

NO. 16-60448

**In the United States Court of Appeals for the
Fifth Circuit**

EXXONMOBIL PIPELINE COMPANY,

Petitioner,

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION; PIPELINE AND HAZARDOUS
MATERIALS SAFETY ADMINISTRATION; OFFICE OF PIPELINE SAFETY,

Respondents.

**REPLY BRIEF OF PETITIONER,
EXXONMOBIL PIPELINE COMPANY**

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TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	iii
INTRODUCTION.....	1
ARGUMENT	5
I. The Regulations Establish Minimal Standards That Operators Are to Implement Through Their Own Written Programs.....	5
A. Rather Than Prescribing Specific Requirements, PHMSA Has Engaged Third-Party Industry Experts.....	7
B. The Goal of the Integrity Management Regulations and an Operator’s Own Integrity Management Program Is to Prevent Accidents, But an Accident Can Occur Despite Compliance.....	9
II. The Baker Report Is the Only Available Guidance, and EMPCo Faithfully Followed It.....	10
III. PHMSA Has Yet to Articulate a Meaningful Regulatory Standard.....	13
IV. PHMSA Is Not Entitled to Deference for Its “Interpretation” of a Third-Party Report.....	20
V. PHMSA Never Announced Its Current Interpretation of the Regulations Before This Case.	21
A. PHMSA’s Brief Reflects a Fundamental Misunderstanding of the Fair Notice Doctrine.	22
B. EMPCo Did Not Have Fair Notice of PHMSA’s New and Litigation-Derived Standard for Determining Susceptibility to Seam Failure. ..	25
VI. PHMSA’s Penalty and Compliance Order Are Unlawful.....	28
CONCLUSION	30
PRAYER.....	32
CERTIFICATE OF FILING AND SERVICE.....	34

CERTIFICATE OF COMPLIANCE35

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>ASG Indus., Inc. v. United States</i> , 548 F.2d 147 (6th Cir. 1977)	12
<i>Auer v. Robbins</i> , 519 U.S. 452 (1997).....	23
<i>Caterpillar Logistics Servs., Inc. v. Solis</i> , 674 F.3d 705 (7th Cir. 2012)	12
<i>Christopher v. SmithKline Beecham</i> , 132 S. Ct. 2156 (2012).....	26
<i>Diamond Roofing Co. v. OSHRC</i> , 528 F.2d 645 (5th Cir. 1976)).....	23
<i>Gates & Fox Co. v. OSHRC</i> , 790 F.2d 154 (D.C. Cir. 1986).....	24
<i>Gen. Elec. Co. v. EPA</i> , 53 F.3d 1324 (D.C. Cir. 1995).....	22, 23, 25
<i>Medina Cty. Env'tl. Action Ass'n v. Surface Transp. Bd.</i> , 602 F.3d 687 (5th Cir. 2010)	21
<i>Morgan Stanley Capital Group Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cty.</i> , 554 U.S. 527 (2008).....	12
<i>Satellite Broad. Co. v. FCC</i> , 824 F.2d 1 (D.C. Cir. 1987).....	22
<i>Talk Am., Inc. v. Michigan Bell Tel. Co.</i> , 131 S. Ct. 2254 (2011).....	26
<i>Trinity Broad. of Florida v. FCC</i> , 211 F.3d 618 (D.C. Cir. 2000).....	23

United States v. Chrysler Corp.,
158 F.3d 1350 (D.C. Cir. 1998).....23

United States v. S. Ind. Gas & Elec. Co.,
245 F.Supp.2d 994 (S.D. Ind. 2003).....23

Other Authorities

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John F. Kiefner and Willard A. Maxey, *The Benefits and Limitations
of Hydrostatic Testing* (2013)16

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<https://primis.phmsa.dot.gov/iim/faqs.htm>29

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Gas Transmission and Gathering Pipelines,” 68 Fed. Reg. 20722
(Apr. 8, 2016)..... 16-17

INTRODUCTION

EMPCo shares PHMSA's goal to ensure public safety and enhance pipeline system integrity. Yet the underlying enforcement does not further that goal, and EMPCo must counter PHMSA's unfounded allegations.

Contrary to PHMSA's characterization, this case does not turn on routine deference to an agency's interpretation of its regulatory requirements. *See* PHMSA Br. at 19, 20, 24, 32. Because the pertinent regulations are performance based, they do not set minimum standards for operators but give them latitude in achieving compliance, including reliance on recognized industry practices and the exercise of engineering judgment. Further, on the issue of determining susceptibility to seam failure, PHMSA's regulations are silent. Rather than developing technical guidance on seam-failure, PHMSA commissioned the Baker Report.

EMPCo exercised its engineering judgment in conformity with industry practice, and it followed the Baker Report, even consulting with Report co-author Dr. John Kiefner. Yet EMPCo is the subject of an enforcement action.

Essentially, this dispute centers on a disagreement between PHMSA and Dr. Kiefner about the Baker Report and its Decision Tree. The Decision Tree represents a comprehensive methodology for "determin[ing] if a seam-integrity assessment is required based on the federal pipeline integrity management

regulations.” Cert.Index.No.16:Ex.3, at 16. On those subjects, the record reveals no agency expertise and certainly no more than the Report’s co-author.

Having commissioned the Baker Report, PHMSA now demands deference to its “interpretation” of the Report. Yet its “interpretation” is newly minted for this enforcement action and conflicts with Dr. Kiefner’s interpretation. Further, even in its Brief, PHMSA cannot articulate with clarity what operators must do. PHMSA’s newfound position is the antithesis of fair notice.

PHMSA initially told this Court in opposing a stay that it had given EMPCo guidance and fair notice by a regulatory presumption that all pre-1970 ERW pipe is susceptible to seam failure. That presumption was also relied on by PHMSA throughout the enforcement action. Yet PHMSA now concedes that no such presumption exists in the relevant IMP regulations, and it now says the non-existent presumption somehow signals that this type of pipe is “prone” to seam failure—a decidedly imprecise term. And if all LF-ERW pipe were really “prone” to seam failure, then PHMSA would have promulgated an IMP regulation advising industry of that specific fact, and would have informed EMPCo during its many audits that EMPCo’s IMP processes for analyzing and assessing LF-ERW pipe were deficient. PHMSA did neither.

