Attachment 2 (Civil Penalty Worksheet).

[25] *Balice v. U.S. Dep't of Agriculture,* 203 F.3d 684, fn 4 (9th Cir. 2000)("Where a statute requires an agency to consider specific…factors before assessing a civil penalty…the [APA] places on the agency the burden of producing evidence showing that a proposed penalty is reasonable in light of those factors.").

[26] Hearing discussion between M. Williams (OPS) and A. Iorio (OPS).

of the Incident. The previous controller remained in the control room and therefore not having a completed written shift form did not contribute to the severity of the Incident. PHMSA presented no information in the record or at the Hearing to support its assertion that a failure to complete a shift change form increased the severity of the Incident. The National Transportation Safety Board (NTSB) investigation, which PHMSA characterized as "an official investigation" that lead to an "official report" made no findings that this lack of documentation increased the severity of the Incident.[27]

Instance #2. The failure to document a deviation from controller schedules also did not increase the severity of the Incident. The decision to allow the controller to remain at the console was evaluated. It was just not documented correctly. While OPS discussed concerns with fatigue training during the Hearing, fatigue training is addressed by Item No. 7 in the Notice, not Item No. 4. Notably, OPS did not allege that fatigue training increased the severity of the Incident in Item No. 7.[28] NTSB also expressly found that although there was likely fatigue, that presence of other (not fatigued) controllers meant fatigue was not a factor in the accident response.[29] PHMSA has introduced no evidence to support its contention that a failure to document a deviation from control room schedules made the Incident worse.

Instance #3. The failure to provide records documenting the annual alarm management plan review also did not increase the severity of the Incident. PHMSA has not introduced evidence that specifically links this instance of violation to the severity of the Incident, which it must do to sustain its burden. On the contrary, the NTSB found that the anchor strike, insufficient controller training, and failure to comply with procedures related to responding to the Incident and shutting

[27] OPS Pre-Hearing Submission, p. 4.
[28] *See* Pre-Hearing Brief, Attachment 2 (Civil Penalty Worksheet).
[29] National Transportation Safety Board, MIR-24-01 (Jan. 2, 2024), p. 82.

down the line, not documentation of the annual alarm management plan review, were the principal contributors to the spill volume.[30]

Instance #4. A failure to document the review of points taken off scan also did not increase the severity of the Incident. In the Notice, OPS noted that Beta completed the points off scan review by "regularly reevaluating its alarm and safety equipment, but does not maintain records of these evaluations."[31] While Beta is not contesting that its documentation could be improved, none of these recordkeeping concerns increased the severity of the Incident. PHMSA has not introduced any evidence to support its position.

In addition to not presenting any evidence to meet its burden of proof, OPS stated at the Hearing that these allegations were indexed as 'activities' in the Violation Report and the civil penalty worksheet and therefore are not recordkeeping violations. But that is not what OPS actually charged in the Notice. OPS alleged a failure to have records in all four instances. For Instance #1, OPS alleged that "Beta Offshore could not provide *any records* to demonstrate that Beta Offshore's controllers documented the required minimum information listed [] using the required Form 304 or equivalent during shift changes prior to and during the Failure event."[32] For Instance #2, OPS stated that "Beta Offshore failed to *provide records* to demonstrate that the decision to require the dayshift controller to work an extended shift greater than 16 hours was managed in accordance with Section #108 of its CRM procedure."[33] For Instance #3, OPS stated that "*documents* provided by Beta Offshore…failed to demonstrate that the Elly Control Room Operator, Elly Facilities operator, and the Sr. Pipeline Tech had reviewed the Alarm Management

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[30] National Transportation Safety Board, MIR-24-01 (Jan. 2, 2024), p. 87.
[31] Notice, at fn 61.
[32] Notice, at 10 (emphasis added).
[33] Notice, at 12 (emphasis added).

Plan"[34] and for Instance #4, OPS noted that Beta "*does not maintain records*" of these evaluations."[35] Categorizing a series of record issues as "activities" violations does not make them such. In fact, PHMSA must also recalculate the proposed civil penalty on this basis (recordkeeping instead of activities) in addition to revising the gravity score.

