U.S. Department
of Transportation

Pipeline and Hazardous Materials
Safety Administration

1200 New Jersey Ave., SE
Washington, DC 20590

MAY 1 8 2009

Mr. Gary W. Pruessing
President
ExxonMobil Pipeline Company
P.O. Box 2220
Houston, TX 77252-2220

Re: CPF No. 4-2004-5004

Dear Mr. Pruessing:

Enclosed is the Final Order issued in the above-referenced case. It withdraws one of the allegations of violation, makes a finding of violation on another, and assesses a reduced civil penalty of $25,000. The penalty payment terms are set forth in the Final Order. This enforcement action closes automatically upon payment. Your receipt of the Final Order constitutes service of that document under 49 C.F.R. § 190.5.

Thank you for your cooperation in this matter.

Sincerely,

William H Cook
for

Jeffrey D. Wiese
Associate Administrator
for Pipeline Safety

Enclosure

cc: R.M. Seeley, Director, Southwest Region, PHMSA
Candice Frembling Dykhuizen, Esq., Law Department, ExxonMobil

<u>CERTIFIED MAIL – RETURN RECEIPT REQUESTED</u> [7005 1160 0001 0047 7100]

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

In the Matter of	)	
	)	
ExxonMobil Pipeline Company,	)	**CPF No. 4-2004-5004**
	)	
Respondent.	)	
	)	

FINAL ORDER

Pursuant to 49 U.S.C. § 60117, a representative of the Research and Special Programs Administration (RSPA)[1], Office of Pipeline Safety (OPS), conducted an investigation of an August 19, 2002 accident involving the release of approximately seven barrels of crude oil from a pipeline operated by ExxonMobil Pipeline Company (ExxonMobil or Respondent) at its Raceland station in Lafourche Parish, Louisiana (Accident).[2] Respondent operates four pipeline systems that transport crude oil into and out of the Raceland station.[3] As a result of the investigation, the Director, Southwest Region, OPS (Director), issued to Respondent, by letter dated March 9, 2004, a Notice of Probable Violation and Proposed Civil Penalty (Notice). In accordance with 49 C.F.R. § 190.207, the Notice proposed finding that Respondent had violated 49 C.F.R. §§ 195.403(a) and 195.406(b) and proposed assessing a civil penalty of $110,000 for the alleged violations.

Respondent responded to the Notice by letter dated April 8, 2004 (Response). Respondent contested both of the allegations, offered information in explanation thereof, sought elimination or mitigation of the proposed penalty, and requested a hearing. A hearing was held on October 5, 2004, in Houston, Texas. Following the hearing, Respondent provided additional information by letter dated October 29, 2004 (Closing). A second hearing was held on March 29, 2007, in Houston, Texas. By letter dated April 30, 2007, Respondent provided a summary of the information that it had presented at the 2007 hearing (Summary).

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[1] On November 30, 2004, the Norman Y. Mineta Research and Special Programs Improvement Act, Pub. L. No. 108-426, 118 Stat. 2423, created the Pipeline and Hazardous Materials Safety Administration (PHMSA) and transferred the authority of RSPA exercised under chapter 601 of title 49, United States Code, to the Administrator of PHMSA. *See also* 70 Fed. Reg. 8299, 8301-8302 (2005) (delegating authority to the Administrator of PHMSA).

[2] Respondent reported the Accident to the National Response Center (NRC). NRC Incident Report No. 620402.

[3] The two incoming systems are known as the Empire and Grand Isle pipelines. The two outgoing systems are known as the Anchorage and St. James pipelines.

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. § 195.403(a), which states:

> **§ 195.403 Emergency response training.**
> (a) Each operator shall establish and conduct a continuing training program to instruct *emergency response personnel* to:
> (1) Carry out the *emergency procedures* established under 195.402 that relate to their assignments;
> (2)...
> (3) Recognize conditions that are likely to cause emergencies, predict the consequences of facility malfunctions or failures and hazardous liquids or carbon dioxide spills, and take appropriate corrective action. [Emphasis added.]

The Notice alleged that Respondent violated § 195.403(a) by failing to train one of its contract employees[4] to recognize conditions that were likely to cause emergencies, to predict the consequence of facility malfunctions or failures and hazardous liquid spills, and to take appropriate corrective action. Specifically, the Notice alleged that on August 19, 2002, the employee closed Station Valve 1165 on an active crude oil pipeline at the Raceland station, instead of closing the adjacent firewall drain valve that he had been instructed to close. The firewall drain valve had been opened earlier that day, apparently to drain water from one area at the Raceland station to another. When the employee closed Station Valve 1165, Respondent's pipeline systems were subjected to an overpressure condition, which resulted in the release of approximately seven barrels of crude oil from three different locations at the station.

