



U.S. Department
of Transportation

Pipeline and Hazardous Materials
Safety Administration

1200 New Jersey Avenue SE
Washington DC 20590

MAY 03 2019

Mr. Kelcy Warren, Chairman
Energy Transfer Partners, LP
8111 Westchester Drive
Dallas, Texas 75225

Re: CPF No. 2-2017-5003

Dear Mr. Warren:

Enclosed please find the Final Order issued in the above-referenced case to your subsidiary, Mid-Valley Pipeline Company. It makes one finding of violation and assesses a reduced civil penalty of \$23,500. The penalty payment terms are set forth in the Final Order. This enforcement action closes automatically upon receipt of payment. Service of the Final Order by certified mail is effective upon the date of mailing, as provided under 49 C.F.R. § 190.5.

Thank you for your cooperation in this matter.

Sincerely,

Alan K. Mayberry
Associate Administrator
for Pipeline Safety

Enclosure

cc: Mr. James A. Urisko, Director, Southern Region, Office of Pipeline Safety, PHMSA
Mr. Gary MacDonald, President, Mid-Valley Pipeline Company, 1 Fluor Daniel Drive,
Building A, Level 3, Sugar Land, Texas 77478

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

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

In the Matter of

**Mid-Valley Pipeline Company,
a subsidiary of Energy Transfer Partners, LP,**

Respondent.

CPF No. 2-2017-5003

FINAL ORDER

From August 15 through 19, 2016, pursuant to 49 U.S.C. § 60117, representatives of the Pipeline and Hazardous Materials Safety Administration (PHMSA), Office of Pipeline Safety (OPS), conducted an on-site pipeline safety inspection of Mid-Valley Pipeline Company's (MVPL) pipeline facilities in Mississippi and Tennessee and records at the company's Oxford, Mississippi office. MVPL owns a 1,103-mile crude-oil pipeline running from Longview, Texas, to Samarian, Michigan (the Mid-Valley Pipeline). The Mid-Valley Pipeline is operated by Energy Transfer Partners, LP.¹

As a result of the inspection, the Director, Southern Region, OPS (Director), issued to MVPL, by letter dated May 3, 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 MVPL had violated 49 C.F.R. § 195.412 and proposed assessing a civil penalty of \$88,400 for the alleged violation.

After requesting and receiving an extension of time, Sunoco Pipeline, LP (SPLP), responded to the Notice on behalf of MVPL, by letter dated June 12, 2017 (Response).² The company contested the allegation, offered additional information in response to the Notice, and requested that the proposed civil penalty be reduced or eliminated. Respondent did not request a hearing and therefore has waived its right to one. For purposes of this Order, the terms "MVPL," SPLP," and "Respondent" shall be used interchangeably.

FINDING OF VIOLATION

The Notice alleged that Respondent violated 49 C.F.R. Part 195, as follows:

¹ At the time of the PHMSA inspection, the Mid-Valley Pipeline was operated by Sunoco Pipeline, LP, a wholly-owned subsidiary of Sunoco Logistics Partners, LP. See, Sunoco Logistics Partners, LP 2016 Form 10-K, available at, <http://www.sunocologistics.com/SiteData/docs/10K2016Fin/b9174876261d8ab4/10-K:%202016%20-%20Final.pdf> (last accessed May 21, 2018). On April 28, 2017, Sunoco Logistics Partners, LP and Energy Transfer Partners merged, with the resulting company being known as Energy Transfer Partners, LP. See, Energy Transfer, Company Information, website, available at <http://www.sunocologistics.com/Investors/Company-Information/32/> (last accessed March 4, 2019).

² As of the date of the Response, SPLP had merged with Energy Transfer Partners, LP.

Item 1: The Notice alleged that Respondent violated 49 C.F.R. § 195.412(a), which states:

§ 195.412 Inspection of rights-of-way and crossings under navigable waters.

(a) Each operator shall, at intervals not exceeding 3 weeks, but at least 26 times each calendar year, inspect the surface conditions on or adjacent to each pipeline right-of-way. Methods of inspection include walking, driving, flying or other appropriate means of traversing the right-of-way.

