

February 12, 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:

Pursuant to your letter dated August 17, 2023, Eastern Gas Transmission and Storage, Inc. (EGTS) provides its pre-hearing submission in the above-referenced case. By copy of this letter, EGTS is also providing these materials to Eastern Region counsel.

EGTS intends to have the following individuals attend the hearing:

1. Eric V. Taylor, Director, Engineering Services, EGTS
2. Dan Stahl, Pipeline Integrity, Senior Engineer, II, EGTS
3. Court Reporter (a specific name will be provided closer to the date of the hearing)

EGTS will be represented at the hearing by the undersigned. EGTS reserves the right pursuant to 49 C.F.R. § 190.211(g) to submit further material after the hearing for inclusion in the record and to respond to the region's recommendation pursuant to 40 C.F.R. § 190.209(b)(7).

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.,

Respondent.

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CPF No. 1-2023-028-NOPV

**PRE-HEARING BRIEF OF EASTERN GAS TRANSMISSION & STORAGE, INC.
FEBRUARY 12, 2024**

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I. Introduction

Pursuant to 49 C.F.R. § 190.211(d), Eastern Gas Transmission and Storage, Inc. (EGTS or the Company) respectfully submits this pre-hearing brief regarding the Notice of Probable Violation and Proposed Compliance Order (Notice) that the Office of Pipeline Safety (OPS) issued on May 25, 2023.¹

The Notice arose from an inspection conducted by OPS between September 7, 2022, and November 10, 2022, at EGTS's pipeline facilities in and around Luthersburg, Pennsylvania.²

II. Background

A. Summary of OPS Allegations

OPS has alleged that EGTS violated section 192.167(a)(4)(ii) (Item #1) by not “hav[ing] an emergency shutdown system that was operable from at least two locations near exit gates at its South Bend compressor station.”³ OPS proposed a Compliance Order for the alleged violation which would require EGTS to “install emergency shutdown system activation points near the exit gates of the South Bend Compressor station.”⁴

B. Summary Response and Request for Relief

EGTS is committed to public safety, protecting the environment, and operating its pipeline facilities safely. EGTS takes the allegation of violation very seriously and appreciates OPS's role in ensuring that operators comply with the pipeline safety regulations. However, the Company believes that the allegation in this case is procedurally barred and is not supported by the text, structure, or history of the cited regulation or the evidence presented in the Violation Report. As

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

² *Id.*

³ Notice, at 2.

⁴ Notice, at 4.

to the procedural issue, EGTS's position is that the five-year statute of limitations for the Pipeline and Hazardous Materials Safety Administration's (PHMSA) enforcement actions prohibits the Agency from pursuing this case. PHMSA initiated this proceeding on May 25, 2023, and can only prevail insofar as the alleged violation of the design standards in section 192.167(a)(4)(ii) occurred during the five years preceding that date, *i.e.*, on or after May 24, 2018. The evidence in the record clearly demonstrates that EGTS did not design the compressor station in question or install any of the ESDs at issue within that 5-year window. Therefore, OPS is time barred by the statute of limitations from pursuing this enforcement action.

Even if the statute of limitations does not apply, OPS cannot meet its burden of proving the alleged violation on the merits. Section 192.167(a)(4)(ii) requires that the operator have an emergency shutdown system that is –

- (1) operable from at least two locations,
- (2) each of which is...near the exit gates, if the station is fenced, or near emergency exits, if not fenced...”⁵

The South Bend Compressor Station (the Station) was built in 1951 and emergency shutdown devices (ESDs) were added in 1961. Today, EGTS has five ESDs at the Station which exceeds the required two locations. See Exhibit 1. Four of the five ESDs were installed in 1961 and continue to be located in the same place today. EGTS has not moved, modified, or relocated the four ESDs in the sixty-two years between installation and the OPS inspection. The Station is fenced so the ESDs were purposely placed between the emergency exits of the building and the fence to ensure that they could be safely operated as personnel exited the facility.

⁵ 49 C.F.R. § 192.167(a)(4)(ii)(2024).

