

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

In the Matter of)	
)	
)	
Gulf South Pipeline Company, LLC)	
and Texas Gas Transmission, LLC,)	CPF No. 3-2024-066-NOPV
)	
Respondents.)	
)	

**Written Response of Gulf South Pipeline Company, LLC
and Texas Gas Transmission, LLC
To Notice of Probable Violation, Proposed Civil Penalty,
and Proposed Compliance Order**

Pursuant to § 190.208(a) and (b) of the regulations of the Pipeline and Hazardous Materials Safety Administration (PHMSA),¹ Gulf South Pipeline Company, LLC (Gulf South) and Texas Gas Transmission, LLC (Texas Gas) submit a written response (Response) to the Notice of Probable Violation, Proposed Civil Penalty, and Proposed Compliance Order (Notice) issued on August 22, 2024.

Item 1 of the Notice involves the identification of a Class 3 location only on the Gulf South system.² Gulf South does not contest Item 1 and the proposed civil penalty. Item 2 of the Notice alleges violations on the systems of both Gulf South and Texas Gas. Both companies contest Item 2 and the proposed compliance order and request that they be withdrawn.

Concurrently with this Response, pursuant to 49 C.F.R. § 190.208(b)(4) and § 190.211,³ Gulf South and Texas Gas submit a Request for a Hearing and a Preliminary Statement of Issues. As provided under 49 U.S.C. § 60117(b)(1),⁴ Gulf South and Texas Gas also request an informal meeting to further discuss the alleged violation contained in Item 2 and the proposed compliance order, and request that the presiding official delay scheduling a hearing to allow the parties sufficient time to convene this meeting.

Gulf South and Texas Gas are committed to public safety and to operating their pipeline facilities in accordance with PHMSA's regulations. They take allegations of non-compliance seriously and they look forward to a resolution of this case.

¹ 49 C.F.R. § 190.208(a) & (b) (2022).

² Notice at 1-2. Gulf South and Texas Gas are wholly owned operating subsidiaries of Boardwalk Pipelines, L.P. Gulf South's Operator Identification Number (OPID) is 31728 and Texas Gas's OPID is 19270. Gulf South and Texas Gas operate their pipeline systems pursuant to procedures that are maintained by Boardwalk on behalf of multiple Boardwalk-owned pipelines. Boardwalk does not operate any pipeline facility and does not have an OPID.

³ 49 C.F.R. §§ 190.208(b)(4), 190.211.

⁴ 49 U.S.C. § 60117(b)(1) (2018), as amended by The Protecting our Infrastructure of Pipelines and Enhancing Safety Act of 2020, Pub. L. No. 116-260, div. R, title I, § 108(a)(2), 134 Stat. 2221, 2223 (Dec. 27, 2020).

I. Response of Gulf South and Texas Gas

A. Overview of the Alleged Violation.

Section 192.605(a) of PHMSA’s regulations requires, in part, that an operator prepare and follow “a manual of written procedures for conducting operations and maintenance activities and for emergency response.”⁵ Item 2 of the Notice alleges that Gulf South and Texas Gas did not follow Chapter 05, “Baseline and Reassessment Plan,” and Chapter 03, “Identification of Pipeline HCA Covered Segments and Non-HCA Covered Segments,” of the Boardwalk Gas Integrity Management Plan (IMP).⁶ These chapters address the identification of Moderate Consequence Areas (MCA) for the purpose of performing baseline assessments under § 192.710(b).⁷

The Notice identifies six road crossings on the pipeline systems of Gulf South and Texas Gas and alleges that all of them should be considered MCAs.⁸ The Notice and Violation Report provide the names of the roads that are crossed by the pipelines and the geographical coordinates of those crossings.⁹ The Violation Report contains a Google Map aerial screenshot of each crossing.¹⁰ Neither the Notice nor the Violation Report explains why these road crossings satisfy the definition of an MCA under § 192.3.¹¹ Based on the assumption that the crossings are MCAs, the Notice alleges that Gulf South and Texas Gas failed to identify them by July 1, 2021.¹² As a result, the Notice alleges that Gulf South and Texas Gas did not complete their initial MCA analyses for their baseline assessment plans as required by Chapters 05 and 03 of the IMP and violated § 192.605(a).

