

**Before the
U.S. Department of Transportation
Pipeline and Hazardous Materials Safety Administration
Office of Pipeline Safety
Washington, D.C.**

_____)	
In the Matter of)	
)	CPF No. 1-2019-5006
Sunoco Pipeline, L.P.)	Notice of Probable Violation
)	
Respondent.)	
_____)	

**Sunoco Pipeline, L.P. Mariner East Pipeline System
Pre-Hearing Brief**

I. Introduction

The Pipeline and Hazardous Materials Safety Administration (PHMSA or the Agency) issued a Notice of Probable Violation (NOPV) and Proposed Compliance Order (PCO) to Sunoco Pipeline, L.P. (SPLP or the Company) on May 17, 2019 following inspections and discussions regarding SPLP’s Mariner East pipeline system in Pennsylvania. This matter presents two straightforward questions: (1) whether the specified minimum yield strength (SMYS) of the GRE pipeline is “known” under 49 C.F.R. Part 195.106 (NOPV Item 1); and (2) whether SPLP “considered” tailoring its communications coverage area to certain highly volatile liquids (HVL) pipeline locations and release consequences under API RP 1162 as incorporated by 49 C.F.R. Part 195.440(c) (NOPV Item 2).

As set forth below, SPLP believes that the factual evidence and legal requirements support the Company’s position that the SMYS of the GRE pipeline is “known” and that it properly “considered” tailoring its communication coverage area. Further, if the allegations are maintained in a Final Order, they would violate fundamental requirements of due process and fair notice. For these reasons, the NOPV and PCO should be withdrawn in their entirety.

SPLP timely requested a hearing under 49 C.F.R. Parts 190.208 and 190.211 and a pre-hearing settlement conference. The parties convened a settlement conference on August 28, 2019 in West Trenton, New Jersey during which SPLP believed the parties were in agreement that the efforts undertaken with respect to the issues raised in Items 1 and 2 were satisfactory to the Agency. Despite that progress, PHMSA nevertheless elected to proceed to a Hearing on both NOPV Items. PHMSA subsequently issued a Notice of Hearing for November 7, 2019 in West Trenton, New Jersey and set a deadline of October 28, 2019 for submission of prehearing materials.

In advance of the Hearing, SPLP timely files this pre-hearing brief and supporting exhibits reiterating its request that the NOPV be withdrawn in its entirety, including the PCO.

II. Background

A. Mariner East Pipeline System

SPLP's Mariner East pipeline systems transport natural gas liquids (NGL) from the Marcellus and Utica Shales areas in Western Pennsylvania, West Virginia and Eastern Ohio to destinations in Pennsylvania. Mariner East 1 (ME1) transports interstate and intrastate (Pennsylvania) propane and ethane service. Mariner East 2 (ME2) and Mariner East 2 Expansion (ME2X) largely parallel ME1 and are still being constructed. Due to certain delays, SPLP repurposed a portion (roughly 25 miles known as the "GRE") of an existing pipeline known as the "12 inch PTBR to MNTL" to serve as a temporary bypass and interconnection between ME2 and ME2X to transport butane and propane. NGLs such as propane, ethane and butane are classified as HVLs under Part 195. The GRE is at issue in NOPV Item 1 and ME2 (inclusive of the GRE) is at issue in NOPV Item 2.¹

To facilitate the temporary flow reversal and change of product on the relevant GRE segment, SPLP voluntarily complied with PHMSA's advisory guidance regarding both MOP substantiation as well as flow reversal and change of product. In addition, and as explained in further detail below, SPLP reviewed material records, performed hydrostatic pressure and spike testing two separate times without failure, and conducted materials testing.

B. Coordination with Federal and State Agencies

SPLP has coordinated with both PHMSA and the Pennsylvania Public Utility Commission (PA PUC) from the outset of the Mariner East projects and throughout the conversion of ME1 and the construction of ME2 and ME2X as well as the temporary repurposing of the GRE. Specifically, SPLP has engaged in numerous information exchanges, meetings, public hearings, and responses to formal requests for information with agencies and third parties. This engagement included multiple meetings with PHMSA and submissions regarding various topics, including issues relevant to the subject of this Hearing (1) substantiating the MOP of the GRE and (2) detailing the Public Awareness Plan and coverage communications areas (or buffers) and stakeholder mailing information for the Mariner East pipelines.

III. NOPV Item 1: GRE SMYS is Known and Part 195.106(b)(1)(i) is Not Applicable

A. SPLP Complied with Parts 195.106 and 195.406 in Revising MOP

In conjunction with reversing the flow and changing the product of the GRE, SPLP substantiated a MOP of 1,200 psi in compliance with Part 195 using (1) original and historical records confirming the pipe SMYS and (2) hydrostatic pressure and spike testing. In support of its MOP, SPLP has submitted to PHMSA un rebutted evidence that uniformly demonstrates SMYS for the GRE pipe. The pipe SMYS is therefore "known" and there is no regulatory requirement to perform

¹ Once ME2 and ME2X construction is completed, the GRE segment will no longer be used for the transportation of HVLs for ME2 or ME2X purposes and will return to transporting refined petroleum products.

material/tensile testing under Part 195.106(b)(1)(i). Nonetheless, even though not required, SPLP voluntarily performed tensile testing which further corroborated the SMYS.

