



U.S. Department
of Transportation
Pipeline and Hazardous Materials
Safety Administration

1200 New Jersey Ave., SE
Washington, DC 20590

DEC 30 2010

Mr. Lee Hobbs
President
ANR Pipeline Company
717 Texas St Ste 2500
Houston, TX 77002

Re: CPF No. 3-2007-1006

Dear Mr. Hobbs:

Enclosed please find the Decision on the Petition for Reconsideration filed by ANR Pipeline Company in the above-referenced case. For the reasons set forth in the Decision, your petition is denied on all counts, except that PHMSA will not consider the company's violation to be a "prior offense" for purposes of any future civil penalty assessment.

The stay of the compliance order, which was previously granted on January 15, 2010, is hereby lifted and therefore ANR must comply with the order by the deadlines specified in the Decision. When the terms of the compliance order have been completed, as determined by the Director, Central Region, this enforcement action will be closed. Service of this document by certified mail is deemed effective upon the date of mailing, or as otherwise provided under 49 C.F.R. § 190.5.

Thank you for your cooperation in this matter.

Sincerely,

Jeffrey D. Wiese
Associate Administrator
for Pipeline Safety

Enclosure

cc: Mr. David Barrett, Director, Central Region, PHMSA

Mr. Eugene R. Morabito, Attorney for ANR Pipeline Company
5250 Corporate Drive, Troy, Michigan 48098

CERTIFIED MAIL – RETURN RECEIPT REQUESTED [7005 1160 0001 0039 9969]

I. Background

ANR operates a system of natural gas pipelines that includes a major interstate transmission line that transports gas from Texas and Oklahoma to Wisconsin and Michigan. The portion of the ANR system relevant to this proceeding is the Illinois–Wisconsin lateral system, a subsidiary system of transmission pipelines that branches away from the main interstate line at a single point in Illinois (Sandwich Station), delivering gas to different distribution facilities in Wisconsin.² The lateral system consists of various branches, compressor stations, and pipes with varying diameters and pressures. In some areas of the lateral system, pipelines branch away from other pipelines, which themselves branch from other pipelines. The system runs through various Class 1, Class 2, and Class 3 areas, as defined in 49 C.F.R. § 192.5.³

The Final Order, issued on December 4, 2009, found that ANR had violated § 192.625(b) by failing to odorize gas in those portions of the lateral system located in Class 3 areas. Section 192.625 provides, in pertinent part:

§ 192.625 Odorization of gas.

(a) A combustible gas in a distribution line must contain a natural odorant or be odorized so that at a concentration in air of one-fifth of the lower explosive limit, the gas is readily detectable by a person with a normal sense of smell.

(b) After December 31, 1976, a combustible gas in a transmission line in a Class 3 or Class 4 location must comply with the requirements of paragraph (a) of this section unless: . . .

(3) In the case of a lateral line which transports gas to a distribution center, at least 50 percent of the length of that line is in a Class 1 or Class 2 location;

This regulation requires ANR to odorize gas in those portions of its lateral system located in Class 3 areas, unless, in the case of a lateral line which transports gas to a distribution center, at least 50 percent of the length of that line is in a Class 1 or Class 2 location. ANR acknowledged that the subject pipelines were not odorized, but argued that the pipelines were lateral lines that ran mostly through rural areas and therefore qualified for the exception from odorization under § 192.625(b)(3).⁴

² A transmission line is “a pipeline, other than a gathering line, that: (1) transports gas from a gathering line or storage facility to a distribution center, storage facility, or large volume customer that is not down-stream from a distribution center; (2) operates at a hoop stress of 20 percent or more of [specified minimum yield strength]; or (3) transports gas within a storage field.” 49 C.F.R. § 192.3.

³ Class 1 and Class 2 locations are generally rural areas with lower concentrations of population near the pipeline, while Class 3 and Class 4 locations have more population and other sensitive areas near the pipeline. *See* 49 C.F.R. § 192.5.

⁴ Final Order at 3.

