



VIA E-MAIL TO MR. DUSTIN HUBBARD

September 14, 2021

Dustin B Hubbard
Director, Western Region
Pipeline and Hazardous Materials Safety Administration
12300 W. Dakota Ave., Suite 110
Lakewood, Colorado 80228

RE: CPF 5-2021-002-NOA

Dear Mr. Hubbard:

On August 16, 2021, Kinder Morgan CO2 LLC (KM CO2) received the above-referenced Notice of Amendment (NOA), CPF 5-2021-001-NOA, issued by the Pipeline and Hazardous Materials Safety Administration (PHMSA). The NOA contains seven (7) alleged procedural inadequacies based on inspections conducted by representatives of PHMSA between September 28, 2020 and October 2, 2020 of KM CO2's welding, certification, inspection, and operator qualification procedures. Within the NOA, PHMSA requested that KM CO2 submit written comments, amended procedures, or a request for hearing under 49 C.F.R. § 190.211 within 30 days of receipt of the NOA. As such, this response is timely.

As set forth below and in the supporting attachments, KM CO2 submits with this response amended procedures to address six (6) of the seven (7) procedural allegations, NOA Items 1-6. With respect to NOA Item 7, KM CO2 believes that its existing procedures meet the regulatory requirements of 49 C.F.R. § 195.404 regarding repair records. KM CO2 believes that the issues raised by NOA Item 7 are capable of resolution outside of a hearing, however, and the Company respectfully requests a settlement meeting to discuss further. To preserve its rights, KM CO2 is concurrently requesting a hearing as provided by 49 C.F.R. §§ 190.206 and 190.211 regarding NOA Item 7. In the event a hearing proceeds in this matter, KM CO2 will be represented by counsel from KM CO2 and the Troutman Pepper law firm. With this response, KM CO2 neither admits nor denies any allegation or conclusion set forth in the NOA.

Response to Uncontested NOA Items 1-6

KM CO2 provides the following responses to the allegations set forth in the NOA for Items 1-6. Each response includes reference to revisions that KM CO2 has implemented in the attached procedures (relevant updated text is highlighted in yellow), some of which were implemented prior to receipt of the NOA.

NOA Item 1

PHMSA Allegation

§ 195.202 - Compliance with specifications or standards.

Each pipeline system must be constructed in accordance with comprehensive written specifications or standards that are consistent with the requirements of this part.

§ 195.204 – Inspection - general.

Inspection must be provided to ensure that the installation of pipe or pipeline systems is in accordance with the requirements of this subpart. Any operator personnel used to perform the inspection must be trained and qualified in the phase of construction to be inspected. An operator must not use operator personnel to perform a required inspection if the operator personnel performed the construction task requiring inspection. Nothing in this section prohibits the operator from inspecting construction tasks with operator personnel who are involved in other construction tasks.

Kinder Morgan failed to have a procedure specifying what training and qualifications are required by inspectors for the specific phase of construction they are inspecting (i.e. welding inspectors or coating inspectors), pursuant to § 195.204.

Kinder Morgan does have a document they claim they are using to evaluate training and qualifications, but its Operations & Maintenance manual neither explains the procedure nor identifies where the document can be found.

Kinder Morgan must develop a procedure for determining what training and qualifications are needed in the phase of construction to be inspected, including what documentation or records will be maintained.

KM CO2 Response

To address the allegation under NOA Item 1, KM CO2 revised CO2 C1003, Construction Inspection Manual, to incorporate inspector qualifications at Section 11 and added reference to the Construction Inspection Manual in Liquid Operations & Maintenance Manual (L-O&M) 406, Weld Inspection and Testing, Section 3. See *Attachment 1*, CO2 C1003, Construction Inspection Manual and *Attachment 2*, L-O&M 406, Weld Inspection and Testing.

NOA Item 2

PHMSA Allegation

§ 195.208 - Welding of supports and braces.

Supports or braces may not be welded directly to pipe that will be operated at a pressure of more than 100 p.s.i. (689 kPa) gage.

Kinder Morgan does not have a procedure for welding supports directly to the pipeline or a statement that prohibits supports being welded directly to the pipeline.

