

OCTOBER 17, 2012

Mr. Carlos Munguia
Regional Vice President
Kinder Morgan Liquids Terminals LLC
8500 West 68th Street, #1
Summit Argo, IL 60501

Re: CPF No. 1-2011-5001

Dear Mr. Munguia:

Enclosed please find the Final Order issued in the above-referenced case. It makes findings of violation, assesses a civil penalty of \$425,000, and specifies actions that must be taken by Kinder Morgan Liquids Terminals LLC to comply with the pipeline safety regulations. The penalty payment terms are set forth in the Final Order. When the civil penalty has been paid and the terms of the compliance order completed, as determined by the Director, Eastern Region, this enforcement action will be closed. Service of the Final Order by certified mail is deemed effective upon the date of mailing, or as otherwise provided under 49 C.F.R. § 190.5.

Thank you for your cooperation in this matter.

Sincerely,

Jeffrey D. Wiese
Associate Administrator
for Pipeline Safety

Enclosure

cc: Mr. Alan Mayberry, Deputy Associate Administrator for Field Operations, OPS
Mr. Byron Coy, Director, Eastern Region, OPS
Robert Hogfoss, Esq., Hunton & Williams, Bank of America Plaza, Suite 4100
600 Peachtree Street, N.E., Atlanta, GA 30308

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

**U.S. DEPARTMENT OF TRANSPORTATION
PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMINISTRATION
OFFICE OF PIPELINE SAFETY
WASHINGTON, D.C. 20590**

In the Matter of)	
)	
Kinder Morgan Liquids Terminals LLC,)	CPF No. 1-2011-5001
)	
Respondent.)	
)	

FINAL ORDER

On May 4, 2010, pursuant to 49 U.S.C. § 60117, a representative of the Pipeline and Hazardous Materials Safety Administration (PHMSA), Office of Pipeline Safety (OPS), conducted an investigation of an accident involving the release of approximately 8,600 gallons (200 barrels) of fuel oil at a pipeline terminal facility operated by Kinder Morgan Liquids Terminals LLC (KMLT or Respondent) in Perth Amboy, New Jersey. The accident was reported to the National Response Center on October 28, 2009 (NRC Report 921903). The Perth Amboy facility consists of 23 breakout tanks and a refined petroleum products pipeline that is 2.28 miles in length. KMLT, a subsidiary of Kinder Morgan Energy Partners, L.P., operates approximately 250 breakout tanks and 55 miles of pipeline transporting refined petroleum products primarily in Texas and New Jersey.¹

As a result of the investigation, the Director, Eastern Region, OPS (Director), issued to Respondent, by letter dated May 11, 2011, a Notice of Probable Violation, Proposed Civil Penalty, and Proposed Compliance Order (Notice). In accordance with 49 C.F.R. § 190.207, the Notice alleged that KMLT committed seven violations of the hazardous liquid pipeline safety regulations in 49 C.F.R. Part 195. The Notice proposed a civil penalty of \$425,000 for the alleged violations and proposed corrective measures to remediate the alleged violations.

By letter dated June 10, 2011, KMLT requested a hearing and an extension of time to respond to the allegations in the Notice. After receiving an extension of time, Respondent submitted a written response dated August 9, 2011 (Response). In its Response, KMLT did not contest the alleged violations, but requested that the proposed penalty be reduced. Both Respondent and counsel for OPS submitted pre-hearing briefs regarding the proposed penalty on November 11, 2011. The hearing was held on November 22, 2011, in West Trenton, New Jersey, before the Presiding Official from the Office of Chief Counsel, PHMSA. After the hearing, Respondent filed a Post-Hearing Submittal by letter dated January 6, 2012.

¹ System information for calendar year 2011 is reported pursuant to 49 C.F.R. § 195.49.

FINDINGS OF VIOLATION

The Notice alleged that Respondent committed seven violations of 49 C.F.R. Part 195 as follows:

Item 1: The Notice alleged that Respondent violated § 195.402(c)(7), which states:

§ 195.402 Procedural manual for operations, maintenance, and emergencies.

(a) *General.* Each operator shall prepare and follow for each pipeline system a manual of written procedures for conducting normal operations and maintenance activities and handling abnormal operations and emergencies

(c) *Maintenance and normal operations.* The manual required by paragraph (a) of this section must include procedures for the following to provide safety during maintenance and normal operations:

(7) Starting up and shutting down any part of the pipeline system in a manner designed to assure operation within the limits prescribed by § 195.406, consider the hazardous liquid or carbon dioxide in transportation, variations in altitude along the pipeline, and pressure monitoring and control devices.

The Notice alleged that Respondent violated § 195.402(c)(7) by failing to have and follow written procedures for starting up and shutting down the pipeline at the Perth Amboy terminal facility. Specifically, the Notice alleged that on October 28, 2009, while a third-party pipeline company was delivering fuel oil into Tank #57, the valve on the tank closed prematurely, causing a pressure surge in the piping. Surge pressures normally would relieve into Surge Tank #42, but the Notice alleged that the isolation valve on Tank #42 had been left closed, preventing surge pressure relief. This resulted in an overpressure and failure of the piping and release of approximately 8,600 gallons of fuel oil into the breakout tank's dike containment area.

During an investigation of the accident, the OPS inspector observed that Respondent did not have startup and shutdown procedures that included "line-up procedures" designed to ensure valves were in the correct position for unimpeded tank loading and unloading operations and appropriate pressure relief. Additional evidence in the record supporting the allegation included KMLT's accident investigation report, which lists under "immediate/direct causes" of the accident that "there was no written SOP or SSP that was used or followed to perform and check the lineup associated with this pipeline move."² The report also listed under "basic/root causes" that "there is no written SOP or SSP that is followed for the lineup and operations activity associated with pipeline inbound movements to tank 57 and the new tank field. This would include verification of high pressure/surge tank valves being open as appropriate."³

² OPS Pipeline Safety Violation Report, Exhibit A-3 at 5 (May 10, 2011).

³ Violation Report, Exhibit A-3 at 6.

In its Response and at the hearing, KMLT did not contest the alleged violation and acknowledged that the isolation valve to Tank 42 was inadvertently left in a closed position after maintenance activities. Respondent stated that it has revised its manual of written procedures to include more specific startup and shutdown procedures in regard to valve lineup, as well as conducting additional activities intended to prevent recurrence of such an incident.

