

ExxonMobil Pipeline Company

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Richard E. Byrne
General Counsel



October 19, 2017

Ms. Terri J. Binns
Acting Director, Southwest Region
U.S. Department of Transportation
Pipeline and Hazardous Materials Safety Administration
Office of Pipeline Safety
8701 S. Gessner, Suite 630
Houston, Texas 77074

Via Email: Terri.J.Binns@dot.gov
Via UPS: 1Z77E6872210003394

**Re: CPF No. 4-2017-5027; ExxonMobil Pipeline Company
Notice of Probable Violation and Proposed Civil Penalty
Request for Hearing**

Dear Ms. Binns:

This letter serves as a request for a hearing in response to the referenced Notice of Probable Violation and Proposed Civil Penalty dated August 11, 2017 (the "NOPV"). ExxonMobil Pipeline Company ("EMPCo") received the NOPV on August 17, 2017 via electronic and certified mail. PHMSA had addressed the NOPV to Mr. Geoffrey Craft, who, as we have previously advised, is no longer employed by EMPCo.¹

On September 8, 2017, then-Acting Director Frank Causey granted EMPCo an extension of time to respond until October 20, 2017.

Pursuant to 49 C.F.R. §§ 190.208(a)(4) and 190.211, EMPCo hereby requests a hearing in the referenced case. Enclosed herewith please find EMPCo's Statement of Issues which it submits pursuant to 49 C.F.R. § 190.211(b). EMPCo requests that the hearing be held at the Southwest Region office in Houston, Texas.

Please be advised that EMPCo intends to be represented by in-house counsel and outside counsel in connection with the requested hearing.

Please be further advised that, pursuant to 49 C.F.R. § 190.211(f), EMPCo intends to have a court reporter prepare a transcript of the hearing, and will bear all costs of that transcription and will provide a copy of same to PHMSA.

Thank you for your attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "RE Byrne", with a long horizontal flourish extending to the right.

Richard E. Byrne

¹ Other than those matters where EMPCo is represented by inside or outside counsel, can you please update your records and replace Geoff Craft with Bill Sint, Operations Manager and Vice President, ExxonMobil Pipeline Company, E3.5A.385, 22777 Springwoods Village Parkway, Spring, Texas 77389 for all future communications,

PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMINISTRATION
WASHINGTON, DC 20590

In the matter of:	§	
	§	
ExxonMobil Pipeline Company	§	CPF No. 4-2017-5027
	§	
Respondent	§	
	§	

**STATEMENT OF ISSUES
OF
EXXONMOBIL PIPELINE COMPANY
TO
NOTICE OF PROBABLE VIOLATION
AND
PROPOSED CIVIL PENALTY**

ExxonMobil Pipeline Company (“Respondent”) submits this Statement of Issues pursuant to 49 C.F.R. § 190.211(b) in connection with its request for a hearing pursuant to 49 C.F.R. § 190.208(a)(4).

By letter dated August 11, 2017, the Pipeline and Hazardous Materials Safety Administration (“PHMSA”) issued to Respondent a Notice of Probable Violation and Proposed Civil Penalty (collectively, the “NOPV”), CPF No. 4-2017-5027, which was received by Respondent via email and via certified mail on August 17, 2017. On September 8, 2017, an extension of time to respond to the NOPV was granted directing that Respondent must respond on or before October 20, 2017. By letter of even date, Respondent has requested a hearing in this matter, and this Statement of Issues is served therewith.

BACKGROUND

This NOPV results from a three-year PHMSA inspection of procedures and records, and certain pipeline facilities, of Respondent extending from March 11, 2013, to February 18, 2016.

In the NOPV, PHMSA alleges four violations of pipeline safety regulations promulgated at 49 C.F.R. Part 195 and proposes to assess civil penalties in connection with three of the alleged violations, all pursuant to the procedural and enforcement regulations promulgated at 49 C.F.R. Part 190, Subparts A and B, as to each and all of which Respondent states its issues.

THE ALLEGED VIOLATIONS

Respondent states below its factual, legal and regulatory issues that relate to the alleged violations of the NOPV. The numbered paragraphs below correspond with the numbered Items of the NOPV. Each numbered paragraph begins with a citation to the subject regulation and a summary of the agency's allegations.

Initially, as to all four alleged violations, PHMSA did not fulfill the threshold requirements for issuing a notice of probable violation, provided at 49 C.F.R. § 190.207, and as a result of this procedural deficiency, all four alleged violations in the NOPV must be withdrawn, along with the proposed civil penalties.

