

NOV 23 2009

Mr. Thomas P. Morgan
Vice President of Operations, Western Pipeline Group
Colorado Interstate Gas Company
2 North Nevada Avenue
Colorado Springs, CO 80903

Mr. Daniel B. Martin
Senior Vice President of Operations
El Paso Corporation
1001 Louisiana Street
Houston, TX 77002

Re: CPF No. 5-2008-1005

Dear Sirs:

Enclosed is the Final Order issued in the above-referenced case. It withdraws two allegations of violation, makes findings of violation, assesses a civil penalty of \$2,335,000, and specifies actions that need to be taken by Colorado Interstate Gas Company to comply with the Federal 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, Western Region, this enforcement action will be closed. Your receipt of the Final Order constitutes service of that document under 49 C.F.R. § 190.5.

Thank you for your cooperation in this matter.

Sincerely,

Jeffrey D. Wiese
Associate Administrator
for Pipeline Safety

Enclosure

cc: Patrick F. Carey, P.E., Director, D.O.T. Compliance Services
El Paso Corporation, 1001 Louisiana Street, Houston, TX 77002
Elizabeth B. Herdes, Esq., Managing Senior Counsel
El Paso Western Pipelines, 2 North Nevada Avenue, Colorado Springs, CO 80903
Mr. Chris Hoidal
Director, Western Region, PHMSA

CERTIFIED MAIL – RETURN RECEIPT REQUESTED [7005 0390 0005 6162 5067]

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

_____)	
In the Matter of)	
)	
Colorado Interstate Gas Company)	CPF No. 5-2008-1005
And El Paso Corporation,)	
)	
Respondents.)	
_____)	

FINAL ORDER

On November 11, 2006, pursuant to 49 U.S.C. § 60117, a representative of the Pipeline and Hazardous Materials Safety Administration (PHMSA), Office of Pipeline Safety (OPS) initiated an investigation of the November 11, 2006 accident in Laramie County, Wyoming involving a 36-inch gas pipeline owned by Wyoming Interstate Company, Ltd. (WIC) and operated by Colorado Interstate Gas Company (CIG), both being subsidiaries of El Paso Corporation (together or individually, "Respondents"). The WIC pipeline system consists of approximately 600 miles of pipeline extending from Western Wyoming to various pipeline interconnections near Cheyenne, Wyoming. The WIC pipeline was struck and ruptured by a bulldozer operator employed by Associated Pipeline, LLC during construction of the new Rockies Express Pipeline. The bulldozer operator was killed in the ensuing explosion and fire.

As a result of the investigation, the Director, Western Region, OPS ("Director"), issued to Respondent, by letter dated March 4, 2008, a Notice of Probable Violation, Proposed Civil Penalty, and Proposed Compliance Order ("Notice"). In accordance with 49 C.F.R. § 190.207, the Notice proposed finding that Respondent had committed violations of 49 C.F.R. Part 192 and proposed assessing a total civil penalty of \$3,364,000 for the alleged violations. The Notice also proposed ordering Respondent to take certain measures to correct the alleged violations.

Respondent responded to the Notice by letter dated April 3, 2008, as supplemented by submissions dated September 25 and 30, and October 1, 2008 (collectively, "Response"). In its Response, Respondent expressed its intent to contest the allegations, the proposed penalty, and the proposed compliance order and requested a hearing. An informal hearing was held on October 7, 2008 in Lakewood, Colorado, with Larry White, Attorney, Office of Chief Counsel, PHMSA, presiding at which Respondent was represented by counsel. After the hearing, Respondent provided additional information and materials for the record on October 13 and November 13, 2008.

FINDINGS OF VIOLATION

The Notice alleged that Respondent violated 49 C.F.R. Part 192, as follows:

Item 1: The Notice alleged that Respondent violated 49 C.F.R. § 192.605, which states in relevant part:

§ 192.605 Procedural manual for operations, maintenance, and emergencies.

(a) General. Each operator shall prepare and follow for each pipeline, a manual of written procedures for conducting operations and maintenance activities and for emergency response. For transmission lines, the manual must also include procedures for handling abnormal operations. This manual must be reviewed and updated by the operator at intervals not exceeding 15 months, but at least once each calendar year. This manual must be prepared before operations of a pipeline system commence. Appropriate parts of the manual must be kept at locations where operations and maintenance activities are conducted.

(b) Maintenance and normal operations. The manual required by paragraph (a) of this section must include procedures for the following, if applicable, to provide safety during maintenance and operations.

* * *

(3) Making construction records, maps, and operating history available to appropriate operating personnel.

Specifically, the Notice alleged that Respondent failed to establish a written program that included procedures for making construction maps and records available to appropriate operating personnel.

In its Response and at the hearing, Respondent explained that it did have written procedures for making construction maps and records available to appropriate operating personnel and that this procedure was in place at the time. Respondent provided a copy of this procedure. This procedure states that “personnel expected to respond to emergencies and/or maintain the integrity of the pipeline system must be aware of and be able to retrieve construction records, maps, manuals and operating histories.”¹

OPS proceeded to argue that even if Respondent had an adequate procedure, Respondent did not follow the procedure because it provided inaccurate maps to the line locator. It is undisputed in the record that although Respondent had accurate maps of its facilities, it did not provide these materials to the line locator. Instead, Respondent provided copies of Rockies Express Pipeline’s

¹ Respondent initially questioned whether an independent contractor hired by an operator was covered by the term “appropriate operating personnel” but conceded this point at the hearing.

