

November 15, 2019

Mr. Kelcy L. Warren
Chief Executive Officer
Energy Transfer, LP
8111 Westchester Drive
Dallas, Texas 75225

Re: CPF No. 4-2016-5011

Dear Mr. Warren:

Enclosed please find the Final Order issued in the above-referenced case. It withdraws two of the allegations of violation, makes other findings of violation, assesses a civil penalty of \$882,600, and specifies actions that need to be taken by Sunoco Pipeline, LP, to comply with the pipeline safety regulations. The penalty payment terms are set forth in the Final Order. When the civil penalty has been paid and the terms of the compliance order completed, as determined by the Director, Southwest Region, this enforcement action will be closed. Service of the Final Order by certified mail is effective upon the date of mailing, 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: Ms. Mary McDaniel, Director, Southwest Region, Office of Pipeline Safety, PHMSA
Mr. Todd Nardozi, Senior Manager - DOT Compliance, Energy Transfer, LP, 1300
Main Street, Houston, Texas 77002
Mr. Kevin Dunleavy, Esq., Chief Counsel, Sunoco Pipeline, LP, 3807 West Chester Pike,
Newtown Square, Pennsylvania 19073

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)

Sunoco Pipeline, LP,)
a subsidiary of Energy Transfer, LP,)

Respondent.)

CPF No. 4-2016-5011

FINAL ORDER

From May of 2014 through March of 2015, pursuant to 49 U.S.C. § 60117, representatives of the Pipeline and Hazardous Materials Safety Administration (PHMSA), Office of Pipeline Safety (OPS), conducted an on-site pipeline safety inspection of the Permian Express II (PEX II) pipeline being constructed by Sunoco Pipeline, LP (Sunoco or Respondent), from West Texas to a tank facility in Corsicana, Texas near the Gulf of Mexico.¹ Sunoco Pipeline, LP operates over 4,500 miles of crude oil, refined petroleum, and highly volatile liquids pipelines across several states between Texas and Massachusetts and is a subsidiary of Energy Transfer, LP.²

As a result of the inspection, the Director, Southwest Region, OPS (Director), issued to Respondent, by letter dated April 28, 2016, a Notice of Probable Violation, Proposed Civil Penalty, and Proposed Compliance Order (Notice).³ In accordance with 49 C.F.R. § 190.207, the Notice proposed finding that Sunoco had committed five violations of 49 C.F.R. Part 195 and proposed assessing a total civil penalty of \$1,278,100 for the alleged violations. The Notice also proposed ordering Respondent to take certain measures to correct two of the alleged violations.

Sunoco responded to the Notice by letter dated May 27, 2016 (Response). Sunoco contested the allegations and requested a hearing. A hearing was subsequently held on November 10, 2016, in Houston, Texas, before a PHMSA Presiding Official. At the hearing, Respondent was represented by counsel. Respondent provided additional written materials for the record prior to the hearing by letter dated October 31, 2016 (Pre-hearing submission) and following the hearing by letter dated December 12, 2016 (Post-hearing submission). The Director submitted a post-hearing recommendation on November 20, 2018.

¹ Permian Express II Pipeline Project, available at <http://sxlpipelineprojects.com/wp-content/uploads/2014/03/permian-factsheet-jan30-2014.pdf> (last accessed October 4, 2019).

² Pipeline Safety Violation Report (Violation Report), (April 27, 2016) (on file with PHMSA), at 1; Energy Transfer, LP website, available at <https://www.sunocologistics.com/> (last accessed October 4, 2019).

³ Notice of Probable Violation, Proposed Civil Penalty, and Proposed Compliance Order, CPF No. 4-2016-5011, (Notice)(April 28, 2016).

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. § 195.214, which states:

§ 195.214 Welding procedures.

(a) Welding must be performed by a qualified welder or welding operator in accordance with welding procedures qualified under section 5, section 12, Appendix A or Appendix B of API Std 1104 (incorporated by reference, see §195.3), or Section IX of the ASME Boiler and Pressure Vessel Code (ASME BPVC) (incorporated by reference, see §195.3). The quality of the test welds used to qualify the welding procedures must be determined by destructive testing.

(b) Each welding procedure must be recorded in detail, including the results of the qualifying tests. This record must be retained and followed whenever the procedure is used.⁴

The Notice alleged that Respondent violated 49 C.F.R. § 195.214 by failing to perform welding in accordance with a welding procedure qualified under section 5, section 12, Appendix A or Appendix B of API Std. 1104, or Section IX of the ASME Boiler and Pressure Vessel Code during the construction of the PEX II pipeline.⁵ Specifically, the Notice alleged that Sunoco performed welding using a new base material, X65 grade pipe, and that under API 1104 this change is an essential variable required welding procedure requalification which Respondent did not accomplish prior to commencing the welding.

