U.S. Department
of Transportation

**Pipeline and Hazardous
Materials Safety
Administration**

1200 New Jersey Avenue, SE
Washington, D.C. 20590

DEC 27 2012

Mr. Steve Pankhurst
President
BP Pipelines (North America), Inc.
150 W. Warrenville Road
Naperville, IL 60563

Re: CPF No. 3-2010-5007

Dear Mr. Pankhurst:

Enclosed please find the Final Order issued in the above-referenced case. It makes findings of violation and assesses a civil penalty of $90,000. 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 deemed effective upon the date of mailing, or as otherwise provided under 49 C.F.R. § 190.5.

Thank you for your cooperation in this matter.

Sincerely,

for: Jeffrey D. Wiese
Associate Administrator
for Pipeline Safety

Enclosure
cc: Mr. David Barrett, Director, Central Region, OPS
Mr. Alan Mayberry, Deputy Associate Administrator for Field Operations, OPS
Mr. David Barnes, DOT Compliance Manager, BP Pipelines (North America), Inc.
Mr. Chuck Pinzone, Counsel, BP Pipelines (North America), Inc.
Mr. John B. Reinbold, Group Leader, Regulatory Compliance, Buckeye Partners, LP

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	)	
BP Pipelines (North America), Inc.,	)	**CPF No. 3-2010-5007**
Respondent.	)	

FINAL ORDER

On May 6, 2009, pursuant to 49 U.S.C. § 60117, a representative of the Pipeline and Hazardous Materials Safety Administration (PHMSA), Office of Pipeline Safety (OPS), conducted an investigation of an accident involving the pipeline system operated by BP Pipelines (North America), Inc. (BPNA or Respondent), in Page County, Iowa. BPNA operates about 4,400 miles of pipelines across the United States, transporting 1.6 million barrels per day of oil, refined products, natural gas, natural gas liquids, and chemicals.[1]

The investigation arose out of an accident that occurred at Milepost 116.5 on BPNA's eight-inch petroleum pipeline running from Sugar Creek, Missouri, to Council Bluffs, Iowa, during pipeline-lowering and maintenance work on May 6, 2009.[2] A BPNA contractor struck a two-inch valve on the pipeline with a backhoe during excavation. The accident resulted in the release of 36 barrels of diesel fuel, which was contained within the ditch. There were no injuries, fatalities, or significant environmental impacts as a result of the accident.

Following the investigation, the Director, Central Region, OPS (Director), issued to Respondent, by letter dated June 25, 2010, a Notice of Probable Violation and Proposed Civil Penalty (Notice). In accordance with 49 C.F.R. § 190.207, the Notice proposed finding that BPNA had violated 49 C.F.R. § 195.402(a) and proposed assessing a civil penalty of $90,000 for the alleged violation.

Respondent responded to the Notice by letter dated July 28, 2010 (Response). BPNA contested the allegation and requested a hearing, which was subsequently held on April 28, 2011, in Kansas City, Missouri, with an attorney from the Office of Chief Counsel, PHMSA, presiding.

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[1] *See* http://www.bp.com/sectiongenericarticle.do?categoryId=9030201&contentId=7055756 (last accessed October 1, 2012).

[2] The pipeline facilities that are the subject of this Final Order were as sold to Buckeye Partners, LP, on June 1, 2011.

At the hearing, Respondent was represented by counsel. After the hearing, BPNA provided a post-hearing statement for the record, by letter dated May 13, 2011 (Closing).

FINDING OF VIOLATION

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

Item 1: The Notice alleged that Respondent violated 49 C.F.R. § 195.402(a), which states, in relevant part:

> **§ 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....

