

In the Matter of)	
)	
Tennessee Gas Pipeline Company)	CPF No. 1-2018-1001
)	Notice of Probable Violation
Respondent.)	
)	

**Respondent's
Pre-Hearing Written Submittal**

I. Introduction

Only one issue is presented by this Request for Hearing: whether odorized transmission pipelines are required to employ instrumented leak detection equipment in locations where vegetation does not exist, such as paved areas. There is no express law to support that leakage surveys of odorized pipelines require the use of such equipment, and the preambles to the relevant rulemaking suggest that aerial surveys are, in fact, adequate. Yet the Notice of Proposed Violation (NOPV) issued in this matter alleges otherwise, alleging a violation of 49 C.F.R. Part 192.706 and proposes associated Compliance Order provisions. Given that Respondent Tennessee Gas Pipeline Company, L.L.C. (TGP or the Company) goes beyond federal requirements to odorize all of its mainlines in New England regardless of class location and performs aerial surveys approximately 15 more times per year than required by the regulation, the allegation that TGP fails to properly conduct leak detection surveys is baseless and unfounded.

The Pipeline Hazardous Materials Safety Administration (PHMSA) issued a Notice of Probable Violation, Proposed Civil Penalty and Proposed Compliance Order (collectively, the NOPV) on February 13, 2018, to Tennessee Gas Pipeline Company, L.L.C. (TGP or the Company) alleging two probable violations. The NOPV arose from an inspection conducted by the Connecticut Department of Energy and Environmental Protection (CT DEEP), acting as an agent for PHMSA, of TGP records in Connecticut from May 9-11, 2017.

As noted in the Company's Response and Request for Hearing, Preliminary Statement of Issues, and Request for Documents submitted to PHMSA on March 15, 2018, TGP (1) neither admitted nor contested Item 1 of the NOPV, alleging a violation under 49 C.F.R. Part 192.616 (regarding public awareness obligations) and agreed to pay the Proposed Civil Penalty; and (2) timely contested the alleged violation under 49 C.F.R. Part 192.706 regarding leakage surveys, and requested an in-person Hearing on the alleged violation and withdrawal of the associated Proposed Compliance Order.

PHMSA issued a Notice of Hearing for June 12, 2018, in West Trenton, New Jersey, and set a deadline of June 4, 2018 for submission of Pre-Hearing materials. In advance of the Hearing, TGP timely files this Pre-Hearing Brief and associated exhibits, and reiterates its

request that PHMSA withdraw NOPV Item 2 and the associated Compliance Order provisions because TGP's practice of conducting leakage surveys and patrols in paved areas is both effective and in compliance with the federal regulations at 49 C.F.R. Part 192.706 as well as TGP's own procedures.

II. Factual Background

Following its May 2017 inspection, CT DEEP alleged that TGP failed to conduct leakage surveys of a transmission line at least once each calendar year, not exceeding 15 months, pursuant to 49 C.F.R. Part 192.706. In particular, CT DEEP claims that TGP's use of aerial leak surveys in paved areas is ineffective.

The CT DEEP inspector observed four portions of TGP's transmission line system that travels under paved areas where no vegetation exists, as set forth in the NOPV. These four portions of TGP's transmission line system are odorized pipelines. TGP confirmed to the CT DEEP inspector that the Company does not perform any instrumented leak surveys in these areas, but instead uses visual, aerial surveys to check for signs of a release such as blowing material and relies on the odorant in the pipeline in question to assist with leak detection.

TGP's procedure for leak detection, O&M 215, *Patrolling and Leak Detection*, Revised 2017-02-01 (Procedure) states in part:

3.5...Conduct leakage surveys by walking, driving, flying or using a water vehicle. Note on the inspection report any construction activity, signs of erosion or sunken backfill and dead vegetation indicating leaks.

For pipelines that transport gas without an odor or odorant, use continuous gas monitoring (e.g. flame ionization, Remote Methane Leak Detector, or other leak detection equipment approved by the Technical Services Managers) equipment when:

- *Surveying Class 3 and 4 areas*
- *Conducting leak surveys at highway and railroad crossings*

Exhibit 1, TGP O&M 215, Patrolling and Leak Detection (rev. Feb. 1, 2017), Section 3.5.

