

June 12, 2015

Mr. Gerald S. Frey
Global Pipeline Manager & President
ExxonMobil Pipeline Company
22777 Springwoods Village Parkway
E3.5A.521
Spring, Texas 77389

Re: CPF No. 5-2013-5007

Dear Mr. Frey:

Enclosed is the decision on the petition for reconsideration filed by ExxonMobil Pipeline Company in the above-referenced case. For the reasons explained in the decision, the petition is denied. When the civil penalty assessed in the final order has been paid, this enforcement action will be closed. This decision constitutes the final administrative action in this proceeding. Service of the decision is made pursuant to 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: Mr. Chris Hoidal, Director, Western Region, PHMSA
Mr. Bob Hogfoss and Ms. Catherine Little, Hunton & Williams LLP,
Bank of America Plaza, Suite 4100, 600 Peachtree Street, N.E., Atlanta, GA 30308

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

PHC-20: B. Fred/V. Tsaganos: jrs: x63529: 6/3/15

J:/Pipeline/Orders Pending with PHP/CPF No. 5-2013-5007 ExxonMobil Pipeline Company

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

In the Matter of)
)
ExxonMobil Pipeline Company,) **CPF No. 5-2013-5007**
)
Petitioner.)

DECISION ON PETITION FOR RECONSIDERATION

On July 1, 2011, the Silvertip Pipeline operated by ExxonMobil Pipeline Company (EMPCo or Petitioner) experienced a failure in Laurel, Montana. The failure occurred during a flood event and resulted in the release of approximately 1,500 barrels of crude oil into the Yellowstone River, causing environmental damage and forcing the evacuation of approximately 42 people.¹

Following an investigation by the Pipeline and Hazardous Materials Safety Administration (PHMSA), Office of Pipeline Safety (OPS), the Director, Western Region, issued a Notice of Probable Violation, Proposed Civil Penalty, and Proposed Compliance Order to EMPCo on March 25, 2013 (Notice). The Notice alleged that EMPCo committed five violations of the pipeline safety regulations in connection with the accident, proposed a civil penalty of \$1,700,000, and proposed corrective action.

EMPCo requested a hearing on the Notice, which was held July 17, 2013, in Lakewood, Colorado. On January 23, 2015, pursuant to 49 C.F.R. § 190.213, PHMSA issued a Final Order, finding EMPCo had committed four of the five violations that were alleged in the Notice. The order assessed a civil penalty of \$1,045,000 for the violations, and found that EMPCo had already completed the proposed compliance order.

On February 12, 2015, EMPCo filed a Petition for Reconsideration of the Final Order (Petition) seeking reconsideration of three of the violations and elimination or reduction of the civil penalty. Specifically, the Company sought the withdrawal of the findings that it had violated 49 C.F.R. §§ 195.452(i)(2) (Item 1), 195.402(e)(2) (Item 4), and 195.402(e)(4) (Item 5).

¹ For additional information regarding the accident, *see* pp. 2-6 of the Final Order issued to ExxonMobil Pipeline Co., CPF No. 5-2013-5007, 2015 WL 780721 (Jan. 23, 2015). Enforcement decisions can be viewed on PHMSA's website at <http://www.phmsa.dot.gov/pipeline/enforcement> (follow links for enforcement since 2002 and then enforcement actions issued by year).

Under 49 C.F.R. § 190.243, an operator may petition for reconsideration of a final order. PHMSA may grant or deny, in whole or in part, a petition for reconsideration without further proceedings.

Item 1 in the Final Order found that EMPCo had violated 49 C.F.R. § 195.452(i)(2), which states:

§ 195.452 Pipeline integrity management in high consequence areas.

(a) *Which pipelines are covered by this section?* This section applies to each hazardous liquid pipeline and carbon dioxide pipeline that could affect a high consequence area

(i) *What preventive and mitigative measures must an operator take to protect the high consequence area?*—(1) *General requirements.* An operator must take measures to prevent and mitigate the consequences of a pipeline failure that could affect a high consequence area. These measures include conducting a risk analysis of the pipeline segment to identify additional actions to enhance public safety or environmental protection

(2) *Risk analysis criteria.* In identifying the need for additional preventive and mitigative measures, an operator must evaluate the likelihood of a pipeline release occurring and how a release could affect the high consequence area. This determination must consider all relevant risk factors, including, but not limited to:

(i) Terrain surrounding the pipeline segment, including drainage systems such as small streams and other smaller waterways that could act as a conduit to the high consequence area;

(ii) Elevation profile;

(iv) Amount of product that could be released; [and]

(vii) Physical support of the pipeline segment such as by a cable suspension bridge;

The Final Order determined that EMPCo had violated § 195.452(i)(2) by failing to conduct a risk analysis that evaluated the likelihood of its pipeline experiencing a release caused by flooding, and by failing to consider risk factors relevant to flooding. The Final Order found that seasonal floods were known to occur at the Yellowstone River and that such flooding had caused prior incidents in the area of the Silvertip pipeline. PHMSA found that EMPCo had a duty under § 195.452(i)(2) to include in its risk analysis an evaluation of the likelihood that the Silvertip pipeline could experience a release caused by flooding.

The Final Order reviewed the relevant records and procedures of EMPCo to determine if the Company met its obligation to evaluate the likelihood of a release from flooding. PHMSA found that EMPCo had conducted a risk analysis that identified three potential integrity threats: third-party damage, manufacturing, and external corrosion. EMPCo had not identified flooding of the Yellowstone River as a threat that could affect the likelihood of a pipeline release. In addition, EMPCo had not evaluated risk factors relevant to flooding. For these reasons, the Final Order found EMPCo had committed a violation.

In its Petition, EMPCo maintained that it had performed a risk assessment and analysis that “expressly evaluated the risk of flooding both generally on the Silvertip Pipeline and at the Yellowstone River crossing specifically.”² EMPCo contended further that it had concluded flooding was not a significant risk. To support its position, EMPCo cited to the Company’s *Silvertip to Billings 12” Crude Preventive & Mitigative Measures Analysis Summary* (2010 P&M Analysis), Integrity Management Program (2010 IMP Plan), and Integrity Management Program Form 6.1 (2010 IMP Form 6.1).

Each of these documents were discussed in the Final Order. They were found not to demonstrate compliance with § 195.452(i)(2) because they did not show EMPCo evaluated the likelihood of a release from flooding. In its Petition, EMPCo has not identified any specific provision in these documents that it believes was overlooked or misrepresented in the Final Order. PHMSA reconsiders these documents below, but finds they still fail to demonstrate compliance.

2010 P&M Analysis – EMPCo’s P&M Analysis identified three potential integrity threats to the Silvertip Pipeline: third-party damage, manufacturing, and external corrosion.³ The Analysis did not identify other threats that could affect the likelihood of a pipeline release, including the threat of flooding. While the document did identify and evaluate various P&M measures, those measures only addressed the three integrity threats identified, not flooding. The documentation does not support Petitioner’s contention that it evaluated the risk of flooding or that it concluded flooding was not a significant risk.

2010 IMP Plan – EMPCo’s IMP Plan had procedures for performing a risk analysis, but merely having procedures does not prove the Company followed them by evaluating the risks of flooding. When these documents were originally submitted by EMPCo, they had certain sentences highlighted to emphasize that segments are “evaluated for the relative significance of the nine ASME B31.8S threats.”⁴ The IMP Plan demonstrates that EMPCo had a written process for performing a risk analysis, including evaluating segments for the threats listed in ASME B31.8S, but the procedures alone do not demonstrate the process was followed or that EMPCo actually analyzed the risk of flooding.

2010 IMP Form 6.1 – EMPCo’s IMP Form 6.1 was used to document the evaluation of preventive and mitigative actions in support of the 2010 P&M Analysis.⁵ The documents consist of two separate forms. The first identified moderate external corrosion as a threat and discussed the threats and risk drivers, measures to reduce risk, and risk reduction results. The second evaluation identified a manufacturing threat and provided the same type of discussion. There were no forms identifying the threat of natural forces or flooding, and none that indicated risk factors were considered in regard to the specific threat of natural forces or flooding.

² Petition at 3.

³ OPS Pipeline Safety Violation Report (Violation Report) (Apr. 19, 2013), Exhibit B-7.

⁴ EMPCo Pre-hearing Submittal (Jul. 8, 2013), Exhibit 9, p. 83. ASME/ANSI B31.8S is a consensus standard related to integrity management of gas pipelines. *See* 49 C.F.R. § 192.7.

⁵ Pre-hearing Submittal, Exhibit 10.