1. *Part 195.106 Relies on SMYS Unless it is “Not Known”*

The plain regulatory text of Part 195.106(b) is clear that SMYS should be used in the design formula unless it is “not known.” The rule is unambiguous and states the following:

The yield strength to be used in determining the internal design pressure under paragraph (a) of this section is the specified minimum yield strength. If the specified minimum yield strength is not known, the yield strength to be used in the design formula is one of the following [providing for options to identify the yield strength including performing API 5L tensile tests on randomly selected specimens depending on the pipe diameter at 195.106(b)(1)(i)].

While PHMSA does not define “known” in the Part 195 regulations or guidance, the dictionary definition of “known” means “generally recognized.”²

Of particular importance is the grade of pipe under the American Petroleum Institute’s (API) Specifications 5L, 5LS, or 5LX. Knowing the API grade allows the operator, and PHMSA, to determine the minimum yield strength based on tables contained in the API specifications. PHMSA’s predecessor agencies determined SMYS and MOP based on pipe grade,³ and PHMSA itself has looked to grade as a proxy for SMYS when enforcing Part 195.⁴

2. *The GRE Pipe’s SMYS is Uniformly Documented and Corroborated*

By way of background, the GRE pipeline segment was acquired from Atlantic Pipeline Corp. by Sun Pipe Line Company in 1989 (predecessor to SPLP). The pipeline was originally installed by Keystone Pipeline Company in 1937 and constructed with 12.75 inch diameter and 0.375 inch wall thickness API Grade B seamless pipe manufactured by National Tube. Since original construction, maintenance activities and pipeline relocations have replaced approximately half of the 25 miles of GRE pipeline.

Original construction records, historical records from Atlantic Pipeline (prior owner), and inspection records exist for this pipeline that document the original pipe material as purchased from National Tube and installed during construction as Grade B seamless API 5L pipe of 12.75 inches in diameter

² Merriam-Webster defines “known” to mean “generally recognized.” See <https://www.merriam-webster.com/dictionary/known>.

³ See, e.g., *Letter to RL Brown, Shell Oil, PI-71-061* (Jul. 8, 1971) (“Calculating the internal design pressure by the formula contained in Section 195.106, for 6-inch pipe with 0.250 inch wall thickness and *made of Grade B material*, gives an internal design pressure of 1902 psig based on a same joint factor of 1.00.”) (emphasis added).

⁴ See *Final Order, In re: Rose Rock Midstream, LP, CPF No. 4-2016-5005 at p. 4* (Mar. 2, 2017) (noting that “PHMSA requested documentation supporting the indicated pipe grade” as evidence to support a change in the listed SMYS).

and with a wall thickness of 0.375 inches. Grade B correlates to a SMYS of 35,000 psi.⁵ All of these documents have been provided or have been made available to PHMSA.⁶ These records include pipe specification information such as seam type, pipe grade, wall thickness and diameter, among other information.

In addition to routine operation and maintenance activities, the pipeline has been repeatedly and thoroughly assessed through multiple inline inspections, in 1979, 1990, 1993, 1996, 2001, 2004, 2007, 2012, 2016 and again in 2018. As required by Part 195, relevant anomaly conditions were remediated, including excavation, evaluation and repair of the pipeline as needed. The pipeline was also twice hydrostatically pressure tested and spike tested in 2017 and 2018 without failure and with no sign of yielding. All of these activities have confirmed that the pipe is Grade B. Put another way, nothing in the pipeline's operation, maintenance or integrity management history has called into question the pipe characteristics. PHMSA's statement to the contrary in the NOPV is simply inaccurate and without support.⁷ Because SMYS is known, 49 C.F.R. Part 195.106(b)(1)(i) is not applicable. Therefore, the regulations do not require any tensile testing to be performed.

3. *Part 195 Does Not Require MTRs, Nor Did They Exist When the GRE Pipe Was Manufactured*

The Agency has no rational basis for excluding SPLP's documentation that clearly confirms the pipe as Grade B, which has a SMYS of 35,000 psi. In the NOPV, PHMSA notes that SPLP's "documentation did not incorporate material testing reports (MTRs), purchase orders or other material certification reports." *NOPV*, p. 3. Notably, Part 195 does not require that operators maintain MTRs, purchase orders, or other material certification records. In fact, these terms do not even appear in the Part 195 regulations. Nothing in the rules limit evidence of SMYS to these

⁵ Exhibit 1, *Gas Research Institute, Development of the B31.8 Code and Federal Pipeline Safety Regulations: Implications for Today's Natural Gas Pipeline System 98-0367-1 at p. 1 (1998)* ("[A]t that time (1935)[,] API Standard 5L (currently referred to as API Specification 5L) . . . Grade B pipe, . . . ha[d] a SMYS of 35,000 pounds per square inch[.]").