Further as to all four alleged violations, the four-plus year delay in issuing this NOPV has prejudiced Respondent's ability to defend against these charges. In November 2016, the Respondent divested the assets which are the subject of the alleged violations, and thus no longer has access to the files, records, and potential witnesses necessary to a full and fair defense. Moreover, Respondent objects to PHMSA's use of EMPCo's internal Near Loss Investigation (NLI) records to form the bases for discovery and prosecution of this enforcement matter. Prior to PHMSA's inspection, EMPCo had already identified the alleged cathodic protection deficiency, corrected the alleged deficiency, conducted an NLI, and generated NLI records for the sole purpose of fostering a safety-oriented culture, focused on non-punitive reporting and continuous improvement through near-miss investigations. This approach is entirely consistent with the directives of API Recommended Practice 1173, Pipeline Safety Management Systems, the implementation of which PHMSA strongly encourages. Respondent believes PHMSA's affirmative use of this NLI report as the basis for this enforcement action contravenes good public policy, and undermines the non-punitive reporting and continuous improvement rationales behind the Pipeline Safety Management System principles. On grounds of fundamental fairness, all four alleged violations should be withdrawn, along with the proposed civil penalties.

1. **49 C.F.R. § 195.505 Qualification.**

PHMSA alleges that Respondent violated the cited provision by failing to follow its procedures relating to requalification of an employee performing a covered task. PHMSA alleges that Respondent failed to requalify that employee in accordance with EMPCo's written qualification program, following the incorrect installation of a rectifier, a covered task, because the "employee was requalified 8 months after the incident and only after being questioned by PHMSA staff during the inspection...."

Respondent disputes and objects to the allegations stated in the NOPV, on the following grounds:

- 1.1. The alleged violation is not supported by the evidence in the case file; the case file is incomplete and/or contains inaccurate information.
- 1.2. PHMSA has failed to carry its burden of proof.

- 1.3. PHMSA has failed to provide, or indeed to suggest, a rational connection between the facts found and the conclusions reached, and, as such, the agency has acted in an arbitrary and capricious manner.

2. **49 C.F.R. § 195.573 What must I do to monitor external corrosion?**

PHMSA alleges that Respondent violated the cited provision by failing to electrically check each cathodic protection rectifier at least six times each calendar year, but with intervals not exceeding 2½ months, on the grounds that Respondent “could not have performed checks for proper performance with the frequency specified by § 195.573(c) during [the relevant] period of time and not have detected the reversed rectifier connections.”

Respondent disputes and objects to the allegations stated in the NOPV, on the following grounds:

- 2.1. The alleged violation is not supported by the evidence in the case file; the case file is incomplete and/or contains inaccurate information.
- 2.2. PHMSA has failed to carry its burden of proof.
- 2.3. PHMSA has failed to provide, or indeed to suggest, a rational connection between the facts found and the conclusions reached, and, as such, the agency has acted in an arbitrary and capricious manner.

3. **49 C.F.R. § 195.571 What criteria must I use to determine the adequacy of cathodic protection?**

PHMSA alleges that Respondent violated the cited provision by failing to maintain adequate cathodic protection on its pipeline as required by 49 C.F.R. § 195.571 and NACE SP0169-2007, paragraphs 6.2 and 6.2, on the grounds that Respondent “could not have met one of the required cathodic protection criterion [sic] ... during the 6-month period the rectifier leads were reversed.”

Respondent disputes and objects to the allegations stated in the NOPV, on the following grounds:

- 3.1. The alleged violation is not supported by the evidence in the case file; the case file is incomplete and/or contains inaccurate information.
- 3.2. PHMSA has failed to carry its burden of proof.
- 3.3. PHMSA has failed to provide, or indeed to suggest, a rational connection between the facts found and the conclusions reached, and, as such, the agency has acted in an arbitrary and capricious manner.
- 3.4. The imposition of liability upon Respondent for this alleged violation is contrary to the plain language of the regulation, inconsistent with the application of related

regulations, interpretations and/or agency precedent, and deprives Respondent of fair and adequate notice of PHMSA's interpretation of the cited regulation.

- 3.5. PHMSA has neither identified, nor applied, any reference criteria from the cited source, and, as such, the agency has converted an unidentified cathodic protection criterion into a strict liability requirement, which action is arbitrary, capricious, and otherwise not in accordance with law.

4. **49 C.F.R. § 195.452 Pipeline integrity management in high consequence areas.**

PHMSA alleges that Respondent violated 49 C.F.R. § 195.452(j)(2) by failing to perform an integrity assessment of the subject pipeline after having discovered the reversed connections on the subject rectifier, on the grounds that Respondent should have performed integrity assessments prior to previously-scheduled integrity assessments that were performed two (2) months and (6) months, respectively, following discovery of the reversed connections.

