

ExxonMobil Pipeline Co. v. United States Department of Transportation: Ambiguity in Enforcing Complex Regulations

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I. OVERVIEW OF THE CASE

The pipeline transportation of oil and other hazardous materials is an enormous industry that requires complex statutory regulation and administrative oversight. Due to the interchangeability of diverse pipeline construction methods, materials, functions, geographic placement, and the countless risk factors involved in pipeline construction and operation, the Pipeline Safety Regulations create a framework of self-regulation by requiring pipeline owners and operators to create individual integrity management programs (IMPs) for pipelines.¹ In March 2013, ExxonMobil’s (Exxon) Pegasus Pipeline ruptured and spilled several thousand barrels of oil near Mayflower, Arkansas.² The spill prompted a Pipeline and Hazardous Materials Safety Administration (PHMSA) investigation into the formation and implementation of Exxon’s Pegasus Pipeline IMP.³ PHMSA issued a final order to Exxon that cited nine regulatory violations, assessed over

1. ExxonMobil Pipeline Co. v. U.S Dep’t of Transp., 867 F.3d 564, 568 (5th Cir. 2017) (citing 49 U.S.C. § 60101 *et. seq.* (2012)).

2. *Id.* at 567.

3. *Id.* at 568.

\$2,600,000 in civil penalties, and ordered Exxon to correct its compliance violations.⁴ Exxon disputed the final order in a hearing with PHMSA; when the final order was released, Exxon petitioned for judicial review of the final order, arguing the order was arbitrary and capricious.⁵ The primary issue in the case required the court to determine if the agency's interpretation of the relevant regulations should be awarded deference, and whether Exxon satisfied its obligations under the Pipeline Safety Regulations.⁶

The final order and the court's analysis focused on § 195.452(e)(1) of the PHMSA regulations, which sets out risk factors for pipeline operators to "consider" when establishing a continual assessment program for pipeline segments in high consequence areas.⁷ The court reasoned that because the use of the term "consider" in § 195.452(e)(1) was unambiguous, PHMSA should not be awarded deference to its interpretation of the regulation.⁸ According to the court, the reasoning the agency used in its enforcement action was arbitrary and capricious because Exxon met its obligations under the plain textual interpretation of the regulation.⁹ The court further reasoned that PHMSA's final report would be arbitrary and capricious even under the agency's interpretation as it denied Exxon fair notice that the PHMSA would apply a different interpretation of the regulation in the enforcement action.¹⁰ The United States Court of Appeals for the Fifth Circuit *held* that PHMSA's enforcement action against Exxon was arbitrary and capricious because the agency's interpretation of the regulation did not warrant deference and Exxon reasonably complied with the regulation. *ExxonMobil Pipeline Co. v. United States Department of Transportation*, 867 F.3d 564, at 580 (5th Cir. 2017).

II. BACKGROUND

A. Pipeline Safety Regulations

Federal pipeline statutes give broad regulatory power to the Secretary of Transportation to enforce and improve regulations that protect the public against risks posed by pipeline transportation and

4. *Id.* at 571.

5. *See id.* at 567.

6. *Id.* at 571.

7. *Id.* at 572.

8. *Id.* at 574.

9. *Id.* at 578.

10. *Id.*

pipeline facilities.¹¹ The regulations specifically direct the Secretary of Transportation to “prescribe minimum safety standards for pipeline transportation.”¹²

The Code of Federal Regulations further establishes regulatory authority and procedures for PHMSA to create rules and guidelines, provide notice of violations, hold hearings, assess civil penalties, and issue compliance orders to the owners and operators of pipelines.¹³ Given the variance in building materials, location, and transported material in pipelines, the federal regulations require pipeline owners and operators to create specialized IMPs.¹⁴ The IMP must adequately meet the broad safety standards stipulated by federal regulation, as well as the specific standards PHMSA promulgates for each particular type of pipeline.¹⁵ The IMP is intended to transparently reveal how the operator categorizes pipeline segments and implements the plan according to its evaluation.¹⁶ The regulations instruct the operator to create an IMP that prioritizes pipeline segments based on risk factors that make it more or less susceptible to failure.¹⁷ The operator is further instructed to create a plan that applies assessment methods that “follow recognized industry practices.”¹⁸

A pipeline oil spill or violation will trigger a PHMSA investigation. During an investigation, the agency will review the cause of the spill and determine if there were deficiencies in the IMP or its application.¹⁹ Since the relevant segment of the Pegasus Pipeline was in a high consequence area, § 195.452(e)(1) prescribed the particular risk factors Exxon had to “consider” in creating the continual assessment portion of the IMP for that segment.²⁰

B. IMPs for High Consequence Areas

Pipeline operators are charged with the duty to create more scrupulous IMPs for segments of pipeline that could affect populated areas, commercial waterways, and unusually sensitive areas, which are

11. 49 U.S.C. § 60102(a)(1) (2012).

