



U.S. Department
of Transportation

Pipeline and Hazardous Materials
Safety Administration

NOV 14 2019

1200 New Jersey Ave., SE
Washington, DC 20590

Ms. Kimberly Allen Dang
President
Kinder Morgan, Inc.
1001 Louisiana Street, Suite 1000
Houston, Texas 77002

Re: CPF No. 1-2018-1001

Dear Ms. Dang:

Enclosed please find the Final Order issued in the above-referenced case to your subsidiary, Tennessee Gas Pipeline Company. It withdraws one of the allegations of violation, makes a finding of violation, and assesses a civil penalty of \$39,700. This is to acknowledge receipt of payment of the full penalty amount, by wire transfer dated March 15, 2018. This enforcement action is now closed. Service of the Final Order by certified mail is effective upon the date of mailing as provided under 49 C.F.R. § 190.5.

Thank you for your cooperation in this matter.

Sincerely,


Alan K. Mayberry
Associate Administrator
for Pipeline Safety

Enclosure

cc: Ms. Mary McDaniel, Director, Southwest Region, Office of Pipeline Safety, PHMSA
Mr. Kenneth Grubb, Chief Operating Officer, Tennessee Gas Pipeline Company.
1001 Louisiana Street, Suite 1000, Houston, Texas 77002
Ms. Jessica Toll, Esq., Assistant General Counsel, Kinder Morgan, Inc., 370 Van
Gordon Street, Lakewood, Colorado 80228

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

**U.S. DEPARTMENT OF TRANSPORTATION
PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMINISTRATION
OFFICE OF PIPELINE SAFETY
WASHINGTON, D.C. 20590**

In the Matter of)

Tennessee Gas Pipeline Company,)
a subsidiary of Kinder Morgan, Inc.,)

Respondent.)
_____)

CPF No. 1-2018-1001

FINAL ORDER

From May 9-11, 2017, pursuant to 49 U.S.C. §§ 60106 and 60117, representatives of the Connecticut Department of Energy and Environmental Protection, as agent for the Pipeline and Hazardous Materials Safety Administration (PHMSA), Office of Pipeline Safety (OPS), conducted an on-site pipeline safety inspection of the facilities and records of Tennessee Gas Pipeline Company (TGP or Respondent), in Connecticut. TGP operates approximately 11,750 miles of pipelines which run from the Gulf of Mexico coast in Texas and Louisiana through Arkansas, Mississippi, Alabama, Tennessee, Kentucky, Ohio, and Pennsylvania and deliver gas to various states in the northeastern United States. Kinder Morgan, Inc. is the parent company of TGP.¹

As a result of the inspection, the Director, Eastern Region, OPS (Director), issued to Respondent, by letter dated February 12, 2018, a Notice of Probable Violation, Proposed Civil Penalty, and Proposed Compliance Order (Notice). In accordance with 49 C.F.R. § 190.207, the Notice proposed finding that TGP had committed two violations of 49 C.F.R. Part 192 and proposed assessing a civil penalty of \$39,700 for one of the alleged violations. The Notice also proposed ordering Respondent to take certain measures to correct the alleged violations.

TGP responded to the Notice by letter dated March 15, 2018 (Response). TGP did not contest the first alleged violation and paid the civil penalty for that item. TGP contested the second alleged violation and requested a hearing. A hearing was subsequently held on June 12, 2018, in West Trenton, New Jersey before a PHMSA Presiding Official. At the hearing, Respondent was represented by counsel. Respondent provided additional written material prior to the hearing by letter dated June 4, 2018 (Prehearing Submission), and following the hearing by letter dated July 26, 2018 (Post-hearing Submission). The Director submitted a region recommendation on

¹ Pipeline Safety Violation Report (Violation Report), (Feb. 12, 2018) (on file with PHMSA), at 1; Kinder Morgan, Inc. website, available at https://www.kindermorgan.com/business/gas_pipelines/east/TGP (last accessed Oct. 9, 2019).

January 3, 2019 (Region Recommendation). TGP submitted a reply to the Director's recommendation on February 13, 2019 (Reply).

FINDING OF VIOLATION

The Notice alleged that Respondent violated 49 C.F.R. Part 192, as follows:

Item 1: The Notice alleged that Respondent violated 49 C.F.R. § 192.616(a), which states:

§ 192.616 Public awareness.

(a) Except for an operator of a master meter or petroleum gas system covered under paragraph (j) of this section, each pipeline operator must develop and implement a written continuing public education program that follows the guidance provided in the American Petroleum Institute's (API) Recommended Practice (RP) 1162 (incorporated by reference, see §192.7).

