U.S. Department
of Transportation

**Pipeline and Hazardous
Materials Safety
Administration**

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

OCT 24 2012

Mr. Thomas A. Martin, President
El Paso Natural Gas Company
1001 Louisiana Street
Houston, TX 77002

Re: CPF No. 4-2010-1005

Dear Mr. Martin:

Enclosed please find the Final Order issued in the above-referenced case. It makes a finding of violation and assesses a civil penalty of $20,000. It further finds that El Paso Natural Gas Company has completed the actions specified in the Notice to comply with the pipeline safety regulations. When the civil penalty has been paid, this enforcement action will be closed. 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. Rod Seeley, Director, Southwest Region, OPS
Ms. Elizabeth Herdes, Senior Counsel, El Paso Natural Gas Pipeline Partners, LP
Mr. Patrick Carey, Director, DOT Compliance Services, El Paso Pipeline Partners LP,
1001 Louisiana Street, Houston, TX 77252
Mr. Alan Mayberry, Deputy Associate Administrator for Field Operations, OPS

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	)	
El Paso Natural Gas Company,	)	**CPF No. 4-2010-1005**
Respondent.	)	

FINAL ORDER

On November 5 through 9, 2009, pursuant to 49 U.S.C. § 60117, a representative of the Pipeline and Hazardous Materials Safety Administration (PHMSA), Office of Pipeline Safety (OPS), initiated an investigation of an incident involving El Paso Natural Gas Company's (EPNG or Respondent) natural gas transmission pipeline near Bushland, Texas. EPNG is now a subsidiary of El Paso Pipeline Partners, LP, which operates a 13,000-mile interstate pipeline system.[1]

The investigation arose out of a November 5, 2009 failure on Respondent's Dumas-to-Amarillo 24-inch pipeline, known as Line 1102, that resulted in a release of natural gas and an explosion and fire that destroyed one home, injured three people, and caused an evacuation and other property damage (Failure). As a result of the investigation, the Director, Southwest Region, OPS (Director), issued to Respondent, by letter dated September 10, 2010, a Notice of Probable Violation, Proposed Civil Penalty, and Proposed Compliance Order (Notice). In accordance with 49 C.F.R. § 190.207, the Notice proposed finding that EPNG had violated 49 C.F.R. § 191.15 and proposed assessing a civil penalty of $20,000 for the alleged violation. The Notice also proposed ordering Respondent to take certain measures to correct the alleged violation.

Respondent responded to the Notice by letter dated October 13, 2010 (Response). The company contested the allegation, offered additional information in response to the Notice, requested that the proposed civil penalty be reduced, and requested a hearing. A hearing was subsequently held

[1] At the time of the incident, the facilities in question were operated by EPNG, which was subsequently acquired by Kinder Morgan, Inc., on May 24, 2012. EPNG continues to operate as a subsidiary of El Paso Pipeline Partners, LP, a Kinder Morgan company. El Paso Pipeline Partners, LP, consists of a master limited partnership that owns and operates natural gas transportation pipelines, storage, and other midstream assets throughout the United States. http://www.eppipelinepartners.com/ (last accessed October 17, 2012).

on November 15, 2010, in Houston, Texas, with an attorney from the Office of Chief Counsel, PHMSA, presiding. After the hearing, Respondent provided additional written material for the record, by letter dated December 17, 2010 (Closing).

FINDING OF VIOLATION

The Notice alleged that Respondent violated 49 C.F.R. Part 191, as follows:

Item 1: The Notice alleged that Respondent violated 49 C.F.R. § 191.15(b), which states:

> **§ 191.15 Transmission and gathering systems: Incident report.**
> (a) Except as provided in paragraph (c) of this section, each operator of a transmission or a gathering pipeline system shall submit Department of Transportation Form RSPA F 7100.2 as soon as practicable but not more than 30 days after detection of an incident required to be reported under § 191.5.[2]
> (b) Where additional related information is obtained after a report is submitted under paragraph (a) of this section, the operator shall make a supplemental report as soon as practicable with a clear reference by date and subject to the original report.