PHMSA has never established a specific distance for the placement of ESDs, other than the 500-foot limitation in section 192.167(a)(4)(iii).⁶ PHMSA's direction on ESD placement has always been focused on safety (*i.e.*, that personnel can activate the ESD system from a safe distance but would not need to head back toward a hazardous area to activate the switches).⁷ EGTS has met these considerations by placing at least two ESDs throughout the Station that would not require personnel to head back towards a hazardous situation, are near the exit gates, and are not farther than 500 feet from the limits of the Station. OPS has never voiced verbal or written concerns with the placement of ESDs at the Station or any of EGTS's other stations until the Notice in 2023. For these reasons, EGTS submits that OPS has not met its burden of proof or provided fair notice of a required distance. EGTS respectfully requests that PHMSA withdraw Item # 1 and the associated Proposed Compliance Order. While the Station was constructed and four of the ESDs were installed prior to the codification of the federal pipeline safety regulations, for simplicity reasons, EGTS is not raising a pre-code defense in this proceeding.

III. Procedural History

OPS issued the Notice to EGTS on May 25, 2023. On June 22, 2023, OPS extended the deadline to respond to the Notice to July 28, 2023. On July 28, 2023, EGTS submitted a timely request for an in-person hearing and a preliminary statement of the issues. On August 17, 2023, the Presiding Official scheduled a hearing in this matter.

On January 25, 2024, counsel for EGTS submitted a request for documents to OPS Eastern Region counsel seeking the case file and "any information documenting inspections of the South Bend Compressor station occur between 1970-2022."⁸ On February 12, 2024, OPS responded in

⁶ 49 C.F.R. § 192.167(a)(4)(iii)(2024).

⁷ *In the Matter of Algonquin Gas Transmission*, CPF No. 1-2017-1010, Final Order (Sept. 7, 2018) at 2-3. *See also*, *In the Matter of MoGas Pipeline, LLC*, CPF No. 3-2011-1009, Final Order (Feb. 22, 2012) at 3.

⁸ EGTS Request for Documents dated January 25, 2024.

writing informing EGTS that there are no responsive records.⁹

IV. Discussion and Argument

Section 192.167(a)(4)(ii) provides that an operator must have an emergency shutdown system that is “operable from at least two locations, each of which is...near the exit gates, if the station is fenced, or near emergency exits, if not fenced...”¹⁰ OPS did not cite any other regulation or subregulation in the Notice and therefore EGTS’s response is limited to section 192.167(a)(4)(ii).

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

PHMSA is bound by the general five-year statute of limitations (SOL) set forth in 28 U.S.C. § 2462 to commence a proceeding.¹¹ 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**...”¹² PHMSA must abide by this SOL when alleging a violation of the pipeline safety regulations.¹³

In this case, the Agency alleged a violation of the design of certain pipeline components that were installed sixty-two years ago. Specifically, OPS alleged in 2023 that ESDs installed in

⁹ Correspondence from E. Ross of PHMSA in response to Presiding Official dated February 12, 2024.

¹⁰ 49 C.F.R. § 192.167(a)(4)(ii).

¹¹ 28 U.S.C. § 2462.

¹² *Id.* (emphasis added).

¹³ 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).

1961 were not in compliance with the federal pipeline safety regulations.¹⁴ The five-year SOL prevents OPS from raising concerns with the design of components 62 years after installation. Any claim of a flaw in the design of an ESD first accrued in 1970. A claim first accrues when a violation occurs.¹⁵ In *3M v. Browner*, the D.C. Circuit held that the claim accrues when the company committed the violations, not when the regulatory agency first discovers them.¹⁶ The Supreme Court validated this holding in *Heimeshoff v. Hartford Life & Accident Ins. Co.* and *Gabelli v. SEC*.¹⁷ The Court held in *Heimeshoff* that “a claim accrues as soon as the plaintiff can file suit and obtain relief.”¹⁸ Any claim that EGT&S violated § 192.167(a)(4)(ii) accrued when OPS could have brought a case, *i.e.*, in 1970. 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.

B. EGTS did not violate § 192.167(a)(4)(ii) as alleged in Item #1 of the Notice.

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

OPS has the burden of proof in a pipeline safety enforcement proceeding to demonstrate that a violation occurred.¹⁹ OPS must satisfy this obligation for all elements of each proposed

¹⁴ Notice, at 2.