Kinder Morgan must develop a procedure for supports or braces welded directly to the pipe operating at a pressure below 100 psi, and a statement prohibiting supports or braces welded directly to the pipe that will be operated at a pressure of more than 100 psi.

KM CO2 Response

With respect to PHMSA's allegation under NOA Item 2, KM CO2 had already – prior to receipt of the NOA – revised L-O&M 456, Welding and Fabrication, and added Section 5.22 to better incorporate the requirements of 49 C.F.R. § 195.208 with respect to welding supports and braces. See *Attachment 3*, LO&M 456, Welding and Fabrication.

NOA Item 3

§ 195.222 - Welders and welding operators: Qualification of welders and welding operators.

(a) Each welder or welding operator must be qualified in accordance with section 6, section 12, Appendix A or Appendix B of API Std 1104 (incorporated by reference, see § 195.3), or section IX of the ASME Boiler and Pressure Vessel Code (ASME BPVC), (incorporated by reference, see § 195.3) except that a welder or welding operator qualified under an earlier edition than listed in § 195.3, may weld but may not requalify under that earlier edition.

Kinder Morgan does have a procedure for welder qualifications located in its Liquid Operations & Maintenance Manual (L O&M), Procedure #L O&M 401 – Welder Qualification and Testing, Revised March 11, 2020.

In the procedure, Section 5 – Core Information and Requirements, Subsection 5.1 – Qualification Requirements, it states, “[a] welder shall meet one of these eligibility requirements to be tested as a welder: a. The person has passed a similar test recently.” However, the procedure fails to define what “similar” or “recently” means.

Section 5, Subsection 5.8 – Retesting Due to Conditions Beyond the Welder's Control is confusing and fails to follow the re-testing flowchart found in Attachment 3 – Testing Procedure Chart, found on page 13/13 of the procedure. Attachment 3 – Testing Procedure Chart is confusing. The flow chart has circular paths and fails to clearly show the process of how welders are qualified.

Finally, the procedure fails to identify or mention the American Petroleum Institute's (API) Standard 1104 – Welding of Pipelines and Related Facilities, and the appropriate sections of 1104 that are incorporated by reference for qualifying welders.

Kinder Morgan must revise its procedure to clearly identify the process used to qualify all welders working on Kinder Morgan assets.

KM CO2 Response

In response to the inspection and prior to receipt of the NOA, KM CO2 had already revised L-O&M 401, Welder Qualification and Testing as follows (see *Attachment 4*, L-O&M 401, Welder Qualification and Testing) which addresses PHMSA's allegation under NOA Item 3:

1. Revised Section 5.1, Qualification Requirements to state, “The person has passed a –API 1104 or ASME section IX test within 12 months.”
2. Revised Section 5.4, Maintain Qualification to add reference to appropriate section of API 1104.
3. Revised Attachments 2 and 3, Testing Procedure Chart to align and track the welder qualification and retest/requalification processes.

NOA Item 4

PHMSA Allegation

§ 195.234 - Welds: Nondestructive testing.

(a) A weld may be nondestructively tested by any process that will clearly indicate any defects that may affect the integrity of the weld.

Kinder Morgan's Liquid Operations & Maintenance Manual, Procedure 454 – Non-Destructive Requirements, Revised August 18, 2018, Section 2.0 – Core Information and Requirements, Subsection 2.2 – Codes and Standards (Page 2/9) incorrectly identifies and implies multiple "approved DOT" procedures and/or standards which are not Incorporated by Reference (IBR) in the applicable Pipeline Safety Regulations.

Specifically, Subsection 2.2 states: "NDT testing shall conform to, or exceed requirements of, the following codes and standards, as applicable:"

Item D - ASME Section V - Nondestructive Examination, *most recent DOT-approved edition* - This section is not IBR and the standard being used isn't clear.

Item G - ASTM E709 - Standard Recommended Practice for Magnetic Particle, *most recent DOT-approved edition* - This standard is not IBR.

Item H - ASTM E165 - Standard Practice for Liquid Penetrate Inspection Method, *most recent DOT-approved edition* - This standard is not IBR.

Item I - ASTM E142 - Standard Method for Controlling Quality of Radiographic Testing, *most recent DOT-approved edition* - This standard is not IBR.

