

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

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| _____ |) | |
| In the Matter of |) | |
| |) | |
| Tennessee Gas Pipeline Company |) | CPF No. 4-2019-1007 |
| |) | Notice of Probable Violation |
| Respondent. |) | |
| _____ |) | |

**REQUEST FOR HEARING, WRITTEN RESPONSE, AND PRELIMINARY
STATEMENT OF ISSUES**

I. Request for Hearing

Tennessee Gas Pipeline Company, L.L.C. (TGP or Company) respectfully requests an in-person hearing on the above referenced Notice of Probable Violation (NOPV) and Proposed Compliance Order issued by the Pipeline and Hazardous Materials Safety Administration (PHMSA), pursuant to 49 C.F.R. Parts 190.208(a)(4) and 190.211(b). The NOPV alleges two violations regarding identification of high consequence areas and atmospheric corrosion and proposes a compliance order with corrective measures for each allegation. The NOPV was received by TGP on May 20, 2019 and therefore this request is timely pursuant to 49 C.F.R. Part 190.208.

The Company believes that this matter can be resolved without resort to a hearing and respectfully requests a settlement meeting with the Southwest Region. In order to preserve its rights, however, TGP is filing this Request for Hearing, Written Response, and Statement of Issues as set forth under 49 C.F.R. Part 190.211(b). In the event that a hearing is scheduled in this matter, please be advised that TGP in-house counsel and/or Troutman Sanders law firm, will represent the Company at any hearing.

As set forth below, PHMSA has not met its burden in proving that TGP violated the allegations at issue. For that reason, the Company respectfully requests that the entire NOPV and the Proposed Compliance Order be withdrawn in their entirety.

II. TGP Written Response to NOPV

PHMSA bears the burden of proving that alleged violations have occurred. *See e.g., In re ANR Pipeline Co, Final Order, CPF 3-2011-1011 (Dec. 31, 2012)* (noting that if PHMSA “does not produce evidence supporting the allegation [which] outweighs the evidence and reasoning presented by Respondent in its defense,” the allegation of violation must be withdrawn). The Agency has not met its burden in this case and the NOPV and the Proposed Compliance Order should be withdrawn in their entirety.

A. NOPV Item 1 Should be Withdrawn

1. PHMSA Allegation

§192.905 How does an operator identify a high consequence area?

(b) (1) Identified sites. An operator must identify an identified site, for purposes of this subpart, from information the operator has obtained from routine operation and maintenance activities and from public officials with safety or emergency response or planning responsibilities who indicate to the operator that they know of locations that meet the identified site criteria. These public officials could include officials on a local emergency planning commission or relevant Native American tribal officials.

Tennessee Gas Pipeline (TGP) failed to properly identify an identified site as required by 192.905(b)(1). During the field inspection, PHMSA inspectors identified a playground adjacent to the Sullivan City-Texas Garden pipeline (407D-500 to 407D-501) right-of-way and within its potential impact radius (PIR).

The playground located at Corina Peña Elementary School in Penitas, Texas was not listed by TGP as an identified site.

Based on information provided by TGP personnel on the PIR, and the assistant principal at Corina Peña Elementary School, it was determined that the playground could be occupied by more than 20 students at a time for more than 50 days per year requiring designation as an identified site.

2. TGP Response to NOPV Item 1

NOPV Item 1 is incorrect as a matter of fact and law. TGP fully complied with 49 C.F.R. Part 192.905 and its procedures in identifying high consequence areas (HCA) and more specifically “identified sites” in proximity to its Sullivan City-Texas Garden pipeline. The Corina Pena Elementary School “playground” allegedly identified by PHMSA is in fact only a holding pond. While one or more moveable soccer goals may sometimes be present in this drainage area, the area is typically overgrown and/or holding standing water and is used infrequently by the school. TGP regularly monitors the nearby right of way (ROW) and, among other things, observes the area in question. In addition to this information, when confirming and updating its integrity management HCA designations, TGP expressly discussed the school’s use of the vacant drainage area and school officials have confirmed that the area is not used as an outdoor area of assembly such that it would meet PHMSA’s definition of an “identified site” and thus an HCA.

PHMSA integrity management rules define an HCA to include a number of high populated or frequently used areas, including “identified sites” within certain proximity to the pipeline. *49 C.F.R. Part 192.903*. Part 192.903 defines an identified site to include in relevant part (emphasis added):

an outside area or open structure that is occupied by twenty (20) or more persons on at least 50 days in any twelve (12)-month period. (The days need not be consecutive.) Examples include but are not limited to, beaches, playgrounds, recreational facilities, camping grounds, outdoor theaters, stadiums, recreational areas near a body of water, or areas outside of a rural building such as a religious facility.