Accordingly, after considering the evidence, I find that Respondent violated § 195.402(c)(7) by failing to have and follow written procedures for starting up and shutting down its pipeline at the Perth Amboy terminal facility.

Item 2: The Notice alleged that Respondent violated § 195.402(c)(8), which states:

§ 195.402 Procedural manual for operations, maintenance, and emergencies.

(a)

(c) *Maintenance and normal operations.* The manual required by paragraph (a) of this section must include procedures for the following to provide safety during maintenance and normal operations:

(8) In the case of a pipeline that is not equipped to fail safe, monitoring from an attended location pipeline pressure during startup until steady state pressure and flow conditions are reached and during shut-in to assure operation within limits prescribed by § 195.406.

The Notice alleged that Respondent violated § 195.402(c)(8) by failing to have and follow written procedures for monitoring pressure on the pipeline from an attended location to assure operation within limits prescribed by § 195.406 during startup and shut-in.

During the investigation, the OPS inspector observed that Respondent did not have procedures for monitoring pressure on the terminal facility pipeline from an attended location. Additional evidence in the record supporting the allegation included KMLT's accident investigation report, which lists under "basic/root causes" of the accident that "there is no requirement or policy for an operator [to] oversee the entire [pipeline] inbound operation in the control room."⁴

In its Response and at the hearing, KMLT did not contest the alleged violation and stated that it has revised its manual of written procedures to address this concern.

Accordingly, after considering the evidence, I find that Respondent violated § 195.402(c)(8) by failing to have and follow written procedures for monitoring pressure on the pipeline from an attended location.

Item 3: The Notice alleged that Respondent violated § 195.402(c)(9), which states:

§ 195.402 Procedural manual for operations, maintenance, and emergencies.

⁴ Violation Report, Exhibit A-3 at 6.

(a)

(c) *Maintenance and normal operations.* The manual required by paragraph (a) of this section must include procedures for the following to provide safety during maintenance and normal operations:

(9) In the case of facilities not equipped to fail safe that are identified under paragraph 195.402(c)(4) or that control receipt and delivery of the hazardous liquid or carbon dioxide, detecting abnormal operating conditions by monitoring pressure, temperature, flow or other appropriate operational data and transmitting this data to an attended location.

The Notice alleged that Respondent violated § 195.402(c)(9) by failing to have and follow written procedures for detecting abnormal operating conditions by monitoring pressure, temperature, flow or other appropriate operational data on the pipeline and transmitting this data to an attended location.

During the investigation, the OPS inspector observed that Respondent did not have procedures for monitoring pressure, temperature, flow and other appropriate operational data and transmitting the data to an attended location.

In its Response and at the hearing, KMLT did not contest the alleged violation and stated that it has revised its manual of written procedures to address this concern.

Accordingly, after considering the evidence, I find that Respondent violated § 195.402(c)(9) by failing to have and follow written procedures for detecting abnormal operating conditions by monitoring pressure, temperature, flow or other appropriate operational data and transmitting the data to an attended location.

Item 4: The Notice alleged that Respondent violated § 195.402(c)(3), which states:

§ 195.402 Procedural manual for operations, maintenance, and emergencies.

(a)

(c) *Maintenance and normal operations.* The manual required by paragraph (a) of this section must include procedures for the following to provide safety during maintenance and normal operations:

(3) Operating, maintaining, and repairing the pipeline system in accordance with each of the requirements of this subpart [F] and subpart H of this part.

The Notice alleged that Respondent violated § 195.402(c)(3) by failing to have procedures for operating, maintaining, and repairing the pipeline system's overpressure safety devices and overfill protection systems in accordance with the requirements of § 195.428 of subpart F. Section 195.428 establishes requirements for regularly inspecting and testing overpressure safety devices and overfill protection systems to verify they are functioning properly, in good mechanical condition, and adequate from the standpoint of capacity and reliability of operation for the service in which they are used.

The evidence in the record supporting the allegation included documentation by the OPS inspector of his observation during the investigation that KMLT did not have procedures for operating, maintaining, and repairing the pipeline system's overpressure safety devices and overfill protection systems.

In its Response and at the hearing, Respondent did not contest the alleged violation and stated that it has revised its manual of written procedures to address this concern.

Accordingly, after considering the evidence, I find that Respondent violated § 195.402(c)(3) by failing to have procedures for operating, maintaining, and repairing the pipeline system's overpressure safety devices and overfill protection systems in accordance with the requirements of § 195.428 of subpart F.

Item 5: The Notice alleged that Respondent violated § 195.402(c)(3), quoted above, by failing to have procedures for maintaining pipeline system valves in accordance with the requirements of § 195.420 of subpart F. Section 195.420 establishes requirements for maintaining mainline valves in good working order at all times and for regularly inspecting mainline valves to verify they are functioning properly. Specifically, the Notice alleged that KMLT did not have written procedures for maintaining the automated shell gate valve located on Tank #57 or the gate valve on the 8-inch tank line to Surge Tank #42. As previously alleged, the valve on Tank #57 closed prematurely during the fuel oil transfer, causing a surge in pressure, and the isolation valve at Surge Tank #42 was closed preventing surge relief. This resulted in the overpressure and failure of the piping.

The evidence in the record supporting the allegation included documentation by the OPS inspector of his observation during the investigation that KMLT did not have procedures for maintaining the valves. The OPS inspector also noted that company records documented the valve on Surge Tank #42 had been closed for maintenance, but never reopened. Also included in evidence was KMLT's accident investigation report, which documented there had been "previous examples of tank valves closing during marine and related tank activity operations" and that the company planned to look into the cause of those occurrences to determine if they were related to the premature closure of the valve on October 28, 2009. KMLT's accident report listed under causes, "Inadequate Maintenance," and noted that the valve at Tank #42 had been closed for maintenance after a nitrogen leak was discovered during the summer of 2009, but the valve had never been repaired or reopened and that "many individuals/operators in the terminal were unaware that this valve was closed."⁵

In its Response and at the hearing, KMLT did not contest the alleged violation and stated that it has revised its manual of written procedures to address this concern.