In its Response, ExxonMobil did not contest that a release occurred or that the contract employee closed Station Valve 1165 instead of the adjacent firewall drain valve. Respondent argued, however, that the cited regulation did not apply to a contract employee because he was not authorized to operate a regulated valve. Respondent also argued that the contractor was not being utilized in an emergency response capacity and that therefore there was no requirement to train the contractor's employees to have the skills described in § 195.403(a)(3).

Before discussing the merits of the allegation, I will clarify that the regulatory requirement cited in the Notice was not the version in place at the time of the Accident. The regulation in place at the time of the Accident stated:

> **§ 195.403 Training.**
> (a) Each operator shall establish and conduct a continuing training program to instruct *operating and maintenance personnel* to:
> (1) Carry out the *operating and maintenance, and emergency procedures* established under § 195.402 that relate to their assignments;
> (2)...

[4] The individual was an employee of Danos & Curole, a company hired by ExxonMobil to provide various services at its facilities.

(3) Recognize conditions that are likely to cause emergencies, predict the consequences of facility malfunctions or failures and hazardous liquid or carbon dioxide spills, and to take appropriate corrective action. [Emphasis added.]

The regulation in place at the time of the Accident is controlling in this case, not the one in effect at the time the Notice was issued. At the time of the Accident, § 195.403 applied to operating and maintenance personnel, not emergency personnel.[5] Neither Respondent nor OPS raised this disparity until long after the Notice was issued. As a result, the discussion and arguments presented by Respondent and OPS focused primarily on whether the contractor had emergency response duties. During the March 29, 2007 hearing, OPS and Respondent agreed that the version of the regulation in place at the time of the Accident, applicable to operating and maintenance personnel, should control.[6]

To determine whether Respondent violated the version of § 195.403(a) that was in effect at the time of the Accident, the first question is whether the contractor was, in any manner, performing the duties of operating and maintenance (O&M) personnel. If so, did the contractor's employees receive the training required by the regulation?

Respondent argued that the contractor was not authorized to operate a DOT-regulated valve[7] and therefore the company could not be held responsible for failing to train him to perform duties that were not O&M related. More broadly, the company argued that its contractor was hired to perform "general housekeeping, vegetation control, painting and building maintenance.[8]" Such tasks do not appear to include operation and maintenance of Respondent's pipeline system. Since there is no information in the record showing that Respondent's contractor was in fact performing O&M duties, I can only conclude that ExxonMobil was not required to provide training to the contractor on the topics set out in § 195.403(a)(3).

Accordingly, I find that there is insufficient evidence in the record to demonstrate that Respondent's contractor was performing the duties of O&M personnel on its pipeline facilities. Based upon the foregoing, I order that this allegation of violation be withdrawn.

Item 2: The Notice alleged that Respondent violated 49 C.F.R. § 195.406(b), which states:

§ 195.406 Maximum operating pressure.

(a)...

(b) No operator may permit the pressure in a pipeline during surges or other variations from normal operations to exceed 110 percent of the operating

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[5] RSPA amended Section 195.403 on August 27, 1999, with the passage of the Operator Qualification Final Rule, 64 Fed. Reg. 46853, 46866. Effective October 28, 2002, the amendment moved the requirement that pipeline operators establish and conduct training of operating and maintenance personnel from 195.403(a). Training requirements for operating and maintenance personnel are now addressed in Part 195, Subpart G, Qualification of Pipeline Personnel.

[6] *See also,* Closing at 3. Respondent stated that "the actions that are the subject of this NOPV should be held to the standards in place at the time at which they were carried out, on August 19, 2002."

[7] Response at 3.

[8] Respondent's March 29, 2007 Hearing Presentation, Ex. 3 at 1.

> pressure limit established under paragraph (a) of this section. Each operator must provide adequate controls and protective equipment to control the pressure within this limit.

The Notice alleged that Respondent violated § 195.406(b) by permitting the pressure in its pipeline system to exceed 110 percent of the operating pressure limit established under § 195.406(a). Specifically, the Notice alleged that on August 19, 2002, the pressure at the Raceland station reached 500 psi, which is 165 percent of the operating pressure limit at that location.