In its Response and at the hearing, Sunoco disagreed that any violation had occurred. Sunoco acknowledged that the SP-332Sc-6G welding procedure specified by OPS in the Notice as the basis for the alleged violation dated October 6, 2012 (Version 1), pertained to welding grade X60 pipe to grade X65 pipe, not grade X65 to X65, but stated that there was a second version of welding procedure SP-332Sc-6G dated May 22, 2014, that was relevant to this Item and Item 2 (Version 2).⁶ Respondent further stated that there was also a third version of welding procedure SP-332Sc-6G dated November 7, 2014, that was relevant to the requalification issue in Item 3 (Version 3). Respondent stated that Version 2 had been used on the project, that it believed this procedure was properly qualified, and that the Version 1 procedure provided to the OPS inspector during the field inspection was erroneously provided by Respondent's personnel who were in charge of the construction project in the field.

Sunoco explained that the welding procedure originally provided to OPS, Version 1, references a legacy Procedure SPL-16-6G, dated November 9, 2007. Version 2 was developed from a different legacy procedure SPL-11-6G, dated November 26, 2003. Version 2 was designated for API 5L X-65 pipe, exclusively. Respondent provided records and other evidence showing that

⁴ This regulation was amended on January 23, 2017 (82 FR 7999). The version cited is the regulation that was in place at the time this proceeding commenced, not the amended version.

⁵ Both of these standards are incorporated by reference into Part 195 (see 49 C.F.R. § 195.3).

⁶ Post-hearing submission, at 5-6.

Version 2 uses the qualification testing results of its legacy procedure, and that the X65 grade pipe referenced in Version 2 is consistent with that of the legacy procedure and the X65 grade pipe used during the PEX II pipeline construction. Even assuming Respondent is correct on this point, however, it is not material to the question of which version of the welding procedure was observed as being used in the field. Respondent acknowledged that Version 2 was not provided during the initial field inspections and only Version 1 was provided to OPS by PHMSA Respondent's personnel who were in charge of the construction project in the field.⁷

During the hearing, the OPS inspector stated:

MR. ENG: Okay. I just wanted to be clear that, yes, one of the office managers did assist in obtaining all the different records and variations of this procedure, Ms. Jennifer Thompson, but it was also under the direct insight and supervision of the construction manager, Mr. Mark Grass, and the new chief welding inspector that was put on a week before my arrival, Mr. Barry Leray.

And so, what originally I asked for in determining the qualification of the procedure, was a copy of the procedure. What was provided to me at that time by all three people during those discussions, was WPS SP332-6G Rev. 2. And that would have been dated October 6, 2012. Okay? We're going to call this version one, because that's what was given to me.

When we look at that particular procedure, that succession from what they call the old procedure, SPL-16-HG [verbatim], I reviewed it and the pipe grade test material wasn't 65 to 65 as originally shown. And so, I said, "Well, what actually the test grade materials was, was 65 to 60." And they said, "Well, this is the procedure we've been using to qualify our welders and what we've been using out in the field."

So subsequent to that, they provided, after numerous discussions, another procedure at a later date was produced and it was called the same title, except it was called Rev. 1, but it had a later date. It had the May 22, 2014 date, but it -- it did have 4 the 65 to 65. And I said, "Well, this is -- this is different, it's later, which one did you actually use?" And so, there was some confusion as to who had what in the field.

And then what further complicates things, is the version 3 that they did with Hamilton Engineering on November 11, 2014, they also have titled it "Rev. 2" again. And so, that made it very, very complicated in the field trying to determine who had what version of what, because some people have Rev. 2, some people have the original Rev. 2, some people had Rev. 1, which was actually the second version. And so, we went by what the project manager and chief welding inspector told us that they had been using up to that point of that inspection to conduct welding on the pipeline and do their testing.

⁷ *Id.*

And I said, "This procedure is not qualified for the grades of material you're using based upon the qualification test records that are associated with the procedure." So that's --that's --

MR. PHILLIPS: So just to clarify, again, which version was that? Which one to read into the record again, which one did we go by?

MR. ENG: We went by WPS SP-332Sc-6G Rev. 2 dated October 6, 2012, which we're calling version 1, not to be confused with version 3, similarly titled.⁸

While Respondent stated during the hearing that Version 2 was the welding procedure being used during the construction, this was not the version provided to OPS inspectors and was not the version observed in the field at the time of the OPS inspection. Respondent was unable to provide direct evidence or statements from personnel who were in the field at the time of the inspection and would have had first hand knowledge that would outweigh the evidence that the welding procedure provided to the OPS inspector contemporaneously, Version 1, was being used by its welders.⁹ Respondent was unable to establish that the Version 2 procedure that it later submitted in response to the OPS allegations was used in the field from the beginning of the construction.

