

August 23, 2021

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 please find the Final Order issued in the above-referenced case. It makes findings of violation and assesses a reduced civil penalty of \$19,000. 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 effective upon the date of mailing as provided under 49 C.F.R. § 190.5. Service of the Final Order 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 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**

In the Matter of)

Flint Hills Resources, LLC,)

Respondent.)

CPF No. 3-2020-5021

FINAL ORDER

From March 6, 2019, through August 16, 2019, pursuant to 49 U.S.C. § 60117, a representative of the Pipeline and Hazardous Materials Safety Administration (PHMSA), Office of Pipeline Safety (OPS), conducted a pipeline safety inspection of Flint Hills Resources, LLC's (FHR or Respondent) procedures, records, and facilities in Minnesota and Wisconsin. FHR transports crude oil, natural gas liquids, and refined products through more than 4,000 miles of pipeline, traversing six states.¹

As a result of the inspection, the Director, Central Region, OPS (Director), issued to Respondent, by letter dated December 15, 2020, a Notice of Probable Violation and Proposed Civil Penalty (Notice), which also included three warnings pursuant to 49 C.F.R. § 190.205. 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 and proposed assessing a civil penalty of \$38,300 for the alleged violations. The warning items required no further action, but warned the operator to correct the probable violations or face possible future enforcement action.

FHR responded to the Notice by letter dated January 12, 2021 (Response). FHR contested one of the allegations requesting withdrawal of the allegation and the associated civil penalty, requested a re-examination of the civil penalty for the other allegation, and offered additional information. 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:

¹ See, FHR, Products and Services, Pipelines, website, *available at* <https://www.fhr.com/products-services/pipeline> (last accessed July 30, 2021).

Item 1: The Notice alleged that Respondent violated 49 C.F.R. § 195.403, which states in relevant part:

§ 195.403 Emergency response training.

(a) . . .

(b) At the intervals not exceeding 15 months, but at least once each calendar year, each operator shall:

(1) Review with personnel their performance in meeting the objectives of the emergency response training program set forth in paragraph (a) of this section; and . . .

The Notice alleged that Respondent violated 49 C.F.R. § 195.403(b)(1) by failing to review with personnel, during calendar year 2016, their performance in meeting the objectives of its emergency response training program. Specifically, the Notice alleged that during the inspection, FHR's Emergency Response Manager stated that reviews of the Emergency Plan had been completed on the following dates: December 27, 2014; December 30, 2015; April 25, 2017; and December 4, 2017. FHR's Emergency Response Manager further acknowledged that no review has been completed for calendar year 2016.

In its Response, FHR did not contest this alleged violation, indicating that it recognized that the company failed to conduct the annual review of its emergency response training program in 2016 or within 15 months of the December 30, 2015 review. However, as discussed in more detail below in the assessment of penalty of this item, FHR requested a reduction to the proposed civil penalty amount.

Accordingly, after considering all of the evidence, I find that Respondent violated 49 C.F.R. § 195.403(b)(1) by failing 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.

Item 3: The Notice alleged that Respondent violated 49 C.F.R. § 195.412, which states in relevant part:

§ 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 Notice alleged that Respondent violated 49 C.F.R. § 195.412(a) by failing to inspect the surface conditions on or adjacent to each pipeline right-of-way at intervals not exceeding 3 weeks, but at least 26 times each calendar year. Specifically, the Notice alleged that FHR used aerial patrolling, but neither maintained the pipeline right-of-way conditions at a level that is appropriate for aerial patrolling nor selected an alternate patrol method that would allow effective patrols based on the condition of the right-of-way for the period from January 1, 2019,

through August 14, 2019, at the following two locations: east of County Road Z in Pepin County, Wisconsin, and at mile post 182, near Stevens Point, Wisconsin. The Notice also alleged that during the inspection, OPS observed excessive vegetation cover over the right-of-way at these two locations, which would make it impossible to complete effective aerial patrols of the right-of-way. In support of its observation, OPS provided one photograph taken in Stevens Point, Wisconsin and a Google Earth image of County Road Z in Pepin County, Wisconsin.²

In its Response, FHR contested this allegation of violation and requested that PHMSA withdraw the alleged violation. Respondent contended that PHMSA has not met its burden of proof to establish a violation of § 195.412(a) occurred, and that the photographic evidence submitted by OPS fails to prove that there was excessive vegetation obscuring the surface conditions of the right-of-way during aerial patrol. Respondent further contended that the aerial patrol records submitted by OPS do not substantiate a violation of § 195.412(a); instead, they demonstrate that right-of-way was sufficiently clear to perform aerial patrols.

Section 195.412(a) requires each operator to inspect the surface conditions on or adjacent to each pipeline right-of-way at intervals not exceeding 3 weeks, but at least 26 times each calendar year. Methods of inspection specified by the regulation include walking, driving, flying or other appropriate means of traversing the right-of-way. The purpose of this regulation is to “ensure that operators regularly inspect the surface conditions of their pipeline rights-of-way, by *appropriate* means, in order to detect encroachments and various other threats to the integrity of their facilities.”³ If an operator cannot view surface conditions using aerial patrols, then flying is not a method that achieves compliance with § 195.412(a).⁴

In this case, there are two locations at issue for this alleged violation: (1) east of County Road Z in Pepin County, Wisconsin; and (2) mile post 182, near Stevens Point, Wisconsin, between Wisconsin River and West River Drive. I will discuss each in turn.

