

April 3, 2019

Mr. Richard Byrne  
General Counsel  
ExxonMobil Pipeline Company  
22777 Springwoods Village Parkway  
Energy 3 5A.491  
Spring, TX 77389-2170

**Re: CPF No. 4-2017-5027**

Dear Mr. Byrne:

Enclosed please find the Final Order issued in the above-referenced case. It withdraws the allegations of violation. 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. Johnnie R. Randolph, Jr., Counsel, Exxon Mobil Corporation  
Mr. Vince Murchison, Murchison Law Firm, PLLC, 325 North St. Paul Street, Suite  
2700, Dallas, TX 75201

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

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

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<b>In the Matter of</b>	)	
	)	
<b>ExxonMobil Pipeline Company,</b>	)	<b>CPF No. 4-2017-5027</b>
	)	
<b>Respondent.</b>	)	
	)	

**FINAL ORDER**

From March 2013 through February 2016, pursuant to 49 U.S.C. § 60117, representatives of the Pipeline and Hazardous Materials Safety Administration (PHMSA), Office of Pipeline Safety (OPS), conducted on-site pipeline safety inspections of the facilities and records of ExxonMobil Pipeline Company (Exxon or Respondent), in Woodlands, Texas. Exxon and its affiliates transport 2.8 million barrels of crude oil, refined petroleum products, liquefied petroleum gases, natural gas liquids, and chemical feedstocks through approximately 8,000 miles of pipeline in 10 states and the Gulf of Mexico,<sup>1</sup>

As a result of the inspection, the Director, Southwest Region, OPS (Director), issued to Respondent, by letter dated August 11, 2017, a Notice of Probable Violation and Proposed Civil Penalty (Notice). In accordance with 49 C.F.R. § 190.207, the Notice proposed finding that Exxon committed a number of violations of 49 C.F.R. Part 195 and proposed assessing a civil penalty of \$203,400 for the alleged violations.

Exxon responded to the Notice by letter dated October 19, 2017 (Response). Respondent contested the allegations and requested a hearing. A hearing was subsequently held on May 14, 2018, in Houston, TX, before a Presiding Official from the Office of Chief Counsel, PHMSA. At the hearing, Respondent was represented by counsel. After the hearing, Respondent provided a post-hearing statement for the record, by letter dated June 14, 2018 (Closing). In addition, the Respondent also submitted a response to the Region Recommendation for the record, by letter dated July 6, 2018 (Response to the Region Recommendation).

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<sup>1</sup> <https://corporate.exxonmobil.com/en/company/worldwide-operations/locations/united-states/pipeline-operations/overview> (last accessed November 29, 2018).

## **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. § 195.505, which states in relevant part:

### **§ 195.505 Qualification program.**

Each operator shall have and follow a written qualification program. The program shall include provisions to:

- (a) Identify covered tasks;
- (b) Ensure through evaluation that individuals performing covered tasks are qualified;
- (c) Allow individuals that are not qualified pursuant to this subpart to perform a covered task if directed and observed by an individual that is qualified;
- (d) Evaluate an individual if the operator has reason to believe that the individual's performance of a covered task contributed to an accident as defined in Part 195;
- (e) Evaluate an individual if the operator has reason to believe that the individual is no longer qualified to perform a covered task;
- (f) Communicate changes that affect covered tasks to individuals performing those covered tasks;
- (g) Identify those covered tasks and the intervals at which evaluation of the individual's qualifications is needed;
- (i) After December 16, 2004, notify the Administrator or a state agency participating under 49 U.S.C. Chapter 601 if the operator significantly modifies the program after the administrator or state agency has verified that it complies with this section. Notifications to PHMSA may be submitted by electronic mail to *InformationResourcesManager@dot.gov*, or by mail to ATTN: Information Resources Manager DOT/PHMSA/OPS, East Building, 2nd Floor, E22-321, New Jersey Avenue SE., Washington, DC 20590.

The Notice alleged that Respondent violated 49 C.F.R. § 195.505 by failing to follow their written qualification program. Specifically, the Notice alleged that Exxon failed to follow its own qualification program that required requalification of a Cathodic Protection technician (CP technician) following a July 2012 failure to properly install a cathodic protection rectifier. The procedure, *Qualification of Pipeline Personnel* (October 2012) (the procedure),<sup>2</sup> states, in relevant part:

### **4.3.3 Re-qualification**

EMPCo's Written Program identifies the circumstances in which individuals need to be re-qualified. Personnel will be re-evaluated and re-qualified prior to performing the covered task when any of the following circumstances occur (49 CFR 195.505 or 192.805):

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<sup>2</sup> Pipeline Safety Violation Report (Violation Report)), (August 11, 2017) (on file with PHMSA), at Exhibit A.

