

March 25, 2024

Mr. Lawrence White
Presiding Official
U.S. Department of Transportation
Pipeline and Hazardous Materials Safety Administration
1200 New Jersey Avenue, S.E.
Washington, D.C. 20590

Re: Eastern Gas Transmission and Storage, Inc.
CPF No. 1-2023-028-NOPV

Dear Mr. White:

Please find attached Eastern Gas Transmission and Storage, Inc.'s (EGTS) post-hearing filings for the above-referenced matter. Pursuant to 49 C.F.R. § 190.209(b)(6), EGTS submits this letter and all attachments for inclusion in the case file for this matter.

Sincerely,



Brianne K. Kurdock

cc: Rob Burrough (PHMSA)
Joseph St. Peter, Esq. (PHMSA)
Emma Ross, Esq. (PHMSA)
Jacquie Wilson, Esq. (EGTS)
Eric Taylor (EGTS)

**U.S. DEPARTMENT OF TRANSPORTATION
PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMINISTRATION
OFFICE OF PIPELINE SAFETY**

_____	)	
In the Matter of	)	
	)	
Eastern Gas Transmission & Storage, Inc.,	)	CPF No. 1-2023-028-NOPV
	)	
Respondent.	)	
_____	)	

**POST-HEARING BRIEF OF EASTERN GAS TRANSMISSION & STORAGE, INC.
MARCH 25, 2024**

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I. Introduction

Pursuant to 49 C.F.R. § 190.211(g), Eastern Gas Transmission & Storage, Inc. (EGTS or the Company) respectfully submits this post-hearing brief in the above-referenced matter. EGTS requests that the Pipeline and Hazardous Materials Safety Administration (PHMSA or the Agency) withdraw the allegation and proposed compliance order set forth in the Notice of Probable Violation and Proposed Compliance Order (Notice) issued on May 25, 2023.¹ A hearing was held on February 22, 2024, at PHMSA's Eastern Region office in West Trenton, New Jersey (Hearing). A transcript of the Hearing was prepared and a copy has been provided to PHMSA. EGTS has attached a copy of the Hearing transcript, including errata, as Exhibit A for inclusion in the record.

The arguments in this Post-Hearing brief supplement EGTS's Pre-Hearing brief filed on February 12, 2024. EGTS adopts and advances all arguments set forth in the Pre-Hearing brief, as though set forth fully herein.

Pursuant to 49 U.S.C. § 60117(b)(1)(D), EGTS requests that PHMSA leave the record open beyond April 24, 2024, to allow the Company the opportunity to reply to the Eastern Region's Post-Hearing Recommendation.

II. Summary

EGTS respectfully requests that PHMSA withdraw Item # 1. The Office of Pipeline Safety (OPS) has not met its burden of proof in this case. OPS has not demonstrated that the placement of the emergency shutdown devices (ESD) at the South Bend Station (the Station) violated the design code. Any interpretation of the meaning of 'near' not previously provided would violate the principles of fair notice. Even if the design of the ESDs is suddenly deemed non-compliant,

¹ *In the Matter of Eastern Gas Transmission and Storage, Inc.*, CPF No. 1-2023-028-NOPV, Notice (May 25, 2023).

decades after the introduction of the regulations, any alleged violation is time-barred by the five-year statute of limitations.

III. Discussion and Argument

A. OPS has not met its burden of proof that the Station's ESDs are in violation of section 192.167(a)(4)(ii).

As discussed at length in EGTS's Pre-Hearing Brief, OPS carries the burden of proving the allegation.² It is not the operator's burden to prove that a violation did not occur.³ OPS has not offered any evidence that the ESDs at the Station are in violation of section 192.167(a)(4)(ii). The Violation Report did not include any pictures, measurements, comparison to a required distance or detailed explanation of why the placement of the ESDs at the Station is inappropriate.⁴ During the Hearing, an EGTS employee present during the inspection confirmed that "[w]e walked around the Station but there was no measurement of the distance between the ESDs and the exit gates."⁵ The Agency stated in its Exit Briefing Report that there were "no issues/concerns with field observations."⁶ While the OPS inspector stated at the Hearing that he relied on his inspection notes to determine whether or not to bring an enforcement case,⁷ those notes were not provided to EGTS.⁸

In the Notice and Violation Report, OPS alleged that the inspector did not observe ESDs

² See EGTS Pre-Hearing Brief at 5-6.

³ 49 U.S.C. § 60117(b)(1)(F) ("The Secretary shall require that the agency have the burden of proof, presentation, and persuasion in any enforcement matter"). *In the Matter of ExxonMobil Pipeline Co.*, CPF No. 4-2017-5027 (Apr. 3, 2019) at 4 ("It is OPS' burden to prove that the CP technician continued to perform this task — not the Respondent's burden to prove that he did not").