(REX) alignment sheets to the line locator. These documents were marked with a disclaimer as to their accuracy and it is undisputed that the REX alignment sheets contained inaccurate information about the location of Respondent's facilities.² The REX alignment sheets did not reflect a bend in the pipeline. For the regulatory requirement to be meaningful the information provided must be accurate to accomplish the purpose of protecting the pipeline. The operator is in the best position to provide a line locator with accurate information about its own lines when it has accurate maps and records in its possession. In this case, Respondent tasked the line locator with the critical job of accurately locating the 124A pipeline, yet provided him with unverified maps created by another company.

Respondent further argued that it met its responsibility and followed its procedure because the accurate maps were "available" to the line locator, but the line locator consciously decided not to use them. However, no direct testimony from the line locator was provided for the record on this point. Respondent further contended that even if the accurate maps had been handed to the line locator, he would not have used them because he stated in an interview that even the most accurate maps would only "get him into the neighborhood" and the use of equipment was what physically located the line. Respondent, however, was unpersuasive on this point. Line locators use a combination of maps, locating tools and other information to physically locate a line and OPS never suggested that they rely exclusive on maps. Moreover, the record shows that the line locator did use the inaccurate REX alignment sheets as a general guide to his marking activities.³ Had Respondent provided the line locator with its own accurate maps of the area, rather than inaccurate REX maps, the line locator may well have identified the bend in the pipeline that needed to be marked.

To achieve meaningful compliance with the regulatory requirement, operators must do more than make their personnel "aware of" and "be able to retrieve" records, maps and operating history. They must actually "make available" this information and the word "available" means present and ready for use; at hand; and accessible.⁴ In this case, Respondent acknowledged that it informed the line locator that its maps and records were located at the Cheyenne Station, miles away from much of his work area in the time period before the November 2006 incident. Unless information is at hand and does not require significant travel to obtain, however, it is not actually "available," as that term is understood in the context of field work.⁵ The Cheyenne Station is located approximately 10 miles from the site of the November 2006 incident. Accordingly, I find that Respondent's written procedure that would have allowed a practice where personnel would have to travel several miles to retrieve an accurate map to properly locate a pipeline did not meet the regulatory requirement.

² Violation Report, exhibit 3 to OPS Failure Investigation Report, EPC Memorandum at 11.

³ Violation Report Exhibit, OPS Notes from Interview of Gary Brack, 12/19/2006.

⁴ American Heritage Dictionary, 4th Ed., 2006. During the hearing, OPS also cited PHMSA Advisory Bulletin (ADB-02-03), which recommends that pipeline location mapping information "be readily available to appropriate personnel."

⁵ See In the Matter of Williams-Transco, CPF No. 1-2005-1007, Final Order (Jul. 20, 2007).

Accordingly, after considering all of the evidence, I find that Respondent violated 49 C.F.R. § 192.605 by failing to have and follow required written procedures for making construction maps and records available to appropriate personnel.

Item 2: The Notice alleged that Respondent violated 49 C.F.R. § 192.605, which states in relevant part:

§ 192.605 Procedural manual for operations, maintenance, and emergencies.

(a) General. Each operator shall prepare and follow for each pipeline, a manual of written procedures for conducting operations and maintenance activities and for emergency response. For transmission lines, the manual must also include procedures for handling abnormal operations. This manual must be reviewed and updated by the operator at intervals not exceeding 15 months, but at least once each calendar year. This manual must be prepared before operations of a pipeline system commence. Appropriate parts of the manual must be kept at locations where operations and maintenance activities are conducted.

(b) Maintenance and normal operations. The manual required by paragraph (a) of this section must include procedures for the following, if applicable, to provide safety during maintenance and operations.

(1) Operating, maintaining, and repairing the pipeline in accordance with each of the requirements of this subpart and subpart M of this part.

Specifically, the Notice alleged that Respondent failed to follow the procedures for notifying excavators about its locating and marking practices required by 49 C.F.R. § 192.614.

Respondent did not contest this alleged violation. Accordingly, after considering all of the evidence, I find that Respondent violated 49 C.F.R. § 192.605 by failing to follow its procedures for notifying excavators about its locating and marking practices.

Item 3: The Notice alleged that Respondent violated 49 C.F.R. § 192.605, which states in relevant part:

§ 192.605 Procedural manual for operations, maintenance, and emergencies.

(a) General. Each operator shall prepare and follow for each pipeline, a manual of written procedures for conducting operations and maintenance activities and for emergency response. For transmission lines, the manual must also include procedures for handling abnormal operations. This manual must be reviewed and updated by the operator at intervals not exceeding 15 months, but at least once each calendar year. This manual must be prepared before operations of a pipeline system commence. Appropriate parts of the manual must be kept at locations where operations and maintenance activities are conducted.

