

August 1, 2012

Mr. Bob Steidel
Director
Department of Public Utilities
City of Richmond
400 Jefferson Davis Highway
Richmond, VA 23224

Re: CPF No. 1-2011-0001

Dear Mr. Steidel:

Enclosed please find the Final Order issued in the above-referenced case. It makes a finding of violation and assesses a reduced civil penalty of \$40,000. 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 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. Michael Bellman, Deputy Director, Gas & Light, City of Richmond Dept. of Public Utilities - 400 Jefferson Davis Hwy, Richmond, VA 23224
Mr. Alan Mayberry, Deputy Associate Administrator for Field Operations, OPS
Mr. Byron Coy, Director, Eastern Region, OPS

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)	
)	
City of Richmond,)	CPF No. 1-2011-0001
)	
Respondent.)	
)	

FINAL ORDER

Between February 24, 2009, and September 14, 2010, pursuant to 49 U.S.C. §§ 60106 and 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 a safety inspection of the pipeline facilities and records of the City of Richmond, Virginia (Respondent). Respondent operates approximately 2,000 miles of natural gas distribution pipelines with approximately 92,500 services.¹

As a result of the inspection, the VA-SCC notified the Director, Eastern Region, OPS (Director) of certain probable violations of the gas pipeline safety regulations in 49 C.F.R. Part 192. After reviewing the notification, the Director issued to Respondent, by letter dated May 9, 2011, a Notice of Probable Violation and Proposed Civil Penalty (Notice). In accordance with 49 C.F.R. § 190.207, the Notice alleged that Respondent committed one violation and proposed a civil penalty of \$59,000 for the alleged violation. In accordance with § 190.205, the Notice also included several warning items, which advised Respondent to correct other probable violations.

City of Richmond responded to the Notice by letter dated June 8, 2011 (Response). Respondent did not contest the alleged violation, but requested a hearing to discuss the proposed civil penalty. In accordance with 49 C.F.R. § 190.211, a hearing was held on January 18, 2012, by teleconference before the Presiding Official from the Office of Chief Counsel, PHMSA. After the hearing, Respondent provided a written submission dated February 9, 2012 (Closing).

FINDING OF VIOLATION

In its Response and at the hearing, City of Richmond did not contest the allegation in **Item 3** of the Notice that it had committed a violation of 49 C.F.R. § 192.465(a), which states:

¹ System information for calendar year 2011 is reported pursuant to 49 C.F.R. § 191.11.

§ 192.465 External corrosion control: Monitoring.

(a) Each pipeline that is under cathodic protection must be tested at least once each calendar year, but with intervals not exceeding 15 months, to determine whether the cathodic protection meets the requirements of § 192.463. However, if tests at those intervals are impractical for separately protected short sections of mains or transmission lines, not in excess of 100 feet (30 meters), or separately protected service lines, these pipelines may be surveyed on a sampling basis. At least 10 percent of these protected structures, distributed over the entire system must be surveyed each calendar year, with a different 10 percent checked each subsequent year, so that the entire system is tested in each 10-year period.

The Notice alleged that Respondent violated 49 C.F.R. § 192.465(a) by failing to survey separately protected short sections of mains to determine whether cathodic protection met the applicable requirements. Specifically, the Notice alleged that Respondent's gas pipeline system is primarily plastic pipe with approximately 2,406 steel drips considered to be "separately protected short sections of mains." The Notice alleged that Respondent failed to survey cathodic protection on the steel drips at a sampling rate of 10% per year starting in 1994 when they were installed.

The Notice recognized that following the VA-SCC inspection in 2009, City of Richmond remediated the violation by surveying all of the steel drips. As a result of those surveys, Respondent scheduled approximately 260 steel drips for additional cathodic protection or removal.

In its Response and at the hearing, Respondent did not contest the allegation of violation, but presented information in support of reducing the proposed civil penalty as discussed below in the Assessment of Penalty section.

Accordingly, based upon a review of the evidence, I find that Respondent violated 49 C.F.R. § 192.465(a) by failing to survey separately protected short sections of mains to determine the adequacy of cathodic protection.

This finding of violation will be considered a prior offense 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.²

² Subsequent to the actions that gave rise to this case, the Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011 increased the civil penalty liability for a violation 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. *See* Pub. L. No. 112-90, § 2(a), 125 Stat. 1905.

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 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 subsequent damages, and such other matters as justice may require.

Item 3: The Notice proposed a civil penalty of \$59,000 for Respondent's violation of 49 C.F.R. § 192.465(a). City of Richmond violated § 192.465(a) by failing to survey the cathodic protection on approximately 2,406 steel drips across its gas pipeline system from 1994 to 2009.

Nature, circumstances, and gravity of the violation, including adverse impact on the environment. OPS explained during the hearing that the proposed civil penalty was based on the number and duration of the violations and their gravity. Specifically, there were a high number of drips that were not surveyed for a long period of time, and the drips were located in a densely populated area where a pipeline failure could have significant consequences.

