

**Before the
U.S. Department of Transportation
Pipeline and Hazardous Materials Safety Administration
Office of Pipeline Safety
Washington, D.C.**

In the Matter of	)	
	)	CPF No. 5-2021-002-NOA
Kinder Morgan CO2 Company LLC	)	Notice of Amendment
	)	
Respondent.	)	
	)	

Petition for Reconsideration and Request for Stay

The Pipeline and Hazardous Materials Safety Administration (PHMSA or the Agency) issued an Order Directing Amendment (Order) to Kinder Morgan CO2 Company LLC (KM CO2 or the Company) on October 25, 2022, in connection with a Notice of Amendment (NOA) issued to the Company on August 16, 2021. The NOA alleged seven (7) procedural inadequacies, only one (1) of which KM CO2 contested regarding repair recordkeeping requirements under 49 C.F.R. § 195.404(c)(1) (NOA Item 7). The Order finds that KM CO2’s “procedures for maintaining records indicating which contractor and/or employee performed ‘covered tasks’ under the [Operator Qualification (OQ)] regulations are inadequate to ensure safe operation of its pipeline system.” The Order further directs KM CO2 to “[a]mend the procedures for maintaining records to ensure that each individual who performs a covered task under the [OQ] regulations is identifiable for the purpose of determining compliance with the OQ regulations.”

KM CO2 timely files this Petition for Reconsideration of the Agency’s Order pursuant to 49 C.F.R. § 190.243 to respectfully request that PHMSA reconsider its finding that the Company’s procedures for recordkeeping repairs are inadequate, the rationale upon which the Order is based, and the directive for amendment of KM CO2’s procedures. The Order does not comport with the plain language of the federal pipeline safety regulations, enforcement precedent, rulemaking history, or associated regulatory guidance. Instead, the decision is based almost entirely on a different recordkeeping regulation specific to OQ, which is not even cited in the NOA, was not fully briefed before the Presiding Official, and is not correctly applied.

The Order is unclear about whether the combination of these two recordkeeping regulations results in a new expansive recordkeeping requirement to identify every OQ qualified individual who performs any OQ activity on the pipe or just those associated with the repair of the pipeline such as the tasks noted in the NOA. Moreover, the Order’s vaguely worded directive does not clearly articulate the procedural changes that are required of KM CO2. For these reasons and as explained further below, the Order should be withdrawn in its entirety as it relates to NOA Item 7.

Given the fair notice concerns, the potential significance of this unprecedented finding to KM CO2 and the industry at large, the lack of clarity contained in the Order's directive for procedural revisions, as well as the time and resources it would take to implement such changes, KM CO2 respectfully requests that PHMSA stay the procedural amendments contained in the Order pursuant to 49 C.F.R. § 190.243(c) while the Agency considers this petition.

I. Procedural Background

PHMSA issued the August 16, 2021 NOA based on an inspection of KM CO2's welding, certification, inspection, and OQ procedures that was performed between September 28, 2020 – October 2, 2020. The NOA alleged seven (7) procedural inadequacies, only one (1) of which KM CO2 contested in a Request for Hearing filed on September 14, 2021 relating to life of pipe repair records required to be maintained under the “maps and records” regulation at 49 C.F.R. § 195.404(c)(1), such as in-line inspection repairs and pipe replacements.¹ In an effort to resolve the contested NOA allegation in lieu of a hearing, the parties convened informal settlement meetings beginning on November 3, 2021, but were unable to reach an agreement. KM CO2 timely filed Pre- and Post-Hearing briefs and participated in a hearing on March 3, 2022 as reflected in the transcript in the record.

At the hearing and in its Region Recommendation, PHMSA acknowledged that the NOA did not allege that KM CO2 violated the OQ regulatory requirements.² Yet PHMSA continued to assert that the Company's repair records were deficient because KM CO2 was not able to clearly demonstrate compliance with the (separate) OQ requirements (which generally carry a 5-year retention period) within the specific repair records identified. With reliance on (1) the purpose and intent of the OQ regulations, (2) the OQ recordkeeping regulations themselves, and (3) a “wholistic” reading of the Part 195 recordkeeping requirements, the Order improperly finds that KM CO2's “procedures for maintaining records indicating which contractor and/or employee performed ‘covered tasks’ under the [Operator Qualification (OQ)] regulations are inadequate to ensure safe operation of its pipeline system.”