In its Response, Respondent acknowledged that the Raceland station piping experienced a pressure surge in excess of 110 percent of the operating pressure limit. Respondent explained that the overpressure event occurred when a contract employee mistakenly closed Station Valve 1165, rather than a firewall drain valve. Respondent also argued that it did not authorize or anticipate the actions of its contractor and, therefore, that the alleged violation should be withdrawn. Although Respondent's contractor mistakenly closed the station valve, Respondent, as operator of the pipeline, is responsible for the company's compliance with the pipeline safety regulations. Respondent's reliance on a contractor does not negate this responsibility. To find otherwise would permit pipeline operators to shield themselves from their obligation to comply with the Pipeline Safety Laws simply by contracting out their functions. Neither the Pipeline Safety Laws nor regulations allow such a nullification of operator responsibility.[9]

Respondent also argued that its pipeline system was designed and installed with adequate controls and protective equipment to control pressure within established limits but that such equipment could not function as designed due to the valve closure. While this may be accurate, the violation simply alleged that ExxonMobil failed to adequately "control" the pressure within the operating pressure limits.

After considering all the evidence, I find that Respondent violated 49 C.F.R. § 195.406(b) by permitting the pressure in its pipeline system at the Raceland station to exceed 110 percent of the operating pressure limit established under § 195.406(a).

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 a civil penalty not to exceed $25,000 per violation for each day of the violation, up to a maximum of $500,000 for any related series of violations.[10]

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[9] *See, e.g., In the Matter of Williams Gas Pipeline–Transco*, Final Order at 4, CPF No. 1-2005-1007 (July 30, 2007), 2007 WL 2475903; *In the Matter of Koch Pipelines, Inc.*, Final Order at 7, CPF No. 32506 (April 28, 1998), 1998 WL 35166464.

[10] Subsequent to the accident that gave rise to this case, the Pipeline Safety Improvement Act of 2002 (PSIA), Pub. L. No. 107-355, § 8(b)(1), 116 Stat. 2992, increased the civil penalty liability for violating a pipeline safety standard

49 U.S.C. § 60122 and 49 C.F.R. § 190.225 require that, in determining the amount of the civil penalty, I 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; the Respondent's ability to pay the penalty 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 subsequent damages, and such other matters as justice may require. The Notice proposed a total civil penalty of $110,000 for the violations.

Notice Item 1 proposed a civil penalty of $10,000 for violation of 49 C.F.R. § 195.403(a), for Respondent's alleged failure to properly train a contract employee to recognize conditions that were likely to cause emergencies, to predict the consequence of facility malfunctions or failures and hazardous liquid spills, and to take appropriate corrective action. As discussed above, the record does not contain sufficient evidence to show that Respondent violated the regulation at the time of the Accident. Accordingly, I withdraw the proposed penalty for Item 1.

Notice Item 2 proposed a civil penalty of $100,000 for Respondent's alleged violation of 49 C.F.R. § 195.406(b), caused when Respondent permitted the pressure in its pipeline system at the Raceland station to exceed 110 percent of the operating pressure limit established under § 195.406(a). Respondent sought mitigation or elimination of the proposed civil penalty.

1. Maximum Penalty.

Before reaching Respondent's arguments for reduction or elimination of the proposed penalty, I will address the issue of the maximum civil penalty applicable to this violation. In Respondent's Summary, submitted after the 2007 hearing, Respondent argued, for the first time, that the maximum penalty applicable to the violation was $25,000, not $100,000. Respondent is correct. At the time of the August 19, 2002 violation, 49 U.S.C. § 60122(a)(1) provided that a person found to have violated a pipeline safety regulation was liable for a civil penalty of not more than $25,000 per violation for each day the violation continued.[11] The proposed civil penalty exceeded the statutory maximum per-day penalty applicable at the time the violation took place. Therefore, the penalty for this one-day violation cannot exceed $25,000.

2. Respondent's Arguments for Mitigation or Elimination of the Penalty.

In its Response, ExxonMobil argued that the proposed penalty should be eliminated or mitigated on the basis of several "unique circumstances" related to the Accident. Respondent argued that such circumstances, analyzed in light of the penalty assessment considerations in 49 C.F.R. § 190.225, justify the elimination or mitigation of the proposed penalty.[12]

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to $100,000 per violation for each day of the violation up to a maximum of $1,000,000 for any related series of violations.

[11] *Id.* The PSIA was enacted on December 17, 2002.

[12] Response at 4.