Accordingly, after considering the evidence, I find that Respondent violated § 195.402(c)(3) by failing to have procedures for maintaining the pipeline system's valves in accordance with the requirements of § 195.420.

⁵ Violation Report, Exhibit A-3 at 6.

Item 6: The Notice alleged that Respondent violated § 195.428(a), which states:

§ 195.428 Overpressure safety devices and overfill protection systems.

(a) Except as provided in paragraph (b) of this section, each operator shall, at intervals not exceeding 15 months, but at least once each calendar year, or in the case of pipelines used to carry highly volatile liquids, at intervals not to exceed 7 1/2 months, but at least twice each calendar year, inspect and test each pressure limiting device, relief valve, pressure regulator, or other item of pressure control equipment to determine that it is functioning properly, is in good mechanical condition, and is adequate from the standpoint of capacity and reliability of operation for the service in which it is used.

The Notice alleged that Respondent violated § 195.428(a) by failing to inspect and test the relief device on Surge Tank #42 at intervals not exceeding 15 months, but at least once each calendar year, to verify its capacity was adequate.

During the investigation, the OPS inspector observed that Respondent did not have any records showing the relief device had been inspected and tested to determine that capacity was adequate to relieve anticipated pressure and flow rates in the event of an overpressure situation. Additional evidence in the record supporting the allegation included KMLT's Pipeline Hydraulics Analysis performed after the accident, which found that for normal operating conditions, the maximum flow rate of 4,650 gallons per minute (USGPM) could be run in the current piping system at Perth Amboy Terminal using a relief set point at Surge Tank #42 of 80 psig.⁶ The set point of the relief device at the time of the accident, however, was 90 psig.

In its Response and at the hearing, Respondent did not contest the allegation of violation, and stated it has taken action to confirm that its inspection and testing schedule will ensure future compliance with this regulation.

Accordingly, after considering the evidence, I find that Respondent violated § 195.428(a) by failing to inspect and test the relief device on Surge Tank #42 at intervals not exceeding 15 months, but at least once each calendar year, to verify that its capacity was adequate.

Item 7: The Notice alleged that Respondent violated § 195.408(b)(1), which states:

§ 195.408 Communications.

(a) Each operator must have a communication system to provide for the transmission of information needed for the safe operation of its pipeline system.

(b) The communication system required by paragraph (a) of this section must, as a minimum, include means for:

(1) Monitoring operational data as required by § 195.402(c)(9);

⁶ Violation Report, Exhibit A-4.

The Notice alleged that Respondent violated § 195.408(b)(1) by failing to have a communication system that provided for the transmission of information needed for the safe operation of the pipeline. Specifically, the Notice alleged that the communication system in place at the time of the accident did not transmit information about the inbound product movement, such as pressure, temperature, flow and other operational data, specified in § 195.402(c)(9), for detecting abnormal operating conditions. In addition, the Notice alleged the communication system failed to transmit level alarm information from Tank #57 to the control room of the third-party pipeline company delivering product to the tank.

During the investigation, the OPS inspector noted that when the valve on Tank #57 closed prematurely, causing a pressure surge in the piping system, the third-party control system could not detect any pressure increase. It was not until the failure occurred that the third party's leak detection system detected a pressure loss triggering an automatic shutdown of the pumping operations. Additional evidence in the record supporting the allegation included KMLT's accident investigation report, which lists under "basic/root causes" that "there is no communication link between tank 57 High-high alarm" and the third party's control room to alert the third party of a potential overfill situation.⁷

In its Response and at the hearing, Respondent did not contest the allegation of violation, and stated that it has taken action to revise its communication plan in response to PHMSA's concerns.

Accordingly, after considering the evidence, I find that Respondent violated § 195.408(b)(1) by failing to have a communication system that provided for the transmission of information needed for the safe operation of the pipeline.

These findings of violation will be considered prior offenses in any subsequent enforcement action taken against Respondent.

ASSESSMENT OF PENALTY

Under 49 U.S.C. § 60122, Respondent is subject to an administrative civil penalty not to exceed \$100,000 per violation for each day of the violation, up to a maximum of \$1,000,000 for any related series of violations.⁸ The Notice proposed a total civil penalty of \$425,000 for the violations cited above.

In determining the amount of a civil penalty under 49 U.S.C. § 60122 and 49 C.F.R. § 190.225, I must consider the following criteria: the nature, circumstances, and gravity of the violation, including adverse impact on the environment; the degree of Respondent's culpability; the history of Respondent's prior offenses; any effect that the penalty may have on Respondent's ability to

⁷ Violation Report, Exhibit A-3 at 6.

⁸ Subsequent to the Notice issued in this case, the Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011, Pub. L. No. 112-90, § 2(a), 125 Stat. 1905, increased the civil penalty liability for violating a pipeline safety standard to \$200,000 per violation for each day up to a maximum of \$2,000,000 for any related series of violations.

continue doing business; and the good faith of Respondent in attempting to comply. In addition, I may consider the economic benefit gained from the violation without any reduction because of subsequent damages, and such other matters as justice may require.

In its written submissions and at the hearing, Respondent contended that the proposed penalty should be reduced for four primary reasons: (1) the penalty proposed for Item 1 exceeded the statutory limit of \$100,000; (2) multiple and duplicative penalties were proposed for essentially the same regulatory violations; (3) the statutory assessment criteria warrant reducing the penalty; and (4) the proposed penalty is higher than other penalties assessed by PHMSA for similar violations. Each of these arguments is addressed below.

Item 1: The Notice proposed a civil penalty of \$122,500 for Respondent's violation of 49 C.F.R. § 195.402(c)(7). With regard to the nature, circumstances, and gravity of the violation, Respondent's failure to have startup and shutdown procedures that included "line-up procedures" led to valves being in an incorrect position for tank loading and unloading operations and appropriate pressure relief. The pipeline accident that occurred on October 28, 2009, was directly attributable to this failure to have and follow line-up procedures. At the hearing, OPS explained that an elevated penalty had been proposed for this violation because it was a causal factor in the accident.

