

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

In the Matter of)	
)	
ExxonMobil Pipeline Company,)	CPF No. 5-2013-5007
)	Notice of Probable Violation
Respondent.)	
)	

**RESPONDENT'S
PETITION for RECONSIDERATION**

I. Introduction

On January 23, 2015, the Pipeline and Hazardous Materials Safety Administration (PHMSA or the Agency) issued a Final Order in the above referenced matter. The Final Order addressed a Notice of Probable Violation (NOPV) dated March 25, 2013, regarding Respondent ExxonMobil Pipeline Company's (EMPCo or the Company) release of oil from the Silvertip pipeline to the Yellowstone River during a flood event on July 1, 2011.

The NOPV alleged five violations, proposed a civil penalty of \$1,700,000 and proposed certain corrective actions in a Proposed Compliance Order. In its Request for Hearing, EMPCo challenged four of the alleged violations (Items 1, 2, 4 and 5), contested the penalty and the proposed corrective actions. After the Hearing, the Regional Director recommended withdrawal of one of the four claims in issue (Item 2), and an associated reduction in civil penalty. The Final Order confirmed withdrawal of Item 2, and reduced the civil penalty to \$1,045,000. The Final Order also confirmed that EMPCo had already completed all requested corrective actions, thus the Proposed Compliance Order issued with the NOPV was rendered moot.

EMPCo appreciates the Agency's consideration of this matter, and the adjustments made to the NOPV. For the reasons set forth below, however, the Company respectfully requests reconsideration regarding the interpretation and application of the Agency rules that affect ongoing operations for both this Company and the industry.

Pursuant to 49 C.F.R. Part 190.243(a), this Petition is timely.

II. Background

The July 1, 2011 Silvertip release was a high profile incident that received national attention. It was against this backdrop that PHMSA issued its NOPV. As stated in the Company's briefs and at the Hearing for this matter, EMPCo was in compliance with the Part 195 requirements cited as the basis for the alleged violations in Items 1, 2, 4 and 5 of the NOPV. The cornerstone of PHMSA's performance-based rules is the requirement that operators continually improve their procedures and actions as they implement PHMSA regulations and learn from accidents and other events. Punishment of operators who were in compliance with applicable regulations is inconsistent with the applicable law and frustrates the stated goals of the Pipeline Safety Act and PHMSA's performance-based regulatory regime.

III. Argument for Reconsideration

The Agency relies on a strict liability theory in this case to support its interpretation of the regulations at issue (49 C.F.R. Parts 195.402(e) and 195.452(i)). The Agency's application of the regulations to the facts presented can be summarized as follows: if the Company had a release of product, it must have violated the pipeline safety rules. While Congress has authorized certain federal agencies to enforce their regulations under strict liability theory, it has not done so with respect to PHMSA.

The Pipeline Safety Act (PSA) contains no 'liability without fault' provision, such as that contained in the federal Clean Water Act, which establishes strict liability for any oil that reaches waters of the U.S. *Compare 49 U.S.C. 60101, et seq. with 33 U.S.C. §§ 1321(b)(6)(A);1321(f)*. In Clean Water Act cases, the relevant issues are the quantity of oil released and determination of an appropriate penalty. In contrast, the PSA authorizes PHMSA to promulgate integrity management rules for pipeline operators, which require a series of analytical and logistical steps to help anticipate and prevent incidents. *Final Rule, 65 Fed. Reg. 75378, 75382 (Dec. 1, 2000)* ("Performance-based language will best achieve effective [IMPs] that are sufficiently flexible to reflect pipeline specific conditions and risks."). PHMSA has established "performance-based" rules, in contrast to more prescriptive regulations employed by most federal agencies. As such, PHMSA creates minimum standards, largely narrative in scope, and then allows operators the flexibility to create their own written plans and procedures to embody and implement the federal standards.

The central programs required by PHMSA regulations are preparation of an integrity management program (IMP) manual, and an operation and maintenance (O&M) manual. PHMSA inspects operators frequently to review their IMP and O&M manuals, in order to ensure that an operator has all required written procedures, and that their manuals address all requisite elements in sufficient detail. The Agency also evaluates whether those procedures are being applied properly to the operator's system.