Resorting to misdirection, PHMSA makes the undeserved accusations that EMPCo has been cavalier about pipeline integrity. PHMSA incorrectly claims, for

example, that EMPCo ignored or disregarded risk factors, *see* PHMSA Br. at 32-33, 36, that EMPCo “attempts to avoid obvious and common-sense” conclusions, *id.* at 28, and that EMPCo “steadfastly refused” to reach required conclusions, *id.* at 7. PHMSA also mischaracterizes EMPCo’s arguments as demanding “*carte blanche* to ignore relevant risk factors.” *Id.* at 30. EMPCo demands no such thing.

Instead, EMPCo adopted and implemented a robust IMP program, with a comprehensive manual that leading industry expert Kent Muhlbauer characterized as “among the most complete and well-written of the many such manuals I have seen.” Cert.Index.No.16:Ex.2 ¶7. EMPCo’s IMP details the exact process it would follow for determining seam-failure susceptibility, and that process was lifted from the only available PHMSA-sponsored guidance—the Baker Report. Further, EMPCo complied with the applicable rules by following its frequently audited IMP processes and conducted additional tests beyond those required, even when the Pegasus Pipeline was never identified by the only PHMSA-endorsed methodology as susceptible to seam failure.

Despite EMPCo’s compliance with the applicable regulation and guidance, a release occurred. No matter how diligent or regulatory-compliant a company is, all defects cannot be identified before a release occurs. While there have been substantial advancements in inspection technologies, there is clearly room for technological improvements to achieve industry’s goal of zero incidents. PHMSA

knows this from a recent study it commissioned the Battelle Institute to conduct. Consistent with the study's finding, the defect that ultimately caused the Mayflower incident was not detected by sophisticated in-line inspection (ILI) technology that EMPCo utilized shortly before the release occurred.

According to PHMSA, EMPCo erred by not running that seam ILI tool earlier (on a five-year interval), and that error somehow "caused" the incident. In fact, EMPCo conducted the required assessments at five-year intervals, and though not required to do so, shortly thereafter ran the seam ILI tool that undisputedly did not identify the defect that led to the Mayflower release. Yet EMPCo finds itself the subject of a zealous enforcement action, a multi-million-dollar fine, and an onerous and unlawful compliance order.

Whatever the validity of PHMSA's new interpretation, EMPCo had no fair notice of what PHMSA now seeks to enforce as a requirement for assessing seam-failure susceptibility. In fact, fair notice still does not exist because PHMSA cannot articulate even now with any clarity what it is requiring. Instead, it asks for deference.

ARGUMENT

In an attempt to portray this case as a “straightforward” matter of agency deference, PHMSA’s brief advances arguments that would be valid only if the regulations were entirely different from what they are. PHMSA’s “clear” regulatory requirements represent an open-ended directive to consider all risks. In the underlying enforcement action, PHMSA has selectively re-written its performance-based regulations to include prescriptive requirements that are wholly absent from the regulations because of the Mayflower release.

I. The Regulations Establish Minimal Standards That Operators Are to Implement Through Their Own Written Programs.

PHMSA portrays its enforcement action against EMPCo as based on regulations that plainly direct pipeline operators to perform seam-integrity assessments on all pre-1970 LF-ERW pipe that has exhibited prior hydrostatic test failures or in-service leaks. Yet no such regulations exist.

The regulations at issue are minimal in length and performance-based. They require operators to establish an integrity assessment schedule that prioritizes pipelines based on risk factors that reflect the risk conditions on the pipeline segments. The regulations require operators to follow “recognized industry practices” in §195.452(b)(6). The regulations direct operators to “consider” risk factors, such as manufacturing information and seam type, in prioritizing segments for integrity assessment. *See* 49 C.F.R. §195.452(e). In addition, if (and only if) an

LF-ERW pipeline segment is determined to be susceptible to longitudinal seam failure, the assessment method selected by the operator must be capable of assessing seam integrity. *See* 49 C.F.R. §195.452(j)(5). Thus, the regulations give operators latitude and discretion in determining seam-failure susceptibility.

PHMSA could have written regulations to provide specific requirements for investigating the potential for seam failures. For instance:

- The IMP regulations could have prescribed that all pre-1970 LF-ERW pipelines are susceptible to seam failure. Then, EMPCo and other pipeline operators would assess those pipelines for seam-failure susceptibility every five years. *But the regulations do not require this.*
- The regulations could have prescribed that all pre-1970 LF-ERW pipe is presumed susceptible to seam failure, unless demonstrated otherwise. Then, EMPCo and other operators would use seam-assessment methods every five years unless they could demonstrate the absence of susceptibility. *But the IMP regulations contain no such presumption.*¹
- The regulations could have prescribed that any seam failure during testing or in-service for pre-1970 LF-ERW pipe results in the pipeline being seam-failure susceptible, thereby requiring the use of seam-assessment methods every five years. Then, EMPCo and other operators would always use such methods following any such failures. *But the regulations do not require this.*
- And the regulations could have prescribed that “brittle” pre-1970 LF-ERW pipe is deemed seam-failure susceptible, obviating the need for operators to use the Baker/Kiefner Decision Tree flowchart. Then

¹ PHMSA now acknowledges as much in its brief, after arguing incorrectly to the motions panel that the presumption exists. *Compare* PHMSA Br. at 35-36 (noting, “PHMSA did not apply a presumption of susceptibility for pre-1970 ERW pipe based on 49 C.F.R. §195.303(d)”) *with* Resp. to Mot. to Stay at 18 (“All pre-1970 ERW pipe has been deemed ‘susceptible to longitudinal seam failure’ unless an engineering analysis proves otherwise.”).

