



U S Department
of Transportation

Pipeline and Hazardous Materials
Safety Administration

1200 New Jersey Ave , SE
Washington, DC 20590

MAR 11 2009

Mr. Todd Denton
Vice President of Regional Operations
NuStar Logistics, L.P.
2330 North Loop 1604 West
San Antonio, Texas 78248

Re: CPF No. 4-2005-5048

Dear Mr. Denton:

Enclosed is the Final Order issued in the above-referenced case. It makes findings of violation, withdraws certain allegations of violation, assesses a reduced civil penalty of \$115,000, and specifies actions that need to be taken by NuStar to comply with the 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, Southwest 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,

William H Guts
for

Jeffrey D. Wiese
Associate Administrator
for Pipeline Safety

Enclosure

cc: Mr. R.M. Seeley, Director Southwest Region, PHMSA
Ms. Rebecca L. Fink, Esquire

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

¹ The OPS representative inspected the following Valero petroleum pipeline systems: Denver Products, Turpin Products; Clawson Crude Oil, El Paso Products, Albuquerque Products, Southlake Products, and Trans-Texas Liquefied Petroleum Gas (LPG)

Office of Chief Counsel, PHMSA, presiding. At the hearing, Respondent was represented by counsel. Following the hearing, Respondent's counsel timely submitted a closing statement, by letter dated September 5, 2006 ("Closing"). The following Final Order discusses each of the allegations set forth in the Notice and the issues raised by Respondent and is divided into three sections: Findings of Violation; Assessment of Penalty; and Compliance Order.

FINDINGS OF VIOLATION

I. Uncontested Allegations

At the hearing, Respondent did not contest the allegations in the Notice that it violated 49 C.F.R. Part 195 as follows:

Item 3: The Notice alleged that Respondent violated 49 C.F.R. § 195.410(c), which states:

§ 195.410 Line markers.

(a)

(c) Each operator shall provide line marking at locations where the line is above ground in areas that are accessible to the public.

The Notice alleged that Valero violated § 195.410(c) by failing to provide line marking where its pipelines are above ground in areas that are accessible to the public. Specifically, the Notice alleged that certain spans of formerly buried pipelines in ravines and water drainage areas had been washed out and left exposed. The company did not contest this allegation. Accordingly, I find that Respondent violated 49 C.F.R. § 195.410(c) by failing to provide line marking at certain spans of formerly buried pipelines in ravines and water drainage areas that had been washed out and left exposed.

Item 4: 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 § 195.412(a) by failing to inspect the surface conditions on sections of its Trans-Texas, Southlake, Albuquerque, and El Paso pipelines. Respondent routinely conducts aerial right-of-way (ROW) surveillance, yet certain areas on or adjacent to these pipelines were not visible from the air because the ROWs were obscured by vegetation. Valero did not contest this portion of the allegation. The Notice also alleged that the PHMSA inspector had observed Valero's aerial surveillance aircraft veer off of the ROW during an aerial inspection. The Notice indicated that this observation raised the issue of the adequacy of Respondent's ROW surveillance, clearing and marking programs. Respondent failed to present any evidence that in this particular instance, the pilot had not veered off course. Accordingly, I find that Respondent violated 49 C.F.R. § 195.412(a) by failing to inspect the surface conditions on the above-described portions of its pipeline ROW.

Item 6: The Notice alleged that Respondent violated 49 C.F.R. § 195.436, which states:

§ 195.436 Security of facilities.

Each operator shall provide protection for each pumping station and breakout tank area and other exposed facility (such as scraper traps) from vandalism and unauthorized entry.

The Notice alleged that Respondent violated § 195.436 by failing to provide protection for certain pump stations from vandalism and unauthorized entry. Specifically, the Notice alleged that Respondent failed to protect most of its Albuquerque pipeline pump stations by allowing holes to remain in the chain link fencing surrounding the pump stations after certain piping going through the fencing had been removed. The Notice also alleged that Respondent failed to protect some of its Trans-Texas, Southlake, and El Paso pipeline pump stations by allowing gaps to form under the chain link fencing surrounding the pump stations.² Valero did not contest this allegation. These holes and gaps threatened pipeline safety because unauthorized persons could have gained easy access to sensitive facilities through or under the fencing. Accordingly, I find that Respondent violated 49 C.F.R. § 195.436 by failing to protect certain pump stations from vandalism and unauthorized entry.

II. Contested Allegations

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. § 195.406(b), which states:

§ 195.406 Maximum operating pressure.

(a)

(b) No operator may permit the pressure in a pipeline during surges or other variations from normal operations to exceed 110 percent of the operating pressure limit established under paragraph (a) of this section. Each operator must provide adequate controls and protective equipment to control the pressure within this limit.

Item 1 of the Notice alleged that Respondent violated § 195.406(b) by failing to provide adequate controls and protective equipment to control the pressure on its pipelines within the limit established under § 195.406(a). Specifically, the Notice alleged that Respondent could not provide documentation that its pipelines were protected from overpressure, or that surge overpressure had been considered and could be prevented. Respondent contested this allegation of violation.