The term “lateral line” is not defined in 49 C.F.R. Part 192. In the Final Order, PHMSA agreed with ANR that the subject pipelines were “laterals,” based on the generally understood meaning that such lines are ones transporting gas from transmission lines to particular end points.⁵ The Final Order determined that PHMSA had never expressly articulated how to apply the exception in § 192.625(b)(3) to a lateral line that was part of a “lateral system.” In other words, the agency did not have an established method for determining the length of a lateral line for purposes of calculating whether “at least 50 percent of the length of that line is in a Class 1 or Class 2 location” under § 192.625(b)(3). While it was clear from the text of the regulation that the end point of the pipeline was the distribution center, the beginning point was not so certain.⁶

In deciding how the length of a lateral line should be measured for purposes of applying § 192.625(b)(3), the Final Order evaluated the text of the rule, the intent and safety purpose of the odorization requirement, and the methods for calculating length advocated by ANR and PHMSA regional staff at the hearing. The Final Order concluded that the most reasonable interpretation of the regulation was to calculate the length of a lateral line, for purposes of this section, by measuring the line from its terminus at a distribution center to the first upstream connection with another transmission line, whether that was another lateral transmission line or a non-lateral transmission line. A diagram was provided in the Final Order to help clarify this interpretation and how § 192.625(b)(3) should be applied to the lateral system operated by ANR.

In the Final Order, PHMSA rejected the methodology advocated by ANR because it involved calculating the length of each lateral line from the distribution facility all the way back to the beginning of the entire lateral system at Sandwich Station. This method was rejected because it resulted in “double counting” upstream portions of the lateral system lying closer to the main interstate line that served as common branches for multiple lateral lines. The duplicative counting of such mileage—mileage generally located in rural Class 1 and Class 2 areas—skewed the calculation towards determining that each pipeline had more than 50 percent of its length in a Class 1 and Class 2 location. The Final Order found ANR’s methodology had artificially inflated the number of lines meeting the exception for odorization, resulting in up to 100 miles of Class 3 populated areas being un-odorized. This practice was found to frustrate the safety purposes of the rule, which provides for the odorization of gas in populated areas in order to increase the likelihood that a gas leak will be detected, i.e., smelled, by persons living and working in the vicinity of the lines. The methodology proposed by ANR was also found to be inconsistent with the intent of the exception in § 192.625(b)(3), which “in most cases” was to exclude only “short” segments of pipeline in predominantly rural areas where the likelihood of detecting odorized gas was reduced, due to the smaller population in such areas.⁷

The Final Order also rejected ANR’s contention that PHMSA regional offices had historically accepted the company’s methodology, finding “there is no evidentiary support for this assertion other than perhaps an absence of enforcement cases against operators for similar violations. The

⁵ *Id.* at 5 (*citing* PHMSA’s Stakeholder Communications website definition of “lateral.”)

⁶ This only becomes an issue where a lateral line is part of a “lateral system,” because if a lateral line simply runs between a non-lateral transmission line and a distribution center, the only possible means of calculating the length of that lateral would be from its beginning at the non-lateral transmission line to its end at the distribution center.

⁷ Final Order at 6.

absence of prior enforcement cases does not equate to an affirmative statement of administrative policy.”⁸

After reviewing all of the evidence presented in light of the regulatory interpretation, the Final Order determined that the lateral transmission pipelines at issue in the case did not meet the exception for odorization and therefore the gas transported by the pipelines in Class 3 locations had to be odorized. Since ANR had acknowledged such pipelines were not odorized, PHMSA found the company in violation of § 192.625(b). The Final Order did not assess a civil penalty for the violation, but ordered ANR to take certain actions to bring the pipeline system into compliance.

II. Discussion

In its Petition, ANR advances two basic arguments for withdrawing the finding of violation. First, the company contends that in interpreting the regulation in the Final Order, PHMSA has created and applied a new substantive rule without notice and comment, in violation of the Administrative Procedures Act (APA), 5 U.S.C. § 553.⁹ Second, ANR contends that the methodology articulated in the Final Order is arbitrary and unreasonable.¹⁰ I address these arguments in turn.

1. *Whether the interpretation in the Final Order required APA notice and comment.*

Petitioner contends that PHMSA’s interpretation of § 192.625(b)(3) in the Final Order departs from long-standing agency policy and therefore constitutes a new substantive rule issued without notice and comment, in violation of the APA. Specifically, ANR contends that “the Order’s new methodology for calculating the length of a lateral pipeline constitutes a new substantive rule changing established PHMSA practice and as such must be submitted for notice and comment under the APA.”¹¹ Petitioner argues further that the Final Order “does not merely provide an interpretation of an ambiguous or unclear regulation; rather, the Order substantively alters an established regulatory and universally accepted practice by adopting a novel ‘segment’ interpretation of a lateral line”¹²

ANR has raised this argument before.¹³ In response to the company’s contention that the interpretation would constitute a change in administrative policy that must be adopted by rulemaking, PHMSA stated in the Final Order that it found no evidence to suggest there was settled administrative policy upset by this case. It noted that ANR had not cited any agency statement or practice that had established another method for calculating the length of a lateral in a lateral system under § 192.625(b)(3). PHMSA also dismissed ANR’s contention that several

⁸ *Id.* at 8.