The Notice alleged that Respondent violated 49 C.F.R. § 195.412(a) by failing to inspect the surface conditions on or adjacent to each pipeline right-of-way. Specifically, the Notice alleged that Respondent used aerial patrols to inspect its pipeline right-of-way (ROW), but that at the time of the PHMSA inspection, several portions of the company's ROW in Mississippi and Tennessee were found to be so overgrown with trees and vegetation that the surface condition of the ROW was not visible enough to yield an adequate inspection from the air. The Notice alleged that the following four locations on the pipeline ROW had excessive growth and tree canopy blocking aerial visibility of the surface conditions:

- 1) Aerial Marker 327;
- 2) Bibbs Road crossing between Block Valve 339 and Aerial Marker 352;
- 3) Highway 7 road crossing at Mile Post (MP) 373.842; and
- 4) Danko Lane at MP 560.262.

In its Response, SPLP contested the alleged violation and argued that it should be withdrawn and the proposed penalty either be reduced or eliminated. Specifically, it presented four distinct defenses. First, Respondent argued that PHMSA had inappropriately applied requirements that went beyond the language of § 195.412, thus violating the requirements of due process and the Administrative Procedure Act (APA). Second, SPLP argued that PHMSA appeared "to impose a subjective ground-level visibility requirement into § 195.412 and relies on insufficient evidence to try to demonstrate that SPLP failed to meet this additional requirement." Third, it alleged that "the documentation demonstrates that SPLP was in compliance with § 195.412" and submitted aerial right-of-way patrol reports "as conclusive evidence of compliance." Fourth, it contended that the proposed penalty was "unjustified and excessive."³

Analysis

I will first address Respondent's three defenses aimed at the substantive issues surrounding the violation itself. I will then address its fourth defense, dealing with the proposed penalty, in the "Assessment of Penalty" section below.

SPLP's first argument is that PHMSA violated the company's due process rights and the APA by initiating an enforcement action based on "additional requirements" that go beyond the explicit language of § 195.412, and that form "the sole basis for enforcement."⁴ Specifically, the company contends that the regulation only requires an operator to "inspect" the surface conditions of its ROW, not that it clear or maintain its ROW to any particular standard.

³ Response, at 1.

⁴ *Id.*

According to SPLP, the key is “what § 195.412 does not require – there is no explicit clearing or maintenance requirement contained in § 195.412 (let alone a frequency of maintenance nor an objective measure of success or guidance document provided by PHMSA).” Additionally, SPLP argues that PHMSA has not provided any “guidance document” that gives the regulated community “fair notice” of PHMSA’s position that “an operator can somehow predict PHMSA’s opinion of whether a clearing can be seen from a flyover solely by relying on a ground level visit.”⁵

SPLP is correct that governmental agencies cannot violate an operator’s right of due process by depriving it of property without providing a minimum level of “fair notice” as to what may constitute a violation of law. “Due process requires that parties receive fair notice before being deprived of property In the absence of notice—for example, where the regulation is not sufficiently clear to warn a party about what is expected of it—an agency may not deprive a party of property by imposing civil or criminal liability.” *Gen. Elec. Co. v. U.S. EPA*, 53 F.3d 1324, 1328-29 (D.C. Cir. 1995) (citations omitted) (internal quotation marks omitted). *See also, United States v. Chrysler Corp.*, 158 F.3d 1350, 1354 (D.C. Cir. 1998); *Trinity Broad. of Fla., Inc. v. FCC*, 211 F.3d 618, 628 (D.C. Cir. 2000).