¹⁵ *3M Company (Minnesota Mining and Manufacturing) v. Browner*, 17 F. 3d. 1453 (D.C. Cir. 1994).

¹⁶ *Id.* at 1460.

¹⁷ *Heimeshoff v. Hartford Life & Accident Ins. Co.*, 134 S. Ct. 604, 610 (2013); *Gabelli v. SEC*, 133 S. Ct. 1216, 1220 (2013).

¹⁸ *Heimeshoff*, 134 S. Ct. 604 at 610.

¹⁹ See *In re Air Products and Chemicals, Inc.*, Final Order, CPF No. 4-2013-1001, 2015 WL 6758819, at *3 (D.O.T. Aug. 10, 2015) (PHMSA did not meet its burden of proving a violation when it did not produce “any evidence to support its position”); *In re ExxonMobil Pipeline Co.*, Final Order, CPF No. 5-2013-5007, 2015 WL 780721, at *12 (D.O.T. Jan. 23, 2015) (PHMSA failed to meet burden of proving that certain measures were required under regulations); *In re So. Star Central Gas Pipeline, Inc.*, Final Order, CPF No. 3-2008-1005, 2011 WL 7006614, at *4 (D.O.T. Oct. 21, 2011) (finding the evidence insufficient to sustain the allegation); *In re Golden Pass Pipeline, LLC*, CPF No. 4-2008-1017, 2011 WL 1919517, at *5 (D.O.T. Mar. 22, 2011) (PHMSA did not meet its burden of proving that its interpretation of regulatory language was correct); *In re Butte Pipeline Co.*, CPF No. 5-2007-5008, 2009 WL 3190794, at *1 (D.O.T. Aug. 17, 2009) (“PHMSA carries the burden of proving the allegations set forth in the Notice, meaning that a violation may be found only if the evidence supporting the allegation outweighs the evidence and reasoning presented by Respondent in its defense.”).

violation.²⁰ This responsibility includes the “‘burden of production,’ *i.e.*, which party bears the obligation to come forward with the evidence at different points in the proceeding and the ‘burden of persuasion,’ *i.e.*, which party loses if the evidence is closely balanced.”²¹ To satisfy the burden of production, OPS must present sufficient evidence to sustain an allegation of violation.²² For the burden of persuasion, OPS must demonstrate that “the evidence supporting the allegation outweighs the evidence and reasoning presented by Respondent.”²³ A respondent will prevail under this standard where its rebuttal evidence is more persuasive than the evidence provided by OPS.²⁴ If the Agency fails to provide evidence of an element of the alleged violation, PHMSA has not met its burden of production and the allegation of violation must be withdrawn.²⁵ Likewise, if the evidence is “closely balanced”, the Agency has not met its burden of persuasion and the allegation must be withdrawn.

OPS has not offered any evidence that the ESDs at the Station are in violation of section 192.167(a)(4)(ii). In the evidence section of the Violation Report,²⁶ OPS relies on an inspector’s visual observations at the Station and a Google Earth screenshot provided by EGTS in determining

²⁰ *In re ANR Pipeline Co.*, Final Order, CPF No. 3-2011-1011, 2012 WL 7177134, at *3 (D.O.T. Dec. 31, 2012); *see also In re CITGO Pipeline Co.*, Decision on Petition for Reconsideration, CPF No. 4-2007-5010, 2011 WL 7517716, at *5 (D.O.T. Dec. 29, 2011).

²¹ *Schaffer v. Weast*, 546 U.S. 49, 56 (2005), (citing *Dir., Office of Workers' Comp. Programs, Dep't of Labor v. Greenwich Collieries*, 512 U.S. 267, 272 (1994)); *See also, In re Bridger Pipeline Co.*, Final Order, CPF No. 5-2007-5003, 2009 WL 7796887, at *1 (D.O.T. Apr. 2, 2009).

²² *See e.g., In re EQT Corp.*, Final Order, CPF No. 1-2006-1006, 2010 WL 2228558, at **6-7 (D.O.T. May 13, 2010); *In re Plains Pipeline, L.P.*, Final Order, CPF No. 4-2009-5009, 2011 WL 1919520, at **4-5 (D.O.T. Mar. 15, 2011); *In re Bridger Pipeline Co.*, Decision on Petition for Reconsideration, CPF No. 5-2007-5003 2009, WL 2336991, at *5-6 (D.O.T. June 16, 2009).