The Notice alleged that Respondent violated 49 C.F.R. § 191.15(b) by failing to make a supplemental report as soon as practicable after obtaining additional information related to a pipeline incident for which it had filed an initial incident report. Specifically, the Notice alleged that on December 2, 2009, EPNG filed an incident report for the Failure, indicating the apparent cause of the failure as "Unknown—Still Under Investigation."[3] EPNG subsequently received a detailed metallurgical analysis report on the probable cause of failure from Stress Engineering Services (SES) on December 10, 2009, but did not submit a supplemental report until September 2, 2010, approximately eight months later.

According to the Notice, the metallurgical report identified the probable cause of the rupture as being a one-time overload event on laminations within the carrier pipe wall, in a region along the reinforcing saddle-to-carrier pipe weld.[4] Although PHMSA received a copy of the metallurgical analysis from SES in December 2009, Respondent did not submit a supplemental report as soon as practicable after obtaining this additional information.

In its Response and at the hearing, EPNG admitted that it did not submit the supplemental report

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[2] Subsequent to the date of the alleged violation, Section 191.15 was amended by 75 Fed. Reg. 72,905 (November 26, 2010). Nevertheless, the amendment does not affect this proceeding.

[3] The Incident Report (IR) number is 20090125-6802 (dated December 2, 2009), PHMSA Form 7100-2, formerly named Form RSPA F 7100.2.

[4] Pipeline Safety Violation Report (Violation Report), (September 10, 2010) (on file with PHMSA) Exhibit A, *Metallurgical Analysis of the Ruptured 24Inch, Line 1102 Near Amarillo, Texas*, Stress Engineering Services, Inc., dated December 10, 2009, at 2.

until September 2, 2010. However, the company raised four defenses, as summarized in its Closing, as to why a supplemental report was not required. First, the company argued that in bringing this enforcement action, PHMSA had created a new substantive obligation for EPNG that had not previously been articulated by the agency. The company argued that a court's independent review would find that PHMSA's "interpretation is procedurally defective, arbitrary or capricious in substance, or is manifestly contrary to the statute or regulation."[5]

Second, EPNG argued that PHMSA had misapplied 49 CFR § 191.15 because the regulation did not require an operator to supplement its incident report when the root cause of the incident remained unknown. Third, Respondent questioned whether an operator was required to submit a supplemental report when PHMSA and local landowners had been kept fully informed of the status of the root cause investigation. Fourth, Respondent argued that the allegation of violation was "moot" because EPNG had supplemented its incident report before issuance of the Notice. Respondent also requested a reduction in the proposed civil penalty, which is addressed in the Assessment of Penalty section below.

As for its first argument, EPNG argued that PHMSA had not previously articulated a position or provided any guidance on supplemental reports prior to issuing the Notice in this case. The company contended that its first notice of the agency's interpretation of 49 CFR § 191.15 was through the Notice and that only then did the company learn that PHMSA interpreted the regulation as requiring an operator to supplement an incident report whenever the company received interim failure analysis data. Since the Notice reflected a new requirement imposed by PHMSA, EPNA argued that a court would likely find that the requirement had been unlawfully promulgated because there had been no notice-and-comment rulemaking process, as required under the Administrative Process Act (APA). EPNG further contended that even if PHMSA's action were not deemed a new substantive requirement but was "merely interpretive in nature," the agency would still not be entitled to any deference by the courts under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) and other APA cases.

I find Respondent's argument specious. First and foremost, I reject the notion that the supplemental reporting requirement, as applied here, is somehow novel or that it imposes any new substantive requirement not clearly articulated in the regulation itself. The text of the regulation states: "Where additional related information is obtained after a report is submitted..., the operator shall make a supplemental report as soon as practicable..." The metallurgical report received by EPNG falls within the scope of "additional related information" that must be shared with PHMSA through the filing of a timely supplemental report.

Second, the interpretation applied by PHMSA in this case is nothing new. The agency had previously articulated its position and provided guidance on supplemental reports prior to issuing the Notice. This included prior enforcement actions[6] and a 1994 Advisory Bulletin reminding

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[5] Closing at 3.