Item J - ASTM E1444-01: Standard Practice for Magnetic Particle Examination, *most recent edition*.

Additionally, the Procedure's Codes and Standards section mentions most recently approved DOT editions for Items D, G, H, and I, however, PHMSA does not Incorporate by Reference these mentioned standards.

Procedure 454 - Section 2.4 Magnetic Particle Test Method does not mention any acceptable standards or explicitly state that magnetic particle testing must meet Section 9.4.2 of API 1104 for acceptability.

KM CO2 Response

In response to PHMSA's allegation under NOA Item 4, KM CO2 revised L-O&M 454, Non-Destructive Requirements as follows (*see Attachment 5*, L-O&M 454, Non-Destructive Requirements):

1. Removed references in Section 2.2 to "DOT-approved-edition" for standards that are not incorporated by reference by PHMSA, 49 C.F.R. § 195.3.
2. Revised Section 2.4 Magnetic Particle Test Method to add acceptability criteria.
3. Revised Sections 2.3 and 2.5 to add the referenced codes and standards. After the inspection and before receipt of the NOA, KM CO2 had already revised Section 2.4.7 to reference applicable codes and standards (revised Apr. 14, 2021). Because these changes are contained in an earlier version, they are not highlighted in yellow in Attachment 5.

NOA Item 5

PHMSA Allegation

§ 195.234 - Welds: Nondestructive testing.

(a)...

(g) At pipeline tie-ins, including tie-ins of replacement sections, 100 percent of the girth welds must be nondestructively tested.

Kinder Morgan's Liquid Operations & Maintenance Manual (L O&M), Procedure 406 – Weld Inspection and Testing, Revised April 8, 2020, Section 3.2 – Non-Destructive Testing, Section 3.2.1 – Non-Destructive Testing in the United States mentions the requirements for § 195.234 (d) and (e) but fails to state or identify the requirements under § 195.234 (g) for tie-ins. However, this code requirement is found in Procedure 454 – Non-Destructive Requirements, Table 1.

Kinder Morgan must revise its procedure to include all the requirements found in § 195.234, and correctly reference where the reader will find all non-destructive testing requirements for welds.

KM CO2 Response

To address PHMSA's allegation under NOA Item 5, KM CO2 revised L-O&M 406, Weld Inspection and Testing, Section 3.2.1 to more clearly cross-reference non-destructive testing requirements for welding, including 49 C.F.R. § 195.234, at L-O&M 454, Non-Destructive Requirements Table 1. *See Attachment 2*, L-O&M 406, Weld Inspection and Testing and *Attachment 5*, L-O&M 454, Non-Destructive Requirements.

NOA Item 6

PHMSA Allegation

§ 195.216 - Welding: Miter joints.

A miter joint is not permitted (not including deflections up to 3 degrees that are caused by misalignment).

Kinder Morgan's Liquid Operations & Maintenance Manual (L O&M), Procedure 456– Welding and Fabrication, Revised April 8, 2020, Section 5 – Welding Procedure – General, Item 5.18 is worded oddly and unclearly. The operator appears to be allowing installation of miter joints under the pre-approval of a Kinder Morgan representative but fails to identify a process for this approval.

Kinder Morgan must revise its procedure to clearly identify a process for allowing installation of miter joints and the procedure for installation, or revise the procedure to state Kinder Morgan prohibits the use of miter joints.

KM CO2 Response

With respect to PHMSA's allegation under NOA Item 6, KM CO2 had already revised L-O&M 456, Welding and Fabrication, Section 5.18, prior to receipt of the NOA to align with 49 C.F.R. § 195.216's limitations on welding of miter joints. *See Attachment 3*, L-O&M 456, Welding and Fabrication.

Response, Request for Hearing, and Statement of Issues re: NOA Item 7

With respect to NOA Item 7, KM CO2 believes that its procedures meet the regulatory requirements of 49 C.F.R. § 195.404. KM CO2 believes that the issues raised by NOA Item 7, however, are capable of resolution outside of a hearing and the Company respectfully requests a settlement meeting to discuss further. In order to preserve its rights, KM CO2 respectfully requests a hearing, as provided by 49 C.F.R. § 190.211, regarding NOA Item 7 and PHMSA's allegation under 49 C.F.R. § 195.404, maps and records.

