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BEFORE THE

INDEPENDENT REGULATORY REVIEW COMMISSION

Pennsylvania Public Utility Commission Regulation #3330 - Final Regulation Implementing Hazardous Liquid Public Utility Safety Standards at 52 Pa. Code Chapter 59	IRRC No. 3330

COMMENTS OF SUNOCO PIPELINE L.P. IN OPPOSITION TO PORTIONS OF THE PENNSYLVANIA PUBLIC UTILITY COMMISSION'S FINAL FORM RULEMAKING REGARDING HAZARDOUS LIQUID PUBLIC UTIITY SAFETY STANDARDS

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I. Introduction

Sunoco Pipeline L.P. ("SPLP") submits these comments opposing specific portions of the Pennsylvania Public Utility Commission's ("PUC" or "Commission") final form regulations regarding Hazardous Liquid Public Utility Pipeline Safety. SPLP appreciates that the PUC's Final Form Rulemaking Order ("Order"), in some instances, considered comments and reply comments on its Notice of Proposed Rulemaking ("NOPR"), including technical and engineering information, actions of the Pipeline and Hazardous Materials Safety Administration ("PHMSA"), and legal issues such as the PUC's own jurisdiction.

While the PUC largely resolved SPLP concerns with the regulations as proposed in the NOPR, in other instances, the PUC's Order failed to carefully consider or consider at all some sections of regulations that it seeks to promulgate, including:

- Land Agents. 52 Pa. Code § 59.142. Requiring pipeline land agents to hold professional licenses unnecessary to their employment, which will likely result in loss of employment for Commonwealth citizens for reasons bearing no relationship to pipeline safety over which the PUC has jurisdiction.
- 10-day Notice Requirements with No Exception. 52 Pa. Code § 59.135. Requiring 10-days prior notice for a pipeline operator to take certain actions, including unearthing and repairing a suspected leak, with no exceptions. This requirement results in less safety than the status quo because pipeline operators should unearth and repair suspected leaks immediately, which PHMSA regulations require. This notice provision thus directly contradicts PHMSA regulations because: it is not more stringent as to safety; and compliance with the PUC's regulation to wait 10 days prior to unearthing and repairing a suspected leak would violate PHMSA regulations to address the situation immediately. The PUC's Order provides no clarity on why the PUC did not

provide an exception to the notice rule. At one point the PUC acknowledges the need for an exception and says the regulations will be modified to make such exception, but the regulations do not contain such an exception. Only two pages later in its Order and contrary to the PUC's statement that there should be an exception, the PUC states there should not be an exception to notification.

- Emergency Flow Restricting Devices/Valve Placement. 52 Pa. Code § 59.140(h). Requiring additional valves on existing pipelines based on the opinions of local officials and an arbitrary and impossible standard of decreasing the lower flammability limit ("LFL") to 660 feet. The PUC provides no logical reasoning for ignoring the extensive comments on this issue. Moreover, the PUC's promulgation of this regulation makes no sense in the context of the PUC's decision not to impose regulations with design requirement for valves for newly constructed pipelines and the PUC's lengthy explanation of why it cannot impose retroactive design or construction requirements on an existing pipeline. This regulation creates additional legal and technical issues discussed at length below.

These three examples are of serious concern because these regulations will result in less safety, create inconsistency with PHMSA regulations, create immediate employment issues for pipeline land agents, are illogical and have serious legal defects, or are arbitrary or unrelated to pipeline safety and thus impose wholly unnecessary costs. SPLP has identified four additional portions of the regulations that are similarly flawed and has described these issues and proposed solutions herein.

Some of the remaining issues with the regulations are of such impact that SPLP continues to oppose the regulations. If the regulations are promulgated in final form as currently written,

SPLP will be seeking injunctive relief before the Commonwealth Court based on some of the issues described herein.

For these reasons and those stated below, SPLP respectfully requests the Independent Regulatory Review Commission ("IRRC") reject these regulations and upon rejection, the PUC resolve the issues SPLP has discussed herein.

II. Land Agents. 52 Pa. Code § 59.141.

A. Regulation Relevant Text:

52 Pa. Code § 132. Definitions.

> *Land agent*—A person who negotiates easements on behalf of a hazardous liquid public utility for use in connection with a pipeline.

§ 59.142. Land agents.

> **(a)** A land agent employed or contracted by a hazardous liquid public utility must hold a valid Pennsylvania professional license in one of the following fields: attorney, real estate salesperson, real estate broker, professional engineer, professional land surveyor or professional geologist.

B. Opposition to Land Agent Regulation

SPLP continues to oppose the PUC's requirement regarding land agents because it will have an immediate and negative impact on Commonwealth citizens employed by pipeline operators, it is outside the PUC's jurisdiction and unrelated to pipeline safety, and the regulation is arbitrary and not rationally related to achieving the PUC's alleged goals.

1. Detriment to Employment.

The PUC's proposed regulation of land agents will have negative impacts on employment. The PUC neither asked for nor considered information regarding impacts on employment that requiring land agents to hold professional degrees unnecessary to performance of their jobs will have.

None of SPLP's land agent employees hold the licenses this regulation requires. Thus, the regulation will impact 7 full time SPLP employees in Pennsylvania who will be disqualified for their jobs due to the PUC's arbitrary regulation of land agents. In addition to the 7 full-time employees, SPLP also contracts with firms providing an additional 10-50 contract land agents as work load dictates.

SPLP's existing land agents are key employees. Land Agents are important on a regular basis for ongoing pipeline utility operations and maintenance, as well as new pipeline construction, the latter of which appears to be the PUC's primary concern. There are times a utility must quickly negotiate easements for access to its right-of-way to deal with sometimes urgent situations. Land Agents liaison with landowners in such instances to communicate and/or secure access and/or resolve concerns. It is thus imperative to have Land Agents that are familiar with and known to landowners to be communicators in these situations. Moreover, Land Agents functioning in this role free up the utility's other employees with first line responsibility for emergency response to address their main job responsibility.

This regulation will have negative impacts on employment in Pennsylvania. Performance of a land agent's job duties does not require (and in some instances is not at all related to) holding a professional license in any of the named fields. Thus, SPLP expects this regulation will negatively affect more land agents than SPLP employs, because to the best of its knowledge, none of its land agents currently hold the licenses the PUC seeks to require.

Agencies should not promulgate regulations impacting the jobs of real people without the clear statutory authority to do so and even then should only enact regulations tailored to achieve a legitimate goal of the agency – in this case, safety.

2. PUC Lacks Statutory Authority to Promulgate Regulation.

The PUC lacks statutory authority to regulate land agents. The PUC is attempting to regulate employment qualifications, but such regulation is in the purview of the General Assembly and specific agencies to which the General Assembly delegates this power. The PUC admits it lacks jurisdiction to regulate employment. The PUC's regulation has no relationship to pipeline safety. Instead, the PUC is attempting to regulate outcomes related to a land agent duties over which the PUC has no jurisdiction including easements and eminent domain.

a) No Relationship to Pipeline Safety.

The PUC's Order demonstrates that the proposed regulation has no relationship to pipeline safety. In its Order, the PUC's reasoning relies on various unsubstantiated allegations of 4 commentors[1] that land agents fraudulently acquired easements for new pipeline construction to conclude that the PUC needs to step in to make sure easements are negotiated in good faith and that third parties (landowners) are treated fairly. The PUC stated:

> [W]e have retained these licensure requirements to ensure that professionally licensed employees are negotiating agreements with landowners in good faith. By requiring land agents to be licensed professionals, they will be obligated under their respective licensing to be fair and equitable to both parties. To address IRRC's comment, by limiting the list to these enumerated licenses, we believe these professions are capable of performing the required duties of a land agent as they are held to a higher ethical standard within their respective professions. Licensing ensures land agents will be overseen by their respective licensing boards wherein complaints can be submitted and investigated.

Order at 258. The PUC relied heavily on the fact that a utility has the power of eminent domain as a reason for promulgating its regulation. Order at 252-53. None of these issues are related to

[1] SPLP has acquired hundreds of pipeline easements across the entire Commonwealth.

pipeline safety. The PUC's attempt to relate these issues to pipeline safety fails as a matter of common sense and logic:

> There is a need for these requirements as members of the public residing along the constructed pipelines of the Mariner East Project commented on these regulations. They wish to be protected against fraudulent acts of land agents who are attempting to secure rights-of-way for the hazardous liquid public utilities. Protection is a safety requirement.

Order at 259.

Section 59.142 is not a safety regulation; it is an attempt to regulate: a profession, the negotiation of easements and other land use contracts, and the use of eminent domain. The PUC lacks statutory authority to regulate any of these matters.

b) No Jurisdiction to Regulate Employment, Easements, or Eminent Domain.

Employment. The PUC has already admitted it lacks the statutory authority to regulate professions. The PUC expressly states: "*minimum standards for the professional qualifications and conduct of land agents*" is "*outside the scope of the PUC's statutory duties*." Order at 259 (emphasis added). But by requiring a land agent to hold one of the enumerated licenses, the PUC has used other licensing rules as a proxy thereby regulating the qualifications of land agents. The PUC admits it is attempting to regulate the conduct of land agents stating: "By requiring land agents to be licensed professionals, they will be obligated under their respective licensing ***to be fair and equitable to both parties***." Order at 258 (emphasis added). The PUC is clearly trying to regulate qualifications and conduct of land agents, even though the PUC has admitted it has no statutory authority to do so.

Easements. The PUC says these regulations are necessary because some commentors alleged "fraudulent acts of land agents who are attempting to secure rights-of-way." The PUC is

clearly trying regulate the course of negotiations for easements. But as the PUC itself has time and again held, the PUC has no jurisdiction over the negotiation, content, form, or terms of utility easements. *See Perrige v. Metropolitan Edison Co*., Docket No. C-00004110, 2003 WL 21916400, (Opinion and Order entered July 11, 2003) (concluding that the Commission had no jurisdiction to interpret the meaning of a written right-of-way agreement); *Lou Amati/Amati Serv. Station v. West Penn Power Co. & Bell-Atlantic.-Pennsylvania., Inc.*, Docket No. C-00945842 (Final Order entered October 25, 1995) (real property issues such as trespass and whether utility facilities are located pursuant to valid easements are within the exclusive jurisdiction of the Courts of Common Pleas).

Eminent Domain. The PUC has consistently held that it lacks jurisdiction over a utility's use of eminent domain:

> The Business Corporation Law of 1988 grants public utility corporations the power of eminent domain to condemn property, and provides that the power of the utility to condemn the property or the procedure followed by it shall not be an issue in the commission proceedings. 15 Pa. C.S. § 1511(c). ***Further the Commission has acknowledged that it has no jurisdiction over the exercise of eminent domain*** power by a natural gas utility. *Nelson v. Columbia Gas of PA, Inc.,* Docket No. C-20028763 (Order entered April 23, 2003).
>
> Section 1511(c) states that a public utility may begin the process of condemnation:
>
> > only after the Pennsylvania Public Utility Commission … has found and determined … that the service to be furnished by the corporation through the exercise of those powers is necessary or proper for the service, accommodation, convenience or safety of the public. The power of the public utility corporation to condemn the subject property or the procedure followed by it shall not be an issue in the commission proceedings held under this subsection.…
> >
> > 15 Pa. C.S. § 1511(c). Under this provision, the only role of the PUC is to consider if the project is necessary or proper for the benefit of the public, and it is expressly barred from considering the power of the utility to condemn. After the PUC authorizes a utility to exercise the power of eminent domain, a condemnation is far from final, as 15 Pa. C.S. § 1511(g) makes clear that before taking the land, the utility must prevail in a condemnation action at the Court

> of Common Pleas. As our Supreme Court held, in interpreting an earlier but substantially similar version of the statute: "Once there has been a determination by the PUC that the proposed service is necessary and proper, the issues of scope and validity and damages must be determined by a Court of Common Pleas exercising equity jurisdiction."
>
> *Fairview Water Co. v. Pa. Pub. Util. Comm'n.*, 509 Pa. 384, 393, 502 A.2d 162, 167 (1985).
>
> In other words, the Commission may not grant a certificate of public convenience but withhold the power of that utility to exercise eminent domain. **Once the Commission determines that the work performed is so vital that it achieves public utility status, the power of eminent domain attaches - under a statute that the Commission does not have the authority to interpret or limit.**

Application of Peregrine Keystone Gas Pipeline, LLC for Approval on A Non-Exclusive Basis to Begin to Offer, Render, Furnish, or Supply Nat. Gas Gathering, Compression, Dehydration, & Transportation or Conveying Serv. by Pipeline to the Pub. in All Municipalities Located in Greene & Fayette Ctys. & in E. Bethlehem Twp. in Washington Cnty., Pennsylvania, Docket No. A-2010-2200201, 2012 WL 1995812 (May 3, 2012) (emphasis added).