Respondent first argued that the Notice did not allege that Valero was out of compliance with § 195.406(b).³ Instead, it contended that the allegation was actually that Respondent had failed to provide “on-the-spot” documentation of its “compliance procedures.”⁴ I disagree with Respondent’s characterization of the allegation. At the hearing, the PHMSA inspector testified

² Five examples of holes in and gaps under fencing are included in PHMSA’s Violation Report as Figures 30-34.

³ Supplement to Response, at 2

⁴ *Id.*, and Prefiled Testimony, at 6

that during the inspection, he had observed that Respondent's systems did not use full flow pressure relief valves or breakout tanks to control pressure. He explained that this observation led him to ask Respondent for information on how the company had determined whether it had adequate pressure controls and protective equipment.

Inherent in this performance-based requirement that Respondent provide "adequate" controls and protective equipment to control pressure is the notion that the company must use reasonable means to determine what constitutes "adequate" controls and equipment for its own particular pipeline system and document such a decision-making process. If it hasn't performed such an analysis, Respondent might, for example, select undersized equipment or an insufficient number of pressure control devices. Valero asserted that it had, in fact, performed analyses of each of its pipelines to verify that they were protected from surges.⁵ However, despite having been given numerous opportunities, Respondent failed to provide any evidence that such analyses had actually been performed or that they were adequate.

Respondent did provide other information, however, in support of its argument that it had adequate pressure controls and protective equipment on its pipelines. It offered portions of its Operations and Maintenance (O&M) manual, information about pipeline operating history, and overpressure protection calibration and inspection records. However, none of this information addressed the key issue of whether Valero's overpressure controls and protective equipment were adequate.

During the hearing, Respondent offered a segment of its O&M manual.⁶ This document contained cursory statements that overpressure controls must be provided but provided no explanation as to how to determine whether such controls were adequate.⁷ Respondent next offered information about the operating history of its pipelines.⁸ Respondent's operating history does not confirm the adequacy of controls and protective equipment nor does it indicate that surge overpressure had been adequately analyzed. An operating history that reveals no instances of pipeline overpressure may simply be a matter of Respondent's luck. Finally, Respondent offered information regarding the inspection and calibration of its overpressure safety devices.⁹ While such information may indeed indicate that Valero's equipment was functioning properly, it does not show that the equipment was adequate to control pressure on the system. For example, a well-maintained and calibrated device might still be undersized for the system and therefore inadequate to control pressure within the prescribed limits.

After considering all of the evidence in the record, I find that Respondent violated 49 C.F.R. § 195.406(b) by failing to provide adequate controls and protective equipment on its pipelines to control the pressure within the limit established under § 195.406(a)

Item 2: The Notice alleged that Respondent violated 49 C.F.R. § 195.410(a), which states:

§ 195.410 Line markers.

⁵ Prefiled Testimony, at 7

⁶ Prefiled Testimony, at 7, and Ex. 4, at 316-1, Valero L.P. O&M Manual 316 Maximum Operating Pressure

⁷ Prefiled Testimony Ex. 4, at 316-1, 5

⁸ Prefiled Testimony, at 6-8

⁹ *Id.*, at 8-9, and Prefiled Testimony Ex. 5

(a) Except as provided in paragraph (b) of this section, each operator shall place and maintain line markers over each buried pipeline in accordance with the following:

(1) Markers must be located at each public road crossing, at each railroad crossing, and in sufficient number along the remainder of each buried line so that its location is accurately known. . . .

Item 2 of the Notice alleged that Respondent violated § 195.410(a) by failing to place and maintain pipeline markers over each buried pipeline in sufficient number that the location of the pipeline was accurately known. Specifically, the Notice alleged that when crossing cultivated fields, Valero's pipeline markers frequently could not be seen on the far side of the fields and that at valve sites, looking in both directions, markers were not visible.

Respondent contested this allegation, objecting to the so-called "line-of-sight" test used by PHMSA to determine the adequacy of a pipeline operator's line marking. Valero contended that its pipelines were marked under § 195.410(a) in a manner that accurately identified their location and that the "line-of-sight" test "impermissibly create[ed] additional obligations on regulated parties beyond those in the rule...."¹⁰

PHMSA acknowledges that the "line-of-sight" test, while simple to understand, has resulted in confusion within the industry and has been applied differently in various regions. As a result, the agency has initiated a re-examination of the use of the "line-of-sight" test but no decision has yet been reached on whether or how it should be revised.¹¹ Based upon the foregoing, I find that it is appropriate to withdraw Item 2 of the Notice. PHMSA shall not be prejudiced, however, by this withdrawal nor precluded from alleging future violations of § 195.410(a) against Respondent or any other operator.

Item 5: The Notice alleged that Respondent violated 49 C.F.R. § 195.420(a)-(c), which states:

§ 195.420 Valve maintenance.

