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November 5, 2015

R. M. Seeley
Director, Southwest Region
Pipeline and Hazardous Materials Safety Administration
8701 South Gessner, Suite 1110
Houston, TX 77074

Re: Response to Notice of Probable Violation
and Proposed Compliance Order (CPF 4-2015-5019)

Dear Mr. Seeley:

Magellan Pipeline Company, LP (“Magellan”) hereby responds to the Notice of Probable Violation and Proposed Compliance Order CPF 4-2015-5019 (“NOPV”) issued by the Southwest Region of the Pipeline and Hazardous Materials Safety Administration (“PHMSA”) on September 24, 2015, and received by Magellan on September 29, 2015. On October 15, 2015, Magellan was granted an extension of the 30-day timeframe in which to respond to the NOPV until November 6, 2015.

PHMSA alleges two violations of pipeline safety regulations based on an inspection of Magellan’s Barnsdall Station from November 17 through December 5, 2014. Magellan respectfully disagrees with one of PHMSA’s allegations—the allegation that the impoundments for three aboveground breakout tanks at the Barnsdall Station violate 49 C.F.R. § 195.264(b)(1) because they do not comply with NFPA 30. This letter represents Magellan’s response to that allegation in the NOPV. As explained below, Magellan has not violated § 195.264(b)(1) because that provision, which was promulgated in April 1999, does not apply retroactively to the breakout tanks at issue here, which were constructed decades before 1999.

A. Notice of Probable Violation Count 1

PHMSA alleges that “[a]t the time of the inspection Magellan had not notified PHMSA of a change in the operation of the 127 mile section of line from Northern Oklahoma to Southern Kansas” although Magellan divested these assets on February 29, 2012.

With respect to count 1, PHMSA “decided not to conduct additional enforcement action or penalty assessment proceedings at this time.” As such, Magellan will not respond further to this allegation.

B. Notice of Probable Violation Count 2

PHMSA alleges that “Magellan Tank Dike capacity or impoundment records indicated that impoundment capacities for three breakout tanks at the Barnsdall Station are insufficient as required by NFPA 30 and § 195.264(b)(1).” It asserts that “Magellan must, in accordance with § 195.264(b)(1) after October 2, 2000, ensure that the installation of impoundment for aboveground breakout tanks built to API Specification 12F, API Standard 620, and others (such as API Standard 650 or its predecessor Standard 12C), be in accordance with . . . NFPA 30.” *See* 49 C.F.R. § 195.264(b)(1).

Section 195.264(b)(1), however, does not apply to the three breakout tanks at issue here. Section 195.264(b)(1) was adopted in a final rule issued on April 2, 1999, decades after the three breakout tanks were constructed. *See* Pipeline Safety: Adoption of Consensus Standards for Breakout Tanks, 64 Fed. Reg. 15,926 (Apr. 2, 1999). The regulation’s plain language, the rulemaking record, and the well-settled presumption against retroactive regulation establish that § 195.264(b)(1) does not apply retroactively to the breakout tanks at issue.

Magellan thus respectfully contests the alleged violations identified in the September 24, 2015 NOPV and requests that PHMSA remove this count from the NOPV. If PHMSA declines to remove this count from the NOPV, Magellan respectfully requests a hearing under 49 C.F.R. § 190.211 to formally dispute these allegations. If such a hearing is held, Magellan intends to raise at the hearing the issue of whether 49 C.F.R. § 195.264(b)(1) applies to the three breakout tanks identified in the September 24 NOPV. Magellan will be represented by counsel at any hearing. Because the cost of the proposed corrective action—increasing the capacity of the three tanks’ impoundments—is more than \$25,000, Magellan requests an in-person hearing. *See* 49 C.F.R. § 190.211(c).

1. The tanks and impoundments at issue were installed decades before 49 C.F.R. § 195.264(b)(1) took effect.

PHMSA alleges “that the tank dike capacity area for tanks 1003, 1213, and 1214 at the Barnsdall Station located in Barnsdall, OK are insufficient.” However, each of these

tanks was constructed decades before 49 C.F.R. § 195.264(b)(1) took effect on October 2, 2000.