(b) Maintenance and normal operations. The manual required by paragraph (a) of this section must include procedures for the following, if applicable, to provide safety during maintenance and operations.

(1) Operating, maintaining, and repairing the pipeline in accordance with each of the requirements of this subpart and subpart M of this part.

Specifically, the Notice alleged that Respondent failed to follow its procedures for developing criteria for surveillance inspections at each location in accordance with 49 C.F.R. § 192.614.

Respondent did not contest this alleged violation. Accordingly, after considering all of the evidence, I find that Respondent violated 49 C.F.R. § 192.605 by failing to follow its procedures for developing criteria for surveillance inspections at each location.

Item 4: The Notice alleged that Respondent violated 49 C.F.R. § 192.605, which states in relevant part:

§ 192.605 Procedural manual for operations, maintenance, and emergencies.

(a) General. Each operator shall prepare and follow for each pipeline, a manual of written procedures for conducting operations and maintenance activities and for emergency response. For transmission lines, the manual must also include procedures for handling abnormal operations. This manual must be reviewed and updated by the operator at intervals not exceeding 15 months, but at least once each calendar year. This manual must be prepared before operations of a pipeline system commence. Appropriate parts of the manual must be kept at locations where operations and maintenance activities are conducted.

(b) Maintenance and normal operations. The manual required by paragraph (a) of this section must include procedures for the following, if applicable, to provide safety during maintenance and operations.

(1) Operating, maintaining, and repairing the pipeline in accordance with each of the requirements of this subpart and subpart M of this part.

Specifically, the Notice alleged that Respondent failed to follow its procedures for the Area Manager to conduct oversight of its contract line locator in accordance with 49 C.F.R. § 192.613.

Respondent did not contest this alleged violation. Accordingly, after considering all of the evidence, I find that Respondent violated 49 C.F.R. § 192.605 by failing to follow its procedures for the Area Manager to conduct oversight of its contract line locator.

Item 5: The Notice alleged that Respondent violated 49 C.F.R. § 192.605, which states in relevant part:

§ 192.605 Procedural manual for operations, maintenance, and emergencies.

(a) General. Each operator shall prepare and follow for each pipeline, a manual of written procedures for conducting operations and maintenance activities and for emergency response. For transmission lines, the manual must also include procedures for handling abnormal operations. This manual must be reviewed and updated by the operator at intervals not exceeding 15 months, but at least once each calendar year. This manual must be prepared before operations of a pipeline system commence. Appropriate parts of the manual must be kept at locations where operations and maintenance activities are conducted.

(b) Maintenance and normal operations. The manual required by paragraph (a) of this section must include procedures for the following, if applicable, to provide safety during maintenance and operations.

(1) Operating, maintaining, and repairing the pipeline in accordance with each of the requirements of this subpart and subpart M of this part.

Specifically, the Notice alleged that Respondent failed to follow its procedures for locating the line and placing stakes or other markers where necessary to identify the location of the pipeline in accordance with 49 C.F.R. § 192.614.

Respondent did not contest this alleged violation. Accordingly, after considering all of the evidence, I find that Respondent violated 49 C.F.R. § 192.605 by failing to follow its procedures for locating the line and placing stakes or other markers where necessary to identify the location of the pipeline.

Item 6: The Notice alleged that Respondent violated 49 C.F.R. § 192.605, which states in relevant part:

§ 192.605 Procedural manual for operations, maintenance, and emergencies.

(a) General. Each operator shall prepare and follow for each pipeline, a manual of written procedures for conducting operations and maintenance activities and for emergency response. For transmission lines, the manual must also include procedures for handling abnormal operations. This manual must be reviewed and updated by the operator at intervals not exceeding 15 months, but at least once each calendar year. This manual must be prepared before operations of a pipeline system commence. Appropriate parts of the manual must be kept at locations where operations and maintenance activities are conducted.

(b) Maintenance and normal operations. The manual required by paragraph (a) of this section must include procedures for the following, if applicable, to provide safety during maintenance and operations.

(1) Operating, maintaining, and repairing the pipeline in accordance with each of the requirements of this subpart and subpart M of this part.

Specifically, the Notice alleged that Respondent failed to follow its procedures for performing documented evaluations of marking jobs performed by its contract line locator in accordance with 49 C.F.R. § 192.613.

In its Response and at the hearing, Respondent contended that OPS had taken this procedure out of context and that it actually applied to follow-up evaluations of each pipe exposure, not evaluations of construction marking jobs. The relevant language in Respondent's procedure stated that "If the company pipeline is exposed, specified backfill and procedures shall be used and the coating shall be inspected." The list that followed included various items to be considered during an inspection of exposed pipe. Therefore, Respondent was persuasive on this point. I find that because Respondent's follow-up evaluations of exposed pipe were not the issue, withdrawal of this Item is warranted. Accordingly, after considering all of the evidence, I withdraw the allegation that Respondent violated 49 C.F.R. § 192.605 by failing to follow its procedures for performing documented evaluations of marking jobs performed by its contract line locator.