The preponderance of the evidence including the contemporaneous statements and actions of Respondent's own personnel supports a finding that Version 1 of the welding procedure was being used at least in the early stages of construction and there is no dispute that this procedure was not qualified in accordance with API 1104. Accordingly, after considering all of the evidence and the legal issues presented, I find that Respondent violated 49 C.F.R. § 195.214 by failing to perform welding during the construction of the PEX II pipeline in accordance with a properly qualified welding procedure.

Item 2: The Notice alleged that Respondent violated 49 C.F.R. § 195.222, which states:

§ 195.222 Welders and welding operators: Qualification of welders and welding operators.

(a) Each welder or welding operator must be qualified in accordance with section 6, section 12, Appendix A or Appendix B of API Std 1104 (incorporated by reference, see §195.3), or section IX of the ASME Boiler and Pressure Vessel Code (ASME BPVC), (incorporated by reference, see §195.3) except that a welder or welding operator qualified under an earlier edition than listed in §195.3, may weld but may not requalify under that earlier edition.

(b) No welder or welding operator may weld with a welding process unless, within the preceding 6 calendar months, the welder or welding operator has—

⁸ Hearing transcript, at 55-58.

⁹ Respondent contracted with a third-party engineering firm to manage the PEX II Construction project and as a result, Respondent's direct employees were not always onsite during the construction.

- (1) Engaged in welding with that process; and
- (2) Had one weld tested and found acceptable under section 9 or Appendix A of API Std 1104 (incorporated by reference, see §195.3).¹⁰

The Notice alleged that Respondent violated 49 C.F.R. § 195.222 by failing to properly qualify all of its welders who were constructing the PEX II pipeline in accordance with API 1104 and Sunoco's procedures. Specifically, the Notice alleged that Sunoco used welders who had not passed its welding qualification tests, and specified inadequacies including welders that failed to weld within the specified electrical ranges and failed to perform the specified number of passes during the qualification tests.

In its Response and at the hearing, Sunoco acknowledged that there were discrepancies in the qualification documentation for its welders. Respondent stated:

On January 12, 2015, SPLP learned of discrepancies in the qualification documentation for certain welders working on Spread 24-3. Specifically, SPLP learned that the qualification documentation for 12 welders indicated welding parameters outside the narrow welding procedure parameters during testing, that qualification documentation for 34 welders indicated testing in the 5G position rather than 6G, and that qualification documentation for 2 welders indicated both of these issues, for a total of 48 welders. SPLP promptly and voluntarily took action to remedy issues of Spread 24-3 by stopping 45 welders from working, prepared a Path Forward document, and conducting a requalification process to establish a complete welder qualification record going forward as well as ensuring the integrity of the pipeline. Out of 45 welders that underwent requalification, 7 failed and were not permitted to continue working on the Project; 4 left the Project prior to requalifying, and 34 successfully requalified and were permitted to continue welding.¹¹

Respondent acknowledged that certain of its welders did not pass the qualification test, but pointed out that its qualification parameters were in a very narrow range and explained that it could have used qualification procedures that set a wider range of parameters prior to commencing the welding.¹² As OPS correctly noted, however, these were Respondent's own parameters. In order for Respondent's quality control officials and OPS inspectors to determine whether the welders satisfied the qualification requirements, they must rely on the qualification test parameters that an operator has in place for the project to evaluate the welders. The fact that Respondent subsequently took steps to requalify those welders who did not meet the qualification requirements but were still on the PEX II project does not negate the noncompliance.

The preponderance of the evidence supports a finding that there were welders who could not be

¹⁰ This regulation was amended on January 23, 2017 (82 FR 7999). The version cited is the regulation that was in place at the time this proceeding commenced, not the amended version.

¹¹ Post-hearing submission, at 6-7.

¹² Hearing transcript, at 42-52.

documented as having been qualified in accordance with the qualification requirements in place at the time of the field inspection. Accordingly, after considering all of the evidence and the legal issues presented, I find that Respondent violated 49 C.F.R. § 195.222 by failing to properly qualify its welders who were constructing the PEX II pipeline in accordance with API 1104 and Sunoco's procedures.

Item 3: The Notice alleged that Respondent violated 49 C.F.R. § 195.214, which states:

§ 195.214 Welding procedures.

(a) Welding must be performed by a qualified welder or welding operator in accordance with welding procedures qualified under section 5, section 12, Appendix A or Appendix B of API Std 1104 (incorporated by reference, see §195.3), or Section IX of the ASME Boiler and Pressure Vessel Code (ASME BPVC) (incorporated by reference, see §195.3). The quality of the test welds used to qualify the welding procedures must be determined by destructive testing.