Tank 1003 was constructed in 1937. It was originally built to withstand pressures up to 10 p.s.i.g., but has been operated as an atmospheric tank (similar to an API 650/API 12C tank) for over 20 years. Tanks 1213 and 1214 were constructed in 1979 to API 650. No significant changes have been made to the impoundments associated with these tanks since their construction.

As is clear from these facts, the tanks in question predate the promulgation of 49 C.F.R. § 195.264(b)(1) by several decades. In the case of Tank 1003, it predates the rule by more than a half century. The tanks and impoundments were constructed under the regulations and standards effective in 1937 and 1979, respectively. Thus, no “installation” has occurred with respect to these tanks since October 2, 2000, and the requirements of Section 195.264(b) have not been triggered, let alone violated.

2. Section 195.264(b)(1) does not apply retroactively.

- (a) Section 195.264(b)(1)’s plain language and structure establish that the provision applies only to impoundments installed after October 2, 2000.

At the time of PHMSA’s inspection, 49 C.F.R. § 195.264 provided:

(a) A means must be provided for containing hazardous liquids in the event of spillage or failure of an aboveground breakout tank.

(b) After October 2, 2000, compliance with paragraph (a) of this section requires the following for the aboveground breakout tanks specified:

(1) For tanks built to API Specification 12F, API Standard 620, and others (such as API Standard 650 or its predecessor Standard 12C), the installation of impoundment must be in accordance with the following sections of NFPA 30:

- (i) Impoundment around a breakout tank must be installed in accordance with section 4.3.2.3.2; and

(ii) Impoundment by drainage to a remote impounding area must be installed in accordance with section 4.3.2.3.1.

49 C.F.R. § 195.264 (2014).¹

The plain language of § 195.264(b)(1) makes clear that the provision applies only to “the installation of impoundment[s]” “[a]fter October 2, 2000.” Section 195.264(b)(1) provides that “[a]fter October 2, 2000,” impoundments “must be installed in accordance with” certain sections of NFPA 30. Section 195.264(b)(1) does *not* impose requirements on impoundments installed *before* October 2000. Because the tanks at issue here and their accompanying impoundments were constructed well before October 2000, § 195.264(b)(1) is inapplicable.

This conclusion is bolstered by the fact that § 195.264 appears in Subpart D of the regulations addressing transportation of hazardous liquids by pipeline. Subpart D is solely dedicated to “construction” standards. Section 195.200 provides that Subpart D “prescribes minimum requirements for constructing new pipeline systems with steel pipe, and for relocating, replacing, or otherwise changing existing pipeline systems that are constructed with steel pipe.” 49 C.F.R. § 195.200. Moreover, section 195.202 of Subpart D, “Compliance with specifications or standards,” clearly states: “Each pipeline system must be *constructed* in accordance with comprehensive written specifications or standards that are consistent with the requirements of this part.” 49 C.F.R. § 195.202 (emphasis added). Because the activity regulated by Subpart D is “construction,” § 195.264(b)(1) is most naturally read as applying only to breakout tanks or impoundments constructed after October 2, 2000.

Magellan’s interpretation of § 195.264(b)(1) is further supported by the fact that the API standards referenced in § 195.264(b)(1) are construction standards. For example, API Standard 620 is for the design and construction of large, welded, low pressure storage tanks, and API Standard 2510 is the specification for design and construction of LPG installations. Notably, the rule does not reference API Standard 653, which addresses tank inspection, repair, alteration, and reconstruction. This is further evidence that the drafters of § 195.264(b)(1) intended to apply its requirements on a prospective basis only.

¹ After PHMSA’s inspection, 49 C.F.R. § 195.264(b)(1) was amended “to reflect the current edition section numbers from NFPA-30 (2012).” Pipeline Safety: Periodic Updates of Regulatory References to Technical Standards and Miscellaneous Amendments, 80 Fed. Reg. 168, 172 (Jan. 5, 2015).

- (b) The rulemaking record for § 195.264(b)(1) further establishes that the regulation was not intended to apply retroactively.