EMPCo and other operators would assess the seam integrity on such pipelines every five years. *But the regulations do not require this.*

In fact, the regulations do not actually direct operators to consider “susceptibility to seam failure.”

A. Rather Than Prescribing Specific Requirements, PHMSA Has Engaged Third-Party Industry Experts.

The IMP regulations prescribe no methodology for determining seam-failure-susceptibility. To provide that methodology, PHMSA retained industry experts Michael Baker and John Kiefner. PHMSA commissioned them to develop the Baker Report, intending for it “to serve as a technical resource for OPS [the Office of Pipeline Safety].” Cert.Index.No.16:Ex.3.² PHMSA then incorporated the 2004 Baker Report, without modification, in its enforcement manual (but not its regulations) and recommended it to industry.

Another example of PHMSA’s reliance on third-party experts is its commissioning of the recent and costly Battelle Institute study. In the Public Abstract for the study, PHMSA notes: “The work will address the characteristics of ERW seams that make them susceptible to failure, and it will identify the factors the pipeline operators must consider in order to assure that their ERW pipelines are safe.” Cert.Index.No.20.Ex.67. In other words, PHMSA commissioned an industry

² The full Report is *available at* <https://primis.phmsa.dot.gov/iim/techreports.htm>.

study in August 2011 to identify factors for consideration in assessing seam-failure susceptibility, with the Phase I report being produced in October 2013.

The Battelle Institute issued the Phase I report after the Mayflower incident, and a definitive list of “factors” was still noticeably absent. Thus, PHMSA had not resolved in 2011, and still has not resolved to this day, what comprehensive set of factors should be considered in assessing LF-ERW pipelines. Yet PHMSA, through this enforcement action, expects EMPCo to have already resolved the issue not yet answered by the Battelle Institute, whose study was commissioned by PHMSA.

This Battelle Institute study arose from a recommendation by the National Transportation Safety Board that PHMSA “conduct a comprehensive study to identify actions that can be implemented by pipeline operators to eliminate catastrophic longitudinal seam failures in electric resistance welded (ERW) pipe.” Cert.Index.No.20:Ex.68, at 43. As the NTSB noted, PHMSA’s “current inspection and testing programs” for identifying “features associated with longitudinal seam failures of ERW pipe” “are not sufficiently reliable.” Cert.Index.No.20.Ex.69, at 3. The Battelle Institute study concluded that there is no foolproof method of detecting potential seam failures.

PHMSA’s consultation with such experts conflicts with its position on agency deference before this Court. More specifically, EMPCo has followed the

only guidance that PHMSA has provided through its consultation with third party experts—the Baker Report. EMPCo incorporated the Baker Report into its IMP program and even retained the Report’s co-author Dr. John Kiefner—more than a decade ago—to help develop EMPCo’s process for determining whether pre-1970 LF-ERW pipe is susceptible to long seam failure.

B. The Goal of the Integrity Management Regulations and an Operator’s Own Integrity Management Program Is to Prevent Accidents, But an Accident Can Occur Despite Compliance.

The motivating purpose of the regulations and goal of operators’ IMPs is, of course, to prevent accidents. The unfortunate reality, however, is that accidents can still happen.

Phase I of the PHMSA-commissioned Battelle study recently concluded that there is, at present, no one ILI technology available that can reliably and perfectly detect all LF-ERW seam failure anomalies. Cert.Index.No.20:Ex.66, at vi (“gaps remain . . . in . . . effectiveness of current schemes and technology”). The Mayflower release illustrates that fact. The results of 2012-2013 seam/crack tool assessment by EMPCo—which PHMSA claims (in error) was untimely—did not identify the defect that led to the Mayflower release. Cert.Index.No.16:Ex.54. The cause of the release, as explained in EMPCo’s opening brief (EMPCo Br. at 54-55) and unchallenged by PHMSA’s response, was a defect in pipe with material properties that were atypical, unique, “not frequently seen before in the industry”

and, in Dr. Kiefner's expert analysis, "not capable of reliable detection." Cert.Index.No.16.Ex.1 ¶24.

That fact underlies the improper type of strict liability that PHMSA is imposing here, without congressional authorization. PHMSA causally relates the Mayflower release to EMPCo's conduct, claiming that EMPCo violated IMP regulations by not using a tool capable of assessing longitudinal seam integrity. *See* Cert.Index.No.22, at 13. Yet PHMSA knows that no ILI tool is capable of detecting every anomaly, and knows that the sophisticated ILI tool utilized here did not detect the release-causing defect. Therefore, the real basis for the enforcement action is simply the fact of the release.

II. The Baker Report Is the Only Available Guidance, and EMPCo Faithfully Followed It.

The Baker Report, and specifically the Baker/Kiefer Decision Tree, is the *only* available PHMSA-sponsored guidance for operators on how to assess pipe for seam-failure susceptibility. The Decision Tree is specifically designed to "allow[] one, by supplying appropriate data on a given segment, to determine if a seam-integrity assessment is required based on the federal pipeline integrity management regulations." Cert.Index.No.16:Ex.3, at 16.

As Dr. Kiefner stated under oath, EMPCo faithfully followed the Baker Report and the Baker/Kiefer Decision Tree in developing its seam-failure susceptibility analysis process in its IMP plan. Kiefner stated that EMPCo was

“consistent and compliant with” and “correctly followed the guidance described in the Baker Report.” Cert.Index.No.24:Ex.82 ¶¶10, 18. Kiefner also reaffirmed that the Baker/Kiefner Decision Tree is “our recommended decision tree process for operators to follow to determine if a particular pipeline segment is susceptible to seam failure in the context of the regulations.” *Id.* ¶6.

PHMSA does not challenge Kiefner’s sworn statements. Instead, PHMSA takes issue with the Baker Report itself, claiming that a single sentence from the Report, taken out of context, supports a rule under which a prior seam failure, regardless of cause, mandates a conclusion of susceptibility to seam failure for LF-ERW pipe. *See* PHMSA Br. at 33-34. As Dr. Kiefner explained, the proper methodology is reflected in the Baker/Kiefer Decision Tree that EMPCo indisputably followed. Cert.Index.No.24:Ex.82 ¶¶6-10.