⁹ Petition at 1.

¹⁰ *Id.* at 1.

¹¹ *Id.* at 3.

¹² *Id.* at 2.

¹³ *See, e.g.*, ANR’s Response to the Notice of Probable Violation (Response), at 3 (Mar. 13, 2007).

PHMSA regional offices had accepted the company's understanding of the regulation, on the ground that there was simply no evidence on this issue "other than perhaps an absence of enforcement cases against operators for similar violations."¹⁴ The Final Order concluded that, if anything, the lack of public statements on the issue showed that PHMSA had not formally considered or determined a definitive method for calculating the length of lateral lines under § 192.625(b)(3).

As referenced above, 49 C.F.R. § 190.215 provides that PHMSA does not consider repetitious arguments presented in a petition for reconsideration. Therefore, I dismiss, as a matter of procedure, ANR's repetitious argument that PHMSA has departed from long-standing agency policy. I do note, however, that ANR has presented, for the first time, a citation to a court decision that the company believes supports its position. For the sole purpose of distinguishing that judicial decision, I briefly address Petitioner's argument.

In its Petition, ANR cites *Shell Offshore Inc. v. Babbitt* in support of its contention that PHMSA has created a new substantive rule by departing from its long-standing agency policy.¹⁵ In *Shell Offshore*, the court held that the Department of Interior had changed its policy of approving the use of tariff rates by lessee royalty payors—a policy that it had consistently followed for at least five years. Although the former policy of accepting the use of tariff rates had never been reduced to a written statement, the court found that the policy "was undeniably [the agency's] long established and consistently followed practice."¹⁶ The court held that "[i]f a new agency policy represents a significant departure from long established and consistent practice that substantially affects the regulated industry, the new policy is a new substantive rule and the agency is obliged, under the APA, to submit the change for notice and comment."¹⁷

The holding in *Shell Offshore* was based, in part, on a decision by the D.C. Circuit Court of Appeals in *Alaska Professional Hunters Assoc. v. FAA*.¹⁸ In that case, an FAA regional office had for years advised hunting and fishing guides in Alaska that they were exempt from certain commercial pilot regulations. When the FAA headquarters discovered this policy being espoused by its regional office, the agency published a notice announcing that such guides were no longer considered exempt. On appeal, the court found that the FAA's consistent affirmative statements regarding Alaskan hunting and fishing guides over the years had established a definitive interpretation of the regulation, and that "[w]hen an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish without notice and comment."¹⁹

¹⁴ Final Order at 8.

¹⁵ 238 F.3d 622 (5th Cir. 2001).

¹⁶ *Id.* at 630.

¹⁷ *Id.*

¹⁸ 177 F.3d 1030 (D.C. Cir. 1999).

¹⁹ *Id.* at 1034.

Central to both these decisions is that the two agencies in question had both followed long-established, open, and consistent policies from which the agencies suddenly and significantly departed, giving rise to the legal challenges in question. In the present matter, however, there is simply no evidence that PHMSA had “given its regulation a definitive interpretation, and later significantly revised that interpretation.”²⁰ This factual distinction is critical, since in situations where administrative agencies have not clearly established a policy or practice, courts have declined to follow *Shell Offshore* or *Alaska Professional Hunters*. Similarly, courts have also been unwilling to find that the mere absence of enforcement action by an agency constitutes a regulatory interpretation or an established practice from which an agency may only depart through notice and comment.