⁴ Violation Report, at 4.

⁵ Transcript, 22 (13:15).

⁶ Verbal Exit Briefing Report, at 1.

⁷ Transcript at 46 (14:22)(as amended by PHMSA's Additions to EGTS's Errata of Transcript).

⁸ The Company had requested the inspection records for the Station including those that might support the 2022 inspection as part of its Request for Documents. See EGTS Request for Documents dated January 25, 2024. EGTS did not receive the notes that the inspector relied on at the Hearing.

“at the fence line.”⁹ There is no code requirement that ESDs must be “at the fence”¹⁰ and OPS acknowledged at the Hearing that an ESD does not need to be placed on the fence.¹¹ In fact, as explained at the Hearing, there are likely safety and security risks if EGTS were to install an ESD at the fence of the Station.¹²

The Agency has not provided sufficient evidence to sustain an allegation of violation of section 192.167(a)(4)(ii) and therefore has not met its burden of production. Similarly, the Agency has not demonstrated that the evidence supporting the allegation outweighs the evidence and reasoning presented by EGTS. Having failed to meet both burdens, Item #1 must be withdrawn.

B. OPS has not provided fair notice of the meaning of ‘near’ in section 192.167(a)(4)(ii).

PHMSA has not provided any notice to operators that ESDs must be placed at a specific distance from the exit gates. The allowable distance between an ESD and a station exit gate is not specified in the regulations, any enforcement case, or in agency guidance.¹³ In fact, PHMSA has acknowledged that the regulations do not specify the maximum distance between an ESD activation and a fence exit gate.¹⁴ Instead, the code requires that operators install the ESDs “near the exit gates, if the station is fenced, or near emergency exits, if not fenced... and not more than 500 feet from the limits of the station.”¹⁵

Section 192.167 was first introduced in 1970 and was based entirely on section 843.431 of the B31.8 Code. That section provided that “[t]he emergency shutdown system shall be operable

⁹ Violation Report, at 4.

¹⁰ 49 C.F.R. § 192.167(a)(4)(ii).

¹¹ Transcript, at 38 (23-25).

¹² Transcript, at 29 (10-25)(as amended by EGTS’s Errata of Transcript). *See also*, Transcript, at 30 (1-20)(as amended by EGTS’s Errata of Transcript).

¹³ PHMSA cited the GPTC guidance in its pre-hearing submission. This guidance is not incorporated by reference in 49 C.F.R. § 192.167(a)(4)(ii) or anywhere in Part 192. Further, the guidance does not discuss where ESDs should be installed at a compressor station.

¹⁴ *In the Matter of Algonquin Gas Transmission*, CPF No. 1-2017-1010, Final Order (Sept. 7, 2018) at 2.

¹⁵ 49 C.F.R. § 192.167(a)(4)(ii)-(iii).

from any one of at least two locations outside the gas area of the station, *preferably* near exit gates in the station fence, but not more than 500 feet from the limits of the station.”¹⁶ The word ‘preferably’ was removed when the Department of Transportation first codified section 192.167. As a result, the code requires that operators place ESDs no farther than 500 feet from the limits of the station (*i.e.*, the fence) yet also ‘near’ the fence.

PHMSA has said that ‘near’ means a ‘short distance’ or ‘close to’¹⁷ but has not provided any direction to the industry of the acceptable distance. PHMSA has demonstrated that it can create regulations imposing a close distance requirement when that is its intention. In multiple provisions through the design and construction section of the code,¹⁸ PHMSA routinely uses “near as practicable” to signify installing equipment as close as possible. PHMSA chose not to use that language in section 192.167. The 9th Circuit has stated that “[w]here an agency includes language in one section of the regulation and omits in another, it is reasonable to presume that the agency acted intentionally in foregoing this language.”¹⁹ Here, it would be improper to read “near as practicable” into a requirement that ESDs be placed ‘near’ the exit gate. Additionally, PHMSA could have defined a specific distance between ESD and fence line if desired, similar to the 500 foot requirement in section 192.167(a)(4)(iii) but has failed to do so.

As discussed in the EGTS Pre-Hearing Brief, agencies must “state with ascertainable certainty what is meant by the standards [it] has promulgated [, . . .] must give [a party] fair warning of the conduct it prohibits or requires, and it must provide a reasonably clear standard of culpability to circumscribe the discretion of the enforcement authority and its agents.”²⁰ The D.C. Circuit has

¹⁶ Gas Transmission and Distribution Piping Systems, USAS B31.8, § 843.431 (1968)(emphasis added).