⁶ Exhibit 2, *12 PTBR-MNTL Keystone Pipeline Specifications (Sept. 9, 1937)* (original project construction specifications, describing the pipe on Page 2 under "Pipes, Valves, and Fittings" as 12" pipe weighing 49.562 pounds per foot); Exhibit 3, *Letter to National Tube (Sept. 14, 1937)* (letter to pipe manufacturer National Tube from Keystone Pipeline Company discussing pipe tallies being shipped); Exhibit 4, *12 PTBR-MNTL National Tube Pipe Shipments (Mar. 31, 1937)* (letter from construction contractor detailing pipe shipments from National Tube in 1937); Exhibit 5, *Keystone Pipeline Company Letter (May 28, 1937)* (internal Keystone letter describing information regarding the inspectors on the original installation as well as crossing information); Exhibit 6, *Excerpts, Atlantic Pipeline Line Data and Capacities, Pumping Equipment and Tankage Book (1969)* (including a system map and additional information reflecting historic specifications for the 12" line, as 2" x 0.375wt, Grade B, Seamless pipe with Bell end welds, 1937 install, and a 'Maximum Working Pressure' out of Pt. Breeze of 950 psi); Exhibit 7, *Atlantic Pipe Data Sheet (Dec. 31, 1967)* (handwritten tracking log of the basic pipeline data information which was updated annually and which shows the majority of the line pipe for the 12" PTBR-MNTL line (noted on this sheet as the 12" South Line) as 12.75" x 0.375, 49.56 #/ft, Grade B pipe) (confirmed through interviews with prior Atlantic/SPLP employee); Exhibit 8, *Sun Line Company Line Testing Committee Report for 12 " PTBR-MNTL (1989)* (pipe listed as constructed in 1937, 12 inch, Seamless, Grade B, SMYS 35,000).

⁷ According to the NOPV, "PHMSA's review of integrity management records noted several discrepancies and/or omissions with respect to pipe material records, including validation of pipe grade or [SMYS] for the 1937 vintage pipe that had undergone an MOP upgrade from 950 psi to 1248 psi in 2017."

types of documents, and the Agency has not established that these particular records must be the *only* basis for identifying pipe grade and SMYS. By disregarding the Company’s extensive evidence of pipe grade, PHMSA is effectively requiring evidence of the pipe’s actual yield strength (as demonstrated through testing). But this new requirement reads the words “specified” and “minimum” out of Part 195.⁸

Further, the GRE pipe was manufactured at a time *before* pipe mills even prepared such reports. PHMSA cannot retroactively require an operator of a pipeline that was constructed during a time in which MTRs were not generated or created to maintain those documents because they do not exist nor have ever existed. To do so would impose an *ex post facto* federal law that is expressly forbidden by the United States Constitution in Article 1, Section 9, Clause 3. Further, it would violate the Pipeline Safety Act’s long-standing statutory prohibition on the retroactive application of design and construction standards to pipelines already in existence when such standards are adopted. 49 U.S.C. § 60104(b).⁹ Finally, courts have held that the law cannot command the impossible, including the production of documents that never existed.¹⁰

4. SPLP Pressure Tested the GRE – Twice – to Reconfirm MOP

In addition to review and verification of GRE pipe characteristics, SPLP performed two hydrostatic pressure tests in 2017 and 2018 – without failure – to reconfirm MOP.¹¹ These pressure tests included spike testing in excess of minimum Part 195 requirements.

B. SPLP Followed PHMSA’s Non-Binding Guidance Regarding MOP Substantiation, Flow Reversal and Change of Product

PHMSA has no regulations regarding substantiation of MOP for purposes of integrity verification after a flow reversal and/or change of product. The Agency has likewise not issued any enforcement decision that creates additional requirements for MOP substantiation after flow reversal. In lieu of regulations, the Agency has only issued *non-binding* advisory guidance that includes “recommendations” for substantiating MOP where records may be missing and for pipelines where operators reverse flow, change product or make conversions of service.¹²

⁸ The Agency’s interpretation under Item 1 of the NOPV would also impermissibly amend Part 195 to require operators to keep MTRs. Part 195.404 contains no such requirement.

⁹ *PHMSA Decision on Petition for Reconsideration, In re: Belle Fourche, CPF 5-2004-5010* (Jul. 15, 2009) (withdrawing an alleged violation of Parts 192.406(a)(1) and 195.106 for a pipeline constructed in 1968 and citing PHMSA predecessor agency letter to API dated Oct. 15, 1976 noting the same).

¹⁰ *See, e.g., Evans v. Eaton*, 20 U.S. 356, 413 (1822); *Am. Hosp. Ass’n v. Price*, 867 F.3d 160, 168 (D.C. Cir. 2017).

¹¹ Exhibit 9, *Justification of 12” Glen Riddle Junction to Elverson Junction Pressure Test Plan* (Sep. 27, 2018).

¹² Exhibit 10, *PHMSA Advisory Bulletin, 79 Fed. Reg. 56121 (Sep. 18, 2014)* (including guidance for operators to consider in reversing the flow of a pipeline, changing product, or conversion of service) and *PHMSA Guidance for Pipeline Flow Reversals, Product Changes, and Conversion to Service (Sep. 2014)*; (referenced in Sep. 18, 2014 Advisory). *See also PHMSA Advisory Bulletin, 76 Fed. Reg. 1504, 1507 (Jan. 10, 2011)* (recommending that records substantiating MOP be “traceable, verifiable, and complete”);⁴ *PHMSA Advisory Bulletin, 77 Fed. Reg. 26822 (May 7, 2012)* (reminding operators

Even though there is no express Part 195 regulation regarding MOP substantiation in the context of flow reversal and product change, the Company voluntarily complied with PHMSA’s advisory guidance regarding MOP substantiation as well as flow reversal and change of product. SPLP reviewed material records and performed pressure and spike testing without failure. Further, SPLP performed extensive sampling testing and some in situ testing even though PHMSA’s own guidance states that it was only suggested “where sufficient historical records are not available.”

