ENERGY TRANSFER

June 12, 2017 **VIA: Electronic Mail and FedEx**

Mr. James Urisko
Director, Southern Region
Pipeline and Hazardous Materials Safety Administration
U.S. Department of Transportation
233 Peachtree Street NE
Suite 600
Atlanta, GA 30303

Re: CPF No. 2-2017-5003
Notice of Probable Violation and Proposed Civil Penalty

Dear Mr. Urisko:

The Notice of Probable Violation and Proposed Civil Penalty (NOPV) was issued to the Mid-Valley Pipeline Company (MVPL) and received on May 8, 2017. The MVPL system is operated by Sunoco Pipeline L.P. (SPLP), a subsidiary of Energy Transfer. This NOPV provided SPLP 30 days to respond. On June 7, 2017 SPLP requested an extension of time to respond until June 12, 2017. PHMSA approved this extension of time via electronic mail on June 7, 2017. Attached to this letter is the SPLP response.

Should you have any questions or require further information, please contact Todd Nardozzi of our Sugar Land, TX office at 281-637-6576 or via email at todd.nardozzi@energytransfer.com

Sincerely,

Gary MacDonald
President – Mid Valley Pipeline Company

Enclosure

Cc: Todd Stamm

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1. **§195.412 Inspection of rights-of-way and crossings under navigable waters. Each operator shall, at intervals not exceeding 3 weeks, but at least 26 times each calendar year, inspect the surface conditions on or adjacent to each pipeline right-of-way. Methods of inspection include walking, driving, flying or other appropriate mean of traversing the right-of-way.**

   MVPL did not adequately inspect its pipeline right-of-way.

   MVPL inspects its pipeline right-of-way by flying. During the inspection several areas in Mississippi and Tennessee were found with trees and vegetation overgrown such that the surface of the right-of-way could not be visible enough to yield an adequate inspection.

   Locations where the right-of-way was found to contain excessive growth and tree canopy blocking aerial visibility of the right-of-way surface were as follows:

   - Aerial Marker 327
   - Bibbs Road crossing between Block Valve 339 and Aerial Marker 352
   - Hwy 7 road crossing at M.P. 373.842
   - Danko Lane at M.P. 560.262

SPLP Response

PHMSA alleges a violation of §195.412 and seeks a Proposed Civil Penalty from SPLP of $88,400. Please accept this as SPLP's response (on behalf of itself and Mid-Valley Pipeline Company) contesting the Notice of Probable Violation and Proposed Civil Penalty for the following reasons: (1) PHMSA inappropriately reads additional requirements into §195.412 and uses that as the sole basis for enforcement without meeting the requirements of either due process or the Administrative Procedure Act ("APA"); (2) PHMSA appears to impose a subjective ground-level visibility requirement into §195.412 and relies on insufficient evidence to try to demonstrate that SPLP failed to meet this additional requirement; (3) the documentation demonstrates that SPLP was in compliance with §195.412 and submits the attached aerial right-of-way patrol reports as conclusive evidence of compliance with §195.412; and (4) the proposed penalty is unjustified and excessive.

First, and most notably, the explicit language of §195.412 only requires an operator to "inspect the surface conditions [of] each pipeline right-of-way." In fact, Section 195.412 provides an operator flexibility in how this requirement is met – by providing "[m]ethods of inspection include walking, driving, flying or other appropriate means of traversing the right-of-way." So, to meet this requirement, an operator must inspect the surface of the right-of-way through one of these methods listed and maintain appropriate documentation. SPLP chose to do so through aerial flyovers. Perhaps more importantly is what §195.412 does not require – there is no explicit clearing or maintenance requirement contained in §195.412 (let alone a frequency of maintenance nor an objective measure of success or guidance document provided by PHMSA). Yet, PHMSA impermissibly relies in the NOPV as if there is such an explicit requirement and that an operator can somehow predict PHMSA's opinion of whether a clearing can be seen from a flyover solely by relying on a ground level visit.