12. *Id.*

13. 49 C.F.R. § 190.1 (2017) (citing 49 U.S.C. § 60101 *et. seq.*).

14. 49 U.S.C. §§ 60108, 60118.

15. 49 C.F.R. § 195.452(e)(1); *see* 49 U.S.C. § 60108.

16. 49 C.F.R. § 195.452(b)(5).

17. *Id.* § 195.452(e)(1); *accord* ExxonMobil Pipeline Co. v. U.S. Dep’t of Transp., 867 F.3d 564, 571 (5th Cir. 2017).

18. 49 C.F.R. § 195.452(b)(6).

19. 49 U.S.C. § 60101 *et. seq.*

20. 49 C.F.R. § 195.452(e)(1); *see ExxonMobil*, 867 F.3d at 572.

termed “high consequence areas.”²¹ The regulations for pipeline segments in high consequence areas place an additional requirement on operators to assess certain types of pipe for susceptibility to longitudinal seam failure.²² The relevant segment of the Pegasus Pipeline in the noted case was constructed out of pre-1970 low-frequency electric resistance welded steel “LF-ERW,” which has a relatively high risk of longitudinal seam failure.²³ The regulations specify that if an LF-ERW segment is determined to be susceptible to longitudinal seam failure, the operator must use an integrity assessment method capable of “assessing seam integrity and of detecting corrosion and deformation anomalies.”²⁴ However, the regulations do not specify how operators must determine an LF-ERW segment’s susceptibility to seam failure.²⁵

To address the gap in instruction and improve pipeline safety regulation guidelines for operators and enforcement agencies, PHMSA commissioned and published a technical task order on pre-1970 LF-ERW longitudinal seam evaluation referred to as the “Baker Report.”²⁶ The report includes a decision tree that allows an operator, “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.”²⁷

Ultimately, a sufficient IMP for a pre-1970 LF-ERW pipeline segment in a high consequence area should include an integrity assessment schedule and a process of continual evaluation that considers “all risk factors that reflect the risk conditions on a pipeline segment,”²⁸ and applies an assessment method capable of “assessing seam integrity and of detecting corrosion and deformation.”²⁹ The IMP must be implemented and followed by an operator in a way that promptly “addresses all anomalous conditions the operator discovers through the integrity assessment” and notifies PHMSA if the assessment schedule

21. 49 C.F.R. §§ 195.450, 195.452.

22. *Id.* § 195.452(c)(1)(i).

23. *ExxonMobil*, 867 F.3d at 568-69.

24. *Id.* at 569; 49 C.F.R. § 195.452(j)(5).

25. *ExxonMobil*, 867 F.3d at 569; *see* 49 C.F.R. § 195.452.

26. *ExxonMobil*, 867 F.3d at 569; MICHAEL BAKER JR., OFFICE OF PIPELINE SAFETY, LOW FREQUENCY ERW AND LAP WELDED LONGITUDINAL SEAM EVALUATION 2, 10 (Apr. 2004), https://primis.phmsa.dot.gov/iim/docstr/TTO5_LowFrequencyERW_FinalReport_Rev3_April2004.pdf (hereinafter BAKER REPORT).

27. BAKER REPORT, *supra* note 26, at 16.

28. 49 C.F.R. § 195.452(e)(1).