For the first location, OPS submitted a May 2018 Google Earth image of County Road Z in Pepin County and FHR’s aerial patrol records as evidence to support this instance of an alleged violation.⁵ As Respondent correctly notes, OPS bears the burden of proof in demonstrating that an operator violated the pipeline safety regulations. Having reviewed the evidence, I find that OPS did not carry its burden for this instance of a violation. While OPS may submit a Google Earth image as evidence to support an allegation of violation, in this case, the allegation is based solely on a Google Earth image that predates OPS’ inspection and does not prove the condition of the right-of-way during the alleged period of non-compliance from January 1, 2019, through August 14, 2019. Without any other evidence proving the surface condition of the right-of-way

² Pipeline Safety Violation Report (Violation Report), Evidence Exhibit A.

³ *In The Matter of Nustar Energy, LP*, CPF No. 3-2007-5002, Final Order (issued Feb. 5, 2009) (emphasis in original).

⁴ *In the Matter of Plains Pipeline, LP*, CPF No. 4-2016-5015, Final Order (issued Mar. 7, 2018).

⁵ Violation Report, Evidence Exhibit A.

during the alleged period of non-compliance, the aerial patrol records submitted by OPS simply show that FHR performed the aerial patrols within the requisite intervals. OPS has presented no other evidence demonstrating that FHR failed to maintain the pipeline right-of-way condition at the location east of County Road Z from January 1, 2019, through August 14, 2019, at a level that was not appropriate for aerial patrolling.

For the second location, in support of its claim that it observed excessive vegetation cover at the right-of-way, OPS submitted a photograph taken of mile post 182, near Stevens Point, Wisconsin, between Wisconsin River and West River Drive. Respondent contends that the photograph shows a “visible line marker and ample sky, suggesting that the right-of-way could be seen by the pilot performing an aerial patrol at this location.”⁶ However, I disagree. While 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. Respondent further contends that while the aerial patrol records tended to show that the right-of-way was clear because of the lack of reported excessive vegetation cover, they also showed that the pilot patrolling the pipeline was attentive to reporting vegetation conditions when they were present.⁷ Without discrediting the pilot for his attention to and reporting of vegetation conditions near and along the right-of-way at the location roughly 0.2 miles south of the location at issue, such evidence is unpersuasive to the location at issue for this instance of violation.

Accordingly, after considering all of the evidence, I find that Respondent violated 49 C.F.R. § 195.412(a) by failing in one instance 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. The Assessment of Penalty below will reflect a reduction to account for only one of the two alleged instances of violation having been proven.

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.⁸

In determining the amount of a civil penalty under 49 U.S.C. § 60122 and 49 C.F.R. § 190.225, I

⁶ Response, at 8.

⁷ Response, at 9.

⁸ These amounts are adjusted annually for inflation. *See* 49 C.F.R. § 190.223.

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 its ability to continue doing business; the good faith of Respondent in attempting to comply with the pipeline safety regulations; and self-disclosure or actions to correct a violation prior to discovery by PHMSA. 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. The Notice proposed a total civil penalty of \$38,300 for the violations cited above.

Item 1: The Notice proposed a civil penalty of \$19,000 for Respondent's violation of 49 C.F.R. § 195.403(b)(1) for failing to review with personnel, during calendar year 2016, their performance in meeting the objectives of FHR's emergency response training program. Respondent did not contest the allegation of violation but argued the penalty should be reduced based on the culpability penalty assessment criterion because the company discovered and corrected the violation before it was discovered by PHMSA. Respondent also argued that pipeline safety was minimally affected during the period after the 2016 review interval had passed and that the duration of the violation was four months, and not the two and half years cited in the Violation Report. Respondent further argued that based on PHMSA's Pipeline Safety Enforcement Procedures (Enforcement Procedures)⁹ and the Department of Transportation's regulations in 49 CFR Part 5 (now rescinded), PHMSA should further reduce the penalty assessment.

With regard to culpability argument, FHR contended that upon learning that the company had missed the required emergency response training review in 2016, it took prompt action to conduct the required review in April 2017.¹⁰ In support of its contention, Respondent provided a work order demonstrating that the emergency response training review was completed on April 25, 2017.¹¹ Respondent also asserted that since missing the required review in 2016, it has since conducted the emergency response training reviews at the requisite intervals pursuant to § 195.403(b)(1). The Notice and evidence support this position by showing that FHR completed the required review for calendar year 2017. Moreover, the record shows Respondent performed two emergency response training reviews in 2017. While Respondent missed the required review for calendar year 2016, it completed four emergency response training reviews in the four years from 2014 to 2017, which is the required amount of reviews for that period. Respondent's decision to perform a review in April 2017, and then a subsequent review in December 2017, demonstrates that Respondent took documented action in April 2017 to correct a non-compliance before PHMSA discovered the violation. Having considered the arguments raised by Respondent, I find that FHR found the non-compliance, took documented action to address the cause of the non-compliance, and corrected the non-compliance before PHMSA learned of the violation. As such, I find a reduction in penalty is warranted under the culpability criterion.

