



09-03-15 11:24 RCVD

1050 Thomas Jefferson Street, NW
Seventh Floor
Washington, DC 20007
(202) 298-1800 Phone
(202) 338-2416 Fax

James Curry
Partner
jbc@vnf.com
202-298-1831

VIA E-MAIL AND UPS Overnight

September 3, 2015

Mr. Chris Hoidal, P.E.
Director, Western Region, OPS
Pipeline and Hazardous Materials Safety Administration
12300 W. Dakota Ave
Suite 110
Lakewood, CO 80228

**RE: Request for Hearing, Request for Documents, and Preliminary Statement of Issues
El Paso Natural Gas Company, CPF No. 5-2015-1008**

Dear Mr. Hoidal:

As provided under 49 C.F.R. §§ 190.208 and 190.211, El Paso Natural Gas Company, L.L.C. (“EPNG”)¹ respectfully submits the attached Request for Hearing, Request for Documents, and Preliminary Statement of Issues in response to the Notice of Probable Violation, Proposed Civil Penalty, and Proposed Compliance Order (“Notice”) that OPS issued to EPNG, on July 28, 2015, in the above-referenced case. EPNG received the Notice by certified mail on August 7, 2015.² The Notice alleges that EPNG committed violations of the gas pipeline safety regulations at 49 C.F.R. §§ 192.605, 192.616 and 192.625, and proposes a total civil penalty of \$162,700 for the alleged violations. EPNG respectfully contests the allegations of violation, proposed civil penalty, and proposed compliance order.

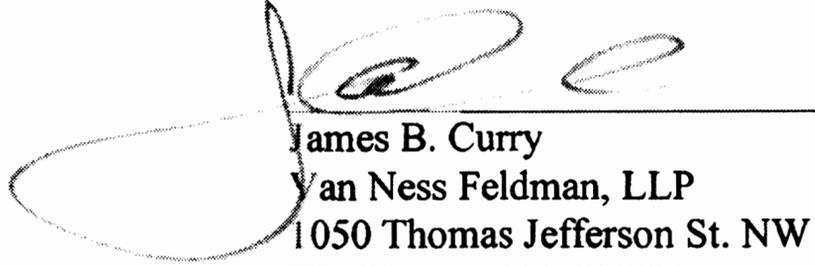
EPNG takes pipeline safety and any allegation of violation by OPS seriously; however, the Company believes that the allegations of violations in this case are not supported by the facts, and that the proposed civil penalty and proposed compliance order are unwarranted. EPNG looks forward to discussing and resolving OPS’s concerns at or before the hearing.

¹ EPNG is the respondent in this matter. We understand that the allegations of violation in the Notice are limited to EPNG and the Operator Identification (“OPID”) Number for the pertinent EPNG assets.

² United States Postal Service Tracking Number 7013263000074828663.

Please do not hesitate to contact me if you have any questions.

Respectfully submitted,



James B. Curry
Van Ness Feldman, LLP
1050 Thomas Jefferson St. NW
Washington, DC 20007
(202) 298-1831
JBC@vnf.com
Counsel for El Paso Natural Gas Company, L.L.C.

CC: Mr. Benjamin Fred, Presiding Official, Office of Chief Counsel, PHMSA
Mr. Larry White, Presiding Official, Office of Chief Counsel, PHMSA
Ms. Bryn Karaus, Senior Attorney and Counsel for the Western Region, Office of Chief Counsel, PHMSA
Mr. Robert E. Miller, Supervisor, Pipeline Safety Section, Arizona Corporation Commission
Ms. Jessica Toll, Assistant General Counsel, Kinder Morgan
Mr. Jorge Torres, Vice President of Engineering and Technical Services, Kinder Morgan
Mr. Gary Buchler, Vice President of Engineering and Operations, Kinder Morgan
Mr. Reji George, Director of Engineering, Kinder Morgan

Attachment: Request for Hearing, Request for Documents and Preliminary Statement of Issues

**PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMINISTRATION
WASHINGTON, DC 20590**

In the matter of	§	
	§	
El Paso Natural Gas Company, L.L.C.,	§	CPF 5-2015-1008
	§	
Respondent.	§	

**REQUEST FOR HEARING, REQUEST FOR DOCUMENTS,
AND PRELIMINARY STATEMENT OF ISSUES,
OF
EL PASO NATURAL GAS COMPANY, L.L.C.
IN RESPONSE TO
NOTICE OF PROBABLE VIOLATION,
PROPOSED CIVIL PENALTY AND PROPOSED COMPLIANCE ORDER**

A. Request for Hearing

Pursuant to 49 C.F.R. §§ 190.208(a)(4) and 190.211(b) (2014), EPNG respectfully requests an in-person hearing on the alleged violations, proposed civil penalties, and proposed compliance order contained in the Notice of Probable Violation, Proposed Civil Penalty and Proposed Compliance Order (“Notice”) issued by OPS on July 28, 2015. EPNG will be represented by counsel at the hearing.

