



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

1200 New Jersey Avenue, SE
Washington, DC 20590

January 18, 2022

VIA ELECTRONIC MAIL TO: jeff.ramsey@fhr.com

Mr. Jeff Ramsey
President and Chief Executive Officer
Flint Hills Resources, LLC
4111 E. 37th Street North
Wichita, Kansas 67220

Re: CPF No. 3-2020-5021

Dear Mr. Ramsey:

Enclosed is the Decision on the Petition for Reconsideration issued in the above-referenced case. For the reasons explained therein, the Decision denies your Petition and affirms Item 3 and the associated Civil Penalty of the August 23, 2021 Final Order. This Decision constitutes the final administrative action in this proceeding. Service of this Decision by electronic mail is effective upon the date of transmission as provided under 49 C.F.R. § 190.5.

Thank you for your cooperation in this matter.

Sincerely,

ALAN KRAMER
MAYBERRY

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Date: 2022 01.14
11:40:33 -05'00'

Alan K. Mayberry
Associate Administrator
for Pipeline Safety

Enclosure

cc: Mr. Gregory Ochs, Director, Central Region, Office of Pipeline Safety, PHMSA
Ms. Kimberly A. Gerold, Manager, Pipeline Safety, Flint Hills Resources, LLC,
kim.gerold@fhr.com
Mr. James B. Curry, Babst Calland, Counsel for Flint Hills Resources, LLC,
jcurry@babstcalland.com

CONFIRMATION OF RECEIPT REQUESTED

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

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In the Matter of)		
)		
Flint Hills Resources, LLC,)	CPF No. 3-2020-5021	
)		
Respondent.)		

DECISION ON PETITION FOR RECONSIDERATION

In an August 23, 2021 Final Order, the Pipeline and Hazardous Materials Safety Administration (PHMSA or Agency) determined that Flint Hills Resources, LLC, (FHR or Petitioner) had committed two violations of 49 C.F.R. Part 195 following an inspection by the Office of Pipeline Safety (OPS) of FHR’s procedures, records, and pipeline facilities in Minnesota and Wisconsin and assessed a civil penalty of \$19,000 for the violations.¹ On September 11, 2021, FHR filed a Petition for Reconsideration pursuant to 49 C.F.R. § 190.243 (Petition). The Petition requested that PHMSA reconsider its finding in Item 3 of the Final Order that FHR had violated 49 C.F.R. § 195.412(a) for failing to inspect the surface conditions on or adjacent to the right-of-way where excessive vegetation cover on the right-of-way precluded inspection of the pipeline surface conditions by aerial patrol at mile post 182, near Stevens Point, Wisconsin (MP 182).

After consideration of the arguments and record in this case, the Petition is denied, and Item 3 of the Final Order is affirmed.

Background

From March 6, 2019 through August 16, 2019, pursuant to 49 U.S.C. § 60117, a representative of OPS conducted a pipeline safety inspection of the facilities, procedures, and records of FHR’s pipeline facility from the Pine Bend Refinery to the Milwaukee and Madison terminals. As a result of the inspection, the Director, Central Region, OPS (Director), issued to FHR, by letter dated December 15, 2020, a Notice of Probable Violation and Proposed Civil Penalty (Notice). In accordance with 49 C.F.R. § 190.207, the Notice proposed finding that FHR had committed two violations of 49 C.F.R. Part 195, proposed assessing a civil penalty of \$38,300 for the alleged violations, and included an additional three warning items which required no further action but warned FHR to correct the probable violations or face possible future enforcement action.

¹ Flint Hills Resources, LLC, Final Order, CPF No. 3-2020-5021, 2021 WL 4055259, at *1 (Aug. 23, 2021) (Final Order).

FHR responded to the Notice by letter dated January 12, 2021 (Response). FHR requested withdrawal of one of the allegations and the associated civil penalty and offered additional information and requested re-examination of the civil penalty for the other allegation. FHR did not request a hearing and therefore waived its right to one.