Specifically, SPLP undertook the following voluntary efforts to comply with PHMSA’s advisory guidance:

1. Review of material records: SPLP reviewed original and historical documentation detailing the *known* SMYS and pipe design characteristics specified under Part 195.106. These records are traceable, verifiable and complete.¹³ They are clearly linked to original information, including contemporaneous records on the pipeline construction; they corroborate each other; and they are all dated and/or signed.
2. Hydrostatic pressure testing and spike testing: SPLP performed two hydrostatic pressure tests of the GRE segment, including spike tests, in 2017 and 2018. The tests were completed without failure.
3. Material Testing and In Situ Examination: SPLP tested forty-three (43) samples in different locations along the roughly 25 mile GRE segment. All of these samples confirm the already *known* SMYS of the GRE pipeline.¹⁴ The location

to review their records to “determine whether they are adequate to support operating parameters and conditions on their pipeline systems.”).

¹³ *PHMSA Advisory Bulletin*, 76 *Fed. Reg.* at 1507 (recommending that records substantiating MOP be “traceable, verifiable, and complete”).

¹⁴ Exhibit 11, *Kiefner Final Report No. 0461-1813 “Materials Properties Evaluation of Twelve Pipe Samples from Energy Transfer’s Point Breeze to Montello 12-inch Pipeline”* (Oct. 28, 2018) (provided to PHMSA) (testing 12 samples of pipe, the majority which were in the GRE segment. All 10 of the 1937 era pipe samples (7 of which were in the GRE), were determined to meet or exceed pipe specifications for 12.75”x 0.375” wt, Seamless Grade B requirements from that time); Exhibit 12 *Kiefner Final Report No. 18-116* (Aug. 23, 2018) (provided to PHMSA) (metallurgical testing on the pipe at this 2018 leak site, located outside of the GRE but on a segment of original 1937 pipe, confirmed the pipe as meeting requirements for 12.75”x 0.375” wt., API 5L Grade B pipe at the time of construction); Exhibit 13 *DNV GL Final Report O-AP-FINV/CPAPE (PP189465) “Metallurgical Analysis of Leak on PTBR-BOOT 12-Inch Diameter Pipeline at Bend”* (Jan. 31, 2018) (provided to PHMSA) (metallurgical testing on the pipe at this 2015 leak site within the GRE confirmed the 1937 pipe as meeting requirements for 12.75” x 0.375” wt., API 5L Grade B pipe at the time of construction); Exhibit 14, *Applus RTD perform in-situ materials testing at pipe dig site 12PTBR-MNTL-18-B06* (documentation made available to PHMSA) (in-situ testing on 2018 Rosen Joint #27100 concluded that the pipe meets the requirements for 12.75” x 0.375”wt., API 5L Grade B); Exhibit 15, *SPLP (A. Kravatz) Letter to PHMSA and PA PUC re GRE Pipe Sampling and Analysis Data Request* (Jan. 15, 2019) (enclosing material testing of 32 joints of original 1937 pipe and the results from Kiefner, *Material Properties*); Exhibit 16, *Evaluation of 32 Pipe Samples from Energy Transfer’s Point Breeze to Montello 12-inch Pipeline* (Jan. 15, 2019) (confirming the pipe material to meet or exceed pipe specifications for 12.75”x 0.375” wt, Seamless Grade B API 5L requirements at the time of construction).

of these samples were displayed on alignment sheets and provided to PHMSA on August 23, 2019.¹⁵

C. PHMSA May Not Enforce Guidance as a Legal Requirement

Even though SPLP voluntarily complied with non-binding PHMSA advisory guidance, the Agency may not rely upon that guidance in enforcement. PHMSA inappropriately quotes its guidance documents, and specifically its flow reversal advisory bulletin, as support for the alleged violation in Item 1 of the NOPV. *NOPV*, p. 3. The NOPV fails to note, however, that the Agency's advisory bulletin itself expressly states the following: "*This guidance material does not create legally enforceable rights or obligations. This guidance is explanatory in nature . . .*"¹⁶ Agency actions may not enforce guidance which is not legally binding, thereby avoiding notice and comment rulemaking required by the Administrative Procedure Act.¹⁷

In addition, recent Department of Transportation (DOT) policy memos provide that modal agencies, such as PHMSA, may not use guidance in enforcement proceedings and that in enforcement PHMSA should "*ensure that the law is interpreted and applied according to its text.*"¹⁸ Most recently, the President issued two Executive Orders entitled "Transparency and Fairness" and "Bringing Guidance Out of the Darkness."¹⁹ Collectively, these "*prohibit[] agencies from enforcing rules they have not made publicly known in advance*" and requiring that "significant" guidance documents go through notice and comment rulemaking.²⁰

¹⁵ Exhibit 17, *SPLP GRE Alignment Sheet Submission* (Aug. 23, 2019).

¹⁶ Exhibit 10, *PHMSA Guidance for Pipeline Flow Reversals, Product Changes, and Conversion to Service* (Sep. 2014).