Respondent argued that the proposed penalty for Item 1 exceeds the statutory limit of \$100,000 for a single-day violation. Respondent argued further that no multiple-day violation had been alleged in the Notice or in the supporting materials, nor would it be appropriate to allow OPS to advance an allegation of a multiple-day violation given the facts.⁹

KMLT is correct that the Notice did not include a statement concerning the duration of the violation, but the Violation Report, which contained all of the evidence and other supporting materials, stated that the violation began in January 2007.¹⁰ At the hearing, OPS also explained that the period of alleged noncompliance lasted approximately 720 days from the date operations first began at the facility until the date of the accident.¹¹ Respondent had an opportunity to respond to these statements at the hearing and in its Post-Hearing Submittal, but did not rebut the alleged duration of the violation. Since the evidence demonstrates the violation extended for multiple days, I find the proposed penalty does not exceed the applicable statutory limit of \$1,000,000.

Respondent also contended that six of the seven violations (Items 1-5 and 7) "should be consolidated for proposed penalty purposes, and kept within the statutory maximum," because they all concern Respondent's manual of written procedures and invoke a single regulation, § 195.402(c).¹²

⁹ KMLT Pre-Hearing Brief at 2.

¹⁰ Violation Report at 5. In fact, the Violation Report noted that each of the violations began in January 2007.

¹¹ *See also* OPS Pre-Hearing Brief at 3.

¹² Cover letter to Response at 2.

Respondent claimed the Pipeline Safety Act (PSA) “expressly prohibits the assessment of multiple penalties for the violation of a single regulation under the Act if the violations are based on the same act,”¹³ but Respondent has misinterpreted 49 U.S.C. § 60122(f), which applies only in situations where a single act by an operator constitutes both a violation of a regulation and a violation of an order.¹⁴ The current proceeding does not involve the violation of an order, therefore § 60122(f) is not applicable.

Respondent also claimed the APA “more generally prohibits federal agencies from seeking duplicate penalties for alleged violations based on the same underlying facts, or for claims that seek same substantially similar relief.” Respondent cited 5 U.S.C. § 706, but I fail to find any language in that section that suggests such a specific prohibition. The APA does authorize a reviewing court to set aside agency action found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” but for the reasons set forth in this Final Order, a reviewing court should not find reason to set aside the penalty assessments.

Respondent further stated that it has been PHMSA’s “ordinary practice” to assess a single penalty not exceeding \$100,000 for related violations that concern an operator’s manual of written procedures under § 195.402. To support this assertion, Respondent cited a prior PHMSA enforcement decision.¹⁵

Section 195.402 is a regulation containing multiple requirements separated into paragraphs and subparagraphs. A review of 49 C.F.R. Part 195 will show this is a common method of organizing the pipeline safety regulations. For example, the integrity management rule in § 195.452 is divided into more than 50 paragraphs containing distinct requirements. Even a single paragraph may actually constitute multiple requirements for which the operator is responsible for compliance, such as § 195.402(c)(3), a paragraph that requires procedures for “operating, maintaining, and repairing the pipeline system in accordance with *each of the requirements of this subpart and subpart H of this part.*” It would be contrary to the intent of the regulations for PHMSA to limit enforcement to only one requirement of § 195.402(c). As explained in another prior enforcement decision, the pipeline safety regulations are performance-based and allow an operator to develop written procedures tailored to its system, “but each section of those procedures is enforceable by PHMSA in the same manner as a code section. If PHMSA were unable to hold operators accountable for following all of their procedures in a given subject area of the manual because they were in some sense related, public safety would suffer and the intent of Congress in enacting the pipeline safety laws would be frustrated.”¹⁶

The prior enforcement decision cited by Respondent is factually different than the current proceeding.¹⁷ In that case, PHMSA alleged a single violation of § 195.402(a) and (d) for failing to follow written procedures for abnormal operations. (The operator ultimately proved it did not

¹³ KMLT Pre-Hearing Brief at 1.

¹⁴ See Florida Gas Transmission Co., CPF No. 45102, at 7-9, 2006 WL 3825342 (Jan. 3, 2006).

¹⁵ KMLT Pre-Hearing Brief at 3.

¹⁶ Colorado Interstate Gas Co., CPF No. 5-2008-1005, at 11, 2009 WL 5538649 (Nov. 23, 2009).

¹⁷ See Alyeska Pipeline Service Co., CPF No. 5-2010-5001, 2011 WL 4351595 (Jul. 29, 2011).

violate the regulation, and PHMSA withdrew the allegation.) In the current proceeding, OPS has alleged multiple violations for failing to have and follow various procedures required by different paragraphs of the code. It is not unusual for PHMSA to allege multiple violations of procedural requirements and propose separate penalties for each violation. For example, in one case, PHMSA assessed civil penalties totaling \$1,200,000 for multiple violations of requirements to have and follow written procedures (combined with other violations, the total penalty was \$2,405,000).¹⁸ In another case, PHMSA assessed civil penalties of \$2,335,000 for multiple violations of requirements to have and follow written procedures.¹⁹

For the above reasons, I reject Respondent's assertion that Items 1-5 and 7 must be consolidated into a single violation. Moreover, I note the combined penalties in this case do not exceed the statutory limit of \$1,000,000 for a related series of violations.

Respondent also argued the civil penalty should be reduced under the statutory assessment criteria. In particular, KMLT contended that the penalty should be reduced because the accident was an isolated error and did not have severe consequences. Respondent noted that the release was contained in a diked area and confined to terminal property. There were no injuries or releases to the environment and Respondent timely reported the accident and conducted all appropriate response, cleanup, and corrective action.

Despite Respondent's contention that the accident did not result in severe consequences, PHMSA still considers it a matter of significant concern when the violation of a regulatory requirement causes a pipeline failure and the release of hazardous liquid, especially when the quantity of the product released exceeds the threshold for immediate reporting to the National Response Center. As noted in the Violation Report, approximately 8,600 gallons of number 2 fuel oil (i.e., home heating oil) was released into a containment dike as a result of this violation. Fuel oil is toxic and flammable and the safety of persons and property was at risk. The fumes are hazardous to individuals, there is a risk of ignition, and the product is harmful to the environment. Approximately 20 gallons splashed over the containment dike onto a road within the terminal property, which required soil remediation. For these reasons, I find the nature, circumstances and gravity of the violation justify the proposed civil penalty.