(b) Each welding procedure must be recorded in detail, including the results of the qualifying tests. This record must be retained and followed whenever the procedure is used.¹³

§195.204 Inspection—general.

Inspection must be provided to ensure that the installation of pipe or pipeline systems is in accordance with the requirements of this subpart. Any operator personnel used to perform the inspection must be trained and qualified in the phase of construction to be inspected.

The Notice alleged that Respondent violated 49 C.F.R. § 195.214 by failing to conduct adequate testing of welds to ensure the requirements of API 1104 were being met. Specifically, the Notice referenced § 195.204 in relevant part and alleged that Sunoco failed to conduct sufficient inspection and testing to ensure that all applicable welding requirements including proper qualification were being followed and the pipeline was being constructed in accordance with Subpart D of Part 195.

In its response and at the hearing, Respondent explained that it used Version 3 of the welding procedure to “requalify” the welders who were not previously qualified but remained on the project.¹⁴ In connection with the hearing, Respondent produced documentation of the limited destructive testing that was conducted afterward and argued that even though some of its welders were not properly qualified, the quality of the production welds they made was satisfactory. Sunoco provided a third-party report, *Review of Welding Documentation and Destructive Test Coupons from PEX II Pipeline Project*, by DNV-GL.¹⁵ This report stated that “some of the

¹³ This regulation was amended on January 23, 2017 (82 FR 7999). The version cited is the regulation that was in place at the time this proceeding commenced, not the amended version.

¹⁴ Hearing transcript, at 168-170.

¹⁵ Pre-hearing exhibit, *Review of Welding Documentation and Destructive Test Coupons from PEX II Pipeline Project*, by DNV-GL (June 28, 2016).

welders deviated from the welding procedure specification with respect to welding current and voltage during welder qualification testing” but concluded that the deviations did not result in unacceptable flaws in the samples tested that were detectable by radiographic inspection. Sunoco contended that its decision to continue production welds was justified based on the results of this third-party testing.

As OPS correctly pointed out, however, only 14 samples were cut out for destructive testing and some of these cutouts failed to pass the API 1104 destructive testing for welder qualification in that some of the welds made by the unqualified welders did not meet required strength and mechanical properties.¹⁶ Moreover, several of the welders who were retested using Version 3 of the welding procedure still failed to qualify with multiple retesting attempts meaning that they did not qualify under any of the three versions of the welding procedure.¹⁷ OPS also pointed out that Sunoco failed to adhere to its own written procedures by allowing welders who failed their qualification tests to attempt more than one retest on the same day they failed their initial qualification test. Even if all of the non-qualified welders had subsequently been qualified to the Version 3 procedure, it would not negate the fact they were not originally in compliance.¹⁸

The fact that numerous welds were made by non-qualified welders prior to the Version 3 requalification effort evidences a failure to inspect and ensure proper oversight of the construction in real time. The preponderance of the evidence supports a finding that Respondent failed to ensure the construction and inspection of the PEX II pipeline in accordance with the requirements of 49 C.F.R. Part 195.

Accordingly, after considering all of the evidence and the legal issues presented, I find that Respondent violated 49 C.F.R. § 195.214 by failing to conduct adequate testing and inspection to ensure the requirements of 49 C.F.R. Part 195 and API 1104 were being met.

Item 4: The Notice alleged that Respondent violated 49 C.F.R. § 195.202, which states:

§ 195.202 Compliance with specifications or standards.

Each pipeline system must be constructed in accordance with comprehensive written specifications or standards that are consistent with the requirements of this part.

§ 195.214 Welding procedures.

(a) Welding must be performed by a qualified welder or welding operator in accordance with welding procedures qualified under section 5, section 12, Appendix A or Appendix B of API Std 1104 (incorporated by reference, see §195.3), or Section IX of the ASME Boiler and Pressure Vessel Code (ASME BPVC) (incorporated by reference, see §195.3). The

¹⁶ Region recommendation, at 13.

¹⁷ *Id*

¹⁸ Respondent also took issue with OPS’ characterization of its subsequent qualification of welders under WPS Version 3 as an attempt to “back-qualify” for the production welds that they made prior to the welder qualification. Respondent argued that it acted to ensure it was in compliance with PHMSA standards on a going-forward basis. To the extent this may be relevant to a penalty assessment, it will be addressed below in the Assessment of Penalty section.

quality of the test welds used to qualify the welding procedures must be determined by destructive testing.

The Notice alleged that Respondent violated 49 C.F.R. § 195.202 by failing to construct the PEX II pipeline in accordance with comprehensive written specifications that are consistent with Part 195. Specifically, the Notice referenced § 195.214(a) and alleged that Sunoco failed to follow its written specifications for welder qualification and used welders to construct the PEX II pipeline who were not qualified.