OPS has inappropriately increased the proposed civil penalty for four recordkeeping violations from $76,342 (reflecting the correct nature score of 1 point for records and the correct gravity score of 17 points) to $1,228,900. It is not reasonable to assess a $1,228,900 civil penalty for four recordkeeping violations. Without any evidence supporting why recordkeeping violations increased the severity of the Incident, Beta submits that proceeding with the increased gravity score is arbitrary and capricious and "contrary to the evidence before [the agency]."[36] Beta requests that PHMSA recalculate the proposed civil penalty by correcting the nature and gravity score and as a result eliminating the multipliers.

D. PHMSA Must Recalculate the Multipliers Used in Item Nos. 3 and 4.[37]

1. The record does not support the use of a 5x multiplier for Item Nos. 3 and 4.

The record does not include any discussion of why the 5x multiplier was appropriate. At the Hearing, the Director of Enforcement stated that he focused on page 5 of the Violation Report in making the 5x determination. He said he used the 588 barrels released and the fact that the pipeline is in the San Pedro Bay. The Director's remarks made it clear that PHMSA views this multiplier as a non-discretionary penalty enhancement that it must apply if oil is released to water.

[34] *Id.*
[35] *Id.* at fn 61.
[36] *See ExxonMobil Pipeline Co. v. PHMSA,* No. 16-60448 (Aug. 17, 2017)(citing *Interamericas Invs., Ltd. v. Bd. of Governors of the Fed. Reserve Sys.*, 111 F.3d 376, 384 (5th Cir. 1997)) at 26-29 (Federal courts review an agency's civil penalty determination under the arbitrary and capricious standard)).
[37] If the Hearing Officer agrees with Beta and reduces the gravity in Item No. 4 from 40 to 17 points, then the multipliers will no longer apply.

This is contrary to law for at least two reasons. First, the creation of a non-discretionary penalty multiplier via the civil penalty worksheet essentially creates a legislative rule[38] that requires notice and comment. PHMSA has not put the use of a non-discretionary barrel multiplier through notice and comment. Federal agencies seeking to establish legal obligations that bind the agency and the regulated public must conduct a notice-and-comment rulemaking.[39] For example, in *Steeltech v. EPA,* a federal court analyzed whether the Environmental Protection Agency (EPA) was bound by its civil penalty policy, which had not been reviewed via notice and comment. The court stated that if EPA's civil penalty policy bound the agency's penalty determination than the policy would be a substantive rule, which required notice-and-comment rulemaking.[40] Ultimately, in *Steeltech,* the court determined that EPA's policy was not binding on the agency and that the EPA administrative law judge did not treat the policy as binding, so the policy did not constitute a substantive rule and did not require notice-and-comment rulemaking.[41] The present case is distinguishable from *Steeltech*. Here, PHMSA has treated the penalty multiplier as non-discretionary and applied it automatically. PHMSA has therefore created a legal obligation without the required notice-and-comment rulemaking.

Second, the non-discretionary nature of the multiplier essentially creates a strict-liability penalty scheme. In other words, if there is a violation and the gravity score is 40 points or higher, it was clear from the discussion at the Hearing that PHMSA enhances the penalty regardless of any relevant mitigation or other considerations. Congress has not authorized a strict liability

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[38] If action by an agency creates new law, rights, or duties, the rule is a legislative rule and requires notice and comment proceedings. *Five Flags Pipe Line Co. v. U.S. Dep't of Transp.*, No. 89-0119 JGP, 1992 WL 78773 (D.D.C. April 1, 1992).
[39] 5 U.S.C. § 553; *Nat'l Mining Ass'n v. McCarthy,* 758 F.3d 243, 251- 252 (D.C. Cir. 2014)(policy statements and interpretive rules cannot bind the issuing agency or the parties they concern).
[40] *Steeltech, Limited v. United States Environmental Protection Agency,* 105 F. Supp.2d 760, 767 (W.D. Mi. 2000).
[41] *Id.*

scheme for the Pipeline Safety Act.[42] Instead, PHMSA must take into account the amount of product recovered (132 barrels) and the amount of product released before any alarm sounded prior to setting a barrels-released multiplier (34 barrels).