On August 23, 2021, pursuant to 49 U.S.C. §§ 60118 and 60122 and 49 C.F.R. § 190.213, the Associate Administrator for Pipeline Safety issued a Final Order finding that FHR had committed a violation of 49 C.F.R. § 195.403(b)(1) (Item 1), with respect to its emergency response training reviews, and 49 C.F.R. § 195.412(a) (Item 3), with respect to its right-of-way inspections at MP 182. Specifically, Item 1 of the Final Order found that FHR had failed to review with personnel their performance in meeting the objectives of the emergency response training set forth in § 195.403(a) at least once each calendar year, but at intervals not exceeding 15 months, as required by § 195.403(b)(1). Item 3 of the Final Order found that FHR violated § 195.412(a) when it failed to inspect the surface conditions on or adjacent to the right-of-way where excessive vegetation cover on the right-of-way precluded inspection of the pipeline surface conditions by aerial patrol. While the Notice had alleged two instances of this violation, the Final Order withdrew one instance of the alleged violation of § 195.412(a) for insufficient evidence.

Pursuant to the authority of 49 U.S.C. § 60122 and 49 C.F.R. § 190.221, the Final Order assessed a civil penalty of \$19,000 for the violations. The Final Order reduced the civil penalty for Item 1 from \$19,000 to \$0 after considering FHR's actions in light of the assessment considerations in 49 C.F.R. § 190.225. Specifically, the Final Order found that FHR had identified and addressed the non-compliance before PHMSA learned of the violation. Therefore, a penalty reduction was warranted under the culpability criterion. The Final Order also reduced the civil penalty for Item 3 from \$19,300 to \$19,000. This reduction was commensurate with withdrawing one instance of the alleged violation.

On September 11, 2021, FHR filed a Petition for Reconsideration pursuant to 49 C.F.R. § 190.243 (Petition). In its Petition, FHR seeks reconsideration of Item 3 in the Final Order and the accompanying Civil Penalty.

FHR presents two grounds for reconsideration. First, FHR contends that PHMSA did not meet its burden of proof regarding the violation of § 195.412(a) that occurred at MP 182. Second, FHR contends that the Final Order should be set aside for policy reasons and alleges that the Final Order creates uncertainty for pipeline operators who use aerial patrols to inspect rights-of-ways.

On September 17, 2021, the Central Region (Region) filed a Motion for Leave to File Response to Petition for Reconsideration of Final Order (Region Response). The Region requested that the Petition be denied in full because FHR's arguments had already been considered in the Final Order and FHR introduced new evidence and advanced new arguments without sufficient justification.

On October 4, 2021, FHR filed a Motion for Leave to File Reply to Central Region's Response (Reply). In its Reply, FHR again requested that PHMSA withdraw Item 3 and the associated Civil Penalty and asserted that its new arguments were necessary in light of the analysis in the Final Order.

Standard of Review

Section 190.243 allows a respondent to petition the Associate Administrator for reconsideration of a final order that has been issued pursuant to § 190.213. Reconsideration is not an appeal or a completely new review of the record. A respondent may ask for correction of an error or, in limited circumstances, may present previously unavailable information. If a respondent requests consideration of additional facts or arguments, the respondent must submit the reasons they were not presented prior to the issuance of the final order. Repetitious information or arguments will not be considered.² The Associate Administrator may grant or deny, in whole or in part, a petition for reconsideration without further proceedings.