²³ *In re Butte Pipeline Co.*, 2009 WL 3190794, at * 1.

²⁴ *In re ANR Pipeline Co.*, 2012 WL 717134, at *3. In *ANR Pipeline*, PHMSA found that ANR’s “plausible” explanation regarding the discovery of a reportable condition on its pipeline was sufficient to warrant withdrawal of the allegation of violation because the “Violation Report contain[ed] no evidence which would rebut ANR’s argument.”

²⁵ *In re Alyeska Pipeline Serv. Co.*, 2009 WL 5538655 at * 3, (quoting *Schaeffer*, 546 U.S. at 56). *Cf. In re Buckeye Partners, LP*, CPF No. 1-2009-5002, 2012 WL 3144486, at *7 (D.O.T. May 30, 2012) (where neither party “present[s] sufficient proof to prove its position,” the violation must be withdrawn because PHMSA bears the burden).

²⁶ Violation Report, at 4.

that the ESDs are not “at the fence line” or “near the man gates at the fence.”²⁷ There is no code requirement that ESDs must be “at the fence”.²⁸ In fact, there are likely safety risks if EGTS were to install an ESD at the fence of the Station. Given that the fence at the Station is in close proximity to a road, installing an ESD at or on the fence, could encourage tampering or lead to potential ignition concerns. The Violation Report does 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.²⁹ EGTS has not received any inspection records for the Station including those that might support the 2022 inspection. The Agency has not provided sufficient evidence to sustain an allegation of violation 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.

2. 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. In a recent enforcement case, PHMSA acknowledged that the regulations do not specify the maximum distance between an ESD activation and a fence exit gate.³⁰ 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.”³¹ 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

²⁷ *Id.*

²⁸ 49 C.F.R. § 192.167(a)(4)(ii).

²⁹ Violation Report, at 4.

³⁰ *In the Matter of Algonquin Gas Transmission*, CPF No. 1-2017-1010, Final Order (Sept. 7, 2018) at 2.

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

emergency shutdown system shall be operable 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.”³² 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’³³ but has not provided any direction to the industry of the acceptable distance. PHMSA has demonstrated that it can impose a close distance requirement in the regulations when that is its intention. In multiple provisions through the design and construction section of the code,³⁴ 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.”³⁵ Here, it would be improper to read “near as practicable” into a requirement that ESDs be placed ‘near’ the exit gate.

Federal courts have concluded that fair notice requires the agency to have “state[d] 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.”³⁶ The D.C. Circuit has held that in order to determine if fair notice exists, the court must

³² Gas Transmission and Distribution Piping Systems, USAS B31.8, § 843.431 (1968)(emphasis added).

³³ *In the Matter of Algonquin Gas Transmission*, CPF No. 1-2017-1010, Final Order (Sept. 7, 2018) at 2.

³⁴ See 49 C.F.R. §§ 192.203(b)(2); 192.313(a)(3); 192.315(b)(4); 192.353(b), and 192.381(d).

³⁵ *U.S. v. Approximately 64,695 Pounds of Shark Fins*, 520 F. 3d 976, 983 (9th Cir. 2008).

³⁶ *ExxonMobil Pipeline Co. v. U.S. Dep’t of Transp.*, 867 F.3d 564, 578 (5th Cir. 2017) (citing *Diamond Roofing Co.*,

“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.”³⁷

Here, regulated parties cannot identify with “ascertainable certainty” that ‘near’ means a specific distance from the exit gate. The code itself allows the ESD to be placed 499 feet from the limits of the station (arguably the fence).³⁸ Yet, in *National Fuel Gas Supply Corporation*, PHMSA determined that ESDs located “10 feet from the station” was not compliant.³⁹ In *Algonquin Gas Transmission*, the company voluntarily chose to install ESDs at 11 feet and 19 feet in the hopes of resolving any concerns prior to the issuance of an enforcement case.⁴⁰ In *MoGas Pipeline*, the distance selected by the operator is not publicly available and therefore provides no notice to industry as to PHMSA’s position on an acceptable distance.⁴¹ None of the compliance orders issued in a section 192.167 case include a specific distance between either the compressor station emergency exit and the ESD or the fence and the ESD. For these reasons, EGTS cannot identify an acceptable distance with “ascertainable certainty”.