In the current matter, however, PHMSA has sought only to enforce the express terms of a regulation first promulgated in 1981. Section 195.412(a) states that each operator is required to inspect the surface conditions on or adjacent to each pipeline ROW at intervals not exceeding 3 weeks, but at least 26 times each calendar year. The operator is given the option to select any “appropriate means of traversing the right-of-way,” such as “walking, driving, [or] flying.” Furthermore, published enforcement decisions from PHMSA have provided ample notice to the regulated community that the agency interprets § 195.412(a) to mean that operators must “regularly inspect the surface conditions of their pipeline rights-of-way, by *appropriate* means, in order to detect encroachments and various other threats to the integrity of their facilities.”⁶ Therefore, if an operator cannot view surface conditions using aerial patrols, then common sense dictates that aerial patrols are not an “appropriate” means of achieving compliance with § 195.412(a).⁷

PHMSA has interpreted this regulation consistently through a series of published final orders, finding that if dense vegetation or overgrowth obstructs an operator’s view of its ROW surface condition from the air, then the operator cannot meet the requirements of the regulation.⁸ For

⁵ *Id.*

⁶ *In The Matter of Nustar Energy, LP*, CPF No. 3-2007-5002, Final Order (issued Feb. 5, 2009) (emphasis in original). Available at https://primis.phmsa.dot.gov/comm/reports/enforce/FOCPEvent_opid_0.html?nocache=5590.

⁷ *In the Matter of Plains Pipeline, LP*, CPF No. 4-2016-5015, Final Order (issued Mar. 7, 2018). Available at https://primis.phmsa.dot.gov/comm/reports/enforce/FOCPEvent_opid_0.html?nocache=5590.

⁸ PHMSA has issued numerous final orders applying this same standard. *E.g., In the Matter of Texas Eastern Pipeline Products Company*, CPF No. 2-2005-5013, Final Order (issued April 13, 2006); *In the Matter of Marathon Pipeline, LLC*, CPF No. 3-2007-5024, Final Order (issued Nov. 7, 2008); *In the Matter of Nustar Energy, LP (f/k/a Valero, LP)*, CPF No. 3-2007-5002, Final Order (issued Feb. 5, 2009); *In the Matter of ExxonMobil Pipeline Company*, CPF No. 5-2011-5003, Final Order (issued Nov. 2, 2011); *In the Matter of Enterprise Products Operating, LLC*, CPF No. 1-2012-5001, Final Order (issued Oct. 9, 2012); *In the Matter of Buckeye Partners, LP*, CPF No. 1-2013-5003, Final Order (issued June 10, 2013); *In the Matter of Plains Pipeline, LP*, CPF No. 4-2016-

example, in a case with facts very similar to those in the present case, PHMSA found that “[r]elying solely on aerial patrols is inappropriate in areas where such overgrowth prevented Valero from observing surface conditions and potential damage to its facilities or encroachments to its rights-of-way. Respondent could have used ground patrols as an additional method of inspection but elected not to do so.”⁹ Finally, while not legally binding, PHMSA has issued other guidance stating that “[i]t is the position of the Department that, if visual aerial inspections are used by the operator to meet the requirements of [195.412], the rights-of-way must be kept clear of brush and trees.”¹⁰ Therefore, based on the foregoing, I find Respondent’s argument that its due process rights and the requirements of the APA were violated lacks merit.

With regard to SPLP’s second argument, the company contends that PHMSA has attempted in this case to “impose a subjective ground-level visibility requirement into §195.412 and relies on insufficient evidence to try to demonstrate that SPLP failed to meet this additional requirement.”¹¹ I disagree. The record demonstrates that the OPS inspector personally observed and photographed conditions at four locations along MVPL’s ROW showing that there was such excessive undergrowth and tree canopy that the surface condition of the ROW could not be observed from the air. I have reviewed the photographic evidence provided by the OPS inspector and find these photographs do indeed show that the four locations on Respondent’s ROW were covered in dense overgrowth and excessive tree canopy.¹² It is evident, from viewing the photographs, that there was no clear line-of-sight from the air to the surface of the ROW. Accordingly, by relying solely on aerial patrols in these specific areas, Respondent could not inspect surface conditions along its ROW.

Finally, SPLP submitted aerial ROW patrol reports from 2014, 2015, and 2016 through August 15, 2016, to demonstrate compliance with § 195.412. While the records demonstrate that SPLP did indeed conduct aerial patrols within the requisite intervals, they are not relevant to the allegation that Respondent could not have inspected the surface conditions at these four locations by the use of aerial patrols.