2. PHMSA should take into account the amount of product recovered and the amount of product attributable to the operator prior to issuing a consequence multiplier.

PHMSA's multipliers are consequence factors that are specifically focused on the impacts and aftermath of a violation and, in that context the amount of product recovered and an operator's actions to reduce the environmental impacts of a release are certainly relevant. Yet, OPS acknowledged at the Hearing that it did not consider the amount of product recovered in the calculation of the proposed civil penalty in this case. OPS stated that the only circumstances in which mitigation is allowed are when released product is contained in secondary containment or a ditch. This position ignores other types of mitigation which can reduce the environmental impact (i.e. "consequences" of a release). In essence, OPS has made the judgment that any release to water will cause an equal level of environmental harm unmitigated by operator efforts to recover oil or otherwise reduce environmental impacts. Again, this has created a strict liability scheme that automatically increases the penalty without undertaking any actual analysis of environmental impacts.

When calculating the appropriate multiplier, PHMSA should at least subtract the 132 barrels that were recovered from the 588-barrel figure. The 132 barrels were documented in the Accident report filed with the Agency. PHMSA routinely notes that the amount recovered when issuing Corrective Action orders, a document that is developed after an accident.[43] In at least one

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[42] *ExxonMobil Pipeline Co. v. U.S. Dep't of Transp., 867 F.3d 564, 577-78 (5th Cir. 2017)..*

[43] *See In the Matter of Chevron Pipeline Co.,* CPF No. 5-2013-5006H (Mar. 22, 2013) at 2; *In the Matter of Bridger Pipeline, LLC,* CPF No. 5-2015-5003H (Jan. 23, 2015) at 3; *In the Matter of Magellan Pipeline Co.,* CPF No. 3-2015-5003H (May 15, 2015) at 2.

civil penalty case, the Agency evaluated the amount recovered and compared it to the amount spilled.[44] PHMSA should also subtract at least another 34 barrels, which undisputedly, even from PHMSA's perspective, are clearly associated with the cargo ships' conduct.[45] It is well-documented that the Incident was not caused by Beta. It was caused by the anchor dragging incidents of cargo ships who did not report their anchor-dragging over the Pipeline.[46] As documented in the record, at the time of the first alarm, 34 barrels had already been released.[47] If PHMSA intends to apply a consequence multiplier, it must take into account the amount recovered and the amount of the spill that could not, under any views of the facts, be attributable to the operator. Given that 588 barrels was spilled but 132 barrels were recovered and 34 barrels could not be not attributed to Beta, at most, the consequence multiplier should reflect a 4x multiplier (and before mitigating factors are taken into account).

3. PHMSA should also apply mitigating factors for Item Nos. 3 and 4.[48]

Notwithstanding that the multiplier used in Item Nos. 3 and 4 should not be higher than 4x, Beta also requests application of mitigating factors. In the civil penalty worksheet, OPS acknowledges that a lower multiplier is appropriate if mitigating factors are identified.[49] Beta worked quickly to clean up the spill, minimizing its environmental impact. Beta, the Coast Guard,

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[44] *In the Matter of Magellan Terminals Holding, LP,* CPF No. 4-2020-5009, Final Order (Sept. 11, 2020).

[45] The United States Department of Justice determined that Beta did not act negligently *until* it continued to pump oil through the Pipeline "after the LDS already had issued seven alarms." *United States v. Amplify*, ECF 42 at 23 (Federal Plea Agreement). This supports the finding that the cargo ships, not Beta, are responsible for the oil that spilled prior to the seventh leak alarm. Beta's crew—who were unaware of the damage to the Pipeline caused by the cargo ships—reasonably relied on their skills, training, and experience to troubleshoot whether a leak was actually occurring after shutting down the Pipeline each time. No statement in this brief constitutes a waiver of any kind or the adoption of a position inconsistent with the Federal Plea Agreement.

