

## 5th Circuit U.S. Court of Appeals Reverses PHMSA

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The 5th Circuit issued a lengthy [opinion](#) on August 14, 2017, reversing most of the violations of a PHMSA enforcement action that began in November 2013 in conjunction with investigation of a failure on the Pegasus Pipeline. In that matter, PHMSA alleged that the ExxonMobil Pipeline Company (EMPCo) failed to properly consider the risk of failure on a segment of pre-1970 low frequency electric resistance welded (LF-ERW) pipe. The Agency assessed a penalty of nearly \$2.7 million for the various alleged violations. In a rare judicial decision regarding a PHMSA Final Order and Decision on Petition for Reconsideration, the Court reversed all but one of the items on appeal, and vacated the penalty associated with those alleged violations (dismissing over \$1.6M of the total penalty). The Court remanded the one remaining item back to PHMSA for recalculation of the associated penalty.

EMPCo argued at the administrative hearing for this matter that it both fully considered and reconsidered the threat of LF-ERW failure, using various tools and methods. The Company retained the co-author of the only report commissioned by PHMSA on how to evaluate threats on LF-ERW pipe. EMPCo asserted that no technology currently exists to identify the type of small cracking ultimately shown to be the cause of the incident. PHMSA disagreed, issuing a Final Order in 2015 that retained the alleged violations and most of the penalty. EMPCo sought reconsideration with the Agency, but was again denied.

The Company brought the same arguments to the 5th Circuit in 2016. In the Court's decision, the Court found that EMPCo did fully consider the threat of LF-ERW pipe "after lengthy, repeated, and in depth consideration of seam failure risk factors and after utilizing the ...available guidance." Order at p. 18. The Court found such efforts to be purposeful and deliberate, and that PHMSA acted in an arbitrary and capricious manner by dismissing those efforts "...simply because ExxonMobil reached a different determination from the one the Agency [made], in hindsight." *Id.*

The Court pointed out that "the fact the Mayflower release occurred, while regrettable, does not necessarily mean Exxon Mobil failed to abide by the pipeline integrity regulations..." Order at p. 19. To do otherwise, the Court said, would allow the Agency to penalize operators for every incident, "...creating a strict liability scheme that Congress has not authorized." *Id.* The Court also explained that "if the agency wishes to enforce outcome-based requirements instead of the process-based requirements that are currently in place with regard to seam failure susceptibility, the agency could have promulgated regulations to that effect." After the fact finding of violations has been a concern raised by industry for years.

Notably, the Court found that PHMSA rule 49 C.F.R. Part 195.452(e) was unambiguous and accorded the Agency no deference under *Auer v. Robbins*. Further, the Court explained that even assuming that the regulations are ambiguous, deference would still not be warranted under *Auer* because EMPCo lacked fair notice of the Agency's interpretation of the regulation advanced through enforcement.

The Order vacates all findings of violation that were the subject of the appeal except one. That item alleged that the Company had not properly documented its approach to evaluating the threat of seam failure in its written Integrity Management Plan. For that one item, the Court remanded the case to PHMSA for the limited purpose of re-calculating the penalty (and noting that item was associated with only \$783,300 of the nearly \$2.7 million total penalty).

This case is significant for several reasons. It is one of the very few judicial decisions where PHMSA enforcement has been overturned by a Court. In addition, the Court's finding on how the agency interprets its regulations after the fact in a manner not authorized by Congress is particularly noteworthy.

The lawyers comprising Troutman Sanders Pipeline Practice (Robert Hogfoss, Catherine Little, and Annie Cook) represented the EMPCo in the administrative proceedings, and assisted appellate counsel Reagan Simpson and Rich Farrer (of the Yetter Coleman law firm) and Colin Harris (of the Faegre Baker Daniels law firm) in the appeal to the 5th Circuit.