The Notice alleged that Respondent violated 49 C.F.R. § 195.402(a) by failing to follow its own written procedures for operations and maintenance. Specifically, the Notice alleged that a BPNA contractor failed to follow the company's Operations and Maintenance (O&M) procedure, *SP-107, Specification for Lowering In Service Pipelines*, and particularly section 2.2, *Procedures for Excavating Around Lines*, while excavating the line. Section 2.2 of that procedure states: "A BP Pipelines 'best practice' is for the backhoe bucket to never be closer to the pipeline than 8 inches for initial stripping out of the line. This practice must be followed and has proven to prevent striking unknown fittings and flanges that may be attached to the line."[3]

At the hearing and in its Closing, BPNA asserted that the procedures required by 49 C.F.R. § 195.402(a) were contained in its Operations, Maintenance and Emergency Response Manual (OM&ER Manual), and that the procedures in the manual were followed on the day of the accident. In particular, BPNA stated that OM&ER Manual *Procedure P 195.422* applied to this project. BPNA argued, however, that the regulatory requirement for the company to follow its own written procedures did not apply to *SP-107* because it was "not intended to be a procedure 'prepared and followed' pursuant to 49 CFR 195.402(a)" but was merely "a technical specification created... to assist in following the procedures contained in the OM&ER Manual."[4]

I disagree. An operator's "manual of written procedures for conducting normal operations and maintenance activities" may be either a single manual or a comprehensive set of cross-referenced volumes. Such procedures must cover a wide range of maintenance tasks and normal operations listed in § 195.402(c), including pipe movement and repairs. BPNA argued that the applicable written procedure for this activity was OM&ER Manual *P 195.422*, and that it did not include *SP-107*. However, OM&ER Manual *P-195.422* expressly lists *SP-107* as a "Related Procedure"[5]

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[3] Pipeline Safety Violation Report (Violation Report), (June 25, 2010) (on file with PHMSA), Exhibit A, at 6.

[4] Respondent's Post-Hearing Statement (Closing), at 3.

and specifically refers to it in its policy regarding line movement.[6] In addition, *SP-107* states: "Lowering in-service pipelines shall be in accordance with the Operating Maintenance and Emergency Response Manual Section P 195.422… and as outlined here."[7] Each of the documents recognizes the import of the other and acknowledges the two as being interdependent.

BPNA further argued that PHMSA was "cherry-picking" language in *SP-107* (specifically, the phrase "this practice must be followed") to bolster PHMSA's position that § 195.402(a) applied in this situation. The company contended that *SP-107* self-identified itself as being merely a "best practice" and not a requirement. However, given the statement in *SP-107* that it must be followed, the title of the procedure ("Procedures for Excavating Around Lines"), the fact that the procedure provided detailed instructions for tasks that were specifically required to be included in the company's O&M procedures by § 195.402(c), and the cross-reference in OM&ER Manual P-195.422 to *SP-107*, the weight of the evidence indicates that the regulatory requirement for an operator to follow its own written procedures does indeed apply to *SP-107*. In fact, to conclude otherwise would allow operators themselves to "cherry-pick" the procedures it wants to follow at any given time, based upon the label it chooses to apply. The purpose of § 195.402 would be undermined if an operator were able to avoid following a particular procedure simply by labeling it as a "technical practice" or "specification."

In its Closing, BPNA further argued that even if § 195.402(a) applied to *SP-107*, the company had complied with the procedure. BPNA stated that the *SP-107* requirement for staying at least eight inches away from the pipeline applied only during "initial stripping out of the line." Respondent argued that once initial stripping had been completed, *SP-107* allowed the back or side of the closed backhoe bucket to be used to remove additional soil; BPNA argued this was what had occurred at the time of the accident. This claim was supported by a written statement from BPNA employee David L. Miller, which was submitted as an attachment to the Closing.

This argument was not raised in its Response or at the hearing, and is inconsistent with other evidence in the record. BPNA's own Root Cause Analysis of the accident found that "Did not follow existing procedures" was a "critical factor" relating to the cause of the accident and identified *SP-107* as the procedure not followed.[8] Further, BPNA employees admitted to PHMSA's investigator that they were aware of the requirement to maintain eight inches of clearance between the backhoe and the pipeline and that this requirement had been emphasized at multiple safety meetings prior to the excavation. The first time BPNA appears to have claimed it complied with *SP-107* was in its Closing, submitted more than a year after the accident. The weight of the evidence, including BPNA's own admissions, indicates that *SP-107* was not followed at the time of the accident.
BPNA has a duty to ensure that its employees and contractors actually implement the company's written procedures when performing operations and maintenance activities, whether they be

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[5] Closing, Attachment, at 1.