[46] *See* NTSB Press Release dated Dec. 5, 2023 ("NTSB investigators determined that the oil leak…resulted from an anchor strike on the pipeline that occurred eight months earlier, when anchors from the container ships Beijing and MSC Danit dragged and contacted the pipeline…").

[47] Notice, at 5.

[48] If the Hearing Officer agrees with Beta and reduces the gravity in Item No. 4 from 40 to 17 points, then the multipliers will no longer apply.

[49] Civil Penalty Worksheet, at 2.

and the California Department of Fish and Wildlife established a Unified Command, which operated 24/7 with support from various other entities to minimize the impact from the spill. Beta funded and provided thorough support to the Unified Command, which included the reopening of all previously closed fisheries on November 30, 2021,[50] and designated all shoreline segments as returned to their original condition on December 27, 2021.[51] More than 68,000 pounds of oiled sand recovered and more than 74,000 pounds of oily water recovered.[52] In total, Beta spent $58.4 million to dispose materials recovered during the spill response.[53] And this release occurred in the unique California environment, in which natural seepage of crude oil from natural subsea reservoirs to offshore waters amounts to a NOAA-estimated 5,000,000 gallons every year, equivalent to approximately 13,700 gallons or 326 barrels every day, an amount equal to the Beta Incident less than every two days.[54]

At the Hearing, OPS stated that mitigation only applies if the product spilled does not create environmental damage, is contained in a ditch, or never reached water. As stated above, mitigation is relevant. If PHMSA pursues a barrel-based penalty multiplier, Beta respectfully requests that the Agency reduce the multiplier from 5x to 3x to acknowledge Beta's effective mitigation of environmental impacts.

4. PHMSA's Approach to Combining Multipliers is Incorrect and Creates a Compounding Effect.

As discussed in detail at the Hearing, when the Agency applied the 2x multiplier for a

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[50] *See* November 20 Briefing, United Command Update 20, S. Call Spill Response, at https://socalspillresponse.com/update-20-fisheries-reopen-65-of-affected-shorelines-meet-spill-response-end-points/
[51] *See* February 2 Briefing; United Command Update 21, S. Cal. Spill Response, at https://socalspillresponse.com/update-21-unified-command-concludes-cleanup-operations-of-orange-and-san-diego-county-beaches/
[52] Accident Report (Dec. 3, 2021), p. 23.
[53] Beta incurred $58.4 million in clean-up costs related to the spill, as billed by Beta's environmental remediation contractor, Patriot Environmental Services.
[54] *See* National Oceanic and Atmospheric Administration, Natural Oil Seeps in Southern California (May 2015), https://incidentnews.noaa.gov/incident/8934/22546/26338 (assuming 42 gallons in one barrel of crude oil).

reportable accident and a 5x multiplier for barrels spilled, it did not just multiply the base penalty by the consequence factor. Instead, the Agency multiplied the two subtotals creating a compounding effect. For example, the proposed base penalty in Item No. 3 was $152,684. PHMSA multiplied $152,684 by 2 to account for the reportable accident. The subtotal was $305,368. Instead of returning to the base penalty, the Agency then multiplied the newly created subtotal by five to reflect a 5x multiplier for the amount of product released. The result is a total of $1,526,840 <u>which is a 10x increase from the base penalty of $152,684</u>. The Agency should have applied each multiplier individually ($152,684 x 2) + ($152,684 x 5) and then added, not multiplied, the subtotals. This total would have reflected a 7x multiplier of the base penalty (2x for a reportable accident and 5x for the amount of product released).

The same error occurred in the calculation of the proposed civil penalty for Item No. 4.[55] The proposed base penalty in Item No. 4 was $122,892. PHMSA doubled that figure to account for the reportable accident. The Agency then took the new subtotal, instead of returning to the base penalty, and multiplied the newly created subtotal by five to reflect a multiplier for the amount of product released. The result is a total of $1,228,900 <u>which is a 10x increase from the base penalty of $122,892</u>. The Agency should have applied each multiplier individually ($122,892 x 2) + ($122,892 x 5) and then added, not multiplied, the subtotals.