With regard to culpability, Respondent contested the allegation in the Violation Report that "KM failed to take any action to comply" with the regulatory requirement. This statement was included in the Violation Report for each of the seven violations.²⁰ Respondent argued that it was inaccurate to allege that the company failed to take any action to comply with § 195.402 because the company did in fact maintain a written operations and maintenance manual.

In each instance this statement appears in the Violation Report, there is an explanation immediately following it to qualify the statement. For example in Item 1, the explanation notes that KMLT did not have line-up procedures for the terminal facility. Taken together, these statements appear to be merely a comment on KMLT's conduct that resulted in the cited

¹⁸ Enbridge Energy Partners, CPF No. 3-2008-5011, 2010 WL 6531629 (Aug. 17, 2010).

¹⁹ Colorado Interstate Gas Co., CPF No. 5-2008-1005, 2009 WL 5538649 (Nov. 23, 2009).

²⁰ See Violation Report at 7, 12, 18, 23, 28, 34 and 40.

violation, in this instance, the failure to establish and follow start up and shutdown procedures that included line-up procedures.²¹ As the operator of the facility, Respondent is responsible for compliance with the regulations and is therefore culpable for its failure to have and follow such procedures. The civil penalty is not based on any broad assertions concerning Respondent's compliance with other regulatory requirements not cited in the Notice.

With regard to good faith in attempting to achieve compliance, Respondent argued in its written submissions and at the hearing that it cooperated fully with PHMSA and has taken efforts to implement the actions in the proposed compliance order, beginning even before the Notice was issued. In addition, Respondent noted that it has completed virtually all of the actions in the proposed compliance order and plans to have all corrective actions completed by the dates set forth in the order.

At the hearing, OPS stated that Respondent's actions taken after the OPS inspection should not be considered evidence of a good faith attempt to comply. This position is generally consistent with the manner in which PHMSA has applied this statutory assessment factor in previous final orders.²² PHMSA does not generally find cause to reduce a civil penalty for corrective action taken after the operator has already been notified of the deficiency through a compliance inspection by OPS, because operators are expected to bring their facilities into compliance with the regulations, particularly when an issue has been brought to the operator's attention by the agency. Rather, PHMSA generally considers evidence of good faith to be those actions taken by an operator as a deliberate attempt to comply with the regulation prior to when the violation occurred. For the above reasons, I find the statutory assessment criteria do not warrant reducing the proposed penalty.

Accordingly, having reviewed the record and considered the assessment criteria, I assess Respondent a civil penalty of \$122,500 for violation of 49 C.F.R. § 195.402(c)(7).

Item 2: The Notice proposed a civil penalty of \$85,000 for Respondent's violation of 49 C.F.R. § 195.402(c)(8). Respondent failed to have and follow written procedures for monitoring pressure on the pipeline from an attended location to assure operation within prescribed pressure limits during startup and shut-in.

With regard to the nature, circumstances, and gravity of the violation, Respondent's failure to monitor pressure on the pipeline from an attended location contributed to the cause of the accident. Had pressure been appropriately monitored, the operator would have been able to make an informed decision to timely shut down the transfer operations before the system became over-pressurized. Accordingly, the nature, circumstances and gravity of the violation justify the proposed civil penalty. For the same reasons discussed above, I find culpability and good faith considerations do not result in reducing the penalty.

²¹ Even OPS referred only to "Respondent's failure to have written startup and shutdown procedures" in responding to KMLT's argument on this issue. OPS Pre-Hearing Brief at 3.

²² See, e.g., Air Products and Chemicals, Inc., CPF No. 4-2009-1008, at 3, 2009 WL 5538650 (Dec. 1, 2009); Chevron Pipe Line Co., CPF No. 4-2005-8008, at 4, 2008 WL 902913 (Mar. 19, 2008).

In addition to arguing that Items 1-5 and 7 should be consolidated, which I rejected, Respondent argued that several pairs of violations should have been brought as single violations because they involve similar duties. Respondent maintained that “[u]nder established administrative law precepts, such duplication is impermissible.”²³

KMLT argued one of the pairs, Items 2 and 3, involve substantially similar duties because both pertain to procedures for monitoring pressure and other parameters from an attended location. KMLT stated that resolution of either one would necessarily result in resolution of the other. Therefore, Respondent argued these two violations are improperly duplicative and should have been brought as a single count with only one penalty.

Item 2 concerns the requirement under § 195.402(c)(8) that operators have and follow procedures for monitoring pipeline pressure during startup and shut-in to ensure compliance with maximum operating pressure limits. Item 3 concerns the requirement under § 195.402(c)(9) that operators have and follow procedures for detecting abnormal operating conditions through monitoring of operational data including pipeline pressure, temperature, flow or other appropriate data. Even though both regulations concern the monitoring of certain operational data, one is concerned only with monitoring pressure during startup and shut-in to avoid overpressure, while the other is concerned with monitoring more operational data at all times to detect abnormal operating conditions. These are separate and distinct requirements. They also require separate evidence to prove a violation (i.e., procedures for monitoring pressure during startup vs. procedures for detecting abnormal operating conditions at all stages of operations). Contrary to Respondent’s assertion, compliance with one regulation does not necessarily result in compliance with the other. For example, an operator may have the means to monitor pressure, but not the means to detect abnormal operating conditions by monitoring other parameters. For these reasons, Items 2 and 3 are appropriately brought as separate violations with individual penalties. The proposed penalties for Items 2 and 3 do not exceed the statutory limit for each violation.

The cases cited by Respondent do not require a different conclusion. In *Blockburger*, the Supreme Court held that a single act by a criminal defendant was appropriately brought as separate violations of two different statutes because each statute required proof of an additional fact the other did not.²⁴ While this was a criminal law decision, PHMSA has found the rationale in *Blockburger* to be relevant to determining whether multiple violations of the pipeline safety regulations are “a related series of violations” subject to the statutory limit of \$1,000,000 under 49 U.S.C. § 60122. For example, in *Colorado Interstate Gas Co.*, PHMSA applied “the idea that separate evidence constitutes separate violations” to determine whether any two or more violations were “so closely related (i.e., same evidentiary basis) that they are not separate and should be considered one violation for purposes of applying the \$1,000,000 cap for an individual violation exceeding 10 days in duration.”²⁵ Using this rationale, Items 2 and 3 of the current

²³ KMLT Pre-hearing Brief at 3, citing *Blockburger v. United States*, 284 U.S. 299 (1932) and *Burkes Mechanical, Inc.*, OSHRC Docket No. 04-475, 2007 WL 2046814 (July 12, 2007).

