In the Matter of
Tennessee Gas Pipeline Company
Respondent.

CPF No. 1-2018-1001
Notice of Probable Violation

Respondent’s
Post-Hearing Brief

I. Introduction

Safety and compliance are core values of Tennessee Gas Pipeline Company, L.L.C. (TGP) and the company is committed to operating its pipeline facilities in accordance with PHMSA’s regulations. It is because TGP takes Pipeline and Hazardous Materials Safety Administration’s (PHMSA’s) allegations in this case seriously that it chose to appeal and now respectfully submits this Post-Hearing Brief in the above referenced matter in accordance with 49 C.F.R. § 190.211(g). TGP reiterates its request that PHMSA withdraw alleged violation Item 2 and the associated proposed compliance order set forth in the Notice of Probable Violation (the “NOPV”) issued February 13, 2018 on the basis that the use of leak detection other than aerial survey on odorized transmission lines is not required by PHMSA as evidenced by the plain language of the regulation and lack of relevant enforcement or guidance1.

A hearing was held on the NOPV on June 12, 2018 at PHMSA’s office in West Trenton, New Jersey. Transcripts of the hearing were prepared and provided to PHMSA’s regional counsel. The hearing transcript, errata agreed to by parties, and version of the transcript with corrections from the errata, are included herein as Exhibit A for inclusion in the record. TGP adopts and advances all arguments set forth in the June 4, 2018 pre-hearing brief which is attached hereto as Exhibit B as well as arguments made during the hearing as evidenced in the transcript.

II. Factual Background

The evidence at the hearing demonstrates that TGP odorizes its pipeline in New England (East of West Winfield, NY and North of Clifford, PA) irrespective of class location and conducts leakage surveys far in excess of the regulatory requirement of once per calendar year not to exceed 15 months. 49 C.F.R. § 192.706; see also Ex. A, Tr. at 20:11-24. More specifically, TGP conducts an aerial patrol approximately every 2 weeks in the New England

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1 At the hearing, PHMSA clarified that the reference to “leak detection device” in the NOPV is merely an example and that the PHMSA regulations “do not prohibit or dictate what method should be used . . . for an odorized line, you do not have to use leak detection equipment.” Ex. A, Tr. at 13.
area between April through October and then monthly from November through March. Ex. A, Tr. at 23:1-4; Exhibit 2 to pre-hearing brief; Kinder Morgan leak survey flight and aerial excel records (PHMSA Pipeline Safety Violation Report (PSVR) Exhibits A-12 and A-13). During these patrols TGP checks for signs of erosion, blowing material, sunken backfill or dead vegetation over or near the pipeline which would indicate a potential leak along the pipeline. Ex. A, Tr. at 23:14-21. In the four locations noted in the NOPV, you can see in the photographs that there is vegetation close to the pipeline in all cases and, in the event of a leak, the gas would migrate to a point where it can escape which likely would be where vegetation is present. See photographs included with Ex. A (at the end of the transcript) and discussion at Ex. A, Tr. at 24:3-6; 30:3-21. In cases where there is a pipeline release that manifests itself in dead vegetation (as opposed to another sign such as blowing material or uplifting or subsidence), it does not always show up directly over the pipeline but can migrate at a ways before it surfaces and impacts vegetation. Id. TGP is proud of its pipeline safety program which has resulted in no leaks in Connecticut in 17 years. Ex. A, Tr. at 35:12-15.