Additional Facts and Repetitious Arguments

In its Petition, FHR reiterates arguments from its Response, presents additional facts and arguments, and asserts that these facts and arguments should be considered on reconsideration.³ In its Region Response, the Region argues first, that the reiterated arguments should not be considered because they were taken into account earlier in the enforcement proceeding, and second, that the additional facts and arguments should not be considered because FHR fails to provide a valid justification as to why they were not presented prior to the issuance of the Final Order.⁴ In its Reply, FHR states that the need for the additional information only became evident after issuance of the Final Order because PHMSA erred in its evaluation of the burden of proof.⁵

When a petition is repetitious of the record or presents new arguments and evidence without valid reason, the additional information need not be considered.⁶ In justifying its presentation of new information, FHR states that it is providing additional detail and arguments that it did not

² Plains All American Pipeline, LP, (Plains), Decision on Reconsideration, CPF No. 5-2009-00118, 2013 WL 5883403, at *3 (Aug. 30, 2013) (stating that the right to petition the Associate Administrator for reconsideration is a limited one and repetitious information or arguments will not be considered).

³ Motion for Leave to File Reply to Central Region's Response (Reply to Central Region's Response), at 2–3 (Oct. 4, 2021).

⁴ Central Region's Motion for Leave to File Response to Petition for Reconsideration of Final Order, at 2 (Sept. 17, 2021) (Central Region's Response).

⁵ Reply to Central Region's Response, at 1.

⁶ Plains, at *3; *see also* TPM, Inc., Decision on Petition for Reconsideration, CPF No. 2-2010-6007, 2012 WL 6184434, at *2 (Oct. 12, 2012).

provide earlier “because it believed that the evidence in the case demonstrated that PHMSA did not meet its burden of proof.”⁷ FHR supports this argument by citing to four decisions on reconsideration where they say PHMSA considered new arguments to determine whether the burden of proof had been carried.⁸ FHR’s citation to other decisions is not a valid justification for raising new details and arguments they had access to all along and glosses over the fact-specific nature of each case. FHR asserts that the new information is needed because the Final Order’s analysis of the burden of proof was flawed. But, by introducing new details and arguments in its Petition, FHR concedes that it did not present its full case at a stage of the proceeding where it could have been used to assist in final review of the issues.

FHR should have raised all arguments prior to the issuance of the Final Order to assist in developing the record prior to final review. Alternatively, the Petition should have stated case-specific reasons, beyond dissatisfaction with the outcome of the Final Order, that the new information was not previously made available. Stating that the new information is necessary because the Final Order did not adopt the position in FHR’s Response is not enough.

The reconsideration stage is a limited one and while FHR has appropriately asked for correction of an error, it has not justified the consideration of new evidence to determine whether an error was made. Therefore, I find reason to deny the petition on these grounds. Notwithstanding this finding, I have considered the information and arguments submitted by FHR and further find no basis to alter the finding of violation in Item 3.

Analysis for Item 3

The Final Order found FHR violated 49 C.F.R. § 195.412, which states:

§ 195.412 Inspection of rights-of-way and crossing under navigable waters.

(a) Each operator shall, at intervals not exceeding 3 weeks, but at least 26 times each calendar year, inspect the surface conditions on or adjacent to each pipeline right-of-way. Methods of inspection include walking, driving, flying or other appropriate means of traversing the right-of-way.

The Final Order found that FHR violated § 195.412(a) by failing to inspect the surface conditions on or adjacent to its right-of-way. Specifically, it found that Respondent had used aerial patrolling to inspect its pipeline right-of-way, but excessive vegetation cover on the right-of-way at MP 182 precluded inspection of the surface conditions by aerial patrol. Evidence supporting the violation included a photograph of the right-of way taken at MP 182, near Stevens Point, Wisconsin, between Wisconsin River and West River Drive.

⁷ Petition for Reconsideration, at 2 (Sept. 11, 2021) (Petition).

⁸ Reply to Central Region’s Response, at n.1.

As noted above, FHR presents two grounds for reconsideration. First, FHR contends that PHMSA did not meet its burden of proof regarding the violation of § 195.412(a) that occurred at MP 182. Second, FHR contends that the Final Order should be set aside for policy reasons and alleges that the Final Order creates uncertainty for pipeline operators who use aerial patrols to inspect rights-of-ways.