The rulemaking record for § 195.264(b)(1) also demonstrates that the regulation was not intended to apply retroactively to breakout tanks and impoundments constructed before the regulation's October 2000 effective date. In the preamble to the 1999 final rule promulgating § 195.264(b)(1), PHMSA's predecessor, the Research and Special Programs Administration ("RSPA"), stated that there would be "minimal or no cost for operators of breakout tanks to comply with this rule." 64 Fed. Reg. at 15,933. As a result, RSPA did not treat the rule as a "significant regulatory action" and did not send the rule to the Office of Management and Budget for review under Executive Order 12866. *Id.* Given that "minimal or no cost[s]" were anticipated for operators, it is not reasonable to suggest that RSPA intended the rule to be retroactively applied to tanks built before its issuance. The cost for operators to reconstruct the impoundments for all breakout tanks constructed to a previously applicable standard would likely reach well into the tens of millions of dollars. In fact, Magellan estimates that it would cost approximately \$500,000 just to increase the capacity of the impoundments for the three tanks at issue in this matter. The only reasonable conclusion to draw from RSPA's assertion that the 1999 rule's costs would be *de minimis* is that RSPA intended § 195.264(b)(1) to apply only prospectively.

Moreover, the drafters of the 1999 rule made clear that while both new and existing breakout tanks are subject to the rule's operating and maintenance requirements, the same is not true for construction requirements, such as § 195.264(b)(1). Specifically, the summary of the rule states that the standards imposed by the rule "apply to the design, construction, and testing of *new* tanks, and the repairs, alterations and replacement of existing tanks" and that "[a]ll *new and existing* breakout tanks are also subject to the operating and maintenance requirements specified in this rule." 64 Fed. Reg. at 15,926 (emphasis added). In addition, the rule's preamble states that "[a]ll consensus standards are being adopted on a *prospective* basis, meaning *design, construction and testing* requirements apply to *new tank construction and future repairs, alterations or replacements of existing tanks.*" 64 Fed. Reg. at 15,927.

The history of the 1999 rule also supports the conclusion that § 195.264(b)(1) does not apply retroactively to the tanks at issue here. During the rulemaking process, industry representatives raised concerns regarding the retroactive application of newly adopted standards. For example, in a meeting between Department of Transportation officials and the Independent Liquid Terminals Association ("ILTA"), ILTA noted that "[s]ome piping and tankage and ILTA terminals may need to be grandfathered." Minutes of Meeting between RSPA/OPS and ILTA on Jan. 27, 1998, Docket No. RSPA-97-2095-3. In response, the

agency officials stated that with respect to the design requirements in § 195.100, the agency would “grandfather the design of existing facilities unless they are relocated, replaced, or otherwise changed.” *Id.* “The meeting closed with the expectation (by both parties) that the proposed regulations . . . would not have a significant economic impact on . . . ILTA Facilities.” *Id.*

During the notice and comment period for the 1999 rule, RSPA also received several comments urging the agency not to apply the rule retroactively because doing so would impose substantial costs on pipeline operators. For example, American Petroleum Institute (“API”) noted that “[i]ndustry design and construction standards and recommended practices cannot be applied retroactively” because “[t]anks are large, expensive fixed assets with long service lives.” Letter from Marty Matheson, Pipeline Coordinator, American Petroleum Institute, to Richard Felder, Associate Administrator Office of Pipeline Safety (July 10, 1997). Therefore, API explained, “[t]he design and construction requirements for new equipment (Standards 620, 650, and 12F) cannot be applied to tanks that were contracted for construction prior to the publication of subsequent editions.” *Id.* API reiterated these concerns in a subsequent comment letter, arguing that “applying new requirements retroactively to[] existing tanks that are functioning satisfactorily is not appropriate.” Letter from Marty Matheson, Pipeline Coordinator, American Petroleum Institute, to Richard Felder, Associate Administrator Office of Pipeline Safety (July 23, 1998).