The Notice alleged that Respondent violated 49 C.F.R. § 192.616(a) by failing to implement certain elements of its written continuing public education program. Specifically, the Notice alleged that TGP failed to provide the program communications materials to the appropriate public officials in 11 specified towns in accordance with its written procedures.

Respondent did not contest this allegation of violation. Accordingly, based upon a review of all of the evidence, I find that Respondent violated 49 C.F.R. § 192.616(a) by failing to provide written public education program materials to the appropriate public officials in 11 towns in accordance with its written procedures.

This finding of violation will be considered a prior offense in any subsequent enforcement action taken against Respondent.

Item 2: The Notice alleged that Respondent violated 49 C.F.R. § 192.706, which states:

§ 192.706 Transmission lines: Leakage surveys.

Leakage surveys of a transmission line must be conducted at intervals not exceeding 15 months, but at least once each calendar year. However, in the case of a transmission line which transports gas in conformity with §192.625 without an odor or odorant, leakage surveys using leak detector equipment must be conducted—

(a) In Class 3 locations, at intervals not exceeding 7 ½ months, but at least twice each calendar year; and

(b) In Class 4 locations, at intervals not exceeding 4 ½ months, but at least four times each calendar year.

The Notice alleged that Respondent violated 49 C.F.R. § 192.706 by failing to conduct transmission line leakage surveys at intervals not exceeding 15 months, but at least once each

calendar year at four specified locations. Specifically, the Notice alleged that TGP's aerial leakage surveys, which among other things look for dead vegetation, should have been supplemented with ground surveys where the pipeline crossed under a paved parking lot in each of the four locations.

In its Response and at the hearing, TGP argued that the plain language of the regulation does not require that an operator conducting leak detection on gas transmission lines using aerial surveys to also use ground surveys in paved areas the size of the specified parking lots.² Respondent stated that the regulation is a performance-based rule that does not prescribe any particular method for conducting these leak surveys and an individual operator has the latitude to determine its leak survey method to be used, and that aerial patrolling had been used for decades on odorized lines.³

TGP noted that under the Administrative Procedures Act (APA), a regulation must provide a regulated entity with "fair notice" of the obligations it imposes and be issued pursuant to notice and comment rulemaking.⁴ Quoting *ExxonMobil Pipeline Co v. US DOT*, No. 16-60448, 2017 US App. LEXIS 15144 (5th Cir. Aug. 14, 2017), TGP stated that "fair notice requires the agency to have stated with ascertainable certainty what is meant by the standards it has promulgated."⁵

Respondent also argued that this citation was inconsistent with OPS' past enforcement practices involving the leak detection regulation which raised additional fair notice issues. At the hearing, TGP stated:

"If PHMSA wants to change its interpretation or adopt a new interpretation, due process requires that there be notice and comment rule making and everybody be put on notice of the new interpretation. It seems like we have a body of 30 years of agency guidance saying that aerial patrols are okay and then all of a sudden we get an NOPV..."⁶

TGP also argued that the presence of an odorant is recognized under the code as impacting a pipeline's need for other leak survey methods such as instrumented leakage surveys. In § 192.706, additional methods such as surveys using leak detector equipment are only specified for pipelines that "transport gas...without an odor or odorant." Odorized pipelines require only a leakage survey once each calendar year at intervals not exceeding 15 months and the regulations do not specify a method for accomplishing the survey. TGP argued that the administrative record of the original rulemaking that established the regulation at issue supported its position:

² Post-hearing submission, at 1.

³ Post-hearing submission, at 2.

⁴ 5 USC § 554(b).

⁵ Post-hearing submission, at 17.

⁶ Hearing transcript, at 19.

In the preamble to the final rule, PHMSA expressly stated that aerial patrols were sufficient when it said "[n]either 192.705 nor 192.706 specifies how patrols or leakage surveys are to be accomplished. The rules are written in performance language. Thus, for example, both aerial patrols and aerial leakage surveys would be acceptable where they are appropriate and effective." Final Rule, 40 Fed. Reg. 20279, 20282 (May 9, 1975), see Exhibit 4 to TGP pre-hearing brief.

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

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

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

It is particularly notable that the proposed rule would have required leak detection equipment in Class 4 locations even where gas is odorized, but PHMSA revised its position in the final rule stating clearly, "[t]he final rule does not require the use of detector equipment in Class 4 locations where transmission lines carry odorized gas." Exhibit 4 to TGP Pre-hearing brief, Final Rule, 40 Fed. Reg. 20282 (May 9, 1975).⁷

⁷ Post-hearing submission, at 5.