[6] *Id.* at 19.

[7] Violation Report, Exhibit A, at 3.

[8] Violation Report, Exhibit B, at 3.

called procedures, specifications, or best practices. In this particular case, compliance with the procedure appears to have been entirely dependent upon the backhoe operator's ability to visually estimate the actual distance from the pipeline. As a result, the backhoe struck a valve 6.5 inches away from the pipe body and diesel fuel was released from the pipeline. Accordingly, after considering all of the evidence, I find that Respondent violated 49 C.F.R. § 195.402(a) by failing to follow its own written procedures for operations and maintenance.

This finding of violation will be considered a prior offense 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. 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; 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. The Notice proposed a total civil penalty of $90,000 for the violation cited above.

Item 1: The Notice proposed a civil penalty of $90,000 for Respondent's violation of 49 C.F.R. § 195.402(a), for failing to follow its own written procedures for operations and maintenance. As discussed above, I found that Respondent's *SP-107, Specification for Lowering In-Service Pipelines*, was a part of the procedural manual required by § 195.402(a), and that Respondent failed to follow procedure 2.2, *Procedures for Excavating Around Lines*, in this document. Respondent objected to the amount of the proposed penalty, noting that it was 90% of the maximum allowed for a single-day violation and arguing that it was unreasonable, considering the nature, circumstances, and gravity of the violation. Respondent argued that the proposed penalty was excessive because the accident had occurred in a rural area and not within a "High Consequence Area,"[9] that there were no injuries or fatalities as a result of the accident, that there was minimal impact to the public or the environment, and that the released product was quickly contained and cleaned up.

In support of its argument that there was minimal environmental impact as a result of the accident, Respondent submitted a letter from the State of Iowa Department of Natural Resources, which documented that as of July 8, 2009, two months after the accident, the state agency detected no visible diesel contamination or odor at the site of the accident.[10] However, the

[9] Section 49 C.F.R. § 195.450 defines a "High Consequence Area" as a commercially navigable waterway, a high population area, an "other populated area," or an unusually sensitive area per § 195.6.

[10] Attachment to Closing, page 3.

record shows that environmental remediation was necessary following the accident; the diesel fuel was cleaned up quickly but the accident still resulted in contaminated soil being delivered to a landfill. In addition, the accident clearly presented a hazard to the public because there was a release of flammable product, even if it occurred in a rural area. The fact that there were no injuries, fatalities, or evacuations may have been largely fortuitous and does not serve to mitigate the proposed penalty.

Respondent further argued that it made good-faith efforts prior to the accident to ensure safety and that such efforts should serve to mitigate the penalty. Specifically, it argued that the accident took place while the company was making an effort to improve safety by lowering the line to an improved depth of cover, that it held daily safety briefings to reinforce safe work practices, that the employees on site knew about the eight-inch clearance requirement, and that the company had used qualified personnel to perform the work.[11] I acknowledge these efforts were undertaken in good faith, and they were, in fact, considered in calculating the proposed penalty. These good-faith efforts, however, were still outweighed by the seriousness of the violation, the fact that the violation was a causal factor for the accident, and other penalty considerations.

In its Closing, Respondent also argued that "PHMSA's penalty calculation methodology is not consistent with federal law."[12] BPNA noted that in spite of its good-faith efforts, the proposed penalty was 90% of the statutory maximum for this violation, and that therefore the penalty for a more serious violation with greater environmental impacts could only have been $10,000 higher. BPNA stated that such a result "is not only irrational, but is arbitrary and capricious."[13]

Federal law sets a maximum civil penalty of $100,000 per day for each violation,[14] and requires that the agency consider certain factors, but there is no requirement that PHMSA's penalties be proportional to each other below that cap. There is no penalty schedule in the statute or regulations and nothing that requires that the same penalty be imposed for similar violations in every case.