Identified sites should be determined based on “information the operator has obtained from routine operation and maintenance activities and from public officials with safety or emergency response or planning responsibilities who indicate to the operator that they know of locations that meet the identified site criteria.” *49 C.F.R. Part 192.905(b)(1)*. In determining whether an area is an “identified site,” PHMSA requires that there be evidence of use and the rule outlines specific criteria for that use “At the site there needs to be evidence that the site is used by 20 or more persons on at least 50 days in any 12-month period.” *Final Rule, 67 Fed. Reg. 50824, 50830 (Aug. 6, 2002)*.

PHMSA’s NOPV and the information contained in the underlying Pipeline Safety Violation Report (PSVR) regarding the use of this area is incorrect. PHMSA’s position is based on imprecise email correspondence with the school. The NOPV alleges that this area is a “playground” and that based on discussions with the school’s assistant principal, it was determined that it “could be occupied by more than 20 students at a time for more than 50 days per year.” The PSVR further attaches correspondence with Mr. Manuel Pena an “Instructional Supervisor” at the school where the PHMSA inspector cites the definition of an “identified site” and asks “if you feel your school and playground area meets the definition of an identified site” to which Mr. Pena responded vaguely, “That definition does seem to fit our scenario.” It is not clear that the Mr. Pena understood that PHMSA was inquiring about the drainage pond area and not the actual playground area of the school property. Earlier in that correspondence, Mr. Pena explained the use of the gym and noted that students in the gym only go outside for activities for 15 minutes at a time 3 times a week and it is “not used during extreme temperatures.”

The Part 192.905 “identified site” regulations require evidence of use and not merely that an area “could be used” but “is” in fact used by a certain amount of people (20) at least a certain number of times a year (50). In addition, the school itself is not within the potential impact radius and therefore it is not relevant to identification of an HCA and its use is not relevant to the regulatory determination of an “identified site” for a nearby outdoor area. The PHMSA inspector’s email exchange with the school employee included vague questions and generalized responses, in contrast with the information that TGP has obtained from its observations of the school during routine maintenance activities and from school officials which evidence that the drainage area does not meet the definition of “identified site.”

For all of the reasons set forth above, PHMSA has not met its burden of proving that a violation occurred under NOPV Item 1 and it should be withdrawn.

B. PHMSA NOPV Item 2 Should be Withdrawn

1. PHMSA Allegation

§192.479 Atmospheric corrosion control: General

(a) Each operator must clean and coat each pipeline or portion of pipeline that is exposed to the atmosphere, except pipelines under paragraph (c) of this section.

(b) Coating material must be suitable for the prevention of atmospheric corrosion.

(c) Except portions of pipelines in offshore splash zones or soil-to-air interfaces, the operator need not protect from atmospheric corrosion any pipeline for which the operator demonstrates by test, investigation, or experience appropriate to the environment of the pipeline that corrosion will—

(1) Only be light surface oxide; or

(2) Not affect the safe operation of the pipeline before the next scheduled inspection.

TGP failed to clean and coat portions of their pipeline exposed to the atmosphere at the Victoria compressor station. During the field inspection, PHMSA inspectors observed several portions of the compressor suction piping with deteriorating coating conditions where the coating was cracking, peeling and disbonding.

Shortly after the inspection, TGP provided evidence indicating that the compressor station suction piping had been cleaned and recoated to satisfactory condition. However, TGP procedure, atmospheric corrosion inspection guidelines CorrPD-006, did not require re-coating when the coating were cracked, peeled, or dis-bonded. TGP procedures in the "fair" and "poor" category did not have a clear and definitive thresholds to determine grading of pipeline coating condition as required by §192.479.

2. TGP Response to NOPV Item 2

NOPV Item 2 should be withdrawn. While TGP disagrees with the allegations of Item 2, TGP is most concerned with the proposed compliance order action #2 that would require that TGP revise its procedure. TGP atmospheric corrosion procedures are more stringent than minimum requirements in 49 C.F.R. Part 192.479 and have proven to be effective in managing atmospheric corrosion.

PHMSA rules require that pipelines that are exposed to the atmosphere be cleaned and coated (with some exceptions). *49 C.F.R. Part 192.479(a)*. Cleaning and coating is not required where an operator can demonstrate by test, investigation or experience appropriate to the environment of the pipeline that corrosion will only be a light surface oxide or will not affect the safe operation of the pipeline before the next inspection. *49 C.F.R. Part 192.479(c)(2)*(with some exceptions). Operators are further required to periodically monitor their pipelines at least every three calendar years and take remedial action when necessary to maintain protection against atmospheric corrosion. *49 C.F.R. Part 192.481*.