First, Respondent argued that OPS and the Louisiana Department of Natural Resources had inspected the pipeline facilities numerous times, and that ExxonMobil had demonstrated its commitment to operate safely. The occurrence of past inspections and Respondent's unexplained assertion that it somehow "demonstrated" a commitment to safety does not warrant elimination or reduction of the proposed penalty. Respondent is responsible for compliance with § 195.406(b) at all times. ExxonMobil violated § 195.406(b) by exceeding the maximum operating pressure at the time of the Accident.

Second, Respondent argued that it quickly responded to and mitigated the overpressure situation, and later implemented corrective actions to prevent a recurrence. Respondent explained that it had contained the spill and that there was never a safety hazard to the environment or the public. PHMSA expects that all operators, at a minimum, will quickly respond to spills and prevent or mitigate any resulting harm. Respondent's actions after the overpressure violation do not warrant elimination or reduction of the proposed penalty. Here again, Respondent is responsible for compliance with § 195.406(b) at all times. PHMSA disagrees that there was never a safety hazard to the environment or the public. Any overpressure condition or unplanned release of hazardous liquid presents safety hazards.

Third, Respondent argued that the overpressure event was caused by a contractor mistake that occurred after ExxonMobil had directed the contractor to close an unregulated drain valve. While the contractor's action appears to have been unintentional, additional facts relating to the nature, circumstances and gravity of the violation weigh against a reduction or elimination of the civil penalty.

As discussed above, Respondent is responsible at all times for the acts and omissions of its contractors. The contractor who closed Station Valve 1165 was working unsupervised inside Respondent's pipeline facility, in close proximity to active pipelines and valves. Though Respondent argued that the contractor's duties did not include operating regulated valves, Respondent provided the contract employee with a key that he subsequently used to unlock the regulated valve. If the contractor's training and duties did not include the operation of regulated valves, Respondent should not have provided the contract employee with a key that permitted him to gain access to and operate a critical valve.

Finally, during both hearings, Respondent argued that the proposed penalty was excessive in light of two other "similar" enforcement cases in which PHMSA found violations of § 195.406(b).[13] When the former $25,000 per day cap is taken into account, the penalties assessed in the cases cited by Respondent actually exceed the maximum penalty in this case because the other cases involved repeated violations over multiple days. Nevertheless, I will address Respondent's argument regarding similarities of penalties. PHMSA proposes and assesses civil penalties on a case-by-case basis, based on the facts and circumstances presented in each case and the assessment criteria set forth in 49 C.F.R. § 190.225. Respondent's citation of past Final Orders that it claims are somehow "similar" to the present case does not acknowledge the reality

[13] Respondent's October 5, 2004 Hearing Presentation, Ex. 3 at 4. Respondent cited *In the Matter of Alyeska Pipeline Service Company*, Final Order, CPF No. 5-2000-5006, December 31, 2003, 2003 WL 25429833; and *In the Matter of Colonial Pipeline Company*, Final Order, CPF No. 2-2000-5001, April 23, 2002.

that each case presents unique facts. The unique facts of each case, even in those involving similar violations, often have a significant impact on the penalties proposed and eventually assessed.

Moreover, even if the present case were similar to past ones, the Supreme Court has held that absent a statutory provision to the contrary, "uniformity of sanctions for similar violations" is not required.[14] Neither the Pipeline Safety Laws nor the implementing regulations require uniformity of penalties for similar violations. Therefore, PHMSA is not legally required, nor would it be practicable, to consider the factual circumstances of every past case when proposing or assessing penalties. Respondent's argument that the proposed civil penalty is dissimilar to previous past cases does not support reduction or elimination of the penalty.

Accordingly, having reviewed the record and considered the assessment criteria, I assess Respondent a reduced total civil penalty of $25,000.

Payment of the civil penalty must be made within 20 days of service. Federal regulations (49 C.F.R. § 89.21(b)(3)) require this payment 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, OK 73125; (405) 954-8893.

Failure to pay the $25,000 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 United States District Court.

Under 49 C.F.R. § 190.215, Respondent has a right to submit a Petition for Reconsideration of this Final Order. The petition must be received within 20 days of Respondent's receipt of this Final Order and must contain a brief statement of the issue(s). The filing of the petition automatically stays the payment of any civil penalty assessed. However if Respondent submits payment for 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 shall be effective upon receipt.

William H Cate
for

Jeffrey D. Wiese
Associate Administrator
for Pipeline Safety

MAY 18 2009
Date Issued

[14] *See Butz v. Glover Livestock Commission Company, Inc.*, 411 U.S. 182, 186-87 (1973).