Nor is the Baker/Kiefer Decision Tree flowchart itself an “isolated statement[] [or] figure[] contained in [an] industry report,” as PHMSA’s brief suggests. PHMSA Br. at 19. The Baker/Kiefer Decision Tree is instead the summation of the step-by-step process set forth in the Baker Report to allow operators to “determine if a seam-integrity assessment is required based on the federal pipeline integrity management regulations.” Cert.Index.No.16:Ex.3, at 16. The Report’s co-author, Dr. Kiefner, explained his disagreement with PHMSA’s interpretation of his Report. *See, e.g.*, Cert.Index.No.24:Ex.82 ¶¶6-20.

Lacking any response to Dr. Kiefner's sworn statements, PHMSA's brief just ignores them. Instead PHMSA makes the bare assertion that it is the "expert," without citing or being able to cite any supporting evidence in the record from a PHMSA employee with requisite qualifications. *See* PHMSA Br. at 3, 19, 22, 23, 34, 36, 37. That is arbitrary and capricious conduct. *See Caterpillar Logistics Servs., Inc. v. Solis*, 674 F.3d 705, 709 (7th Cir. 2012) (agency cannot "simply ignore" key evidence or "strong indications that its favored witness got things wrong"); *ASG Indus., Inc. v. United States*, 548 F.2d 147, 154 (6th Cir. 1977) (an agency cannot "assert 'expertise' as a defense for all seasons"); *see also Morgan Stanley Capital Group Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cty.*, 554 U.S. 527, 552 (2008).

Also counter to PHMSA's post-failure enforcement position is PHMSA's repeated pre-failure silence during the multiple audits the Agency conducted of EMPCo's IMP plan: during inspections in 2003, 2007, as well as 2011, and including an in-depth review of the Pegasus Pipeline system during the restart and reversal of the pipeline in 2006. Cert.Index.No.18, at 85, 96. Given PHMSA's decade-long knowledge and acceptance of EMPCo's IMP, which explicitly included EMPCo's adoption of the Baker/Kiefner Decision Tree flowchart, the Agency cannot credibly assert that its newfound enforcement position is reasonable and worthy of deference. Surely, if the regulations' plain text and a

single, isolated half-sentence in the Baker Report mandate (and always have mandated with ascertainable certainty) a conclusion of seam-failure susceptibility for any LF-ERW pipe that has experienced a prior seam failure (no matter the cause), as PHMSA now contends, it would have been highly unusual (to say the least) for PHMSA to have repeatedly allowed this purported integrity program deficiency to remain unaddressed in EMPCo's IMP during PHMSA's many audits.

PHMSA cannot have it both ways. Either PHMSA repeatedly allowed EMPCo's purported program deficiency to remain throughout multiple pre-failure audits, or the post-failure interpretation of this performance-based regulation is new. In any event, EMPCo and other operators have not been afforded the requisite fair notice of PHMSA's changed position.

III. PHMSA Has Yet to Articulate a Meaningful Regulatory Standard.

Even today, PHMSA has not clearly interpreted its regulations or identified a standard for assessing seam-failure susceptibility. Instead, PHMSA's requirements amount to a moving target.

A prime example is PHMSA's disavowal of its prior (mistaken) argument that §195.303(d) creates a presumption that all pre-1970 LF-ERW pipe is susceptible to seam failure, barring an engineering analysis showing otherwise. PHMSA relied on this non-existent presumption throughout the enforcement proceedings. The presumption appears in bold on page 2 in the "Describe the

evidence” section of Violation 1 in the Pipeline Safety Violation Report. Cert.Index.No.2. At the hearing, PHMSA’s own counsel directly quoted §195.303(d) as supposed “black letter.” Cert.Index.No.18, at 103. PHMSA cited the purported presumption in its Final Order and Decision on Petition for Reconsideration:

In a regulation separate from integrity management, PHMSA deemed all pre-1970 ERW pipe to be “susceptible to longitudinal seam failure” unless an engineering analysis proved otherwise. §195 303(d).

The pipeline safety regulations expressly deem all pre-1970 ERW pipe to be presumptively susceptible to seam failure unless an engineering analysis shows otherwise.

Given that the Pegasus Pipeline was constructed with pipe known to be presumptively susceptible to seam failure . . . PHMSA continues to find unpersuasive Dr. Kiefner’s opinion regarding the reasonableness of EMPCo’s actions.

Cert.Index.No.22, at 8 n.36; Cert.Index.No.31, at 2, 6. Likewise, before this Court in opposing EMPCo’s stay request, PHMSA argued that the “agency has deemed all pre-1970 ERW pipe to be susceptible to seam failure” under §195.303(d). Resp. to Mot. to Stay at 4 n.1, 18. Relying on PHMSA’s argument, this Court denied a stay because “[t]he regulations clearly state that all pre-1970 ERW pipe is considered susceptible to seam failure.” Order Denying Stay (Aug. 11, 2016).

After relying on and arguing the presumption, PHMSA now abandons §195.303(d). On page 35 of its Brief, PHMSA states: “PHMSA did not apply a

presumption of susceptibility for pre-1970 ERW pipe based on 49 C.F.R. § 195.303(d).”³

Also showing the absence of a coherent regulatory standard is PHMSA’s Statement of the Issues in its brief, which asks “whether PHMSA’s conclusion that EMPCo improperly determined that the Pegasus Pipeline was not susceptible to seam failure, given that the pipeline material was prone to seam failure and that the pipeline had a history of seam failures, was arbitrary or capricious.” PHMSA Br.at 4. This issue statement has two fundamental problems.