PHMSA guidance further clarifies that the Agency’s atmospheric corrosion rules allow for some surface rust as long as there is no wall loss (*i.e.*, pitting). Specifically, PHMSA interpretive guidance has explained that “surface rust or passive surface oxidation caused by atmospheric corrosion would subject the pipeline to the requirements of 192.479(b) [to be coated] if the corrosion is deteriorating the pipeline, such as pitting.” *Exhibit 1, PHMSA Part 192 Corrosion Enforcement Manual, p. 119 (Dec. 12, 2015) citing to PHMSA Interpretation to W. Kelly from G. Tenley, PI-91-013 (May 23, 1991)* (emphasis added) (also stating that “studies have shown that passive film oxidation inhibits atmospheric corrosion. Therefore, the rate of corrosion could be slowed to the point that the corrosion is not deteriorating the pipeline”). PHMSA corrosion control enforcement guidance further explains:

atmospheric corrosion is an area of metal loss due to general corrosion, localized corrosion pitting, or peeling scale on the steel surface that has damaged the pipe. Surface oxide is corrosion and if allowed to continue may affect the safe operation of the pipeline at some point in the future. Oxidation (or “light surface oxide”) can be defined as the slow rusting of pipe which is not yet considered to be atmospheric corrosion because there is no evidence of metal loss at this time.

Exhibit 1, PHMSA Part 192 Corrosion Enforcement Manual, p. 120 (Dec. 12, 2015). PHMSA rules set minimum standards and allow operators the discretion to prepare and implement their own atmospheric corrosion control programs based on operating experience, the pipeline environment, and the training and judgment of the qualified corrosion technician conducting the inspections. TGP’s atmospheric corrosion control procedures are effective and adequate under PHMSA Part 192 corrosion control regulations. In addition, TGP’s grading criteria are in line with PHMSA guidance and industry standards. *Kinder Morgan O&M Procedure 918, Inspecting for Atmospheric Corrosion, Sec. 3.2 (rev. Nov. 1, 2017) (directing personnel to Atmospheric Corrosion Inspection Guidelines, CorrPD-006, (rev. Feb. 25, 2019) on grading coating condition)*.

There is no evidence that TGP’s procedures are inadequate or that the thresholds outlined in its “Fair” and “Poor” categorizations require revision to meet 49 C.F.R. Part 192.479. To the extent that PHMSA is asserting that Part 192.479 always requires recoating where coating is cracked, peeled or disbonded and/or is trying to read Parts 192.479(c)(1) and (2) out of the regulation this constitutes rulemaking without due process and fair notice. Such a change to the regulations (and guidance at issue) must be issued through the notice and comment rulemaking process mandated by the Administrative Procedure Act. 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, 867 F.3d 564 (5th Cir. 2017)* (citing *Diamond Roofing Co., 528 F.2d at 649*). To do otherwise violates due process requirements under the U.S. Constitution.

For the reasons set forth above, PHMSA has not met its burden in proving that a violation occurred under NOPV Item 2, and it should therefore be withdrawn.

C. Proposed Compliance Order Should be Withdrawn

The NOPV contains a Proposed Compliance Order that would require TGP within 90 days of a Final Order to: (1) include the Corina Pena Elementary School as an identified site and incorporate the site into its integrity management assessment schedule and (2) review and amend its atmospheric corrosion inspection guidelines in the “fair” and “poor” categories to provide “a more clear and definitive threshold to determine the grading of pipeline coating conditions” and ensure that personnel using the procedure have been trained on its revisions. As explained above, TGP fully complied with the regulations at issue in the NOPV and relevant TGP procedures and PHMSA has not met its burden to prove otherwise. For those reasons, the Proposed Compliance Order should be withdrawn.

III. Preliminary Statement of Issues

TGP respectfully contests both alleged violations in the NOPV and the Proposed Compliance Order in its entirety, and intends to raise the following issues at the Hearing:

1. Whether NOPV Item 1, alleging a violation of 49 C.F.R. Part 192.905(b)(1), should be withdrawn because it is incorrect as a matter of fact and law;
2. Whether NOPV Item 2, alleging a violation of 49 C.F.R. Part 192.479, should be withdrawn because it is incorrect as a matter of fact and law;
3. Whether PHMSA’s interpretation of 49 C.F.R. Part 192.479 violates due process and fair notice; and
4. Whether the Proposed Compliance Order should be withdrawn because TGP fully complied with 49 C.F.R. Parts 192.905(b)(1) and 192.479 and its atmospheric corrosion procedure guidelines CorrPD-006 fully comply 49 C.F.R. Part 192.479.

IV. Summary

In the event that the parties are unable to resolve these issues in advance of a hearing, TGP intends to present evidence and engage in discussion with PHMSA on these issues at the hearing in this case. TGP reserves the right to revise and supplement this Response and Statement of Issues at or before the Hearing. TGP also reserves the right to respond to any new factual assertions or arguments introduced by OPS during the proceeding of the case.

For all of these reasons identified above, and in consideration of other matters as justice may require, the Company respectfully requests that PHMSA withdraw the NOPV and the Proposed Compliance Order.

Respectfully submitted,



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List of Exhibits

1. Exhibit 1, PHMSA Part 192 Corrosion Enforcement Manual, pp. 119-120 (Dec. 12, 2015).