As an initial matter, TGP odorizes all its mainline transmission pipe in New England (East of West Winfield, NY and North of Clifford, PA) regardless of class location. By doing so, TGP has implemented the most effective method of leak detection in all of Eastern Pennsylvania, New Jersey, Eastern New York, Connecticut and New England.

TGP also conducted the leakage surveys at the appropriate intervals. In fact, TGP's aerial survey's greatly exceed the regulatory requirement of not exceeding 15 months, but at least once each calendar year, in 49 C.F.R. Part 192.706. Rather than once per quarter, TGP conducts an aerial patrol approximately every 2 weeks in the New England area between April through October and then monthly from November through March *Exhibit 2, Kinder Morgan leak survey flight and aerial excel records (PHMSA Pipeline Safety Violation Report (PSVR) Exhibits A-12 and A-13); Exhibit 3, Summary of TGP Aerial Survey FY 2017 (for areas at issue in NOPV Item 2).* Aerial surveys would reveal any signs of erosion, blowing material, or sunken

backfill indicating a leak along the line. 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. Additionally, 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.

III. PHMSA Regulations 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 in certain areas to employ instrumented leak detection equipment is incorrect and is without support in the plain language of the regulations, associated rulemakings, enforcement or interpretive guidance. The regulations 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 only 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, PHMSA was explicit about this fact in the final rule, stating that "neither 192.705 nor 192.706 specifies how patrols or leakage surveys are to be accomplished. The rules are written in performance language." *Exhibit 4, Final Rule, 40 Fed. Reg. 20279, 20282 (May 9, 1975).* Additionally, the preamble to the Final Rule expressly states that the very method employed by TGP in the leakage surveys at issue is acceptable: "both aerial patrols and aerial leakage surveys would be acceptable where they are appropriate and effective." *Id.*

Part 192.706 was promulgated in order to "require that transmission lines be patrolled and surveyed for leaks on the basis of class location and whether the lines carry odorized gas." *Id. at 20279.* As noted above, the four portions of TGP's transmission line system at issue in this NOPV are odorized pipelines. The very purpose of odorized gas, as stated by PHMSA's predecessor agency, is to facilitate the early detection of leaks by the public. *Notice of Proposed Rulemaking, 38 Fed. Reg. 22044 (Aug. 15, 1973); Final Rule, 40 Fed. Reg. 20282 (May 5, 1975)* ("Odorization allows the early detection of leaks in open air by the public..."); *see also Final Order, In the Matter of ANR Pipeline Co., CPF No. 3-2007-1006, at 6 (Dec. 4, 2009)* ("Persons in the vicinity of a gas leak will generally be able to smell the gas if it is odorized, which increases the opportunity for early detection and abatement of risk. To address this concern, PHMSA established 'a general requirement for odorization of gas in transmission lines in Class 3 and Class 4 locations.'" (quoting 1973 Notice of Proposed Rulemaking and 1975 Final Rule)). In short, odorization allows both the operator and the public the ability to detect leaks 24 hours a day, 7 days a week, 365 days a year. *Final Rule at 20282* ("OPS believes that the record is clear—a large number of gas leaks, including leaks on transmission lines, have been detected by people smelling odorant in open air.").

The Final Rule also provides clarification that the intent of odorized gas is to provide a level of safety equal to using leak detector equipment for determining the presence of leaks by emphasizing the need for additional surveys where gas is not odorized:

Gas detector surveys were proposed under 192.706 to provide a compensatory measure of protection for the public where transmission lines carry unodorized gas in Class 3 and Class 4 locations. ... In the opinion of OPS, to conduct leakage surveys without using detector equipment would not yield a level of safety comparable to that provided by odorization of gas.

Final Rule, 40 Fed. Reg. at 20282. The agency goes on to note that it is in “the absence of odorization” that leak detection devices provide adequate means of protection because “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.” *Id.* 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). Further, 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, Final Rule, 40 Fed. Reg. 20282 (May 9, 1975).*

The preamble makes only one solitary reference to paved areas in conjunction with leak detection equipment regarding the *absence of odorization*; not paved areas where the gas is odorized. *Id.* In that one reference, the Agency emphasizes that it is those areas without odorization where leak detector equipment may be necessary:

OPS considers the use of leak detection devices to provide the most satisfactory means of protection in the absence of odorization. Further, many areas subject to the exceptions [from odorization]... have a large amount of pavement and a sparse amount of vegetation. For these reasons, a requirement for using detector equipment is adopted.