As in *Trinity Broadcasting*, PHMSA "never clearly articulates its theory of where or how" the regulation

requires the obligation.[1] Accordingly, SPLP had no notice here that by failing to do so, it would then be penalized. The Due Process Clause of the Fifth Amendment states that no person shall be "deprived of life, liberty or property without due process of law."[2] In the context of administrative law, this has been held to "protect[] a regulated party from civil penalties or similar sanctions where it did not have ***fair notice*** of an agency's interpretation of a regulation."[3] Thus, as PHMSA has noted, "in the absence of notice—for example, where the regulation is not sufficiently clear to warn a party about what is expected of it—an agency may not deprive a party of property by imposing civil or criminal liability."[4]

The U.S. Circuit Courts of Appeals have applied various tests regarding what constitutes fair notice of an agency's interpretation of its regulations. The U.S. Court of Appeals for the D.C. Circuit has largely applied an "ascertainable certainty" test.[5] Specifically, a party lacks fair notice when a similarly-situated person who is acting in good faith cannot identify, with ***ascertainable certainty*** on the face of regulations and other public statements issued by the agency, whether its conduct constitutes a violation of the law(s) at issue.[6] The ascertainable certainty standard is understood to require that agency must set forth "reasonably plain language specific to the particular problem to be addressed."[7] The D.C. Circuit has also noted that "where, as here, the regulations and other policy statements are unclear, where the petitioner's interpretation is reasonable, and where the agency itself struggles to provide a definitive reading of the regulatory requirements, a regulated party is not 'on notice' of the agency's ultimate interpretation of the regulations, and may not be punished."[8]

PHMSA has applied a standard that combines the "ascertainable certainty" standard with the "reasonably prudent person" standard used by the Second, Ninth and Tenth Circuits, and occasionally the D.C. Circuit. The "reasonably prudent person" standard assumes that the party is familiar with the conditions the regulations are meant to address and the objectives of the regulations. Recently, PHMSA has stated that

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[1] *Trinity Broad. of Fla. v. FCC*, 211 F.3d 618, 629 (D.C. Cir. 2000).
[2] U.S. Const. amend. V.
[3] Albert C. Lin, *Refining Fair Notice Doctrine: What Notice Is Required of Civil Regulations?*, 55 BAYLOR L. REV. 991, 992 (2003) (emphasis added). It should be noted that whether the Agency's interpretation of the regulation is permissible is not a part of this inquiry. Fair notice only deals with the question of whether the regulated party was aware of the interpretation, not whether the Agency's interpretation is correct (which receives deference from the courts).
[4] Final Order at *4, *Butte Pipeline Co.*, 2009 WL 3190794 (D.O.T. June 23, 2009) (CPF No. 5-2007-5008) (*citing Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1328–29 (D.C. Cir. 1995)) (citations omitted) (internal quotation marks omitted). *See also United States v. Chrysler Corp.*, 158 F.3d 1350, 1354 (D.C. Cir. 1998); *Trinity Broad.*, 211 F.3d at 628.
[5] Lin, *supra* note 66, at 1002.
[6] *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995). *See also* Daniel J. Collins, 2003 WL 549202, at *2 (2003) (emphasis added). *See also* Order at *2, *Daniel J. Collins*, 2003 WL 549202 (D.O.T. Feb. 27, 2003) (CFTC Docket No. 94-13) (emphasis added).
[7] Lin, *supra* note 66, at 1002. Further, an obligation being consistent with the underlying purpose of a regulation is not sufficient to provide the fair notice required by due process, it must be directly verbalized by the agency. *Trinity Broad.*, 211 F.3d at 631 (arguing that "before an agency can sanction a company for its failure to comply with regulatory requirements, the agency 'must have either put this language into [the regulation] itself, or at least referenced this language in [the regulation]'").
[8] *Trinity Bd. of Fla.*, 211 F.3d at 632 (*citing Gen. Elec. Co.*. 53 F.3d at 1333–34).

> [w]hen an agency interprets a regulation through enforcement rather than pre-enforcement efforts, the issue of notice rests on 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.[9]

In this case, a reading of the cited regulation in the NOPV did not put SPLP on notice of a subjective clearing standard that needs to be met. Instead, the first notice that SPLP received was in the NOPV and despite no regulatory or legal duty imposed on the operator to do so. By adding this requirement, PHMSA is imposing an additional obligation on SPLP and has seemingly taken the position that, in every instance where SPLP relies on right-of-way flyovers to meet the inspection requirement, it is insufficient without more and SPLP should be penalized by assessing a civil penalty and that PHMSA's ground level walkthrough can form the sole basis that the flyover was insufficient.

