



U.S. Department
of Transportation

**Pipeline and Hazardous
Materials Safety
Administration**

1200 New Jersey Avenue SE
Washington, DC 20590

MAY 22 2015

Mr. Ron McClain
President, Products Pipelines
Plantation Pipe Line Company
Kinder Morgan Energy Partners, LP
1001 Louisiana St, Suite 1000
Houston, TX 77002

Re: CPF No. 1-2013-5018

Dear Mr. McClain:

Enclosed please find the Final Order issued in the above-referenced case. It makes findings of violation and assesses a civil penalty of \$57,600. The penalty payment terms are set forth in the Final Order. This enforcement action closes automatically upon receipt of payment. 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. Byron Coy, Director, Eastern Region, OPS
Mr. James Hotinger, Virginia State Corporation Commission
Mr. Jim Fisher, Virginia State Corporation Commission
Mr. Wayne Simmons, Vice President, Operations, Plantation Pipe Line Company

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)
)

Plantation Pipe Line Company,)
)

Respondent.)
_____)

CPF No. 1-2013-5018

FINAL ORDER

On September 13, 2012, pursuant to 49 U.S.C. § 60117, a representative of the Virginia State Corporation Commission (VA SCC), as agent for the Pipeline and Hazardous Materials Safety Administration (PHMSA), Office of Pipeline Safety (OPS), conducted an on-site pipeline safety inspection of the facilities and records of Plantation Pipe Line Company (Plantation or Respondent) in Roanoke, Virginia. Plantation is a subsidiary of Kinder Morgan Energy Partners, LP, and operates approximately 3,100 miles of pipeline transporting refined petroleum products from Louisiana to the Washington, DC area.¹

As a result of the inspection, the Director, Eastern Region, OPS (Director), issued to Respondent, by letter dated August 19, 2013, a Notice of Probable Violation and Proposed Civil Penalty (Notice). In accordance with 49 C.F.R. § 190.207, the Notice proposed finding that Plantation had violated 49 C.F.R. §§ 195.410(a) and 195.567(c) and proposed assessing a civil penalty of \$57,600 for the alleged violations.

Plantation responded to the Notice by letter dated September 17, 2013 (Response). The company contested the allegations, offered additional information in response to the Notice, and requested that the proposed civil penalty be reduced or eliminated. Respondent did not request a hearing and therefore has waived its right to one.

FINDINGS OF VIOLATION

The Notice alleged that Respondent violated 49 C.F.R. Part 195, as follows:

Item 1: The Notice alleged that Respondent violated 49 C.F.R. § 195.410(a), which states, in relevant part:

¹ http://www.kindermorgan.com/business/products_pipelines/plantation.aspx (last accessed Nov. 24, 2014).

§ 195.410 Line markers.

(a) Except as provided in paragraph (b) of this section, each operator shall place and maintain line markers over each buried pipeline in accordance with the following:

(1) Markers must be located at each public road crossing, at each railroad crossing, and in sufficient number along the remainder of each buried line so that its location is accurately known. . . .

The Notice alleged that Respondent violated 49 C.F.R. § 195.410(a) by failing to place and maintain sufficient line markers to accurately know the location of each buried line. Specifically, the Notice alleged that at the time of the VA SCC inspection, Plantation failed to have a sufficient number of line markers over the buried pipeline so that its location could be accurately known at two locations: in uncultivated pasture land near Retreat Road and Crooked Oak Road in Franklin County, Virginia. Photographs and descriptions of the locations that allegedly did not have sufficient line markers were included as Exhibit A-4 (Retreat Road) and A-5 (Crooked Oak Road) in the Violation Report.²

In its Response, Plantation contested the allegations, stating that there were adequate pipeline markers at the road crossings for Retreat Road and Crooked Oak Road, and submitted photographs of these markers. For Retreat Road, Respondent provided a Google Earth photograph from May 2012, which showed a pipeline marker at the road crossing.³ While it is true there was a marker at the road crossing, as expressly required under § 195.410(a), it is not responsive to the allegation that there were insufficient markers off the public road and across the pasture to ensure that the location of the pipeline was accurately known.

Plantation also provided a photograph of the same pasture that was taken after the VA SCC's inspection, showing two pipeline markers: one that was in place at the time of the inspection and one that was installed following the inspection.⁴ Again, this does not demonstrate that the location of the pipeline could have been accurately known in the pasture without the marker that Plantation asserts was re-installed subsequent to the inspection.