Below KM CO2 provides its response and statement of issues that it intends to address at a hearing on NOA Item 7, in the event that settlement discussions do not resolve the issue.

NOA Item 7

PHMSA Allegation

§ 195.404 - Maps and records.

(c) Each operator shall maintain the following records for the periods specified:

(1) The date, location, and description of each repair made to pipe shall be maintained for the useful life of the pipe.

While reviewing project files for in-line inspection (ILI) repairs for sleeve installation and project files for pipeline replacements, the files failed to clearly identify which contractor and/or employee performed specific covered tasks. While operator qualification (OQ) records for contractor and employees were provided in the project files, compliance could not be determined due to the records failing to indicate who performed each covered task.

Kinder Morgan must develop or identify a clear process that will document which qualified personnel performs each covered task.

KM CO2 Response

KM CO2 requests this NOA Item 7 be withdrawn because its process for documenting repairs complies with 49 C.F.R. § 195.404. As expressly outlined in the plain text of this regulation, operators must maintain certain repair records related to specific categories of information, including (1) the date, (2) the location, and (3) a "description of each repair." This regulation does not, however, include any requirement that an operator maintain records which identify the specific individual who completed the repair, let alone the individual who completed each covered task associated with a repair.

Separate PHMSA regulations which are notably not referenced in the NOA, 49 C.F.R. Part 195 Subpart G, require operators to develop operator qualification (OQ) programs that include processes for ensuring that individuals that complete certain covered tasks on a pipeline facility are properly qualified. Specifically, 49 C.F.R. § 195.507 outlines the following recordkeeping requirements that operators must incorporate into their programs: (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. 49 C.F.R. § 195.507(a). Supporting PHMSA OQ guidance explains that "[r]ecords are comprehensive to include: Identification of qualified individual(s); Identification of the covered tasks the individual is qualified to perform; Date(s) of current qualification; and Qualification method(s)." *PHMSA's Operator Qualification Enforcement Guidance*, p. 36 (last updated Dec. 7, 2017).

There is no OQ requirement to maintain records that indicate which specific individual completed a covered task. Instead, the regulations require that an operator maintain records to verify that individuals are properly qualified to complete covered tasks as well as the dates and methods of qualification and that is all PHMSA needs to verify compliance. PHMSA has left it to operator's discretion whether additional records are required to implement these requirements in their procedures. See *PHMSA OQ FAQ 7.3* (Apr. 25, 2017) (stating that "While the rule does not specify particular additional records to be retained, it does require operators to maintain records that demonstrate compliance with the rule and with its written program. To demonstrate compliance, operators need to identify appropriate records to be maintained.").

PHMSA may not articulate new rules through enforcement. The Administrative Procedure Act and the courts require that a regulation provide a regulated entity with fair notice of the obligations it imposes and be issued pursuant to notice and comment rulemaking. 5 U.S.C. § 554(b). Courts have found 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." *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 Circ. 1976)). 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).

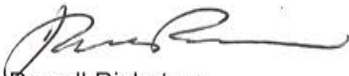
For these reasons, KM CO2 believes that NOA Item 7 should be withdrawn because its procedures adequately specify the records required for repairs under 49 C.F.R. § 195.404.

Summary

KM CO2 is committed to operating its pipelines safely and in compliance with applicable 49 C.F.R. Part 195 regulations. We appreciate PHMSA's efforts in helping us achieve this goal. We trust that our amended procedures address the allegations identified in the NOA for Items 1-6. With respect to NOA Item 7, we respectfully believe that KM CO2's procedures are adequate and comply with the pipeline safety regulations. As such, KM CO2 respectfully requests a hearing on this item.

If you have any questions or require additional information, please contact me at (713) 369-8930. Jaime Hernandez and Juhi Joshi are also available answer any questions, at (713) 369-9443 and (713) 369-8078 respectively.

Sincerely,



Darrell Ricketson
Chief Operating Officer

Cc: Mr. Jaime Hernandez, Director – Engineering: Codes and Standards, KMI
Ms. Jessica Toll, Assistant General Counsel, Kinder Morgan, Inc.
Ms. Annie Cook, Troutman Pepper LLP