Respondent disputes and objects to the allegations stated in the NOPV, on the following grounds:

- 4.1. The alleged violation is not supported by the evidence in the case file; the case file is incomplete and/or contains inaccurate information.
- 4.2. PHMSA has failed to carry its burden of proof.
- 4.3. PHMSA has failed to provide, or indeed to suggest, a rational connection between the facts found and the conclusions reached, and, as such, the agency has acted in an arbitrary and capricious manner.

THE PROPOSED CIVIL PENALTIES

PHMSA proposes a total of \$203,400 in civil penalties in connection with alleged violation Items 1, 2, and 3, as to each and all of which Respondent states the following issues:

1. Neither the NOPV, the underlying Violation Report, nor the Proposed Civil Penalty Worksheet provide a sufficient evidentiary basis for, or adequate discussion, explanation or analysis of, the manner in which the penalty amounts were determined, and thus Respondent has been prejudiced in its ability to prepare an adequate defense to contest the proposed civil penalties.
2. Neither the NOPV, the underlying Violation Report, nor the Proposed Civil Penalty Worksheet provide a sufficient evidentiary basis for, or adequate discussion, explanation or analysis of, the penalty assessment considerations of 49 C.F.R. § 190.225, in support of the proposed civil penalties, and thus Respondent has been prejudiced in its ability to prepare an adequate defense to contest the proposed civil penalties.
3. Regarding the application of the penalty assessment considerations of 49 C.F.R. § 190.225, neither the NOPV, the underlying Violation Report, nor the Proposed Civil Penalty

Worksheet provide sufficient evidentiary basis for, and provide no discussion, explanation or analysis of, the weight accorded each such consideration, nor the relative weighting among all such considerations, and thus Respondent has been prejudiced in its ability to prepare an adequate defense to contest the proposed civil penalties.

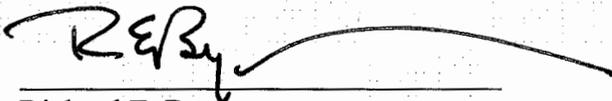
4. The instructions and guidance for completion of the PHMSA form Violation Report relating to the penalty assessment considerations of 49 C.F.R. § 190.225 lack the specificity and degree of explanation found in agency policy statements which define the application of the penalty assessment considerations; as such, the inspector cannot have considered adequately the penalty assessment factors, and thus the findings based upon the underlying Violation Report and based upon conclusory statements of fact must be found insufficient to satisfy the Congressional directive in the Pipeline Safety Act that the Secretary of Transportation “shall” consider such factors (49 U.S.C. § 60122(b)(1)).
5. To the extent that the related alleged violation is not supported by statute, regulation, substantial evidence, or a rational connection between facts found and conclusions drawn, such proposed civil penalty may not be imposed and must be withdrawn in its entirety.
6. Respondent objects to the magnitude of the proposed penalties as: unreasonable; disproportionate to any of the penalty assessment considerations of 49 C.F.R. § 190.225; unsupported by the evidence set forth in the NOPV and the case file, or any analysis that applies the penalty assessment considerations found in Part E of the Violation Report; arbitrary, capricious or otherwise not in accordance with law; and an abuse of discretion.
7. PHMSA’s allegation in Part E5 of the underlying Violation Report for Items 1, 2 and 3 to the effect that each individual alleged violation extended from July 2012 until January 2013 is (a) unsupported by the evidence, and (b) is inaccurate, and therefore overstates the duration of each violation. As a result, the proposed civil penalties for Items 1, 2, and 3 should be reduced if not withdrawn.
8. Respondent further objects to the proposed civil penalties with respect to the following individual assessments:
 - 8.1. With regard to Item 1, PHMSA’s allegation in Part E9 of the underlying Violation Report to the effect that Respondent reaped cost savings by way of the alleged violation is (a) unsupported by the evidence, and (b) is inaccurate and overstates any alleged economic benefit to the Respondent. As a result, the proposed civil penalty should be reduced if not withdrawn.
 - 8.2. With regard to Items 2 and 3, PHMSA’s allegation in Part E7 of the underlying Violation Report with respect to Culpability is (a) unsupported by the evidence, and (b) is inaccurate and overstates Respondent’s culpability. As a result, the proposed civil penalty should be reduced if not withdrawn.

CONCLUSION

At the hearing in this matter, Respondent intends to bring forth evidence in the form of documents and/or witness testimony. The Respondent intends to examine the evidence, documents and any witness testimony presented or introduced by PHMSA. The Respondent will also present its arguments in support of the issues stated heretofore. Respondent reserves the right to amend and supplement this Statement of Issues at or before the hearing.

COUNSEL FOR RESPONDENT EXXONMOBIL PIPELINE COMPANY

October 19, 2017



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