For the location at Crooked Oak Road, Plantation provided a photograph taken on the date of the inspection, showing a line marker at the road crossing.⁵ However, evidence of a line marker at the road crossing again fails to rebut the photographic evidence in the record that there was an insufficient number of line markers along the buried pipeline *in the pasture near the road* to ensure that its location could be accurately known to an observer.

² Pipeline Safety Violation Report (Violation Report), (August 19, 2013) (on file with PHMSA).

³ Response, at 3 (Figure No. 1).

⁴ *Id.*, at 5 (Figure No. 3). According to Plantation, the marker that was subsequently re-installed "had been knocked down in the brush next to it from farming activities conducted in the pasture. The downed line marker was discovered in the brush by the Kinder Morgan employee immediately after he installed the new line marker." Response, at 2-3.

⁵ *Id.*, at 4 (Figure No. 2).

Plantation provided a second photograph that the company contended showed “numerous pipeline markers that were already in place at the Crooked Oak Road location,” as well as one marker that was added after the inspection.⁶ In this photograph, there is only one marker visible in the pasture, which Plantation admits was installed *after* the VA SCC inspection. In contrast, the photograph that was taken by the VA SCC on September 13, 2012, shows that there were no pipeline markers in the pasture at that time and that the location of the pipeline in the pasture could not be accurately known after it left the road crossing.

I would also note that in a letter to the VA SCC dated October 15, 2012, Respondent acknowledged that “Kinder Morgan agrees that out of the numerous locations observed during the field review of the BRK pipeline, two locations were noted as missing line markers to see across the crestline of ridges in pastures” during the VA SCC’s field inspection.⁷ Therefore, there seems to be no dispute that in the two instances cited in the Notice, it was impossible for an observer to discern the location of the pipeline from the road crossings across the crestline of both pastures.

In its Response, Plantation also stated that the pastures in question were in farm use and “in the path of heavy mowing/farming equipment.” Plantation argued “it is extremely difficult to maintain pipeline markers when subject to heavy mowing equipment as on these two pastures.”⁸ This may well be true, but the fact remains that the company had previously installed a marker at the Retreat Road location and that it had apparently been knocked over and later replaced. This shows that Respondent apparently believed a marker was needed at that particular location to properly identify the route of the pipeline.

It may be difficult in such situations for an operator to properly maintain its markers, and this is why all operators are required to frequently patrol their lines to assess conditions along the right-of-way and to find out whether their lines have been damaged or are threatened. It is also why prudent operators frequently take precautions such as installing bollards or other physical means of protecting line markers from cattle, farm equipment, or similar threats that can damage or destroy critical facilities. Only by regularly patrolling and checking its line markers, by communicating with landowners and community members, and by taking precautions to protect its equipment can an operator ensure that the pipeline’s location is accurately known and that its right-of-way is properly maintained.

Finally, Plantation argued that the alleged violation was based on the enforcement of PHMSA’s “line of sight” standard, i.e., the concept that when standing at one line marker, another is visible in each direction, and argued that the “line of sight” standard is unenforceable because it does not appear in the regulation and “has not gone through the due regulatory process.”⁹

⁶ *Id.*, at 6 (Figure No. 4).

⁷ Violation Report, Exhibit A-2. The October 15, 2012 letter does not indicate which two locations were missing markers, but apparently they were the same ones cited in the Notice.

⁸ Response, at 6.

⁹ *Id.*, at 8.

In 2008, PHMSA began re-examining the “line of sight” test used by some inspectors to check if markers were sufficient in number. The test had been used primarily at cultivated agricultural fields and valve sites. An inspector would stand at a valve site or at one end of a cultivated field and observe whether the operator’s next line marker could be seen when looking in both directions. Between 2008 and 2011, however, PHMSA withdrew several alleged violations of § 195.410 where “line of sight” was the stated basis for the alleged violation.¹⁰ PHMSA made clear at the time, however, that the withdrawals were due to a reexamination of the test and that “no decision” had been made as to “whether or how [line-of-sight] should be applied.” PHMSA also clarified that the “withdrawal neither constitutes an interpretation of § 195.410(a)(1) nor prejudices future potential enforcement action.”¹¹