The Notice proposes a compliance order that would require Gulf South and Texas Gas to review all processes associated with identifying MCAs “to determine how existing structure and roadway MCAs were not previously identified and provide documentation of the review” to the Central Region Director within 90 days of issuance of the Final Order. Once Gulf South and Texas Gas complete the review, the proposed compliance order would require that they ensure that all MCAs and other pipe segments subject to § 192.710 are identified and submit the final results to the Central Region Director within 180 days of issuance of the Final Order.¹³

⁵ 49 C.F.R. § 192.605(a).

⁶ *Id.*

⁷ *Id.* § 192.710(b).

⁸ Notice at 2-3.

⁹ *Id.*; Pipeline Safety Violation Report, CPF No. 3-2024-066-NOPV at 17-20 (Aug. 22, 2024).

¹⁰ *Id.*

¹¹ 49 C.F.R. § 192.3 (moderate consequence areas).

¹² The Notice states that § 192.710(b) became effective July 1, 2021. As a point of clarification, § 192.710(b) became effective July 1, 2020. Operators were given until July 1, 2021 to identify MCAs. See PHMSA, Frequently Asked Questions (FAQ) on Gas Transmission Final Rule, FAQ-12 (Sept. 15, 2020).

¹³ Notice at 5.

B. PHMSA Has the Burden of Proving the Alleged Violation.

PHMSA has the burden of proving that Gulf South and Texas Gas violated the pipeline safety regulations.¹⁴ PHMSA has the “‘burden of production,’ *i.e.*, . . . 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.”¹⁵ PHMSA “bears the burden of proof as to all elements of the proposed violation.”¹⁶ To meet its burden of production, PHMSA must present sufficient evidence to sustain an allegation of violation. Where PHMSA does not produce such evidence, the allegation of violation must be withdrawn.¹⁷

To meet its burden of persuasion, PHMSA “must prove, by a preponderance of the evidence, that the facts necessary to sustain a probable violation actually occurred.”¹⁸ This burden is carried “only if the evidence supporting the allegation outweighs the evidence and reasoning presented by Respondent in its defense.”¹⁹ The respondent prevails under this standard not by conclusively proving compliance, but where its rebuttal evidence is more persuasive than the evidence provided by PHMSA.²⁰ If “the evidence is closely balanced,” PHMSA has not met its burden of persuasion and the allegation of violation must be withdrawn.²¹

In this proceeding, PHMSA does not prove that Gulf South and Texas Gas did not follow the Boardwalk IMP when performing their initial MCA analyses. In particular, PHMSA fails to establish that the six road crossings identified in the Notice are MCAs which is a necessary factual predicate to proving the alleged violation. Below, Gulf South and Texas Gas demonstrate that

¹⁴ 49 U.S.C. § 60117(b)(1)(F) (2018), as amended by The Protecting our Infrastructure of Pipelines and Enhancing Safety Act of 2020, Pub. L. No. 116-260, div. R, title I, § 108(a)(2), 134 Stat. 2221, 2223 (Dec. 27, 2020). *See* 49 C.F.R. § 190.213(a)(1) (2022). *See, e.g., ExxonMobil Pipeline Co.*, Final Order, CPF No. 4-2017-5027, 2019 WL 3734516, **4, 5 (Apr. 3, 2019) (withdrawing allegation because PHMSA’s evidence did not establish a violation); *ExxonMobil Pipeline Co.*, Final Order, CPF No. 5-2013-5007, 2015 WL 780721, *12 (Jan. 23, 2015) (finding that PHMSA failed to meet burden of proving that certain measures were required under regulations); *Golden Pass Pipeline, LLC*, Final Order, CPF No. 4-2008-1017, 2011 WL 1919517, *5 (Mar. 22, 2011) (finding that PHMSA did not meet its burden of proving that its interpretation of regulatory language was correct).