Respondent cited three previous final orders where penalties had been assessed for violations of this same regulation, with penalties ranging from $22,500 to $45,400.[15] As PHMSA has

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[11] Closing at 5.

[12] *Id.* at 6.

[13] In its Closing, BPNA requested "a copy of PHMSA's penalty policy, penalty guidance, penalty matrix, and/or penalty calculation methodology, as well as a copy of the specific penalty calculations used" in this case. Closing at 6-7. While PHMSA's policy is not to release deliberative documents in enforcement cases, I am providing a copy of OPS' civil penalty guidelines under separate cover.

[14] 49 U.S.C. § 60122. The Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011 raised the maximum civil penalty per violation to $200,000, although that increase does not impact the current proceeding.

[15] The cases were: *In the Matter of Holly Energy Partners, LP,* CPF Nos. 4-2010-5005 (Mar. 30, 2011); *In the Matter of Butte Pipeline Company,* 5-2009-5002 (Mar. 30, 2011); and *In the Matter of Chevron Pipe Line Company* 5-2010-5028 (Feb. 17, 2011).

indicated in other enforcement proceedings, the agency applies the same statutory assessment criteria on a case-by-case basis.[16] Given the unique facts of each offense, including operating conditions, how the violation was discovered, its duration, whether the operator made a good-faith effort to comply with the regulation prior to the inspection, and whether there were any immediate or potential safety or environmental impacts, it is not uncommon for there to be some variance in the penalties assessed for different operators' violations of the same code section.

PHMSA is not required to compare the factual circumstances of every past finding of violation when proposing and assessing penalties. Neither the PSA nor the implementing regulations require a strict uniformity of penalties. Nevertheless, I have reviewed the cases cited by Respondent and find they do not present either factual or legal issues that warrant any adjustment of the penalty proposed in this proceeding. Each of the cases is factually distinguishable from the current case. In particular, the violations in these previous cases did not constitute a direct or contributing cause of a pipeline accident.

At the hearing, the PHMSA official who determined the penalty amount proposed in the Notice testified about the penalty considerations applied in this case and explained that the gravity of the violation – the fact that the violation caused the accident – was the largest single contributing factor in proposing the penalty amount. Furthermore, Respondent did not present evidence or argue at the hearing or in its Closing that the violation did not cause the accident.

In summary, the penalty proposed in this case was below the statutory limit and does take into consideration the required statutory assessment criteria. Ultimately, BPNA's failure to follow this procedure directly led to the accident and the release of 36 barrels of diesel fuel. Having reviewed the record and considered the assessment criteria, I assess Respondent a civil penalty of $90,000 for violation of 49 C.F.R. § 195.402(a).

Accordingly, having reviewed the record and considered the assessment criteria for the Item cited above, I assess Respondent a total civil penalty of **$90,000**.

Payment of the civil penalty must be made within 20 days of service. Federal regulations (49 C.F.R. § 89.21(b)(3)) require 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 (AMZ-341), Federal Aviation Administration, Mike Monroney Aeronautical Center, P.O. Box 269039, Oklahoma City, Oklahoma 73125. The Financial Operations Division telephone number is (405) 954-8893.

Failure to pay the $90,000 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 district

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[16] *See, e.g., In the Matter of Belle Fourche Pipeline Company*, CPF No. 5-2009-5042, at 20-21, 2011 WL 7006607 (Nov. 21, 2011).

court of the United States.

Under 49 C.F.R. § 190.215, Respondent has the right to submit a Petition for Reconsideration of this Final Order. The petition must be sent to: 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. PHMSA will accept petitions received no later than 20 days after receipt of service of the Final Order by the Respondent, provided they contain a brief statement of the issue(s) and meet all other requirements of 49 C.F.R. § 190.215. The filing of a petition automatically stays the payment of any civil penalty assessed but does not stay any other provisions of the Final Order, including any required corrective actions. 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.

for Jeffrey D. Wiese
Associate Administrator
for Pipeline Safety

DEC 27 2012
Date Issued