B. Request for Documents

In order to ensure a full and fair hearing, EPNG respectfully requests the following:

1. Pursuant to 49 C.F.R. § 190.208(c), EPNG requests that OPS provide a copy of its violation report and any accompanying evidence in this matter, including any supporting documentation reviewed by the Compliance Officer in developing the proposed civil penalty.
2. Pursuant to 49 C.F.R. §§ 190.207(b)(1) and 190.208(c), EPNG requests that OPS provide copies of any information obtained from third parties regarding odorant levels and lower explosive limits (LEL) on EPNG’s pipeline facilities or downstream third party facilities.
3. Pursuant to 49 C.F.R. § 190.212(c)(2), (c)(3) and (c)(7), and 5 U.S.C. § 552(a)(2)(C), EPNG requests that OPS provide copies of the following materials related to the proposed civil penalty in this case:

- a. Copies of any penalty calculation worksheets or work papers for the penalty proposed in this case.

Longstanding Supreme Court precedent entitles a party to an agency proceeding to the facts on which an agency relies to render a decision.³ EPNG is entitled to the facts relied on by OPS in developing proposed civil penalty amounts based on the statutory assessment factors.⁴ OPS's penalty calculation worksheets and work papers constitute evidence that OPS is using against EPNG in this case. OPS uses these materials, presumably, to propose penalty amounts based on the statutory assessment factors and in light of the facts of the case. If EPNG cannot view these materials it is at a distinct disadvantage in responding to OPS's proposed penalty because it will not know what facts OPS believed were relevant to the penalty calculation, or how the statutory penalty factors were weighed in light of those facts. The violation reports that OPS prepares in support of violation cases do not provide this information because they do not reveal what facts the Compliance Officer found relevant in light of the penalty assessment criteria, nor do they reveal how each criterion contributed to the amount of the proposed penalty. Without these materials, the Presiding Official is at a similar disadvantage, as he will not be able to determine the bases for the proposed penalty, whether errors occurred that he must correct, and what weight was given to each penalty factor. It is unclear how the Presiding Official can arrive at a rational penalty if he is not afforded the basis for the proposed penalty that serves as the starting point for his final penalty determination.

- b. Copies of any administrative staff manuals or instructions to staff, including guidance, manuals, directions, procedures or any other documents that OPS staff rely on to develop a proposed civil penalty under 49 U.S.C. § 60122 and 49 C.F.R. § 190.225.

The Freedom of Information Act ("FOIA") requires that PHMSA make available to the public those "administrative staff manuals and instructions to staff that affect a member of the public."⁵ PHMSA's obligation to provide these materials is affirmative and the courts have made clear that no FOIA request is required to obtain them.⁶ To the extent that OPS staff rely on staff manuals, instructions to staff, or any other internal guidance for how to determine the amount of a proposed civil penalty; OPS must disclose such materials to the public. Any such

³ See *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 288 n.4 (1974) ("A party is entitled, of course, to know the issues on which decision will turn and to be apprised of the factual material on which the agency relies for decision so that he may rebut it. Indeed, the Due Process Clause forbids an agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation."). See also *Williston Basin Interstate Pipeline Co. v. FERC*, 165 F.3d 54, 63 (D.C. Cir. 1999).

⁴ 49 U.S.C. § 60122 (2012); 49 C.F.R. § 190.225 (2014).

⁵ 5 U.S.C. § 552(a)(2)(C) (2012).

⁶ See e.g. *Food Chem. News v. Dep't of Health & Human Servs.*, 980 F.2d 1468, 1472 (D.C. Cir. 1992). The court found that an agency's obligation to disclose staff manuals and instructions under 5 U.S.C. § 552(a)(2) is affirmative and "clearly does not require a FOIA request."

materials would clearly affect the public because they are used to determine the amount of the penalties that members of the public must pay. A review of PHMSA's FOIA "reading room" webpage reveals no materials that describe the manner in which OPS employs its substantial civil penalty authority.⁷

EPNG's affiliate has already received from OPS its "Civil Penalty Summary (September 6, 2014)" in connection with a different matter. However, that document includes language that expressly precludes its use in determining civil penalties.⁸ EPNG believes there are additional materials that are responsive to this request that must be provided beyond the Civil Penalty Summary.

- c. Copies of any administrative staff manuals or instructions to staff, including guidance, manuals, directions, procedures or any other documents that that the Presiding Official or Associate Administrator rely on to determine a final civil penalty under 49 U.S.C. § 60122 and 49 C.F.R. § 190.225.