At the hearing, Respondent argued the drips were not located in densely populated areas, but rather were located primarily in counties outside of the urban city area. On this point, the VA-SCC agreed that at least the majority of drips were in suburban areas.

PHMSA may assess an elevated civil penalty for a violation that occurs in a densely populated area or "high consequence area" (HCA) due to the gravity of the violation. The proposed civil penalty in this case was based, in part, on the violation allegedly occurring in a densely populated HCA.³ I note, however, that the Notice did not include relevant information about the location of the violation, and while the Violation Report indicated that the steel pot drips were in the City of Richmond's "metropolitan area," it did not indicate the extent to which the violation occurred either in the urban center or in the less-populated surrounding areas. In the absence of additional information to justify an elevated penalty for a violation in an HCA, I find the penalty should be reduced.

The City also argued there was minimal if any impact on the environment by the violation, explaining that in addition to the steel drips being located outside of densely populated city areas, more than 90% of the steel drips when surveyed in 2009 still had adequate cathodic protection. Although Respondent did not disagree that the system experienced a number of leaks, Respondent argued the leaks represented a relatively insignificant safety threat because none of them met the threshold for having to be repaired under the regulations.⁴

The Violation Report included statements concerning the potential impact to public safety posed by the violation, but did not state explicitly that the violation caused an incident or other adverse

³ Pipeline Safety Violation Report, at 4 (May 9, 2011) (Violation Report).

⁴ Closing at 3. See 49 C.F.R. § 192.703(c) (requiring gas pipeline operators to repair "hazardous leaks").

impact to the environment. At the hearing, OPS indicated the proposed penalty was based, in part, on the significant consequences that *could have* happened. For these reasons, I find there were minimal, if any, actual impacts on the environment, but since actual impacts were not a factor in the proposed civil penalty, this consideration does not affect the penalty.

Respondent argued further that PHMSA should not consider the *potential* impacts on the environment, claiming there is no legislative intent for the agency to consider potential impacts under 49 U.S.C. § 60122. Rather, Respondent argued, PHMSA should only consider the *actual* impacts, which were minimal, as noted above.

In considering “the nature, circumstances, and gravity of the violation, including adverse impact on the environment,” PHMSA has broad discretion to consider not only the actual impacts to person, property and the environment, but also the potential impacts that could result from the operator’s failure to comply with a safety standard. Potential impacts are relevant to the gravity of the violation. As explained in a previous final order:

PHMSA sets civil penalties by applying the statutory assessment criteria on a case-by-case basis. Given the unique facts of each offense, operating conditions of each pipeline, an operator’s individual compliance history, 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 some variance in the penalties assessed for different operators’ violation of the same code section.⁵

PHMSA’s consideration of potential safety and environmental impacts is also consistent with the agency’s regulatory approach to preventing the potential for certain risks to public safety, property, and the environment. For example, operators of natural gas pipelines are required to identify “potential threats” to pipeline integrity and must take preventative and mitigative measures based on those threats to prevent a pipeline failure.⁶

Accordingly, I find it is appropriate for PHMSA to consider the potential impacts of the violation in the assessment of a civil penalty.

In the present case, Respondent’s failure to regularly test the cathodic protection of such a large number of steel drips for a long period of time represented a significant safety threat that had the potential to result in a pipeline incident in or near residential areas. For these reasons, I find the nature, circumstances, and gravity support the assessment of a civil penalty.

⁵ Belle Fourche Pipeline Co., Final Order, CPF No. 5-2009-5042, at 20, 2011 WL 7006607 (Nov. 21, 2011). *See also* ExxonMobil Pipeline Co., Final Order, CPF No. 5-2009-5004, at 3, 2011 WL 4351593 (Jul. 11, 2011) (considering proximity to a sole source drinking water supply and the potential for serious consequences).

⁶ 49 C.F.R. § 192.917. *See also* §§ 192.935 and 192.1007.

Degree of Respondent's culpability. When evaluating an operator's culpability, I determine the extent to which Respondent deserves the blame for the violation that occurred.⁷ In this instance, as the operator of the facility, City of Richmond is responsible for compliance and therefore is determined to be culpable for the violation. There is no basis in the record to find a lesser degree of culpability on the part of Respondent for the violation.

History of Respondent's prior offenses. Respondent argued the civil penalty should not be based on any history of prior violations, because at the time of the Notice, the City had not been issued a final order since 2004. During the hearing, OPS explained that the proposed penalty was not based on any prior violations. Therefore this consideration does not affect the penalty.