The PUC lacks statutory authority for the proposed regulation related to land agents. The General Assembly did not give the PUC the power to regulate professions divorced from any rational goal over which the agency does have jurisdiction. Moreover, the General Assembly certainly did not intend for the PUC to have authority to pass arbitrary regulations that negatively impact employment that are not tailored to achieving such goal.

3. Regulation is Arbitrary and Doesn't Support Alleged Purpose.

The PUC's means (requiring land agents to hold degrees unnecessary to their job duties) do not achieve its ends (requirements for fair treatment of third party land owners). Specifically, the PUC alleges that it is requiring land agents to be licensed professionals because a licensed professional "will be obligated under their respective licensing to be fair and equitable to both parties." Order at 258. The PUC also stated: "[t]o address IRRC's comment, by limiting the list

to these enumerated licenses, we believe these professions are capable of performing the required duties of a land agent as they are held to a higher ethical standard within their respective professions." Order at 258.

However, ethical codes for lawyers, engineers, geologists, and surveyors do not require or regulate from the lens of fair treatment of third parties. A professional's first duty under ethical codes for these licenses is to their client, not ensuring fair or equitable treatment of a third party. Engineers, geologists, and surveyors share the same code of ethics in Pennsylvania.[2] The first ethical obligation is to "act for his/her client or employer in professional matters as a faithful agent or trustee." The ethical code does not contain an obligation or standard to "be fair and equitable to both parties."

So too regarding lawyers. A lawyer's first duty is loyalty to their client. In fact, where the Pennsylvania Rules of Professional Conduct regulate the conduct of a lawyer with respect to a third party, there is no duty to treat third parties fairly or equitably. For example, Rule 3.4 Fairness to Opposing Party and Counsel has nothing to do with transactions, but instead prohibits a lawyer from obstructing access to evidence, falsifying evidence, asserting personal opinions on the justness of a cause before a tribunal, etc; Rule 4.3 Dealing with Unrepresented Person, expressly requires a lawyer not to state or imply that the lawyer is disinterested (e.g. the lawyer always must put her client's interests first). A requirement to treat a third party fairly or equitably can run afoul of a lawyer's duty to their client, where, as here, such concepts of fairness and equity are wholly undefined.

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[2] https://www.dos.pa.gov/ProfessionalLicensing/BoardsCommissions/EngineersLandSurveyorsandGeologists/Documents/Board%20Documents/Board%20Document%20-%20Law.pdf

4. Regulation violates principle of managerial discretion.

By placing arbitrary requirements on utility employees, the Commission is illegally impeding utility managerial discretion. As SPLP discussed at length throughout its comments to the PUC, black letter law establishes that the Commission is not a super board of directors and cannot interfere with the management of a utility. *See, e.g., Metropolitan Edison Co. v. Pa. Pub. Util. Comm'n*, 437 A.2d 76, 80 (Pa. Cmwlth. 1981) ("Recognizing the Commission's duty to the public and a utility's right of self-management, our courts adopted the further proposition that it is not within the province of the Commission to interfere with the management of a utility unless an abuse of discretion or arbitrary action by the utility has been shown."). In the Order when considering a different regulation, the PUC recognized that it should not interfere with a utility's managerial discretion through regulation. *See, e.g.*, Order at 220 ("We will not substitute our judgement for that of the operators' managerial discretion on how it wishes to comply with existing federal safety standards, which have been ideally thoroughly vetted with the industry.").

5. Regulation creates illegal irrebuttable presumption.

As SPLP discussed at length in its comments to the PUC, this regulation creates an illegal irrebuttable presumption. The regulation presumes enumerated professional licenses are necessary for a pipeline land agent to perform their job. It presumes land agents are otherwise ethically unfit. And the regulation provides no ability for a land agent to show they are otherwise qualified to be a pipeline land agent. The regulation is thus an illegal irrebuttable presumption. *E.g., Dep't of Transp. v. Clayton*, 684 A.2d 1060 (Pa. 1996) (holding irrebuttable presumptions violate due process).

C. Proposed Solution

There is a simple resolution that is at least rationally related to the PUC's stated goals and will not negatively impact employment in the Commonwealth. The International Right-of-Way Association ("IRWA") provides an ethics code for land agents and a forum for complaints of non-compliance. The PUC can require the utility to require its land agents to become IRWA members and adhere to the IRWA code of conduct. SPLP acknowledges that this resolution does not solve many of the legal issues SPLP has raised, but it will result in a regulation with which SPLP can comply without further legal challenge, will not negatively impact employment, and is tailored to the PUC's stated goals for the regulation.

The IRWA Code of Ethics is publicly available on IRWA's website[3] and is appended hereto as Attachment A.

The IRWA Code of Ethics contains a provision tailored to the PUC's alleged goals:

> ER 1.1. It is unethical for a Member:
>
> (a) To conduct themselves in a manner which will prejudice their professional status, the reputation of the Association, the right of way profession, or any other Member of the Association;
>
> (b) To act in a manner that is misleading or fraudulent; or
>
> (c) To use or permit the use of misleading information.

Rule 1.1. INTERNATIONAL RIGHT OF WAY ASSOCIATION CODE OF ETHICS: RULES OF PROFESSIONAL CONDUCT & STANDARDS OF PRACTICE FOR THE RIGHT OF WAY PROFESSIONAL.

[3] https://www.irwaonline.org/about-us/code-of-ethics/

IRWA provides specific disciplinary procedures and a forum for complaints regarding conduct in violation of the ethics code, including a complaint form.[4]

This requirement also has relatively de minimis costs of requiring land agents to join IRWA and follow a relevant code of ethics versus wholly disqualifying people from their jobs due to lack of irrelevant qualifications. SPLP thus proposes the regulations be rejected to allow the PUC to make the following modification to Section 59.142:

§ 59.142. Land agents.

(a) A land agent employed or contracted by a hazardous liquid public utility must ~~hold a valid Pennsylvania professional license in one of the following fields: attorney, real estate salesperson, real estate broker, professional engineer, professional land surveyor or professional geologist~~ **or become a member and maintain membership in the International Right of Way Association and follow the INTERNATIONAL RIGHT OF WAY ASSOCIATION CODE OF ETHICS: RULES OF PROFESSIONAL CONDUCT & STANDARDS OF PRACTICE FOR THE RIGHT OF WAY PROFESSIONAL**.

III. 10-day Notice Requirements with No Exception. 52 Pa. Code § 59.135

A. Relevant Regulation Text:

§ 59.135. Construction, operation and maintenance, and other reports to the Commission.

(a) *Scope.* This section establishes requirements for a hazardous liquid public utility reporting construction, **[operation and maintenance] O&M**, and other activities.

(b) *Timeframe for notice.* A hazardous liquid public utility shall notify the Pipeline Safety Section of the following:

…

(2) Maintenance, verification digs, and assessments involving an expenditure in excess of $50,000, and the unearthing of suspected leaks, dents, pipe ovality features, cracks, gouges or corrosion anomalies, or other suspected metal losses 10 days prior to commencement.

[4] https://www.irwaonline.org/about-us/ethics-and-rules-of-professional-conduct/

B. Opposition to 10-day Prior Notice Requirement.

The PUC seeks to require an operator to provide 10-days prior notice to the PUC before unearthing a suspected leak and various other potential anomalies. The PUC provided no exception to this requirement. As explained at length below, the PUC's regulation as drafted results in less safety than the status quo and is inconsistent with PHMSA regulations. Moreover, the PUC's statements regarding this rule and the need for an exception are internally inconsistent and inconsistent with the regulations contained in the PUC's Annex.

1. Regulation results in less safety than status quo.

Subsection (b)(2) of this regulation requires a pipeline operator to provide the PUC investigators with at least 10 days notice prior to: "the unearthing of suspected leaks, dents, pipe ovality features, cracks, gouges or corrosion anomalies, or other suspected metal losses." 52 Pa. Code § 59.135(b)(2). Thus, the PUC has prohibited a pipeline operator from unearthing a suspected leak until it has provided 10-days notice to the PUC. There is no exception contained in the regulation Annex.

Obviously, where an operator suspects a leak, it should (and will) investigate. unearth, and repair the leak as soon as possible to protect public safety. To follow the PUC's regulation would mean allowing potential leaks to go unchecked for 10 days just so the PUC can have prior notice. The PUC should not promulgate regulations in the name of safety that will result in less safety.

2. Inconsistent with PHMSA regulations.

The PUC's regulation is inconsistent with PHMSA regulations because the PUC prohibits a pipeline operator from addressing immediate repair situations on the timelines PHMSA prescribes. In this case, SPLP cannot comply with both PHMSA and PUC requirements. As the PUC explained, one way a regulation can be inconsistent is where a pipeline operator cannot

comply with both the federal regulation and state regulation. Order at 2 ("While the standards a State may adopt may be more stringent than the minimum Federal standards at 49 U.S.C. §§ 60101—60503 and the regulations at 49 CFR Parts 195 and 199, they must remain compatible with those standards in such a fashion that a hazardous liquid public utility can continue to comply with the Federal standards even as it complies with the new PUC standards.").

Immediately unearthing and repairing a suspected leak, certain kinds of dents, and certain types of metal loss is a PHMSA regulatory requirement, with no exception for waiting for a state regulatory notice timeframe to elapse:

> An operator must treat the following conditions as immediate repair conditions:
>
> (A) Metal loss greater than 80% of nominal wall regardless of dimensions.
>
> (B) A calculation of the remaining strength of the pipe shows a predicted burst pressure less than the established maximum operating pressure at the location of the anomaly. Suitable remaining strength calculation methods include, but are not limited to, ASME/ANSI B31G (incorporated by reference, see § 195.3) and PRCI PR–3–805 (R–STRENG) (incorporated by reference, see § 195.3).
>
> (C) ***A dent*** located on the top of the pipeline (above the 4 and 8 o'clock positions) that has any indication of metal loss, cracking or a stress riser.
>
> (D) ***A dent*** located on the top of the pipeline (above the 4 and 8 o'clock positions) with a depth greater than 6% of the nominal pipe diameter.
>
> ***(E) An anomaly that in the judgment of the person designated by the operator to evaluate the assessment results requires immediate action***.

49 CFR § 195.452(h)(2)(4)(i) (emphasis added).

An operator could not comply with both the PHMSA immediate repair regulation and the PUC 10-day notice regulation. The PUC's regulation is thus inconsistent with PHMSA regulation and cannot be promulgated as a matter of law.

3. Order and Annex regulations are so inconsistent it is impossible to tell what the PUC intended.

In the Order the PUC: (1) recognized a need for an exception to the 10-day prior notice provision, (2) failed to modify the Annex to provide for an exception, and (3) went on to make inconsistent remarks about allowing an exception. *Compare* Order at 126 (agreeing to include a provision allowing utility to provide notice after deadline where advance notice impracticable) *with* Order at 128 (stating no exception for notice to the Bureau of Investigation and Enforcement). Specifically, the PUC stated:

> We agree with the Associations to increase the monetary threshold and to include a provision allowing the hazardous liquid public utility to provide notice after the deadline if advance notice is impracticable.