III. PHMSA Regulations Are Unambiguous and Do Not Require That Odorized Transmission Pipelines Use Instrumented Leak Detection Equipment

PHMSA’s assertion in the NOPV that the regulations require odorized transmission pipelines to employ leak detection survey methods other than an aerial survey in every area where there is a hard top surface is incorrect and is without support in the plain language of the regulations. The regulations unambiguously do not specify that an operator must use another method (such as a leak detection device) over areas where no vegetation is present. The Part 192.706 regulation requires that “leakage surveys of a transmission line must be conducted at intervals not exceeding 15 months, but at least once each calendar year.” 49 C.F.R. Part 192.706. The regulation is a performance-based rule which allows individual operators the latitude to identify the most appropriate leak survey method to demonstrate compliance for its pipelines. Indeed, at the hearing PHMSA referred to the fact that the rule is performance based on multiple occasions. Ex. A, Tr. at 12:17-18; 47:14-23; 56:13-21. Therefore, based on the unambiguous regulatory language which does not specify how the leak survey must be performed, PHMSA should withdraw the NOPV.

IV. PHMSA Has Not Sustained Its Burden of Proof that TGP’s Aerial Surveys Are Not Appropriate and Effective

PHMSA has not introduced any evidence, let alone sufficient evidence, to demonstrate that TGP committed the alleged violation. PHMSA has the burden of proof in a pipeline safety enforcement proceeding of demonstrating that a violation occurred.⁵ This obligation includes the

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'burden of persuasion,' i.e., which party loses if the evidence is closely balanced, and the 'burden of production,' i.e., which party bears the obligation to come forward with the evidence at different points in the proceeding.'3 In a case involving a Notice of Proposed Violation, PHMSA "bears the burden of proof as to all elements of the proposed violation."4

At the hearing, PHMSA asserted its position that aerial surveys are only allowed if they are "appropriate and effective." See, e.g., Ex. A, Tr. at 42:8-10; 52:14-18. However, PHMSA provided no evidence whatsoever that TGP's existing Aerial Surveys for leak detection under Part 192.706 are not "appropriate and effective." Indeed PHMSA's case is based on supposition and conjecture that "an aerial vegetation survey isn't appropriate or effective in detecting a leak from a pipeline when it runs under, as was noted in the violation report, a parking lot, simply because you can't see soil, you can't see leaves, trees or anything." Ex. A, Tr. at 12:6-11. When asked by the Hearing Officer if they had any evidence that aerial patrols were not effective, PHMSA provided one example of a leak caused by third party damage in West Virginia that traveled under pavement and caused a grocery store to explode a few hours later. Ex. A, Tr. at 63:16-25; 64:1-6. As the Hearing Officer noted, that was a short term leak. Thus, it seems unlikely that this leak that manifested serious consequences would have been caught by an annual leak survey. PHMSA was unable to provide any other evidence to support its case, beyond that one irrelevant example. Therefore, PHMSA has simply not met its burden of proving by a preponderance of the evidence that TGP violated Part 192.706 as alleged.

V. TGP Offered Persuasive Evidence Demonstrating that a Violation of 49 C.F.R. §192.706 Has Not Occurred

In contrast to PHMSA’s lack of evidentiary support for its allegations, and even though TGP does not bear the burden of proof, the company nevertheless offered strong, unrefuted evidence at the hearing demonstrating the effectiveness of its leak detection program. Indeed at the hearing TGP noted that it had not had a leak in Connecticut for 17 years. Ex. A, Tr. at 35:12-15. In addition, TGP provided evidence that:

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measures were required under regulations); In re ANR Pipeline Co., Final Order CFP No. 3-2011-1011, 2012 WL 7177134, at *3 (D.O.T. Dec. 31, 2012) (PHMSA recognizes that it “bears the burden of proof as to all elements of the proposed violation[,]”) . And, of course, any final agency action must be supported by substantial evidence. 5 U.S.C. § 706(2)(E).


4 In re ANR Pipeline Co., Final Order, CFP No. 3-2011-1011, 2012 WL 7177134, at *3 (D.O.T. Dec. 31, 2012) (PHMSA recognizes that it “bears the burden of proof as to all elements of the proposed violation[,]”) ; see also In re CITGO Pipeline Co., Decision on Petition for Reconsideration, CFP No. 4-2007-5010, 2011 WL 7517716, at *5 (D.O.T. Dec. 29, 2011) (noting that “OPS bears the burden of proof in an enforcement action and must prove, by a preponderance of the evidence, that all of the elements necessary to sustain a violation are present in a particular case.").