²⁴ 284 U.S. 299, 304 (1932).

²⁵ CPF No. 5-2008-1005, at 12, 2009 WL 5538649 (Nov. 23, 2009).

proceeding are separate violations of two different regulations because they involve separate facts and evidence to prove a violation.

Respondent also cited *Burkes Mechanical, Inc.*, an administrative decision by the Occupational Safety Health Review Commission. In that case, the Commission examined whether two violations were duplicative by determining whether “the standards cited require the same abatement measures, or whether abatement of one citation item will necessarily result in the abatement of the other item.”²⁶ The Commission decided the two violations were not duplicative because one regulatory standard was narrower than the other. Although the decision by the Commission is not binding on PHMSA, even using its rationale, Items 2 and 3 are separate violations because compliance with one regulation does not necessarily result in compliance with the other.

In *Burkes Mechanical, Inc.*, the Commission ultimately decided that it would be “appropriate” to group the two violations for penalty purposes because as a factual matter, had the respondent complied with its own procedures under one of the standards, the company would have complied with the other standard. But that is a factually different situation than the current proceeding, where KMLT did not have procedures to follow that would have complied with either standard.

Accordingly, having reviewed the record and considered the assessment criteria, I assess Respondent a civil penalty of \$85,000 for violation of 49 C.F.R. § 195.402(c)(8).

Item 3: The Notice proposed a civil penalty of \$30,000 for Respondent’s violation of 49 C.F.R. § 195.402(c)(9). Respondent failed to have and follow written procedures for detecting abnormal operating conditions by monitoring pressure, temperature, flow or other appropriate operational data and transmitting this data to an attended location.

This noncompliance posed a threat to pipeline integrity and safe operation of the pipeline as evidenced by the pipeline failure and release. Accordingly, the nature, circumstances and gravity of the violation justify the proposed civil penalty. For the same reasons discussed above, culpability and good faith considerations do not result in reducing the penalty.

Accordingly, having reviewed the record and considered the assessment criteria, I assess Respondent a civil penalty of \$30,000 for violation of 49 C.F.R. § 195.402(c)(9).

Item 4: The Notice proposed a civil penalty of \$30,000 for Respondent’s violation of 49 C.F.R. § 195.402(c)(3). Respondent failed to have procedures for operating, maintaining, and repairing the pipeline system’s overpressure safety devices and overflow protection systems, including regular inspection and testing of the devices and systems to verify they are functioning properly, in good mechanical condition, and adequate from the standpoint of capacity and reliability of operation for the service in which they are used.

This noncompliance posed a threat to pipeline integrity and safe operation of the pipeline as evidenced by the pipeline failure and release. Accordingly, the nature, circumstances and gravity

²⁶ OSHRC Docket No. 04-475, 2007 WL 2046814, *7 (July 12, 2007).

of the violation justify the proposed civil penalty. For the same reasons discussed above, culpability and good faith considerations do not result in reducing the penalty.

Respondent argued that Items 4 and 6 were improperly duplicative and that resolution of Item 4 concerning overpressure safety devices and overfill protection systems would have abated the recordkeeping issues set forth in Item 6 concerning the conduct of inspections of those devices. Respondent maintained these two violations should have been brought as a single count.²⁷

Item 4 concerns the requirement under § 195.402(c)(3) that operators have procedures for, among other things, inspecting and testing relief devices to verify they have sufficient capacity for the service in which they are used. Item 6 concerns the requirement under § 195.428(a) that operators actually perform the inspections and tests of relief devices to verify they have sufficient capacity for the service in which they are used. The two requirements, having written procedures and performing the maintenance activity, are separate provisions in the code and require separate evidence to prove a violation (i.e., procedures vs. records of actions). Compliance with one regulation does not necessarily result in compliance with the other. For example, an operator may have the required written procedures, but fail to carry out the requisite inspections and tests for a particular valve. For these reasons, Items 4 and 6 are appropriately brought as separate violations with individual penalties. The proposed penalties of Items 4 and 6 do not exceed the statutory limit for each violation.

Accordingly, having reviewed the record and considered the assessment criteria, I assess Respondent a civil penalty of \$30,000 for violation of 49 C.F.R. § 195.402(c)(3).

Item 5: The Notice proposed a civil penalty of \$30,000 for Respondent's violation of 49 C.F.R. § 195.402(c)(3), for failing to have procedures for maintaining the automated shell gate valves in good working order at all times and for regularly inspecting the valves to verify they are functioning properly in accordance with the requirements of § 195.420 of subpart F.

This noncompliance posed a threat to pipeline integrity and safe operation of the pipeline as evidenced by the pipeline failure and release. Accordingly, the nature, circumstances and gravity of the violation justify the proposed civil penalty. For the same reasons discussed above, culpability and good faith considerations do not result in reducing the penalty.

Accordingly, having reviewed the record and considered the assessment criteria, I assess Respondent a civil penalty of \$30,000 for violation of 49 C.F.R. § 195.402(c)(3).

Item 6: The Notice proposed a civil penalty of \$42,500 for Respondent's violation of 49 C.F.R. § 195.428(a). Respondent failed to inspect and test the relief device on Surge Tank #42 at intervals not exceeding 15 months, but at least once each calendar year, to verify its capacity was adequate.

This noncompliance posed a threat to pipeline integrity and safe operation of the pipeline as evidenced by the pipeline failure and release. Accordingly, the nature, circumstances and gravity

²⁷ KMLT Pre-Hearing Brief at 3-4.

of the violation justify the proposed civil penalty. For the same reasons discussed above, culpability and good faith considerations do not result in reducing the penalty.

Accordingly, having reviewed the record and considered the assessment criteria, I assess Respondent a civil penalty of \$42,500 for violation of 49 C.F.R. § 195.428(a).