Item 7: The Notice alleged that Respondent violated 49 C.F.R. § 192.605, which states in relevant part:

§ 192.605 Procedural manual for operations, maintenance, and emergencies.

(a) General. Each operator shall prepare and follow for each pipeline, a manual of written procedures for conducting operations and maintenance activities and for emergency response. For transmission lines, the manual must also include procedures for handling abnormal operations. This manual must be reviewed and updated by the operator at intervals not exceeding 15 months, but at least once each calendar year. This manual must be prepared before operations of a pipeline system commence. Appropriate parts of the manual must be kept at locations where operations and maintenance activities are conducted.

(b) Maintenance and normal operations. The manual required by paragraph (a) of this section must include procedures for the following, if applicable, to provide safety during maintenance and operations.

(1) Operating, maintaining, and repairing the pipeline in accordance with each of the requirements of this subpart and subpart M of this part.

§ 192.613 Continuing surveillance.

(a) Each operator shall have a procedure for continuing surveillance of its facilities to determine and take appropriate action concerning changes in class location, failures, leakage history, corrosion, substantial changes in cathodic protection requirements, and other unusual operating and maintenance conditions.

Specifically, the Notice alleged that Respondent failed to have and follow procedures for taking appropriate action to address unusual operating conditions (repeated encroachments) in accordance with 49 C.F.R. § 192.613.

In its response and at the hearing, Respondent questioned whether the procedures required by § 192.613 for taking action to correct unusual operating conditions applied to encroachments associated with a parallel construction project and contended that encroachments were of a different nature than the other conditions listed. Respondent, however, was not persuasive on this point. Construction demands a heightened need for surveillance and appropriate action. “Other unusual maintenance and operating conditions” is a catch-all term that captures conditions not otherwise enumerated in § 192.613 and reflects that there are a variety of conditions that could occur on or near pipeline facilities that could cause harm. Respondent’s operation of a gas pipeline immediately adjacent to an area with extensive ongoing construction activity is reasonably a kind of other “unusual condition” for which Respondent must take appropriation action. In addition, Respondent’s own procedures for compliance with § 192.613 negate the argument that encroachments were of a different nature than the other conditions listed as implicating surveillance requirements. These procedures state that “surveillance is [among other things] awareness of: Conditions on and adjacent to pipeline rights-of-way; construction activity and movement of heavy equipment near facilities; encroachments, and other factors which might affect operations of the pipeline system or result in possible injury or damage to people or property.” The construction of a pipeline adjacent to Respondent’s right-of-way implicates all of these aspects of Respondent’s surveillance procedures.

Respondent further argued that it was not required to take corrective action in the absence of “actual knowledge” of the repeated encroachments and asserted that it did not have actual knowledge of these encroachments. In support of its argument, Respondent produced weekly reports along with the transmittal e-mails and contended that nothing in these e-mails or the reports themselves highlighted an ongoing or repeated issue with encroachments. It is undisputed in the record, however, that there were at least twelve documented instances of encroachments by REX.⁶ It is undisputed that the line locator was aware of multiple encroachments onto the 124A right-of-way. OPS argued that the weekly reports did communicate these incidents to Respondent’s Area Manager. While the reports, entitled “Weekly Progress – Inspection of REX Encroachments” could have better highlighted the incidents, poor descriptions or an inadequate level of detail by Respondent’s contractor in its reports to Respondent’s manager does not absolve Respondent of its responsibility to conduct continuing surveillance and take action where necessary. In addition, Respondent otherwise acknowledged that its Area Manager was aware of encroachment issues. OPS noted a March 9, 2007 Summary of Findings provided by Respondent stating that the Area Manager had “several discussions during the project” with REX personnel to try to resolve encroachment issues.⁷ Accordingly, I find that Respondent was or should have been sufficiently aware of an unusual operating condition to take corrective action to satisfy the regulatory requirement. Respondent did not take the kinds of systemic corrective actions needed to fully address the repeated encroachments, such as changing from the REX survey maps to Respondent’s alignment sheets or increasing oversight of the line locator.

⁶ El Paso’s own internal investigation confirmed that there had been “repeated encroachments pointing to a systemic failure of the REX survey and the marking process.” November 13, 2008 Response at 6.

⁷ OPS Violation Report, exhibits. OPS also expressed its view that there is no requirement for actual knowledge in §§ 192.605 or 192.613.

Accordingly, after considering all of the evidence, I find that Respondent violated 49 C.F.R. § 192.605 by failing to follow its procedures for taking appropriate action to address the repeated encroachments.

Item 8: The Notice alleged that Respondent violated 49 C.F.R. § 192.605, which states in relevant part:

§ 192.605 Procedural manual for operations, maintenance, and emergencies.

(a) General. Each operator shall prepare and follow for each pipeline, a manual of written procedures for conducting operations and maintenance activities and for emergency response. For transmission lines, the manual must also include procedures for handling abnormal operations. This manual must be reviewed and updated by the operator at intervals not exceeding 15 months, but at least once each calendar year. This manual must be prepared before operations of a pipeline system commence. Appropriate parts of the manual must be kept at locations where operations and maintenance activities are conducted.