¹⁷ *In the Matter of Algonquin Gas Transmission*, CPF No. 1-2017-1010, Final Order (Sept. 7, 2018) at 2.

¹⁸ See 49 C.F.R. §§ 192.203(b)(2); 192.313(a)(3); 192.315(b)(4); 192.353(b), and 192.381(d).

¹⁹ *U.S. v. Approximately 64,695 Pounds of Shark Fins*, 520 F. 3d 976, 983 (9th Cir. 2008).

²⁰ *ExxonMobil Pipeline Co. v. U.S. Dep’t of Transp.*, 867 F.3d 564, 578 (5th Cir. 2017) (citing *Diamond Roofing Co.*,

held that in order to determine if fair notice exists, the court must “ask whether the regulated party received, or should have received, notice of the agency’s interpretation in the most obvious way of all: by reading the regulations. If, by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with “ascertainable certainty,” the standards with which the agency expects parties to conform, then the agency has fairly notified a petitioner of the agency’s interpretation.”²¹

Here, regulated parties cannot identify with “ascertainable certainty” what ‘near’ means and how far is too far from the exit gate. The code itself allows the ESD to be placed 499 feet from the limits of the station (arguably the fence).²² Yet, in *National Fuel Gas Supply Corporation*, PHMSA determined that ESDs located ‘10 feet from the station’ was not compliant.²³ OPS stated at the Hearing that “You know it when you see it.”²⁴ None of these decisions or statements provide EGTS or other regulated parties with “ascertainable certainty.”

The enforcement history cited by OPS in its Pre-Hearing Submission²⁵ also does not shed any light on the meaning of ‘near’ or the type of analysis that operators should be undertaking to determine where to install ESDs. None of these decisions direct operators to install an ESD at a specific distance.²⁶

Inc. v. OSHRC, 528 F.2d 645, 649 (5th Cir. 1976)); *See also, Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012); *Upton v. S.E.C.*, 75 F.3d 92, 97-98 (1996).

²¹ *General Elec. v. U.S. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995).

²² 49 C.F.R. § 192.167(a)(4)(iii)(“It must be operable from at least two locations, each of which is....(iii) Not more than 500 feet (153 meters) from the limits of the station”). The Gas Pipeline Advisory Committee discussed this requirement in 1970 as they reviewed the new federal pipeline safety regulations. The committee acknowledged that the regulation, as proposed, would likely allow the ESD to be placed 499 feet past the fence line, as the fence could be the ‘limits of the station’. The committee also questioned whether a specific number was the solution. Meeting of Technical Pipeline Safety Standards Committee, Transcript (July 22, 1970).

²³ *In the Matter of National Fuel Supply Corp.*, CPF No. 1-2021-057-NOPV, Notice (Oct. 7, 2021) at 2.

²⁴ Transcript, at 28 (21-22).

²⁵ OPS Pre-Hearing Submission, at 2, fn 1.

²⁶ OPS cited the following cases in its Pre-Hearing Submission (footnote 1). *See* Viking Gas Transmission Company, Final Order, CPF No. 3-2020-1003, 2020 WL 8369930 (Dec. 4, 2020); Panhandle Eastern Pipeline Company, Final Order, CPF No. 3-2020-1005, 2020 WL 8369931 (Dec. 4, 2020); National Fuel Gas Supply

Four of the cases are not relevant to the allegations in the EGTS matter. In both the *Viking* and *KPC* cases, PHMSA cited the operators for not having at least two ESDs near the exit gates. EGTS had more than two ESDs at the Station so these cases are not relevant. In the *Panhandle* case, the operator had placed an ESD by a locked vehicle gate. The compliance order in that case directed the operator to install an exit gate in compliance with section 192.163(d). Section 192.163(d) was not an issue in the EGTS matter. In *Vector*, the operator did not have an ESD outside the gas area. PHMSA has not alleged a violation of section 192.167(a)(4)(i) in the EGTS case.

In *Great Lakes*, *Gulf South*, and both *East Tennessee* cases, the Agency did not discuss distance stating simply that the ESDs were not near the exit gates. All four of these cases were uncontested.