¹⁵ *Schaffer v. Weast*, 546 U.S. 49, 56 (2005) (quoting *Dir., Office of Workers’ Comp. Programs, Dep’t of Labor v. Greenwich Collieries*, 512 U.S. 267, 272 (1994)); *see also Butte Pipeline Co.*, Final Order, CPF No. 5-2007-5008, 2009 WL 3190794, *1 (Aug. 17, 2009) (finding that PHMSA may find a violation “only if the evidence supporting the allegation outweighs the evidence and reasoning presented by Respondent in its defense.”) (internal citation omitted).

¹⁶ *ANR Pipeline Co.*, Final Order, CPF No. 3-2011-1011, 2012 WL 7177134, *3 (Dec. 31, 2012) (finding that evidence in violation report was insufficient).

¹⁷ *See, e.g., ExxonMobil*, 2019 WL 3734516 at **4, 5 (ordering withdrawal of allegations where OPS failed to prove that Respondent engaged in conduct that would constitute a violation).

¹⁸ *Alyeska Pipeline Serv. Co.*, Decision on Petition for Reconsideration, CPF No. 5-2005-5023, 2009 WL 5538655, *3 (Dec. 16, 2009) (citing *Butte Pipeline*, 2009 WL 3190794 at *1, n.3; *Schaffer*, 546 U.S. at 56-58).

¹⁹ *Butte Pipeline*, 2009 WL 3190794 at *1 (internal citation omitted).

²⁰ *See ANR Pipeline*, 2012 WL 7177134 at *3 (finding Respondent’s plausible explanation sufficient to warrant withdrawal of the allegation of violation because the “Violation Report contain[ed] no evidence which would rebut ANR’s argument.”); *see also City of Richmond, VA*, Final Order, CPF No. 1-2004-0006, 2006 WL 3825337, *4 (Jan. 12, 2006) (stating that the Respondent does not have the burden of proving compliance, rather, OPS has the burden of proving the violation).

²¹ *Alyeska Pipeline*, 2009 WL 5538655 at *3 (quoting *Schaffer*, 546 U.S. at 56). *Cf. Buckeye Partners, LP*, Final Order, CPF No. 1-2009-5002, 2012 WL 3144486, *7 (May 30, 2012) (where neither party “present[s] sufficient proof to prove its position,” the violation must be withdrawn because PHMSA bears the burden).

none of the road crossings meet the definition of an MCA. As a result, PHMSA does not meet its burden of proving the allegation in Item 2. This item and the proposed compliance order must be withdrawn.

C. PHMSA Has Failed to Prove That the Road Crossings Are MCAs or That Gulf South and Texas Gas Did Not Follow Their Procedures When Identifying MCAs.

Item 2 of the Notice alleges that, when performing their initial MCA analyses, Gulf South and Texas Gas failed to identify six road crossings as MCAs.²² As relevant to this Notice, § 192.3 of PHMSA's regulations defines an MCA as:

An "onshore area that is within a potential impact circle, as defined in § 192.903, containing either: . . . Any portion of the paved surface, including shoulders of a designated interstate, other freeway, or expressway, as well as any other principal arterial roadway with 4 or more lanes, as defined in the Federal Highway Administration's *Highway Functional Classification Concepts, Criteria and Procedures*."²³

PHMSA's definition of an MCA includes several terms that the regulation states are defined by the Federal Highway Administration (FHWA) in its established guidance, *Highway Functional Classification Concepts, Criteria and Procedures (FHWA Guidance)*. Interpreting and applying § 192.3's definition of an MCA, therefore, requires an understanding of the FHWA's definitions of these terms, as well as the purpose and use of this guidance, and its importance to functionally classifying roads and highways.

In 1991, Congress passed the Intermodal Surface Transportation Efficiency Act (ISTEA) authorizing the National Highway System (NHS).²⁴ The ISTEA required that components of the NHS include, among other things, "urban and rural principal arterials and highways," and directed states to propose such arterials and highways to the Secretary of Transportation for designation to the NHS.²⁵ Each state was required to "functionally reclassify the roads and streets in such State in accordance with such guidelines and time schedule" established by the Secretary.²⁶ The Secretary was then required to use the states' functional reclassifications when proposing to Congress the highways to be included in the NHS.²⁷ The National Highway System Designation Act of 1995 (NHSDA) designated as the NHS the proposed recommendations of the Department of Transportation.²⁸

The *FHWA Guidance* is used by states to continue to fulfill their "responsibility for developing and updating a statewide highway functional classification in rural and urban areas to

²² Notice at 2-3.