The first problem is PHMSA’s apparent new requirement that operators presume all LF-ERW pipe is “prone” to seam failure, and then, if there are past failures, the pipe is automatically susceptible to seam failure. But “prone to seam-failure susceptibility” is not a regulatory phrase; it is in reality just PHMSA’s latest

³ PHMSA now disavows §195.303 no doubt because the provision—although not relevant to this matter for all the reasons stated in EMPCo’s opening brief (EMPCo Br. at 37-38)—is actually the subject of regulations that are inconsistent with PHMSA’s arguments on appeal. For example, Appendix B in the Part 195 regulations, which “provides guidance on how . . . § 195.303 will work,” does not jibe with PHMSA’s current interpretation that LF-ERW pipe with any history of prior seam failures “obviously” mandates a determination of seam-failure susceptibility. Appendix B indicates that “a history of past [seam] failures” calls for review of “failure causes,” including “time-dependent defects” to “determin[e] risk classification.” The Baker/Kiefner Decision Tree, like the Appendix B guidance, calls for investigation into the causes of prior failures to assess seam-failure susceptibility and emphasizes time-dependent defects.

Appendix B also specifically suggests that any LF-ERW pipeline segments that experience 3 or fewer in-service seam failures in 10 years are “low” risk for “Probability or Failure Indicators.” The Pegasus Pipeline experienced only a single in-service seam weep/pinhole leak in 1984.

post-failure invention to justify its enforcement actions. And even if this is now the standard (which would be patently inconsistent with the regulation), what does “prone” mean? How many past failures suffice for an LF-ERW pipe to be prone to failure? Are more failures required for a non-LF-ERW pipe that is not “prone” to seam failure? Does it matter why the past failure(s) occurred, or whether they were repaired? Does the cause of a past seam failure(s) not matter at all?

These questions are significant because, without any answers, operators are left to guess at what is required for compliance, subject to an after-the-fact enforcement action similar to the one PHMSA undertook in this case. The questions about failures during hydrotests are especially significant because such tests subject a pipeline to pressures far in excess of maximum operating pressure, and are designed to cause failures that would not otherwise occur operationally. Cert.Index.No.16:Ex.1 ¶13.

As Dr. Kiefner explained: “[LF-]ERW seam failures that occur during a hydrostatic test at a level well above the maximum operating pressure can result from manufacturing defects that, absent any in-service crack growth, do not pose a threat of rupture at the maximum operating pressure.” *Id.* Indeed, hydrotests can damage pipe. See John F. Kiefner and Willard A. Maxey, *The Benefits and Limitations of Hydrostatic Testing* 1-3 (2013); see also PHMSA, Notice of Proposed Rulemaking, “Pipeline Safety: Safety of Gas Transmission and

Gathering Pipelines,” 68 Fed. Reg. 20722, 20727-28 (Apr. 8, 2016) (“Many operators prefer not to use hydrostatic pressure tests because it can potentially be a destructive method of testing.”). Requiring hydrotests every five years is something that would require notice and comment from industry and other interested parties, so that the pros and cons of frequent hydrotests could be analyzed properly. Are operators now on notice that any hydrotest failure requires a conclusion of seam-failure susceptibility, in any seamed pipe?

A second problem with PHMSA’s issue statement is its inaccuracy about the Pegasus Pipeline’s supposed “extensive history of seam failures.” PHMSA Br. at 19. The Pegasus Pipeline does not have an extensive history of seam failures. The pipeline experienced no time-dependent failures in its over 65-year history, prior to the Mayflower incident. During that time, the pipeline also did not exhibit any in-service seam failures beyond a single 2-gallon seam weep/pinhole leak in 1984 that was subsequently repaired. Hydrostatic test failures that occurred in 2005-2006 were repaired and individually analyzed by an independent expert metallurgist for evidence of conditions indicative of seam failure susceptibility; none were found. *See* Cert.Index.No.16:Ex.1 ¶13; Ex.3, at 18; Exs.12, 14 &15. Accordingly, given its 850-mile length, the number of 50-foot joints, and its 65-year lifespan, the Pegasus Pipeline did not have an “extensive leak history” as

PHMSA's brief repeatedly and erroneously asserts. *See* PHMSA Br. at 2, 14, 19, 26, 28.

Moving beyond its Statement of the Issues, PHMSA's brief declares another "new" rule for pipeline operators. Apparently, operators should be on notice that "in-line inspection [is] not an appropriate tool for assessing seam integrity for brittle pipe." PHMSA Br. at 12. Given the Baker Report's statement that "all low-frequency and DC-welded materials possess bondline regions that are prone to low toughness and brittle-fracture behavior," Baker Report, *supra* note 2, at 8, apparently, by extension in PHMSA's mind, in-line inspection is not an appropriate tool for assessing LF-ERW pipe. That runs contrary to all regulations, guidance, and reporting to date by the Battelle Institute.

The reality is that PHMSA relies on brittleness because it knows that, otherwise, the Baker/Kiefner Decision Tree does not show the Pegasus Pipeline to be susceptible to seam failure. So PHMSA literally invents a brittleness exception to the Decision Tree that, as Dr. Kiefner explains, does not exist. PHMSA cites no expert opinion in support of the brittleness exception, nor any proof that brittleness invalidated the results of using the Decision Tree.

Further, PHMSA points to the Final Order's statement that EMPCo was "required to consider the factors accurately and appropriately, without dismissing probative information." PHMSA Br. at 2. PHMSA has never in the past and the

Government does not here, identify what “factors” have to be considered, let alone how “accuracy” is to be measured, and what is or is not “appropriate” when making a seam failure susceptibility determination. Similarly, if an operator cannot dismiss “probative information,” then what exactly constitutes probative information? PHMSA identifies one or two factors (prior seam failures and LF-ERW pipe) that it believes are important (and which EMPCo did consider), but never says whether these are the only factors.

In addition, PHMSA’s brief suggests there is another test: whether an operator “fail[s] to appropriately consider” that a pipe exhibits “brittle” characteristics. PHMSA Br. at 25-26. But in doing so, PHMA offers no explanation as to how one “appropriately consider[s]” “brittleness.” Once again, the harder PHMSA tries to justify its actions in this case, the more it demonstrates that it is merely offering *post hoc* justifications.