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• TGP odorizes its pipeline in New England (East of West Winfield, NY and North of Clifford, PA), Ex. A, Tr. at 20:16-24;
• TGP responds to “odor” complaints received and 99.999% of the time it is the result of an LDC leak and not a leak on the TGP system, Ex. A, Tr. at 27:3-18;
• TGP conducts aerial leak surveys approximately every 2 weeks in the New England area between April through October and then monthly from November through March, Ex. A, Tr. at 23: ll 1-4;
• Aerial surveys would reveal any signs of erosion, blowing material or sunken backfill indicating a leak along the line, Ex. A, Tr. at 57:15-25; 58:1;
• In the four locations noted in the NOPV, the photographs illustrate that there is vegetation close to the pipeline in all cases and, in the event of a leak, the gas would migrate to the nearby vegetation and would seek to escape there, Ex. A, Tr. at 30-35;
• If the pilot cannot see the right of way (ROW) due to a tree canopy, the pilot notes that in the report and TGP personnel then walk that portion of the ROW, Ex. A, Tr. at 24:20-25; 25:1;
• TGP personnel are trained to recognize gas leaks when they are performing duties on the pipeline and they respond to any gas odor calls within the vicinity of the pipeline, Ex. A, Tr. at 27:13-14; and
• TGP personnel are in the vicinity of the four locations noted in the NOPV and shown in the photographs viewed at the hearing at least annually to monitor test leads and have never detected a leak in this area. Ex. A, Tr. at 31-34 and Exhibit 1 to TGP pre-hearing brief.

Based on the above, TGP’s existing leak detection of aerial visual observation (erosion, blowing material and vegetation) to conduct leak surveys in transmission pipelines with odorized gas is not only consistent with the regulatory requirement but is also “appropriate and effective” in accordance with the guidance.

VI. PHMSA’s New Enforcement Interpretation is Arbitrary, Capricious and an Abuse of Discretion

Should a reviewing court determine that Part 192.706 is ambiguous, it would then look to see whether PHMSA provided fair notice of its interpretation of the regulation to the regulated community and if not, it would overrule the new interpretation as being arbitrary and capricious. Pursuant to the Administrative Procedure Act (APA), a regulation must provide a regulated entity with fair notice of the obligations it imposes and be issued pursuant to notice and comment rulemaking. 5 U.S.C. § 554(b). Fair notice requires the agency to have “state[d] with ascertainable certainty what is meant by the standards [it] has promulgated.” ExxonMobil Pipeline Co v. U.S. DOT, No. 16-60448, 2017 U.S. App. LEXIS 15144 (5th Cir. Aug. 14, 2017) (citing Diamond Roofing Co., 528 F.2d at 649). When one applies the legal standard to PHMSA’s statements regarding 192.706, it is clear that the failure to withdraw the NOPV in this instance would be arbitrary and capricious.

Over the course of the history of Part 192.706, PHMSA has made but a handful of statements regarding how it should be interpreted, all of which indicate that whether or not the line is odorized is a key consideration and that aerial patrols are an acceptable method of leak
detection for odorized lines. In the preamble to the final rule, PHMSA expressly stated that aerial patrols were sufficient when it said “[n]either 192.705 nor 192.706 specifies how patrols or leakage surveys are to be accomplished. The rules are written in performance language. Thus, for example, both aerial patrols and aerial leakage surveys would be acceptable where they are appropriate and effective.” Final Rule, 40 Fed. Reg. 20279, 20282 (May 9, 1975), see Exhibit 4 to TGP pre-hearing brief.