Order at 126. Notwithstanding recognizing the need for an exception, the PUC in a turnabout fashion stated:

> The PUC agrees that some exceptions to the general reporting requirement may exist in cases where compliance is not practicable due to unforeseen circumstances, in emergency situations ***or where an immediate repair is required under PHMSA regulations***. In such cases, notice need not be given in the timeframe to the municipalities and local emergency responders, but it should still be given to Pipeline Safety Section of BI&E.

Order at 128 (emphasis added).

> Accordingly, we have revised section 59.135 in the final-form regulation as discussed above.

Order at 131; s*ee also* Annex, § 59.135 (containing no exception to 10-day prior notice rule).

C. Proposed Solution.

The PUC already recognized an exception is needed for this rule. SPLP proposes the following modifications to this section:

> (b) *Timeframe for notice.* A hazardous liquid public utility shall notify the Pipeline Safety Section of the following:

…

(2) Maintenance, verification digs, and assessments involving an expenditure in excess of $50,000, and the unearthing of suspected leaks, dents, pipe ovality features, cracks, gouges or corrosion anomalies, or other suspected metal losses 10 days prior to commencement**, except where the operator determines such activity must occur prior to 10-days from the date of discovery of the condition to be investigated or addressed, in which instance notification shall occur as soon as practicable**.

This modification will resolve the serious safety and legal flaws of the regulation as currently drafted.

IV. EFRD/Valve Placement. 52 Pa. Code § 59.140(h)

A. Relevant Regulation Text.

[EFRDs] EFRD—*Emergency flow restricting device*—The term as defined in 49 CFR 195.450 (relating to definitions).

Emergency flow restricting device or EFRD means a check valve or remote control valve as follows:

(1) Check valve means a valve that permits fluid to flow freely in one direction and contains a mechanism to automatically prevent flow in the other direction.

(2) Remote control valve or RCV means any valve that is operated from a location remote from where the valve is installed. The RCV is usually operated by the supervisory control and data acquisition (SCADA) system. The linkage between the pipeline control center and the RCV may be by fiber optics, microwave, telephone lines, or satellite.

49 CFR § 195.450.

§ 59.140. [Operation] Operations and maintenance.

(a) *Scope.* This section establishes requirements for a hazardous liquid public utility operating and maintaining a pipeline.

(h) [*EFRDs in HCAs*] *Emergency flow restricting devices in high consequence areas*. In addition to the requirements of 49 CFR 195.452 (relating to pipeline integrity management in high consequence areas), a hazardous liquid public utility shall determine the need for remote controlled EFRDs in consultation with public officials in all HCAs. The need for emergency flow restriction devices in HCAs must be based on limiting the LFL to 660 feet on either side of a pipeline.

B. Opposition to Operations and Maintenance regulation of valve placement.

SPLP continues to oppose this regulation because: it is an illegal retroactive rulemaking; it is wholly inconsistent with the PUC's decisions in this rulemaking regarding valve placement including failure to defer to PHMSA's new valve regulation in this instance; the PUC wholly failed to consider any comments on this issue and provided no reasoning for ignoring comments and promulgating the rule; the issues SPLP raised in comments to the PUC have not been resolved; the rule violates the anti-delegation doctrine; and the rule will result in a significant increase in the use of eminent domain on a larger scale than the usual pipeline easement.

1. Illegal Retroactive Rulemaking

This regulation seeks to retroactively require pipelines to place additional valves on existing pipelines in direct contradiction to Federal Pipeline Safety Law. This regulation requires the utility "to determine the need for remote controlled EFRDs in consultation with public officials in all HCAs. The need for emergency flow restriction devices in HCAs must be based on limiting the LFL to 660 feet on either side of a pipeline."

An EFRD is a valve. The PUC defined EFRD through reference to PHMSA regulations, which define an EFRD as:

> Emergency flow restricting device or EFRD means a check valve or remote control valve as follows:
>
> (1) Check valve means a valve that permits fluid to flow freely in one direction and contains a mechanism to automatically prevent flow in the other direction.
>
> (2) Remote control valve or RCV means any valve that is operated from a location remote from where the valve is installed. The RCV is usually operated by the supervisory control and data acquisition (SCADA) system. The linkage between the pipeline control center and the RCV may be by fiber optics, microwave, telephone lines, or satellite.

49 CFR § 195.450.

This portion of the regulation applies to existing pipelines; notably it is not in the construction section which is only applicable to new pipeline construction. Instead, this regulation is in the operations and maintenance section, which contains no limitations on application to existing pipelines. Requiring additional valves to be placed on an existing pipeline equates to major pipeline construction. Valves are above ground facilities, meaning pipelines that are sometimes hundreds of feet below the ground would potentially need to be reconstructed to reach the surface for a valves to be placed.

Requiring additional valves on existing pipelines is clearly retroactive rulemaking and therefore illegal. As the PUC explained elsewhere in the Order:

> Consistent with the Section 60104(c) of the FPSA[5] and PHMSA's interpretation, ***this rulemaking does not apply new regulations regarding the areas of design, installation, construction, initial inspecting, and initial testing to existing hazardous liquid pipelines in current use in the Commonwealth.*** 49 U.S.C. § 60104(c); PHMSA Interpretation Response #PI-81-012. ***Some of the proposed regulations have been eliminated as discussed below. The remaining regulations properly state that they apply to new pipelines, or pipelines for which the grandfathering clause has been nullified, by specifying that the regulations apply only if the pipeline has been "converted, relocated, or replaced."*** This approach is consistent with PHMSA's interpretation that the grandfathering clause is nullified when "some condition is changed on the pipeline." PHMSA Interpretation Response #PI-93-065. PHMSA provided "significant and considerable" changes as an example of the changes nullifying the grandfathering clause. The PUC has removed the phrase "otherwise changed" to clarify the meaning of the regulation.

Order at 47 (emphasis added). The PUC by its own Order (and Federal and State law) cannot require a pipeline operator to modify existing pipelines with major construction due to a new regulation not in existence when the pipeline was constructed.

[5] "A design, installation, construction, initial inspection, or initial testing standard does not apply to a pipeline facility existing when the standard is adopted." 42 U.S.C. § 60104(c).

2. PUC's Order is internally inconsistent and fails to consider this EFRD/valve regulation in context of PHMSA's recent valve rule.

The PUC decided elsewhere in the Order that it would not promulgate regulations related to design, installation, and construction of valves. As many commenters pointed out in response to the PUC's NOPR regarding new design regulations for valves, PHMSA was in the process of developing new design regulations for valves and the PUC should yield to PHMSA's rulemaking. The PUC did yield to PHMSA's rulemaking concerning PUC's previously proposed design regulations regarding valves by removing those proposed regulations. The PUC reviewed PHMSA's now promulgated regulations concerning valves and found that the PUC would not promulgate additional regulations concerning valves because PHMSA's regulations resolved the PUC's concerns. Thus, the PUC removed Section 59.137(g). The PUC stated:

> We agree with MSC and have also deleted the proposed § 59.137(g) addressing valves for pipelines transporting HVLs from the final-form regulation because PHMSA has promulgated its final rule at Pipeline Safety: Requirement of Valve Installation and Minimum Rupture Detection Standards, PHMSA-2013-0255; See Federal Register, Vol. 87, No. 68, published April 8, 2022, effective October 5, 2022. PHMSA now requires operators of these lines to install rupture-mitigation valves (i.e., remote-control or automatic shut-off valves) or alternative equivalent technologies and establishes minimum performance standards for those valves' operation to prevent or mitigate the public safety and environmental consequences of pipeline ruptures. The final rule establishes requirements for rupture-mitigation valve spacing, maintenance and inspection, and risk analysis. The final rule also requires operators of gas and hazardous liquid pipelines to contact 911 emergency call centers immediately upon notification of a potential rupture and conduct post-rupture investigations and reviews. Operators must also incorporate lessons learned from such investigations and reviews into operators' personnel training and qualifications programs, and in design, construction, testing, maintenance, operations, and emergency procedure manuals and specifications. Accordingly, as we adopt by reference these revised regulations at 49 CFR Part 195, the relief requested by Environmental Advocates and others supporting valve rules are already addressed in federal regulations. The elimination of proposed § 59.137(g) will eliminate incremental cost increases to Laurel and Sunoco as stated in their comments or responses to data requests. Additionally, the elimination of this subsection should address the comments by the industry, chambers of commerce

> and labor unions concerned about costs, interruption of service, lack of access, supply issues, and inflation.

Order at 174.

However, the PUC completely ignored the reasoning it used when choosing not to promulgate design rules for valves when it went on to consider and promulgate Section 59.140(h), which through Operations and Maintenance requirements imposes new valve design regulations. For the same reasons the PUC chose not to regulate the design and installation of valves on new pipelines, the PUC should not regulate the design and installation of valves on existing pipelines.

3. The PUC wholly failed to address or consider any comments or provide any legitimate reasoning for promulgating Section 59.140(h).

SPLP and others commented at length on the inappropriateness of this valve requirement. *See, e.g.*, SPLP Comments at 85-86:

> In subsection (i), the Commission seeks to require, pipeline operators to "determine the need for remote controlled EFRDs in consultation with public officials in all HCAs" and that the need for such devices in HCAs "must be based on limiting the LFL to 660 feet on either side of a pipeline." *See* Annex, § 59.140(i).
>
> The current federal PHMSA standard pursuant to 49 C.F.R. § 195.452(i)(4) states:
>
> > If an operator determines that an EFRD is needed on a pipeline segment to protect a high consequence area in the event of a hazardous liquid pipeline release, an operator must install the EFRD. In making this determination, an operator must, at least, consider the following factors - the swiftness of leak detection and pipeline shutdown capabilities, the type of commodity carried, the rate of potential leakage, the volume that can be released, topography or pipeline profile, the potential for ignition, proximity to power sources, location of nearest response personnel, specific terrain between the pipeline segment and the high consequence area, and benefits expected by reducing the spill size.
>
> This standard was also modified as part of a recently issued PHMSA rule, setting forth additional requirements. *Pipeline Safety: Valve Installation and Minimum Rupture Detection Standards*, Docket No. 2013-0255, 87 Fed. Reg. 20,940 (Apr. 8, 2022) (to be codified at 49 C.F.R. pts. 192 and 195) (available at https://www.federalregister.gov/documents/2022/04/08/2022-07133/pipeline-

safety-requirement-of-valve-installation-and-minimum-rupture-detection-standards).

> As demonstrated by the federal standard, installation of EFRDs should be based on a risk analysis, not preferences with no technical or scientific basis. A requirement to determine the need in consultation with public officials would be inconsistent with PHMSA regulations and violate the managerial discretion to which pipeline operators are entitled.[6] Additionally, SPLP is equally concerned that this requirement may result in unreasonable requests for valve placement that are not supported by any technical justification or that do not provide any safety benefit to the public. The preferences of local officials, who typically have no technical expertise, should not impact the decision-making process of a pipeline operator and its engineers. Particularly when adding numerous valves can create additional operational complexities, including security vulnerabilities. *See* pg. 57, *supra*. SPLP recommends that the Commission remove this requirement from its proposed regulations.
>
> Lastly, and most importantly, minimizing the LFL to 660 feet is not scientifically achievable in most pipelines. There are many factors which control the flammability limit of a product released from a pipeline, including factors outside of the pipeline operator's control. Based on this requirement, the Commission may limit the ability of HVL pipelines to operate. The Commission has not provided any justification to support this limit that is arbitrary and lacks technical support. The federal standard appropriately balances the need for EFRDs in HCAs with the discretion of a pipeline operator to ensure that valves and EFRDs are reasonably and efficiently located to best protect the surrounding communities. The Commission should defer to those federal standards.

The Commission did not consider these comments. The entirety of the Commission's reasoning states: "We did not amend the proposed § 59.140(i), now § 59.140(h), having concluded that the limiting reason for EFRDs described in the regulation subsection is appropriate." Order at 246. This statement makes no sense and wholly fails to address the significant issues raised in comments regarding the propriety and legality of this regulation.