I. Burden of Proof

Throughout these proceedings, FHR has asserted that PHMSA's evidence, consisting of a photograph of the right-of-way at MP 182, fails to meet the burden of proof that PHMSA must carry. Specifically, FHR contends that the photographic evidence submitted by PHMSA does not establish that there was excessive vegetation obscuring the surface conditions of the right-of-way at MP 182, such that aerial patrol was an inappropriate method of inspection.⁹ FHR notes that PHMSA had the burden of proof, the burden of presentation, and the burden of persuasion in this enforcement matter.¹⁰ FHR alleges that because the regulation is performance-based, PHMSA has an additional burden of proving why the method chosen by the operator was not effective to establish compliance.¹¹

In order to find that FHR violated § 195.412(a) as alleged in the Notice, PHMSA must determine, by a preponderance of the evidence, that Respondent failed to inspect the surface conditions of its right-of-way at MP 182.¹² Aerial patrols, the method selected by FHR to inspect its right-of-way, are a permissible method of right-of-way inspections if the operator can view surface conditions while flying.¹³ If the operator could not view surface conditions while conducting aerial patrols, then the operator's inspections were not in compliance with

⁹ Pipeline Safety Violation Report (Violation Report), Evidence Exhibit A (A-Photographs of right-of-way).

¹⁰ 49 U.S.C. § 60117(b)(1)(F).

¹¹ Petition, at 1–2. FHR asserts that 49 C.F.R. § 195.412(a) is a performance-based regulation. Section 195.412(a) has two components: a timing component and a methods of inspection component. The timing component is prescriptive and not at issue in the present matter. The method of inspection component provides operators with flexibility in determining how they will carry out right-of-way inspections, so long as the method chosen is appropriate. The method component of § 195.412(a) may be considered performance-based because it allows the operator to select the method that they deem most appropriate to carry out the inspections. However, the validity of FHR's assertion that § 195.412(a) is a performance-based regulation does not change the burden of proof standard.

¹² *See, e.g.*, Express Holdings (USA), LLC, a subsidiary of Enbridge, Inc., Decision on Reconsideration, CPF No. 3-2020-5005, 2021 WL 4055257, at **4–5 (July 26, 2021) (finding that the preponderance of the evidence in the proceeding supported the finding in the Final Order); *see also* Sunoco Pipeline, LP, a subsidiary of Energy Transfer, LP, Final Order, CPF No. 1-2019-5006, 2020 WL 6955633, at *3 (June 26, 2020); Centurion Pipeline, LP, a subsidiary of Lotus Midstream, LLC, Decision on Petition for Reconsideration, CPF No. 4-2014-5028, 2019 WL 4257142, at *4 (June 27, 2019); Citgo Pipeline Co., Decision on Reconsideration, CPF No. 4-2007-5010, 2011 WL 7517716, at *5 (Dec. 29, 2011).

¹³ Plains Pipeline, LP, Final Order, CPF No. 4-2016-5015, 2018 WL 2229413 (Mar. 7, 2018) (stating that “[I]f an operator cannot view surface conditions using aerial patrols, then flying is not a method that achieves compliance with the regulation.”).

§ 195.412(a). After reviewing the evidence, I find that PHMSA appropriately found FHR violated § 195.412(a) based on the photograph of the right-of-way.

a. Trees in the Right-of-Way

First, FHR argues that PHMSA has failed to demonstrate how the trees in the photograph prevented FHR's aerial patrols from inspecting the surface conditions of the right-of-way and that, therefore, PHMSA erred when it found that the trees obscured the right-of-way.¹⁴ However, FHR misstates the finding in the Final Order. PHMSA did not find that trees obscured the right-of-way. Rather, the Final Order states:

“[W]hile the photograph shows a line marker in the foreground and an open sky beyond the tree line, I find that the photograph also shows excessive vegetation, specifically brush and overgrown grass, immediately behind the line marker along the right-of-way at that location such that an aerial patrol at this location would not have been an appropriate means to observe the surface conditions of the right-of-way. In this case, the excessive vegetation is not limited to tree canopy in the background of the photograph, which Respondent claims is not on the right of way.”¹⁵