The Agency has no support in the case file for increasing the base penalty ten-fold. Given the recognition in the Civil Penalty Worksheet that only multipliers of 2x and 5x are appropriate for each item, PHMSA must redo its calculation. At the Hearing, the Enforcement Director stated that his office has always calculated the multipliers this way. The Hearing Officer also provided that Beta is not being treated differently from other operators. Beta is not making a consistency

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[55] If PHMSA rejects Beta's request to reduce the gravity for Item No. 4, then the math in Item No. 4 will also need to be corrected.

argument. It is just asking that PHMSA calculate the math correctly. The Agency cannot list 7x of multipliers in the worksheet but then produce a dollar amount equal to a 10x multiplier. Beta respectfully requests a recalculation for Item Nos. 3 and 4.

E. PHMSA Must Recalculate the Civil Penalties Proposed in this Case to Reflect the Correct Value Per Point.

1. OPS erroneously used the 2023 value per point in a case that involved allegations of violation that occurred in 2021.

As discussed at the Hearing and in the Pre-Hearing Brief,[56] PHMSA erroneously applied an $1,862 value per point in this case. It is not abundantly clear when PHMSA started using the $1,862 value per point but publicly available Civil Penalty Guidance indicates that as of February 7, 2020, PHMSA was using $1,440 per point,[57] and by January 28, 2022, the Agency had switched to $1,728 per point.[58] The allegations in the Notice are based on activities that occurred on <u>October 1, 2021</u>, or earlier.[59] During that time period, PHMSA used a value of $1,440 per point to calculate civil penalties. Therefore, $1,440 per point should be applied in this case. Since the $1,862 value did not go into effect until January 23, 2023 (479 days after the Incident),[60] it should not be applied retroactively to alleged violations occurring in 2021.

At the Hearing, the Enforcement Director responded with two arguments: (1) he discounted the relevance of the Civil Penalty Summary stating that his office updates the document "when they have time", the summary may not reflect the exact penalty scheme in place, and Beta should not be relying on "archived Civil Penalty Summary documents."[61] and (2) it would be

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[56] Pre-Hearing at 12-14.
[57] Civil Penalty Summary dated Feb. 7, 2020.
[58] Civil Penalty Summary dated Jan. 28, 2022.
[59] PHMSA conducted the inspection between October 3-22, 2021. Notice, at 1; *See also,* Violation Report, at 2.
[60] Civil Penalty Summary dated Jan. 23, 2023.
[61] Discussion at the Hearing between R. Dyck, Enforcement Director (OPS), and B. Kurdock, Babst Calland, counsel for Beta.

impracticable or too difficult to use the value per point in place at the time the violation occurred.

It may be true that OPS updates the Civil Penalty Summary when it has time and that the Civil Penalty Summary does not accurately reflect the civil penalty scheme in place, but then basic notions of fairness and due process demand that OPS cannot also point to this document as proof that due process exists in the PHMSA penalty process. The Civil Penalty Summary is the only publicly available document describing PHMSA's implementation of the civil penalty assessment considerations. In numerous cases, PHMSA has referenced the Civil Penalty Summary as support for its belief that the Agency has provided sufficient information to the public on how the agency calculates administrative civil penalties.[62] Yet, in the Beta case, the Enforcement Director is now stating that the Civil Penalty Summary is only updated 'when they have time' and should not be relied on. PHMSA cannot have it both ways: the Civil Penalty Summary cannot serve as proof that the regulated community has sufficient information on the civil penalty process but at the same time, should not be relied on.[63]

As for the notion that applying the value per point in place when the violation occurred would be impracticable or too difficult, Beta appreciates that calculating proposed civil penalties is a complicated process but respectfully, PHMSA is issuing $3 million civil penalties. It is absolutely critical that the Agency ensure that its civil penalty process is transparent and is applied in a consistent and uniform way. PHMSA consistently states in its Notices of Probable Violation that the statutory civil penalty cap in effect *when the violation occurred* is the cap that applies in