PHMSA even ignores the Baker Report and Dr. Kiefner. The Baker Report explicitly recognized: “It is safe to say that all low-frequency and DC-welded materials possess bondline regions that are prone to low toughness and brittle-fracture behavior.” Baker Report, *supra* note 2, at 8; *see also* Cert.Index.No.24:Ex.82 ¶¶13, 14, 17. As Dr. Kiefner also stated, “The Baker Report assumes that all LF-ERW materials possess bond line regions that are prone to low toughness and brittle-fracture behavior” *Id.* at ¶11.

Moreover, as Dr. Kiefner pointedly observed, “[t]he PHMSA Final Order’s discussion of brittleness is misleading.” *Id.* ¶14. “In contrast to PHMSA’s conclusions, the relevant consideration for a LF-ERW pipeline’s fatigue life is not toughness of the bond line region.” *Id.* ¶17. “The toughness of the pipe seam is simply not relevant to [the] analysis.” *Id.* ¶13. And if Dr. Kiefner’s testimony and the Baker/Kiefner Decision Tree’s consideration of brittleness is somehow not “appropriate,” whatever that means, PHMSA has failed to explain how an operator might make that determination *before* it is the subject of an enforcement proceeding. Once again, EMPCo was without the requisite fair notice to act upon the standard that PHMSA now seeks to impose.

When examined, PHMSA’s positions and its interpretations reveal nothing that is straightforward and nothing that is entitled to deference. Instead, PHMSA’s positions on seam-failure susceptibility seem to be a work in progress, just like its recent abandonment of the §195.303(d) presumption.

IV. PHMSA Is Not Entitled to Deference for Its “Interpretation” of a Third-Party Report.

PHMSA presented no expert witness to contradict Dr. Kiefner’s testimony regarding the very methodology—indeed, the only methodology—that PHMSA has published to the industry; the 2004 Baker Report. Its solution now is to demand deference. Yet the deference that PHMSA demands is deference to a new interpretation of the very Report it commissioned from a third-party more than a

decade ago—an interpretation that conflicts with the interpretation of the Report’s co-author.

More than that, the law does not afford a federal agency deference to interpret the opinion of a third party.

The case cited by PHMSA, *Medina County Environmental Action Association v. Surface Transportation Board*, 602 F.3d 687, 699 (5th Cir. 2010), does not support its argument for deference. *Medina* deferred to a Fish and Wildlife Service “biological assessment” performed under the Endangered Species Act (ESA). The ESA regulations pertinent in that case “leave the contents of a biological assessment . . . to the discretion of the evaluating agency.” *Id.* at 699. There is no analogous statutory authority granted to PHMSA to make seam failure susceptibility determinations. Furthermore the citizen’s group in *Medina* demonstrated no specialized expertise in making biological assessments. Here, EMPCo relied on an assessment methodology developed by an expert metallurgist, and published in a report commissioned by PHMSA.

V. PHMSA Never Announced Its Current Interpretation of the Regulations Before This Case.

In its brief, PHMSA claims it has provided fair notice of the interpretation asserted in this case of how to apply the LF-ERW seam-failure-susceptibility-analysis process, which in fact was presented for the first time in this proceeding as a *post hoc* rationalization to support alleged violations. The record shows that

PHMSA first articulated its view of the relevant regulatory requirements when it initiated the underlying administrative proceedings.

The fundamental underpinning of the fair notice doctrine is that PHMSA's asserted interpretation must have been reasonably ascertainable at the time EMPCo made its seam-failure susceptibility determination that PHMSA now second-guesses. *See, e.g., Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1328-29 (D.C. Cir. 1995). There is absolutely no evidence—and PHMSA refers to none in its brief—that PHMSA provided prior to this case any notice to EMPCo or the regulated community of the interpretation the Agency presents in this case. Even if PHMSA's new interpretation is now ascertainable and reasonable (which it is not), EMPCo cannot be penalized after-the-fact for not following a purported “reasonable” interpretation of a broadly worded regulation never previously announced by the agency. For this reason alone, EMPCo has been deprived of fair notice, and cannot be subject to the penalties and compliance order relief sought by PHMSA in this case.

A. PHMSA's Brief Reflects a Fundamental Misunderstanding of the Fair Notice Doctrine.

The requirement of fair notice has been “thoroughly ‘incorporated into administrative law.’” *Gen. Elec. Co.*, 53 F.3d at 1328, 1333 (quoting *Satellite Broadcasting Co. v. FCC*, 824 F.2d 1, 3 (D.C. Cir. 1987)). If a regulation does not provide “fair warning of the conduct it prohibits or requires,” an agency may not

impose liability for violation of that regulation. *Id.* at 1328, 1333; *see also Trinity Broad. of Florida v. FCC*, 211 F.3d 618 (D.C. Cir. 2000); *United States v. Chrysler Corp.*, 158 F.3d 1350 (D.C. Cir. 1998).

PHMSA initially states, incorrectly, that EMPCo raised the fair-notice issue only in the context of deference. *See* PHMSA Br. at 37 (“EMPCo contends (Br. 44-49) that it lacked adequate notice of PHMSA’s interpretation of its pipeline regulations, and that PHMSA’s interpretation of those regulations is therefore not entitled to deference under *Auer v. Robbins*, 519 U.S. 452, 461 (1997).”). But as EMPCo explained, a regulation that does not provide “fair warning of the conduct it prohibits or requires” cannot serve as a basis to impose liability for regulatory violation. *Gen. Elec. Co.*, 53 F.3d at 1328; EMPCo Br. at 44-49.