PHMSA did not find a violation of § 195.412(a) at MP 182 because of trees in the right-of-way. Therefore, PHMSA rejects this argument by FHR.

b. Grass and Brush in the Right-of-Way

Second, FHR newly argues that the grass and brush was not excessive because the pipeline marker is visible in the photograph and activities and conditions listed in PHMSA's O&M Enforcement Guidance (Guidance) could be viewed at the location by aerial patrol.¹⁶

Contrary to FHR's position, the fact that the pipeline right-of-way marker is visible in the photograph is not indicative of whether the excessive vegetation prevented FHR from inspecting its right-of-way. The right-of-way marker is in the foreground of the photo and the Final Order states that the excessive vegetation is located immediately behind the marker on the right-of-way. The fact that the marker is visible in the photo does not preclude finding the vegetation behind the marker is excessive.

FHR argues that the vegetation is not excessive because it would not prevent the pilot conducting aerial patrol inspections from observing the activities and conditions that the Guidance notes

¹⁴ Petition, at 4–5.

¹⁵ Final Order, at 4.

¹⁶ Petition, at 5.

should be observable by patrol programs.¹⁷ However, that is not the case. FHR does not address all of the activities that the Guidance lists. Namely, that the patrol program should be able to observe the presence of “marking flags, ribbon, or paint on or near the (right-of-way).”¹⁸ The PHMSA photo shows brush and overgrown grass that would obscure these markings from an aerial patrol inspection of the surface conditions due to the vegetation’s height and density. Further, the patrol program should be able to observe the presence of leaks on the right-of-way.¹⁹ The PHMSA photo shows dense brush and overgrown grass that obscures the surface conditions such that an aerial patrol inspection would be unable to observe product, sheen, or other evidence of a leak on the surface of the right-of-way. Additionally, the Guidance on § 195.412(a) explicitly calls out excessive vegetation obscuring the right-of-way as a surface condition that the inspection program should include.²⁰

The Final Order did not err when it found that FHR violated § 195.412(a) by failing to inspect the surface conditions of its right-of-way at MP 182 where the brush and overgrown grass prevented inspection by the aerial method of patrols utilized.

c. Evidence Submitted by FHR

Third, FHR contends that the Final Order erred because the Final Order should have found that the evidence offered in its Response was persuasive to rebut the allegation of violation.

The Final Order considered the evidence offered by FHR against the evidence offered by PHMSA and concluded that, taken together, the evidence supported a finding that FHR had violated § 195.412(a) at MP 182. The issue of material fact in this case is whether there was excessive vegetation at MP 182 that prevented aerial patrols from observing the surface conditions of the right-of-way. The evidence presented by PHMSA is the photograph taken by a PHMSA inspector that shows the right-of-way at MP 182. The evidence presented by FHR includes a pilot’s affidavit, pilot’s report, and aerial photographs of the right-of-way. In its analysis, the Final Order correctly points out that the pilot’s report and affidavit are not persuasive as to whether there was excessive vegetation on the right-of-way at MP 182. FHR argues that because the pilot attests to being appropriately trained and attentive to vegetative conditions on the right-of-way, he would have identified excessive vegetation at MP 182 in his reports if it existed.²¹ FHR then points to his reports and the lack of notation of excessive vegetation at MP 182 as evidence that the right-of-way was indeed free of excessive vegetation.

¹⁷ *Id.*

¹⁸ Operations and Maintenance Enforcement Guidance, Part 195 Subpart F, § 195.412, Guidance Information 2(d), o-m-enforcement-guidance-part-195-7-21-2017.pdf (dot.gov) (last accessed Dec. 21, 2021).

¹⁹ *Id.*, at Guidance Information 2(a).

²⁰ *Id.*, at Guidance Information 2(l).