29. *Id.* § 195.452(j)(5).

cannot be kept or if remediation of an anomalous condition cannot be fulfilled.³⁰

C. PHMSA's Interpretation

As a result of PHMSA's investigation into the Mayflower spill, PHMSA issued Exxon a final order citing nine total violations of the Pipeline Safety Regulations.³¹ PHMSA found that Exxon violated § 195.452(e)1 "by failing to properly consider the susceptibility of its ERW pipe to seam failure when establishing its continual integrity assessment schedule based on all the risk factors on the Pegasus Pipeline."³² Violations 1 and 4 were based directly on the agency's finding that Exxon failed to "consider" all the risk factors under § 195.452(e)(1). Violations 2, 3, and 7 were based on deficiencies in Exxon's IMP design.³³ PHMSA found that Exxon failed to consider the appropriate risk factors established under § 195.452(e)(1) and thus failed to correctly determine the pipeline's susceptibility to seam failure. Accordingly, PHMSA concluded that the IMP for the Pegasus Pipeline was deficient because it relied on Exxon's determination that the Pegasus Pipeline was unsusceptible to seam failures.³⁴ PHMSA reasoned that Exxon's reliance on the Baker Report decision tree was insufficient "consideration" under the regulatory requirement of § 195.452(e)(1).³⁵ In light of the history of seam-related failures in the relevant pipeline section and the lack of consideration for "toughness" in the Baker Report's decision tree, PHMSA found that Exxon's methodology for creating a continual assessment program compliant with PHMSA regulations violated the Pipeline Safety Regulations.³⁶

PHMSA concluded that under its interpretation of § 195.452(e)(1), proper "consideration" of all the relevant risk factors for the Pegasus Pipeline compelled Exxon to reach a certain outcome.³⁷ Under PHMSA's interpretation, Exxon was required to determine that the relevant section of the pipeline was susceptible to seam failure to comply with the consideration element in § 195.452(e)(1).³⁸

30. *Id.* § 195.452(b)(5), (h).

31. *ExxonMobil*, 867 F.3d at 571.

32. *Id.* at 570.

33. *Id.*

34. *Id.*

35. *Id.* at 570-71.

36. *Id.*

37. *Id.* at 572-73.

38. *See id.*

Item 8 was based on § 195.452(b)(5), which requires operators to implement the written IMP.³⁹ Under the IMP, Exxon was required to report its use of a Threat Identification Risk Assessment program to PHMSA.⁴⁰ While Exxon reported it had used the appropriate tool to determine if repairs were necessary, they did not actually “run the appropriate tool” until two years later.⁴¹ PHMSA levied a \$783,300 fine against Exxon because it determined the violation had “the highest level of gravity because the violation was a causal factor in the Mayflower Accident . . . [Exxonmobil] had an elevated degree of culpability and . . . no good faith credit was warranted.”⁴²

D. Standard of Review for Agency Action

When an agency’s action is under judicial review, a court will apply the standard of review prescribed by the Administrative Procedure Act (APA), unless an applicable statute imposes a different standard.⁴³ “The reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.”⁴⁴ If necessary, a court may set aside agency findings and actions that are arbitrary and capricious, in excess of statutory authority, unsupported, unwarranted by the facts of the case, or not in accordance with the law.⁴⁵

The plaintiff bears the burden of overcoming the presumption of validity of the agency action to prove it was arbitrary and capricious.⁴⁶ Under the highly deferential arbitrary and capricious standard, a court “focuses on whether an agency articulated a rational connection between the facts found and the decision made.”⁴⁷ A court will disregard “*post-hoc*” rationalizations and evaluate the action based on the agency’s stated reasoning at the time of the decision.⁴⁸ Put another way, a court will be highly deferential to the agency’s determinative rationale at the time of

39. *Id.* at 571.

40. *Id.* at 581.

41. *Id.*

42. *Id.* at 582-83 (quoting PHMSA’s final order) (citation omitted).

43. 5 U.S.C. § 706 (2012); *see* 49 U.S.C. § 60119(a)(3) (2012).

44. 5 U.S.C. § 706.

45. *Id.* § 706.

46. *ExxonMobil*, 867 F.3d at 571 (citing *La. Pub. Serv. Comm’n v. FERC*, 761 F.3d 540, 558 (5th Cir. 2014)).

47. *Id.* (citing *Pension Benefit Guar. Corp. v. Wilson N. Jones Mem’l Hosp.*, 374 F.3d 362, 366 (5th Cir. 2004)).