Id. (emphasis added).

Moreover, PHMSA’s Notice of Proposed Rulemaking, “Pipeline Safety: Safety of Gas Transmission and Gathering Pipelines” that was issued on April 8, 2016 (NPRM), provides additional support for the fact that instrumented leak surveys are not currently required for odorized transmission pipelines under 49 C.F.R. Part 192.706, and further PHMSA is not proposing that they should be. *81 Fed. Reg. 20,722 (Apr. 8, 2016).* The term “instrumented leak surveys” is not currently used in Part 192 or defined in the NPRM, and it is used in the NPRM outside of the context of Part 192.706 (e.g., at proposed Part 192.624 (to require instrumented leak surveys as part of a method for establishing and confirming maximum allowable operating pressure for pipelines operating below 30% specified minimum yield strength) and proposed Part 192.935(d)(3) (revisions to preventative and mitigation measures under the integrity management program)). *Id. at 20836, 20846, 20856.*

No other PHMSA regulation, enforcement, or other interpretive guidance exists to support PHMSA’s proposition that instrumented leak detection equipment must be employed in

lieu of other effective leakage survey methods on odorized pipelines.¹ PHMSA's own Part 192 Operation & Maintenance (O&M) Enforcement Manual cites to the only PHMSA interpretation on point, which supports TGP's position, clearly stating 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." *Exhibit 5, PHMSA Interpretation P1-09-0018, Letter from J. Gale (PHMSA) to B. Wald from (Nov. 5, 2009)*; *Exhibit 6 PHMSA Part 192 O&M Enforcement Manual, Part 192.706* (noting also that the "regulations do not mandate the use of any specific type of detection equipment"). 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).

Given that these lines are odorized, allowing for detection by either TGP or the public at any time, instrumented leak detection equipment is not warranted. This is consistent with Kinder Morgan's understanding of the industry's practice as well. Based on an informal poll of members of an industry trade group, TGP understands that most transmission operators do not maintain procedures requiring instrumented leak detection equipment in areas where paving covers pipelines carrying odorized gas nor do they routinely use gas detection equipment in areas with odorized gas. Based on the above, TGP's procedure prescribes visual observation (erosion, blowing material and vegetation) to conduct leak surveys in all transmission pipelines that are not odorized in a manner consistent with PHMSA regulations and guidance. Accordingly, TGP procedures appropriately require that leak surveys be performed by "walking, driving, flying or using a water vehicle." *Exhibit 1, TGP O&M 215, Patrolling and Leak Detection (rev. Feb. 1, 2017), Section 3.5*. TGP goes above and beyond the federal requirements by odorizing all of the gas in New England and conducting aerial patrols at a greater frequency than required by the regulations. As such, TGP's procedure complies fully with PHMSA's regulations Part 192.706.

IV. PHMSA's New Enforcement Interpretation is Arbitrary and Capricious

PHMSA's assertion in the NOPV that Part 192.706 requires odorized transmission pipelines in certain areas to employ instrumented leak detection equipment constitutes regulation without due process and fair notice. Such a change to the plain language of 192.706 must be issued through the notice and comment rulemaking process mandated by the Administrative Procedure Act, and due process requirements under the U.S. Constitution. 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.*

¹ While PHMSA has issued one Notice of Amendment in response to another inspection conducted by the CT DEEP which alleged similarly inadequate procedures, that action has no relevance here given that (1) PHMSA issued the Notice of Amendment under a different regulatory provision, Part 192.605, and (2) the operator *already had a practice in place* of using leak detection equipment in areas where it considered vegetation survey was impractical. See *PHMSA Notice of Amendment, CPF 1-2017-1019M, issued to Algonquin Gas Transmission, L.L.C. (Dec. 5, 2017)*. It is interesting to note that PHMSA has not issued any enforcement on this subject outside of issues raised by CT DEEP.