**3) Reason to believe an employee is no longer able to perform or displays unsatisfactory performance:** If an individual's performance is identified to be unsatisfactory, regardless of whether it has resulted in an incident, the individual must be re-qualified prior to further performance of the covered task. An individual's performance may be determined to be unsatisfactory during an incident investigation, observations by Supervisors, or other qualified individuals, or a near-miss occurrence.

Before attempting to re-qualify an employee, the Supervisor should consider and document any of the following that are completed:

- Reviewing the applicable policy and procedure(s) with the individual
- Assigning a qualified individual to work with the individual
- Identifying applicable training for the individual

At the hearing, Exxon argued that OPS failed to prove that it violated the procedure. First, the Respondent argued that it abided by the language in the procedure and was not required to requalify the CP technician given that requalification is only *required prior to further performance of the covered task*.

Alternatively, Exxon contended that, even if it was required to requalify the CP technician per the procedure, the CP technician was requalified on October 16, 2012, after the display of unsatisfactory performance in July 2012 and prior to identification of the error in January 2013. Therefore, the terms of the procedural requirement were met as of October 16, 2012.

The Region contended that Exxon could only requalify the CP technician *following discovery* of the mistake in January 2013 (*emphasis added*). According to OPS, Exxon could not requalify the CP technician prior to identifying the error. Therefore, the October 16, 2012 qualification did not count as a requalification, even though the practical result of a further qualification (or requalification) would have resulted in the CP technician repeating the same testing module. OPS pointed out that Exxon chose to requalify the CP technician in May 2013 following the inspection, after investigators pointed out the failure to requalify. During the hearing, OPS argued that this fact establishes that, as of January 2013, Exxon also believed it was required to requalify.<sup>3</sup>

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<sup>3</sup> Informal Hearing Transcript Excerpt:

“Mr. Murchison (Exxon): Well, is there anything in the case file that shows us that unsatisfactory performance was determined?”

Ms. McDaniel (OPS): To me, yes. Hooking it up incorrectly would be unsatisfactory performance. And when it was brought to ExxonMobil's attention in May of 2013, he was immediately requalified. So, ExxonMobil must have felt the same thing; otherwise, why would he be requalified if he was on a three-year requalification – or five-year requalification time period. I mean, to me that sort of falls in line to where, based off of my comment, which is sort of what they said here; after being questioned by PHMSA staff during the inspection, EMPCo was requalified. So, based off that.

Mr. Randolph (Exxon): Okay. So—but that pursuant to the procedure, when its determined that his performance was unsatisfactory is when the requirement kicks in.

Ms. McDaniel (OPS): Right. So, January of 2013....

Mr. Randolph (Exxon): So a violation of this element could not start until January of 2013, once unsatisfactory performance was determined?

Mr. Matthews (OPS): Yes, I think we'd be willing to concede that, yes.”  
(Informal Hearing Tr. 107-108, May 14, 2018).

*Analysis*

The October qualification cannot count as a requalification because the procedure also requires that “(b)efore attempting to re-qualify an employee the supervisor consider and document that” they reviewed the policy with the individual, assigned a qualified individual to work with the individual, or identified applicable training for the individual. There is no evidence that Exxon did this prior to the October 16, 2012 qualification. Therefore, this cannot credibly be considered a requalification following a display of unsatisfactory performance.

However, I agree with the Respondent that, in order to prove that it violated the procedure, OPS must establish that the CP technician *performed the task again prior to requalification*. The procedure states that “individuals need to be re-qualified . . . prior to performing the covered task when any of the following circumstances occur (49 CFR 195.505 or 192.805): . . . if an individual’s performance is identified to be unsatisfactory . . .the individual must be re-qualified prior to further performance of the covered task.”

Critically, the procedure only requires requalification “prior to further performance of the covered task.” There is nothing in the Violation Report to suggest that OPS inquired or collected evidence establishing that the CP technician continued to perform the covered task. OPS conceded this point.<sup>4</sup> Both parties acknowledged that CP technicians perform duties that do not include this covered task. It is OPS’ burden to prove that the CP technician continued to perform this task – not the Respondent’s burden to prove that he did not. Therefore, OPS has not established that Exxon failed to follow the procedure.

Accordingly, after considering all the evidence, I find that OPS did not present evidence proving that the operator failed to follow the procedure. Based upon the foregoing, I hereby order that Item 1 be withdrawn.