PHMSA acknowledged the limitations of aerial patrols and yet did not state that they were an unacceptable method of conducting leak surveys in areas with odorized gas. Specifically the agency stated:

OPS considers the use of leak detection devices to provide the most satisfactory means of protection in the absence of odorization for the following reasons. Without instruments, gas leaks are detected by sight, sound, smell or by dying vegetation. However, most leaks are not visible or audible, and without an odorant natural gas cannot be detected by smell. It follows that observing vegetation is not always effective. The effect of a gas leak on vegetation is only noticeable during the growing season; and a leak must exist for a long time to have noticeable effect on vegetation.

Id.

In contrast, PHMSA expressly required an alternative method to visual aerial surveys for transmission lines in Class 3 and 4 locations with unodorized gas because “to conduct leakage surveys [without odorized gas] without using detector equipment would not yield a level of safety comparable to that provided by odorization of gas.” The agency also states that “…leakage surveys using leak detector equipment must be conducted under 192.706 as an alternative safety measure except where gas is odorized…” Id. at 20283 (emphasis added).

It is particularly notable that the proposed rule would have required leak detection equipment in Class 4 locations even where gas is odorized, but PHMSA revised its position in the final rule stating clearly, “[t]he final rule does not require the use of detector equipment in Class 4 locations where transmission lines carry odorized gas.” Exhibit 4 to TGP Pre-hearing brief, Final Rule, 40 Fed. Reg. 20282 (May 9, 1975).

Since adoption of the final rule, PHMSA has made a few additional statements about the Part 192.706 requirements which again reaffirm that the Operator has the discretion to decide what method of leak detection it should use and that visual aerial patrols in areas with odorized gas are acceptable. The specific references are:

- PHMSA’s Part 192 Operation & Maintenance (O&M) Enforcement Manual provides that the “regulations do not mandate the use of any specific type of detection equipment.” PHMSA Part 192 O&M Enforcement Manual, Part 192.706, see Exhibit 6 to TGP pre-hearing brief.

- In an interpretation letter issued in 2009, PHMSA clearly states that “an operator
could potentially utilize an alternate leak patrol method such as an over-the-line vegetation survey in Class 1 and Class 2 locations and for transmission lines with odor or odorant in Class 3 and Class 4 locations if it can be shown to be an effective means of patrolling for indications of leaks.” *PHMSA Interpretation P1-09-0018, Letter from J. Gale (PHMSA) to B. Wald from (Nov. 5, 2009), see Exhibit 5 to TGP pre-hearing brief.* PHMSA notes in the letter that in locations without vegetative cover such as road crossings, paved areas, dead soil areas with no vegetation, and other such areas, “additional leakage survey methods [other than vegetation surveys] potentially involving leak detection equipment would be necessary.” *Id.* (emphasis added).

Finally, while not expressly with regard to leak surveys, in the preceding regulation, Part 192.705 which addresses patrolling the right-of-way, PHMSA has expressly provided that “methods of patrolling including walking, driving, flying or other appropriate means of traversing the right-of-way.” It is noteworthy, while this regulation is not in regard to leak surveys specifically, that 192.705(a) does state that patrolling is to “observe ... for indications of leaks” and this is further regulatory evidence that flying the right-of-way is acceptable.

As detailed above, every statement that PHMSA has made leads operators to the reasonable conclusion that aerial surveys are appropriate in odorized areas. PHMSA has never said that aerial surveys are prohibited in any area with a hard top surface. PHMSA’s new assertion in the NOPV and at the hearing that Part 192.706 requires odorized transmission pipelines in any area where there is pavement and cement, no matter how small, to employ a different method of leak survey other than aerial patrol constitutes regulation without due process and fair notice. *See Ex. A, Tr. at 51:6-13.*