The only cases cited by OPS that are potentially relevant to the allegations in the EGTS matter are *National Fuel*, *MoGas*, and *Algonquin*. As discussed in the EGTS Pre-Hearing Brief, in *National Fuel*, the operator had placed its ESDs ten feet from the compressor station building. In *MoGas*, the operator had chosen 300 feet. Both the 10 feet in *National Fuel* and 300 feet in *MoGas* were deemed in violation of section 192.167 even though those distances are less than the required maximum of 500 feet from the limits of the station. In *Algonquin*, the operator voluntarily chose 11 feet and 19 feet in the hopes of resolving the case. PHMSA appeared to accept that

Corporation, Final Order, CPF No. CPF No. 1-2021-057, 2021 WL 5907915 (Dec. 10, 2021); KPC Pipeline, LLC, Final Order, CPF No. 3-2020-001, 2021 WL 663170 (Jan. 4, 2021); MoGas Pipeline, LLC, Final Order, CPF No. 3-2011-1009, 2012 WL 1551674 (Feb. 22, 2012); Great Lakes Gas Transmission, LP, Final Order, CPF No. 3-2019-1003, 2021 WL 663169 (Jan. 25, 2021); Algonquin Gas Transmission Company, LLC, Final Order, CPF No. 1-2017-1010, 2018 WL 10539384 (Sep. 7, 2018); Vector Pipeline, LP, CPF No. 3-20171008, 2018 WL 7350934 (Oct. 15, 2018); Gulf South Pipeline Company, LP, Final Order, CPF No. 2-2011-1006, 2011 WL 7006610 (Nov. 1, 2011); East Tennessee Natural Gas Company, Warning Letter, CPF No. 27110-W, 1997 WL 34614815 (July 24, 1997); East Tennessee Natural Gas Company, Warning Letter, CPF No. 27106-W, 1997 WL 34614810 (May 8, 1997).

distance because it closed the case.²⁷ The Agency did not discuss an acceptable distance in any of these three cases and, other than Algonquin,²⁸ the distance selected by these operators is not in the public record. As stated on the record at the Hearing, none of these cases provided EGTS with notice of the Agency's expectations for section 192.167(a)(4)(ii).²⁹

At the Hearing, OPS stated that section 192.167 is a performance-based regulation.³⁰ Performance-based regulations typically specify the ends to be achieved but not the means to implement the requirement.³¹ These type of regulations "give operators flexibility to customize their programs to circumstances and to concentrate on enhancing the performance of their internal risk management actions, as opposed to "checklist" compliance with specifications having industrywide application."³² At the Hearing, OPS acknowledged that section 192.167 "allows operators leeway...based on the attributes of the facility."³³ Compressor stations vary in size and complexity and so this flexibility is appropriate. At the Hearing, EGTS explained its process for installing ESDs at the Station. EGTS discussed its decision to place the ESDs near the fence while also being careful not to place the ESDs too close to the fence to avoid security risks or safety concerns.³⁴ EGTS reviewed Exhibit 1 and explained where personnel are located at the Station

²⁷ OPS also cannot use Algonquin's choice of either 11 or 19 feet as the new standard. Federal courts have made clear that an agency cannot advance a position for the first time for purposes of litigation or to support a claim for a regulatory violation. *See Gose v. United States Postal Service*, 451 F.3d 831, 838 (Fed. Cir. 2006); *Bowen v. Georgetown University Hospital*, 109 S. Ct. 468, 474 (1988). *Id.* at 839. A hearing officer or court "must ensure that the agency is not . . . masquerading a post hoc rationalization as a then-existing 'interpretation.'"

²⁸ Algonquin Gas Transmission Company, LLC, Final Order, CPF No. 1-2017-1010, 2018 WL 10539384 (Sep. 7, 2018).

²⁹ Transcript at 36 (4-7) ("Without anything written formal what could be defined acceptable today could be different in the future so there's still an interpretative concern"). *See also*, Transcript, at 34 (21-25) and Transcript, at 35 (1-25) (as amended by PHMSA's Additions to EGTS's Errata of Transcript).

³⁰ Transcript, at 12 (19-21).

³¹ The Transportation Research Board's Committee for a Study of Performance-Based Safety Regulation, <https://www.phmsa.dot.gov/sites/phmsa.dot.gov/files/docs/technical-resources/hazmat-technical-resources/70131/designing-safety-regulations-high-hazard-industries.pdf> (2018).

³² *Id.*

³³ Transcript, at 12 (22-25).

³⁴ During the Hearing, EGTS reviewed Exhibit 1 and explained the path from where personnel are located at the Station to the exit gate. Transcript, at 27 (13-25); Transcript, 28 (1-24).

and the path to the exit gate.³⁵ EGTS also discussed its experience at another station where an ESD was too close to the exit gate and a visitor (non-company, non-contractor personnel) mistook the ESD for the push button for the exit gate.³⁶ Finally, EGTS explained that it has installed more ESDs than required by the code to ensure employee safety.³⁷

EGTS has evaluated the attributes of the Station and taken a reasonable approach to install ESDs where personnel can hit the switch on their way out of the Station and not be required to head back towards an emergency to activate the ESD. Yet, EGTS has ensured that it did not install the ESDs too close to the fence which could lead to a safety or security risk. EGTS has met the requirement in the code in having ESDs near the exit gates and has evaluated the performance-based nature of the regulation. For these reasons, PHMSA must withdraw Item #1.