* * *

(c) Abnormal operation. For transmission lines, the manual required by paragraph (a) of this section must include procedures for the following to provide safety when operating design limits have been exceeded:

(1) Responding to, investigating, and correcting the cause of:

* * *

(v) Any other foreseeable malfunction of a component, deviation from normal operation, or personnel error, which may result in a hazard to persons or property.

Specifically, the Notice alleged that Respondent failed to establish and follow procedures for correcting abnormal operating conditions (repeated encroachments).

In its Response and at the hearing, Respondent argued, among other things, that the term “abnormal operation” as used in the cited regulation is a term of art used to describe situations in which pipeline facility design limits have been exceeded, and was not applicable to excavation damage. Notably, the introductory text of this regulation states that correcting the kinds of situations exemplified in the list is required “when operating design limits have been exceeded.” Therefore, Respondent was persuasive on this point. I find that because exceeding facility design limits was not the issue, withdrawal of this Item is warranted. Accordingly, after considering all of the evidence, I withdraw the allegation that Respondent violated 49 C.F.R. § 192.605 by failing to follow procedures for correcting repeated encroachments.

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

49 U.S.C. § 60122 and 49 C.F.R. § 190.225 require that, in determining the amount of the civil penalty, I consider the following criteria: the nature, circumstances, and gravity of the violation, including adverse impact on the environment; the degree of Respondent's culpability; the history of Respondent's prior offenses; the Respondent's ability to pay the penalty and any effect that the penalty may have on its ability to continue doing business; and the good faith of Respondent in attempting to comply with the pipeline safety regulations. In addition, I may consider the economic benefit gained from the violation without any reduction because of subsequent damages, and such other matters as justice may require.

In its Response and at the hearing, Respondent initially argued that under the statutory penalty caps for administrative pipeline enforcement cases, the civil penalties for violations involving the same subject matter arising from an accident investigation could not exceed \$1,000,000 in total regardless of whether the case involved a number of violations none of which individually exceeded \$1,000,000. Respondent argued in the alternative that even if the overall case could exceed \$1,000,000 in civil penalties, Items 4, 6 and 7 were so closely related that the civil penalties assessed for these three items in combination could not exceed \$1,000,000. Since these three items had a proposed amount of \$1,000,000 each, Respondent's alternative argument would result in the total civil penalty amount being reduced from the \$3,364,000 proposed in the Notice to \$1,364,000.⁸ I will discuss the initial argument, and then discuss the alternative argument by analyzing the extent to which each item is related to another item or items to an extent that would invoke the statutory cap.

With respect to Respondent's initial argument that the civil penalties in a case arising from a single accident can not exceed \$1,000,000 in total regardless of the number of violations, Respondent noted that administrative civil penalty assessments by PHMSA are limited by the following provision of 49 U.S.C. 60122:

(a) General penalties.--(1) A person that the Secretary of Transportation decides, after written notice and an opportunity for a hearing, has violated section 60114(b), 60114(d), or 60118(a) of this title or a regulation prescribed or order issued under this chapter is liable to the United States Government for a civil penalty of not more than \$100,000 for each violation. A separate violation occurs for each day the violation continues. The maximum civil penalty under this paragraph for a related series of violations is \$1,000,000.

Citing *U.S. v. Chrysler Corporation*,⁹ Respondent contended that the phrase "related series of

⁸ Respondent also questioned whether the appropriate penalty should be \$1,133,000 reflecting 1/3 of the responsibility given the involvement of two other companies, or \$1,200,000 which it asserted would reflect the penalty policy of the U.S. Department of Justice.

⁹ 16 F.Supp 2d 25 (U.S. Dist. Ct. DC, 1998). This case involved a U.S. Code section applicable to automobiles, not a Chapter 601 pipeline statute.

violations” in the last sentence, which PHMSA has interpreted to mean a series of daily violations in light of the preceding sentence, could also be read to effectively cap all cases at \$1,000,000 because the violations can be considered related by their involving the same subject matter as part of the same accident investigation.

In the absence of legislative history, I will interpret this provision in light of the purposes of the federal pipeline safety laws. First, such a reading would effectively limit the number of violations that PHMSA could assess penalties on in cases where each violation had sufficient seriousness to hit the daily cap. For example, under PHMSA’s reading, a case involving three unrelated violations (i.e., different evidentiary elements) each of which was serious enough to implicate the \$100,000 per day cap and each of which continued for at least 10 days would result in a total case of \$3,000,000. Respondent’s suggested reading that PHMSA is capped at \$1,000,000 assumes that violations involving the same subject matter are related and amounts to the proposition that PHMSA would have to discard the penalties associated with two of the three violations in the example. We believe this is an incorrect reading of our authority. Nothing in this statute prohibits PHMSA from assessing total civil penalties of over \$1,000,000 in a case as long as the violations are separate. The statute limits an individual violation to \$100,000 per day up to \$1,000,000 if that individual violation continued for a series of days, the number of which multiplied by the per-day amount would otherwise exceed \$1,000,000. Therefore, Respondent’s proposed reading is contrary to the plain language of the statute.