Accordingly, the IMP Forms do not demonstrate that EMPCo performed a risk analysis that considered flooding as a threat.

Having reconsidered the documentation cited by Petitioner, PHMSA confirms its finding that the documents fail to demonstrate EMPCo evaluated the likelihood of a release from flooding.

Petitioner also noted that the Final Order withdrew Item 2 in the Notice, and argued that Item 1 should also be withdrawn because the Company's arguments were the same for both items.

PHMSA withdrew Item 2 after finding that OPS failed to prove EMPCo had committed a violation of § 195.452(i)(1).⁶ Item 1 and Item 2 concerned two separate regulatory requirements and the withdrawal of Item 2 had no bearing on the finding of violation in Item 1.

For the reasons stated above, PHMSA does not find cause to disturb the finding in the Final Order that EMPCo violated § 195.452(i)(2).

Items 4 and 5 in the Final Order found that EMPCo had violated 49 C.F.R. § 195.402(e)(2) and (e)(4), respectively, which state:

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

(a) *General.* Each operator shall prepare and follow for each pipeline system a manual of written procedures for conducting normal operations and maintenance activities and handling abnormal operations and emergencies

(e) *Emergencies.* The manual required by paragraph (a) of this section must include procedures for the following to provide safety when an emergency condition occurs . . .

(2) Prompt and effective response to a notice of each type [of] emergency, including fire or explosion occurring near or directly involving a pipeline facility, accidental release of hazardous liquid or carbon dioxide from a pipeline facility, operational failure causing a hazardous condition, and natural disaster affecting pipeline facilities

(4) Taking necessary action, such as emergency shutdown or pressure reduction, to minimize the volume of hazardous liquid or carbon dioxide that is released from any section of a pipeline system in the event of a failure.

Item 4 of the Final Order determined that EMPCo had violated § 195.402(e)(2) by failing to have procedures for responding to natural disasters, such as seasonal flooding of the Yellowstone River. The Final Order evaluated EMPCo's written emergency procedures and found that while they defined "emergency condition" broadly to include natural disasters, the procedures only

⁶ Final Order at 15. Petitioner incorrectly suggested that PHMSA withdrew Item 2 because the facts were too similar to Item 1. Petition at 5, n. 2. The Final Order withdrew Item 2 based on a finding that OPS failed to prove a violation of § 195.452(i)(1).

provided instructions for responding to accidental leaks. Instructions to address other types of emergencies, such as fires and natural disasters which may not involve an immediate leak, were not included in the procedures.

Item 5 of the Final Order determined that EMPCo had violated § 195.402(e)(4) by failing to have procedures requiring the closure of remote control valves (RCVs) to minimize the volume of oil released into the Yellowstone River during a failure. The Final Order reviewed EMPCo's emergency procedures and found they only required closing valves at the beginning of the pipeline and at the Laurel Terminal Facility, which is downstream of the river. Closure of only these two valves is not adequate to minimize the flow of oil into the Yellowstone River if there is a failure at the river crossing. The procedures did not require immediate closure of the nearest upstream RCV from the river.

In its Petition, EMPCo contends that it had the requisite procedures in place, including procedures to respond to emergency conditions and to identify RCVs to isolate the Yellowstone River. To the extent there were deficiencies in the implementation of these procedures, or if improvements could be made to the procedures themselves, Respondent argued that it would not constitute a violation. Respondent also argued that Items 4 and 5 were based on the same factual allegations and were so related they should be withdrawn or their penalties reduced.

Petitioner essentially raises arguments that are already discussed in the Final Order. PHMSA evaluated EMPCo's written emergency procedures in the Order and concluded they did not contain the necessary instructions for personnel to respond to natural disasters and to minimize the volume of oil released. PHMSA has consistently held that an operator's procedures may be found in violation if the procedures fail to contain elements that are required or if the procedures do not provide the level of safety mandated by the regulation.⁷ Respondent has failed to demonstrate the findings of violation in Items 4 and 5 were in error.

The Final Order also addressed Petitioner's argument that Items 4 and 5 are "related" and should be withdrawn or their penalties reduced. The Final Order rejected this argument, finding the violations were based on separate regulatory provisions and constituted violations of separate regulatory requirements. Each violation also required proof of an additional fact the other did not. For these reasons, the Final Order determined they were not "a related series of violations." Even if it had been determined that the violations were "a related series," their combined penalties would not exceed the maximum allowed under 49 U.S.C. § 60122.⁸

⁷ See, e.g., Sunoco Pipeline L.P., CPF No. 1-2009-5003, Item 1, 2011 WL 7416422 (Nov. 25, 2011) (stating that "[p]rocedures that are ineffective or that do not provide an acceptable level of safety may be found in noncompliance").