OPS acknowledged that the regulation was a performance-based regulation, but stated that the method had to be effective.⁸ OPS cited a 2009 Letter of Interpretation which stated that operators could utilize aerial surveys only if they were effective and that determination should be informed by factors including the time of year, weather conditions, ground visibility, soil conditions, and the location of the pipeline and that additional leakage survey methods would potentially be necessary in locations without vegetation cover.⁹ OPS argued that the aerial surveys conducted by TGP were inherently ineffective at detecting leaks in paved areas because TGP's own written procedures list the leak indicators that TGP personnel should be looking for while conducting leak surveys to include "signs of erosion," "sunken backfill," and "dead vegetation."¹⁰ TGP disagreed, stating that OPS had no evidentiary basis that would support a determination that its leak detection method for the areas at issue were ineffective. TGP argued that the available information was more consistent with a determination that its leak detection program was effective. TGP explained that there were numerous test points in the vicinity of the parking lots, and its personnel are trained to recognize gas leaks when they are performing electrical checks, patrols or other duties on the pipeline and they would respond to any gas odors detected.¹¹ As a measure of its effectiveness, TGP stated that no leaks had ever been detected in the four locations specified in the NOPV.¹²

Having considered these arguments, OPS is correct that a performance-based regulation must be carried out in a manner that is effective in achieving the purpose. However, in the absence of a reason to believe that TGP's method was ineffective, such as one or more leak incidents, it is OPS that has the burden of proof in showing that Respondent's methods were not effective. The 2009 Letter of Interpretation cited by OPS does not shift this burden in this proceeding. In the context of proving a code violation for ineffective leak detection where no leaks had occurred, it was incumbent on OPS to demonstrate that underground migration patterns or other factors made Respondent's method ineffective. OPS did not provide any technical analysis along these lines and no history of a leak incident was shown.

OPS also argued that TGP had fair notice that parking lots were required to have supplemental leakage surveys by citing the *Guide for Gas Transmission, Distribution, and Gathering Piping System (Addendum 8, 2017 to the 2015 Edition)* (GPTC Guide).¹³ Although the GPTC Guide has not been incorporated into the regulations, OPS views it as evidence of industry practices that operators should be aware of. TGP countered that the reliance on guidance by OPS was inconsistent with the importance of notice and comment rulemaking, and that the Constitutional principal of due process and the Administrative Procedure Act limit the role that agency

⁸ Hearing transcript, at 12.

⁹ PHMSA Interpretation PI-09-0018 (Nov. 5, 2009) available at <https://www.phmsa.dot.gov/regulations/title49/interp/PI-09-0018>.

¹⁰ Hearing transcript, at 57.

¹¹ Hearing transcript, at 34-35.

¹² *Id.*

¹³ Region recommendation, at 8-9.

guidance can play.¹⁴ TGP also pointed out that reliance on guidance was inconsistent with Executive Branch policy.¹⁵ TGP is correct that the GPTC Guide does not create an enforceable requirement on when to conduct a survey other than a vegetation survey. TGP was also able to show that other interpretive statements made by OPS were either agnostic on the method to be used or tended to support its argument that ground patrols for small paved areas had never been required in the past on odorized pipelines for which aerial patrolling of a vegetated right-of-way was done.¹⁶

During the hearing, OPS cited a Notice of Amendment that had been issued to another operator in accordance with § 190.206 and noted how that operator had amended its procedures to include supplemental leak detection in paved areas.¹⁷ OPS stated that TGP's written procedures "don't specify that in areas where there's inadequate vegetation, that TGP would have to provide further instruction on how to perform leak surveys..."¹⁸ In this case, however, for whatever reason OPS elected not to allege that Respondent's procedures were inadequate.¹⁹ To be sure, Respondent would probably be well served by enhancing its written procedures for addressing smaller paved areas such as parking lots.²⁰ Under the regulation that was cited in the Notice, however, an operator is not required to have any particular combination of methods for conducting leak surveys on an odorized pipeline.

The four parking lots specified in this case were of a size that held approximately 50-100 cars. If aerial surveys of vegetation were being performed along a significant portion of a pipeline right-of-way where no vegetation was present anywhere in the vicinity at the time of the patrol such as hundreds of yards of fields in a non-growing season, it may well have been a violation for TGP not to use leak detection methods other than aerial vegetation patrols. In this case, however, TGP was doing aerial patrols along a vegetated right-of-way during the season of growth. Based on the text of the regulation, an operator in TGP's position has no way of knowing how small a paved area crossing that right of way must be to avoid a citation. Operators would be left to wonder what OPS would do if the size of a given parking lot is less than 50-100 cars. There are also driveways, recreation areas, structures, and walkways which are common along pipeline right of ways. Based on the very austere plain language of this one-sentence regulation, and in the absence of any authoritative history of any pipeline operator being found in violation of the

¹⁴ Post-hearing submission, at 6.