II. PHMSA's Order Directing Amendment Should be Reconsidered and Withdrawn.

This matter turns on a single straightforward issue: whether KM CO2 repair procedures meet the regulatory requirements of 49 C.F.R. § 195.404(c)(1) by requiring an adequate “description of each repair.” Despite the uncontroverted fact that there is no express law, enforcement precedent, guidance or industry standard that requires operators to document the name of individuals performing repair activities for the purpose of determining compliance with the OQ regulations, PHMSA impermissibly expands the repair recordkeeping requirements (49 C.F.R. § 195.404(c)(1)) and the OQ recordkeeping requirements (49 C.F.R. § 195.507) to impose such a requirement.

¹ In that filing, KM CO2 also provided revised procedures to address the six (6) uncontested procedural amendments, which the Order found were adequate.

² During the hearing, PHMSA acknowledged that it has not alleged that KM CO2 violated any OQ requirements. Hr'g. Tr. 61:8-10 (“I agree with Kinder Morgan. We did not bring this notice of amendment under OQ. We believe it has relevance to OQ. However, it is under 195.404(c)(1).”). The Presiding Official likewise recognized that the OQ requirements are outside of the scope of the violation alleged in the NOA. *Id.* at 19:4-7 (“But that's not what the allegation is. Your allegation involves a records issue. You didn't allege if a person wasn't qualified.”).

Neither of these regulations – whether read together or separately – support PHMSA’s expanded interpretation of the information that must be included in repair records.

Further, PHMSA’s misappropriation of the distinct OQ recordkeeping requirements to potentially expand the scope of the Order creates serious due process and fair notice issues. Although included within the scope of the inspection, PHMSA alleged no procedural deficiencies under the OQ regulations in the NOA. Instead PHMSA alleged deficiencies as it relates to repair recordkeeping regulations which were promulgated with an entirely different purpose and intent long before issuance of the OQ regulations and associated recordkeeping requirements. Without providing fair notice or due process to KM CO2 or the industry generally, PHMSA’s Order combines these two separate recordkeeping regulations to establish an unprecedented and expansive recordkeeping requirement. It is unclear if the PHMSA Order requires this recordkeeping for repair tasks or if it includes every OQ qualified individual who performs an activity associated with a covered task on a pipeline facility. In addition, the directive to amend KM CO2’s procedures requires the Company to amend its procedures to include the very same process already in place under the Company’s OQ program and documentation. To the extent that the Order requires anything more, it is not clearly articulated – creating difficulties for KM CO2 in achieving compliance with the directive and subjecting the Company to future risk of enforcement.

KM CO2’s procedures and related records meet and exceed the 49 C.F.R. § 195.404(c)(1) regulatory requirements at issue in NOA Item 7 and KM CO2 maintains separate OQ documentation that meets 49 C.F.R. § 195.507. PHMSA’s Order has not put forward any factual or legal basis to demonstrate otherwise. KM CO2’s OQ program is not at issue in this action and, as such, the Company’s OQ documentation is not part of the record in this case. For these reasons, KM CO2 respectfully requests that the Order be withdrawn as it relates to NOA Item 7.

A. 49 C.F.R. § 195.404(c)(1) Does Not Require Documentation of the Individuals Performing Repair Activities.

Under Part 195 Subpart F, Operation and Maintenance, 49 C.F.R. § 195.404 relates to “Maps and records” that an operator must maintain and the associated timeframes to maintain such documentation. The repair recordkeeping requirements under 49 C.F.R. § 195.404(c)(1) are unambiguous. Operators are required to maintain three (3) specific categories of repair information for the useful life of the pipeline:

1. “[t]he date,”
2. “location, and”
3. “description of each repair made to pipe [. . .]”