Since that time, PHMSA has taken a closer look at the whole issue of what constitutes sufficient proof to make a finding of violation under 49 C.F.R. § 195.410. In a recent case that is factually similar to the present one and was issued in September 2014, PHMSA found that an operator had failed to place and maintain line markers in sufficient number (other than ones expressly required at public road and railroad crossings) so that the pipeline’s location could be accurately known. In that case, both parties presented photographic, as well as eyewitness, evidence that markers were not visible through normal observation on the ground. The Associate Administrator enunciated the agency’s interpretation of the phrase “sufficient number....that [the pipeline’s] location is accurately known” to mean that “inspectors must be able to use normal methods of observation to see if markers are present and to discern the location of the pipeline.”¹²

In this case, the Notice and Violation Report did not use or rely upon the “line of sight” standard. Instead, it relied on the inspector’s own personal observations, photographic evidence, and Respondent’s admission that markers in these two locations were missing. I have closely reviewed all of the photographs submitted by the VA SCC inspector and Plantation and the other evidence in the record and find that the photographs submitted by Plantation do not serve to disprove or rebut those provided by the VA SCC inspector, which show that there were no visible markers in the pastures in question as of the date of the inspection. Based upon an inspector’s “normal methods of observation,” I am convinced that the inspector in this case was unable to accurately locate the pipeline’s route once it left the vicinity of the marked road crossings.

Accordingly, after considering all of the evidence, I find that Respondent violated 49 C.F.R.

¹⁰ See, e.g., Citgo Pipeline Co., CPF 4-2007-5010, Item 3, 2011 WL 2040231 (Apr. 14, 2011); Kinder Morgan CO2 Co., CPF 4-2006-5003, Item 1, 2010 WL 6539184 (Oct. 12, 2010); Kinder Morgan Energy Partners, L.P., CPF 4-2006-5023, Item 2, 2010 WL 6531634 (Aug. 31, 2010); BP Pipelines (North America), Inc., CPF 4-2007-5003, Item 1, 2010 WL 6518288 (Jul. 19, 2010); Enterprise Products Operating, LLC, CPF 4-2007-5015, Item 2, 2009 WL 5538652 (Dec. 2, 2009); and NuStar Logistics, L.P., CPF 4-2005-5048, Item 2, 2009 WL 1211363 (Mar. 11, 2009). PHMSA also held a public workshop on February 20-21, 2008, in Houston, Texas, to discuss, among other issues, placement of line markers. See also, Pipeline Safety: Workshop on Public Awareness Programs for Pipeline Operators and Location of Line Markers, 73 Fed. Reg 223 (Jan. 2, 2008).

¹¹ E.g., Enterprise Products, CPF 4-2007-5015, Item 2.

¹² Magellan Pipeline Company, CPF 4-2012-5010, Item 2, 2014 WL 5431188 (Sept. 2, 2014), at 11.

§ 195.410(a) by failing to maintain sufficient line markers to accurately know the location of each buried line off Retreat Road and Crooked Oak Road.

Item 2: The Notice alleged that Respondent violated 49 C.F.R. § 195.567(c), which states:

§ 195.567 Which pipelines must have test leads and what must I do to install and maintain the leads?

(a) *General.* Except for offshore pipelines, each buried or submerged pipeline or segment of pipeline under cathodic protection required by this subpart must have electrical test leads for external corrosion control. . . .

(c) *Maintenance.* You must maintain the test lead wires in a condition that enables you to obtain electrical measurements to determine whether cathodic protection complies with § 195.571.

The Notice alleged that Respondent violated 49 C.F.R. § 195.567(c) by failing to maintain the test lead wires on its pipeline in a condition that enabled the company to obtain electrical measurements to determine whether cathodic protection complied with § 195.571. Specifically, the Notice alleged that Plantation failed to maintain the test lead wire at station number 2180+19 in Franklin County, Virginia, in a condition that would allow the company to conduct the necessary tests during the 2011 and 2012 annual surveys.

In its Response, Plantation acknowledged that no pipe-to-soil measurements were taken during 2011 and 2012 because the test lead could not be located during the annual surveys, and stated that the test station was repaired on September 13, 2012. Accordingly, after considering all of the evidence, I find that Respondent violated 49 C.F.R. § 195.567(c) by failing to maintain the test lead wires in a condition that enabled the company to obtain electrical measurements to determine whether cathodic protection complied with § 195.571.