¹⁵ *Memorandum for all Components from the Attorney General, Subject: Prohibition on Improper Guidance Documents*, November 16, 2017. The Attorney General stated that: "guidance may not be used as a substitute for rulemaking and may not be used to impose new requirements on entities outside the Executive Branch. Nor should guidance create binding standards by which the Department will determine compliance with existing regulatory or statutory requirements."

¹⁶ Hearing transcript, at 17-18.

¹⁷ Hearing transcript, at 65.

¹⁸ Hearing transcript, at 54.

¹⁹ This would have involved citing § 192.605.

²⁰ OPS likely could have issued a Notice of Amendment under § 190.206 along these lines instead of an NOPV.

cited regulation under similar circumstances, I find that the use of an alleged violation of § 192.706 to establish a new requirement for TGP on top of using aerial patrolling for a right-of-way containing ample vegetation that has small paved areas the size of the parking lots specified in this case is inconsistent with fair notice.

Accordingly, after considering all of the evidence and the legal issues presented, I find that OPS did not meet its burden of proving that TGP violated the cited regulation. Based upon the foregoing, I hereby order that this allegation be withdrawn.

ASSESSMENT OF PENALTY

Under 49 U.S.C. § 60122, Respondent is subject to an administrative civil penalty not to exceed \$200,000 per violation for each day of the violation, up to a maximum of \$2,000,000 for any related series of violations.²¹ In determining the amount of a civil penalty under 49 U.S.C. § 60122 and 49 C.F.R. § 190.225, I must consider the following criteria: the nature, circumstances, and gravity of the violation, including adverse impact on the environment; the degree of Respondent's culpability; the history of Respondent's prior offenses; any effect that the penalty may have on its ability to continue doing business; and the good faith of Respondent in attempting to comply with the pipeline safety regulations. In addition, I may consider the economic benefit gained from the violation without any reduction because of subsequent damages, and such other matters as justice may require. The Notice proposed a total civil penalty of \$39,700 for the first violation cited above.

Item 1: The Notice proposed a civil penalty of \$39,700 for Respondent's violation of 49 C.F.R. § 192.616(a) by failing to provide written public education program materials to the appropriate public officials in eleven towns in accordance with its written procedures. TGP neither contested the allegation nor presented any evidence or argument justifying a reduction in the proposed penalty. Having reviewed the record, I find that the assessment criteria for the Item cited above including nature, circumstances and gravity of the violation, Respondent's culpability, history of prior violations, and any good faith attempts at compliance, are supported by the record. Accordingly, I assess Respondent a total civil penalty of **\$39,700**, which amount was paid in full by wire transfer on March 15, 2018.

COMPLIANCE ORDER

The Notice proposed a compliance order with respect to Items 1 and 2 in the Notice for the alleged violations of 49 C.F.R. §§ 192.616(a) and 192.706. Under 49 U.S.C. § 60118(a), each person who engages in the transportation of gas or who owns or operates a pipeline facility is required to comply with the applicable safety standards established under chapter 601. As discussed above, Item 2 has been withdrawn. Therefore, the compliance terms proposed in the Notice for that Item are not included in this Order. Pursuant to the authority of 49 U.S.C. § 60118(b) and 49 C.F.R. § 190.217, Respondent is ordered to take the following actions to

²¹ These amounts are adjusted annually for inflation. See 49 C.F.R. § 190.223.

ensure compliance with the pipeline safety regulations applicable to its operations:

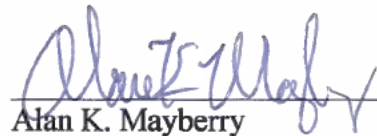
1. With respect to the violation of § 192.616(a) (**Item 1**), within 60 days following receipt of this Order, Respondent must determine the required public official stakeholder group members for the 11 towns listed in the Notice, provide necessary public awareness messages to those officials, and submit documentation of the completion of this requirement to the Director.

The Director may grant an extension of time to comply with the required item upon a written request timely submitted by the Respondent and demonstrating good cause for an extension.

It is requested (not mandated) that Respondent maintain documentation of the safety improvement costs associated with fulfilling this Compliance Order and submit the total to the Director. It is requested that these costs be reported in two categories: (1) total cost associated with preparation/revision of plans, procedures, studies and analyses; and (2) total cost associated with replacements, additions and other changes to pipeline infrastructure.

Failure to comply with this Order may result in the administrative assessment of civil penalties not to exceed \$200,000, as adjusted for inflation (49 C.F.R. § 190.223), for each violation for each day the violation continues or in referral to the Attorney General for appropriate relief in a district court of the United States.

The terms and conditions of this Final Order are effective upon service in accordance with 49 C.F.R. § 190.5.



Alan K. Mayberry
Associate Administrator
for Pipeline Safety

NOV 14 2019

Date Issued