(a) Each operator shall maintain each valve that is necessary for the safe operation of its pipeline systems in good working order at all times.

(b) Each operator shall, at intervals not exceeding 7½ months, but at least twice each calendar year, inspect each mainline valve to determine that it is functioning properly.

(c) Each operator shall provide protection for each valve from unauthorized operation and from vandalism.

Item 5 of the Notice alleged that Respondent committed four violations of § 195.420, as follows: By failing to maintain certain valves that were necessary for the safe operation of its pipeline system; by failing to inspect various mainline valves within the required intervals; and by failing to protect certain other valves from unauthorized operation and vandalism. Each of the specific allegations is addressed separately below.

¹⁰ Closing, at 4.

¹¹ PHMSA held a public workshop on February 20-21, 2008, in Houston, TX to discuss, among other issues, the location of line markers Pipeline Safety: Workshop on Public Awareness Programs for Pipeline Operators and Location of Line Markers, 73 Fed. Reg. 223 (Jan. 2, 2008)

1. Clawson Crude Oil Pipeline, Valve Site MP 11.

The Notice alleged that Valero failed to inspect the valve at Valve Site Mile Post (MP) 11 on its Clawson Crude Oil Pipeline in accordance with the required 7½-month inspection interval set out in § 195.420(b). The Notice alleged that PHMSA inspectors observed that the chain locking the valve was adhered with paint to the hand wheel of the valve, and that the car seals locking the valve in place were very corroded.¹² The Notice further alleged that these conditions showed that Respondent had not moved the valve for an extended period of time and therefore that the valve could not have been inspected in a timely manner.

Valero responded by presenting evidence that the valve had been painted on the same day that the valve was last inspected and that it had been inspected within the required interval.¹³ Respondent also presented credible evidence that the MP 11 valve was a ball-type valve that could be completely closed in five (5) movements, that only a partial movement of the valve hand wheel was necessary to inspect the valve, and that such a partial movement did not require the removal or unlocking of the car seals.¹⁴ I find that Respondent presented sufficient evidence to indicate that it had inspected the MP 11 valve in accordance with the 7½-month inspection requirement set forth in § 195.420(b). Accordingly, upon considering all of the evidence, I hereby withdraw that portion of the allegation in Item 5 relating to the MP 11 valve.

2. Turpin Products Pipeline, Valve Site MP 44.

The Notice alleged that Respondent failed to maintain its MP 44 valve in good working order at all times as required by § 195.420(a). Specifically, the Notice alleged that Valero allowed the pipeline into and out of the Turpin MP 44 valve (and therefore the valve itself) to be supported by blocks of wood, thereby risking severe corrosion of the pipeline within a short period of time. The Notice also alleged that Respondent did not provide any fencing or other protection for the valve as required by § 195.420(c). The valve was located in a farm equipment storage yard, where heavy equipment was frequently moved in and out, thereby exposing the valve to unauthorized operation or vandalism.

Respondent acknowledged that the Turpin MP 44 valve site was out of compliance with § 195.420.¹⁵ Accordingly, upon considering all of the evidence, I find that Respondent violated 49 C.F.R. § 195.420(a) and (c) by failing to maintain the Turpin MP 44 valve in good working order and by failing to provide protection for the valve from unauthorized operation and vandalism.

3. Mainline Valve Inspection Interval.

The Notice alleged that Respondent failed to inspect a large number of mainline valves on the Turpin, El Paso, Trans-Texas and Southlake pipelines within the 7½-month interval as required

¹² The “hand wheel” is the device used to open and close the valve. The “car seals” are metal seals on the valve that lock the valve in position.

¹³ Respondent offered two notarized affidavits from two of its employees as evidence that the MP 11 valve was inspected. Prefiled Testimony, at 22, Ex. 9 and 10.

¹⁴ Prefiled Testimony, at 23, Ex. 12, at 313-7.

¹⁵ Prefiled Testimony, at 25.

by § 195.420(b). According to the PHMSA inspector's review of company records and his Violation Report, 220 mainline valves had not been properly inspected.¹⁶

In its Prefiled Testimony and at the hearing, Respondent admitted that 105 of the valves listed in the Violation Report had not been timely inspected.¹⁷ However, Respondent asserted that the remaining 115 valves were not mainline valves and therefore not subject to the 7½-month inspection interval.¹⁸ Valero explained that the list of valves provided to PHMSA during the inspection contained all valves, not just the mainline ones. The company provided an excerpt from its O&M manual containing a definition of the term "mainline valves," to show that 115 of the valves on the list did not qualify as such.¹⁹ Respondent also testified that its definition of mainline valves had been in place prior to the inspection and that no valves had been re-classified since that time.²⁰

Based upon a review of all the evidence, I find that Respondent violated 49 C.F.R. § 195.420(b) by failing to inspect 105 of its mainline valves in accordance with the 7½-month interval required by the regulation.