Aug. 14, 2017) (citing *Diamond Roofing Co.*, 528 F.2d at 649). By accepting PHMSA's contention that TGP has violated Part 192.706, the Agency would be acting in a manner that is "arbitrary, capricious an abuse of discretion, or otherwise not in accordance with law" or is "unsupported by substantial evidence." 5 U.S.C. § 706(2)(A), (E). The fact that most other INGAA members TGP polled have the same interpretation of the requirements of 192.706 as does TGP is evidence of the fact that notice of PHMSA's new interpretation has not been provided.

Moreover, the blanket assertion that instrumented leak detection equipment is required in paved areas (where the gas is odorized) is, in and of itself, vague and does not provide fair notice of the length of paving necessary to trigger this requirement. TGP cannot determine from the NOPV if instrumented leak detection is required over just these four parking lots or is required in other parking lots in this area. For example, without more clarity it would appear that instrumented leak detection "required" would also be required in other paved areas such as roads, driveways and sidewalks. In other words, PHMSA's blanket assertion in an enforcement proceeding that instrumented gas detection is required in these four paved areas undermines the performance based philosophy of PHMSA's rules and flies in the face of the fair notice requirement of due process.

V. NOPV Item 2 and the Relevant Portions of the Compliance Order Should be Withdrawn

As explained above, NOPV Item 2 and the associated provisions in the Compliance Order should be withdrawn in their entirety as a matter of law and fact. As a matter of law, PHMSA's allegation that the regulations require odorized transmission pipelines in certain areas to employ instrumented leak detection equipment is incorrect and without support in the plain language of the regulations, associated rulemakings, enforcement or interpretive guidance. As a matter of fact, TGP conducted leakage surveys at the appropriate intervals, *i.e.*, not exceeding 15 months, but at least once each calendar year, per the requirements of 49 C.F.R. Part 192.706 and TGP's procedures. For those reasons, the proposed Compliance Order provisions at numbered paragraphs 3, 4 and 5 (requiring that TGP "revise its procedures for leak surveys to address methods of survey for areas where vegetation survey is not an effective method of detecting leaks," implement those within 60 days of PHMSA's acceptance and provide records confirming compliance) are not warranted and should be withdrawn.

VI. If Not Withdrawn, NOPV Item 2 Should Have Been Alleged as a Single Notice of Amendment

Notwithstanding the unambiguous language of the regulation, the preamble to the Final Rule, and available guidance, the NOPV is also procedurally flawed. If not withdrawn, Item 2 should have been issued as a Notice of Amendment. This alleged violation is precisely the type of alleged procedural inadequacy that PHMSA guidance indicates should be issued as a Notice of Amendment. *Exhibit 7, PHMSA Pipeline Safety Enforcement Procedures, Section 3.1.3.1, at p. 5 (Jun. 29, 2017)* (noting the example where "procedures provide instructions for compliance in a vague, general or conflicting manner that offers little or no practical or meaningful guidance"). Moreover, PHMSA has issued at least one NOA for failure to include the use of leak detection equipment in the operator's procedure where the operator had a practice of doing

so. See e.g., PHMSA Notice of Amendment, CPF 1-2017-1019M, issued to Algonquin Gas Transmission, L.L.C. (Dec. 5, 2017) (discussed in f.n. 1).

VII. 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,



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Date: June 4, 2018

List of Exhibits

1. TGP O&M 215, Patrolling and Leak Detection (rev. Feb. 1, 2017), Section 3.5
2. Kinder Morgan leak survey flight and aerial excel records (PHMSA Pipeline Safety Violation Report (PSVR) Exhibits A-12 and A-13)
3. TGP Summary of Aerial Patrol Surveys FY 2017 (for areas at issue in the NOPV)
4. Final Rule, 40 Fed. Reg. 20283 (May 9, 1975)
5. PHMSA Interpretation P1-09-0018, Letter from J. Gale (PHMSA) to B. Wald from (Nov. 5, 2009)
6. PHMSA Part 192 O&M Enforcement Manual, Part 192.706
7. PHMSA Pipeline Safety Enforcement Procedures, Section 3.1.3.1 (Jun. 29, 2017)