48. *Id.* (quoting *Luminant Generation Co. v. E.P.A.*, 675 F.3d 917, 925 (5th Cir. 2012)).

the action as long as the decision is in accordance with the law and can be reasonably discerned from the facts.⁴⁹

E. Limitations on Agency Deference

While generally awarding deference during the review of agency actions, a court will look at the specific type of action to determine if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.”⁵⁰ When an agency action involves an interpretation of the agency’s own regulation, the regulation must be ambiguous and the interpretation must be in line with the purpose of regulation for a court to defer to an agency’s interpretation.⁵¹

In *Auer v. Robbins*, the Supreme Court of the United States applied highly deferential review of an agency interpretation of a regulation.⁵² In that case, petitioners sought judicial review of the Secretary of Labor’s enforcement of disciplinary pay reduction under the Department of Labor’s own regulation.⁵³ The regulation stated that disciplinary pay reduction was “subject to” certain factors, and the Court held that this phrase “bears the meaning the Secretary assigns.”⁵⁴ Further, the Court’s reading of the regulation allowed for several reasonable interpretations, none of which precluded the Secretary’s interpretation.⁵⁵ The Supreme Court held that deference should be awarded to the Secretary of Labor’s interpretation of the ambiguous regulation because it was not clearly erroneous or inconsistent with the regulation and the interpretation reflected fair and considered judgment.⁵⁶

In *Anthony v. United States*, the petitioner sought to overturn an Internal Revenue Service (IRS) interpretation of an estate tax regulation that led to a higher valuation of the petitioner’s estate.⁵⁷ The court began its review by determining whether the regulation’s plain language was ambiguous.⁵⁸ The court found that the regulation’s language was broad and required a determination subject to factors such as “contingency,

49. *Id.* (citing *Pension Benefit Guar. Corp.*, 374 F.3d at 366).

50. 5 U.S.C. § 706(2)(a).

51. *ExxonMobil*, 867 F.3d at 573 (quoting *Delek Ref., Ltd. v. OSHRC*, 845 F.3d 170, 175 (5th Cir. 2016)); *see also Auer v. Robbins*, 519 U.S. 452, 461 (1997); *Martin v. OSHRC*, 499 U.S. 144, 150-51 (1991).

52. *Auer*, 519 U.S. at 461 (citing *Bowels v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)).

53. *Id.* at 456 (citing 29 C.F.R. § 541.118(a) (2017)).

54. *Id.* at 461.

55. *See id.* at 461-62.

56. *Id.* at 461.

57. *Anthony v. United States*, 520 F.3d 374, 380 (5th Cir. 2008).

58. *Id.*

power, or other restriction[s].”⁵⁹ The court found that the required determination was sufficiently ambiguous to allow more than one reasonable interpretation.⁶⁰ The court then reviewed the agency’s interpretation to ensure the interpretation effectuated the regulation’s purpose.⁶¹ The court found that, although the agency’s interpretation lacked certain accuracy, the interpretation upheld Congress’ stated “preference for convenience and certainty over accuracy in the individual case.”⁶² Thus, the court held that the IRS should be awarded deference to its interpretation of its own ambiguous regulation.⁶³

One further requirement for granting *Auer* deference in enforcement actions is fair notice of the agency’s interpretation of the regulation.⁶⁴ In *Employer Solutions Staffing Group II, L.L.C. v. Office of the Chief Administrative Hearing Officer*, the court analyzed whether the petitioner was given fair notice of an agency’s interpretation of its own regulation.⁶⁵ The court reasoned that because the agency was seeking to enforce a financial penalty, *inter alia*, the regulated party must have fair notice.⁶⁶ The court found that for the agency’s interpretation of the regulation to be enforceable, it must be ascertainable from the words of the regulation itself or through overt and sufficient promulgation of the interpretation.⁶⁷ The court held that because the agency’s interpretation of the regulation imposed obligations on the regulated party that were not reasonably ascertainable, the interpretation could not be granted *Auer* deference.⁶⁸

III. THE COURT’S DECISION

In the noted case, the Fifth Circuit followed the *Auer* methodology to determine if PHMSA’s final order regarding the Mayflower spill should be afforded deference. Pursuant to that framework, the court

59. *Id.* (quoting 26 C.F.R § 20.7520-3(b)(1)(ii) (2017)).

60. *See id.* at 380-81.

61. *Id.* at 380 (quoting *Jochum v. Pico Credit Corp.*, 730 F.2d 1041, 1047 (5th Cir. 1984)).

62. *Id.* at 382 (quoting *Cook v. Comm’r of the I.R.S.*, 349 F.3d 850, 854-55 (5th Cir. 2003)).

63. *See id.* at 384.

64. *ExxonMobil Pipeline Co. v. U.S Dep’t of Transp.*, 867 F.3d 564, 572 (5th Cir. 2017).