PHMSA’s further page-and-a-half argument on fair notice reflects its fundamental misunderstanding of the fair notice doctrine. *See* PHMSA Br. at 37-38. The fair notice doctrine asks whether PHMSA’s new interpretation of the regulations, articulated for the first time in this case, could have been understood with ascertainable certainty by EMPCo at the time it engaged in the conduct that potentially exposed it to this enforcement action. *See Gen. Elec. Co.*, 53 F.3d at 1329 (citing this Court’s opinion in *Diamond Roofing Co. v. OSHRC*, 528 F.2d 645, 649 (5th Cir. 1976)); *see also United States v. S. Ind. Gas & Elec. Co.*, 245 F. Supp.2d 994, 1013 (S.D. Ind. 2003) (“[T]iming plays a significant role in a fair

notice inquiry—the notice that matters in this case is what SIGECO had notice of when it was contemplating and implementing its projects.”).

Contrary to those principles, during the various times that EMPCo evaluated the pipeline for susceptibility to seam failure, neither EMPCo nor the pipeline industry had any notice that PHMSA disagreed with the PHMSA-commissioned Baker Report or, specifically, the Baker/Kiefner Decision Tree. Nor did they have notice that PHMSA had a specific interpretation of the regulations that departed in any way from that Report and the Baker/Kiefner Decision Tree posted on PHMSA’s website, let alone that they could be subject to an enforcement action for strictly adhering to the Baker/Kiefner Decision Tree, as EMPCo indisputably did here.

EMPCo cannot be liable for the violations alleged unless the standard for determining whether pipe is susceptible to seam failure that PHMSA now champions was apparent with ascertainable certainty at the time EMPCo conducted its analyses, years before the Mayflower release. A reasonable pipeline operator, therefore, must have understood at those times that failure to follow that standard could trigger liability. Agencies cannot enforce regulations according to “what an agency intended but did not adequately express [The agency] as enforcer . . . has the responsibility to state with ascertainable certainty what is meant by the standard [] [it] has promulgated.” *Gates & Fox Co. v. OSHRC*, 790 F.2d 154, 156

(D.C. Cir. 1986) (citation omitted). Additionally, where “regulations and other policy statements are unclear, where the [regulated entity’s] interpretation is reasonable, and where the agency itself struggles to provide a definitive reading of the regulatory requirements, a regulated party is not ‘on notice’ of the agency’s ultimate interpretation of the regulations, and may not be punished.” *Gen. Elec. Co.*, 53 F.3d at 1334.

B. EMPCo Did Not Have Fair Notice of PHMSA’s New and Litigation-Derived Standard for Determining Susceptibility to Seam Failure.

Applying the correct standards, EMPCo did not have fair notice of PHMSA’s *post hoc* litigation-derived seam-susceptibility standard, for three primary reasons.

First, at the time EMPCo evaluated the pipeline for seam-failure susceptibility, PHMSA had never issued any regulations or made any formal interpretation about how to investigate seam-failure susceptibility. Instead, PHMSA commissioned the Baker Report from third-party expert metallurgists Drs. Baker and Kiefner. Even then (and to this day), the Report was not a formal agency interpretation and was not incorporated into the regulations. PHMSA also has never previously “interpreted” the Baker Report, as it purports to do in this case. Consequently, the only “ascertainably certain” meaning of the regulations available to EMPCo at the relevant time and with the co-author of the Report’s

assistance was that it had to examine whether pipe was susceptible to seam failure, and then factor that consideration into its overall §195.452(e)(1) risk evaluation. It is undisputed that EMPCo made this examination, using a rigorous engineering evaluation process from the Baker report, and utilizing one of the authors of the report.

Second, PHMSA's interpretation of the seam failure susceptibility test is still not clear, and seems to be ever-changing throughout this matter. *See* §III *supra*. Given that PHMSA to this day cannot articulate a consistent standard for examining seam-failure susceptibility, EMPCo cannot possibly have an "ascertainably certain" understanding of the standards that might expose it to punishment through a PHMSA enforcement action.

Thus, PHMSA's brief falls short by simply stating that EMPCo had all the notice required under the law, based on the regulation's directive to consider "all risk factors." *See* PHMSA Br. at 38. The Supreme Court has warned of such "open-ended regulations that [agencies] can later interpret as they see fit, thereby 'frustrat[ing] the notice and predictability purposes of rulemaking.'" *Christopher v. SmithKline Beecham*, 132 S. Ct. 2156, 2168 (2012) (quoting *Talk Am., Inc. v. Michigan Bell Tel. Co.*, 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring)).

Ultimately, PHMSA does not argue—because it cannot argue—that EMPCo failed to consider risk factors, as the regulations instruct; PHMSA instead argues

that EMPCo failed to “consider” the risk factors in the same way PHMSA now, after the Mayflower release, wishes it had stated in the regulations (but did not). This is why PHMSA’s brief refers throughout to “proper,” “improper,” “appropriate,” and “adequate” consideration of factors. *See* PHMSA Br. at 4, 8, 9, 10, 13, 24, 26, 27, 31, 32, 38, 41, 43, 47, 48, 51. At a minimum, PHMSA must provide notice to operators, *before* pursuing an enforcement action, that informs them with ascertainable certainty what would and would not constitute “proper,” “improper,” “appropriate,” “adequate” consideration of factors. And to the extent PHMSA is inclined to split hairs with aspects of the Baker Report, it must also explain with ascertainable certainty its basis for doing so.

As noted, PHMSA had ample opportunity to notify EMPCo of PHMSA’s interpretation of the Baker Report and disagreement with how EMPCo implemented the regulations into its IMP. PHMSA knew about the prior seam failures on the Pegasus Pipeline through multiple audits, and also knew from those audits that EMPCo was not running a seam ILI tool every five years. Yet PHMSA raised no alarm, never objected to how EMPCo was managing its LF-ERW pipe, and never informed EMPCo that it was supposedly non-compliant with the relevant IMP regulations.

The third reason for the lack of fair notice is equally clear and simple: it is not possible in these circumstances for EMPCo to have been afforded fair notice of

its regulatory obligations, absent a communication from PHMSA that never occurred. PHMSA has not cited any pre-failure directive to the industry or communication to EMPCo that it was required to do more than, or even as much as, it was doing.