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[62] *In the Matter of ExxonMobil Pipeline Co.,* CPF No. 4-2021-018-NOPV (Mar. 7, 2022) at 8 ("PHMSA has also published additional information about civil penalties on its website, including a general overview to assist the public in understanding civil penalty calculations."). *See also, In the Matter of ExxonMobil Pipeline Co.,* CPF No. 4-2013-5027 (Apr. 1, 2016) at 13(The Civil Penalty Summary "corresponds directly to the particular facts noted in the Violation Report, which contained the factual allegations and description selections for each violation…).
[63] In 2024, PHMSA added a disclaimer to the Civil Penalty Summary stating that "[it] should not be relied upon for determining the specific penalties PHMSA might impose." Civil Penalty Summary dated Jan. 19, 29024.

individual cases.[64] OPS should take the same position when applying the value per point. The Agency should use the value per point in effect *when the violation occurred*, not the value established years later.

2. PHMSA cannot rely on secret evidence in supporting multi-million dollar civil penalties.

During the Hearing, the Enforcement Director repeatedly referred to a document that was neither in the case file nor accessible to Beta to explain the civil penalty calculation in this case. In response to a question about the use of the 588 barrels, the Enforcement Director referred to 'line 79". The Enforcement Director then confirmed that he was reading from an excel spreadsheet. Beta's counsel asked for a copy of it and both the Enforcement Director and the Hearing Officer declined that request due to a "longstanding agency policy." While operators have asked for this document in the past and PHMSA has declined these requests stating that it is an internal document or that industry has sufficient information on how the agency calculates administrative civil penalties,[65] this case is different. Here, OPS's key witness in the Hearing relied on a document that the operator has not seen. While Beta has the Civil Penalty Worksheet provided by the region, Beta cannot cross-examine the witness properly if it cannot review the very documents that the witness is relying on. Without comparing both documents, Beta would have no way of knowing whether the two documents are different, *i.e.,* whether the excel spreadsheet included notes or additional discussion. This amounts to secret law. If OPS is going to rely on a document to present its case in an administrative hearing, then it can no longer maintain the position that it is an internal document. The District Court for the District of Columbia

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[64] *See* Notice, at 17.

[65] OPS cites the assessment considerations in the statute and regulations, the Violation Report and the Civil Penalty Summary to demonstrate that it has provided sufficient information. *In the Matter of ExxonMobil Pipeline Co.,* CPF No. 4-2021-018-NOPV (Mar. 7, 2022) at 8.

reviewed a similar document used by the Federal Highway Administration (FHWA) and noted that FHWA's computer algorithm used to calculate an individual motor carrier's safety rating was not "…purely internal because [of] its effect and legal status it imposes on [motor] carriers….[66] In Beta's case, OPS relied on the same type of document during its presentation of the case and must release it to Beta.

The Enforcement Director also acknowledged at the Hearing that he can modify the excel version of the Civil Penalty Worksheet at any point including prior to issuing a new case. Since neither the value per point in place nor any modifications to the calculation are published for public comment or released to the public in any way, the regulated community does not have advance notice of how the Agency intends to use its civil penalty authority against operators. For example, through the end of 2022, PHMSA applied an "up to 50%" credit for self-reports.[67] However, beginning in 2023, the Agency abruptly changed that approach and now only allows for a 50% credit if a self-report is submitted prior to the Agency's notice of a planned inspection. The Enforcement Director acknowledged at the Hearing that this was a recent change in the civil penalty calculation. However, only operators who have received a recent enforcement case would be aware of these changes (and only after they receive a proposed civil penalty). This amounts to a clear due process violation.

For the reasons stated above, Beta requests a recalculation of the proposed civil penalty using $1,440, the correct value per point.

F. Beta Requests that PHMSA Correct the Record Regarding the Number of Leak Alarms Beta Received.

[66] *Don Ray Drive-A-Way Co. of California, Inc. v. Skinner*, 785 F. Supp. 198, 200 (D.D.C. 1992).
[67] *See* various Civil Penalty Worksheets issued to operators during the 2022 timeframe.