It is the sufficiency of these written programs that makes them "performance-based," not whether they prevent all incidents from occurring. In many cases, an accident investigation will show that the operator did not fully address or apply a required element for its IMP or O&M plans, and in those instances, a causal connection can typically be shown between the regulatory

violation and the incident. That is not always the case, however. There are instances where an operator's IMP or O&M manuals have all requisite elements and have been fully applied to the operator's system, yet some occurrence beyond the operator's control causes an incident. This was one such incident.

PHMSA understandably looks to find a violation of its rules after an incident occurs, and more often than not a violation is found. The Agency typically alleges violations after all incidents, however, even where the clear cause of an incident was beyond the control of the operator, and the operator was in full compliance with applicable law. Neither the Pipeline Safety Act nor traditional principles of jurisprudence support such an approach. Had Congress given PHMSA strict liability authority, then the Agency could assess penalties after every incident, regardless of fault. The Agency does not have such authority, however, thus it must base all enforcement on documented findings of violations.

A flood of historic proportion caused the incident in this case. There was no operator error and no clear violation of applicable law. The undisputed facts presented in this matter show that the Company was in compliance with the rules cited in the NOPV, both before and at the time of the incident:

EMPCo Properly Applied IMP Risk Analysis Requirements (NOPV Item 1)

The IMP regulations require pipeline operators to prepare a written IMP plan to address all pipeline segments within high consequence areas (HCA). *49 C.F.R. Part 195.452(b)*. The operator's IMP plan must include a risk analysis that evaluates the likelihood of a release occurring and how a release could affect the HCA, considering "all relevant risk factors," in order to identify additional preventative and mitigation (P&M) measures. *Id.* (emphasis added). In the Agency's NOPV Item 1, PHMSA alleges that EMPCo failed to perform a risk analysis that considered the risk of flooding with respect to the Silvertip Pipeline, and the Final Order upholds that alleged violation.

The record reflects that EMPCo did have a written IMP plan and did perform a risk assessment and subsequent risk analysis that expressly evaluated the risk of flooding both generally on the Silvertip Pipeline and at the Yellowstone River crossing specifically. *Respondent's Pre-Hearing Submittal, Exhibits 9 and 10; Silvertip to Billings 12 inch Crude P&M Analysis Summary (Jul. 7, 2010)*. In considering the risk of flooding, EMPCo's 2010 risk assessment did not assign significant risk to flooding as a threat because there had been no impacts from flooding to the pipeline at the Yellowstone River since the line was constructed at this location in 1991. *Id.* Further, EMPCo already had identified and implemented all P&M measures that could be undertaken to prevent or mitigate the risk of flooding.¹ For those reasons, EMPCo's P&M risk analysis did not identify flooding as a significant risk and based on the information available to the Company at that time, to do otherwise would have skewed the results of the risk analysis in violation of both EMPCo's procedures and Part 195.

¹ These measures, many of which exceed PHMSA regulatory standards, include: thicker walled pipe, concrete coating, pipe placed in rock trench much deeper in depth than required by PHMSA rules, rock cobble placed on top of the pipe in trench; integrity assessments including a hydrotest and two in-line inspections; two depth of cover surveys; and increased patrols during high water.

PHMSA IMP rules do not dictate any one result or conclusion, but allow operators discretion in drafting and implementing their own procedures based on the operator's expertise, and in consideration of all available information relevant to the pipeline. Under applicable law, it was acceptable and reasonable for EMPCo to consider the risks of flooding and conclude that flooding was not a significant risk to its pipeline at this river crossing.

The Agency's rationale in agreeing to withdraw Item 2 of the NOPV should apply equally to Item 1, as the arguments and the process at issue for P&M considerations and risk analysis are the same. After the Hearing, the Regional Director recommended that Item 2 be withdrawn, noting that, "the facts supporting Items #1 and #2 are so similar that #2 should be withdrawn." *Region Recommendation at 3*. The PHMSA Final Order found that "the evidence in the record [for Item 2] is insufficient to prove a violation with regard to these allegations." *Final Order at 15*. It follows that if the Agency withdrew Item 2 due to an insufficient basis for the allegation, Item 1 should be withdrawn for the same reasons.

EMPCo Properly Applied O&M Manual Requirements (NOPV Items 4 and 5)

One of the essential provisions of PHMSA regulation is that operators prepare an O&M manual that addresses normal operations, abnormal operations and emergencies. *49 C.F.R. Part 195.402(c), (d) and (e)*. Specific to emergencies, operators' procedures must address a number of circumstances, including the "prompt and effective response" to emergency conditions such as natural disasters (*Part 195.402(e)(2)*) and "necessary action ... to minimize the volume of hazardous liquid" released during an incident (*Part 195.402(e)(4)*). In NOPV Items 4 and 5, PHMSA alleges that EMPCo failed to have procedures in place to address these two requirements, and the Final Order upholds those violations.