²³ 49 C.F.R. § 192.3 (moderate consequence area).

²⁴ Pub. L. No. 102-240, § 2, 105 Stat. 1914 (Dec. 18, 1991). In establishing the NHS, the ISTEA restructured the Federal-aid highway systems.

²⁵ *Id.* § 1006(a), 105 Stat. at 1924.

²⁶ *Id.* § 1006(c), 105 Stat. at 1925 (codified at 23 U.S.C. § 103, note).

²⁷ *Id.* § 1006(a), 105 Stat. at 1924-25.

²⁸ Pub. L. No. 104-59, § 101(a), 109 Stat. 568, 569 (Nov. 28, 1995).

determine functional usage of the existing roads and streets.”²⁹ States’ functional classifications are mapped and then submitted to the FHWA for approval.³⁰ Upon approval, these functional classifications “serve as the official record for Federal-aid highways and the basis for designation of the National Highway System.”³¹

The *FHWA Guidance* identifies and describes the functional classification categories that a state must use to functionally classify streets and roads. The identified categories are Principal Arterials (Interstate, Other Freeways and Expressways, and Other Principal Arterials), Minor Arterials, Collector, and Local.³² Section 3 of the *FHWA Guidance* contains the “Definitions and Characteristics” for each of these categories,³³ including Interstates,³⁴ Other Freeways and Expressways,³⁵ Other Principal Arterials,³⁶ and Minor Arterials.³⁷ The *FHWA Guidance* also recommends that state departments of transportation maintain information, such as mileage, functional classification, lanes and traffic forecasts in a Linear Referencing System/GIS format and provides a color coding scheme for displaying different functional classifications.³⁸ The category of Minor Arterials reflects a color and is designated as the number “4.” These are different from the color and number (“3”) associated with the category of Other Principal Arterials.³⁹

All of the road crossings identified in PHMSA’s Notice are located in Louisiana. To ascertain the functional classification of each of these road crossings, Gulf South and Texas Gas accessed a GIS map of Louisiana’s highways via FHWA’s website.⁴⁰ A screenshot of this website page reflects the same functional classification categories and number references as set forth in the *FHWA Guidance*. The screenshot also contains a legend describing the various database field names.⁴¹

Using the geographical coordinates for each road crossing listed in the Notice, Gulf South and Texas Gas identified the road’s functional classification that has been assigned by the state of Louisiana and approved by the FHWA. For each of the roads, the functional classification is listed

²⁹ 23 C.F.R. § 470.105(b)(1) (2023).

³⁰ *Id.* § 470.115(b).

³¹ *Id.* § 470.105(b)(2).

³² *FHWA Guidance* at 2, Sec. 3.

³³ *Id.* at 14-25.

³⁴ *Id.* at Sec. 3.1.1.

³⁵ *Id.* at Sec. 3.1.2.

³⁶ *Id.* at Sec. 3.1.3.

³⁷ *Id.* at Sec. 3.1.4.

³⁸ *Id.* at 33.

³⁹ *Id.* at 34.

⁴⁰ Highway Performance Monitoring System (HPMS) Public Release of Geospatial Data in Shapefile Format – Policy, Federal Highway Administration (dot.gov), <https://www.fhwa.dot.gov/policyinformation/hpms/shapefiles.cfm>. (page last modified on Sept. 13, 2022). A screenshot of this website page is attached hereto as Attachment 1. Information on Louisiana’s State Highway Functional Classification, including a map of Louisiana’s Functional Systems, also can be found on the website of the Louisiana Department of Transportation and Development, http://www.sps.dotd.la.gov/Inside_LaDOTD/Divisions/Multimodal/Data_Collection/Mapping/Pages/Statewide_Highway_Functional_Classification_Maps.aspx (last visited Sept. 9, 2024).