For example, in *MetWest Inc. v. Secretary of Labor*, the court found that OSHA’s 13-year practice of not enforcing a particular provision of its regulations regarding the disposal of needles in the workplace did not establish an “express, direct, and uniform interpretation” of the applicable regulation, and therefore the agency had not created a substantive rule change when it issued a citation for violating the provision.²¹ Likewise, in *Warshauer v. Solis*, the court determined that an agency’s decision not to enforce certain requirements, even if it could be considered a “policy,” did not rise to the level of an established interpretation under *Alaska Professional Hunters*.²² In *Warshauer*, despite a showing that the agency had an enforcement policy of “mere acquiescence” to the conduct at issue was found insufficient to trigger the need for notice-and-comment rulemaking.²³

As explained in the Final Order, PHMSA did not have an established policy or position on the method of calculating the length of a lateral line in a lateral system for purposes of the odorization exception, and the mere absence of prior enforcement did not rise to the level of constituting an affirmative statement of agency policy. In its Petition, however, ANR contends that PHMSA “ignores relevant statements in the record demonstrating that the present ‘interpretation’ runs contrary to PHMSA’s past practices.”²⁴ Specifically, Petitioner points to its statement at the hearing that compliance audits by PHMSA since 1990 included discussion of ANR’s interpretation of the regulation and that “compliance audit reviews . . . implicitly acknowledged Respondent’s qualification for the § 192.625(b)(3) exception without finding a violation.”²⁵

²⁰ *Id.*

²¹ 560 F.3d 506, 510 (D.C. Cir. 2009).

²² 577 F.3d 1330, 1340-41 (11th Cir. 2009).

²³ *Id.* at 1340. See also, *Devon Energy Corp. v. Norton*, [verify cite] 2007 WL 2422005 *5 (D.D.C. 2007) (distinguishing *Shell Offshore*, because in that case, “there was no question that Interior had made a change in policy and departed significantly from a consistent, prior practice of not requiring the certification. By contrast, in [*Devon*] . . . it is not all clear that the 2003 decision is a departure from a longstanding practice of Interior.”); *Visiting Nurse Assoc. v. Thompson*, 378 F. Supp.2d 75, 89 (E.D.N.Y. 2004) (declining to follow *Shell Offshore* and *Alaska Professional Hunters* because there was “no evidence that the [agency’s interpretation] was at odds with either a prior written interpretation of the cost-reporting regulations or any pattern of practice sufficiently longstanding to establish that the Secretary had arrived at a definitive interpretation of these rules.”)

²⁴ Petition at 4.

²⁵ *Id.* (citing ANR Hearing Presentation, Slide 20); Petition Amendment at 1.

Petitioner's statements in this regard were not "ignored" in the Final Order. Rather, PHMSA found there was simply no evidence demonstrating that the statements were true. While ANR is correct that agency representatives at the hearing did not introduce evidence refuting the company's assertion,²⁶ ANR likewise failed to produce any evidence that the statements were true. Since the statements could not be supported with any probative evidence, the claims simply did not carry much value in determining whether or not PHMSA had a long-standing policy.

In apparent response to such lack of evidence, ANR presents in its Petition Amendment, for the first time, an affidavit dated January 25, 2010, from the company's Senior Field Compliance Engineer, who attests that in 2002 PHMSA performed an inspection of the ANR pipeline facility and discussed with him the odorization, or lack thereof, of the Illinois–Wisconsin lateral system. The employee stated that, based on his knowledge and experience, the fact that PHMSA did not issue a citation for a violation of § 192.625(b) following the 2002 inspection indicated that PHMSA found the company's practice to be acceptable.²⁷

As a procedural matter, ANR did not submit in its Petition any reason why such evidence was not presented prior to issuance of the Final Order, as required under § 190.215. Even accepting the validity of the witness's statement, however, this new evidence demonstrates only that at a single point in time, a PHMSA representative reviewed ANR's methodology and did not issue a probable violation. This fact alone, even if true, does not constitute a "long established and consistently followed practice" upon which ANR could reasonably rely.

Finally, Petitioner argues that PHMSA "abused its discretion" under the APA by interpreting and applying § 192.625(b)(3) in an adjudication rather by rulemaking.²⁸ Again, ANR has raised this basic argument before.²⁹ In response to the contention that PHMSA should enunciate this interpretation by rulemaking, the agency determined in the Final Order that it is not necessarily required to undertake a rulemaking in order to interpret its own regulations, and that courts have recognized the discretion of agencies to set forth regulatory interpretations either by adjudication or rulemaking.³⁰

As referenced above, PHMSA does not consider repetitious arguments presented in a petition for reconsideration. Therefore, I dismiss ANR's repetitious argument that PHMSA failed to comply with the APA by interpreting this particular regulation through its adjudication process. I note further, however, that ANR has suggested the agency consider several court decisions the company believes support its position. For the sole purpose of distinguishing those decisions, I address Petitioner's argument.