Turning to the question of what constitutes separate violations, Respondent contended that the violations in this case all involved the same subject—pipeline locating and marking requirements—and should be seen as a continuous event resulting in the accident. However, this approach is inconsistent with the structure of the regulatory requirements. In exercising its rulemaking authority delegated by Congress in its organic statute, a regulatory agency often establishes numerous different regulatory requirements in the same subject matter area.¹⁰ I am not aware of any court decision or other authority that would force an agency to enforce only one requirement because citing more than one would make separate requirements “related” simply because they involve the same subject matter. In the case of the pipeline safety regulations, because each pipeline system is unique the regulations allow the operator to develop written procedures tailored to its system, but each section of those procedures is enforceable by PHMSA in the same manner as a code section. If PHMSA were unable to hold operators accountable for following all of their procedures in a given subject area of the manual because they were in some sense related, public safety would suffer and the intent of Congress in enacting the pipeline safety laws would be frustrated.¹¹ For the reasons discussed above, Respondent’s argument that the total civil penalties in this case can not exceed \$1,000,000 is unpersuasive.

¹⁰ The Code of Federal Regulations is organized into Parts, Subparts, and other subdivisions which often involve a single subject area.

¹¹ See, e.g., *United States v. American Airlines, Inc.*, 739 F. Supp. 52 (D. Mass. 1990). The court concluded that each individual suitcase that went uninspected was a separate violation and assessed the maximum civil penalty of \$1,000 for each suitcase. The court rejected the airline’s argument that all uninspected suitcases on a flight should be considered to constitute only one violation because they were all transported on a single flight. The court reasoned that assessing the penalty on the basis of only one penalty for each flight would result in a civil penalty so low that it would frustrate Congress’ intent in promulgating federal safety regulations and would not deter the airline from committing the violation again. Similarly, Congress intended PHMSA’s penalty levels to provide deterrence to multi-million dollar oil and gas pipeline companies.

Respondent's alternative argument is that a subset of three items in the case (Items 4, 6 and 7) are related and the civil penalty for them collectively cannot exceed \$1,000,000. First, I note that the issue of separate regulatory violations can be informed by the analogy to separate offenses under well established principals of criminal law. In *Blockburger v. United States*, the U.S. Supreme Court held that "Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not." 284 U.S. 299 at 304. Applying the idea that separate evidence constitutes separate violations, I will evaluate all Notice Items to determine whether each can stand alone and has its own evidentiary basis, or whether any two or more are so closely related (i.e., same evidentiary basis) that they are not separate and should be considered one violation for purposes of applying the \$1,000,000 cap for an individual violation exceeding 10 days in duration. I will also individually apply the penalty assessment considerations.

With respect to Item 1, the Notice proposed a civil penalty of \$100,000 for Respondent's failure to have and follow written procedures for making construction maps and records available to appropriate personnel. Making these maps and records available is a key part of pipeline safety, particularly for field personnel who must frequently refer to them in making decisions that could impact safety. In its Response and at the hearing, Respondent argued that the penalties should be mitigated because the failures of many other entities contributed to the November 2006 incident. In its Response and at the hearing, Respondent argued: (1) that it didn't have the experience that would lead it to appreciate the magnitude of the risk of construction adjacent to its pipeline; (2) that REX had failed to meet certain FERC obligations; (3) that REX failed to mark Respondent's facilities when creating REX alignment sheets; (4) that Associated Pipeline (REX's construction contractor) failed to locate and mark Respondent's facilities, failed to stop work when encroachments occurred, and continued to instruct its employees to excavate when no pipeline markings were present; (5) that Associated Pipeline effectively subverted the one-call process; and (6) that Associated Pipeline relied on Respondent's line locator to locate the WIC lines yet failed to tell it about its daily activities. Respondent then argued that because of the actions of the other two entities, it should only be liable for approximately 1/3 of the total proposed penalties.

Respondent's arguments do not support a reduction of the proposed civil penalties for several reasons. First, Respondent should have known of the risks associated with a large construction project occurring adjacent to its active pipelines. For many years third party damage has been widely known to be among the greatest pipeline safety threats. Respondent knew of the presence of extensive construction and excavation activities in the vicinity of its pipelines, yet the company failed to have and follow procedures meant to address the risks of excavation adjacent to its pipelines. Next, even if other parties contributed to the incident, Respondent was primarily responsible for the proper locating, marking, and surveillance of its facilities. The regulations and Respondent's own procedures make this clear. Yet Respondent failed on several accounts to prepare and/or follow the many procedures that are specifically intended to address threats to its pipelines and prevent incidents. In addition, Respondent placed the crucial responsibility for locating and marking its pipelines in the hands of just one person, the line locator. Yet it failed to provide him with accurate information, management, and supervision. Finally, the liability of the other two entities was not at issue in this matter.

With respect to culpability, Respondent did not heed a requirement that applied to its facility and failed to take practicable steps it could have taken to comply. With respect to gravity, the violation contributed to a significant accident involving a fatality. Respondent has presented no information 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 \$100,000 for this violation of 49 C.F.R. § 192.605.