Neither the regulations at Parts 192 nor 195 define “description” and PHMSA has not provided any clarification as to the scope of this term in any PHMSA guidance or prior enforcement under this provision. When determining how to comply with the requirements of § 195.404(c)(1) and the requirement to provide a “description” of a repair, PHMSA has instructed operators to apply the common dictionary meaning of any undefined terms.³ The ordinary dictionary definition of

³ See *In re: Sunoco Pipeline, LP*, Final Order, CPF 1-2019-5006 (Jun. 26, 2020) (“In interpreting undefined regulations, we [PHMSA] look to the common dictionary definition.”). During the hearing, PHMSA agreed that the recordkeeping

“description” simply means “kind or character” or “a statement or account giving the characteristics of someone or something.”⁴

Neither the plain language of the regulation nor the various ordinary dictionary definitions of description include a requirement to provide the “who” or the specific individual that completed each OQ covered task during a repair. PHMSA appears to agree in the Order, stating:

§ 195.404(c)(1) does not specify that the word “description” means that all records created and maintained by a pipeline operator must automatically include the “who, what, when, where, and why” of any and all repairs. OPS could have included such precision in § 195.404(c)(1) when it promulgated the regulation but did not do so. Accordingly, this order does not apply such an automatic requirement to all recordkeeping generally done by Respondent.

Any limitations established by this finding are subsequently rendered meaningless, however, by the faulty rationale and regulatory interpretation that is subsequently articulated in the Order.

B. PHMSA’s Rationale Is Flawed.

Despite agreeing that the regulation does not require an operator to document “who” conducted a repair, PHMSA goes on to rely on (1) the purpose and text of OQ regulations and (2) a “wholistic” reading of the Part 195 recordkeeping requirements to establish an entirely new life of pipe recordkeeping requirement that combines general repair records with specific OQ documentation requirements to require the very information (i.e., the “who”) the Order just acknowledged was not required.

1. PHMSA Ignores the Context and Purpose of Regulation at Issue.

PHMSA cites to the primary purpose of recordkeeping generally to demonstrate compliance and facilitate oversight of personnel. Order at 6 (citing *In re: Pacific Operators Offshore, LLC*, Final Order, 2010 WL 1323384, at *2 (Mar. 17, 2010)).⁵ In doing so, PHMSA completely disregards

requirements at 49 C.F.R. § 195.404(c)(1) must be read in light of the common dictionary definition and cited to the same definition offered by KM CO2. Moreover, PHMSA offered a third definition of “description,” including the “act of describing, specifically discourse intended to give a mental image of something experienced.” Hr’g. Tr. 12:21-23.

⁴ *Description*, Merriam-Webster.com Dictionary, <https://www.merriam-webster.com/dictionary/description> (last accessed Mar. 23, 2021). An earlier version of Merriam-Webster’s website (last accessed by KM CO2 on Dec. 27, 2021) defined “description” as “type or kind.” This is the definition that was cited by KM CO2 in its pre-hearing materials and at the hearing. Although slightly modified on Merriam-Webster’s website, the current definition of “kind or character” is substantially the same. Both definitions reinforce KM CO2’s argument that providing the names of individuals that complete specific covered tasks is not within the scope of the ordinary meaning of “description.”

⁵ This Final Order is distinguishable from the facts and the law at issue. In that case, the operator did not provide any records to demonstrate compliance with annual valve inspections under 49 C.F.R. § 192.745(a). In finding a violation of the regulation, PHMSA emphasized the importance of PHMSA’s periodic maintenance inspections and recordkeeping requirements, noting that the purpose of inspections is to ensure safe operation of the pipeline and emphasizing the accuracy of maintenance records so managers can oversee personnel.

the (1) performance based nature of the regulations at issue and (2) the purpose of the “maps and records” regulation at 49 C.F.R. § 195.404(c)(1), which is intended to provide individuals performing work on the pipeline with pertinent information regarding prior repairs.

Under these performance-based standards, operators are permitted to design their processes and procedures to best fit their unique systems and operating conditions to promote pipeline safety.⁶ The recordkeeping requirements at 49 C.F.R. § 195.404 were designed to ensure that individuals working on the pipeline have access to historical information regarding the timing, location, and nature of prior repairs to ensure that they have enough information to safely and effectively perform their duties.⁷ Inclusion of the name of the qualified individual that made the repair is not germane to the purpose and intent of this regulatory requirement.