[6] citing *Metropolitan Edison Co. v. Pa. Pub. Util.* Comm'n, 437 A.2d 76, 80 (Pa. Cmwlth. 1981); *see also Bell Telephone Co. of Pa. v. Driscoll*, 21 A.2d 912, 916.

The issues upon which SPLP commented remain:

- Installation of EFRDs should be based on a risk analysis, not preferences lacking technical or scientific basis.
- A requirement to determine the need in consultation with public officials would be inconsistent with PHMSA regulations and violate the managerial discretion to which pipeline operators are entitled.
- Requirement may result in unreasonable requests for valve placement that do not provide any safety benefit to the public. The preferences of local officials, who typically have no technical expertise in pipeline safety and do not have jurisdiction over pipeline safety, should not impact the decision-making process of a pipeline operator and its engineers. This is particularly true when adding numerous valves can create additional operational complexities, including security vulnerabilities – all of which can result in less safety.
- Minimizing the LFL to 660 feet is not scientifically achievable in most HVL pipelines. There are many factors which control the flammability limit of a product released from a pipeline, including factors outside of the pipeline operator's control. Based on this requirement, the Commission may limit the ability of HVL pipelines to operate. The Commission has not provided any justification to support this limit which is arbitrary and lacks technical support.

The Order fails to address how it can adopt this valve regulation given the reasoning elsewhere in the Order, for example, against retroactive application of design requirements and generally adopting new valve requirements as discussed above. The PUC's failure to provide reasoning and address comments also violates the Regulatory Review Act and IRRC's regulations.

4. Anti-Delegation Doctrine

Providing local public officials with any power over valve siting is directly contrary to the General Assembly's delegation of regulation of public utilities to the PUC. The anti-delegation doctrine prohibits improper delegation of decision-making power by agencies through regulation. *See, e.g., City of Lancaster et al v. PA PUC,* 284 A.3d 522 (Pa. Cmwlth. 2022) (holding PUC regulation violated anti-delegation doctrine) ("*City of Lancaster*").

The PUC has no authority to delegate decision-making regarding siting of pipeline facilities to another governmental entity. In fact, such delegation is directly contrary to legislative intent in creating the PUC. "[t]he Public Utility Code creates a uniform, statewide regulatory scheme for utilities. To avoid overlaying a statewide scheme with a 'crazy quilt of local regulations' municipalities are generally preempted from regulating public utilities." Order at 141 (citing *PPL Elect. Utils. Corp. v. City of Lancaster*, 214 A.3d 639 (Pa. 2019)). Further, the PUC cannot delegate to other governmental entities authority that the PUC itself does not have. The PUC acknowledges that it does not have statutory authority over valve siting:

> We do not have extensive siting authority conferred upon us from the General Assembly for a hazardous liquid pipeline. Our jurisdiction over the siting and location of public utilities, including pipelines and related equipment such as valve stations and pumping stations is limited. *West Goshen* [*Township v. Sunoco Pipeline L.P.*, Docket No. C-2017-2589346, Order entered October 1, 2018), at 10-11.
>
> As noted above, other than the authority to review plans to build shelters and buildings that cover a pipeline operator's facilities for determinations whether the MPC and zoning ordinances regarding the building of shelters protecting a public utility's facilities apply, current law does not charge the PUC with siting duties nor does it expressly authorize the PUC to review and approve siting applications regarding the proposed siting of HVL pipelines before they are constructed or being repurposed from transporting petroleum or refined product to HVLs. [*Meghan Flynn, et al. v. Sunoco Pipeline, L.P.*, Docket Nos. C-2018-3006116, et al., (Order entered November 18, 2021)] at 24, affirmed, in part, and reversed, in part, by *Sunoco* [*Pipeline L.P. v. Pa. Pub. Util. Comm'n*, 295 A.3d 37 (Pa. Cmwlth. 2023)].

Order at 284-85.

As the Commonwealth Court explained in *City of Lancaster*, the issue boils down to whether the PUC has set out standards or procedures to curtail or affect review of the discretion granted to a third-party. Where there was no standard cabining utility discretion to place meters indoors or outdoors, the PUC regulation violated the anti-delegation doctrine. So too here. The PUC gives some level of unfettered discretion[7] to local officials regarding placement of valves. While the PUC did set forth that the need for valves should be based on decreasing the LFL of the pipeline to 660 feet on either side, this is not a limiting factor because it provides no specific standard to determine where a valve is placed or standard to determine the degree to which local officials can choose the location of a valve. Moreover, the PUC's chosen 660 feet is completely arbitrary; the PUC fails to explain why it chose 660 feet and in fact admitted in its Regulatory Analysis Form that its regulations are not based on empirical data. RAF at 19. Like in *City of Lancaster*, the proposed regulation has "no safeguards to protect against arbitrary, *ad hoc* decision-making" that will occur where people without pipeline safety expertise or responsibility are delegated authority regarding location of valves. 284 A.3d at 529.

5. Regulation Will Cause Eminent Domain Issues and Disruption To The Public

If SPLP were to attempt to install additional valves consistent with this regulation, SPLP will have to condemn a significant amount of property, particularly in Southeastern Pennsylvania. In general, SPLP owns its valve sites (not just an easement) and these sites are much larger than the usual pipeline easement SPLP most often requires. Because valves are above-ground

[7] The PUC's regulation is also unclear as to what consulting local officials means in the context of the ultimate decision of need for a valve.

infrastructure susceptible to accidental damage, vandalism, and terroristic acts, SPLP requires more control over the property than the usual pipeline easement for underground facilities.

The inflexibility of this rule coupled with other regulations such as the requirement that no pipeline facilities be under a building, will likely require condemnation of homes in highly populated areas. It will certainly require significant, disruptive construction. The PUC wholly failed to consider the additional land requirements and disruption to the public that its regulation will require.

C. Proposed Solution

The PUC should remove this section from its regulations consistent with its decision regarding valves generally in the rulemaking.

V. Pipeline Conversion 52 Pa. Code § 59.138(a)

A. Relevant Regulation Text

§ 59.138. Horizontal directional drilling and trenchless technology, or direct buried methodologies.

(a) *Scope*. This section establishes requirements for hazardous liquid public utilities using HDD, TT, or direct buried methodologies for constructing new pipelines, and converting, relocating, **or** replacing**[, or otherwise changing]** existing pipelines (the foregoing terms individually or in the aggregate shall constitute the term ‘‘construction’’ for purposes of this section), or in the **[operation and maintenance]** O&M of pipelines **as referenced in 49 CFR 195 Subpart F (relating to operations and maintenance)**.

B. Opposition to inclusion of conversion within scope of section

The PUC stated in the Order that it would not include conversion within the scope of HDD, trenchless technology, or direct buried methodologies regulations, but did not make this change in the Annex. Order at 194-195. Specifically, the Order states:

> With respect to the Associations’ comment that retroactively requiring the proposed requirements for HDD, TT and direct buried methodologies to convert pipelines conflicts with PHMSA’s regulations (49 CFR 195.5) by banning operators of

> existing pipelines from using the conversion to service process. The Associations recommend eliminating reference to "converting" pipelines. Operators using the "conversion" process would only be impacted if their system needs upgrading (*i.e.*, cut outs, replacement, etc.). ***We agree with the Associations that "conversion" should not be in the HDD and TT section of these proposed regulations and have amended the final-form regulation A to remove the reference to converting***.

Order at 195-96 (emphasis added).

C. Proposed Solution

Remove the term "converting" from subsection (a) consistent with the Order.

VI. Pipeline Shut-Ins During Construction; 52 Pa. Code § 59.138(c)(5)

A. Relevant Regulation Text

(c) *Geological and Environmental Impacts.* For a pipeline with a bore diameter 8 inches or greater, a bore depth greater than 10 feet, or pipeline length greater than 250 feet, a hazardous liquid public utility using HDD or TT methodology shall:

….

(5) Maintain the integrity of affected pipeline facilities and take actions to mitigate risk including:

…

(ii) Performing pipeline shut in or pressure reductions.

…

B. Opposition to unnecessary pipeline shut ins and pressure reductions.

This regulation imposes an overbroad requirement for a pipeline operator to "perform[] pipeline shut in or pressure reductions." It appears the trigger for taking such action is conducting an HDD of 8 inches or greater, deeper than 10 feet, or length greater than 250 feet, not whether there is a threat to pipeline integrity from the construction. As SPLP commented to the PUC:

> [T]he requirement to perform a shut in or implement a pressure reduction is arbitrary and inconsistent with federal regulations. Where there is no risk to safety, there is no basis in safety or science to require a shut in or pressure reduction. Such requirements only apply when there is a safety related condition warranting such action. 49 CFR § 195.452. Any action taken in response to any geological issues found should be based on data and technical assessments instead of mandated by inflexible regulations.

SPLP Comments at 61.

The Order failed to consider anyone's comments on this subsection except State Senator Comitta. *See* Order at 194-203.

The Order also ignores that PHMSA already has a more specific regulation regarding integrity management in high consequence areas that provides detailed guidance on when pressure reductions or shut-ins must occur:

> (h) ***What actions must an operator take to address integrity issues?***—
>
> (1) General requirements. An operator must take prompt action to address all anomalous conditions in the pipeline that the operator discovers through the integrity assessment or information analysis. In addressing all conditions, an operator must evaluate all anomalous conditions and remediate those that could reduce a pipeline's integrity, as required by this part. An operator must be able to demonstrate that the remediation of the condition will ensure that the condition is unlikely to pose a threat to the long-term integrity of the pipeline. An operator must comply with all other applicable requirements in this part in remediating a condition. Each operator must, in repairing its pipeline systems, ensure that the repairs are made in a safe and timely manner and are made so as to prevent damage to persons, property, or the environment. The calculation method(s) used for anomaly evaluation must be applicable for the range of relevant threats.
>
> …
>
> (4) Special requirements for scheduling remediation—
>
> (i) Immediate repair conditions. An operator's evaluation and remediation schedule must provide for immediate repair conditions. ***To maintain safety, an operator must temporarily reduce the operating pressure or shut down the pipeline until the operator completes the repair of these conditions.*** An operator must calculate the temporary reduction in operating pressure using the formulas referenced in paragraph (h)(4)(i)(B) of this section. If no suitable remaining strength calculation method can be identified, an operator must implement a minimum 20 percent or greater operating pressure reduction, based on actual operating pressure for two months prior to the date of inspection, until the anomaly is repaired. An operator must treat the following conditions as immediate repair conditions:
>
> …
>
> (E) ***An anomaly that in the judgment of the person designated by the operator to evaluate the assessment results requires immediate action.***

49 CFR § 195.452 (emphasis added). The PUC's regulation provides for no consideration of whether there is in fact a threat to pipeline integrity such that the operator needs to take steps to protect pipeline integrity. Requiring shut ins and pressure reductions just because pipeline construction is occurring, with no reference to any form of integrity threat, is inconsistent with PHMSA regulations.

C. Proposed Solution

PHMSA regulations already provide for specific actions operators must take in specific scenarios. *See* 49 CFR § 195.452(h). The PUC should defer to PHMSA's regulations on this issue and remove this subsection. If the PUC feels it is necessary, the PUC could specify that: Section 195.452(h) applies in construction scenarios, applies to pipelines regardless of whether the pipeline is in a high-consequence area, and that operators must consider potential threats pipeline construction could cause to integrity management as part of its evaluations under 49 CFR § 195.452.

VII. Emergency Procedures Manual

A. Relevant Regulation Text

§ 59.140. [Operation] Operations and maintenance.

(a) *Scope.* This section establishes requirements for a hazardous liquid public utility operating and maintaining a pipeline.

(b) *Emergency procedures manual and activities.* A hazardous liquid public utility shall establish and maintain liaison with emergency responders and shall consult with them in developing and updating an emergency procedures manual**, which must be made available upon request to the Pipeline Safety Section,** addressing **emergency procedures and activities including** the following:

(1) Reasonable and practicable steps to inform emergency responders of the practices and procedures to be followed to provide them with relevant information, including information regarding the product in the pipeline and the associated risk**[, consistent with the hazardous liquid public utility's emergency procedures manual]**.