65. *Emp’r Sols. Staffing Grp. II, L.L.C. v. Office of the Chief Admin. Hearing Officer*, 833 F.3d 480, 487-89 (5th Cir. 2016).

66. *Id.* at 487 (quoting *Diamond Roofing Co. v. Occupational Safety & Health Rev. Comm’n*, 528 F.2d 645, 649 (5th Cir. 1976)).

67. *Id.* (citing *Diamond Roofing*, 528 F.2d at 649).

68. *Id.* at 487-89; *see also Diamond Roofing*, 528 F.2d at 649; *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012).

determined that (1) § 195.452(e)(1) is unambiguous, (2) PHMSA is not awarded deference to its interpretation of § 195.452(e)(1), (3) the finding of items 1 through 4 and 7 in the final order were based on an arbitrary and capricious interpretation of § 195.452(e)(1), (4) items 1 through 4 and 7 of the final order and their corresponding civil penalties and compliance orders must be vacated, and (5) the final order must be remanded to PHMSA for reevaluation of the civil penalties for item 8 in light of the court's decision.⁶⁹

A. *Deference to Interpretation*

When reviewing the final order under the APA's arbitrary and capricious standard, the court looked to the determinative reasoning stated by the agency in the enforcement action. The court reviewed items 1 through 4 and 7, which were based on PHMSA's finding that Exxon violated § 195.452(e)1, "by failing to properly consider the susceptibility of its ERW pipe to seam failure when establishing a continual integrity assessment schedule based on all the risk factors on the Pegasus Pipeline."⁷⁰ The court reviewed the finding of item 8, which was based on PHMSA's determination that Exxon misrepresented its compliance with the IMP and that the misrepresentation was of the highest gravity in contributing to the spill.⁷¹

B. *Ambiguity*

The court applied the reasoning from *Anthony* to determine if the regulation was ambiguous. By the plain language of the regulation, the court determined that "consider" in the context of § 195.452(e)(1) was unambiguous in requiring Exxon to "carefully undergo an informed decision-making process in good faith, reasonably taking into account all relevant risk factors in reaching a decision."⁷² Finding the regulation unambiguous, the court held that the *Auer* deference was inapplicable.⁷³

C. *The Court's Interpretation*

Next, the court reviewed the record to determine if Exxon's consideration process was sufficient in light of the plain language

69. *ExxonMobil*, 867 F.3d at 584.

70. *Id.* at 570 (quoting PHMSA's final order) (citations omitted).

71. *Id.* at 582.

72. *Id.* at 573.

73. *Id.* at 571.

meaning of § 195.425(e)(1).⁷⁴ The pipeline regulations require the operator to determine the susceptibility of pre-1970 LF-ERW segments in creating its continual assessment schedule.⁷⁵ Using the Baker Report decision tree, Exxon determined the relevant pipeline section was not susceptible to seam failure.⁷⁶ Exxon hired John F. Kiefner, Ph.D., the coauthor of the Baker Report, to ensure it had correctly applied the decision tree in its determination of insusceptibility for the relevant pipe segments.⁷⁷ Based on Exxon and Dr. Kiefner's determination, Exxon developed its IMP in accordance with the regulatory requirements for an LF-ERW segment that was not susceptible to seam failure.⁷⁸

Under PHMSA's interpretation of the regulation, Exxon's reliance on the Baker Report decision tree to determine the pipeline segment's susceptibility was insufficient because its reliance allowed Exxon to improperly consider the history of seam failure and the decision tree did not address pipe "toughness."⁷⁹ Because PHMSA found that § 195.452(e)(1) compelled Exxon to find the relevant pipeline segment susceptible to seam failure, PHMSA concluded that Exxon had failed to consider all the relevant risk factors.⁸⁰ While the Baker Report addressed toughness and other factors differently throughout the report than it did in the decision tree, the court found the report made a "clear pronouncement that the decision tree is *the means* of determining susceptibility."⁸¹ The court also found that the Baker Report reflected industry practices and was provided as a guide for making the relevant determination under § 195.452(e)(1). Ultimately, the court found that Exxon successfully adhered to the consideration process mandated by § 195.452(e)(1) by relying on the Baker Report decision tree.⁸²

After concluding that Exxon complied with the regulatory requirements of § 195.425(e)(1), the court addressed the validity of PHMSA's interpretation of § 195.452(e)(1) in its action against Exxon.⁸³ The court found that PHMSA's final order, which critiqued Exxon's reliance on the decision tree, was paradoxical because the agency itself commissioned the report, published and recommended the report on its

74. *Id.* at 570-73.