In its Response and at the hearing, Sunoco contended that this Item was duplicative of Item 2. Respondent noted that it involved the same conduct as Item 2, using unqualified welders due to the failure to properly qualify the welders.¹⁹ Where the same act or transaction constitutes a violation of two distinct requirements, the test to be applied to determine whether there are two offenses or only one, is whether one of the requirements involves proof of an additional fact which the other does not.²⁰ In this instance, Respondent is correct that the same acts and omissions are involved and have the same evidentiary basis. Accordingly, I agree with Respondent that the Notice should not have added a duplicative allegation involving the same acts.

Based upon the foregoing, I hereby order that this allegation be withdrawn.

Item 5: The Notice alleged that Respondent violated 49 C.F.R. § 195.222, which states:

§ 195.222 Welders and welding operators: Qualification of welders and welding operators.

(a) Each welder or welding operator must be qualified in accordance with section 6, section 12, Appendix A or Appendix B of API Std 1104 (incorporated by reference, see §195.3), or section IX of the ASME Boiler and Pressure Vessel Code (ASME BPVC), (incorporated by reference, see §195.3) except that a welder or welding operator qualified under an earlier edition than listed in §195.3, may weld but may not requalify under that earlier edition.

(b) No welder or welding operator may weld with a welding process unless, within the preceding 6 calendar months, the welder or welding operator has—

- (1) Engaged in welding with that process; and
- (2) Had one weld tested and found acceptable under section 9 or Appendix A of API Std 1104 (incorporated by reference, see §195.3).²¹

¹⁹ Post-hearing submission, at 43-44.

²⁰ See generally, *In the matter of Colorado Interstate Gas Co.*, 2009 WL 5538649, CPF No. 5-2008-1005 (Nov. 23, 2009).

²¹ This regulation was amended on January 23, 2017 (82 FR 7999). The version cited is the regulation that was in place at the time this proceeding commenced, not the amended version.

§195.204 Inspection—general.

Inspection must be provided to ensure that the installation of pipe or pipeline systems is in accordance with the requirements of this subpart. Any operator personnel used to perform the inspection must be trained and qualified in the phase of construction to be inspected.

The Notice alleged that Respondent violated 49 C.F.R. § 195.222 by failing to meet the requirements for welding procedures and the qualifications of its welders in API 1104. Specifically, the Notice referenced § 195.204 in relevant part and alleged that Sunoco failed to conduct sufficient inspection and testing to ensure that applicable welding requirements including proper qualification were being followed and the pipeline was being constructed in accordance with Part 195.

In its Response and at the hearing, Sunoco contended that this Item was duplicative of Item 3. Respondent noted that this Item involved the same conduct as Item 3, failing to conduct sufficient inspection and testing to ensure that applicable welding requirements including proper qualification were being followed and the pipeline was being constructed in accordance with Subpart D of Part 195.²² Where the same act or transaction constitutes a violation of two distinct requirements, the test to be applied to determine whether there are two offenses or only one, is whether one of the requirements involves proof of an additional fact which the other does not. In this instance, Respondent is correct that the same acts and omissions are involved and have the same evidentiary basis. Accordingly, I agree with Respondent that the Notice should not have added a duplicative allegation involving the same acts.

Based upon the foregoing, I hereby order that this Item be withdrawn.

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.²³ 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 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 \$1,278,100 for the violations cited above.

²² Post-hearing submission, at 41-43.

²³ These amounts are adjusted annually for inflation. See 49 C.F.R. § 190.223.

In its Response and at the hearing, Respondent questioned whether PHMSA's overall civil penalty assessment mechanism was consistent with basic due process, primarily as it relates to the use of a "worksheet" to develop the proposed civil penalty amount at the Notice stage.²⁴ Respondent explained that it did not have an opportunity at the hearing to examine the individual who calculated the proposed penalty, known as the compliance officer, and argued that there was no way it could understand the proposed penalty amount in the Notice without access to this person.²⁵

PHMSA and its predecessor agencies have been conducting administrative enforcement proceedings that use an informal hearing process for pipeline safety compliance actions that in some cases administratively assess civil penalties for over 30 years resulting in hundreds of Final Orders in cases such as this one.²⁶ At the hearing, OPS explained that as a general matter, the compliance officer who prepares a proposed penalty will attend an enforcement hearing by telephone to answer any questions about the proposed penalty in that case. In this instance, however, the compliance officer had taken another position. Therefore, OPS made available the Director of Enforcement who had reviewed the relevant information as part of his supervision of the compliance officer and who could be examined about the specific proposed penalty or the worksheet in general during the hearing.²⁷

Respondent is correct that it is entitled to have sufficient information about the proposed penalty to allow a meaningful and targeted response concerning the proposed penalty amount for each Item. The assessment factors that influence a civil penalty assessment such as the nature, circumstances, and gravity of the violation, the Respondent's degree of culpability, history of prior offenses, any good faith attempts at compliance, and other such matters, are listed in § 190.225 and are explained in more detail in the Violation Report. The Violation Report describes the particular facts and circumstances in this case that were considered under each assessment factor to determine the proposed civil penalty amount in the Notice. In its initial response, its prehearing materials, its hearing presentation, and its post-hearing materials, Respondent had ample opportunities to dispute any of those facts or otherwise offer any mitigating information that it believed was relevant to the assessment factors and may have justified a reduction or elimination of the proposed penalty amount for any of the alleged violations.