(2) The development of a continuing education program for emergency responders and the affected public to inform them of the location of the pipeline, potential emergency situations involving the pipeline and the safety procedures to be followed in the event of an emergency.

(3) Tabletop drills to be conducted twice a year **[and a response drill conducted annually]** by the hazardous liquid public utility to simulate a pipeline emergency. The table-top drills **[and response drills]** must be conducted on different pipelines and products and in **[each geographic area] the counties** where the hazardous liquid public utility's pipelines are located.

(4) Response drills to be conducted at least once a year by the hazardous liquid public utility to simulate a pipeline emergency. The response drills must be conducted on different pipelines and products and in the counties where the hazardous liquid public utility's pipelines are located.

B. Opposition to Regulation

1. Inconsistent with More Stringent PHMSA Regulation

PHMSA's emergency procedure manual regulation already provides very detailed requirements for a pipeline operator's emergency procedures manual. In contrast, the PUC's regulation is general and vague; it requires "developing" an emergency manual "addressing emergency procedures and activities including" one requirement that is duplicative of PHMSA requirements (subsection 1) and three requirements that are related to public awareness training for emergencies, not emergency response (subsections 2-4). It does not appear the PUC is making more stringent regulations related to existing emergency response manuals developed pursuant to PHMSA's regulation, but instead injecting ambiguity and confusion into PHMSA's regulations for emergency procedural manuals by making general prescriptions that are not more stringent than PHMSA regulations.

PHMSA's detailed regulations require:

> (e) Emergencies. ***The manual required by paragraph (a) of this section must include procedures for the following to provide safety when an emergency condition occurs***:
>
> (1) Receiving, identifying, and classifying notices of events that need immediate response by the operator or notice to the appropriate public safety answering point (i.e., 9–1–1 emergency call center), where direct access to a 9–1–1 emergency call center is available from the location of the pipeline, and fire, police, and other

appropriate public officials, and communicating this information to appropriate operator personnel for prompt corrective action. Operators may establish liaison with the appropriate local emergency coordinating agencies, such as 9–1–1 emergency call centers or county emergency managers, in lieu of communicating individually with each fire, police, or other public entity.

(2) Prompt and effective response to a notice of each type emergency, including fire or explosion occurring near or directly involving a pipeline facility, accidental release of hazardous liquid or carbon dioxide from a pipeline facility, operational failure causing a hazardous condition, and natural disaster affecting pipeline facilities.

(3) Having personnel, equipment, instruments, tools, and material available as needed at the scene of an emergency.

(4) Taking necessary actions, including but not limited to, emergency shutdown, valve shut-off, or pressure reduction, in any section of the operator's pipeline system, to minimize hazards of released hazardous liquid or carbon dioxide to life, property, or the environment. Each operator must also develop written rupture identification procedures to evaluate and identify whether a notification of potential rupture, as defined in § 195.2, is an actual rupture event or non-rupture event. These procedures must, at a minimum, specify the sources of information, operational factors, and other criteria that operator personnel use to evaluate a notification of potential rupture, as defined at § 195.2. For operators installing valves in accordance with § 195.258(c), § 195.258(d), or that are subject to the requirements in § 195.418, those procedures should provide for rupture identification as soon as practicable.

(5) Control of released hazardous liquid or carbon dioxide at an accident scene to minimize the hazards, including possible intentional ignition in the cases of flammable highly volatile liquid.

(6) Minimization of public exposure to injury and probability of accidental ignition by assisting with evacuation of residents and assisting with halting traffic on roads and railroads in the affected area, or taking other appropriate action.

(7) ***Notifying*** the appropriate public safety answering point (i.e., 9–1–1 emergency call center), where direct access to a 9–1–1 emergency call center is available from the location of the pipeline, and ***fire, police, and other public officials, of hazardous liquid or carbon dioxide pipeline emergencies to coordinate and share information to determine the location of the release, including both planned responses and actual responses during an emergency,*** and any additional precautions necessary for an emergency involving a pipeline transporting a highly volatile liquid (HVL). The operator must immediately and directly notify the appropriate public safety answering point or other coordinating agency for the communities and jurisdiction(s) in which the pipeline is located after notification

> of potential rupture, as defined at § 195.2, has occurred to coordinate and share information to determine the location of the release, regardless of whether the segment is subject to the requirements of § 195.258 (c) or (d), § 195.418, or § 195.419.
>
> (8) In the case of failure of a pipeline system transporting a highly volatile liquid, use of appropriate instruments to assess the extent and coverage of the vapor cloud and determine the hazardous areas.
>
> (9) Providing for a post accident review of employee activities to determine whether the procedures were effective in each emergency and taking corrective action where deficiencies are found.
>
> (10) Actions required to be taken by a controller during an emergency, in accordance with the operator's emergency plans and §§ 195.418 and 195.446.

49 CFR § 195.402(e) (emphasis added). Requiring a manual as the PUC has done that merely mentions "emergency procedures and activities" is not more stringent than PHMSA requirements and is inconsistent and incompatible with the detailed requirements PHMSA proscribes.

2. Duplicative and Miscategorized

The PUC's information requirements in subsections 1-4 are largely duplicative of existing public awareness requirements. To the extent these requirements are not duplicative, they should be reorganized as public awareness requirements consistent with PHMSA regulations, not miscategorized and misplaced in a manual that is limited to procedures to follow during an emergency.

PHMSA's regulation quoted above encompasses the PUC's requirement in subsection 1 for procedures to inform emergency responders of the practices and procedures to be followed to provide emergency responders with relevant information. 49 CFR § 195.402(e)(7).

PHMSA's regulations also require the development of a continuing education program for emergency responders and the affected public to inform them of the location of the pipeline, potential emergency situations involving the pipeline and the safety procedures to be followed in

the event of an emergency, which is subsection 2 of the PUC's regulations. PHMSA's regulations state:

> (a) ***Each pipeline operator must develop and implement a written continuing public education program*** that follows the guidance provided in the American Petroleum Institute's (API) Recommended Practice (RP) 1162 (incorporated by reference, see § 195.3).
>
> (b) The operator's program must follow the general program recommendations of API RP 1162 and assess the unique attributes and characteristics of the operator's pipeline and facilities.
>
> (c) The operator must follow the general program recommendations, including baseline and supplemental requirements of API RP 1162, unless the operator provides justification in its program or procedural manual as to why compliance with all or certain provisions of the recommended practice is not practicable and not necessary for safety.
>
> (d) ***The operator's program must specifically include provisions to educate the public, appropriate government organizations, and persons engaged in excavation related activities on:***
>
> (1) Use of a one-call notification system prior to excavation and other damage prevention activities;
>
> (2) ***Possible hazards associated with unintended releases from a hazardous liquid or carbon dioxide pipeline facility***;
>
> (3) ***Physical indications that such a release may have occurred;***
>
> (4) ***Steps that should be taken for public safety in the event of a hazardous liquid or carbon dioxide pipeline release***; and
>
> (5) Procedures to report such an event.
>
> (e) The program must include activities to advise affected municipalities, school districts, businesses, and residents of pipeline facility locations.
>
> (f) The program and the media used must be as comprehensive as necessary to reach all areas in which the operator transports hazardous liquid or carbon dioxide.
>
> (g) The program must be conducted in English and in other languages commonly understood by a significant number and concentration of the non-English speaking population in the operator's area.
>
> (h) Operators in existence on June 20, 2005, must have completed their written programs no later than June 20, 2006. Upon request, operators must submit their

> completed programs to PHMSA or, in the case of an intrastate pipeline facility operator, the appropriate State agency.
>
> (i) The operator's program documentation and evaluation results must be available for periodic review by appropriate regulatory agencies.

49 CFR § 195.440.

API RP 1162 further provides that for both the affected public and emergency responders baseline (i.e. required) messaging must contain pipeline location information. API RP 1162 at 10-11.[8] Thus, PHMSA regulations already require the utility to provide to the affected public and emergency responders the same information the PUC seeks to require operators to provide. 52 Pa. Code § 59.140(b)(2) ("The development of a continuing education program for emergency responders and the affected public to inform them of the location of the pipeline, potential emergency situations involving the pipeline and the safety procedures to be followed in the event of an emergency.").

The PUC's requirements in subsections 3 and 4 – developing procedures for tabletop drills and response drills to be conducted twice a year – are more stringent than current PHMSA public awareness requirements. These requirements should be contained with other public awareness requirements, not misplaced in an emergency procedures manual.

Notably, topics PHMSA's emergency procedures manual does not cover are non-emergency events like continuing education for emergency responders and tabletop and response drills. That is because this information is not necessary in an emergency. Instead, this information is a public awareness issue considered in a public awareness plan. The emergency procedures manual should only contain those procedures necessary during an emergency, not tangential topics covered elsewhere in pipeline safety regulation.

[8] https://law.resource.org/pub/us/cfr/ibr/002/api.1162.2003.pdf

Regarding sharing emergency procedures, the Public Utility Code already requires the utility to provide emergency response procedures to emergency officials.[9] The PUC appears to be concerned that the statute does not require sharing of public awareness procedures regarding emergency responder liaison and training. If the PUC wants emergency responder liaison and

[9] (a) Plans.--A public utility that engages in the delivery of natural gas liquids through a high consequence area in this Commonwealth as defined in 49 CFR 192.903 (relating to what definitions apply to this subpart?)[sic] shall make available upon written request the public utility's emergency response plans to all of the following:

(1) The secretary of the commission.

(2) The Pennsylvania Emergency Management Agency.

(3) The emergency management director of each county in this Commonwealth where the high consequence area is located.

(b) Confidential information.--

(1) If the emergency response plan under subsection (a) contains confidential security information as defined in section 2 of the act of November 29, 2006 (P.L.1435, No.156), known as the Public Utility Confidential Security Information Disclosure Protection Act, and the public utility has marked the information in the plan as confidential security information, each reviewer of the plan under subsection (a) shall have the following duties:

(i) Comply with all requirements of the Public Utility Confidential Security Information Disclosure Protection Act to protect the information from dissemination to the public.

(ii) Enter into a notarized agreement with the public utility for the purpose of maintaining the confidentiality requirements under this paragraph.

(2) A public utility shall provide a copy of a proposed agreement under paragraph (1)(ii) to the commission before making available an emergency response plan under subsection (a) that contains confidential security information as specified under paragraph (1).

(c) Penalties.--A public utility that fails to comply with subsection (a) may be subject to an enforcement action by the commission.

66 Pa. C.S. § 1512 (footnote omitted).

training procedures to be shared with local emergency officials, that regulation should be contained within public awareness requirements; not conflated with emergency response procedures.

C. Proposed Solution

The PUC should delete this section of the regulation, move subsection (2)-(4) to the regulation regarding emergency responder liaisons (subsection (c), and remove any requirement to consult with emergency officials regarding SPLP's emergency procedures manual.

VIII. Cathodic Protection Repair Timing With No Exceptions for Permitting Delays

A. Relevant Regulation Text

§ 59.143. Corrosion control.

…

[(d)] (c) Adequacy of cathodic protection. A hazardous liquid public utility shall test a cathodically-protected pipeline at the corrosion test station to determine the adequacy of cathodic protection as follows:

(1) Each pipeline must be tested at least once each calendar year, with intervals not exceeding 15 months [, to determine whether the cathodic protection meets the requirements of subsection (c)]. Each impressed current ground bed must be tested as part of this monitoring.

[(3)] (2) Each non-remote cathodic protection rectifier must be inspected once each calendar month [but] with intervals not exceeding 37 days[,] to ensure that it is operating properly. Remote monitoring devices are permissible to accomplish monitoring; however, if the remote device stops reporting or reports operations outside the expected parameters, then the remote device must be inspected within a reasonable time period not to exceed 7 days from date of discovery.