SPLP did not receive, as is required by due process, fair notice of this obligation as interpreted by the agency because, prior to the initiation of the enforcement action, SPLP was in no way able to identify, that when it did not do more than §195.412 requires that a possible violation would evolve or that SPLP would be subject to penalty despite having no legal obligation to do so. This information was solely in the possession of PHMSA before it produced the NOPV to SPLP in this matter. This also runs afoul of the APA requirements because it is tantamount to creating a new rule[10] without the following required procedures of notice and comment in rulemaking which "imposes obligations . . . on private interests."[11]

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[9] Final Order at *4, *Butte Pipeline Co.*, 2009 WL 3190794 (D.O.T. Aug. 17, 2009) (CPF No. 5-2007-5008) (*citing Gen. Elec. Co.*, 53 F.3d at 1329). *See also* Final Order at *5, *Bridger Pipeline Co., LLC,* 2009 WL 7796887 (D.O.T. June 23, 2009) (CPF No. 5-2007-5003).). Previously, in 2004, PHMSA repeatedly stated

> Respondent is considered to have received fair notice of the agency's interpretation if a prudent person familiar with the pipeline industry and the safety purposes of the standard would have recognized the safety requirement. In applying the reasonable person standard to the notice issue, consideration is given to a variety of factors, including the language of the regulation, its purpose, its placement in the overall regulatory scheme, its regulatory history, the agency's enforcement, and OPS' advisory notices and interpretations informing the regulated community of its interpretation. Pre-enforcement efforts such as advisory bulletins, agency interpretations and 49 C.F.R. §190.11 provide notice and enable Respondent to identify with ascertainable certainty the standards with which OPS expects parties to conform.

Decision on Petition for Reconsideration at *2, *Alyeska Pipeline Service Co.*, 2004 WL 6241283 (D.O.T. June 23, 2009) (CPF No. 5-2000-5006). *See also* Final Order at *4, *Natural Gas Pipeline Co. of Am,*. 2004 WL 6241370 (D.O.T. Oct. 21, 2004) (CPF No. 4-2003-1005).

[10] The APA defines ''rule'' to mean "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing." 5 U.S.C. § 551(4) (2015).

[11] *Batterton v. Marshall*, 648 F.2d 694, 701–02 (D.C.Cir. 1980) (alterations omitted).

The central question is essentially whether PHMSA is exercising its rulemaking power to clarify an existing regulation, or to create new law, rights, or duties in what amounts to a legislative act.[12] Generally, when an agency is promulgating a rule, the APA requires general notice to be published to allow "interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation."[13] When an agency action has "palpable effects" upon the regulated industry and the public in general, it is necessary to expose that action "to the test of prior examination and comment by the affected parties."[14] The significant effect that PHMSA's interpretation has on SPLP's interest is undeniable - it puts the onus on the operator to guess what PHMSA will deem sufficient despite there being no objective measure in the regulation and does so in an arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.[15]

Secondly, PHMSA relies on a mere few of ground-level photographs to justify attempting to impose a hefty penalty against SPLP. There is no indication that any interviews of the pilots occurred or any confirmation that the pilots were unable to the see the right-of-way. Nor was there any evidence that PHMSA undertook to flyover the area itself and at any time actually saw what the pilots saw. Instead, PHMSA jumped to the conclusion that SPLP did not meet this implied requirement while PHMSA was standing at ground level and, as such, has failed to meet its burden of proof in this proceeding. As discussed, "OPS bears the burden of proof in an enforcement action and must prove, by a preponderance of the evidence, that all of the elements necessary to sustain a violation are present in a particular case."[16]

Third, SPLP has produced substantial documentation that it satisfied the requirements of Section 195.412. The time period of attached inspection reports includes current (to the time of the PHMSA inspection over the week of August 15, 2016) plus the prior two years. At no time during this period did inspection of the right-of-way exceed 3 weeks, as required by §195.412. Additionally, in the full calendar years of 2014 and 2015 MVPL exceeded the minimum number of 26 inspections per calendar year and was on pace as of the time of the inspection to do so again in 2016.