¹⁷ See *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1212 (2015) (Scalia, J., concurring) (warning that an "agency need only write substantive rules more broadly and vaguely, leaving plenty of gaps to be filled in later, using interpretive rules unchecked by notice and comment"); *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1024-1025 (D.C. Cir. 2000) (noting it is "well-established that an agency may not escape . . . notice and comment requirements by labeling a major substantive legal addition to a rule as a mere interpretation").

¹⁸ *DOT Memo Review and Clearance of Guidance Documents*, p. 3 (Dec. 20, 2018) ("Because guidance documents are not regulations promulgated in accordance with the requirements of the Administrative Procedure Act, they cannot set forth binding obligations that limit the legal rights or augment the legal duties of parties outside the Executive Branch.") (emphasis added). It also quotes a Department of Justice memorandum noting that "[t]he Department should not treat a party's noncompliance with an agency guidance document as presumptively or conclusively establishing that the party violated the applicable statute or regulation." *Id.* at p. 2 (also defining advisories as "guidance documents").

¹⁹ *Executive Order on Promoting the Rule of Law Through Improved Agency Guidance Documents* (Oct. 9, 2019); *Executive Order on Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication* (Oct. 9, 2019).

²⁰ *Id.* (emphasis added).

D. NOPV Item 1 and Associated PCO Item Must be Withdrawn

PHMSA bears the burden of proof of all elements of a proposed violation in an enforcement proceeding.²¹ PHMSA has not met its burden for NOPV Item 1; the SMYS of the GRE is *known*. PHMSA cannot require more than what the plain language of the regulations provide. The Agency also may not penalize an operator for not maintaining a document that never existed nor was required.

Further, the PCO should be withdrawn because SPLP has already substantially completed the actions outlined in it, namely representative sampling of pipe joints of all pipe, regardless of vintage. Prior to issuance of the NOPV, SPLP had already performed material testing of forty-three (43) samples in different locations along the roughly 25 mile GRE segment, exceeding the sample rate outlined in Part 195.106(b)(1)(i), even though that rule is inapplicable in this instance. PHMSA has no authority to mandate an immediate pressure reduction or additional testing where it is not required by the regulations. Moreover, at the parties' settlement meeting, PHMSA indicated that it was satisfied that the Company's efforts to date met the requirements of the PCO.

IV. NOPV Item 2: SPLP Properly Considered Tailoring its Public Awareness Coverage Areas

SPLP maintains a robust Public Awareness Program under which it provides a variety of notifications to relevant public awareness stakeholders associated with the GRE and ME2, among other pipelines. In identifying public awareness communications coverage areas for the relevant GRE segment and ME2, SPLP considered all factors required under 49 C.F.R. Part 195.440(c). Part 195.440(c) and portions of API Recommended Practice (RP) 1162 incorporated therein do not mandate any express distances for communications coverage areas. Instead, they require operators to consider certain factors specific to their pipelines and determine the appropriate coverage area. SPLP properly considered all required factors. PHMSA cannot require more than the regulations provide.

A. SPLP Complied with 49 C.F.R. 195.440(c) and Applicable Sections of API RP 1162

1. *Part 195.440(c) and API RP 1162 Require Operators to Consider Pipeline Characteristics in Determining Public Awareness Coverage Areas*

PHMSA's public awareness regulation, 49 C.F.R. Part 195.440(c), requires operators to follow the 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."²² In incorporating the API standard, PHMSA stated that it is not attempting to "*define the method or approach operators must*

²¹ See e.g., *In the Matter of Inland Corp*, Final Order, CPF No. 1-2017-5003 (Mar. 7, 2018).

²² 49 C.F.R. Parts 195.440(c), 195.3 (incorporating by reference portions of API RP 1162, Public Awareness Programs for Pipeline Operators, 1st edition, Dec. 2003).

use (or not use) to achieve effective [public awareness] programs” and that each operator “must consider the unique characteristics of its pipelines.”²³

API RP 1162 notes at the outset that the RP “is intended as a resource” and that operators in implementing public awareness programs should “select the most appropriate mix of audiences, message types, and delivery methods and frequencies, depending on their needs and the needs of the communities along a given pipeline segment.”²⁴ In incorporating certain provisions of API RP 1162 by reference, PHMSA explained “there is no intent that every occurrence of ‘should,’ ‘may,’ or ‘can’ found in API RP 1162 be translated to ‘shall,’” but rather that operators will have to follow the provisions of the practice unless its notes why compliance with those provisions is not necessary under the circumstances.²⁵

With respect to communication coverage areas (also called a buffer), API RP 1162 instructs operators to “consider” tailoring the coverage area based on a pipeline location and release consequences; “consider” integrity management areas of consequence; and expand coverage “as appropriate” where a wider coverage may be suggested under the circumstances.²⁶ Operators should “consider” extending the 660-foot area under certain circumstances, such as HVL pipelines located in high population areas.²⁷ Neither the regulations nor API RP 1162 mandate a specific distance for extending coverage in high populated areas along an HVL pipeline. PHMSA and API RP 1162 could have established a minimum communications coverage area for HVL pipelines, but they have not done so.

2. *SPLP Considered All Required Factors*

In May 2018, SPLP began using the Energy Transfer Public Awareness Program (ET Standard Operating Procedure HLA.17).²⁸ The ET Public Awareness Program used a 660-foot coverage area for the Affected Public along HVL pipelines. Following discussions with PHMSA and the PA PUC in August of 2018, and prior to the next scheduled mailing to the Affected Public along the Mariner

²³ *Final Rule*, 70 Fed. Reg. 28833 (May 19, 2005) (emphasis added).