4. Valve Site Fencing.

The Notice alleged that Respondent failed to provide protection for numerous valves on its pipeline systems from unauthorized operation and vandalism as required by § 195.420(c). Specifically, it alleged that a large number of Valero's valves did not have fencing around the valve sites; instead, many of the valves simply had pipe post-and-beam enclosures around them that might serve to protect them from unauthorized operation but not from vandalism. It also alleged that the Denver pipeline had valves with no fencing of any kind around them and that the Trans-Texas pipeline had at least one valve site with a four-foot-high cyclone fence that would not protect against vandalism, as it was located adjacent to a busy road in Mt. Belvieu, Texas. In its Violation Report, PHMSA provided photographs of examples of the allegedly unprotected valves.

Respondent asserted that § 195.420(c) does not specify the methods by which it must protect valves from unauthorized operation and vandalism and that therefore the means of protection is left to the discretion of the operator. Respondent also argued that the regulation does not require it to place fencing around *all* of its pipeline valves.

Respondent is correct that § 195.420(c) does provide operators with flexibility in providing protection for valves from unauthorized operation and vandalism. While fencing is a common means of providing such protection, it is not the only possible one. However, inherent in the flexibility provided by § 195.420(c) is the need for operators to show that they have considered the particular circumstances at each valve site and determined the specific measures that are needed to protect each valve. Without a documented process and evidence that it has been satisfactorily implemented, neither Respondent nor PHMSA can determine whether the company has provided adequate protection under the regulation. Depending on the results of a valve site

¹⁶ Violation Report Ex 4b.

¹⁷ Prefiled Testimony, at 26.

¹⁸ *Id.*, Prefiled Testimony Ex 15

¹⁹ Prefiled Testimony, at 27, Ex. 12

²⁰ Closing, at 5

analysis, a variety of different protective measures may be appropriate, including, but not limited to, post-and-beam enclosures, fencing, security cameras, motion detectors, concertina wire, brick walls, or combinations of these measures.

During the hearing, PHMSA argued that the presence of many unfenced valve sites and the existence of other valves in populated areas with only limited protection indicated that Valero had not made adequate and consistent efforts to protect its valve sites. The company was unable to show that it had a process in place for determining what types or levels of protections were necessary in various locations.

Accordingly, based upon a review of all the evidence, I find that Respondent violated 49 C.F.R. § 195.420(c) by failing to provide adequate protection for each valve from unauthorized operation and vandalism.

Item 7: The Notice alleged that Respondent violated 49 C.F.R. § 195.438, which states:

§ 195.438 Smoking or open flames.

Each operator shall prohibit smoking and open flames in each pump station area and each breakout tank area where there is a possibility of the leakage of a flammable hazardous liquid or the presence of flammable vapors.

Item 7 of the Notice alleged that Respondent violated § 195.438 by failing to prohibit smoking and open flames in each pump station area. Specifically, the Notice alleged that Respondent failed to post clearly visible “No Smoking” signs at the entrances to its pump station facilities. Valero contested the allegation but acknowledged that “No Smoking” signs were not posted at all facility entrances.²¹ Respondent argued that hanging “No Smoking” signs was not the only allowable means of achieving compliance with the regulation, contending that it had complied with the regulation simply by having and following its O&M manual, which included provisions to “ensure” that § 195.438 was followed.²² The manual required that Valero post signs prohibiting smoking and open flames around all facilities (including pump stations) where there was a possibility of flammable hazardous liquid leaks or the presence of flammable vapors. While it is necessary and appropriate for Respondent to have O&M procedures prohibiting smoking and open flames in pump station areas, the existence of such procedures alone does not constitute compliance with the regulation. If it did, no operator would ever have to do anything other than have a no-smoking policy on the books. Moreover, it is clear that Respondent did not follow its own procedures.

In order to achieve compliance with § 195.438, an operator must take action that actually implements a no-smoking policy for those persons who may not be familiar with the operator’s O&M manual. In this case, not all visitors to Respondent’s facilities were privy to Valero’s internal prohibitions on smoking, and may not have learned about them upon entry to the facility. For example, contractors, delivery persons, emergency responders, law-enforcement, and other non-company personnel may have entered through the pump station gates. Without “No Smoking” signs or other clear warnings that smoking was prohibited, visitors might be unaware that smoking was prohibited. Respondent provided no evidence of how it had prohibited

²¹ Prefiled Testimony, at 37

²² Prefiled Testimony, at 38, Ex. 21

smoking and open flames with regard to visitors in those locations where it had failed to install “No Smoking” signs.

Accordingly, based upon a review of all the evidence, I find that Respondent violated 49 C.F.R. § 195.438 by failing to prohibit smoking and open flames in each pump station and breakout tank area where there was a possibility of flammable hazardous liquid leaks or the presence of flammable vapors.

Item 8: The Notice alleged that Respondent violated 49 C.F.R. § 195.581(a), which states:

§ 195.581 Which pipelines must I protect against atmospheric corrosion and what coating material may I use?

(a) You must clean and coat each pipeline or portion of pipeline that is exposed to the atmosphere, except pipelines under paragraph (c) of this section.