²⁶ Petition Amendment at 2.

²⁷ Petition Amendment, Attachment 1 at ¶ 6.

²⁸ *Id.* at 2.

²⁹ *See* Final Order at 8 (*citing* ANR's Supplemental Response to the Notice of Probable Violation at 2 (Nov. 20, 2007)).

³⁰ Final Order at 9 (*citing* *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 292–94 (1974) (stating that an agency is "not precluded from announcing new principles in an adjudicative proceeding"))).

In its Petition Amendment, ANR cites the decision in *First Bancorporation v. Board of Governors of the Federal Reserve System*, where the Board had issued an order unconditionally allowing the petitioner to acquire a particular financial institution.³¹ Several years later, when the same party applied for approval to acquire a similar institution, the agency issued an order imposing new conditions on such an acquisition and, at the same time, placed those same new conditions on petitioner's *previous* acquisition, which had already been unconditionally approved. The court found that the second order "contains no adjudicative facts having any particularized relevance to petitioner," and therefore that the Board's order "was thus merely a vehicle by which a general policy would be changed."³² Under such facts, the court held it was an abuse of discretion for the agency to improperly attempt to change its policy with regard to such acquisitions by adjudication, and that such a significant policy change was required to be made through rulemaking under the APA.

Similarly, in the other case cited by ANR, *Patel v. Immigration and Naturalization Service*, the court looked at facts involving the agency's alleged attempt to implement a new substantive rule through adjudication.³³ In that case, the INS had issued an order finding that the respondent had failed to meet an exception for deportation because he had not complied with what the agency viewed as a requirement for aliens to show their commercial investment in the U.S. through expanded job opportunities. The court found that not only was the job opportunities requirement not mentioned in the regulation establishing an exception for aliens who have made significant commercial investments in the U.S., but the INS had previously *proposed* to include such a condition in the regulation but then, in response to comments, had eliminated it from the final rule. For this reason, the court found that the INS had "attempted to add a requirement to the . . . regulation [through its order] which had been expressly discarded during its rulemaking proceedings."³⁴ Under such facts, the court held that the agency had abused its discretion by announcing what amounted to a new substantive rule by adjudication rather than rulemaking.

In contrast to these cases, in which an agency tried to use the adjudicatory process to implement a significant policy change or to establish a new requirement, the present matter does not reflect an attempt by PHMSA to use this adjudication "merely [as] a vehicle by which a general policy would be changed."³⁵ Moreover, as has already been discussed at length, both in the Final Order and in this Decision, PHMSA has not changed an established policy, but, rather, has interpreted the manner in which the exception in § 192.625(b)(3) should be applied to the specific facts presented by Petitioner's particular pipeline system.

In a court decision more analogous to the present matter, the FCC interpreted an otherwise ambiguous regulatory term (i.e., "in substantial accordance with . . . the station authorization") in an adjudication by deciding that, in the context of radio station construction, the term means within one mile of the coordinates authorized by the agency.³⁶ On appeal by several parties who

³¹ 728 F.2d 434 (10th Cir. 1984).

³² *Id.* at 438.

³³ 638 F.2d 1199 (9th Cir. 1981).

³⁴ *Id.* at 1202.

³⁵ *First Bancorp.*, 728 F.2d at 438.

³⁶ *Cassell v. FCC*, 154 F.3d 478, 481 (D.C. Cir. 1998).

argued the FCC had adopted a substantive rule without notice and comment, the court found their argument “without merit.” The court held that “it is well settled that an agency is not precluded from announcing new principles in an adjudicative proceeding.”³⁷ This decision is consistent with the determination in the Final Order that the agency is not necessarily required to undertake a rulemaking in order to announce the interpretation of the exception in § 192.625(b)(3).

For all of the reasons set forth above and in the Final Order, I reject ANR’s contention that PHMSA violated the APA by issuing a final order interpreting an agency regulation without going through notice and comment.

2. *Whether the interpretation of § 192.625(b)(3) is reasonable.*

In its Petition, ANR acknowledges that an agency interpretation of a regulation is generally entitled to deference.³⁸ The company argues, however, that PHMSA’s interpretation of § 192.625(b)(3) is arbitrary, capricious, unreasonable, and not supported by the evidence in the record. Petitioner presents several different arguments in this regard.