Item 7: The Notice proposed a civil penalty of \$85,000 for Respondent's violation of 49 C.F.R. § 195.408(b)(1), for failing to have a communication system in place that provided for the transmission of information about the inbound product movement, such as pressure, temperature, flow and other operational data, specified in § 195.402(c)(9), for detecting abnormal operating conditions. The communication system also failed to transmit level alarm information from Tank #57 to the control room of the third-party pipeline company delivering product to the tank.

This noncompliance posed a threat to pipeline integrity and safe operation of the pipeline. Accordingly, the nature, circumstances and gravity of the violation justify the proposed civil penalty. For the same reasons discussed above, culpability and good faith considerations do not result in reducing the penalty.

In its Response, KMLT asserted that Items 3 and 7 were duplicative, but did not provide an explanation other than to note they both referenced § 195.402(c)(9). KMLT did not advance this argument in subsequent written submissions or at the hearing. I reject this argument, because a cross-reference by itself does not necessarily render the two violations duplicative.

Accordingly, having reviewed the record and considered the assessment criteria, I assess Respondent a civil penalty of \$85,000 for violation of 49 C.F.R. § 195.408(b)(1).

Civil penalties in prior enforcement decisions

Finally, Respondent argued the total proposed penalty in this case is excessive in light of previous penalties for similar violations, which the company claimed have been much lower, even in cases with more significant consequences. Respondent cited to nine previous final orders that had penalties ranging from \$17,500 to \$200,000.²⁸

PHMSA has addressed this argument before by explaining that the agency applies the statutory assessment criteria on a case-by-case basis.²⁹ Given the unique facts of each offense, including operating conditions, how the violation was discovered, its duration, whether the operator made a good faith effort to comply with the regulation prior to the inspection, and whether there were any immediate or potential safety or environmental impacts, it is not uncommon for there to be variance in the penalties assessed for different operators' violation of the same code section. Furthermore, when looking at the total penalty assessed in different cases, there may be variance

²⁸ The cases were: CPF Nos. 1-2010-5009 (Jan. 31, 2011); 3-2007-5021 (Aug. 20, 2007); 3-2008-5006 (Dec. 16, 2010); 4-2009-5006 (Apr. 6, 2010); 4-2009-5011 (Apr. 22, 2010); 5-2008-5002 (Mar. 21, 2011); 5-2009-5002 (Mar. 30, 2011); 5-2009-5004 (Jan. 11, 2011); and 5-2009-5022 (Dec. 23, 2009) (operator names omitted for brevity).

²⁹ See, e.g., Belle Fourche Pipeline Co., CPF No. 5-2009-5042, at 20-21, 2011 WL 7006607 (Nov. 21, 2011).

as a result of the number of violations found and the operator's compliance history.³⁰ PHMSA has also found it appropriate to increase civil penalties in recent years to deter violations and to give effect to the 2002 amendments of 49 U.S.C. § 60122 by Congress, which raised PHMSA's maximum civil penalties. (Congress raised the maximum penalties again in 2011, although that increase does not impact the current proceeding.)

In a prior decision, PHMSA responded to a pipeline operator's claim that the proposed penalty of \$14,000 was excessive and "arbitrary and capricious" because it was greater than penalties assessed in prior decisions.³¹ PHMSA explained that under applicable law, the agency is not required to consider the factual circumstances of every past finding of violation when proposing and assessing penalties. Neither the PSA nor the implementing regulations require absolute uniformity of penalties. Quoting the Supreme Court, PHMSA noted that "[t]he employment of a sanction within the authority of an administrative agency is . . . not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases."³² Although PHMSA may strive for consistent application of the statutory assessment criteria, the statute itself does not preclude variance between cases by mandating uniformity of penalties.

Moreover, I have reviewed all of the cases cited by Respondent and find they do not warrant adjustment of the penalty in this proceeding. Most of the cases are factually distinguishable. With regard to § 195.402, for example, the penalty in CPF No. 3-2007-5021 was for failing to follow company procedures for reporting an accident to the NRC. The penalty in CPF No. 4-2009-5011 was for failing to follow procedures for determining the cause of an accident. The penalty in CPF No. 5-2009-5002 was for failing to perform an annual review of written procedures. With regard to § 195.428, the penalty in CPF No. 5-2009-5022 was for inspecting certain relief valves 53 days beyond the interval established by regulation. In CPF No. 5-2008-5002, PHMSA did not propose a penalty for the operator's failure to include a procedural reference to a new pressure transmitter that had been installed. These are all factually different violations than those in the current proceeding.

In addition, most of the penalties cited by Respondent were only for a single violation. For example, PHMSA assessed a penalty of \$100,000 in CPF No. 5-2009-5004 for failing to establish and follow a written procedure for the safe removal of a temperature probe resulting in a spill. PHMSA assessed a penalty of \$100,000 in CPF No. 1-2010-5009 for failing to follow written procedures for locating a pipeline. PHMSA assessed a penalty of \$200,000 in CPF No. 4-2009-5006 for failing to follow company procedures designed to minimize the volume of hazardous liquid released from a pipeline during a failure. These penalties were for single violations, whereas the current proceeding involves a greater number of violations for which penalties have been proposed.

³⁰ The Violation Report, at 43, noted that KMLT had committed two violations in the five-year period preceding the Notice.

³¹ Valero Natural Gas Pipeline Co., CPF No. 1-2007-1013, at 5, 2010 WL 5761111 (Dec. 30, 2010).

³² *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187 (1973). OPS also cited to this case in its Pre-Hearing Brief, at 4.

The one example cited by Respondent that most resembles the current proceeding, CPF No. 3-2008-5006, is a case in which PHMSA assessed a total civil penalty of \$365,000 for multiple violations resulting in an overpressure release, including a violation for failing to properly align valves for delivery of product into a tank. Although Respondent noted that only a portion of the penalties were for procedural violations, the total penalty for the four violations in that case is comparable to the penalty in the present proceeding, even though the cases are separated by several years.

Finally, as noted in the discussion of the penalty in Item 1, in some cases PHMSA has assessed much higher penalties for failing to have and follow written procedures than the amount proposed in the current proceeding.

Accordingly, having reviewed the record and considered the assessment criteria for each of the Items cited above, in addition to the legal arguments, I assess Respondent a total civil penalty of **\$425,000**.