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).

³⁷ *General Elec. v. U.S. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995).

³⁸ 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).

³⁹ *In the Matter of National Fuel Supply Corp.*, CPF No. 1-2021-057-NOPV, Notice (Oct. 7, 2021) at 2.

⁴⁰ *In the Matter of Algonquin Gas Transmission*, CPF No. 1-2017-1010, Response (Aug. 10, 2017) at 2-3.

⁴¹ *In the Matter of MoGas Pipeline, LLC*, CPF No. 3-2011-1009, Final Order (Feb. 22, 2012).

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.⁴² A hearing officer or court "must ensure that the agency is not . . . masquerading a post hoc rationalization as a then-existing 'interpretation.'"⁴³

EGTS has made a good faith effort to comply with the regulation by purposely placing its ESDs near the exit gates and in the route between the emergency exits of the compressor building and the exit gates.⁴⁴ Having failed to provide fair notice of the meaning of 'near', Item #1 must be withdrawn.

3. 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. Federal courts have examined whether a vague term in a regulation can be interpreted by the agency as a specific numerical requirement. It cannot. 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.⁴⁵ The USDA regulation in question did not set a specific height for perimeter fencing for dangerous animals.⁴⁶

⁴² 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).

⁴³ *Id.* at 839.

⁴⁴ At the South Bend Compressor Station, most personnel are physically located in the office. If an emergency were to occur, an individual would have several ESDs to choose from as he or she left the office and headed toward the exit gates. This approach allows personnel to reach the ESD quickly compared to the time it would take to reach the exit gate. There are five ESDs located throughout the station which provides a greater opportunity for quick activation of an ESD compared to the code requirement of two ESDs. Personnel can activate the ESD system from a safe distance but would not need to head back toward a hazardous area to activate the switches.

⁴⁵ *Hector v. U.S. Dep't of Agric.*, 82 F. 3d 165 (7th Cir. 1996).

⁴⁶ *Id.* at 168-169.

Instead, it only required the fence to be structurally sound to contain the animals.⁴⁷ The agency then established an eight-foot minimum height in an internal memo.⁴⁸ The 7th Circuit determined that this approach was an improper legislative rule under the Administrative Procedure Act⁴⁹ and the agency would need to conduct notice and comment proceedings to select an appropriate height limitation.⁵⁰ The Ninth Circuit further explained in *Marsh v. Alexander* that “[an] indicator of a legislative rule is that it states a principle ‘in numerical terms, that cannot be derived from a particular record’....[and an action] requiring that an enclosure for dangerous animals be surrounded by an eight-foot high perimeter fence is legislative when the underlying regulation merely requires structurally sound containment of dangerous animals.”⁵¹ Likewise, 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, this would be arbitrary and capricious and amount to an improper legislative rule.

C. Industry Impact

The Interstate Natural Gas Association of America (INGAA)⁵² and many companies are following this case and have expressed concern about the impact of potentially relocating ESDs at all stations. Similar to the South Bend Compressor Station, many of these stations have been in existence for decades. Re-installing these ESDs now at an exit gate would be costly and would

⁴⁷ *Id.*

⁴⁸ *Id.* at 168.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Marsh v. Alexander*, 905 F.3d 610, 644 (9th Cir. 2018)(citing *Hector v. U.S. Dep’t of Agric.*, 82 F.3d. 165, 170-171 (7th Cir. 1996)).

⁵² See Exhibit 2.

not enhance safety. It is questionable whether installing an ESD at an exit gate, as opposed to between the gas area and the exit, would enhance safety. For security reasons, the exit gate is typically quite a distance from the areas where personnel work. It would take a longer amount of time to reach an ESD at an exit gate rather than one installed closer to the facility.

D. Right to Supplement

EGTS reserves the right to supplement its positions based on any arguments discussed at the hearing or provided by OPS in this case.

V. Conclusion

Based on the foregoing, EGTS respectfully requests that PHMSA withdraw the allegation of violation and the proposed compliance order in this case.

Respectfully submitted this 12th day of February, 2024



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