On October 27, 2016, PHMSA published a Federal Register notice outlining the civil penalty assessment criteria and announcing that the civil penalty worksheet used in a given case would be provided upon request to a Respondent in a pipeline enforcement proceeding.²⁸ The civil

²⁴ Post-hearing submission, at 11-29.

²⁵ Post-hearing submission, at 10-11.

²⁶ See Westlaw database FTRAN-OPS. The administrative enforcement process of the type set forth in subpart B of 49 C.F.R. Part 190 has generally been upheld as meeting the minimum due process in the context of regulatory proceedings involving companies that handle hazardous products. *Chemical Waste Mgt. v. U.S. EPA*, 873 F.2d 1477.

²⁷ The fact that Respondent was able to examine the Enforcement Director in depth concerning the proposed penalty calculation for approximately two full hours speaks for itself. Hearing transcript at 226-285.

²⁸ 81 FR 71566. This document also included general penalty ranges and guidelines.

penalty worksheet Respondent received contained detailed information concerning the weight given to each of the assessment factors in its case, explains the range of proposed penalties that may be assessed under each factor, and explains the type of evidence or facts that will result in higher or lower penalties under each assessment factor. This information corresponds directly to the particular facts of each violation that were noted in the Violation Report. Taking the Violation Report and the worksheet together, Respondent can readily discern where the alleged facts of its case fall on the range of conduct and how that weighed into the proposed penalty. For these reasons, I find Respondent had access to sufficient information about the basis for the proposed penalty to allow a meaningful response. Moreover, it must be recognized that the proposed civil penalty amount in the Notice is not final. The proposed amount in the Notice only serves as a mechanism to put a ceiling on the amount of civil penalties that the Agency can pursue for that alleged violation. The final civil penalty, if any, is not actually set until the Final Order stage. Respondent has a full and unfettered ability to present information before, during, and after the hearing that it believes may justify the reduction or elimination of any proposed civil penalty amount.

I will now apply the statutory penalty factors in 49 U.S.C. 60122(b) to each of the three violations separately based on the information and arguments presented for each item by Respondent.

Item 1: The Notice proposed a civil penalty of \$119,500 for Respondent's violation of 49 C.F.R. § 195.214, by failing to perform welding during the construction of the PEX II pipeline in accordance with a properly qualified welding procedure. Respondent disagreed with the amount of the proposed civil penalty and questioned whether it was supported by the penalty consideration factors in the Pipeline Safety Act and § 190.225 regulations.

With respect to the nature and circumstances of Sunoco's violation of § 195.214, ensuring that welding during the construction of a pipeline is performed in accordance with a properly qualified welding procedure is one of the most fundamental aspects of pipeline safety. With respect to the gravity of the offense, ensuring that a pipeline is constructed in accordance with applicable welding requirements is a key part of safety and the use of a welding procedure that was not qualified to the exact materials used on the project risks compromising the safety of the pipeline—which notably is located in a high consequence area. If a girth weld failure should occur, it could either leak slowly over a long period of time, or result in a catastrophic failure where the entire circumference of the pipe joint separates releasing a large quantity of hazardous petroleum products under high pressure. Pipelines that have welding or other significant problems during construction are much more likely to have leaks and operational failures throughout their service life.

With respect to culpability, there were no circumstances beyond Respondent's control that prevented it from complying with the regulation and action was not taken to achieve compliance until after the violation was discovered by OPS. Sunoco argued that it was being penalized for not "self-reporting" the violation to OPS. As OPS explained, however, there is no requirement for an operator to self-report violations and Respondent was incorrect that it was being penalized for not doing so.²⁹ I further find that the record supports the points assigned for prior offenses

²⁹ To the contrary, if an operator decides to voluntarily self-report a violation, it receives a credit for doing so. Hearing transcript, at 74-77.

and good faith.

As discussed above, I did not agree with Respondent's main argument regarding penalty assessment that PHMSA's civil penalty assessment mechanism violates Respondent's right to due process, nor did the manner in which it was carried out in this proceeding. Respondent has presented no information or arguments that would warrant a reduction in the civil penalty amount proposed in the Notice for this violation. Accordingly, having reviewed the record and considered the assessment criteria, I assess Respondent a civil penalty of \$119,500 for violation of 49 C.F.R. § 195.214.