The Notice alleged that Respondent violated § 195.581(a) by failing to keep certain pipeline facilities properly coated. In many locations, the coatings had failed or were failing, leaving the facilities susceptible to external corrosion. Specifically, the Notice and Violation Report included examples of facilities that were not properly coated, including above-ground and exposed pipelines, above-ground valves, and breakout tank roofs.²³

Valero responded by claiming that the facilities were properly protected from atmospheric corrosion. In its Prefiled Testimony and during the hearing, the company described a variety of measures it had taken to protect its facilities but failed to provide any credible evidence or arguments that the facilities cited were in compliance with § 195.581 at the time of the inspection. Accordingly, based upon a review of all the evidence, I find that Respondent violated 49 C.F.R. § 195.581(a) by failing to keep certain of its pipeline facilities that were exposed to the atmosphere properly coated, as more fully described in the Notice and Violation Report.

These findings of violation will be considered prior offenses in any subsequent enforcement action taken against Respondent.

III. Additional Issues Raised by Respondent

In addition to the specific allegations discussed above, Valero argued that PHMSA did not meet the notice requirements of 49 C.F.R. § 190.207 because many items in the Notice contained “general allegations and unidentified instances of non-compliance.”²⁴ As a result, Respondent contended that the Notice “provide an insufficient basis for PHMSA to allege any non-compliance or seek penalties.”²⁵ Valero asserted that its due process rights had been violated by such lack of notice and announced its intention to challenge portions of the Notice based on the generality of the allegations.²⁶ However, Respondent did not provide details as to what portions

²³ Violation Report Ex 7. Figures 39 – 45 consist of photographs of failing and failed pipeline coatings on the Albuquerque, Denver, El Paso, Turpin, and Trans-Texas pipeline facilities

²⁴ Response, at 4

²⁵ *Id*

²⁶ Supplement to Response, at 2.

of the Notice were too “general” or how it had been harmed by such purported generality. Upon review of the record, I find that the Notice contained brief but adequate statements of each allegation of violation. In addition, at Valero’s request, PHMSA provided a copy of the Violation Report, which set out detailed information in support of the allegations, including photographs of specific examples of non-compliance at Respondent’s facilities, procedures and inspection records. Respondent did not renew its generality arguments at the hearing or in its Closing.

Respondent also argued that the Notice “may be untimely” because it was issued more than one year after the inspections.²⁷ Respondent did not cite any authority or offer any evidence or information in support of this contention. I find that the Notice was issued well within the general five-year federal statute of limitations.²⁸

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. The Notice proposed a total civil penalty of \$255,000 for violations of Part 195.

Notice Item 1 proposed a civil penalty of \$10,000 for violation of 49 C.F.R. § 195.406(b), for Respondent’s failure to provide adequate controls and protective equipment to control the maximum operating pressure of the pipeline within the limits established under § 195.406(a). Adequate pressure controls and protective equipment are particularly important means of fostering pipeline safety because they serve to prevent pipeline overpressure and possible ruptures, spills, and harm to life, property, and the environment. Respondent made several arguments and offered information in opposition to the allegation and penalty, all of which are discussed above. None of Respondent’s arguments or information warrant a reduction or elimination of the proposed civil penalty. Therefore, I assess Respondent a civil penalty of **\$10,000** for violating 49 C.F.R. § 195.406(b).

Notice Item 2 proposed a civil penalty of \$25,000 for violation of 49 C.F.R. § 195.410(a), for Respondent’s failure to provide sufficient line markers to accurately locate its pipelines. This allegation of violation has been withdrawn. Accordingly, I withdraw the proposed penalty for this Item.

²⁷ Response, at 4

²⁸ See 28 U.S.C. § 2462.

Notice Item 5 proposed a civil penalty of \$220,000 for violation of 49 C.F.R. § 195.420(b), for Respondent's failure to meet the 7½-month inspection interval for 220 mainline valves. The Violation Report explained that PHMSA was proposing a civil penalty of \$1,000 for each of the 220 valves allegedly out of interval. As discussed more fully above, the evidence showed that Respondent failed to meet the 7½-month inspection interval for only 105 valves, as opposed to the 220 alleged in the Notice. No civil penalty was proposed for the other allegations in Item 5.

Respondent admitted that some penalty was warranted but made several arguments in favor of a reduction.²⁹ First, it argued that the proposed \$1,000-per-valve amount exceeded the penalties assessed by PHMSA for similar violations by other operators in the past; in addition, it argued that the penalty should be based upon how late each valve inspection occurred.³⁰ Respondent cited four past Final Orders to support its argument.³¹ Second, it argued that the missed valve inspections occurred during a time period when the company was changing valve inspection tracking systems and, therefore, that the missed inspections were inadvertent. Finally, Respondent argued that the penalty should be reduced because the missed inspections did not result in any adverse impact on the environment or public safety.