²⁴ Exhibit 18, *API RP 1162*, Section 1.2, Scope p. 1 (1st ed.).

²⁵ *Final Rule*, 70 Fed. Reg. at 28837.

²⁶ Exhibit 18, *API RP 1162*, Sec. 3, p. 17 (2003). Notably, the third and current edition of API RP 1162 does not include the provision that operators “should consider tailoring its communication coverage area to fit its particular location and release consequences.” Non-binding Appendix B outlines stakeholder examples and generally recommends a minimum Affected Public coverage area of 660 feet or “as much as 1,000 feet in some cases.” *Id. at Appendix B*, p. 33 (2003) (emphasis added). PHMSA FAQ states that RP 1162 appendices are not enforceable: “The public awareness regulations only specify baseline and supplemental requirements; therefore, for inspection purposes, the API RP 1162 appendices are not enforceable.” *PHMSA Public Awareness FAQ* (Sep. 6, 2011).

²⁷ *Id. at Sec. 6.3.1*, p. 25 (2003).

²⁸ Exhibit 19, *Energy Transfer Equity (ETE) HLA.17 Public Awareness Plan* (effective Apr. 1, 2018); *SOP HLI.40 Public Awareness Plan – Communication with API RP 1162-defined Stakeholders* (effective Apr. 1, 2018). Prior to that time, SPLP had utilized the SPLP Public Awareness Program and had sent a pipeline awareness mailing to the Affected Public along NGL pipelines it operated in Pennsylvania in October of 2016.

East HVL pipelines (including the GRE and ME2), the coverage area was increased to 1,000 feet on either side of the pipeline centerline.²⁹

This change was made following additional review and reevaluation of its communication coverage areas and in compliance with 49 C.F.R. Part 195.440 and API RP 1162, which require operators to “consider” whether to implement a communications coverage area beyond 660-feet for HVL pipelines in high populated areas. Neither PHMSA regulation nor API RP 1162 define “consider,” and the dictionary definition provides that it means “to think carefully about something, typically before making a decision.”³⁰ Courts have held that the term “consider” does not compel a certain outcome, including with respect to use of the term under Part 195.³¹

API RP 1162, as incorporated by Part 195.440(c), instructs operators that, where specific circumstances suggest a wider communications coverage area for a certain pipeline location, the operator should expand the coverage area accordingly. The rule requires that an operator consider (i.e., to think carefully about) the pipeline location, release consequences, and areas of consequence in support of its communications coverage area. SPLP did just that.³² In addition, following the placement of the GRE pipeline into service in December of 2018, PHMSA requested that SPLP consider expanding the buffer even further. In response, SPLP voluntarily undertook further reevaluation of the coverage area and made the decision to increase the buffer area. That voluntary reevaluation resulted in an additional mailing to the Affected Public along all NGL pipelines operated by SPLP in Pennsylvania to the extent of the maximum lower flammable limit (LFL) distance as identified by hazard analysis reports.³³

²⁹ *Id.*; Exhibit 20, *SPLP Public Awareness White Paper, p. 1* (Jun. 14, 2018); Exhibit 21, *SPLP Public Awareness White Paper, p. 1* (Aug. 10, 2018); Exhibit 22, *Energy Transfer Summary of Public Awareness Program Changes* (July 2019) (noting the August 18, 2018 expanded buffer to 1,000 feet).

³⁰ Merriam Webster defines “consider” to mean “to think carefully.” See <https://www.merriam-webster.com/dictionary/consider>.

³¹ *ExxonMobil Pipeline Company v. U.S. Dep’t of Transp.*, 867 F.3d 564, 573-74 (5th Cir. 2017) (“Contrary to the agency’s assertion, the term ‘consider’ does not compel a certain outcome, but rather it serves to inform the pipeline operator’s careful decision-making process.”); *J.H. Miles & Co. v. Brown*, 910 F. Supp. 1138, 1156 (E.D. Va. 1995) (explaining that a federal regulation requiring federal fishing officials to “consider” various statutory factors in setting fishing quota recommendations was not a “strict dictate,” but rather officials had “some discretion” in preparing their recommendation); see also *Cent. Valley Chrysler-Jeep v. Witherspoon*, 456 F. Supp. 2d 1160, 1173 (E.D. Cal. 2006) (“Congress’s use of the term ‘consider’ in a statute requires an actor to merely ‘investigate and analyze’ the specified factor, but not necessarily act upon it.”).

³² Exhibit 20, *SPLP Public Awareness White Paper, p. 1* (Jun. 14, 2018); Exhibit 21, *SPLP Public Awareness White Paper, p. 1* (Aug. 10, 2018); Exhibit 22, *Energy Transfer Summary of Public Awareness Program Changes* (July 2019) (noting the August 18, 2018 expanded buffer to 1,000 feet).

³³ Exhibit 23, *SPLP Letter to PA PUC re: NC-41-18, pp 3-4* (Jan. 16, 2019) (summarizing SPLP’s consideration of PA PUC’s request and review of affected public in conjunction with hazard analysis and agreeing to voluntarily supplement its Public Awareness Program).