⁹ PHMSA, Pipeline Safety Enforcement Procedures, at § 3.1.1.4 (Sept. 15, 2020), available at <https://www.phmsa.dot.gov/pipeline/enforcement/pipeline-enforcement-procedures>.

¹⁰ Response, at 2.

¹¹ Response, Attachment 1.

With regard to Respondent's additional arguments, pipeline safety being minimally affected has already been considered under the gravity criterion.¹² Additionally, while FHR noted that it had remedied the non-compliance in April 2017, four months after the non-compliance occurred, this does not serve to change the penalty amount, as the duration of the violation remains greater than 10 days for penalty assessment purposes. As for Respondent's citation to PHMSA's Enforcement Procedures, the purpose of those procedures is to provide PHMSA personnel with guidance on implementation of PHMSA's enforcement program. The Enforcement Procedures do not bind PHMSA to any particular course of action and do not mandate that PHMSA consider any penalty assessment criteria other than those required by statute and regulation.¹³ Furthermore, the provisions of 49 CFR Part 5 cited by Respondent have been rescinded. Even before they were rescinded, they did not create any right or benefit, substantive or procedural, enforceable at law or in equity to any party.¹⁴ Accordingly, neither the Enforcement Procedures nor the rescinded Part 5 regulations require further reduction to the civil penalty.

Accordingly, having reviewed the record and the assessment criteria, and based upon a finding that a culpability credit is warranted, the civil penalty assessed is reduced to \$0 for the violation of 49 C.F.R. § 195.403(b)(1).

Item 3: The Notice proposed a civil penalty of \$19,300 for Respondent's alleged violation of 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. Respondent requested that the penalty be eliminated consistent with statutory factors, as well as PHMSA's Enforcement Procedures and the Department of Transportation's regulations in 49 CFR Part 5.

As discussed above, I withdrew the instance of violation associated with the right-of-way east of County Road Z in Pepin County, Wisconsin, which results in a reduction to the proposed civil penalty. As for the remaining instance of violation associated with the right-of-way at mile post 182, with respect to the nature and circumstances of the violation, inspection the surface conditions on or adjacent to each pipeline right-of-way is a routine pipeline maintenance activity. With respect to gravity, the civil penalty assessment already considered that pipeline safety was minimally affected. With respect to culpability and good faith, Respondent's failure to inspect the surface conditions on or adjacent to the right-of-way at mile post 182 was not consistent with the purpose of the regulation, which is an added means of detecting threats and monitoring and minimizing the risk of a pipeline failure. Furthermore, nothing in the record would indicate that the proposed civil penalty amount would impact Respondent's ability to continue in business. Respondent has not presented any information or arguments that would warrant a reduction in the civil penalty amount proposed in the Notice for the one remaining instance of violation. Finally, for the reasons discussed under Item 1, the penalty will not be further reduced based on the PHMSA Enforcement Procedures or the Part 5 regulations. Accordingly, having reviewed the record and considered the assessment criteria, I assess Respondent a reduced civil penalty of

¹² Violation Report, at 8.

¹³ 49 U.S.C. 60122; 49 CFR § 190.225.

¹⁴ See Enforcement Procedures, Section 3, page 1; 86 Fed. Reg. 17,292 (Apr. 2, 2021); and 49 CFR § 5.111 (2020).

\$19,000 for the one instance of violation of 49 C.F.R. § 195.412(a).

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 **\$19,000**.

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 (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.

WARNING ITEMS

With respect to Items 2, 4 and 5, the Notice alleged probable violations of Part 195, but identified them as warning items pursuant to § 190.205. The warnings were for:

49 C.F.R. § 195.410(a)(1) (**Item 2**) — Respondent's alleged failure to maintain line markers as required at certain locations in Wisconsin. PHMSA observed a lack of sufficient line markers at two locations so that the location of the pipeline could be accurately known.

49 C.F.R. § 195.428(d) (**Item 4**) — Respondent's alleged failure to complete the annual overfill protection system inspection for Tank 541 at the Milwaukee Terminal in 2015; and

49 C.F.R. § 195.452(l)(1)(ii) (**Item 5**) — Respondent's alleged failure to maintain records of the decisions and analysis for the periodic evaluation of pipeline integrity in 2018.

If OPS finds a violation of any of these items in a subsequent inspection, Respondent may be subject to future enforcement action.

Under 49 C.F.R. § 190.243, Respondent may submit a Petition for Reconsideration of this Final Order to the 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, no later than 20 days after receipt of service of the

Final Order by Respondent. Any petition submitted must 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. The other terms of the order, including any corrective action, remain in effect unless the Associate Administrator, upon request, grants a stay. 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.

August 23, 2021

Alan K. Mayberry
Associate Administrator
for Pipeline Safety

Date Issued