OPS incorrectly asserts in the Notice that Beta received 83 leak alarms during the course of the Incident.[68] As explained by Mr. Ortloff at the Hearing, the leak detection system used by Beta at the time of the Incident, has two related, but distinct, tags, 14_ALM_Atmos_Leak_Detected and 10_ALM_Leak_Detect_From_Atmos. 14_ALM_Atmos_Leak_Detected is the alarm that warns controllers that a potential leak has been detected on the Pipeline. This alarm sounded nine times on October 1–2, 2021, but one of those alarms sounded at a time when the Pipeline's shipping pumps had already been turned off (around 10:33 p.m. on October 1). 10_ALM_Leak_Detect_From_Atmos provides leak alarm signals, informing the controllers of the ongoing potential leak first recognized by the 14_ALM_Atmos_Leak_Detected.[69]

The Notice wrongly conflates these two indications, treating them as if they have the same purpose and meaning. This is an over-simplification, exposed by the fact that the leak detection system provided two separate tags, which have different meanings. PHMSA has never tried to distinguish between the two tags, supporting its position by placing PHMSA raw SCADA data into the record without making the effort to distinguish between the meaning of different kinds of tags within that data.[70]

Further, PHMSA is the only federal agency that reviewed the Incident and declined to recognize the distinction between the two tags. Both the U.S. Department of Justice and the NTSB correctly distinguished between the leak alarm tags, and either stipulated or found that Beta received 8 leak alarms during the Incident, not 83.[71]

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[68] Notice at 2, 6, & 8.
[69] Pre-Hearing Brief Attachment 4.
[70] See Exhibit C to Violation Report.
[71] Plea Agreement for the San Pedro Bay Pipeline Company at Exhibit 2, pp. 4:1-7:19, *United States v. Amplify Energy Co.,* No. CR 21-226 (C.D. Cal. Aug. 26, 2022) (Discussion of each leak alarm that occurred during the

Beta requests that the Final order confirm that the Company received 8 leak alarms during the Incident. As discussed at the Hearing, inconsistency in findings among different Federal agencies creates ambiguity that could create public confusion.

G. Beta Requests that its Progress on Compliance Items be Reflected in the Final Order.

The Notice includes a proposed compliance order (PCO) that consists of nine items (A-I). Beta has worked diligently on most of these items and requests that the final compliance order reflect the progress Beta has made so far.

More specifically, Beta has updated its Startup and Shutdown Procedure, Abnormal Operations Procedure, and Control Room Management Plan in line with PCO items B(1), B(2), B(3) C, and D. Beta has submitted these procedures to OPS and looks forward to further discussions with the Agency.

Further, Beta has retired its Manual Leak Detection Procedure and Emergency Shutdown, Isolation, & Drawdown Procedure. Beta has amended its Abnormal Operations Procedure to state it will no longer manually operate the pipeline, and instead will shut down the line. Beta has also retired the drawdown component of its Emergency Procedures will instead shut down and isolate the pipeline in line with its revised Startup and Shutdown procedure. Therefore, PCO Items A (revisions to the Manual Leak Detection Procedure) and B(2)(b) (revisions to the Emergency Shutdown, Isolation, and Drawdown Procedure) are no longer necessary and do not need to be included in the final order.

IV. Conclusion

Based on the foregoing, Beta respectfully requests that PHMSA reduce the proposed civil

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Incident); National Transportation Safety Board, MIR-24-01 (Jan. 2, 2024), p. 7 (timeline of Incident showing the 8 leak alarms), p. 78 ("From the afternoon of October 1 to the early morning on October 2, the controllers received eight leak alarms.").

penalty to $1,111,886 in this case. This figure reflects the correct value per point, a withdrawal of a single instance in Item No. 3 and at least three instances in Item No. 9, a correction to the gravity score in Item No. 4 and the subsequent removal of the multipliers, and adding the individual multipliers in Item No. 3 instead of compounding them. Beta also respectfully requests that PHMSA not include items A, B(1-3), C, and D of the Proposed Compliance Order in the Final Order if OPS deems those items complete.

Respectfully submitted this 7th day of June, 2024

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