B. NOPV Item 2 and the Associated PCO Item Should be Withdrawn, or in the Alternative, PHMSA Should Issue a Revised PCO

PHMSA bears the burden of proof of all elements of a proposed violation in an enforcement proceeding. PHMSA has not met its burden; to “consider” does not dictate an outcome.³⁴

The NOPV and PCO Item 2 must be withdrawn. Further, the PCO should be withdrawn because SPLP has already substantially completed the specified actions. Under its Public Awareness Plan, SPLP already identifies the communication coverage area and how it is determined, including specific to pipelines that transport HVLs.³⁵ Further, SPLP annually reviews its Public Awareness Plan to determine if supplemental enhancements are warranted to solicit input from operations personnel in the field regarding a variety of factors including extending or broadening the coverage area beyond the current parameters.³⁶

Alternatively, even though SPLP contests NOPV Item 2, SPLP requests that if the violation is maintained the PCO be revised to track the relevant regulation at issue as set forth below (suggested revision highlighted) and that the PCO be deemed complete.

(a) Modify Public Awareness Plan (PAP) applicable to new ME2 pipeline, including any temporary reversal and repurposed portions of the existing 12-inch PTBR to MNTL pipeline and any components of the new 16-inch ME2X pipeline which will be utilized to facilitate transportation of HVLs. Sunoco shall expand-confirm their communication coverage area for Stakeholder Audience Identification, as defined by API RP 1162 provisions that are incorporated by reference under 49 C.F.R. 195.440, consistent with areas of potential impact for their pipeline facilities. Sunoco shall also update their PAP to reflect communication buffer area(s) and information on how buffer(s) were determined and/or rationale for selection.

(b) Should the modification be deemed unwarranted, Sunoco shall provide justification in its program or procedural manual as to why compliance with all or certain provisions of the [RP] is not practicable and not necessary for safety, specifically, education of Stakeholder Audiences that were concluded to be susceptible to product dispersion and/or thermal radiation impact.

³⁴ *ExxonMobil Pipeline Co.*, 867 F.3d at 573-74.

³⁵ Exhibit 19, *ETE HLA.17 Public Awareness Plan* (effective Apr. 1, 2018); *SOP HLI.40 Public Awareness Plan – Communication with API RP 1162-defined Stakeholders* (effective Apr. 1, 2018); Exhibit 20, *SPLP Public Awareness White Paper, p. 1* (Jun. 14, 2018); Exhibit 21, *SPLP Public Awareness White Paper, p. 1* (Aug. 10, 2018); Exhibit 22, *Energy Transfer Summary of Public Awareness Program Changes* (July 2019) (noting the August 18, 2018 expanded buffer to 1,000 feet).

³⁶ See e.g., *Energy Transfer Annual Public Awareness Review and Operations Managers Surveys* (2019).

V. Due Process and Fair Notice

PHMSA's NOPV attempts to effectively revise the relevant regulations to include express requirements that do not exist and which are unsupported by enforcement precedent. If the Agency finalizes its new enforcement derived applications of Parts 195.106 and 195.440, it would violate fundamental concepts of due process and fair notice. A regulation must provide a regulated entity with fair notice of the obligations it imposes and be issued pursuant to notice and comment rulemaking.³⁷

Fair notice requires the agency to have "state[d] with ascertainable certainty what is meant by the standards [it] has promulgated."³⁸ A surprise *sub silentio* amendment to regulations deprives an operator of fair notice and due process in violation on the U.S. Constitution and the Administrative Procedure Act. It also violates recent DOT policy memorandum directives and Presidential Executive Orders.

Recent DOT policy memos provide that (1) DOT modal agencies, including PHMSA, "must not adopt or rely upon overly broad or unduly expansive interpretations of the governing statutes or regulations, and should ensure that the law is interpreted and applied according to its text"³⁹ and (2) consistent with current DOJ policy, decisions

to prosecute an enforcement action should be based upon a reasonable interpretation of the law about which the public has received fair notice and should be made with due regard for fairness.⁴⁰

Similarly, a recent Presidential Executive Order focused on promoting the rule of law through transparency and fairness provides, "[t]he rule of law requires transparency. Regulated parties must know in advance the rules by which the Federal Government will judge their actions."⁴¹

VI. Conclusion and Request for Relief

For the reasons identified in this Pre-Hearing Brief, in SPLP's Request for Hearing, and for other reasons as justice may require, SPLP respectfully requests that PHMSA withdraw the NOPV and the PCO in their entirety. SPLP complied with PHMSA regulations 49 C.F.R. Parts 195.106 and 195.440 and the Agency has not met its burden of proof under NOPV Item 1 or 2. Principles of fair notice and due process require that the NOPV and the PCO be withdrawn.

³⁷ 5 U.S.C. § 554(b).

³⁸ *Id.* at 578 (alterations in original) (citing *Diamond Roofing Co. v. OSHA*, 528 F.2d 645, 649 (5th Cir. 1976)).

³⁹ *DOT Memo Procedural Requirements for DOT Enforcement Actions*, p. 6 (Feb. 15, 2019) (emphasis added).

⁴⁰ *Id.* at p. 10 (emphasis added).

⁴¹ *Executive Order on Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication* (Oct. 9, 2019) (emphasis added).