I find Respondent's arguments unpersuasive for several reasons. First, PHMSA proposes and assesses civil penalties in accordance with the assessment criteria set forth in 49 U.S.C. § 60122(b) and 49 C.F.R. § 190.225. In applying these criteria, PHMSA has determined that the most appropriate means of setting civil penalties is to apply the assessment criteria on a case-by-case basis. When PHMSA proposes a penalty, it examines the allegations and supporting evidence and applies the relevant assessment criteria to those particular facts. This analysis generally includes, among other things, a review of an operator's compliance history, how the alleged non-compliance was discovered and its duration, whether the respondent made a good faith effort to comply with the regulation prior to the inspection, and whether there was any immediate or potential safety or environmental impact. This fact-sensitive, case-by-case approach is also consistent with PHMSA's largely performance-based regulatory scheme, which involves the consideration of risk factors and complexities unique to each pipeline system.

Second, Respondent suggests that PHMSA take into consideration the amount of penalties assessed against other operators in the past for "similar" violations and weigh the culpability of Valero against that of other operators who have been assessed lesser amounts for the same violation. PHMSA has found that such an approach is impracticable, given the unique facts of each offense and operating conditions of each pipeline system. Respondent did not cite any law or regulation requiring a standardized set of civil penalties, nor am I aware of any requirement that PHMSA follow such an approach³²

²⁹ Closing, at 8

³⁰ Closing, at 6

³¹ See Prefiled Testimony at 43-46, citing *In the Matter of Sinclair Pipeline Company*, Final Order, CPF No. 55503 (May 5, 1998), *In the Matter of Mobil Corporation*, Final Order, CPF No. 13504 (June 27, 1997), *In the Matter of Koch Pipeline Company L P*, Final Order, CPF No. 46501 (June 3, 1998), and *In the Matter of Texas Eastern Petroleum Products Company*, Final Order, CPF No. 3-2004-5027 (Jan. 3, 2006)

³² The Supreme Court has held that absent a statutory provision to the contrary, "uniformity of sanctions for similar violations" is not required. See *Butz v. Glover Livestock Commission Company, Inc.*, 411 U.S. 182, 186-87 (1973) (holding that "the employment of a sanction within the authority of an administrative agency is thus not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases.")

Third, PHMSA has found it appropriate to increase many of its civil penalties in recent years, including those for violations of § 195.420(b). Most of the Final Orders cited by Respondent, in which several other operators were assessed lower penalties for violations of § 195.420(b), were initiated before Congress amended the Pipeline Safety Laws in 2002 to increase the maximum penalties that PHMSA can assess through its administrative enforcement process.³³ I would also note that the \$1,000-per-valve penalty assessed in this case is consistent with other recent enforcement cases in which PHMSA has proposed and, in most cases, assessed similar amounts for violations of § 195.420(b).³⁴ Unlike some of the older cases that Respondent cited, none of the recent cases adjusted the per-valve penalty amount based upon the length of time the valve inspections had been delayed.

Respondent also argued that its failure to timely inspect 105 valves was the result of a change in the company's administrative tracking systems and that because its error was inadvertent, the per-valve penalty should be reduced. I disagree. A change of tracking systems, if anything, should have prompted Valero to exercise greater, not less, vigilance to ensure that inspections were not missed.

Finally, I reject Respondent's argument that the penalty should be reduced because the missed valve inspections did not result in an adverse impact on the environment or public safety. Respondent's failure to conduct timely inspections of more than 100 mainline valves was a serious violation that could have had a harmful effect upon public safety or the environment. Properly functioning mainline valves are essential to the safe operation of hazardous liquid pipeline systems; they are used to limit the volume of product released in the event of a spill. One purpose of the mandatory valve inspection interval set forth in § 195.420(b) is to ensure that valve problems are identified and corrected before they impact the safety of the pipeline system. Accordingly, upon consideration of all of the evidence and the arguments presented, I hereby assess Respondent a reduced civil penalty of **\$105,000** for violations of 49 C.F.R. § 195.420(b).

In summary, having reviewed the record and considered the assessment criteria for Items 1 and 5, I assess Respondent a reduced total civil penalty of **\$115,000**. There is nothing in the record indicating that payment of this penalty would adversely Respondent's ability to continue in business.

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.

³³ The Pipeline Safety Improvement Act of 2002, Pub. L. No. 107-355, § 8(b)(1), 116 Stat. 2992, increased the civil penalty liability for violating a pipeline safety standard from \$25,000 to \$100,000 per violation for each day the violation continued. It also increased the maximum penalty for a related series of violations from \$500,000 to \$1,000,000.

³⁴ See *In the Matter of Premcor Refining Group, Inc.*, Final Order, CPF 3-2004-5008 (Feb. 16, 2006), *In the Matter of Alyeska Pipeline Service Co.*, Final Order, CPF 5-2002-5035 (Jul. 19, 2006), *In the Matter of Cenex Pipeline, LLC*, Final Order, CPF 5-2001-5003 (Feb. 10, 2003), *In the Matter of Norfolk Southern Corp.*, Final Order, CPF 2-2005-6018 (Jul. 26, 2006). PHMSA has also issued at least one Final Order where no penalties were proposed for failure to conduct valve inspections in accordance with § 195.420(b). See *In the Matter of Alyeska Pipeline Service Co.*, Final Order, CPF 5-2000-5006 (Dec. 31, 2003).