75. 49 C.F.R. § 195.452(e)(1)(i), (j)(5) (2017).

76. *ExxonMobil*, 867 F.3d at 575-77.

77. *Id.* at 576.

78. *Id.* at 576-77.

79. *Id.* at 572, 576.

80. *Id.*

81. *Id.* at 577 (quoting BAKER REPORT, *supra* note 26, at 25).

82. *Id.* at 577; *see also* 49 C.F.R. § 195.452(b)(6) (2017).

83. *ExxonMobil*, 867 F.3d at 574-78.

website, incorporated the report into its enforcement manual, and relied on it for prior enforcement decisions.⁸⁴ Further, the court found that § 195.452(e)(1) placed a process-based decision requirement on the pipeline operator, which, contrary to PHMSA's argument, does not compel a certain outcome.⁸⁵ The court concluded that PHMSA's interpretation of the regulation was contradicted by the record.⁸⁶ Therefore, the court held that PHMSA's interpretation was arbitrary and capricious.⁸⁷

Assuming *arguendo* that PHMSA should be awarded *Auer* deference, the court found that the enforcement of the regulation under PHMSA's interpretation would still fail the fair notice standard set forth in *Employers*. Since PHMSA's final order placed monetary penalties on Exxon, Exxon needed fair notice of the agency's interpretation of § 195.452(e)(1).⁸⁸ The court found that the rule relied on by PHMSA required Exxon to find the relevant pipeline section susceptible to seam failure and discounted Exxon's findings under the Baker Report. The court reasoned that Exxon could not have reasonably ascertained PHMSA's interpretation of the regulation at the time Exxon developed their continual assessment program because they did not have fair notice.⁸⁹ Further, the court held that PHMSA never notified Exxon that it would fault Exxon for reliance on the Baker Report decision tree.⁹⁰ Accordingly, the court found that PHMSA's interpretation constituted a "*post-hoc*" rationalization that deprived Exxon of fair notice.⁹¹ Therefore, the court held that PHMSA was barred from applying its interpretation to exclude Baker Report findings even if the regulation was ambiguous.⁹²

The court affirmed the PHMSA finding of item 8 because Exxon had in fact misrepresented its compliance with the IMP.⁹³ The agency ran the IMP-required test on the pipeline shortly before the spill and failed to identify any defect.⁹⁴ However, the court reasoned that even if Exxon had complied, they too would have failed to identify any defect in the

84. *Id.* at 576-77.

85. *Id.*

86. *Id.* at 577; *see* 5 U.S.C. § 706(2)(a), (e) (2012).

87. *ExxonMobil*, 867 F.3d at 577; 5 U.S.C. § 706(2)(a), (e).

88. *ExxonMobil*, 867 F.3d at 578; *e.g.*, *Emp'r Sols. Staffing Grp. II, L.L.C. v. Office of the Chief Admin. Hearing Officer*, 833 F.3d 480, 487-89 (5th Cir. 2016).

89. *ExxonMobil*, 867 F.3d at 579.

90. *Id.* at 580.

91. *Id.* at 579.

92. *Id.* at 580.

93. *Id.* at 583.

94. *Id.*

pipeline; thus, the violation was not a causal factor in the spill.⁹⁵ PHMSA further contended the IMP specified the wrong tool for the assessment because it was chosen based on Exxon's reliance on the Baker Report decision tree.⁹⁶ As the court already determined PHMSA's findings were arbitrary and capricious insofar as they were contrary to Exxon's reliance on the Baker Report, the court remanded the \$783,300 civil penalty to be reassessed in light of its decision.⁹⁷

D. *The Court's Conclusion*

Because the court concluded § 195.452(e)(1) was unambiguous, the court found that PHMSA's interpretation did not warrant *Auer* deference and was arbitrary and capricious.⁹⁸ Further, the court held that PHMSA's enforcement of the interpretation deprived Exxon of fair notice.⁹⁹ Accordingly, the court vacated items 1 through 4 and 7 of the final order and their corresponding civil penalties and compliance orders because they were based on PHMSA's inapplicable interpretation.¹⁰⁰ Item 8 was remanded to the agency for reassessment of the civil penalty, as it was calculated under PHMSA's improper interpretation.¹⁰¹