Good faith of Respondent in attempting to comply with the pipeline safety regulations. Respondent requested that the civil penalty be reduced to reflect the aggressive corrective action the City took immediately following identification of the violation during the VA-SCC's inspection in 2009. Respondent explained that following the inspection, the City immediately surveyed 100% of the steel drip structures in the pipeline system over a 10-month period. The City explained this action was taken even though the regulation would only require surveying at a rate of 10% per year. Respondent took other action as well, including providing additional cathodic protection to 206 steel drips and removing 56 drips that were located in areas that were hard to access. The City stated that it has spent \$183,802, not including paving costs, to complete the corrective measures, an amount far exceeding the proposed penalty of \$59,000. Because the City "went beyond [the] requirements" in surveying all of the steel drips within a 10-month period, Respondent argued the penalty should be reduced.⁸

Respondent's aggressive corrective action is acknowledged. However, PHMSA does not generally find cause to reduce a civil penalty for corrective action taken after the operator has been notified of the deficiency through a compliance inspection.⁹ PHMSA considers operators to have an affirmative obligation to comply with the pipeline safety regulations, particularly when a compliance issue has already been brought to their attention.

Given the long period of time in which the steel drips had not been surveyed, it was not unreasonable to expect the operator to complete a survey of all of the drips at an aggressive schedule. In fact, had Respondent not performed such a survey, the Agency would have been justified in ordering a complete survey rather than to allow another 10 years for the drips to be surveyed at a rate of 10% per year. For these reasons, I find the cost incurred by Respondent to remediate the violation does not warrant reducing the proposed civil penalty.

Any effect that the penalty may have on Respondent's ability to continue doing business. Finally, Respondent requested that the civil penalty be reduced because it would have an effect on its

⁷ Belle Fourche, 5-2009-5042, at 19.

⁸ Response at 2.

⁹ Air Products and Chemicals, Inc., Final Order, CPF No. 4-2009-1008, at 3, 2009 WL 5538650 (Dec. 1, 2009). See also Chevron Pipe Line Co., Final Order, CPF No. 4-2005-8008, at 4, 2008 WL 902913 (Mar. 19, 2008) (finding that corrective action taken by an operator after the OPS/PHMSA inspection did not justify reducing the proposed penalty).

ability to perform pipeline operations and maintenance activities. Specifically, Respondent explained that as a municipal operator, it is bound by city code requirements pertaining to budgeted funds. In other words, Respondent is budgeted for operations and maintenance expenses, but not fines. Therefore, Respondent explained, payment of the proposed penalty would come out of its operations and maintenance budget and would impact its ability to perform pipeline repairs and maintenance.

In general, pipeline operators may prove that a proposed fine will cause undue financial hardship by submitting certified financial data.¹⁰ In this case, Respondent did not submit financial data, but asked PHMSA to consider the operator's unique financial status as a municipal operator.

PHMSA treats public and private operators equally when it concerns the assessment of civil penalties. Therefore, the agency does not automatically factor an operator's status as a municipality when assessing a civil penalty. As explained in a previous final order, "to ensure public safety, any company, municipality, or tribal entity that is in the business of transporting hazardous products by pipeline must have sufficient resources to operate in a manner consistent with applicable regulations."¹¹

Since Respondent's status as a municipality alone does not warrant reducing the penalty, and the operator has not proven through financial data that the proposed civil penalty would cause undue financial hardship impacting its ability to continue doing business, I find there is insufficient justification to reduce the penalty.

Accordingly, having reviewed the record and considered the assessment criteria, including the absence of sufficient documentation that the violation occurred in an HCA, I assess Respondent a reduced civil penalty of **\$40,000** for violation of 49 C.F.R. § 192.465(a).

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 \$40,000 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.

¹⁰ Jayhawk Pipeline, LLC, Final Order, CPF No. 3-2008-5006, at 5, 2010 WL 5761106 (Dec. 16, 2010).

¹¹ Navajo Nation Oil & Gas Co., Final Order, CPF No. 4-2006-5029, at 12, 2010 WL 1323383 (Mar. 17, 2010).

WARNING ITEMS

With respect to Items 1, 2 and 4, the Notice alleged probable violations of Part 192 and specifically considered them to be warning items. The warnings were for:

§ 192.707(d)(2) (**Item 1**) – Respondent’s alleged failure to include on two line markers a telephone number where it could be reached at all times. Respondent has taken action to correct the telephone numbers.

§ 192.725(b) (**Item 2**) – Respondent’s alleged failure to pressure test a service line riser that had been temporarily disconnected. Respondent has taken corrective action by performing an air test of the line.

§ 192.355(b)(2) (**Item 4**) – Respondent’s alleged installation of a regulator (meter) directly underneath a house window, rather than in a location where venting gas would escape freely into the atmosphere and away from any opening into the building. Respondent has taken corrective action by installing additional piping to vent the gas away from the window and also by revising its written procedures to prevent future occurrences.

If OPS finds one or more of these issues in a subsequent inspection, Respondent may be subject to future enforcement action.

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, D.C. 20590, no later than 20 days after receipt of the Final Order by the Respondent. Any petition submitted must contain a 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. 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.

Jeffrey D. Wiese
Associate Administrator
for Pipeline Safety

Date Issued