Accordingly, after considering all of the evidence and the legal issues presented, I find that Respondent violated 49 C.F.R. § 195.412(a) by failing to inspect the surface conditions on or adjacent to its ROW where trees and vegetation on the ROW precluded a proper inspection of the pipeline surface conditions by aerial patrol.

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

5015, Final Order (issued Mar. 7, 2018). Available at https://primis.phmsa.dot.gov/comm/reports/enforce/FOCPEvent_opid_0.html?nocache=5590.

⁹ *In the Matter of Nustar Energy, LP (f/k/a Valero, L.P.)*, CPF No. 3-2007-5002, Final Order (issued Feb. 5, 2009). Available at https://primis.phmsa.dot.gov/comm/reports/enforce/FOCPEvent_opid_0.html?nocache=5590.

¹⁰ *The Honorable Jerry F. Costello*, Response to Request for Interpretation, [PI-95-015] (May 28, 1991).

¹¹ Response, at 1.

¹² Pipeline Safety Violation Report (Violation Report) (May 3, 2017), at Exhibit A (on file with PHMSA).

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.¹³ 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 \$88,400 for the violations cited above.

Item 1: The Notice proposed a civil penalty of \$88,400 for Respondent's violation of 49 C.F.R. § 195.412(a), for failing to inspect the surface conditions on or adjacent to its ROW where trees and excessive vegetation precluded inspection of the pipeline surface conditions by aerial patrol. In its Response, SPLP contended that "the proposed penalty is unjustified and excessive."¹⁴ Specifically, SPLP argued that PHMSA had erroneously applied the penalty assessment criteria for gravity and culpability, resulting in a proposed civil penalty that was higher than warranted.

With regard to gravity, the Violation Report alleged the next-to-the-lowest level of gravity for the violation, i.e., that the "[p]robable violation occurred in areas that are not in [a High Consequence Area (HCA)] or not in an HCA 'could affect' segment."¹⁵ SPLP argued that PHMSA should have selected the lowest level of gravity, i.e., that the probable violation occurred outside an HCA but "pipeline safety was minimally affected." In support of its argument, SPLP first reiterated its contention that operator personnel did not note excessive vegetation growth as obstructing the pipeline ROW and that all inspections were performed at the requisite intervals. Second, SPLP asserted that its ROW inspections at these locations, when considered in conjunction with its public-awareness and damage-prevention programs and computerized leak-detection program, provided for the overall safe operation of the pipeline. Third, SPLP stated that there were no accidents, releases or other events that occurred on this segment, presumably showing that no harm had resulted from its aerial inspection program.¹⁶

This penalty criterion, however, is not dependent on whether any actual harm occurred as a result of the violation. On the contrary, it recognizes that the areas in which the violation occurred are not the most environmentally sensitive locations but that the violation still presented a risk of accident or injury to life, the environment and property. When trees and vegetation overgrowth prevent a proper inspection of surface conditions along a ROW, an operator may fail to promptly identify certain activities, including conduct by third parties, that could lead to pipeline damage

¹³ 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).

¹⁴ Response, at 1.

¹⁵ Violation Report, at 10.

¹⁶ Response, at 5.

or to identify an actual release of product. I also reject the argument that because SPLP's employees failed to note the existence of excessive vegetation in their patrolling reports, this should somehow mitigate the penalty. Aerial patrols should alert operators to those situations where excessive vegetation prevents effective inspections and thereby result in additional clearing or alternative means of patrolling.

However, I am persuaded, in this particular case, that Respondent's public-awareness and damage-prevention programs and computerized leak detection, working in conjunction with the aerial patrolling conducted pursuant to § 195.412(a), ensured that safety was only minimally affected. Although these programs and the company's leak-detection system do not serve as a substitute for SPLP's regulatory obligation to visually inspect the surface conditions of its ROWs, they do serve to complement patrolling by monitoring pipeline integrity and minimizing the risk of a pipeline failure or product release. I would also note that the locations cited in the Notice as lacking adequate patrolling are located in areas that are not considered to be environmentally sensitive HCAs. Finally, while the overgrowth inhibited SPLP's ability to inspect the condition of the ROW at these four locations, Respondent did perform the patrols at the required regulatory intervals for the remainder of the ROW. Considering the totality of these circumstances, I find that pipeline safety was minimally affected in this case and the penalty should be reduced.