With respect to Item 2, the Notice proposed a civil penalty of \$35,000 for Respondent's failure to follow its procedures for notifying excavators about its locating and marking practices. Notifying excavators about locating and marking practices is a key first step in preventing excavation damage. With respect to culpability, Respondent did not heed a requirement that applied to its facility and failed to take practicable steps it could have taken to comply. With respect to gravity, the violation contributed to a significant accident involving a fatality. Respondent has presented no information 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 \$35,000 for this violation of 49 C.F.R. § 192.605.

With respect to Item 3, the Notice proposed a civil penalty of \$100,000 for Respondent's failure to follow its procedures for developing criteria for surveillance inspections at each location. Developing criteria for surveillance inspections provides an important mechanism for considering the risks involved during excavation projects and planning for adequate oversight resources. With respect to culpability, Respondent did not heed a requirement that applied to its facility and failed to take practicable steps it could have taken to comply. With respect to gravity, the violation contributed to a significant accident involving a fatality. Respondent has presented no information 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 \$100,000 for this violation of 49 C.F.R. § 192.605.

With respect to Item 4, the Notice proposed a civil penalty of \$1,000,000 for Respondent's failure to follow its procedures for the Area Manager to conduct oversight of its contract line locator. Inadequate oversight by Respondent's Area Manager of its contract line locator was one of the primary factors that led to this fatal accident. With respect to culpability, Respondent did not heed a requirement that applied to its facility and failed to take practicable steps it could have taken to comply. With respect to gravity, the violation was a causal factor in a significant accident involving a fatality. Respondent has presented no information 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 \$1,000,000 for this violation of 49 C.F.R. § 192.605.

With respect to Item 5, the Notice proposed a civil penalty of \$100,000 for Respondent's failure to follow its procedures for locating the line and placing stakes or other markers where necessary to identify the location of the pipeline. Poor execution of the locating and marking function was one of the primary factors that led to this fatal accident. With respect to culpability, Respondent did not heed a requirement that was clearly applicable to its facility and failed to take practicable steps it could have taken to comply. With respect to gravity, the violation contributed to a significant accident involving a fatality. Respondent has presented no information 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 \$100,000 for this violation of 49 C.F.R. § 192.605.

With respect to Item 6, the Notice proposed a civil penalty of \$1,000,000 for Respondent's failure to follow its procedures for performing documented evaluations of marking jobs performed by its contract line locator. OPS' allegation in the Notice that Respondent failed to evaluate marking jobs performed by its line locator was essentially the same allegation of failure to conduct adequate oversight of the line locator in Item 4 and would have involved the same evidentiary basis (i.e., conduct of the Area Manager). Therefore, the two were related for purposes of a \$1,000,000 penalty cap. As discussed above, Item 6 has been withdrawn and the civil penalty proposed in the Notice for Item 6 is eliminated.

With respect to Item 7, the Notice proposed a civil penalty of \$1,000,000 for Respondent's failure to take appropriate action to address the repeated encroachments. The absence of action to correct the systemic encroachment problem was a major factor in this fatal accident. With respect to culpability, Respondent did not heed a requirement that was clearly applicable to its facility and failed to take practicable steps it could have taken to comply. With respect to gravity, the violation was a causal factor in a significant accident involving a fatality. Respondent has presented no information 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 \$1,000,000 for this violation of 49 C.F.R. § 192.605.

With respect to Item 8, the Notice proposed a civil penalty of \$29,000 for Respondent's failure to establish and follow procedures for correcting the repeated encroachments. OPS' allegation in the Notice that Respondent failed to follow procedures for correcting repeated encroachments is essentially the same allegation of failure to take appropriate action to address the repeated encroachments in Item 7 and would have involved the same evidentiary basis (i.e., evidence of what actions were and were not taken). Therefore, the two were related for purposes of a \$1,000,000 penalty cap. As discussed above, Item 8 has been withdrawn and the civil penalty proposed in the Notice for Item 8 is eliminated.

Accordingly, with respect to Respondent's argument that Notice Items 4, 6 and 7 were related for purposes of the civil penalty cap, Respondent was persuasive that Item 6 was related to and not separate from Item 4, but was not persuasive that Item 7 was related to either. In addition, I find that Item 8 was related to and not separate from Item 7. As indicated above, Items 6 and 8 have been withdrawn.

For the reasons discussed above, having reviewed the record and considered the assessment criteria, I assess Respondent a total civil penalty of \$2,335,000.

Payment of the civil penalty must be made within 20 days of service. Federal regulations (49 C.F.R. § 89.21(b)(3)) require this payment be made by wire transfer, through the Federal Reserve Communications System (Fedwire), to the account of the U.S. Treasury. Detailed instructions are contained in the enclosure. Questions concerning wire transfers should be directed to: Financial Operations Division (AMZ-341), Federal Aviation Administration, Mike Monroney Aeronautical Center, P.O. Box 269039, Oklahoma City, OK 73125; (405) 954-8893.

Failure to pay the \$2,335,000 civil penalty will result in accrual of interest at the current annual rate in accordance with 31 U.S.C. § 3717, 31 C.F.R. § 901.9 and 49 C.F.R. § 89.23. Pursuant to those same authorities, a late penalty charge of six percent (6%) per annum will be charged if payment is not made within 110 days of service. Furthermore, failure to pay the civil penalty may result in referral of the matter to the Attorney General for appropriate action in a United States District Court.