Failure to pay the **\$115,000** 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 Items 1-8 in the Notice for violations of 49 C.F.R. Part 195. Under 49 U.S.C. § 60118(a), each person who engages in the transportation of hazardous liquids or who owns or operates a pipeline facility is required to comply with the applicable safety standards established under Chapter 601.

Respondent contested all elements of the Proposed Compliance Order in the Notice, arguing that it had already complied with each requirement. While Respondent may have performed some of the proposed compliance order requirements, there is insufficient information in the record to demonstrate that Respondent has fully complied with each item. Therefore a compliance order remains necessary.

Several of the compliance terms warrant further discussion, as follows:

Regarding the portion of **Item 5** in the Notice concerning Respondent's violation of § 195.420(c) relating to valve fencing, after the hearing Valero provided PHMSA with the company's new valve screening procedure for determining susceptibility to vandalism.³⁵ While this procedure represents an improvement over the previous lack of having any procedure at all, it sets out only permissive guidance on what measures Respondent "should" or "may" take to address valve security.³⁶ Such a permissive procedure is insufficient to remediate the circumstances that led to Respondent's violation of § 195.420(c). I would also note that the final compliance order has been clarified to reflect that fencing is not required at all valve sites, but, rather, that valve protection must be provided according to a consistently applied process. Therefore, a compliance order remains necessary for this Item.

With respect to **Item 6** in the Notice regarding Respondent's violation of § 195.420, Respondent opposes the proposed compliance order on the basis that the company has already fixed the fencing problems at the pump stations identified during PHMSA's inspection, and has conducted a survey to identify any other holes or erosion problems.³⁷ Respondent submitted photographs showing that it has fixed the fencing at the pump stations that PHMSA inspected.³⁸ Respondent also provided a two-page excerpt from its O&M manual as evidence that it has implemented

³⁵ Closing, attachment "Valve Screening: Susceptibility to Vandalism "

³⁶ *Id.* Respondent's procedure sets out a screening analysis by which it claims to assess the susceptibility of each valve site to vandalism. However, the procedure is drafted in permissive language that does not require the operator to actually apply the screening analysis and does not require the application of additional security measures

³⁷ Prefiled Testimony, at 34-36.

³⁸ Prefiled Testimony Ex 18

policies to ensure compliance with § 195.436.³⁹

Respondent's photographs confirm that repairs have been made to certain pipeline facility fences. PHMSA appreciates Respondent's efforts to address these violations, but the O&M manual excerpt does not show if or how Respondent has changed its procedures to ensure compliance with § 195.436. The document only indicates that certain facilities must be fenced and that personnel are to inspect the fencing.⁴⁰ Respondent has not provided any documentary evidence that it has conducted a survey of all of its facilities, developed a plan for fencing repair, or adequately reviewed and amended its procedures as proposed in the Notice. Therefore, a compliance order remains necessary for this Item.

With respect to **Item 7** of the Notice regarding Respondent's violation of § 195.438, Valero opposes the proposed compliance order on the basis that it was already in compliance with the regulation and that it had hung additional "No Smoking" signs at "each requested location." The proposed compliance order required Respondent to survey its pipeline systems for "No Smoking" signs and to take system-wide action, not just action at the inspected locations. Therefore, a compliance order remains necessary for this Item.

Required Activities

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.

Respondent must:

1. With respect to **Item 1** of the Notice pertaining to adequate pressure controls and equipment to control the pressure on its pipelines within the limits established under § 195.406(a), perform an audit to ensure Respondent is in compliance with § 195.406(b). The audit and the documentation shall consist of:
 - a. A review of all applicable procedures and the amendment of all applicable procedures to prevent future non-compliance with the regulation;
 - b. Analyses of all of the pipeline systems subject to the Notice to determine whether they are protected from overpressure, surges, and other variations from normal operations and that they are in compliance with applicable procedures; and
 - c. A plan and schedule for installation of adequate controls and protective equipment to protect the pipelines and control pressure within the limits established pursuant to § 195.406. The plan shall be based on the results of the review of Respondent's procedures and its analyses of its pipeline systems.
2. The Final Order withdraws the allegation of violation in **Item 2** of the Notice. Therefore Respondent need not take any action regarding Item 2.
3. With respect to **Item 3** of the Notice, pertaining to the failure to mark lines that had been

³⁹ Prefiled Testimony Ex. 19

⁴⁰ *Id*

washed out and left exposed to the elements, perform an audit to ensure Respondent is in compliance with § 195.410(c). The audit and documentation shall consist of:

- a. A review of all applicable procedures and the amendment of applicable procedures to prevent future non-compliance with the regulation;
- b. A survey of each of the pipeline systems subject to the Notice for above-ground spans of pipe and washed-out segments. The purpose of the survey shall be to identify whether line markers are in compliance with applicable procedures and the regulation; and
- c. A plan and schedule to replace or install line markers based on applicable procedures and the regulation. The plan shall be based on the results of the review and survey.

