

November 30, 2017

Mr. Greg Armstrong
Chairman and CEO
Plains All American Pipeline, LP
333 Clay Street, Suite 1600
Houston, Texas 77002

Re: CPF No. 4-2016-5024

Dear Mr. Armstrong:

Enclosed please find the Final Order issued in the above-referenced case. It makes one finding of violation and assesses a reduced civil penalty of \$22,000. The penalty payment terms are set forth in the Final Order. This enforcement action closes automatically upon receipt of payment. Service of the Final Order by certified mail is effective upon the date of mailing as provided under 49 C.F.R. § 190.5.

Thank you for your cooperation in this matter.

Sincerely,

Alan K. Mayberry
Associate Administrator
for Pipeline Safety

Enclosure

cc: Director, Southwest Region, Office of Pipeline Safety, PHMSA
Mr. Wm. Dean Gore, Jr., Vice President – Environmental & Regulatory Compliance,
Plains All American Pipeline, LP

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)	
)	
Plains All American Pipeline, LP,)	CPF No. 4-2016-5024
)	
Respondent.)	
)	

FINAL ORDER

On May 16, 2016, pursuant to 49 U.S.C. § 60117, representatives of the Pipeline and Hazardous Materials Safety Administration (PHMSA), Office of Pipeline Safety (OPS), inspected the National Registry of Pipeline and LNG Operators notification records of Plains Marketing, LP, a subsidiary of Plains All American Pipeline, LP (Plains or Respondent). Plains owns and operates a large network of pipelines, terminals, storage, and gathering assets in crude-oil and natural-gas-liquids-producing basins, transportation corridors, and at major market hubs in the United States and Canada.¹

As a result of the records inspection, the Director, Southwest Region, OPS (Director), issued to Plains Marketing, LP, by letter dated July 11, 2016, a Notice of Probable Violation and Proposed Civil Penalty (Notice). In accordance with 49 C.F.R. § 190.207, the Notice proposed finding that the company had violated 49 C.F.R. § 195.64(c)(1)(i) and proposed assessing a civil penalty of \$33,500 for the alleged violation.

Plains responded to the Notice on behalf of Plains Marketing, LP, by letter dated August 11, 2016 (Response), and sent a supplemental response by letter dated November 29, 2016 (Supplemental Response) (collectively, Responses). Plains contested the allegation of violation and requested that the Notice be withdrawn and replaced with a warning letter. Respondent did not request a hearing and therefore has waived its right to one.

FINDING 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. § 195.64(c)(1)(i), which states:

¹ Plains website, *available at* <https://www.plainsallamerican.com/> (last accessed September 19, 2017).

§ 195.64 National Registry of Pipeline and LNG Operators.²

(a)

(c) Changes. Each operator must notify PHMSA electronically through the National Registry of Pipeline and LNG Operators at <http://opsweb.phmsa.dot.gov>, of certain events.

(1) An operator must notify PHMSA of any of the following events not later than 60 days before the event occurs:

(i) Construction or any planned rehabilitation, replacement, modification, upgrade, uprate, or update of a facility, other than a section of line pipe, that costs \$10 million or more. If 60-day notice is not feasible because of an emergency, an operator must notify PHMSA as soon as practicable;

The Notice alleged that Respondent violated 49 C.F.R. § 195.64(c)(1)(i) by failing to notify PHMSA of the construction of a pipeline facility costing \$10 million or more not later than 60 days before such event occurred. Specifically, the Notice alleged that Plains failed to inform PHMSA of the proposed construction of 10 breakout tanks³ in Oklahoma at least 60 days in advance of the anticipated construction start dates.⁴ Instead, the Notice alleged that Plains submitted three late construction notifications for the breakout tanks.

In its Responses, Plains provided additional information on the actual construction start dates for each breakout tank covered by the three notifications. For the five tanks covered by Notification No. F-20141028-6202, filed on October 28, 2014, Plains acknowledged that the anticipated construction start date of November 25, 2014, was less than 60 days from the notification date for all of the tanks. However, it argued that for three of the tanks, the actual construction start dates were more than 60 days. For the three tanks covered by Notification No. F-20151211-9202, filed on December 11, 2015, Plains acknowledged that the anticipated construction start date was July 1, 2015, roughly five months *before* the notification date and that the actual start dates were roughly four months *before* the notification date. For the four tanks covered by Notification No. F-20160428-11144, filed on April 28, 2016, Plains acknowledged that the anticipated construction start date of June 1, 2016, was less than 60 days from the notification date for all four tanks but contended that it was more than 60 days prior to the actual construction start dates.