Respectfully submitted,



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Pre-Hearing Brief Exhibits

1. Gas Research Institute, Development of the B31.8 Code and Federal Pipeline Safety Regulations: Implications for Today's Natural Gas Pipeline System 98-0367-1 at p. 1 (1998).
2. 12 PTBR-MNTL Keystone Pipeline Specifications (Sep. 9, 1937).
3. Letter to National Tube (Sep. 14, 1937).
4. 12 PTBR-MNTL National Tube Pipe Shipments (Mar. 31, 1937).
5. Keystone Pipeline Company Letter (May 28, 1937).
6. Excerpts, Atlantic Pipeline Line Data and Capacities, Pumping Equipment and Tankage Book (1969).
7. Atlantic Pipe Data Sheet (Dec. 31, 1967).
8. Sun Line Company Line Testing Committee Report for 12 " PTBR-MNTL (1989).
9. Justification of 12" Glen Riddle Junction to Elverson Junction Pressure Test Plan (Sep. 27, 2018).
10. PHMSA Advisory Bulletin, 79 Fed. Reg. 56121 (Sep. 18, 2014); PHMSA Guidance for Pipeline Flow Reversals, Product Changes, and Conversion to Service (Sep. 2014).
11. Kiefner Final Report No. 18-153 "Materials Properties Evaluation of Twelve Pipe Samples from Energy Transfer's Point Breeze to Montello 12-inch Pipeline" (Oct. 25, 2018).
12. Kiefner Final Report No. 18-116 (Aug. 23, 2018).
13. DNV GL Final Report O-AP-FINV/CPAPE (PP189465) "Metallurgical Analysis of Leak on PTBR-BOOT 12-Inch Diameter Pipeline at Bend" (Jan. 31, 2018).
14. Applus RTD perform in-situ materials testing at pipe dig site 12PTBR-MNTL-18-B06.
15. SPLP (A. Kravatz) Letter to PHMSA and PA PUC re: GRE Pipe Sampling and Analysis Data Request (Jan. 15, 2019).
16. Evaluation of 32 Pipe Samples from Energy Transfer's Point Breeze to Montello 12-inch Pipeline (Jan. 15, 2019).
17. SPLP GRE Alignment Sheet Submission to PHMSA (Aug. 23, 2019).

18. Excerpts of Relevant API Recommended Practice 1162, Sections 1.2, 3, 6 (1st edition).
19. ETE HLA.17 Public Awareness Plan (effective Apr. 1, 2018); SOP HLI.40 Public Awareness Plan – Communication with API RP 1162-defined Stakeholders (effective Apr. 1, 2018)
20. SPLP Public Awareness White Paper, p. 1 (Jun. 14, 2018).
21. SPLP Public Awareness White Paper, p. 1 (Aug. 10, 2018).
22. Energy Transfer Summary of Public Awareness Program Changes (Jul. 2019).
23. SPLP Letter to PA PUC re: NC-41-18, pp 3-4 (Jan. 16, 2019).

TABLE OF AUTHORITIES

	Page(s)
Statutes	
5 U.S.C. § 554(b)	11
49 U.S.C. § 60104(b)	5
Administrative Procedure Act.....	7
U.S. Constitution and the Administrative Procedure Act.....	11
Constitution	
United States Constitution, Article 1, Section 9, Clause 3	5
Cases	
<i>Am. Hosp. Ass’n v. Price</i> , 867 F.3d 160 (D.C. Cir. 2017)	5
<i>Appalachian Power Co. v. EPA</i> , 208 F.3d 1015 (D.C. Cir. 2000)	7
<i>In re: Belle Fourche, CPF 5-2004-5010</i> (Jul. 15, 2009)	5
<i>Cent. Valley Chrysler-Jeep v. Witherspoon</i> , 456 F. Supp. 2d 1160 (E.D. Cal. 2006).....	10
<i>Evans v. Eaton</i> , 20 U.S. 356 (1822).....	5
<i>ExxonMobil Pipeline Company v. U.S. Dep’t of Transp.</i> , 867 F.3d 564 (5th Cir. 2017)	10, 11
<i>re GRE Pipe Sampling and Analysis Data Request</i> (Jan. 15, 2019).....	6
<i>In the Matter of Inland Corp.</i> , Final Order, CPF No. 1-2017-5003 (Mar. 7, 2018)	7
<i>J.H. Miles & Co. v. Brown</i> , 910 F. Supp. 1138 (E.D. Va. 1995)	10

Other Authorities

49 C.F.R. 195.440(c).....1, 8, 9, 10, 11, 12

49 C.F.R. Parts 190.208 and 190.2111

49 C.F.R. Part 195.106.....1, 2, 4, 6, 8, 11, 12

49 C.F.R. Part 195.106(b)(1)(i)4, 8

49 C.F.R. Part 195.406.....5

49 C.F.R. Part 195.3.....8

70 Fed. Reg. 28833 (May 19, 2005)8, 9

76 Fed. Reg. 1504 (Jan. 10, 2011)5, 6

77 Fed. Reg. 26822 (May 7, 2012)5

79 Fed. Reg. 56121 (Sep. 18, 2014)5, 13

DOT Memo Review and Clearance of Guidance Documents, p. 3 (Dec. 20, 2018).....6

Executive Order on Promoting the Rule of Law Through Improved Agency Guidance Documents (Oct. 9, 2019).....7

Executive Order on Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication (Oct. 9, 2019).....7, 12

DOT Memo Procedural Requirements for DOT Enforcement Actions (Feb. 15, 2019).....12