Item 2: The Notice proposed a civil penalty of \$149,700 for Respondent's violation of 49 C.F.R. § 195.222, by failing to properly qualify its welders who were constructing the PEX II pipeline in accordance with API 1104 and Sunoco's procedures. Respondent disagreed with the amount of the proposed civil penalty and questioned whether it was supported by the penalty consideration factors in the Pipeline Safety Act and § 190.225 regulations.

With respect to the nature and circumstances of Sunoco's violation of § 195.222, ensuring that the welders on a pipeline construction project are qualified is one of the most fundamental aspects of pipeline safety. With respect to the gravity of the offense, ensuring that a pipeline is constructed in accordance with applicable welding requirements is a key part of safety and the use of welders who are not qualified on the project risks compromising the safety of the pipeline. If a girth weld failure should occur, it could either leak slowly over a long period of time, or result in a catastrophic failure where the entire circumference of the pipe joint separates releasing a large quantity of hazardous petroleum products under high pressure.

With respect to culpability, there were no circumstances beyond Respondent's control that prevented it from complying with the regulation and action was not taken to achieve compliance until after the violation was discovered by OPS. I further find that the record supports the points assigned for prior offenses and good faith.

As discussed above, I did not agree with Respondent's main argument regarding penalty assessment that PHMSA's civil penalty assessment mechanism violates Respondent's right to due process. Respondent has presented no information or arguments that would warrant a reduction in the civil penalty amount proposed in the Notice for this violation. Accordingly, having reviewed the record and considered the assessment criteria, I assess Respondent a civil penalty of \$149,700 for violation of 49 C.F.R. § 195.222.

Item 3: The Notice proposed a civil penalty of \$613,400 for Respondent's violation of 49 C.F.R. § 195.214 by failing to conduct adequate testing and inspection to ensure the requirements of 49 C.F.R. Part 195 and API 1104 were being met. Respondent disagreed with the amount of the proposed civil penalty and questioned whether it was supported by the penalty consideration factors in the Pipeline Safety Act and § 190.225 regulations.

With respect to the nature and circumstances of Sunoco's violation of § 195.214, operators are obligated to ensure that adequate testing and inspection of a pipeline under construction is performed and proper oversight of contractors is being conducted to ensure pipeline safety. With respect to the gravity of the offense, ensuring that a pipeline is constructed with sufficient oversight to ensure that non-compliance is avoided is a key part of safety and the use of welding

procedures and welders who are not qualified on the project risks compromising the safety of the pipeline. If a girth weld failure should occur, it could either leak slowly over a long period of time, or result in a catastrophic failure where the entire circumference of the pipe joint separates releasing a large quantity of hazardous petroleum products under high pressure. It appears that approximately 2000 welds were made in an unqualified manner.

With respect to culpability, the proposed penalty amount reflected that the violation was considered to be egregious, meaning that the requalification effort and the shifting rationales and offering different versions of the welding procedures as though Respondent was in compliance all along made identification of the non-compliance very difficult for the OPS inspectors. Respondent argued that its conduct was intended to achieve compliance, not to obscure its non-compliance. In describing the multiple retests of unqualified welders that were uncovered, the OPS inspector stated: "And knowingly doing that knowing that if you have an unqualified welder welding on a 195 pipeline, the safety issues involved, and still allowing this retest to go on is a pretty egregious act."³⁰ I find that this designation was not unreasonable under the circumstances and the culpability factor in the Violation Report used as an input for the worksheet is supported by the overall record. I further find that the record supports the points assigned for prior offenses and good faith.

As discussed above, I did not agree with Respondent's main argument regarding penalty assessment that PHMSA's civil penalty assessment mechanism violates Respondent's right to due process. Respondent has presented no information or arguments that would warrant a reduction in the civil penalty amount proposed in the Notice for this violation. Accordingly, having reviewed the record and considered the assessment criteria, I assess Respondent a civil penalty of \$613,400 for violation of 49 C.F.R. § 195.214.

Item 4: The Notice proposed a civil penalty of \$51,400 for Respondent's alleged violation of 49 C.F.R. § 195.202. As discussed above, I have withdrawn this allegation of violation. Accordingly, no penalty is assessed.

Item 5: The Notice proposed a civil penalty of \$344,100 for Respondent's alleged violation of 49 C.F.R. § 195.222. As discussed above, I have withdrawn this allegation of violation. Accordingly, no penalty is assessed.

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 **\$882,600**.

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 \$882,600 civil penalty will result in accrual of interest at the current annual

³⁰ Hearing transcript, at 171-172.

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.