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 \$200,000 per violation for each day of the violation, up to a maximum of \$2,000,000 for any related series of violations.¹³ 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; and any effect that the penalty may have on its ability to continue doing business; and the good faith of Respondent in attempting to comply with the pipeline safety regulations. In addition, I may consider the economic benefit gained from the violation without any reduction because of

¹³ The Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011, Pub. L. No. 112-90, § 2(a)(1), 125 Stat. 1904, January 3, 2012, increased the civil penalty liability for violating a pipeline safety standard to \$200,000 per violation for each day of the violation, up to a maximum of \$2,000,000 for any related series of violations.

subsequent damages, and such other matters as justice may require. The Notice proposed a total civil penalty of \$57,600 for the violations cited above.

Item 1: The Notice proposed a civil penalty of \$28,900 for Respondent's violation of 49 C.F.R. § 195.410(a), for failing to maintain sufficient line markers to accurately know the location of each buried line. Respondent's defenses to the proposed penalty were the same as the ones discussed above and which I found unconvincing. The purpose of pipeline markers is to identify the general location of the pipeline in order to help the public understand the danger of digging nearby, and thus prevent excavation-damage accidents. In addition, markers are used during the pipeline operators' own surveys to inspect the pipeline right-of-way. Respondent provided no evidence of efforts to ensure its line was adequately marked as of the date of the inspection, to install physical barriers or take other precautions to protect the line markers from damage or removal, or to demonstrate why it should not be held fully culpable for the failure to maintain the pipeline markers. Accordingly, having reviewed the record and considered the assessment criteria, I assess Respondent a civil penalty of \$28,900 for violation of 49 C.F.R. § 195.410(a).

Item 2: The Notice proposed a civil penalty of \$28,700 for Respondent's violation of 49 C.F.R. § 195.567(c), for failing to maintain test lead wires in a condition that enabled the company to obtain electrical measurements to determine whether cathodic protection complied with § 195.571. Respondent did not contest this allegation of violation, but stated that it believed the proposed civil penalty was excessively punitive and requested that the penalty be withdrawn or reduced. Respondent stated that this was an isolated incident and that a review of its corrosion records for this pipeline showed it to be the only occurrence over the past 10 years. Respondent also stated that it was taking steps to ensure that test leads would be better maintained so as to ensure that pipe-to-soil measurements could be timely taken.

However, Respondent is fully culpable and responsible for this violation. The company failed to repair the test station after discovering the test lead wires could not be located in 2011, and only made the repair and conducted the required test after the VA SCC inspection in 2012. In addition, Respondent's history of prior offenses and failure to act in accordance with its duty to meet the regulatory obligation do not warrant a reduction in the penalty. Accordingly, having reviewed the record and considered the assessment criteria, I assess Respondent a civil penalty of \$28,700 for violation of 49 C.F.R. § 195.567(c).

In summary, having reviewed the record and considered the assessment criteria for each of the Items cited above, I assess Respondent a total civil penalty of **\$57,600**.

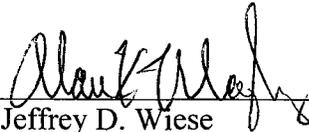
Payment of the civil penalty must be made within 20 days of service. Federal regulations (49 C.F.R. § 89.21(b)(3)) require such payment to be made by wire transfer through the Federal Reserve Communications System (Fedwire), to the account of the U.S. Treasury. Detailed instructions are contained in the enclosure. Questions concerning wire transfers should be directed to: Financial Operations Division (AMK-325), Federal Aviation Administration, Mike Monroney Aeronautical Center, P.O. Box 269039, Oklahoma City, Oklahoma 73125. The Financial Operations Division telephone number is (405) 954-8845.

Failure to pay the \$57,600 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. Furthermore, 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.

Under 49 C.F.R. § 190.243, Respondent has the right to submit a Petition for Reconsideration of this Final Order. The petition must be sent to: Associate Administrator, Office of Pipeline Safety, PHMSA, 1200 New Jersey Avenue, SE, East Building, 2nd Floor, Washington, DC 20590, with a copy sent to the Office of Chief Counsel, PHMSA, at the same address. PHMSA will accept petitions received no later than 20 days after receipt of service of the Final Order by the Respondent, provided they contain a brief statement of the issue(s) and meet all other requirements of 49 C.F.R. § 190.243. The filing of a petition automatically stays the payment of any civil penalty assessed but does not stay any other provisions of the Final Order, including any required corrective actions. If Respondent submits payment of the civil penalty, the Final Order becomes the final administrative decision and the right to petition for reconsideration is waived.

The terms and conditions of this Final Order are effective upon service in accordance with 49 C.F.R. § 190.5.

over 

Jeffrey D. Wiese
Associate Administrator
for Pipeline Safety

MAY 22 2015

Date Issued