**Item 2:** The Notice alleged that Respondent violated 49 C.F.R. § 195.573(c), which states:

**§ 195.573 What must I do to monitor external corrosion control?**

(c) *Rectifiers and other devices.* You must electrically check for proper performance each device in the first column at the frequency stated in the second column.

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<sup>4</sup> Mr. Murchison (Exxon): Where in the case file, the NOPV, the violation report, the exhibits to the violation report is . . . the evidence that the gentleman, Kevin Hollingsworth covered this particular task --... prior to being requalified?

Ms. McDaniel (OPS): I’m not saying performed. I don’t have evidence to show he performed the covered task. But he was not removed from his position as a CP technician doing this stuff . . . I do not have evidence in here that shows that he installed another rectifier at that time.

(Informal Hearing Tr. 111-112, May 14, 2018).Mr. Phillips (OPS): No, I’m asking if the employee did the covered task.

Mr. Murchison (Exxon Counsel): The burden is yours, sir. Do you have any evidence?

Mr. Phillips (OPS): And I’m asking. And if you don’t have it, that’s fine.

(Informal Hearing Tr. 134, May 14, 2018).

Device	Check frequency
Rectifier	At least six times each calendar year, but with intervals not exceeding 2 ½ months.
Reverse current switch	
Diode	
Interface bond whose failure would jeopardize structural protection	
Other interface bond	At least once each calendar year but with intervals not exceeding 15 months

The Notice alleged that Respondent violated 49 C.F.R. § 195.573 by failing to electrically check the performance of a newly installed rectifier at the required frequencies. Specifically, the Notice alleged that Exxon failed to perform electric checks for six months after the improper installation of a rectifier.

At the hearing, the Region acknowledged that the NOPV was based on a misunderstanding of the facts in evidence and withdrew the allegation of violation.

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

**Item 3:** The Notice alleged that Respondent violated 49 C.F.R. § 195.571, which states:

**§ 195.571 What criteria must I use to determine the adequacy of cathodic protection?**

Cathodic protection required by this subpart must comply with one or more of the applicable criteria and other considerations for cathodic protection contained paragraphs 6.2.2, 6.2.3, 6.2.4, 6.2.5 and 6.3 in NACE SP 0169 (incorporated by reference, *see* §195.3).

The Notice alleged that Respondent violated 49 C.F.R. § 195.571 by failing to maintain the cathodic protection required by NACE SP 0169. Specifically, the Notice alleged that the Respondent could not have met one of the required cathodic protection criterion required by the regulation given that there was a reverse rectifier connection in place.

At the hearing, Exxon argued that the Region failed to establish that it failed to comply with any of the applicable criteria for cathodic protection in NACE SP 0169. The Respondent introduced an expert in cathodic protection, Mr. Kevin Garrity, P.E. At the hearing, both sides debated whether § 195.571 requires adequate cathodic protection and, if not, whether OPS produced sufficient evidence to establish a violation of this regulation. Mr. Garrity testified that § 195.571 requires only that the cathodic protection meet the requirement of SP 0169, which includes three measurement criteria. For each criteria, Mr. Garrity stated that there was no evidence in the record to demonstrate that the reverse connection on the rectifier changed the polarity of the

cathodic protection measurement under those three criteria. In fact, the expert testified that the only evidence in the record<sup>5</sup> demonstrated that there were no significant external metal loss anomalies in the area of the reversed rectifier. While the metal loss report found approximately one-hundred anomalies over the entire 49 mile ILI run, the two most significant anomalies (63 percent deep) were found 30-miles away from the reversed rectifier – squarely outside of the rectifier’s area of influence. Given the lack of external metal loss in the area, in Mr. Garrity’s expert opinion, the reversed rectifier did not compromise adequate cathodic protection on the pipeline.

OPS acknowledged that there was no evidence in the record that the incorrectly installed rectifier resulted in a charge on the pipeline. However, OPS argued that the evidence in the record, namely the ILI tool run, was not the correct tool to adequately evaluate corrosion.<sup>6</sup>

### *Analysis*

There is no evidence in the record that this pipeline did not have adequate cathodic protection. While the reversed rectifier connection could have put current onto the pipeline that negated the area of influence of the other rectifiers, neither the ILI data nor the pipe-to-soil readings support that supposition. The ILI data and the pipe-to-soil readings are the only evidence of the current on the pipeline.