Three decades after the repair records regulation at 49 C.F.R. § 195.404(c)(1) was established, PHMSA issued OQ regulations under 49 C.F.R. Part 195, Subpart G, which include processes for ensuring that individuals that complete certain covered tasks are properly qualified. In contrast to 49 C.F.R. § 195.404, the OQ regulations were designed to focus on an individual’s training and qualifications to complete covered tasks with the goal of “reduc[ing] the risk of accidents on pipeline facilities attributable to human error.”⁸ Subpart G includes its own recordkeeping requirements at 49 C.F.R. § 195.507, which did not in any way alter the recordkeeping requirements at 49 C.F.R. § 195.404(c)(1). Consistent with the purpose of the OQ regulations, the OQ regulations require that operators maintain records that include: (1) identification of qualified individual(s); (2) identification of the covered tasks the individual is qualified to perform; (3) date(s) of current qualification; and (4) qualification method(s). 49 C.F.R. § 195.507. Section 195.507 sets forth a retention period of 5 years for prior qualifications and individuals no longer performing covered tasks. Most significantly, these OQ recordkeeping requirements do not require operators to maintain records that connect specific individuals to completed covered tasks to demonstrate compliance with the OQ regulations.

⁶ *Notice of Proposed Rulemaking*, 33 Fed. Reg. 10213, 10214 (Jul. 17, 1968) (“These proposed regulations are general ‘performance’ type requirements rather than detailed ‘specification’ type requirements of the type previously issued for the transportation of hazardous materials. [. . .] The goal is the safe transportation of certain materials through pipelines; the regulation relates to the goal, not the means used to achieve the goal.”).

⁷ See *PHMSA Advisory Bulletin, Gas and Hazardous Liquid Pipeline Mapping*, 67 Fed. Reg. 40768, 40769 (Jun. 13, 2002) (reminding operators of their recordkeeping obligations under 49 C.F.R. § 195.404 and their “responsibility to maintain construction records, maps, and operating history and to make this information available to appropriate operating personnel to enable them to safely and effectively perform their duties”); *PHMSA Operations & Maintenance Enforcement Guidance* at 17, 36 (stating that “[r]ecords, maps, etc. must be available to personnel performing O&M functions” and that “[u]pdated maps, schematics, [and] documents . . . that reflect current conditions and are critical to operations, the control center, and emergency response situations must be available to operating personnel”); *Final Rule, Requirements for Design, Construction, Operation, and Maintenance*, 34 Fed. Reg. 15473, 15475 (Oct. 4, 1969) (rejecting a suggestion to reduce the length of time that certain records must be maintained to ensure that the records are available so that the operator can “adequately evaluate the past performance of [a pump] station and to isolate any problems if an accident has occurred”).

⁸ *Final Rule, Qualification of Pipeline Personnel*, 64 Fed. Reg. 46853, 46853 (Aug. 27, 1999).

2. PHMSA's Wholistic Expansion of Recordkeeping Requirements Misapplies Principles of Regulatory Interpretation.

Through its attempt at a “wholistic” reading of the Part 195 recordkeeping requirements, PHMSA misapplies longstanding established principles of regulatory interpretation. It is well-established that “the rules of statutory construction apply when interpreting an agency’s regulations.” *Roberto v. Dep’t of Navy*, 440 F.3d 1341, 1350 (Fed. Cir. 2006). “When construing a regulation, it is appropriate first to examine the regulatory language itself to determine its plain meaning.” *Goodman v. Shulkin*, 870 F.3d 1383, 1386 (Fed. Cir. 2017) (citing *Meeks v. West*, 216 F.3d 1363 (Fed. Cir. 2000)). “If the regulatory language is clear and unambiguous, the inquiry ends with the plain meaning.” *Id.*

KM CO2 submits that the regulatory requirements of § 195.404(c)(1), as clarified by the ordinary meaning of “description,” are unambiguous. PHMSA should not be able to use the larger context of the pipeline safety regulations in an after-the-fact attempt to significantly expand the ordinary meaning of these requirements. Such a construction impermissibly strays from the common understanding of the meaning of “description” in the context of the unambiguous language of § 195.404(c)(1). *See Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1328-29 (D.C. Cir. 1995) (refusing to hold a company responsible for an agency’s sweeping regulatory definition where the company had no prior notice of the agency’s interpretation).