4. With respect to **Item 4** of the Notice, pertaining to aerial inspections of the right-of-way, perform an audit to ensure Respondent is in compliance with § 195.412(a). The audit and documentation shall consist of:

- a. A review of all applicable procedures and the amendment of applicable procedures to prevent future non-compliance with the regulation;
- b. A survey of each of the pipeline systems subject to the Notice for compliance with applicable procedures and the regulation;
- c. A plan and schedule for the clearing of rights-of-way on the covered pipeline systems to bring Respondent into compliance with applicable procedures and the regulation. The plan and schedule shall be based on the results of the review and survey;
- d. Documentation that shows aerial patrol procedures and right-of-way maps have been reviewed with Respondent's pilots and that the pilots are familiar with the procedures and rights-of-way; and
- e. Documentation that shows pilots are properly completing reports and other documentation for each aerial survey.

5. With respect to **Item 5** of the Notice, pertaining to valve inspection, maintenance, and protection from vandalism and unauthorized operation, perform an audit to ensure Respondent is in compliance with § 195.420. The audit and documentation shall consist of:

- a. A review of all applicable procedures and the amendment of applicable procedures to prevent future non-compliance with the regulation;
- b. A survey of each of the valve sites on all of the pipeline systems subject to the Notice for compliance with applicable amended procedures and the regulation; and
- c. A plan and schedule for replacement or installation of fencing and/or other appropriate protective measures at each valve site, according to Respondent's consistent application of amended procedures. The plan shall be based on the results of the review and amendment of procedures and the survey.

6. With respect to **Item 6** of the Notice, pertaining to holes in and gaps under Respondent's fences, perform an audit to ensure Respondent is in compliance with § 195.436. The audit and documentation shall consist of:

- a. A review of all applicable procedures and the amendment of applicable procedures to prevent future non-compliance with the regulation;

- b. A survey of all of the fencing around the pump stations, breakout tanks, and pig launchers and receivers on all of the pipeline systems subject to the Notice for compliance with applicable procedures and the regulation; and
 - c. A plan and schedule for repair and/or installation of fencing to bring Respondent into compliance with applicable procedure and the regulation. The plan shall be based on the results of the review and survey.
- 7. With respect to **Item 7** of the Notice, pertaining to prohibiting smoking and open flames at pump stations, perform an audit to ensure Respondent is in compliance with § 195.438. The audit and documentation shall consist of:
 - a. A review of all applicable procedures and the amendment of applicable procedures to prevent future non-compliance with the regulation;
 - b. A survey of each of the pump stations and breakout tank areas, on all of the pipeline systems subject to the Notice, for “No Smoking” signs and compliance with applicable procedures and the regulation. The purpose of the survey shall be to evaluate whether signs are posted at each pump station and breakout tank area and to identify those areas where signs or other measures are needed to prohibit smoking and open flames. The survey shall also examine whether signs and/or other measures are in compliance with applicable procedures and the regulation; and
 - c. A plan and schedule for the replacement and/or installation of signs to bring Respondent into compliance with applicable procedures and the regulation. The plan shall be based on the results of the review and survey.
- 8. With respect to **Item 8** of the Notice, pertaining to atmospheric corrosion on breakout tank roofs, above-ground valves and exposed pipelines, perform an audit to ensure Respondent is in compliance with § 195.581(a). The audit and documentation shall consist of:
 - a. A review of all applicable procedures and the amendment of applicable procedures to prevent future non-compliance with the regulation;
 - b. A survey of all of the pipeline systems subject to the Notice to determine whether they are protected from atmospheric corrosion in accordance with applicable procedures and the regulation. The survey shall, in particular, examine piping and tank roofs that are susceptible to standing or collecting water; and
 - c. A plan and schedule for repair of atmospheric corrosion and recoating of facilities to bring facilities in compliance with applicable procedures and the regulation. The plan shall be based on the results of the review and survey.
- 9. Within thirty (30) days of receipt of the Final Order, submit all audit materials and documentation required in paragraphs one (1) through eight (8) above, to the Director, Southwest Region, Pipeline and Hazardous Materials Safety Administration, 8701 South Gessner, Suite 1110, Houston, Texas 77074
- 10. Within one (1) year of receipt of the Final Order, complete all actions required by this Compliance Order and submit documentation of completion to the Director.

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. 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 the petition automatically stays the payment of any civil penalty assessed. All other terms of the order, including any required corrective action, remain in full effect unless the Associate Administrator, upon request, grants a stay. The terms and conditions of this Final Order shall be effective upon receipt.

William H. Gule
for

Jeffrey D. Wiese
Associate Administrator
for Pipeline Safety

MAR 11 2009

Date Issued