⁸ At the time of the violations, the maximum administrative penalty was \$100,000 per violation for each day of the violation, up to a maximum of \$1,000,000 "for a related series of violations." The Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011, Pub. L. No. 112-90, § 2(a) (Jan. 3, 2012) increased the maximum to \$200,000 per day, up to \$2,000,000 for a related series.

Accordingly, having reconsidered the record, PHMSA confirms its finding that EMPCo's procedures did not comply with § 195.402(e)(2) and (4), as set forth in Items 4 and 5 of the Final Order, respectively.

Strict Liability

Finally, EMPCo contends that the Final Order relies on a theory of "strict liability" to support the imposition of civil penalties. Under this theory, EMPCo argues that PHMSA is inappropriately holding the Company liable for the Silvertip pipeline accident even though "the Company was in compliance with the rules . . . both before and at the time of the incident."⁹ EMPCo argues that under the Pipeline Safety Act, PHMSA does not have authority to impose strict liability, and "must base all enforcement on documented findings of violations."¹⁰ EMPCo contends that it met all applicable safety standards, and the pipeline accident occurred due to a flood that was beyond its control.

EMPCo's notion that it was in compliance with the regulations at the time of the accident is refuted by the findings of violation documented in the Final Order, and confirmed in this Decision. Specifically, EMPCo violated the following regulations: 49 C.F.R. §§ 195.452(i)(2) (Item 1); 195.403(a)(3) (Item 3); 195.402(e)(2) (Item 4); and 195.402(e)(4) (Item 5).

Under the Pipeline Safety Act, "a person that [PHMSA] 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"¹¹ EMPCo committed violations of the pipeline safety regulations, and is therefore liable for civil penalties in this administrative proceeding.¹²

When assessing a civil penalty, PHMSA considers a number of assessment criteria.¹³ If a violation is the result of circumstances beyond the control of an operator, PHMSA may find cause to reduce or withdraw the proposed penalty after weighing the other assessment criteria. In this case, Petitioner's failure to complete an appropriate risk analysis and to prepare appropriate emergency response procedures was not the result of circumstances beyond its control. Moreover, these violations contributed to increasing the severity of the consequences of an accident: crude oil drained into the Yellowstone River for 56 minutes after the first alarm indicated a pressure drop at the location of the river crossing, causing significant environmental damage and forcing the evacuation of approximately 42 people. . Accordingly, PHMSA finds no reason to reduce the penalty assessed in the Final Order.

⁹ Petition at 3.

¹⁰ Petition at 3.

¹¹ 49 U.S.C. § 60122(a)(1).

¹² Petitioner's attempt to distinguish the Pipeline Safety Act (PSA) from the Clean Water Act (CWA) does not help its position. Like the PSA, the CWA holds parties liable for a "violation" of that statute and the implementing regulations. 33 U.S.C. § 1321(b)(6)(A), (f)(2).

¹³ 49 U.S.C. § 60122(b) and 49 C.F.R. § 190.225.

For the above reasons, the Petition for Reconsideration filed by EMPCo is *denied*. Payment of the \$1,045,000 civil penalty assessed in the Final Order is now due and must be made within 20 days of service of this Decision.

Federal regulations (49 C.F.R. § 89.21(b)(3)) require such payment to be made by wire transfer through the Federal Reserve Communications System (Fedwire), to the account of the U.S. Treasury. Detailed instructions are contained in the enclosure. Questions concerning wire transfers should be directed to: Financial Operations Division (AMK-325), Federal Aviation Administration, Mike Monroney Aeronautical Center, P.O. Box 269039, Oklahoma City, Oklahoma 73125-4915. The Financial Operations Division telephone number is (405) 954-8845.

Failure to pay the \$1,045,000 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. Failure to pay the civil penalty may result in referral of the matter to the Attorney General for action in a district court of the United States.

This Decision on Petition for Reconsideration is the final administrative action in this proceeding.

Jeffrey D. Wiese
Associate Administrator
for Pipeline Safety

Date Issued