[(4)] (3) Each reverse current switch, each diode, and each interference bond whose failure could jeopardize structure protection on a pipeline transporting HVLs must be electrically checked for proper performance 12 times each calendar year, with intervals not exceeding 37 days.

[(5)] (4) A hazardous liquid public utility shall initiate actions to start remedial measures within [14] 30 days upon discovery to correct any deficiencies indicated by the monitoring. ***At no point shall the completion of the remedial measures exceed the next scheduled inspection.***

(emphasis added)**.**

B. Opposition to Timing with Lack of Exceptions for Permitting Delays

The requirement to complete repairs to a cathodic protection system prior to the next scheduled inspection is not reasonable because it is a timeline that will be impossible to comply with for some repairs when environmental permits are required. There are two inspection timelines in the regulation. Those timelines are 37 days and 1 year. But where an environmental permit is required, permitting alone can take approximately 6 months.

If no environmental permitting exception is included, SPLP will be in the position of either following the requirement to obtain an environmental permit and violate the PUC's regulation or violating requirements for environmental permits to comply with the PUC's regulation.

C. Proposed Solution

The PUC should include an exception for environmental permitting delays.

IX. CONCLUSION

SPLP thanks both IRRC and the PUC for their consideration of these comments. SPLP requests the regulations be rejected for the reasons stated above and that the PUC implement the solutions herein if it proceeds with this rulemaking.

Respectfully submitted,

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ATTACHMENT A

CODE OF ETHICS

We improve people's quality of life through infrastructure development

INTERNATIONAL RIGHT OF WAY ASSOCIATION CODE OF ETHICS:

RULES OF PROFESSIONAL CONDUCT & STANDARDS OF PRACTICE FOR THE RIGHT OF WAY PROFESSIONAL

Code of Ethics, Rules & Standards As Amended to September 2014

CODE OF ETHICS

Members of the International Right of Way Association recognize the responsibility of the right of way profession to the people and businesses we serve, and believe that we should encourage and foster high ethical standards in our profession. Therefore, we do hereby adopt the following Rules of Professional Conduct & Standards of Practice for the Right of Way Professional as our Code of Ethics for our constant guidance and inspiration predicated upon the basic principles of professional competence, character, integrity, fairness, commitment, and trustfulness. These basic principles provide the foundation for establishing and maintaining all professional relationships. Therefore, all Members shall dedicate themselves to a course of conduct which manifests respect, confidence and trust on the part of the general public and all users of right of way services.

GENERAL PROVISIONS AND GUIDING PRINCIPLES

The Rules of Professional Conduct (“Ethical Rules” or “Rules”) shall be binding upon all members of the International Right of Way Association (“Association” or “IRWA”) and any Credentialed non-member (as defined in the Disciplinary Procedures) (collectively, “Members”), and the breach of any of these Rules shall be punishable as provided in the Bylaws of the Association and Disciplinary Procedures. The failure to prohibit certain conduct in these Rules is not to be interpreted as approval of conduct not specifically mentioned, but rather these Rules shall be regarded as establishing minimal acceptable conduct. Terminology used herein, if not otherwise defined, shall have the meanings given to them in other Association documents.

Following each Ethical Rule is a corresponding Standard of Practice which will provide additional guidance and interpretation of the applicable Ethical Rule. It is incumbent upon all Members to provide their services in a manner which instills a strong sense of trust and confidence between themselves and their employers, clients, peers and all members of the general public by complying with these Rules and Standards.

ETHICAL RULE NO. 1 – PROFESSIONAL CONDUCT

Members of the Association pledge to conduct themselves in a manner that is not detrimental to the public, the Association, or the right of way profession, and to comply with the Association's Code of Ethics, Rules of Professional Conduct and Standards of Practice for the Right of Way Professional.

ER 1.1. It is unethical for a Member:

(a) To conduct themselves in a manner which will prejudice their professional status, the reputation of the Association, the right of way profession, or any other Member of the Association;

(b) To act in a manner that is misleading or fraudulent; or

(c) To use or permit the use of misleading information.

ER 1.2. It is unethical for a Member to engage in conduct which results in the breach of any criminal offense statutes, laws or other government regulations, including minor offenses which reflect adversely upon the professional character, trustfulness, morality or reputation of the Member.

ER 1.3. It is unethical for a Member:

(a) To claim or present professional qualifications (including recertification status) which he or she does not possess;

(b) To identify himself or herself as a candidate Member when they are not, or fail to provide a listing of their true educational standing with the Association, when requested to do so; or

(c) To make a materially false statement in, or to deliberately fail to disclose a material fact requested in connection with, his or her application for admission to Membership in or Credentialing by the Association.

ER 1.4. It is unethical for a Member to maliciously and/or without cause injure or attempt to injure the professional reputation or business prospects of another.

ER 1.5. It is unethical for a Member or group of Members to take part in any efforts to secure the enactment, alteration, or amendment of any statute, law or code in any jurisdiction on behalf of the Association without receiving prior approval from the Association as provided in the Association's Bylaws.

ER 1.6. It is unethical for a Member to:

(a) Violate any provision of the Code of Ethics, Rules of Professional Conduct and Standards of Practice for the Right of Way Professional;

(b) Circumvent any provision of the Code of Ethics, Rules of Professional Conduct and Standards of Practice for the Right of Way Professional personally or through action of another;

(c) Engage in illegal conduct;

(d) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;

(e) Engage in any other conduct that adversely reflects on his or her capacity to engage in the right of way profession;

(f) Engage in any other conduct that is detrimental to, or has a substantially adverse effect upon, the right of way profession or the Association; or

(g) Fail to report any violations of the Code of Ethics, Rules of Professional Conduct and Standards of Practice for the Right of Way Professional involving another Member of the Association.

ER 1.7. It is unethical for a Member to fail to sign a Conflict of Interest Statement, prior to or shortly after being installed or taking office (1) as an International Officer; Director; Region Chair, Vice-Chair, Secretary or Treasurer; (2) as an International Committee Chair, Vice-Chair or Committee Member; or (3) as a Chapter Officer Committee Chair, Vice-Chair or Committee Member.

ETHICAL STANDARD OF PRACTICE NO. 1- PROFESSIONAL CONDUCT

Quality of Service is an expectation and demand of all Members. A Member's quality of service is an outgrowth of technical competence, personal character, responsiveness, informative communication, and appropriate care of property.

Interpretation:

1. Technical competence is knowledge and the appropriate skillful application of that knowledge.

(a) Knowledge is possessing an informed understanding of the subject matter of a Member's field of practice or employment, based on education and experience. It includes an appropriate understanding of the laws regulating the conduct of business (e.g., licensing, obligation of broker and agent, trust accounts, etc.) and laws concerning the substance of business, (e.g., contract law, real estate titles, uniform act procedures, other regulatory procedures, condemnation/expropriation procedures, record keeping procedures, etc.).

Because technical competence is not static, continuing education, both formal and informal, is necessary to maintain and improve a Member's knowledge and understanding of the right of way profession.

United States and Canadian Members of IRWA who perform appraisal services for clients in their respective countries are required to comply with the standards and requirements of USPAP or CUSPAP, as appropriate. All other countries are to follow their jurisdictional professional standards.

(b) Skillfulness is the appropriate application of knowledge. It is the focusing of one's knowledge in the most effective manner resulting in diligently and thoroughly completed services. It includes the ability to recognize and acknowledge the need to obtain additional qualified assistance and or expertise when necessary.

2. Personal character is a quality which is demonstrated through trustworthiness, truthfulness and professional conduct. It demands full disclosure of all pertinent information, data and records. It is manifested through providing services with the highest degree of integrity.

3. Communication must be responsive, informative and accurate. Communication includes, but is not limited to timely responses to inquiries from others in an appropriate and needful manner; keeping of appointments; complying with client and employer requests for information; periodic updates to the client or employer on project progress, and informing the client or employer when deadlines will not be met. Communication also includes the maintenance of appropriate and accurate records, and prompt notification of the receipt or disbursement of property or funds.

4. A client's or employer's property entrusted to a Member creates a fiduciary relationship which means that detailed and accurate records are kept and property is not commingled or used personally.

A Member must:

- Promptly notify a client or employer of the disbursement or receipt of the client's or employer's funds, securities, or other property;
- Identify and label securities and properties of a client or employer promptly upon receipt. The place of safekeeping shall be independent from the Member's personal property or files;

- Maintain complete records of all funds, securities, and other properties of a client or employer coming into the possession of the Member and render the appropriate accounts to the client or employer regarding them;
- Promptly pay or deliver to the client or employer as requested by a client or employer the funds, securities, and/or other properties in the possession of the Member which the client or employer is entitled to receive.

5. A Member shall always act within the scope of his[her] employment.

ETHICAL RULE NO. 2 – COOPERATION IN THE RIGHT OF WAY PROFESSION

Members pledge to assist the Association in carrying out its responsibilities to the public and users of professional right of way services by exchanging information and experience within the Association and with other associations and professional organizations.

ER 2.1. It is unethical for a Member:

(a) To violate or circumvent the Association's Bylaws and all other Association rules; or

(b) To refuse to cooperate with the Association in all matters related to carrying out its responsibilities to the public and to the users of professional right of way services.

ER 2.2. It is unethical for a Member:

(a) To submit misleading information to the Ethics Committee or a duly authorized Investigation Committee of the Association or, when requested to do so by such Committee, to refrain from submitting any relevant non-confidential information in the possession of such Member; or

(b) To fail or refuse to promptly submit any non-confidential information, report, or related file when requested to do so by the Ethics Committee or a duly authorized Investigation Committee of the Association in the enforcement of the Code of Ethics, Rules of Professional Conduct and Standards of Practice for the Right of Way Professional; or

(c) To fail or refuse to cooperate with the Ethics Committee or a duly authorized Investigation Committee regarding the investigation of an alleged ethics violation when requested to do so, and further, to fail to sign a Confidentiality Agreement with regard to such investigation when requested to do so.

ER 2.3. It is unethical for a Member:

(a) To disclose or utilize confidential information obtained in connection with such membership in or service to the Association; or

(b) To use the names, trademarks, service marks and logos of IRWA, including its divisions, offices, committees, printed or electronic lists and other data, for non-Association purposes, or to use them in any advertising or publicity, or otherwise to indicate IRWA sponsorship or affiliation with any product or service, without prior specific written permission of the Association.

ER 2.4. It is unethical for a Member to fail to promptly furnish copies of all business records and any related file in his or her possession relating to work undertaken by the Member for a client upon request by such client.

ER 2.5. It is unethical for a Member to enter into a contract for right of way services which precludes compliance with the Association's Articles of Incorporation and Bylaws.

ER 2.6. It is unethical for a Member to knowingly infringe another's intellectual property rights (copyrights, trademarks, patents or trade secrets) or to plagiarize and/or hold out as the Member's own work the materials and/or works of the Association, its Members or third parties.

ER 2.7. It is unethical for a Member to resign membership or fail to renew membership after the Member has been notified that an ethics complaint has been filed against the Member and an Investigation Committee has been formed. Any resignation or failure to renew shall be deemed an admission of violation and will result in automatic Expulsion from the Association.

ETHICAL STANDARD OF PRACTICE NO. 2 – COOPERATION IN THE RIGHT OF WAY PROFESSION

A Member shall abide by all laws, rules, regulations, certification and licensing requirements applicable to the Member's profession. All business or professional practices shall be in strict accordance with all applicable laws, rules, professional standards, and regulations governing the Member's business, practice or profession.

Interpretation:

Compliance with all laws, regulations, rules, certification and licensing requirements shall also include the following:

1. In hiring or performing services, Member shall follow non-discriminatory practices without regard to race, creed, sex, national origin or other legally protected classes.

2. Members shall cooperate fully with the Association in the enforcement of its rules and regulations.

- ER 3.2 precludes use of Association designations or intellectual property in a misleading manner or without proper authorization.
- ER 3.3 precludes preparation or transmission of false or misleading professional qualifications.
- ER 1.3(a) requires a Member to disclose accurate credentials and educational status in the Association upon request.