First, ANR argues that the interpretation is arbitrary and capricious because it “introduces a new criterion of length into the analysis of whether a lateral qualifies for the § 192.625(b)(3) exception.”³⁹ Petitioner contends that the “interpretation is flawed and illogical in application” because the concept of length “is not a concept that is addressed in the regulatory definition of a transmission line.”⁴⁰ As grounds for its position, the company cites *Acadian Gas Pipeline System v. FERC*, which found that “[w]here any agency fails to distinguish past practice, its actions may indicate that lack of reasoned articulation and responsibility that vitiates the deference the reviewing court would otherwise show.”⁴¹

I reject Petitioner’s contention that PHMSA has introduced a “new criterion of length” into § 192.625(b)(3) in the Final Order, or that the concept of length was not contemplated in the regulation. The text of the regulation clearly states that an exception for lateral lines applies only if at least 50 percent “of the *length* of that line” is in either a Class 1 or Class 2 location. Thus, the regulation necessarily requires one to calculate the length of a lateral line from one point to another in order to determine whether 50 percent of that distance is in a Class 1 or Class 2 location. PHMSA has not introduced a new concept of length, but simply interpreted how that length should be measured. The *Acadian Gas* case is further distinguished because there is no past practice from which the agency is departing. For these reasons, I reject Petitioner’s argument that PHMSA has introduced a new concept of length into the regulation.

³⁷ *Id.* at 486 (citations omitted).

³⁸ Petition at 5.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ 878 F.2d 865, 868 (5th Cir. 1989).

In a related argument, ANR asserts that PHMSA has introduced the new concept that a lateral line, in the context of § 192.625(b)(3), must be “short.” This is apparently in response to the finding in the Final Order that ANR’s practice of artificially increasing the mileage of Class 1 and Class 2 areas for each lateral line was inconsistent with the intent of the lateral line exception, which, “in most cases,” was to exclude “short” segments of pipeline in predominantly rural areas.⁴² The interpretation set forth in the Final Order, however, does not mandate that all laterals meeting the exception be short; instead, it rejects the practice of ANR in this particular case, because the result of the company’s actions is inconsistent with the intent of the rule. Therefore, I reject Petitioner’s argument.

Second, ANR questions the reasonableness of the interpretation on the ground that under the Final Order, a lateral that otherwise meets the exception in § 192.625(b)(3) could be bifurcated by a newly constructed interconnecting pipeline, resulting in the loss of its exception status.⁴³ For example, using the hypothetical lateral system diagram in the Final Order, Petitioner argues that a lateral constructed from point H to point D might qualify for the exception, but if an interconnection were subsequently built at point G, the portion from point H to point G might lose its exception status under § 192.625(b)(3).

PHMSA has not been presented with an actual situation where a lateral meeting the exception in § 192.625(b)(3) is subsequently bifurcated, and therefore the agency does not decide here whether the interpretation enunciated in the Final Order would cause such a formerly exempt lateral to lose its exception status. I would note, however, in the hypothetical presented that even if the portion from point H to point G did not meet the exception in § 192.625(b)(3), ANR’s concern over the “loss” of an exception is misplaced, because that portion of the line could still potentially qualify for another exception if certain criteria were met. For example, § 192.625(b)(1) provides that odorization is not required for combustible gas in a transmission line in a Class 3 or Class 4 location if “at least 50 percent of the length of the line downstream from that location is in a Class 1 or Class 2 location.” Therefore, I reject Petitioner’s argument that the interpretation is unreasonable in this regard.

Third, ANR provides several alternatives to the agency’s interpretation of the term “lateral” under § 192.625(b)(3) and suggests that PHMSA adopt such a “definition” in lieu of the one set forth in the Final Order.⁴⁴ As noted above, however, the definition of a lateral was not an issue in the Final Order, because PHMSA agreed that the subject pipelines were indeed lateral transmission lines. Rather, the issue was how to calculate the length of a lateral for the specific purpose of applying § 192.625(b)(3). Furthermore, the alternatives provided by ANR provide no further assistance in the application of § 192.625(b)(3), because they generally identify the beginning point of a lateral as the upstream transmission line, just as the interpretation employed by PHMSA does. To the extent there are any inconsistencies between PHMSA’s interpretation

⁴² Final Order at 6 (*citing* Odorization of Gas in Transmission Lines, 40 Fed. Reg. 20,279, 20,280 (May 9, 1975)).