Experts for OPS and Exxon proffered conflicting testimony. The Regional Director testified that “it would be almost impossible to have adequate cathodic protection in that area.”<sup>7</sup> Exxon’s expert testified that he had personally observed situations where a single rectifier wired in reverse polarity was compensated for by other rectifiers. In its post-hearing recommendation, OPS stated “basic cathodic protection and engineering principles would clearly call into question the adequacy of cathodic protection for an area of pipe that was influenced by an incorrectly installed rectifier.”<sup>8</sup> I agree that OPS called into question the adequacy of the cathodic protection at or near the reversed rectifier, but it has no supporting evidence. Contrary to the Regional Recommendation, the Respondent is not required to “rule[d] out as being possible that the area

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<sup>5</sup> Exxon ran an in-line inspection tool through the pipeline. In the opinion of Mr. Garrity, if the cathodic protection was inadequate, “coincident metal loss anomalies” would have been observed (Page 196). (Informal Hearing Tr. 196, May 14, 2018).

<sup>6</sup> Informal Hearing Excerpt:

Ms. McDaniel (OPS): And I think maybe it I’m hearing you right, your conclusion is based off the lack of evidence to say that there was inadequate cathodic protection supported by your looking at the tool run; is that correct?...

Mr. Garrity: It’s a combination of that and also the fact that there was a rectifier half a mile away discharging almost twice as much of the current of the Lake Washington rectifier.”

Ms. McDaniel (OPS): But it’s sort of in the same situation when I was asked the question; it’s supposition. We don’t know. And I would think the same thing from you, wouldn’t we? Without any evidence, we don’t know.

Mr. Garrity (Exxon): Well, in my opinion, the tool data is very persuasive and it’s very conclusive. And I don’t want to sound curt, but if we have a lack of evidence, in the absence of evidence, how is a speculation the basis for a violation? Or the allegation of a violation?” (Informal Hearing Tr. 198-199, May 14, 2018).

<sup>7</sup> (Informal Hearing Tr. 151, May 14, 2018).

<sup>8</sup> Post Hearing Regional Recommendation, at 3.

influenced by the rectifier did not meet the required criteria of -850mv.”<sup>9</sup> The burden of proof is on OPS to establish there was not adequate cathodic protection.

Accordingly, after considering all of the evidence I find that OPS has not met its burden of proof in establishing that there was not adequate cathodic protection on this pipeline. Based upon the foregoing, I hereby order that the Item be withdrawn.

### **WARNING ITEM**

With respect to Item 4, the Notice alleged probable violations of Part 195 but did not propose a civil penalty or compliance order for this item. Therefore, this is considered as a warning item. The warning was for:

49 C.F.R. § 195.452 (**Item 4**) — Respondent’s alleged failure to continue to assess the line pipe at specified intervals and periodically evaluate the integrity of each pipeline segment that could affect a high consequence area.

Exxon requested withdrawal of Item 4, because OPS lacked data to substantiate the allegation that cathodic protection adequacy was compromised. Under § 190.205, PHMSA does not adjudicate warning items to determine whether a probable violation occurred. If OPS finds a violation of this provision in a subsequent inspection, Respondent may be subject to future enforcement action.

### **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.<sup>10</sup> 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 \$203,400 for the violations cited above.

**Item 1:** The Notice proposed a civil penalty of \$63,900 for Respondent’s violation of 49 C.F.R. § 195.505, for failing to follow their written qualification program. For the reasons discussed above, I find that the Respondent did not violate this regulation. Based upon the foregoing, I withdraw the proposed penalty for violation of 49 C.F.R. § 195.505.

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<sup>9</sup> Post Hearing Regional Recommendation, at 3.

<sup>10</sup> 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).

**Item 2:** The Notice proposed a civil penalty of \$75,600 for Respondent's violation of 49 C.F.R. § 195.573, for failing to electrically check the performance of a newly installed rectifier at the required frequencies. For the reasons discussed above, I find that the Respondent did not violate this regulation. Based upon the foregoing, I withdraw the proposed penalty for violation of 49 C.F.R. § 195.573.

**Item 3:** The Notice proposed a civil penalty of \$63,900 for Respondent's violation of 49 C.F.R. § 195.571, for failing to maintain the cathodic protection required by NACE SP 0169. For the reasons discussed above, I find that the Respondent did not violate this regulation. Based upon the foregoing, I withdraw the proposed penalty for violation of 49 C.F.R. § 195.571.

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, 2<sup>nd</sup> 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.

April 3, 2019

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Alan K. Mayberry  
Associate Administrator  
for Pipeline Safety

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Date Issued