While it is true that regulatory interpretation may be a wholistic endeavor, no canon of construction can be invoked to lead to an interpretation that is at odds with the plain meaning and purpose of the regulation. When determining the meaning of a regulation, courts have employed a variety of “tools of statutory construction,” including “the statute’s text and structure.” *Balestra v. United States*, 803 F.3d 1363, 1369 (Fed. Cir. 2015) (emphasis added). PHMSA’s Order, however, ignores the structure of the regulations. Sections 195.404(c)(1) and 194.507 are entirely different regulations with disparate recordkeeping requirements and timeframes, contained in separate subparts, and delineated by different headings. Construing regulations wholistically and in a manner that gives effect to all of the provisions, where possible, is not *carte blanche* to impermissibly expand the regulations.

Moreover, the purpose of applying the rules of regulatory construction is to discern the intent behind the regulation when it was first implemented. *See Morgan v. Gay*, 466 F.3d 276, 277 (3d Cir. 2006) (discussing that the “purpose in statutory interpretation is to discern legislative intent”). In this instance, 49 C.F.R. § 195.404(c)(1) was enacted in 1969 – 30 years before the OQ regulations were enacted.⁹ The regulatory requirements within § 195.404 have remained unchanged since they were first implemented. PHMSA cannot reasonably argue that the meaning of the requirements at § 195.404(c)(1) should now be expanded by regulations that were not in existence at the time they were implemented. *See Perez v. Loren Cook Co.*, 803 F.3d 935, 943 (8th Cir. 2015) (“[D]eference is due when an agency has developed its interpretation contemporaneously with the regulation, when the agency has consistently

⁹ Compare *Final Rule, Requirements for Design, Construction, Operation, and Maintenance*, 34 Fed. Reg. 15473 (Oct. 4, 1969) with *Final Rule, Pipeline Safety: Qualification of Pipeline Personnel*, 64 Fed. Reg. 46853 (Aug. 27, 1999).

applied the regulation over time, and when the agency's interpretation is the result of thorough and reasoned consideration.”).

C. KM CO2's Procedures Satisfy 49 C.F.R. § 195.404(c)(1).

KM CO2 maintains repair project documentation in its detailed Pipeline Inspection/Repair Report (PIR Report), which is the Company's document of record for purposes of 49 C.F.R. § 195.404(c)(1). *See* Pre-Hearing Brief, Ex. A. As established during the hearing by KM CO2 Superintendent of Operations, the PIR Report is detailed and provides a variety of information about the relevant repair, including information about the existing pipe (wall thickness, seam, operating pressure, etc.), the origin of the defect (whether it was caused by corrosion, outside force, etc.), how the defect was detected (by air patrol, ground patrol, or some other method), and the type of repair (steel sleeve, composite sleeve, or replacement pipe).¹⁰ Pre-Hearing Brief, Ex. A at 2; *see also* Testimony of M. McGuire, Hr'g. Tr. 41:17-25, 40:1-5. The report further includes the name of the “person or persons who examined the pipeline and completed the form.” Pre-Hearing Brief, Ex. A at 4. Additionally, the form provides a notes section, where KM CO2 representatives tasked with completing the form are instructed to provide additional information to describe the repair, including:

how much pipe was cut and replaced, type of pipe used for replacement, type of coating used to make repairs, whether the coating sample was sent to a lab for determining asbestos content; whether this pipeline location had been excavated before and why; more detail as to the pipeline coating condition; more detail on types of corrosion or mechanical defects found, etc.

Id. at 3. In sum, the information included in the PIR Report provides a comprehensive description of the relevant pipeline repair that exceeds what is required by the ordinary meaning of “description” and the regulatory requirements at 49 C.F.R. § 195.404(c)(1).

D. KM CO2's Procedures Satisfy 49 C.F.R. § 195.507.

The Order inaccurately states that KM CO2's review of covered tasks performed for a given project along with the field documentation would not indicate which individuals performed one or more OQ covered tasks. In compliance with the OQ requirements, KM CO2 maintains a robust OQ program that complies with the requirements in Part 195 Subpart G and maintains appropriate records to document its compliance with 49 C.F.R. § 195.507(a). As explained at the hearing, KM CO2 verifies the relevant OQ qualifications of individuals working on repair projects both prior to commencement of the project and when they arrive on site before they are authorized to perform

¹⁰ As provided during the hearing, Mr. McGuire testified about the details provided on the PIR Report, including that the form provides

the date, the repair date. [. . .]. It will give you the link, that start station, GPS coordinates and all that for the repairs. If it's pipe, it would give you the OD, the grade of the pipe, that type of thing. Also the test pressures used to hydro the pipe and all that.