E. *Concurrence*

The concurrence agreed with the majority's finding that Exxon lacked fair notice of PHMSA's interpretation, thus proscribing the application of *Auer* deference.¹⁰² However, the concurrence disputed the majority's determination that § 195.425(e)(1) is unambiguous.¹⁰³ The concurrence noted that *Auer* deference is especially appropriate when an agency is interpreting its own highly technical regulation.¹⁰⁴ Section 195.452(e)(1) compels the operator to undergo a complicated and multifaceted analysis of the risk factors for pipeline failure. Because the regulation requires identification and classification of relevant criteria for "consideration," the concurrence found that the agency's application of the regulation was not "plainly erroneous" and reflected the agency's

95. *Id.*

96. *Id.*

97. *Id.* at 583-84.

98. *Id.* at 583.

99. *Id.*

100. *Id.* at 583-84.

101. *Id.*

102. *Id.* at 585.

103. *Id.* at 584-85.

104. *Id.* at 585 (citing *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994)).

considered judgment.¹⁰⁵ The concurrence found conflicting guidance in the Baker Report as further evidence of ambiguity.¹⁰⁶ Accordingly, the concurrence disagreed with the majority's decision to supplant its own interpretation of § 195.452(e)(1) in place of PHMSA's interpretation.¹⁰⁷

IV. ANALYSIS

The noted case provides a straightforward example of the fair notice standard for granting *Auer* deference in enforcement actions. The court was swayed by Exxon's contention that the regulation's language itself did not notify Exxon how PHMSA would attempt to enforce the regulation.¹⁰⁸ The court further found that PHMSA's interpretation that faulted Exxon for relying on the Baker Report, despite its own promulgation of the Baker Report, was arbitrary and capricious.¹⁰⁹ Accordingly, when reviewing PHMSA's finding that Exxon violated § 195.452(e)(1), the court correctly found PHMSA denied Exxon fair notice by enforcing an interpretation that was contrary to the agency's previous interpretations and reliance on the Baker Report.¹¹⁰ There is no dispute that § 195.452(e)(1) unambiguously places a process-based requirement on pipeline operators to "consider" all the relevant risk factors. However, there is ambiguity with regard to what is required for a sufficient consideration process.

Under the *Anthony* standard, a court determines if a statute is ambiguous by looking to the regulation's plain language.¹¹¹ The court reasoned that while the language, structure, and purpose of the regulation were not so broad as to require the petitioner's interpretation of the regulation, the considered elements preclude the agency's interpretation in the enforcement action.¹¹² The court further supported its reasoning by applying authorities that require consideration of the regulation as a whole and contextual interpretation.¹¹³ In *Auer*, the Court noted broad language in the relevant regulation with regard to the Secretary's authority to weigh "reductions in pay" based on "variations in the quality

105. *See id.* at 584-85 (citing *Bowels v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)).

106. *Id.* at 585.

107. *Id.*

108. *Id.* at 580.

109. *Id.* at 576-77.

110. *See id.* at 578-80.

111. *Anthony v. United States*, 520 F.3d 374, 380 (5th Cir. 2008).

112. *Id.*

113. *Id.*

or quantity of the work performed.”¹¹⁴ In *Auer* and *Anthony*, the Supreme Court and the Fifth Circuit stressed that in reviewing an agency’s interpretation, a rule that forces the agency to narrowly construe its own regulation makes little sense, as the agency itself created the broadly defined regulation.¹¹⁵ These authorities afforded deference to the agency where the broadly worded regulations required determinations based on several factors, which could be reasonably construed multiple ways that effectuate the purpose of the regulation.¹¹⁶

The relevant statute in the noted case states, “[a]n operator must base the assessment schedule on all risk factors that reflect the risk conditions on the pipeline segment. The factors an operator must consider include, but are not limited to”¹¹⁷ Applying the reasoning from *Anthony* and *Auer*, the plain meaning of the regulation requires the operator to create an assessment schedule “subject to” or “in consideration of” all risk factors in a way consistent with the regulatory framework. Like the regulations at issue in *Anthony* and *Auer*, the regulation in the noted case presents broad language in a structure that requires discretionary determinations by the agency.¹¹⁸ Where the “risks” to “consider” include multiple highly technical factors, it would seem that regulation could be construed in more than one way that effectuates its purpose.