²¹ Operator Response to Notice of Probable Violation and Proposed Civil Penalty, Flint Hills Resources, LLC, CPF No. 3-2020-5021, Affidavit of Tom Dean, ¶ 7, 9 (Jan. 13, 2021) (Response).

However, I affirm the Final Order, which found that evidence of the condition of other locations and the pilot's general training is not as persuasive regarding whether there was excessive vegetation at MP 182 compared to the photograph of MP 182 that shows excessive vegetation. In short, evidence of the pilot's training and actions at other locations does not outweigh the photographic evidence of excessive vegetation on the right-of-way at MP 182.

FHR also submitted two aerial photographs of the right-of-way route to prove that the trees in the background of PHMSA's photo did not cover the right-of-way. These photographs do not outweigh PHMSA's evidence because the Final Order found that the excessive vegetation that prevented inspection was brush and overgrown grass, rather than trees.²²

A third image submitted by FHR shows a different location where the pilot had spotted and reported vegetation on the right-of-way. This photo, like the reports and affidavit discussed above, is indicative of the condition of the right-of-way at another location but is not persuasive regarding the conditions at MP 182.

Therefore, the Final Order correctly found that PHMSA's evidence outweighs FHR's evidence and demonstrates that there was excessive vegetation on the right-of-way at MP 182 which prevented FHR from inspecting the surface conditions by aerial patrols.

II. Policy Implications

Finally, FHR asserts that the Final Order should be set aside because it creates "substantial policy concerns" and FHR suggests that if the Final Order is affirmed it will mean that PHMSA may assert that any amount of vegetation on a right-of-way is excessive.²³ Specifically, FHR states that if PHMSA does not withdraw the violation, operators will be forced to forgo the use of aerial patrols and will have to change their procedures for right-of-way clearing programs to avoid subjective and arbitrary and capricious review by PHMSA.

Having considered this argument, I find it overstates the potential impacts of this finding of violation, which as noted above, is based on factual evidence that the amount of vegetation seen in a photograph of Respondent's right-of-way prevented inspection of the surface condition by aerial patrol. FHR's argument overlooks that, while § 195.412(a) affords operators flexibility in choosing the method of inspection, operators must still comply with the pipeline safety regulations by inspecting the surface condition.²⁴ In order to be in compliance with § 195.412(a), the operator must conduct inspections of the surface conditions on or adjacent to each pipeline right-of-way by a method that allows for inspection of the surface conditions such that various threats to the integrity of a pipeline facility can be determined and leaks can be detected. In this case, excessive vegetation prevented inspection of the surface conditions of the

²² Final Order, at 4.

²³ Petition, at 6.

²⁴ *Id.*

right-of-way as required by § 195.412(a). This is not, as FHR contends, a purely subjective exercise. Nor does it imply, as Respondent suggests, that any amount of vegetation is excessive, or that operators will forever be prohibited from using aerial patrols. Accordingly, this argument is rejected.

Relief Denied

Based on the information provided in the Petition, a review of the record, and for the reasons stated above, the preponderance of the evidence in this proceeding supports the finding in the Final Order that FHR violated 49 C.F.R. § 195.412(a) for failing to inspect the surface conditions on or adjacent to the right-of-way where excessive vegetation cover at MP 182 precluded inspection of the pipeline surface conditions by aerial patrol. Therefore, I am affirming Item 3 in the Final Order without modification. FHR must pay the civil penalty of \$19,000 assessed in the Final Order.

Payment of the civil penalty must be made within 20 days of service of this decision. 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, 6500 S MacArthur Blvd, Oklahoma City, Oklahoma 79169. The Financial Operations Division telephone number is (405) 954-8845.

Failure to pay the \$19,000 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. 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.

This Decision is the final administrative action in this proceeding.

ALAN KRAMER
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Alan K. Mayberry
Associate Administrator
for Pipeline Safety

January 18, 2022

Date Issued