If PHMSA *now* believes there is a better way to manage the integrity of LF-ERW pipe, EMPCo—which continuously assesses its integrity practices—welcomes the consideration of new regulations, following notice and comment from all concerned parties, that would apply industry-wide to assist the whole industry’s pipeline-integrity-management efforts.

VI. PHMSA’s Penalty and Compliance Order Are Unlawful.

PHMSA’s enforcement action exceeds the bounds of the Pipeline Safety Act. For the reasons noted in EMPCo’s opening brief, the Agency’s penalty exceeds the penalty authority under the Pipeline Safety Act because the violations are related and the \$1 million penalty maximum applies. *See* EMPCo Br. at §III. At a minimum, the penalty is excessive because PHMSA inappropriately applies the highest level of gravity by erroneously concluding that alleged violations 1, 2 and 8 were causal factors of the incident. Cert.Index.No.22, at 34-40; *see* Cert.Index.No.2 at Part E7 of Violation 1. PHMSA does not maintain a civil penalty policy, but it maintains a draft “Civil Penalty Summary” document that

clarifies this factor, stating “for example: human error or equipment failure that if eliminated, would have prevented the accident.” Cert.Index.No.23.Ex.92.

In applying this penalty factor here, the Agency ignored the undisputed facts. EMPCo performed an assessment of the Pegasus Pipeline before the incident with a tool capable of assessing seam integrity (a seam/crack tool). The assessment—which PHMSA agrees that EMPCo should have performed but just 10 months earlier—did not detect the anomaly that led to the failure. Cert.Index.No.16:Ex.54. Accordingly, the alleged delay in using the ILI tool could not have contributed to the failure.

PHMSA suggests that EMPCo should have used a hydrostatic test, but this contrasts with PHMSA’s own guidance, which states that *both* hydrostatic testing and certain ILI tools are capable of assessing seam integrity. *Compare* PHMSA Br. at 51 *with* PHMSA Frequently Asked Question (FAQ) 6.10, <https://primis.phmsa.dot.gov/iim/faqs.htm> (“For ERW pipe or lap welded pipe susceptible to seam failures, an operator must: run an [ILI] device(s) capable of detecting seam flaws, metal loss corrosion, and deformation anomalies, OR perform a Subpart E hydrostatic test.”).

Further, EMPCo’s root-cause analysis and expert opinion indicate that the cause was atypical, unique, “not frequently seen before in the industry” and in Dr.

Kiefner’s analysis “not capable of reliable detection.” Cert.Index.No.16:Ex.1 ¶24. For all these reasons, PHMSA’s penalty should at least be greatly reduced.

The Agency’s Compliance Order is likewise inconsistent with the applicable law. PHMSA may issue orders “directing compliance” with a “regulation” where the relief sought is linked to the regulatory violation at issue and those orders “clearly” state the action needed to comply. 49 U.S.C. §60118(b); 49 C.F.R. §190.217. Although PHMSA includes cites to regulatory provisions for each element of the Compliance Order, as noted in its Response Brief (PHMSA Br. at 52), that does not mean that PHMSA is staying within the boundaries of those regulatory provisions.

To the contrary, PHMSA’s vague and overbroad Compliance Order in this matter does not meet these requirements because the Agency is imposing its new interpretations that have no basis in the relevant regulations or statute. Moreover, these new interpretations would be imposed across the entirety of the EMPCo’s system where no violation has been alleged. Finally, because PHMSA is wrong as a matter of law with regard to what is required under the relevant regulations, what it is asking EMPCo to do under the Compliance Order is similarly unfounded.

CONCLUSION

EMPCo shares PHMSA’s desire to ensure public safety and enhance pipeline system integrity and regrets that the Mayflower release occurred. In

response to the release, EMPCo has cooperated with PHMSA and other agencies and has worked diligently to address its impact on the community and environment. Further, EMPCo pursues the continuous improvement of the safety of its pipelines—even co-leading an industry group to advance knowledge and guidance about the integrity of all pipe. Nevertheless, to preserve its focus on sound science-based integrity management, EMPCo must counter PHMSA’s contentions.

PHMSA’s contentions lack support in its regulations. Because its regulations are performance based, PHMSA has relied on industry experts, on industry recognized practices, and on operators’ discretion and engineering judgment. PHMSA now demands deference to justify an enforcement action prompted by a release from a defect that was not capable of reliable detection by a sophisticated seam-assessment tool. Recognizing that it cannot rely on a presumption that it repeatedly referenced in the enforcement action and even argued to this Court, PHMSA tries but fails even now to articulate a coherent interpretation that would justify its selective enforcement action.

EMPCo complied with all applicable regulations, using the only methodology PHMSA has endorsed to date. Even though that methodology did not reveal seam-failure susceptibility, EMPCo still went beyond the regulatory

requirements by investigating seam-failure susceptibility. For those reasons, the Court should grant EMPCo's prayer for relief.

PRAYER

EMPCo respectfully requests that the Court overturn violations 1-4 and 7-8 found by PHMSA; vacate the Compliance Order as to all of the violations or, alternatively, vacate it to the extent it is based on violations 1-4 and 7-8; and order that PHMSA reimburse all or part of the penalty paid by EMPCo.

Respectfully submitted,

DATED: September 30, 2016.

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CERTIFICATE OF FILING AND SERVICE

I certify that this brief was filed with the Court via the court's electronic filing system, on September 30, 2016. A copy of this brief was also sent to Respondents by the court's electronic filing system and/or Federal Express, addressed to:

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CERTIFICATE OF COMPLIANCE

I certify that:

1. This Petitioner's Reply brief complies with the type-volume limitation in Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,998 words, exclusive of the portions of the brief that are excluded from the type-volume limitation by Rule 32(a)(7)(B)(iii), the word count having been obtained through the word processing system used to create this brief, namely Microsoft Word 2010.
2. This brief further complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6), because it was prepared in Microsoft Word 2010 in 14-point, proportionally spaced Times New Roman font, except that 12-point font is used for footnotes as permitted by Fifth Circuit Rule 32.1.

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