The court provided its own definition for the meaning of “consideration” within the regulation: “[to] carefully undergo an informed decision-making process in good faith, reasonably taking into account all relevant risk factors in reaching a decision.”¹¹⁹ By providing its own standard for consideration, the court proscribed PHMSA’s interpretation, which held Exxon to different higher standard given the particular risk factors for the Pegasus Pipeline. The court’s interpretive exercise shows that within the process-based requirement of the regulation, there is room for interpretation of what is required of pipeline operators and the agency. The court’s methodology can be understood as an inquiry into the reasonableness of the different interpretations provided by Exxon and PHMSA. *Auer* holds that an agency’s interpretation of its own ambiguous regulation is controlling unless clearly erroneous or inconsistent with the regulation.¹²⁰ As the court in

114. *Auer v. Robbins*, 519 U.S. 452, 456 (1997) (citing 29 C.F.R. § 541.118(a) (2017)).

115. *Anthony*, 520 F.3d at 380.

116. *Id.*; see also 29 C.F.R. § 541.118(a); 26 C.F.R. § 20.7520-3(b)(1)(ii) (2017).

117. 49 C.F.R. § 195.452(e)(1) (2017).

118. See *id.*; 29 C.F.R. § 541.118(a); 26 C.F.R. § 20.7520-3(b)(1)(ii).

119. *ExxonMobil Pipeline Co. v. U.S. Dep’t of Transp.*, 867 F.3d 564, 573 (5th Cir. 2017).

120. *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

the noted case seems to consider whether PHMSA's interpretation is consistent with meaning of the regulation, under *Auer* that inquiry necessarily arises only once the regulation is deemed ambiguous. Thus, the court tacitly acknowledges the ambiguity of the regulation through its analysis of PHMSA's interpretation and creation of its own definition of "consider."

PHMSA's interpretation would certainly seem to be a "*post hoc*" rationalization under the court's interpretation of the consideration standard in the regulation. This reasoning casts PHMSA's interpretation as a last-ditch effort to punish Exxon for the Mayflower spill. However, PHMSA's interpretation reflects the fair and considered judgment of the agency if PHMSA is not precluded from compelling certain outcomes upon consideration of certain risk factors. The agency promulgated § 195.452(e)(1) and under tremendously narrow circumstances found that sufficient consideration compelled a specific determination. If the goal of the regulation is to create effective IMPs, it would seem that PHMSA's interpretation is a meaningful way to effectuate that purpose.

The holding in the noted case unequivocally affirms the significance and strength of the fair notice standard. However, the court's decision reflects an assumption that PHMSA was trying to abuse *Auer* deference by "promulgat[ing] vague and open-ended regulations that they can later interpret as they see fit, thereby 'frustrat[ing] the notice and predictability purposes of rulemaking.'"¹²¹ While this concern is entirely appropriate, not all broadly worded regulations are created to grant arbitrary and potentially abusive power to the agencies that create them. The court in the noted case could have relieved Exxon of arbitrary and capricious enforcement by looking only to the fair notice requirement. By finding § 195.425(e)(1) unambiguous, the court altered PHMSA's ability to enforce the Pipeline Safety Regulations in their current form, regardless of fair notice. While courts should seek to prevent the abuse of *Auer* deference, they should do so in a way that respects the necessity of agency expertise in interpreting regulations for highly complex subject matter.

V. CONCLUSION

Given the extraordinary and diverse risks associated with the transportation of hazardous materials through high consequence areas, it is logical for PHMSA and pipeline operators to be able to interpret the

121. *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 158 (2012) (quoting *Talk America, Inc. v. Michigan Bell Tel. Co.*, 564 U.S. 50, 69 (2011) (Scalia, J., concurring)).

regulations in a way that effectively accommodates the host of specific safety issues that a particular pipeline presents. The ambiguous nature of § 195.425(e)(1) allows pipeline operators to create appropriate IMPs that are neither unnecessarily broad nor inappropriately limited based on the relevant safety factors. The court's decision could cause PHMSA and other agencies to create overly burdensome regulatory schemes to foreclose the possibility of judicial intervention in future enforcement actions. While the court's holding in the noted case is appropriate in light of the fair notice requirement, the method the court used to invalidate PHMSA's interpretation could unnecessarily diminish the effective enforcement of the Pipeline Safety Regulations.

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