⁴³ Petition at 5.

⁴⁴ Petition at 6.

and the various other “definitions” suggested or cited by Petition, the latter are expressly rejected for purposes of § 192.625(b)(3).⁴⁵

Fourth, ANR objects to the decision in the Final Order that “double-counting” the upstream mileage of pipeline predominantly in Class 1 and Class 2 areas should not be allowed.⁴⁶ Petitioner contends that “there is no background in the preamble to the rule that indicates that overlapping should not be allowed.” I disagree. As explained in the Final Order, such a methodology can artificially inflate the mileage calculated in Class 1 and Class 2 areas, which, in ANR’s case, led to an improper and erroneous conclusion that approximately 100 miles of pipeline in populated areas were exempted from the odorization standard.

Fifth, ANR suggests that PHMSA could calculate the length of the company’s lateral lines from their endpoints at the respective distribution centers back to the line that connects Sandwich Station to the interconnection between ANR’s facilities and another pipeline operated by TransCanada at Fortune Lake, Michigan.⁴⁷ ANR contends this approach is justified because “this line is the source of the majority of gas delivered in Wisconsin by ANR [and] is a ‘main’ transmission line from which various laterals emanate.” Petitioner also contends this suggestion was discussed at the hearing but “not addressed in the Order.”

A review of Petitioner’s presentation at the hearing shows the company argued that each lateral in question should be viewed to begin at Sandwich Station, not some other location suggested in the Petition.⁴⁸ The Final Order specifically addressed this argument by noting that ANR had argued that the length of each lateral line “should be traced back to its point of origin at its primary source of supply . . . at the Sandwich Compressor Station.”⁴⁹ The Final Order noted that such methodology resulted in the “double-counting” of upstream mileage, and formed one of the bases for PHMSA’s rejection of ANR’s methodology for calculating the length of laterals.⁵⁰

Finally, ANR contends that the Final Order “arbitrarily limits the applicability of the lateral line exemption by excluding any ‘lateral line’ that does not meet the new test for measuring length, although the simple and unambiguous language in the text of the regulation does not exclude any types of lateral lines—whether such lines are of any particular length, or a certain diameter, or overlapping lines.”⁵¹ ANR suggests that the limits of the exception for odorizing gas pipelines in populated areas be much broader than the text of the regulation permits. The regulation itself sets forth certain limiting factors, that is, at least 50 percent of the length of a lateral line ending at a distribution center must be in a Class 1 or Class 2 location. Given the safety importance of

⁴⁵ See Final Order at 5 (finding no significant inconsistency between the agency’s definition and the various other definitions cited by Petitioner).

⁴⁶ Petition at 6.

⁴⁷ *Id.*

⁴⁸ See ANR Hearing Presentation, Slides 16-18.

⁴⁹ Final Order at 3 (*citing* Response at 2).

⁵⁰ *Id.* at 5-7. To the extent Petitioner is proposing alternative measures or activities, the agency has set forth procedures for considering such proposals at 49 C.F.R. § 190.341.

⁵¹ Petition at 7 (emphasis in original).

the general odorization requirement, I must construe this exception narrowly.⁵² PHMSA has resolved the ambiguity in the regulation presented by the novel situation of ANR's lateral system. The resolution is an interpretation that constitutes a reasonable and justifiable approach based on all of the reasons set forth in the Final Order and in this Decision. Therefore, I reject the company's argument that the limits placed on the applicability of the exception by PHMSA's interpretation are arbitrary and capricious.

For all of the reasons set forth above and in the Final Order, I affirm that the interpretation of 49 C.F.R. § 192.625(b)(3) set forth in the Final Order is not an unreasonable application of the regulation.

III. Additional Time to Implement the Compliance Order

In its Petition, ANR requests, in the alternative, that the deadlines in the compliance order for completing the corrective actions be extended.⁵³ Specifically, ANR requests: (1) with regard to Requirement 1, that the 30-day deadline for developing and submitting written procedures for identifying pipelines to be odorized be extended to 60 days; (2) with regard to Requirement 2, that the 60-day deadline for identifying pipelines to be odorized be extended to 120 days; (3) with regard to Requirement 3, that the one-year deadline for performing corrective actions to ensure proper odorization be extended to two years; and (4) with regard to Requirement 4, that the 30-day deadline for submitting written operation and maintenance procedures for odorizers be extended to 60 days. Petitioner requests these extensions because the company would need "to coordinate completion of various tasks with other tasks, and additional time [would be] needed to consult with other affiliates of TransCanada, so we can obtain consistent and better internal specifications than would otherwise occur."⁵⁴