With respect to culpability, the Violation Report alleged that "[t]he operator made a deliberate decision not to comply with a requirement that was clearly applicable."¹⁷ SPLP argues there was no regulatory requirement that was "clearly applicable" in this case. Additionally, Respondent claims that PHMSA relies solely on the statement of one SPLP employee regarding the modifications that had been made to the company's ROW mowing program to support the proposed penalty. Finally, Respondent argues that the inspections were completed within the requisite interval and at no time during these inspections did company personnel note excessive vegetation growth as prohibiting SPLP from adequately inspecting its ROW.¹⁸

According to SPLP, PHMSA appeared to be relying on the statements of a single SPLP employee, i.e., its Operations Supervisor, regarding budget cuts that had been made to the company's ROW mowing program. The company argued that PHMSA failed to "connect those purported statements to a violation of §195.412. Simply stating that funding had decreased does not demonstrate that funding was insufficient and, once again, §195.412 does not specify any frequency of right-of-way maintenance. Moreover, at no time did the personnel performing the inspections note that excess vegetation growth did not allow for adequate inspection of the right-of-way and all inspections were performed at the prescribed intervals and total number required per calendar year."¹⁹

I agree with SPLP that the evidence presented by the Southern Region on this Item is insufficient to prove a *deliberate* violation of 49 C.F.R. § 195.412. While I suspect that the company's failure to clear the overgrowth obscuring its view of the ROW from the air may well have been due to budget cuts, I find that the Southern Region has failed to meet its burden of proving that

¹⁷ Violation Report, at 11.

¹⁸ Response, at 5.

¹⁹ *Id.*

Respondent made a *deliberate* decision not to comply with a requirement that was clearly applicable. Instead, I find that SPLP simply failed to comply with a requirement that was clearly applicable, which represents a lower level of culpability than a deliberate violation and would therefore justify an additional reduction in the proposed civil penalty for culpability.

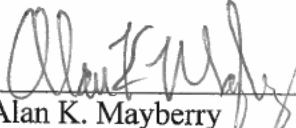
Notwithstanding such a reduction, I should emphasize that the diminished culpability still carries a substantial penalty and does not negate or diminish SPLP's obligation to inspect the surface conditions on or adjacent to each pipeline ROW. Effective patrolling is one of the best ways for a pipeline operator to identify encroachments, third-party damage, and leaks along its ROW that might not otherwise be detectable and should never be compromised. Accordingly, based upon a reduction in both the gravity and culpability assessment criteria, as discussed above, I assess Respondent a reduced civil penalty of **\$23,500** for the violation of 49 C.F.R. § 195.412.

Payment of the civil penalty must be made within 20 days of service. Federal regulations (49 C.F.R. § 89.21(b)(3)) require such payment to be made by wire transfer through the Federal Reserve Communications System (Fedwire), to the account of the U.S. Treasury. Detailed instructions are contained in the enclosure. Questions concerning wire transfers should be directed to: Financial Operations Division (AMK-325), Federal Aviation Administration, Mike Monroney Aeronautical Center, 6500 S MacArthur Blvd, Oklahoma City, Oklahoma 79169. The Financial Operations Division telephone number is (405) 954-8845.

Failure to pay the \$23,500 civil penalty will result in accrual of interest at the current annual rate in accordance with 31 U.S.C. § 3717, 31 C.F.R. § 901.9 and 49 C.F.R. § 89.23. Pursuant to those same authorities, a late penalty charge of six percent (6%) per annum will be charged if payment is not made within 110 days of service. Furthermore, failure to pay the civil penalty may result in referral of the matter to the Attorney General for appropriate action in a district court of the United States.

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

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



Alan K. Mayberry
Associate Administrator
for Pipeline Safety

MAY 03 2019

Date Issued