Year	Segment	Number of Inspections	Segment	Number of Inspections
2014	Mayersville to Denver	45	Clarkson to Denver	39
2015	Mayersville to Denver	42	Clarkson to Denver	36
2016 - Through August 23	Mayersville to Denver	31	Clarkson to Denver	22

[12] *See Metropolitan Sch. Dist.*, 969 F.2d at 489–90; *United Technologies Corp. v. EPA*, 821 F.2d 714, 718 (D.C.Cir. 1987).
[13] 5 USC § 553(c).
[14] *Nat'l Motor Freight Traffic Assoc. v. United States*, 268 F.Supp. 90, 96 (D.D.C. 1976), *aff'd per curiam*, 393 U.S. 18 (1968).
[15] *See* 5 U.S.C. § 706(2)(A) (2015). *See generally Pension Ben. Guar. Corp. v. LTC Corp.*, 496 U.S. 633 (1990).
[16] Decision on Reconsideration at *5, *Citgo Pipeline Co.*, 2011 W.L. 7517716 (D.O.T. Dec. 29, 2011) (CPF No. 4-2007-5010) (citing Decision on Reconsideration at 4 –5, *Alyeska Pipeline Service Co.*, 2004 WL 6241283 (D.O.T. June 23, 2009) (CPF No. 5-2005-5023) (allegation of violation withdrawn on the basis that OPS did not include sufficient evidence in the record to demonstrate the violation); Final Order at *2 n.3, *Butte Pipeline Co.,* 2009 WL 3190794 (D.O.T. Aug. 17, 2009) (CPF No. 5-2007-5008); *Schaffer v. Weast*, 546 U.S. 49, 56–58 (2005).

These records were reviewed during the week of the inspection by PHMSA. It is key to note that none of the inspection records contain comment(s) from the inspection personnel indicating that any area along the MVPL Mayersville to Clarkson right-of-way, including the areas identified by PHMSA above, contained excess vegetation growth that did not allow the right-of-way to be adequately inspected during the flight. So, not only is there insufficient support for PHMSA's contention, but there is sufficient support that SPLP met the requirements.

Lastly, SPLP is in receipt of the Penalty Worksheet from PHMSA, assigning seven points in the gravity section and thirty points in the culpability section. The gravity and culpability have been erroneously assigned by PHMSA resulting in the Civil Penalty calculation value being higher than warranted.

Section 190.255 provides that PHMSA "shall consider: (1) The nature, circumstances and gravity of the violation, including adverse impact on the environment; (2) The degree of the respondent's culpability; (3) The respondent's history of prior offenses; [and (4)] Any good faith by the respondent in attempting to achieve compliance," among other factors.

With respect to gravity, PHMSA selected a category of 4, which correlates with "Probable violation occurred in areas that are not in an HCA or not in an HCA "could affect" segment." While the subject location was not in a high consequence area, at most, a more appropriate selection would be category 5 "Probable violation occurred in or outside and HCA; however, pipeline safety was minimally affected". Again, at no time did the personnel performing the inspections note that excess vegetation growth did not allow for adequate inspection of the right-of-way and all inspections were performed at the prescribed intervals and total number required per calendar year. Additionally, by virtue of the right-of-way inspection program working in conjunction with other programs such as public awareness, damage prevention and computerized leak detection, SPLP has provided for the overall safe operation of the pipeline and therefore believes that in this case pipeline safety was minimally affected. Also, there were no accidents, releases or other events that occurred on this segment.

With respect to culpability, PHMSA selected a category of 2, which correlates with "The operator made a deliberate decision not to comply with a requirement that was clearly applicable." For the reasons noted above, there was no requirement that was "clearly applicable" here. Moreover, PHMSA appears to rely solely on the statement of one SPLP employee that there were modifications to SPLP's right-of-way mowing program. Yet, the NOPV fails to in any way connect those purported statements to a violation of §195.412. Simply stating that funding had decreased does not demonstrate that funding was insufficient and, once again, §195.412 does not specify any frequency of right-of-way maintenance. Moreover, at no time did the personnel performing the inspections note that excess vegetation growth did not allow for adequate inspection of the right-of-way and all inspections were performed at the prescribed intervals and total number required per calendar year.

For these reasons SPLP respectfully requests the Probable Violation of §195.412 and the associated Civil Penalty be rescinded by PHMSA.