For the same reasons articulated in 2(b), above, EPNG is entitled to such materials.

To the extent that an action by the Presiding Official is necessary in order to obtain the materials sought in this Request for Documents, EPNG hereby requests that the Presiding Official who is assigned to this case take such action. Such action is proper under 49 C.F.R. § 190.212(c)(2), (c)(3) and (c)(7) which set forth the Presiding Official's authority to "receive evidence and inquire into relevant and material facts, require the submission of documents and other information," and, generally, "exercise the authority necessary to carry out [his responsibilities]"

C. Preliminary Statement of Issues

EPNG respectfully contests the allegations of violation, Proposed Civil Penalty and Proposed Compliance Order contained in the Notice.

Notice Item 1 – 49 C.F.R. § 192.616

Whether EPNG violated 49 C.F.R. § 192.616 as alleged in the Notice.

- a. Whether EPNG's reference to a pungent odor such as sulfur (rotten egg) in the public version of its brochure provided the public with sufficient information to

⁷ DOT FOIA regulations mirror 5 U.S.C. § 552(a) and provide that PHMSA will provide access to so-called "reading room materials" electronically. 49 C.F.R. § 7.5 (2014); <http://www.phmsa.dot.gov/foia/e-reading-room> (last accessed August 25, 2015).

⁸ The first page of the Civil Penalty Summary provides: "This summary does not attempt to provide a specific method for calculating civil penalties and cannot be used for determining an appropriate civil penalty in a specific enforcement action." Given this language, it seems that OPS staff are prohibited from using the Civil Penalty Summary in their deliberations regarding proposed penalty amounts.

recognize the smell of a leak from the EPNG pipeline system, which transports gas that contains sulfur compounds that emit a sulfur or rotten egg odor.

- b. Whether EPNG followed the guidance in API RP 1162.

Notice Item 2 – 49 C.F.R. § 192.625

Whether EPNG violated 49 C.F.R. § 192.625 as alleged in the Notice.

- a. Whether EPNG can demonstrate that EPNG lines 1015 and 2074 were, in fact, adequately odorized at the time of the alleged violation.
- b. Whether OPS has appropriately relied upon the information provided to OPS by Southwest Gas Corporation, the cities of Safford and Benson, and Graham County Utilities concerning odorant levels in EPNG lines 1015 and 2074, and whether such information is relevant and probative.

Notice Item 3 – 49 C.F.R. § 192.605

Whether EPNG violated 49 C.F.R. § 192.605 as alleged in the Notice.

- a. Whether § 192.605 requires that the precise lower explosive limit (“LEL”) percentages be listed in EPNG’s manual of written procedures for operations, maintenance and emergencies.
- b. Whether EPNG’s listing of a range of LEL percentages in its operations and maintenance procedures is an appropriate means of complying with § 192.605, given the changes in gas composition that may occur on its pipelines.
- c. Whether specific LEL percentages in other EPNG documents and records allow field personnel to determine that the gas is adequately odorized.

Proposed Civil Penalty

1. Whether OPS’s \$162,700 proposed civil penalty must be withdrawn.
 - a. Whether the record supports the proposed civil penalty in this case.
 - b. Whether OPS’s current method of developing, proposing, and assessing administrative civil penalties is consistent with applicable laws and regulations.

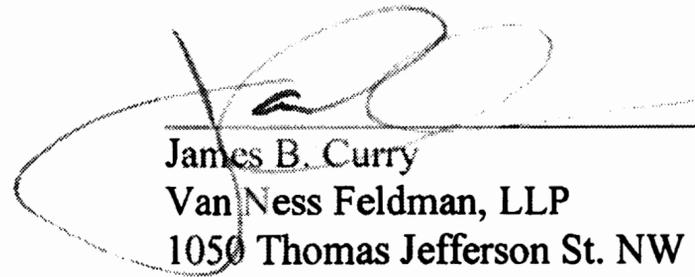
Proposed Compliance Order

1. Whether OPS’s proposed compliance order must be withdrawn.

- a. Whether the record supports the proposed compliance order.
- b. Whether the proposed compliance order is overly broad.

At the hearing in this case, EPNG intends to present evidence and engage with OPS in discussion on these issues. EPNG reserves the right to revise and supplement this Preliminary Statement of Issues at or before the hearing based on a review of the material in OPS's violation report as well as any other evidence EPNG obtains in the course of this proceeding. EPNG also reserves the right to respond to factual assertions and arguments introduced by OPS during the proceedings in this case, and to supplement the record accordingly.

Respectfully submitted, September 2, 2015.



James B. Curry
Van Ness Feldman, LLP
1050 Thomas Jefferson St. NW
Washington, DC 20007
(202) 298-1831
JBC@vnf.com
Counsel for El Paso Natural Gas Company, L.L.C.