⁴¹ Attachment 1.

as “4,” meaning that each road is a “Minor Arterial.”⁴² None of them has a functional classification of “3” which would signify “Other Principal Arterial.”⁴³

These maps conclusively show that none of the road crossings listed in the Notice involve a “designated interstate, other freeway, or expressway,” or “other principal arterial roadway with 4 or more lanes.”⁴⁴ Rather, each road is a Minor Arterial which is not specified in PHMSA’s definition of an MCA. Therefore, none of these road crossings should be considered an MCA.

The fact that the roads listed in the Notice may have four lanes is not relevant to the determination of whether a road crossing should be considered an MCA. Arguments suggesting otherwise ignore the functional classifications of these roads which have been established by the state of Louisiana and approved by the FHWA pursuant to federal law. PHMSA’s incorporation of these FHWA terms, including, “Other Principal Arterial,” roadways in the MCA definition, combined with the requirement that operators refer to the *FHWA Guidance* when identifying MCAs requires that operators comply with established functional classifications. This is reinforced by the fact that in the final rule adopting the MCA definition, PHMSA recites the *FHWA Guidance* description of Other Principal Arterial roadways in response to requests for guidance on the meaning of “other principal roadways with 4 or more lanes.”⁴⁵ If PHMSA is going to require that operators refer to the FHWA’s definitions, then PHMSA must respect the functional classifications approved by the FHWA. Disregarding them is inconsistent with the plain language of § 192.3 which invokes the FHWA definitions and guidance.

The Google Map aerial screenshots contained in the Violation Report do not establish that the road crossings listed in the Notice are MCAs. The Violation Report contains no reference to the definition of an MCA and does not reference the *FHWA Guidance*. None of these screenshots contained in the Violation Report shows the functional classifications of these roads or demonstrates that they are Other Principal Arterials. The Violation Report contains no evidence demonstrating that the road crossings are MCAs.

By failing to establish that the six road crossings listed in the Notice are MCAs, PHMSA fails to prove all elements of the alleged violation⁴⁶ and fails to satisfy its burden of proving that Gulf South and Texas Gas did not identify all MCAs as defined in § 192.3.⁴⁷ Without establishing this fundamental fact, PHMSA fails to meet its burden of demonstrating that Gulf South and Texas

⁴² A screenshot of each road crossing as shown on the FHWA’s GIS is attached hereto as Attachment 2.

⁴³ In addition, none of them has a functional classification of “Interstate” or “Freeway or other Expressway.”

⁴⁴ 49 C.F.R. § 192.3 (moderate consequence area).

⁴⁵ Pipeline Safety: Safety of Gas Transmission Pipelines: MAOP Reconfirmation, Expansion of Assessment Requirements, and Other Related Amendments, Final Rule, 84 Fed. Reg., 52,180, 52,214 (Oct. 1, 2019) (quoting U.S. Department of Transportation, Federal Highway Administration, *Highway Functional Classification Concepts, Criteria and Procedures*, 15 (2013 Edition)). This definition of Other Principal Arterials is unchanged in the 2023 edition of the *FHWA Guidance*.

⁴⁶ *ANR Pipeline*, 2012 WL 7177134 at *3 (finding that evidence in violation report was insufficient to prove that Respondent failed to identify knew of probable existence of safety-related condition based only on in-line inspection data).

⁴⁷ *ExxonMobil*, 2015 WL 780721 at *12 (finding that PHMSA failed to meet its burden of proving that certain measures were required under the regulations); *Golden Pass*, 2011 WL 1919517 at *5 (finding that PHMSA did not meet its burden of proving that its interpretation of the regulatory language was correct).

Gas did not complete their initial MCA analyses for their baseline assessment plans as required in their IMP procedures in violation of § 192.605(a).⁴⁸

Gulf South and Texas Gas request that Item 2 and the proposed compliance order be withdrawn.

II. Conclusion

For the reasons set forth above, Texas Gas and Gulf South request that PHMSA withdraw Item 2 of the Notice and the proposed compliance order. Gulf South does not contest the allegation in Item 1 or the proposed civil penalty.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Tony G. Rizk", with a stylized flourish extending to the right.

Tony G. Rizk, P.E.
VP, Technical Services
Boardwalk Pipelines

September 12, 2024

⁴⁸ *ExxonMobil*, 2019 WL 3734516 at **4, 5 (withdrawing allegation because PHMSA's evidence did not establish a violation).