The three notifications are summarized below:

² 49 C.F.R. § 195.64 was amended after issuance of the Notice. Amdt. 195-101, 82 FR 7972 (January 23, 2017).

³ The NOPV mistakenly totaled the number of breakout tanks at 10 instead of 12.

⁴ PHMSA has provided guidance to operators on what constitutes examples of “construction” activities for purposes of this notification requirement, including whichever occurs first of the following: material purchasing and manufacturing, right-of-way acquisition, construction equipment move-in activities, onsite or offsite fabrications, or right-of-way clearing, grading and ditching. Advisory Bulletin ADB-2014-03 (September 9, 2014).

Notification No.	PHMSA Notification Date	Anticipated Construction Start Date	Actual Construction Start Date reported by Respondent
F-20141028-6202	October 28, 2014	November 25, 2014	Tank 1720: December 13, 2014* Tank 1820: December 18, 2014* Tank 1840: January 17, 2015 Tank 1830: January 24, 2015 Tank 1730: March 1, 2015
F-20151211-9202	December 11, 2015	July 1, 2015	Tank 1740: August 3, 2015* Tank 1750: August 11, 2015* Tank 1850: August 25, 2015*
F-20160428-11144	April 28, 2016	June 1, 2016	Tank 7200: August 3, 2016 Tank 7300: July 19, 2016 Tank 3950: August 19, 2016 Tank 4350: September 14, 2016

* Indicates tanks whose actual construction Plains admits was started before the expiration of the minimum 60-day notification period.

Plains explained that generally “the forecasting and contracting underlying these construction projects include sufficient time to provide timely notifications to PHMSA,” and that Plains had maintained a good track record of providing timely notifications.⁵ In the case of Notification No. F-20141028-6202, however, the company’s construction schedule resulted in a shorter notification period for two of the tanks, while the other three did not begin actual construction until after the 60-day period has expired. Therefore, the company admitted that it had begun actual construction of two of the tanks less than 60 days from the notification date, thereby violating § 195.64(c)(1).

In the case of Notification No. F-20151211-9202, Plains acknowledged that actual construction began on all three tanks even *before* the December 11, 2015 notification date.⁶ However, Plains argued that it had attempted to provide timely notice by supplementing an earlier notification (October 28, 2014), in which these tanks had been mistakenly omitted. According to Plains, PHMSA had, in previous instances, allowed “back-dated” supplemental notifications or corrected notifications to be filed after the 60-day period had expired.⁷ Therefore, Plains argued that “when it was discovered in November 2015 that eight tanks, instead of five, were under construction, Plains attempted to revise the original registration.” At this point, a PHMSA employee allegedly informed Plains that PHMSA had made changes to its online Registry System that “prevented post-dated changes to existing Registry entries.” The company argued that “[h]ad Plains been able to modify the October 28, 2014 notification to add these three tanks (as had been allowed in the past), it would not have violated the 60-day notification requirement.”⁸

⁵ Response at 2.

⁶ *Id.*

⁷ Response, Attachment.

⁸ Response at 2.

Finally, in the case of Notification No. F-20160428-11144, Plains acknowledged that it “provided only 34 days’ advance notice to PHMSA” before the anticipated construction start date but asserted that the notice was made more than 60 days before the actual construction start dates.