Payment of the civil penalty must be made within 20 days of service. Federal regulations (49 C.F.R. § 89.21(b)(3)) require such payment to be made by wire transfer through the Federal Reserve Communications System (Fedwire), to the account of the U.S. Treasury. Detailed instructions are contained in the enclosure. Questions concerning wire transfers should be directed to: Financial Operations Division (AMZ-341), Federal Aviation Administration, Mike Monroney Aeronautical Center, P.O. Box 269039, Oklahoma City, Oklahoma 73125. The Financial Operations Division telephone number is (405) 954-8893.

Failure to pay the \$425,000 civil penalty will result in accrual of interest at the current annual rate in accordance with 31 U.S.C. § 3717, 31 C.F.R. § 901.9 and 49 C.F.R. § 89.23. Pursuant to those same authorities, a late penalty charge of six percent (6%) per annum will be charged if payment is not made within 110 days of service. Failure to pay the civil penalty may result in referral of the matter to the Attorney General for appropriate action in a district court of the United States.

COMPLIANCE ORDER

The Notice proposed a compliance order with respect to the violations cited above. Under 49 U.S.C. § 60118(a), each person who engages in the transportation of hazardous liquids or who owns or operates a pipeline facility is required to comply with the applicable safety standards established under chapter 601.

In its Post-Hearing Submittal, Respondent included an Exhibit summarizing the status of its response to the proposed compliance order. Several items were listed as "Complete," while others were listed as "In Progress." For those listed as "Complete," there is not sufficient documentation in the record of this proceeding to demonstrate completion. For example, for certain procedural revisions, Respondent submitted procedures in draft form, but there is no indication the procedures have been adopted as final and are being implemented at the Perth Amboy facility. For the other corrective actions, there is a lack of documentation that those

actions have been performed as well.

Since Respondent did not contest the proposed compliance order and committed to completing all of the actions by the specified deadlines, if not sooner, all of the following items will be verified by PHMSA in due course upon issuance of this Order.

Pursuant to the authority of 49 U.S.C. § 60118(b) and 49 C.F.R. § 190.217, Respondent is ordered to satisfy the following actions to ensure compliance with the pipeline safety regulations applicable to its operations:

1. With regard to **Items 1 through 5** of the Notice pertaining to KMLT's failure to have written procedures, KMLT must prepare written procedures addressing the requirements of the following regulations for the Perth Amboy Terminal, New Jersey:
 - (a) § 195.402(c)(7) (Item 1) – Startup and shutdown;
 - (b) § 195.402(c)(8) (Item 2) – Pipeline monitoring;
 - (c) § 195.402(c)(9) (Item 3) – Detecting abnormal operating conditions;
 - (d) §§ 195.402(c)(3) and 195.428 (Item 4) – Overpressure safety devices and overflow protection systems; and
 - (e) §§ 195.402(c)(3) and 195.420 (Item 5) – Valve maintenance.
2. With regard to **Item 6** of the Notice pertaining to overpressure safety devices and overflow protection systems under § 195.428(a), KMLT must ensure that all regulated overpressure safety devices at the Perth Amboy Terminal are adequate from a standpoint of capacity and meet the requirements outlined under § 195.428.
3. With regard to **Item 7** of the Notice pertaining to communications under § 195.408, KMLT must update its control/communication system(s) to allow for transmission of information needed for the safe operation of its pipeline system. The communication system must be capable of detecting abnormal operating conditions by monitoring pressure, temperature, flow or other operational data on inbound and outbound product movement. The update must include provisions for on-site monitoring from attended locations (either automatic or manual means) and consideration for disseminating information to other locations.
4. KMLT must implement the recommendation as outlined on page 3 of KMLT's March 2010 Pipeline Hydraulics Report (*see* Violation Report, Exhibit A-4, incorporated by reference). This recommendation includes the redesigning of the relief system and associated piping to ensure the maximum pressures within the system do not exceed Maximum Operating Pressure during normal and abnormal operations.
5. KMLT must conduct a comprehensive field review of all pipeline facilities to ensure that all the manually operated valves that have the potential to isolate a safety relief device from performing its intended function, have been adequately secured to prevent inadvertent closure.
6. KMLT must complete the requirements outlined in Compliance Order Item 1 within 90

days of receipt of the Final Order. The requirements outlined in Compliance Order Items 2, 3, and 4 must be completed within 180 days of receipt of the Final Order. The requirement outlined in Compliance Order Item 5 must be completed within 60 days of receipt of the Final Order. All documentation demonstrating compliance with each of the Compliance Order Items outlined in this order must be submitted by the specified deadline to Byron Coy, Director, Eastern Region, Office of Pipeline Safety, Pipeline and Hazardous Materials Safety Administration, Suite 103, Bear Tavern Road, West Trenton, NJ 08628 for review.

7. It is requested that KMLT maintain documentation of the safety improvement costs associated with fulfilling this Compliance Order and submit the total along with the documentation demonstrating compliance. It is requested that these costs be reported in two categories: 1) total cost associated with preparation/revision of plans, procedures, studies and analyses, and 2) total cost associated with replacements, additions and other changes to pipeline infrastructure.

The Director may grant an extension of time to comply with any of the required items upon a written request timely submitted by the Respondent and demonstrating good cause for an extension.

Failure to comply with this Order may result in the administrative assessment of civil penalties not to exceed \$100,000 for each violation for each day the violation continues or in referral to the Attorney General for appropriate relief in a district court of the United States.

Under 49 C.F.R. § 190.215, Respondent may submit a petition for reconsideration of this Final Order to the Associate Administrator for Pipeline Safety, PHMSA, 1200 New Jersey Avenue SE, East Building, 2nd Floor, Washington, DC 20590, no later than 20 days after receipt of the Final Order by the Respondent. Any petition submitted must contain a brief statement of the issue(s) and meet all other requirements of 49 C.F.R. § 190.215. The filing of a petition automatically stays the payment of any civil penalty assessed, however, all other terms of the order, including the corrective action, remain in effect unless the Associate Administrator grants a stay. The terms and conditions of this Final Order are effective upon service in accordance with 49 C.F.R. § 190.5.

Jeffrey D. Wiese
Associate Administrator
for Pipeline Safety

Date Issued