C. A finding that § 192.167(a)(4)(ii) includes a specific distance requirement would be arbitrary, capricious, and an abuse of discretion.

Any finding that section 192.167(a)(4)(ii) can be interpreted as requiring ESDs to be placed within a specific distance from the exit gates would be arbitrary and capricious. As discussed in EGTS's Pre-Hearing Brief, the Seventh Circuit held in *Hector v. U.S. Dep't of Agric.*, that where the U.S. Department of Agriculture's (USDA) regulation did not include a specific numerical requirement, the agency could not establish one through guidance.³⁸ Section 192.167(a)(4)(ii) only requires that the ESDs be placed *near* the exit gates if there is a fence or *near* the emergency exits if there is no fence. A numerical term cannot be derived from the language in the regulation. If PHMSA were to interpret 'near' in numerical terms without notice and comment proceedings, that approach would be arbitrary and capricious and amount to an improper legislative rule.

³⁵ *Id.*

³⁶ Transcript, at 29 (23-25); Transcript, at 30 (1-9).

³⁷ Transcript, at 28 (20-24).

³⁸ *Hector v. U.S. Dep't of Agric.*, 82 F. 3d 165 (7th Cir. 1996).

D. The section 192.167(a)(4)(ii) allegation is time-barred under the five-year statute of limitations.

As discussed in the EGTS Pre-Hearing Brief and at the Hearing, PHMSA is bound by the general five-year statute of limitations (SOL) set forth in 28 U.S.C. § 2462 to commence a proceeding.³⁹ Section 2462 specifies that “an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued...”⁴⁰ In this case, the Agency alleged a violation of the design of certain pipeline components that were installed sixty-two years ago. If OPS had concerns with the design of the ESDs at the Station, its opportunity to initiate an enforcement action expired in 1975. OPS is time-barred from bringing an allegation of a design violation now, 62 years after the ESDs were installed. Any claim of a flaw in the design of an ESD first accrued in 1970. PHMSA must abide by this SOL when alleging a violation of the pipeline safety regulations.⁴¹

While PHMSA has previously stated that a compliance order is not punitive and therefore not subject to the statute of limitations, any finding of violation is punitive. As discussed on the record at the Hearing, a finding of violation whether it is associated with a civil penalty or a compliance order, would label EGTS as a wrongdoer, impacts EGTS’s reputation as an operator of its existing pipeline system and in possible future expansion projects, insurance disclosures, and

³⁹ 28 U.S.C. § 2462.

⁴⁰ *Id.*

⁴¹ PHMSA has acknowledged that this five-year SOL applies to its enforcement cases. See *In the Matter of Alon USA, LP*, CPF No. 5-2004-5021 (October 22, 2009); *In the Matter of Equitable Production Company, a Division of EQT Corporation, et al.*, CPF No. 2-2006-5001 (February 17, 2011); *In The Matter of Bridgemark Corporation*, CPF No. 5-2005-0018 (July 28, 2009); *In the Matter of Distrigas of Massachusetts LLC*, CPF No. 1-2002-3003 (November 2, 2005); *In the Matter of Equitable Production Company, a Division of EQT Corporation, et al.*, CPF No. 2-2006-5001 (January 6, 2012); *In the Matter of Hopkinton LNG Corp.*, CPF No. 1-2012-3001 (November 24, 2014); *In the Matter of Buckeye Partners, LP*, CPF No. 3-2010-5006 (August 1, 2013); *In the Matter of Mardi Gras Pipeline, LLC*, CPF No. 4-2009-1007 (December 19, 2011); *In the Matter of NuStar Logistics, L.P., f/k/a Valero Logistics Operations, L.P.*, CPF No. 4-2005-5048 (March 11, 2009); and *In the Matter of National Fuel Supply Corp.*, Final Order, CPF No. 1-2016-1005 (Apr. 18, 2019).

corporate notifications.⁴²

IV. Conclusion

Based on the foregoing, EGTS respectfully requests that PHMSA withdraw Item # 1 and the Proposed Compliance Order.

Respectfully submitted this 25th day of March, 2024



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⁴² See Transcript, at 32 (19-25)(as amended by EGTS's Errata of Transcript). See also, Transcript, 33 (1-17).