The record reflects that the Company did in fact have the requisite procedures in place to direct prompt and effective action in the event of a flood, and to minimize the volume of a release. These O&M procedures include OCC Operating Instructions for the Montana Crude Pipeline System, and Local Operating Instructions for the Silvertip to Laurel and Billings segments, which (1) define an emergency condition to include, among other things, natural disasters affecting the pipeline and require certain actions to be taken in response to emergency conditions, and (2) identify remote controlled valves (RCV) to isolate vulnerable locations on the Silvertip Pipeline, including the Yellowstone River. *Respondent's Pre-Hearing Written Submittal, Exhibit 13*.

PHMSA regulations establish minimum standards that operators must meet, and the requirements are intended to be performance-based to allow operators the flexibility to develop procedures that best suit their systems. As required by PHMSA regulations in Part 195.402, EMPCo O&M procedures instructed personnel with regard to prompt and effective response to emergency conditions, including flooding, and how to minimize the volume of liquid during a release event on the Yellowstone River. To the extent that the Silvertip incident identified deficiencies in implementation of these procedures (a separate issue addressed in NOPV Item 3 which was not contested), or areas where EMPCo procedures could be improved, that does not equate to a violation of Part 195.492(e).

In addition to the fact that there is no support for the Agency’s findings, the Agency relies on the *same factual allegations* to support its findings in both Items 4 and 5, pointing to a lack of procedures for shut down of pumps or valves or closure of all RCVs. Consequently, Items 4 and 5 are so related and redundant as pled that they should be withdrawn, or at the very least limited to one count with the penalty reduced.² *Colorado Interstate Gas Co., CPF 5-2008-1005, p. 12 (Nov. 23, 2009)* (holding that where alleged violations in a NOPV are “so closely related” and share the same evidentiary basis, then “they are not separate and should be considered one violation.”).

The essential issue in this matter is whether an administrative agency can conclude, after the fact, that a regulated entity should anticipate and prevent every possible accident, or else be found liable for some perceived violation (*i.e.*, since the incident occurred, you “could have/should have done something better”). PHMSA does not have strict liability authority, thus the only test it should apply in bringing an enforcement action is whether an operator complied with the relevant regulations. EMPCo did comply with the relevant regulations in this instance. The occurrence of an incident due to a flood of historic proportion does not automatically mean that an operator’s IMP and O&M manuals and/or implementation of those manuals were insufficient. That approach only frustrates the reasoned interpretation and application of the Agency’s rules and is contrary to the best interests of industry and the public.

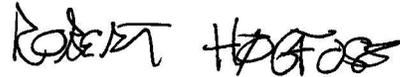
IV. Summary and Request for Relief

EMPCo is committed to ensuring the safety of its pipelines and working with PHMSA toward that goal. The Company appreciates the Agency’s consideration of this matter, and the adjustments made to the NOPV in the Final Order. For the reasons set forth in this Petition and other matters as justice may require, however, the Company respectfully requests reconsideration regarding the interpretation and application of the Agency rules at issue that affect ongoing operations for both this Company and the industry. The Company requests that PHMSA revise the Final Order as issued to withdraw Items 1, 4 and 5 in their entirety, and/or significantly reduce the penalties associated with those Items and adjust the final penalty downward accordingly.

² While the Final Order did not make a determination on the Company’s arguments that Items 1 and 2 were a “related series of violations,” the similarities between those Items prompted the Regional Director to recommend withdrawal of Item 2. *Region Recommendation at 3* (stating “the facts supporting Items #1 and #2 are so similar that #2 should be withdrawn.”). In withdrawing Item 2 on the basis of the Regional Director’s recommendation, the Final Order endorsed this conclusion. The same rationale should apply to Items 4 and 5 (as articulated in the Agency’s Colorado Interstate Gas Final Order, CPF 5-2008-1005). If those items are not withdrawn, at the very least their penalty amounts should be combined and adjusted downward.

Pursuant to 49 C.F.R. Part 190.243(c), the filing of this Petition stays the deadline for payment of the civil penalty for this matter, pending ultimate resolution.

Respectfully submitted,



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