COMPLIANCE ORDER

The Notice proposed a compliance order with respect to Items 1 and 2 in the Notice for violations of 49 C.F.R. §§ 195.214 and 195.222, respectively. Under 49 U.S.C. § 60118(a), each person who engages in the transportation of hazardous liquids or who owns or operates a pipeline facility is required to comply with the applicable safety standards established under chapter 601.

With regard to the violation of § 195.214 (Item 1), Respondent indicated that it has completed the actions outlined in the proposed compliance order, but stated that it had not yet completed the submission of the documentation to the Director demonstrating such completion.³¹

With regard to the violation of §195.222 (Item 2), Respondent indicated that it has completed the actions outlined in the proposed compliance order, but did not indicate that the documentation demonstrating such completion had been submitted to the Director.³² The Director has not indicated that the proposed compliance items have been documented as completed.

For the above reasons, the Compliance Order is issued as set forth below. Pursuant to the authority of 49 U.S.C. § 60118(b) and 49 C.F.R. § 190.217, Respondent is ordered to take the following actions to ensure compliance with the pipeline safety regulations applicable to its operations:

1. With respect to the violation of § 195.214 (**Item 1**), Respondent must correct all welding procedures to reflect the proper qualifications for each grade of materials, filler metals and other changes in essential variables and welding parameters, reflect proper versioning for any changes, and provide the PHMSA Southwest Region Director revised procedures and complete destructive testing records for each procedure. The procedures cannot be used on any other construction project or Part 195 regulated piping until all correction are made and accepted by the PHMSA Southwest Region Director.
2. With respect to the violation of § 195.222 (**Item 2**), Respondent must perform destructive tests on a statistically significant number of girth welds on Spread 24-3 to show that the welds have the required strength and mechanical properties for the application. The proposed testing plan must include specific designation of the welds to be tested, the analysis showing that the number of welds to be tested is statistically significant based on the total number of welds made, the procedures that Sunoco proposes to be used to cut out and test the welds, and the qualified welding procedure that will be used to re-weld the pipeline. The proposed testing plan must be

³¹ Post-hearing submission, at 45.

³² *Id.*

submitted to the PHMSA Southwest Region director for approval prior to initiating the plan. If any of these welds fail destructive testing, the number of welds tested must be expanded as specified by the Southwest Region Director to include an additional number of welds made by that welder.

In addition, Sunoco must review welder qualification testing on all the other construction- spreads on the PEXII pipeline to determine if there were similar instances of unqualified welders performing welding during construction. Evidence in the form of properly completed welder qualification records showing that all welders were qualified to a previously qualified welding procedure must be submitted to PHMSA. If any issues with welder qualification are identified, the welds made by those welders must be tested to determine if the welds meet the qualification and mechanical characteristics required for the project in a manner similar to the process described in the previous paragraph. The testing plan to be approved by the PHMSA Southwest Region Director must also include a specific process for the detailed review of welder qualification records on all of the other construction spreads on the PEX II project. If any other welders are determined to have been not been properly qualified, Sunoco must submit an amended test plan for approval by the Southwest Region Director, to identify welds that made by these welders and destructively test a statistically significant sample of these welds in a manner similar to describe in the paragraph above. If any of these welds fail destructive testing, the number of welds tested must be expanded as specified by the Southwest Region Director to include an additional number of welds made by that welder.

3. Respondent must provide PHMSA with documentation that verifies completion of Item 1 of this compliance order within 30 days following the date of issuance of this order. Respondent must submit the testing plan described in Item 2 of this compliance order for approval by the Southwest Region Director within 30 days following the date of issuance of this order and documentation showing completion of the testing and weld repairs within 120 days following approval of the plan by the Southwest Region Director.

The Director may grant an extension of time to comply with any of the required items upon a written request timely submitted by the Respondent and demonstrating good cause for an extension.

It is requested (not mandated) that Respondent maintain documentation of the safety improvement costs associated with fulfilling this Compliance Order and submit the total to the Director. It is requested that these costs be reported in two categories: (1) total cost associated with preparation/revision of plans, procedures, studies and analyses; and (2) total cost associated with replacements, additions and other changes to pipeline infrastructure.

Failure to comply with this Order may result in the administrative assessment of civil penalties not to exceed \$200,000, as adjusted for inflation (49 C.F.R. § 190.223), for each violation for each day the violation continues or in referral to the Attorney General for appropriate relief in a district court of the United States.

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 this Final Order by Respondent. Any petition submitted must contain a 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 corrective action, remain in effect unless the Associate Administrator, upon request, grants a stay.

The terms and conditions of this Final Order are effective upon service in accordance with 49 C.F.R. § 190.5.

November 15, 2019

Alan K. Mayberry
Associate Administrator
for Pipeline Safety

Date Issued