- ER 1.3(b) precludes conduct which violates criminal laws or which reflects adversely on the character of the Member.
- ER 1.6 precludes conduct which is illegal, which violates Association rules or procedures, or which has a detrimental effect on a Member's reputation, the right of way profession or the Association.
- ER 2 requires Members to engage in information exchange within the Association and other professional organizations for the benefit of the Association and the public.

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3. A Member may engage in lobbying activities on behalf of the Association after having first received permission to do so in accordance with the Association's Articles, Bylaws and Procedural Rules. A Member's lobbying activity shall not be carried out in a manner which could be construed as speaking or acting on behalf of the Association, except as noted above.

ETHICAL RULE NO. 3 – ADVERTISING AND PROMOTIONAL PRACTICES

Members shall avoid advertising, solicitation or promoting which is misleading or otherwise reflects negatively on the Association or its Members.

ER 3.1. It is unethical for a Member to participate or engage in misleading or deceptive advertising.

ER 3.2. It is unethical for a Member to refer to the Association or its professional designation or certifications in a manner that is misleading, or to use or display the registered trademarks, logos, emblems or printed or electronic lists of the Association for non-Association purposes, or in a manner contrary to the Association's Articles of Incorporation and Bylaws, or these Ethical Rules or Standards of Practice for the Right of Way Professional.

ER 3.3. It is unethical for a Member to prepare or transmit in any manner a resume or statement of professional qualifications which is inaccurate or misleading.

ETHICAL STANDARD OF PRACTICE NO. 3 – ADVERTISING AND PROMOTIONAL PRACTICES

Members shall only use those advertising and promotional practices which fairly and accurately inform prospective clients and the public of the Member's services, qualifications, credentials, and other relevant professional information.

Interpretation:

1. Members shall use the Association's logos, emblems, designations, registered trademarks, printed or electronic lists, only in accordance with the Association's Articles, Bylaws and Procedural Rules.

2. The International Right of Way Association's name, its Senior Right of Way Agent designation (SR/WA), its generalist and specialist certifications as they may exist now or in the future, and all emblems, logos, trademarks and printed and electronic lists are the sole property of the Association.

3. Without specific authorization, Members shall refrain from using the Association's logos, emblems, designations or registered trademarks and printed and electronic lists in a manner which could be construed as representing the Association or acting or speaking on behalf of the Association.

4. A Member's advertising and promotional practices shall fairly and accurately reflect the Member's professional and educational qualifications, experience, professional designation(s) and areas of specialization.

5. Resumes and statements of qualification should only be presented in a manner that is positive, factual and not misleading.

6. The SR/WA designation and all other generalist and specialist certifications may be used only by those Members upon whom such certifications have been conferred by the Association.

7. All advertising and promotional practices shall be in good taste and shall not offend or be contrary to the public or the Association.

8. All advertising and promotional practices shall not create unrealistic expectations in clients or the public.

- ER 2.3 precludes unauthorized disclosure of confidential information.
- ER 4.1 precludes furnishing analysis, conclusions, and opinions unless authorized.
- ER 4.2 precludes disclosure of confidential information of clients.
- ER 5.3 precludes furnishing privileged information regarding fees, bids, etc.
- ER 1.3(a) requires a Member to disclose accurate credentials and educational status in the Association upon request.
- ER1.3(b) precludes conduct which violates criminal laws or which reflects adversely on the character of the Member.
- ER 1.3(c) requires an applicant or Member to be truthful and to fully disclose all material facts in connection with applying for membership in or Credentialing by the Association.
- ER 3 precludes advertising, solicitation, or promoting which is misleading or otherwise reflects negatively on the Association or its Members.
- ER 3.2 precludes use of Association designations or intellectual property in a misleading manner or without proper authorization.

ETHICAL RULE NO. 4 – CONFIDENTIALITY

Members shall uphold the confidential nature of the right of way professional-client relationship.

ER 4.1. It is unethical for a Member to disclose the analysis, opinions, or conclusions developed by or on behalf of a client to anyone other than:

(a) The client and those persons specifically authorized by the client to receive such information; or

(b) Third parties, when the Member is legally required to do so by due process of law.

ER 4.2. It is unethical for a Member to disclose information identified by a client as confidential to anyone other tha

(a) Those persons specifically authorized by the client to receive such data;

(b) Third parties, when the Member is legally required to do so by law; or

(c) Third parties, when the Member is required or authorized to do so by the Code of Ethics, Rules of Professional Conduct and Standards of Practice for the Right of Way Professional.

ETHICAL STANDARD OF PRACTICE NO. 4 – CONFIDENTIALITY

A Member shall hold in strict confidence all information provided in confidence by a client or person requesting confidentiality. In addition to the Member's fiduciary obligation to the client, a Member shall at all times exercise loyalty to the interests of the client with respect to confidential information and shall not engage in any activity which could be reasonably construed as contrary to the best interests of the client. The Member shall not use confidential information for personal purposes or personal gain. The Member shall not disclose to a third party any confidential or proprietary information concerning the client's business or personal affairs unless the disclosure is required or compelled by law or regulations. All obligations and duties of the Member to clients, firms, and employers shall also apply to relationships with former clients and former firms and employers.

Interpretation:

1. A Member has a duty to hold in strict confidence all information acquired in the course of the professional relationship concerning the business and affairs of the client, and the Member should not divulge any such information unless (1) expressly authorized by the Member's client; (2) required by law; or (3) required by the Code of Ethics, Rules of Professional Conduct and Standards of Practice for the Right of Way Professional, to do so.

2. The Member owes the duty of confidentiality to every client without exception, regardless of whether the client relationship is continuing or casual. A Member's duty of confidentiality survives the professional relationship and continues indefinitely after the Member has ceased to act on behalf of the client and whether or not subject to differences that may have arisen between them.

- ER 6 requires a high degree of professionalism, generally; the factors discussed in these interpretations are highly relevant in determining professionalism.
- ER 2.3 precludes unauthorized disclosure of confidential information.
- ER 2.4 requires furnishing privileged business records when required by a client.
- ER 4.1 precludes furnishing analysis, conclusions, and opinions unless authorized.
- ER 5.3 precludes furnishing privileged information regarding fees, bids, etc.

3. A Member cannot render effective professional service unless there is full and open communication between the Member and their client. At the same time the client must feel secure in the fact that their confidences will remain confidential and is entitled to proceed on that basis without any express request or stipulation on their part to do s

4. Disclosure by a Member may also be permitted or required in order to defend themselves, a Member's associates or employees, or a Member's employer against any allegation of malpractice or misconduct, or in legal proceedings to establish or collect the Member's fee, but only to the extent reasonably necessary for such purposes.

5. The relationship between the Member and the Member's client forbids the Member from use of any confidential information for the benefit of themselves, or a third person, or to the disadvantage or detriment of the Member's client.

6. Disclosure of confidential information obtained during the course of his[her] employment may be controlled by employment contracts, covenants not to compete as part of the sale of a business and/or the subsequent publication of previously confidential information. The Member shall always use the utmost discretion when disclosing previously confidential information to a third person.

ETHICAL RULE NO. 5 –REASONABLE FEES

A Member shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee, nor shall an appraiser charge a fee based upon a percentage of the amount of his or her appraisal.

ER 5.1. A fee is clearly excessive when, after a review of the facts, a reasonable person of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:

(a) The time and labor required, the novelty and difficulty of the questions or problems involved, and the skill requisite to perform the service properly;

(b) The likelihood that the acceptance of the particular employment will preclude other employment by the Member;

(c) The fee customarily charged in the locality for similar services by individuals with similar credentials;

(d) The amount involved and the results obtained;

(e) The time limitations imposed by the employer, client, or by the circumstances;

(f) The nature and length of the professional relationship with the client or employer;

(g) The experience, reputation, and ability of the Member performing the services;

(h) Whether the fee is fixed or contingent;

(i) The informed consent of the client or employer to the fee or employment agreement.

NOTE: Nothing herein shall be construed as prohibiting contingency fee arrangements where such are otherwise professionally and/or legally authorized.

ER 5.2. It is unethical for a Member who withdraws from employment to fail to refund promptly any part of the fee paid in advance or costs advanced which have not been earned or expended.

ER 5.3. It is unethical for a Member to furnish or use confidential information regarding fees, competitive bids, and like information to his or her benefit and/or to the detriment of his or her client or other third parties.

ETHICAL STANDARD OF PRACTICE NO. 5 – REASONABLE FEES

A Member of the Association shall at all times charge fair and reasonable fees commensurate with the service being provided and fully disclose the amount of such fees prior to the time the service is to be provided. At no time shall the Member accept remuneration from more than one party for services rendered without full knowledge and written agreement of all parties involved. All fees charged for services shall be in accordance with applicable statutory provisions and/or local established rules and customs. A fee is fair and reasonable if it is one which can be justified in the light of all pertinent circumstances, including the factors mentioned herein.

Interpretation:

1. A Member should assure written contractual relationships in all matters in order to avoid any misunderstanding and to assure better service to the Member's client.

- ER 1.1 precludes use of misleading or fraudulent information.
- ER 1.3 precludes presenting false professional qualifications.
- ER 1.6 precludes other unethical conduct.
- ER 3.1 precludes misleading advertising.
- ER 3.3 precludes transmittal of misleading resumes.
- ER 6.2 precludes acceptance of an assignment in which the Member has a personal interest unless fully disclosed.
- ER 6.1 must disclose legally discoverable data.
- ER 6.2 requires disclosure of personal interests; receiving payment from more than one party without disclosure is within the scope of this ethical rule.
- The Member, for the protection of all parties with whom the Member transacts business, should assure (1) that all financial obligations and commitments are in writing, prior to the beginning of work, expressing the exact agreement of the parties; and (2) that copies of such agreements, at the time of execution, are placed in the hands of all parties to the agreement, and shall be dealt with in accordance with the instructions of the parties

involved. A Member shall not receive directly or indirectly any rebate, fee, commission, discount or any other benefit without the full knowledge and prior written consent of all parties.

- The fiduciary relationship between the Member and the Member's client requires full disclosure in all financial matters between them and prohibits the acceptance by the Member of any “hidden” fees.
- No fee, reward, cost, commission, interest, rebate, agency or forwarding allowance or other compensation whatsoever related to professional employment may be taken by the Member from anyone other than the client without full disclosure to and the consent of the client and, where the Member's fees are being paid by someone other than the client(s), the consent of such other person. Example: A leasing officer, whose client is his employer, shall not accept inducements of any kind from contractors bidding on contract work.
- The entering into an agreement with the client imposes upon the Member of the Association an obligation of rendering a skilled and conscientious service. When the Member is unable to render such a service alone, it is incumbent upon the Member to obtain assistance from another person having the appropriate expertise and qualifications. The Member should not engage, recommend or suggest the use of services of any other organization or business without prior disclosure to the client. The Member shall not accept any rebate or profit on expenditures, made on behalf of the client without the client's written consent and knowledge. A Member must render a proper accounting to the client with respect to direct or indirect costs relating to additional services.
    - A Member shall not provide services relating to the sale, purchase, appraisal, management, financing or any other involvement pertaining to any transaction involving real estate where the Member's level of expertise is not on a level that could be reasonably required under the circumstances. Where services are required in such areas and the Member does not have the appropriate level of expertise, such services should not be provided without the aid of another person who is properly qualified in the area of activity being contemplated.
    - The Member shall not recommend or suggest to a client or a third party the use of services of any other organization or business in which the Member has a direct or indirect interest, without disclosing such interest, in writing, at the time of the recommendation or suggestion.
    - The Member must be alert to recognize his or her lack of competence for a particular task and the disservice he or she would do to a client if he or she undertook that task. The Member must either decline to act or shall retain, consult or collaborate in that field, or refer the client to an individual who is competent in that field.