Similarly, Amoco stated that it “support[ed] incorporation of [certain] industry consensus standards,” including NFPA 30, only “on a *prospective* basis.” Letter from David O. Barnes, Compliance Coordinator, Amoco Pipeline Company, to U.S. Department of Transportation (July 15, 1998). Amoco made clear that it did “not support a *retroactive* approach . . . due to the significant amount of resources that would be required to review and incorporate (or not incorporate) these numerous prescriptive requirements with unknown benefits for tanks currently in service.” *Id.*

RSPA’s response to these concerns in the preamble to the 1999 final rule demonstrates that RSPA did not intend the rule’s requirements to apply retroactively. Specifically addressing industry concerns regarding whether new requirements for overfill protection systems would apply retroactively, RSPA expressly stated that it “did not intend to apply [the] proposed [requirements] retroactively.” 64 Fed. Reg. at 15,932. RSPA explained that it instead “intended that operators install overfill protection systems as they customarily do: when constructing new tanks or significantly altering existing tanks.” *Id.* According to RSPA, applying the new requirements retroactively to existing tanks would not be “[c]onsistent with [its] statement that the proposed rules would result in minimal or no cost for operators.” *Id.* The same reasoning applies here: It would be inconsistent with RSPA’s

stated intent of avoiding substantial costs for operators to apply § 195.264(b)(1)'s requirements retroactively to existing tanks and impoundments.

- (c) Retroactive application of § 195.264(b)(1) would violate the Administrative Procedure Act and the presumption against retroactive regulation.

Finally, because the tanks at issue here were built well before the 1999 rule was issued, applying that rule's impoundment requirements to the tanks would violate the well-established presumption against retroactive regulation, *see, e.g., Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988), as well as the Administrative Procedure Act's requirement that legislative rules have only "future effect," 5 U.S.C. § 551(4); *see also Bowen*, 488 U.S. at 216 (Scalia, J., concurring); *Chadmoore Commc'ns, Inc. v. FCC*, 113 F.3d 235, 240 (D.C. Cir. 1997). Applying the impoundment requirements to the tanks would have retroactive effect because the requirements "impose new duties" with respect to the "already completed" transaction of building the tanks and their accompanying impoundments. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994). At a minimum, applying the 1999 rule to the tanks would have the "secondarily retroactive" effect of upsetting settled expectations and investment decisions "made in reliance on the regulatory status quo before the rule's promulgation." *Mobile Relay Assocs. v. FCC*, 457 F.3d 1, 11 (D.C. Cir. 2006). Before it could apply the 1999 rule to existing tanks, RSPA would have been required to "balance the harmful 'secondary retroactivity' of upsetting prior expectations or existing investments against the benefit[] of applying the[] rule[]" to existing tanks. *National Cable & Telecomms. Ass'n v. FCC*, 567 F.3d 659, 670 (D.C. Cir. 2009). RSPA, however, engaged in no such balancing. Indeed, the 1999 rule simply assumed that its requirements would impose "minimal or no cost[s]" on operators. 64 Fed. Reg. at 15,933; *accord id.* at 15,932. This assumption, which allowed RSPA to avoid designating the rule as a significant regulatory action subject to Office of Management and Budget review under Executive Order 12866, *id.* at 15,933, would have been clearly insupportable if RSPA intended the rule to require operators to engage in the expensive task of retrofitting impoundments constructed before the rule's issuance. RSPA's failure to engage in the requisite "balanc[ing]" of the costs and benefits of applying the 1999 rule's impoundment requirements to existing tanks indicates that RSPA did not intend the requirements to apply to such tanks. *National Cable & Telecomms. Ass'n*, 567 F.3d at 670; *see also Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015) ("Agencies have long treated cost as a centrally relevant factor when deciding whether to regulate. Consideration of cost reflects the understanding that reasonable regulation

ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions.”).

C. Conclusion

Magellan appreciates your consideration of our Response to the Notice of Probable Violation and Proposed Compliance Order. Please feel free to contact me with any questions regarding this Response.

Based on this above information, we are hopeful that you will agree with our position and withdraw the NOPV and Proposed Compliance Order. In the alternative, Magellan respectfully requests a hearing in which we can present our arguments pursuant to 49 C.F.R. § 190.211.

Sincerely,

A handwritten signature in black ink that reads "George C. Hopkins". The signature is written in a cursive style.

George C. Hopkins