Hr'g. Tr. 41:17-25. Mr. McGuire explained that the information on the form is provided by the onsite KM CO2 representative and relevant subject matter experts. *Id.* at 40:1-5.

any covered tasks. Records are maintained in KM CO2 project books which identify the personnel on site on a given day, the work performed on a given day, the covered tasks for which individuals are qualified, and the associated OQs. Consequently, KM CO2's project documentation would, in fact, indicate the individual or group of individuals who performed one or more OQ covered tasks. In the event that there are questions related to qualifications of individuals who performed repair activities, KM CO2's policy is to suspend the OQs of all of the individuals associated with that repair task.

As part of its program, KM CO2 maintains records that identify the individuals on a specific project that are qualified to complete covered tasks and the dates and methods that those individuals were qualified. At a project site, a KM CO2 inspector uses these records to confirm that the appropriate personnel are properly qualified to perform the required covered tasks and that one of those individuals completes those tasks. KM CO2 can rely on Safety Sign-in sheets and Job Hazard Analysis forms to discern what qualified individuals were onsite during a repair and completed various OQ covered tasks. *See* Pre-Hearing Brief, Exs. B & C. All of these records are kept in job books related to the relevant repair and were provided to PHMSA during the underlying inspection. During the hearing, Jaime Hernandez, Director of Codes and Standards for KM CO2, described KM CO2's OQ process on a job site (Hr'g. Tr. 58:20-25; 59:1-20):

The site inspector that was referred to earlier then collects all of those records and marries up the project manager checklist with the individual person's OQ qualifications, and those two are entered into the project book that was also referred to earlier. It should be noted that we weren't cited for not having qualified individuals. That wasn't an issue. And, again, we can, if it's a single project, link the personnel that had the appropriate OQ task to the function at hand.

III. PHMSA's Expansion of the Repair Recordkeeping Requirements Violates Fair Notice and Due Process and Is Arbitrary and Capricious.

PHMSA's finding in the Order is without support in law, prior precedent, regulatory guidance or fact and goes so far as to contradict the plain language of the regulations, the regulatory history and purpose of two distinct recordkeeping requirements, and associated guidance. KM CO2 prepared and implemented the relevant procedures and associated PIR Report documentation in reliance on the requirements set forth at 49 C.F.R. § 195.404(c)(1). This Order is the first time that PHMSA has ever indicated to the regulated community that life of pipe repair records must include documentation of every individual who performs an OQ covered task.

Such a broad application of 49 C.F.R. §§ 195.404(c)(1) and 195.507, which expands the plain language of the regulations, must be issued through notice and comment rulemaking to provide KM CO2 as well as the industry with notice and an opportunity to respond. Administrative Procedure Act (APA), 5 U.S.C. § 554(b); U.S. Const. amend. V, XIV; *Appalachian Power Co. v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000).

Fair notice requires that an agency 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.” *ExxonMobil Pipeline Co. v. U.S. DOT*, 867 F.3d 564, 578 (5th Cir. 2017) (citing *Diamond Roofing Co., Inc. v. OSHRC*, 528 F.2d at 645, 649 (5th Cir. 1976)). Regulated entities are not obligated to “divine the agency’s interpretations in advance or else be held liable when the agency announces its interpretations for the first time in an enforcement proceeding and demands deference.” *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 159 (2012). An agency may not enforce regulations according to “what an agency intended but did not adequately express.” *Gates v. Fox Co., Inc. v. OSHRC*, 790 F.2d 154, 156 (D.C. Cir. 1986).

These well-established principles of due process and fair notice apply equally to violations and imposed penalties as much as they do to findings of noncompliance. Hence, any argument that KM CO2 is merely being asked to amend its procedures does not relieve PHMSA of its obligation to provide fair notice of its interpretation of 49 C.F.R. § 195.404(c)(1). *See U.S. v. Chrysler Corp.*, 158 F.3d 1350, 1355 (D.C. Cir. 1998) (holding that there is no real difference between violating a regulation and noncompliance with a regulation and thus the company could not be required to recall cars for noncompliance without prior notice).