2. A fair and reasonable fee will depend upon and reflect such factors as;

- the time and effort required and spent;
- the difficulty and importance of the matter;
- the likelihood that the acceptance of the particular employment will preclude other employment by the Member;
- the fee customarily charged in the locality for similar services by individuals with similar credentials;
- the amount involved and the results obtained;
- the time limitations imposed by the employer, client, or by the circumstances;
- the nature and length of the professional relationship with the client or employer;
- the experience, reputation, and ability of the Member performing the services;
- whether the fee is fixed or contingent;
- the informed consent of the client or employer to the fee or employment agreement;
- fees authorized by statute or regulation;
- the Member should not attempt to set fees for services to be offered by suggesting or implying directly or indirectly, that the level of fees being suggested is based on direction from the Association, Institute, Society or

Council to which a Member also belongs;

(m) A member should be ready to explain the basis for his or her charges (especially if the client is unsophisticated or uninformed as to the proper basis and measurements for fees).

NOTE: Nothing herein shall be construed as prohibiting contingency fee arrangements where such are otherwise professionally and/or legally authorized.

3. A Member should avoid controversy with a client respecting fees. Controversy and misunderstandings regarding fees and financial matters bring the Member's profession into disrepute. The Member should give the client a fair estimate of fees and disbursements, pointing out any uncertainties involved so that the client may be able to make informed decisions.

4. A Member should not accept, without full knowledge and written consent of all parties to the transaction, any fees or other remuneration from mortgage lenders, solicitors, appraisers or property managers or any other person whose services may be reasonably required to complete the terms of the transaction, where such remuneration would be in excess of the remuneration agreed upon by the Member and their client.

5. Nothing herein shall be construed as prohibiting any gratuity, gift, or similar item which may otherwise be permitted by rules, regulations or policies established by the Member's employer and client.

ETHICAL RULE NO. 6 – DISCLOSURE AND CONFLICTS OF INTEREST

Members shall maintain a high professional relationship with his/her client or employer. The duty of a Member to serve the client or employer in a professional manner does not relieve the Member of the responsibility to treat with consideration all persons involved in or with the right of way profession and to avoid the infliction of needless harm.

ER 6.1. It is unethical for a Member to:

(a) Conceal or knowingly fail to disclose that which he or she is required by law to reveal;

(b) Knowingly provide or use perjured testimony or false evidence;

(c) Knowingly make a false statement of law or fact;

(d) Participate in the creation or preservation of evidence when he or she knows or it is obvious that the evidence is false;

(e) Counsel or assist the client or employer in conduct that the Member knows to be illegal or fraudulent;

(f) Knowingly engage in other illegal conduct or conduct contrary to any Association rule.

ER 6.2. It is unethical for a Member to accept an assignment if the Member has any direct or indirect, current or contemplated, personal interest in the subject matter or the outcome of the assignment unless such personal interest is disclosed to the client in writing prior to acceptance of the assignment.

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ER 6.3. It is unethical for a Member to render right of way services without:

(a) Having or acquiring the knowledge and experience necessary to render such services competently, or by associating with others who possess such knowledge and experience; or

(b) Disclosing such lack of experience to the client and subsequently taking all steps necessary or appropriate to render the services competently.

ER 6.4. It is unethical for a Member to fail to render right of way services to a client or employer in a timely manner.

ETHICAL STANDARD OF PRACTICE NO. 6 - DISCLOSURE AND CONFLICTS OF INTEREST

Disclosure

Full disclosure of all pertinent information requires, without reservation, disclosure to the client, employer or public, all relevant information a Member possesses with regard to the Member's employment.

- ER 6.3 and 6.4 require having or obtaining necessary expertise and prohibit neglect of ongoing projects.
- ER 1 imposes general requirements of good character.
- ER 6.2 and 6.3(b) specify general disclosure requirements.
- ER 2.4, 6.4, and 7.2 set out specific requirements.
- ER 7, generally regarding financial integrity.

Interpretation:

1. Full disclosure to the client/employer means disclosure of:

- Conflicts of interests (including, but not limited to such items as personal, financial, emotional, employment; prior or current, or others).
- Lack of competence/experience.

2. Full disclosure to the public with whom the Member has business means disclosure of:

- All pertinent project information (e.g., nature of project, rights acquired and rights retained, project schedule, basis of payments);
- All statutory and equitable rights available, including counsel, appraisal and relocation benefits.

3. Full disclosure does not include privileged information, except when required to do so by law.

CONFLICTS OF INTEREST

A Member has a duty of loyalty and allegiance to his[her] client/employer so long as such duty does not result in the breach of the Code of Ethics or Rules of Professional Conduct of the International Right of Way Association. This duty broadly commands those involved with the Association to be faithful to IRWA's best interest and not to use their organizational position or knowledge to advance a personal agenda at the organization's expense.

Professional Relationships maintained with the Employee/Employer, Client/Former Client is an outgrowth of personal character, responsive and informative communication; appropriate care of property, disclosure, fair and reasonable fees, and confidentiality.

Interpretation:

1. A Member shall always act within the scope of his[her] employment.

2. Disclosure of confidential information obtained during the course of his[her] employment may be controlled by employment contracts, covenants not to compete as part of the sale of a business and/or the subsequent publication of previously confidential information. The Member shall always use the utmost discretion when disclosing previously confidential information to a third person.

3. A Member shall disclose all dual employment which may cause a conflict with the Member's primary employment or when the Member's employer requires such disclosure.

ETHICAL RULE NO. 7 – FINANCIAL INTEGRITY

A Member shall take all reasonable steps to safeguard and account for a client's and employer's funds. Any funds of clients or employers held by a Member in trust for said client or employer shall not be commingled with the Member's funds.

ER 7.1. It is unethical for a Member to misappropriate or commingle funds of a client or employer with those of his own or another person.

ER 7.2. It is unethical for a Member to fail to:

(a) Promptly notify a client or employer of the receipt of his or her funds;

(b) Identify funds of a client or employer promptly upon receipt and place them in a separately designated trust or escrow account for such purposes as soon as practicable;

(c) Maintain complete records of all funds of a client or employer coming into the possession of the Member and render the appropriate accounts to his or her client or employer regarding them;

(d) Promptly pay or deliver to the client or employer as requested by a client the funds in the possession of the Member which the client or employer is entitled to receive.

ETHICAL STANDARD OF PRACTICE NO. 7- FINANCIAL INTEGRITY

To maintain and broaden public confidence, Members should perform all professional financial responsibilities with the highest sense of integrity.

Interpretation:

1. Financial integrity is an element of character fundamental to professional recognition. It is the quality from which the public derives trust and the benchmark against which a Member must ultimately test all decisions.

2. Financial integrity requires a Member to be, among other things, honest and candid within the constraints of client or employer funds and confidentiality. Service and the public trust should not be subordinated to personal gain and advantage. Financial integrity can accommodate the inadvertent error and the honest difference of opinion; it cannot accommodate deceit or subordination of principle.

3. Financial integrity is measured in terms of what is right and just. In the absence of specific rules, standards, or guidance, or in the face of conflicting opinions, a Member should test financial decisions. Financial integrity requires a Member to observe both the form and the spirit of technical and ethical standards; circumvention of those standards constitutes subordination of judgment.

4. Financial integrity also requires a Member to observe the principles of objectivity and independence and of due care with the client or employer entrusted funds.

ETHICAL RULE NO. 8 – PUBLIC CONFIDENCE

All Members who are employees or agents of a public entity or who hold elected or appointed public offices shall strive to foster and maintain the highest level of public confidence in his or her position.

ER 8.1. It is unethical for a Member who holds public office or employment or a Member who contracts with a public entity to:

(a) Use the public or contracted position to obtain, or attempt to obtain, a special advantage in legislative matters for himself or herself or for a client or employer under circumstances where he or she knows or it is obvious that such action is not in the public interest;

(b) Offer or accept anything of value to or from any person when the Member knows or it is obvious that the offer is for the purpose of influencing his or her action as a public official, employee or contractor.

(c) Wrongly use their public or contracted office or position for personal gain or for the personal gain of others.

ER 8.2. It is unethical for a Member to improperly influence a person who holds public office or employment:

- for personal gain;
- for the benefit of the Member's employer or client; or
- for the benefit of any third party.

ETHICAL STANDARD OF PRACTICE NO. 8- PUBLIC CONFIDENCE

Members shall conduct themselves in their daily lives in a manner which looks beyond self or corporate interest to the interest of others and society as a whole, not just the avoidance of harm. A Member's position, title, or authority as a public servant, employee or contractor may offer the opportunity to further the Member's own private interests or the interests of friends, relatives, or persons with whom the Member is affiliated in a nonpublic capacity. A Member in public service may have access to nonpublic information that could benefit those interests. The public may lose confidence in the integrity of the Association if it perceives that a Member is using public office to serve a private interest, and it expects that information, property, and time (including the time of a subordinate) of public servants, employees and contractors will be used to serve the public's interests.

Interpretation:

1. At a minimum, a Member shall avoid conduct involving moral turpitude, dishonesty, fraud or misrepresentation.

2. A Member shall at all times conduct their business and personal activities with knowledge of and in conformance with the highest moral and ethical standards consistent with membership in and the purposes of the Association, as well as within the Member's chosen profession.3. A Member who is in any form of public service, whether as a public official (elected or appointed), employee or contractor:

(a) is required to act impartially;

(b) may not make improper use of their position, title, or authority;

(c) may not use public property, nonpublic information, or time (including the time of a subordinate), or allow its use for other than authorized public purposes;

(d) may not give (or solicit contributions for) a gift to any other public servant or third party in an attempt to improperly influence a decision or outcome.

(e) may not solicit or accept a gift from a vendor or any other individual or entity because of the Member's official position, which is intended to improperly influence the Member's actions in their official public capacity.

ETHICAL RULE NO. 9 – APPRAISAL COMPLIANCE

When performing appraisal services a Member shall comply with all standards of appraisal practice for the jurisdiction in which the appraiser is performing services.

ER 9.1. It is unethical for a Member who is performing appraisal services for a client to fail to comply with the prevailing standards of appraisal practice in the jurisdiction in which the appraisal services are being performed.

ETHICAL STANDARD OF PRACTICE NO. 9- APPRAISAL COMPLIANCE

Both the International Right of Way Association as well as International Professional Appraisal Associations recognize the need for uniform professional practice standards and qualifications that reflect current appraisal theory, experience & skill which regulates and promotes best practices of our Membership.

These standards are in place to keep the Membership educated and accountable so they can provide a professional service to their clients.

ETHICAL RULE NO. 10 – Compliance with Other Codes of Conduct

Members shall uphold and abide by any and all codes of ethics, standards of practice, or other rules or regulations governing personal and professional conduct (collectively, "Codes of Conduct"), of allied associations, organizations, or licensing agencies to which he or she is a Member or licensee.

ER 10.1. It is unethical for any Member to fail to uphold or abide by any Codes of Conduct of any allied or professional organizations, associations, or licensing agencies to which he or she is a Member or a licensee.

ER 10.2. It is unethical for a Member to fail to report to the Association any violations of any Codes of Conduct of any allied or professional organizations, associations, or licensing agencies of which he or she has been found in violation and for which he or she has received any form of discipline which requires publication thereof.

ER 10.3. It is unethical for a Member not to disclose to the Association non-confidential information regarding another Member who has been disciplined by or removed from the rolls of an allied or professional organization or licensing agency for violation of its rules and regulations which requires publication.

Ethical Standard of Practice No. 10 - Compliance with Other Codes of Conduct

ER 10.1.

Adherence to professional codes of conduct ensures that services are performed in accordance with the recognized jurisdictional professional standards in the location of your practice to promote the public's confidence and trust in the services being performed.

Members are obligated to carry out assignments as set out in the standards in an ethical, professional manner.

ER 10.2. and 10.3.

If the conduct of the Member results in violation, suspension or criminal charges as a result of non-compliance of any professional conduct then the Ethics Committee is to be made aware to determine if sanctions in the Association are appropriate also.

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