To the extent that PHMSA reads its limited guidance documents as requiring a particular method of leak detection for odorized pipelines, that reliance is misplaced. The APA clearly requires that a regulation must provide a regulated entity with fair notice of the obligations it imposes and be issued pursuant to notice and comment rulemaking. *5 U.S.C. § 554(b).* The Attorney General for the United States recently reminded his Department (and others) of the importance of notice and comment rulemaking and that the Constitutional principal of due process and the Administrative Procedure Act limit the role that agency guidance can play. *Memorandum For All Components From The Attorney General, Subject: Prohibition on Improper Guidance Documents, November 16, 2017, attached as Exhibit XX.* The lead lawyer for the United States stated that: “guidance may not be used as a substitute for rulemaking and may not be used to impose new requirements on entities outside the Executive Branch. Nor should guidance create binding standards by which the Department will determine compliance with existing regulatory or statutory requirements.”) Put another way, it would be arbitrary and capricious for PHMSA to create a new requirement to conduct specific types of leak detection given the clear language of the regulation.

**VII. The Evidence Also Reveals that Other Operators Are Unaware of PHMSA’s New Enforcement Interpretation**
A. Polled INGAA Members Share TGP’s Interpretation of 192.706

TGP requested INGAA informally poll its membership to determine how other operators interpret the requirements of 192.706. At the hearing, PHMSA requested that TGP provide more specifics on the interaction.\(^5\) TGP’s specific question was “We are asking that you poll the INGAA members to see if they conduct instrumented leak surveys (either in addition to or in place of visual inspections) at intervals not to exceed 15 months in areas where vegetation does not exist such as parking lots and where the pipeline gas is odorized?” The majority of this meeting’s participants indicated that they do not have procedures to address this issue. While Enbridge noted that it had received enforcement action from PHMSA, it was in the form of a NOA that was issued six months after the OPS inspection.\(^6\)

B. Voluntary Standards are Not a Substitute for Fair Notice

During the Hearing, PHMSA counsel also cited the Guide for Gas Transmission, Distribution, and Gathering Piping System (Addendum 8, 2017 to the 2015 Edition) (“GPTC Guide”) as reference materials in addition to PHMSA interpretations that a visual survey is not adequate where vegetation growth is not firmly established. The GPTC Guide specifically notes that “The guide material is advisory in nature and contains guidance and information for consideration in complying with the Regulations. As such, it is not intended for public authorities or others to adopt the Guide in mandatory language, in whole or in part, in laws, regulations, administrative orders, ordinances, or similar instruments as the sole means of compliance.”\(^7\) See Transcript, pp. 45-46 and Pg. 676 (Section 4) of the GPTC Guide. The GPTC Guide includes a letter on pg. xxxiii from PHMSA expressly recognizing that the GPTC Guide is “advisory in nature” on how to comply with the Federal pipeline safety standards.

The GPTC Guide does not create a new requirement or provide clear standards on when to conduct a survey other than a vegetation survey. Section 4.4(c) (3)(i) provides that “[t]his [vegetation] survey method should be limited to areas where adequate vegetation growth is firmly established.” As discussed above, in the four locations noted in the NOPV, there is vegetation close to the pipeline in all cases and, in the event of a leak, the gas would migrate to a point where it can escape which likely would be where vegetation is present. Ex. A, Tr. at 24:3-6; 30:3-21. In addition to dead vegetation, TGP checks for signs of erosion, blowing material, or sunken backfill over or near the pipeline which would indicate a potential leak along the pipeline. These aspects of TGP’s survey patrol are in addition to the features noted in the procedure in Section 4.4(c)(2). Lastly, the survey procedures defined in Section 4.4(c) of the GPTC Guide do not factor in whether the transmission line is odorized.

More relevant to the issue, the presence of an odorant is recognized as negating a pipeline’s need for instrumented leakage survey methodology in PHMSA’s regulation, 49 CFR 192.706, as additional methods are only specified for pipelines that “transport gas... without an

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\(^{5}\) During the Hearing, PHMSA counsel requested TGP to provide the exact question posed to INGAA Membership. See Transcript, pp. 62.


odor or odorant.” Odorized pipelines require only a leakage survey once each calendar year at intervals not exceeding 15 months with the regulation not specifying a method for accomplishing the survey. The language of the regulations, associated rulemakings, enforcement or interpretative guidance does not limit the type of leakage survey available in areas where the line is odorized.