COMPLIANCE ORDER

The Notice proposed a Compliance Order with respect to all 8 items in the Notice, two of which have been withdrawn. Under 49 U.S.C. § 60118(a), each person who engages in the transportation of gas or who owns or operates a pipeline facility is required to comply with the applicable safety standards established under chapter 601. Following the hearing, Respondent and OPS mutually agreed to accept modifications to portions of the Proposed Compliance Order set forth in the Notice and these modifications are reflected 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. In regard to Item 1 of the Notice, pertaining to El Paso's procedures for making construction records, maps, and operating history available to appropriate operating personnel, El Paso must:

- Revise its current procedures to specify that every person under El Paso's direction or supervision who is required to locate, for the purpose of construction or excavation activity in the right of way of El Paso's pipeline facilities, any underground or not otherwise visible pipeline facility owned and/or operated by El Paso ("EP Line Locators"), must be provided access to a current version of the "as-built" maps or drawing of each underground or not otherwise visible El Paso pipeline facility in the vicinity of the proposed excavation.
- Revise its procedures to provide such as-built maps or drawings to excavators performing work in the right of way of El Paso's pipeline facilities. El Paso may provide such as-built maps or drawings to EP Line Locators and excavators electronically or in hardcopy.
- Include in its revised procedures a specific requirement that EP Line Locators must review the as-builts provided by El Paso with an El Paso representative before the performance of their duties. The revised procedure must also require EP Line Locators to consult the as-builts provided by El Paso during the performance of their duties, and make inquiries of El Paso representatives about the location of facilities should questions arise during the performance of their duties.
- Specify the person responsible for ensuring the company's compliance with each revision to the procedures;

2. In regard to Items 2, 3, 4, and 5 of the Notice, El Paso must develop and implement, for a period of two (2) years following the effective date of this Order, written procedures that require Area Managers or any other responsible manager or supervisor to conduct

unannounced reviews of the work done by EP Line Locators to ensure applicable procedures are understood, are being followed, and are effective. During the performance of such reviews, El Paso must give particular attention to the accuracy, visibility, and durability of the marking and line locating work performed in relation to parallel construction activities. In addition to the requirements set out above, the procedures must include, at a minimum, provisions for:

- Conducting unannounced reviews of each EP Line Locator's line locating work. The unannounced reviews must be conducted at least once per month for projects lasting more than a month, but no less than three (3) times for projects lasting more than a month but less than three months. The first review must be conducted no later than one week into the start of the project. Reviews must be conducted more often if El Paso discovers that the EP Line Locators do not understand and/or are not following applicable procedures, or in situations where procedures are not found to be effective in preventing damage to the El Paso facilities.
- Documenting, in writing, all reviews of each EP Line Locator. Documentation must describe El Paso's responsive action if EP Line Locators are found not to be following or not understanding procedures or in situations where procedures were found to be ineffective. El Paso must retain documentation make it available to PHMSA upon request. At the conclusion of the two (2) year period, El Paso must submit a report summarizing the reviews of work done by EP Line Locators. The report must include a list and description of projects, the dates and results of reviews, and how El Paso addressed the results of reviews in its damage prevention procedures.
- Clear, documented communications to excavators, constructing parties, and other pipeline and utility operators regarding El Paso's procedures for line locating and marking;

3. In regard to Item 7 of the Notice, El Paso must develop and implement training for all managers and supervisors to improve their understanding of El Paso's Continuing Surveillance procedures. The training must:

- Be designed to improve the ability of managers and supervisors to understand and effectively intervene in unsafe situations that could lead to hazards to persons or property.
- Include scenarios designed to help managers and supervisors recognize recurring unsafe behaviors associated with construction in the vicinity of El Paso's pipeline facilities.
- Include scenarios in which an emergency situation could have been avoided had immediate action been taken to stop recurring unsafe behaviors that could threaten El Paso's pipelines; and

4. El Paso must maintain documentation of the safety improvement costs associated with fulfilling this Compliance Order and submit the total to Director, Western Region, PHMSA. El Paso must report costs 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.

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 demonstrating good cause for an extension.

Failure to comply with this Order may result in administrative assessment of civil penalties not to exceed \$100,000 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. § 190.215, Respondent has a right to submit a petition for reconsideration of this Final Order. Should Respondent elect to do so, the petition must be sent to the Associate Administrator, Office of Pipeline Safety, PHMSA, 1200 New Jersey Avenue, SE, East Building, 2nd Floor, Washington, DC 20590. The petition must be received within 20 days of Respondent's receipt of this Final Order and must contain a brief statement of the issue(s). The filing of a petition automatically stays the payment of any civil penalty assessed. All other terms of this Final Order, including any required corrective action, shall remain in full force and effect unless the Associate Administrator, upon request, grants a stay. The terms and conditions of this Final Order are effective upon receipt.

Jeffrey D. Wiese
Associate Administrator
for Pipeline Safety

Date Issued