The company argued, in summary, that given Plains’ history of filing timely notifications in the past, that the actual construction start dates for all but two of the tanks in question were well after the 60-day notification period, and that the late notifications had only a “limited affect [sic]” on the PHMSA inspector’s schedule, the allegation of violation should be dismissed, along with the fines, and replaced with a warning letter.⁹

I disagree. The purpose of § 195.64(c)(1)(i) is to ensure that operators provide PHMSA with adequate “lead time” to enable the agency to set its own schedule for construction inspections involving many different operators. This scheduling is difficult, if not impossible, if “construction” under the regulation were deemed to begin only when actual construction begins, since that is often a “moving target” due to fluctuating construction conditions and unexpected delays on account of weather, suppliers, and other circumstances beyond an operator’s control. Moreover, it is a date that can only be confirmed in retrospect, after construction has already begun. To use such a date would defeat the purpose of the regulation, which is to ensure that PHMSA receives adequate advance notice of new pipeline construction. Finally, the anticipated construction start date is one that the operator itself has used internally to plan and schedule a date to begin construction.

Therefore, I find in this case that “construction” began at a point no later than the anticipated or scheduled construction start date set by Plains. This means that all three notifications violated § 195.64(c)(1)(i) because they provided less than 60 days’ advance notice of the operator’s own anticipated construction start dates.

However, as for Notification No. F-20151211-9202, Plains has presented credible evidence in the form of email correspondence between Plains and PHMSA suggesting that PHMSA representatives had previously allowed the “back-dating” of supplemental construction notifications. In its Recommendation, the Region failed to provide any evidence refuting Respondent’s claim and documentary evidence. Under such circumstances, I find that Plains’ violation of the regulation was mitigated by its reasonable, but incorrect, interpretation of § 195.64(c)(1)(i) and that such mitigating circumstances warrant a penalty reduction, which is discussed more fully in the “Assessment of Penalty” section below.

Accordingly, based upon a review of all of the evidence, I find that Respondent violated § 195.64(c)(1)(i) by failing to notify PHMSA of the construction of a pipeline facility costing \$10 million or more not later than 60 days before such event occurred.

This finding of violation will be considered a prior offense in any subsequent enforcement action taken against Respondent.

⁹ Response at 3.

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.¹⁰ 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; 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 \$33,500 for the violation cited above.

Item 1: The Notice proposed a civil penalty of \$33,500 for Respondent's violation of 49 C.F.R. § 195.64(c)(1), for failing to timely notify PHMSA of the construction of its breakout tanks in Oklahoma. For the reasons discussed above, I found that Plains failed to provide timely notifications for the tanks covered by the three notifications. Further, I find that the penalty assessment criterion for "culpability" in Part E of the Violation Report should be reduced to reflect the fact that Plains did take action to comply with the notification requirement but did not achieve compliance. I also find that Plains should receive a "good-faith" credit because it presented unrefuted evidence that it had a credible justification for relying on the representations of PHMSA regarding the "back-dating" of supplemental notifications. At the same time, I would note that although pipeline safety or integrity was minimally affected, Plains had had a total of seven prior offenses of the pipeline safety regulations within the previous five years, which record serves to increase the amount of the proposed penalty. Based upon the foregoing, I assess Respondent a reduced civil penalty of **\$22,000** for violation of 49 C.F.R. § 195.64(c)(1)(i).

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, 6500 S MacArthur Blvd., Oklahoma City, Oklahoma 79169. The Financial Operations Division telephone number is (405) 954-8845.

Failure to pay the \$22,000 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.

Under 49 C.F.R. § 190.243, Respondent may submit a Petition for Reconsideration of this Final

¹⁰ These amounts are adjusted annually for inflation. *See, e.g.*, Pipeline Safety: Inflation Adjustment of Maximum Civil Penalties, 82 Fed. Reg. 19325 (April 27, 2017).

Order to the Associate Administrator, Office of Pipeline Safety, PHMSA, 1200 New Jersey Avenue, SE, East Building, 2nd Floor, Washington, DC 20590, with a copy sent to the Office of Chief Counsel, PHMSA, at the same address, no later than 20 days after receipt of service of the Final Order by Respondent. Any petition submitted must contain a brief statement of the issue(s) and meet all other requirements of 49 C.F.R. § 190.243. The filing of a petition automatically stays the payment of any civil penalty assessed. The other terms of the order, including any corrective action, remain in effect unless the Associate Administrator, upon request, grants a stay. If Respondent submits payment of the civil penalty, the Final Order becomes the final administrative decision and the right to petition for reconsideration is waived.

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

November 30, 2017

Alan K. Mayberry
Associate Administrator
for Pipeline Safety

Date Issued