VIII. PHMSA’s Opportunity to Supplement Post-Hearing is Arbitrary, Capricious and an Abuse of Discretion

During the Hearing, PHMSA counsel stated its intent to supplement the record as part of its Post-Hearing Brief. See Transcript, pp. 67. The Hearing Officer stated that he would not “mandate” that, but went on to say that PHMSA should “provide some explanation in [its] ... post hearing document whether there is or is not this enforcement history elsewhere or in other regions .... [as] that might be relevant.” Id. TGP stated its objection at the Hearing to permitting PHMSA to introduce new evidence (whether enforcement history or otherwise) as part of its Post-Hearing submission, to which the Hearing Officer responded that he would “allow it because it’s factual information that anyone can get in a [FOIA] request and enforcement history.” Id. at pp. 68.

To the contrary, regardless of whether “it is factual information that anyone can get,” the burden was on PHMSA to introduce that information before or during the Hearing. PHMSA was well advised by TGP’s Request for Hearing submission and Pre-Hearing Brief as to the nature of Respondent’s arguments. PHMSA’s own regulations contemplate that the parties may only submit “written material” after a Hearing in 49 C.F.R. Part 190.711(g), which is distinct and considerably more narrow than the “facts, statements, explanations, documents, testimony or other evidence that is relevant and material to the issues under consideration” permitted in the Hearing itself, as set forth in 49 C.F.R. Part 190.211(e) (emphasis added). 8

Further, it is well established under the APA and its case law that reviewing courts must “disregard any post hoc rationalizations of ... [an agency’s] action and evaluate it solely on the basis of the agency’s stated rationale at the time of its decision.” Luminant Generation Co., L.L.C. v. E.P.A., 675 F. 3d 917, 925 (5th Cir. 2012); see also United States v. Keystone Sanitation Co., 1996 U.S. Dist. LEXIS 22808, at *14–15 (M.D. Pa. 1996) (“The general rule that an agency may not supplement the administrative record after its decision is issued is designed to prevent an agency from adding documents which, although not considered in the decision-making process, bolster its ultimate determination.”). In the context of reviewing administrative agency enforcement proceedings, agencies have been prohibited from supplementing the record where the information was available at the time of the hearing. See, e.g., Kopp v. Dept. of Air Force, 33 M.S.P.R. 629, 629 (1987) (“Having elected to proceed without attempting to introduce [certain] evidence, the agency may not at this stage seek to supplement the record with evidence that was available to it at the time of the hearing.”). Accordingly, to allow PHMSA to submit

8 Notably, TGP complied with this standard during the hearing, by introducing additional evidence – informal survey information obtained from other industry members of INGAA – that was relevant and material to the issues under consideration and allowed PHMSA the opportunity to respond. Nothing was to prevent PHMSA from doing the same at the hearing.
supplemental information to the Hearing Officer which was not considered when the Agency issued the NOPV and was not part of the Hearing, whether or not TGP is allowed an opportunity to respond, is akin to inviting PHMSA’s post hoc rationalization and is both an abuse of discretion and arbitrary and capricious under the APA. 5 U.S.C. §706(2)(A).

IX. Request for Relief

For the reasons identified in this Pre-Hearing Brief, in TGP’s Request for Hearing Filing, and in consideration of other matters as justice may require, the Company respectfully requests that PHMSA withdraw or the Hearing Officer recommend dismissal of Item 2 of the NOPV, including the associated items of the Proposed Compliance Order.

Respectfully submitted,

By: Jessica Toll, Esq.
370 Van Gordon Street
Lakewood, CO 80228
(303) 914-7630
jessica_toll@kindermorgan.com
Counsel for Tennessee Gas Pipeline Company, L.L.C.

Date: July 25, 2018

List of Exhibits

A. Hearing Transcript – June 12, 2018
B. Pre-Hearing Brief – June 4, 2018