With respect to Requirement 3, Petitioner further contends that it should be granted an additional year because "it will need to obtain rights to construct and install above ground odorization facilities at numerous locations on its pipeline system, and acquiring such land rights may be a timely process."⁵⁵ ANR also contends that other considerations, such as "material acquisitions, including long lead times, contractor availability, obtaining local permits, determining and minimizing environmental impacts (including possible impact on air emissions), and addressing customer concerns on optimizing facility utilization and avoiding unproductive facility duplication," will cause delays in meeting the current deadline, making a two-year deadline "more realistic."⁵⁶

⁵² Final Order at 7.

⁵³ Petition at 6-7.

⁵⁴ *Id.* at 8.

⁵⁵ *Id.*

⁵⁶ *Id.*

Under ordinary circumstances, filing a petition for reconsideration does not stay the compliance terms of a final order.⁵⁷ In this case, Petitioner requested and received a stay of the Final Order in order to allow the issues discussed herein to be resolved. If anything, this one-year delay in imposing the remedial actions has allowed ANR approximately the same amount of time requested in its Petition. Therefore, ANR's request to extend the deadlines even further is denied. The deadlines specified in the compliance order will run from the date of this Decision, rather than the operator's receipt of the Final Order.

Notwithstanding this denial, ANR has raised issues that could potentially cause delays beyond Petitioner's control. This Decision does not preclude the possibility that an extension of time may be granted in the future for good cause shown. Any such request must be timely submitted by ANR in writing to the Director, Central Region, who may grant an extension of time to comply with any of the required items in the compliance order upon a showing of good cause.

IV. Prior Violation

The Final Order noted that the ANR's violation of § 192.625(b) would be "considered a prior offense in any subsequent enforcement action taken against Respondent."⁵⁸

In its Petition, ANR argues that the finding of violation should not be considered a prior offense because PHMSA has based its finding on an interpretation of § 192.625(b)(3) first established in the Final Order. Petitioner also contends that it did not have prior knowledge of the interpretation, such that the company should not be penalized in the future for its application of § 192.625(b)(3) because it neither "intentionally" nor "negligently" violated the regulation.

When PHMSA makes a finding of violation in an enforcement matter, the agency generally advises the respondent that the violation will be considered a "prior offense" in any subsequent enforcement action against the company. The agency keeps track of prior offenses under 49 U.S.C. § 60122(b)(1)(B) because, in determining the amount of a civil penalty, PHMSA must consider "any history of prior violations" on the part of the respondent. In practice, if a respondent has a history of prior violations, a new violation may support the assessment of a higher civil penalty, or conversely, the absence of a history of prior violations may support assessment of a lower civil penalty or no penalty at all.

In this regard, I find that the violation in this case is one of first impression and therefore that it is appropriate, under the facts and circumstances set forth in the Final Order and this Decision, that the Petitioner should not be penalized for the present violation in future potential enforcement actions. Therefore, PHMSA shall not consider this violation to be a "prior offense" or "prior violation" for purposes of calculating a civil penalty in any subsequent enforcement action taken against ANR.

⁵⁷ 49 C.F.R. § 190.215(d).

⁵⁸ Final Order at 9.

This decision does not restrict PHMSA's ability to take enforcement action against Petitioner for violating any pipeline safety regulation, including § 192.625, any agency order, including the present order, or any other requirement under 49 U.S.C. Chapter 601.

V. Conclusion

For the reasons set forth above, ANR's Petition is **denied** with respect to its requests that PHMSA withdraw the finding of violation or, in the alternative, to modify the agency's interpretation of § 192.625(b)(3) in the manner suggested by Petitioner. ANR's Petition is also **denied** with respect to its request to extend the deadlines in the compliance order; however, the deadlines shall run from the date of this Decision, rather than the date of the operator's receipt of the Final Order. Finally, ANR's Petition is **granted** with respect to its request that PHMSA not consider the violation to be a "prior offense" or "prior violation" for purposes of any future civil penalty assessment.

This Decision on Petition for Reconsideration is the final administrative action in this proceeding.



Jeffrey D. Wiese
Associate Administrator
for Pipeline Safety

DEC 30 2010

Date Issued