In addition, this decision raises significant due process concerns under the APA and the U.S. Constitution. In this proceeding, KM CO2 could not have anticipated that PHMSA would have inserted the OQ recordkeeping requirements into the life of pipe repair recordkeeping requirements. *See U.S. v. Trident Seafoods Corp.*, 60 F.3d 556, 559 (9th Cir. 1995) (“The test is ‘not what [the agency] might possibly have intended, but what [was] said’”); *Gen. Elec. Co.*, 53 F.3d at 1329 (“[W]e 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.”).

For these reasons, KM CO2 does not believe that the factual and legal arguments relied upon in the Order were fully briefed or addressed during the hearing and in the documentation in the record. Specifically, the Company did not provide the OQ procedures or the job books and project files reviewed during the underlying PHMSA inspection in this matter, which include the records by which KM CO2 can match field records with the individuals qualified to perform various tasks to confirm whether individuals were properly OQ qualified. These records were not provided during the hearing because the NOA, as acknowledged by PHMSA and the Order, did not allege that KM CO2 violated any OQ requirements. By basing its decision on information that was not squarely before the Agency or alleged in the NOA, PHMSA has denied KM CO2 a full and fair opportunity to defend itself in this action.

IV. Request for Stay of Procedural Amendments

The Order directs KM CO2 to “[a]mend the procedures for maintaining records to ensure that each individual who performs a covered task under the [OQ] regulations is identifiable for the purpose of determining compliance with the OQ regulations.” As explained above, and separate and apart from the life of pipe repair records, KM CO2’s OQ documentation allows the Company to identify the individual who performs an OQ covered task for the purpose of determining compliance with the OQ regulations. Given the flawed reasoning in this Order, confusion over the scope of the Order, and the Agency’s misperception regarding KM CO2’s OQ records, KM CO2 is unable to ascertain what is required by PHMSA’s directive to revise its procedures. Regulated parties, such

as KM CO2, should know what is required of them so they may act accordingly; precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way. *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). Without more clarity and direction from PHMSA, it is impossible for KM CO2 to adequately amend its procedures and comply with PHMSA's interpretation. The directive should therefore be considered void for vagueness.

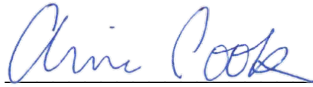
In light of the fair notice concerns, the potential significance of this unprecedented finding to KM CO2 and the industry at large, the lack of clarity contained in the directive for procedural revisions, as well as the time and resources it would take to implement such changes, KM CO2 respectfully requests that PHMSA stay the procedural amendments contained in the Order pursuant to 49 C.F.R. § 190.243(c) while the Agency considers this petition. The Western Region is currently considering KM CO2's request for a 90-day extension of the amendments and a stay would not significantly extend the amendments further in light of the statutory requirement for PHMSA to issue a decision on a petition for reconsideration within 120 days of receipt of a petition.

V. Request for Relief

KM CO2 prioritizes pipeline safety and, through its procedures and practices, emphasizes the importance of accurate and thorough recordkeeping practices to demonstrate compliance with 49 C.F.R. Part 195, including the separate and distinct requirements to maintain repair and OQ records. KM CO2's procedures and related records adequately include the information required to document repairs for the life of pipe as required by 49 C.F.R. § 195.404(c)(1), by providing a comprehensive description of those repairs. KM CO2's OQ program and associated documentation likewise comply with 49 C.F.R. § 195.507 by ensuring that the Company can verify that qualified individuals complete covered tasks.

As such, PHMSA has not met its burden of proof in this case to demonstrate that KM CO2's procedures are deficient or that 49 C.F.R. § 195.404(c)(1) requires the Company to document the names of specific individuals that complete OQ covered tasks on life of pipe repair documentation. If left in place, the Order impermissibly expands the regulatory requirements at issue, is arbitrary and capricious, and presents substantial fair notice, due process, and policy concerns. For the reasons identified in this Petition for Reconsideration, as well as KM CO2's Request for Hearing, Pre-Hearing Brief, Hearing Transcript, Post-Hearing Brief, and for other reasons as justice may require, KM CO2 respectfully requests that PHMSA withdraw the Order as it relates to NOA Item 7.

Respectfully submitted,



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