[6] E.g., *In the Matter of Venoco, Inc.*, Final Order, CPF No. 5-2002-2001 (Nov. 29, 2004); and *In the Matter of CenterPoint Energy Gas Transmission Company*, Final Order, CPF No. 4-2009-1001 (Nov. 6, 2009); (available at www.phmsa.dot.gov/pipeline/enforcement).

pipeline facility owners and operators of the need "to submit a supplemental written report whenever additional relevant information is obtained concerning the particular incident or accident."[7]

As for Respondent's contention that PHMSA has somehow "abused its discretion" under the APA by interpreting and applying 49 CFR § 191.15 in an adjudication rather than through a rulemaking, I do not agree. PHMSA is not necessarily required to undertake a rulemaking in order to interpret its own regulations. In fact, courts have long recognized the discretion of agencies to set forth regulatory interpretations either by adjudication or through rulemaking.[8] However, as stated above, PHMSA had previously articulated its position and provided guidance on supplemental reports prior to issuing the Notice in this case; therefore, PHMSA did not engage in any sort of *de facto* rulemaking by issuing the Notice.

As for EPNG's second argument that 49 CFR § 191.15 does not require an operator to supplement an incident report when the root cause of the incident remains unknown, this contention is based largely on Respondent's reading of Line 25 of part F7 of the incident report form, which provides two alternative boxes for an operator to check when the cause of an accident remains unknown. The first indicates that the company's investigation is "complete." The second indicates that the cause is "Still Under Investigation (submit a supplemental report when the investigation is complete)." EPNG contends that these two alternatives suggest PHMSA interprets § 191.15(b) to mean that a supplemental report is not required so long as an operator's investigation is still incomplete.

At the hearing, PHMSA asserted that the regulation clearly requires that an operator file one or more supplemental reports whenever an operator receives any changes or additional information related to the incident in the original report, not just when an investigation has been completed. I agree. The regulation provides a straightforward requirement under which operators must submit a supplemental report whenever they obtain additional information relevant to the cause of the incident or the extent of damages.[9] I find that the metallurgical analysis in this case contained such additional relevant information.

Depending on the circumstances, an operator may supplement an incident report several times before an investigation is complete, as additional information becomes available. Just because an investigation has not been completed is no reason to fail to comply with § 191.15(b). In fact, a reading to the contrary would mean that if an investigation were never completed or if it took years to make a final determination of the cause of a failure, an operator might never need to file a supplemental report or file one several years later. I do not believe such a result was ever intended or contemplated by the regulation.

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[7] *Certain Requirements Applying to Supplemental Incident/Accident Reports and Estimated Property Damage Totals*, Advisory Bulletin (ADB-94-01), January 13, 1994.

[8] NLRB v. Bell Aerospace Co., 416 U.S. 267, 292–94 (1974) (stating that an agency is "not precluded from announcing new principles in an adjudicative proceeding").

[9] 49 C.F.R. § 191.5.

As for Respondent's third argument that it did not need to file a supplemental report in this case because EPNG had kept PHMSA and local landowners informed of the status of its investigation and of its actions under the corrective action order (CAO),[10] the company testified that it held a town hall meeting and delivered various written communications to the residents in the community.[11]

In response, PHMSA officials responded that supplemental incident reports serve a purpose separate and distinct from the need to keep the agency or the community abreast of the company's investigation or corrective actions under a CAO. The agency argued, on the contrary, that an operator's compliance with reporting requirements helps PHMSA to understand, measure, and assess the performance of individual operators and industry, and to integrate pipeline safety data to allow a more comprehensive understanding and assessment of risk. While I appreciate the company's public awareness efforts and its actions to satisfy the requirements of the CAO, they are no substitute for filing supplemental reports under 49 CFR § 191.15.

As for Respondent's fourth argument that the allegation of violation is rendered moot because EPNG had already supplemented its incident report before issuance of the Notice, PHMSA submitted evidence that agency officials had inquired about the supplemental report in August 2010, at which point the company confirmed that it had not yet filed the report.[12] The company filed its supplemented report on September 2, 2010, and the Notice was issued on September 10, 2010, approximately eight months after the report should have been filed. The allegation of violation is certainly not rendered moot simply because the supplemental report had been filed by the date of the Notice; the violation took place over a period of months prior to the filing of the Notice.

In summary, I find that the meaning of §191.15 is clear from the plain language of the regulation: "Where additional related information is obtained after a report is submitted under paragraph (a) of this section, the operator shall make a supplemental report as soon as practicable..." I further find that on December 10, 2009, the company received the results of a metallurgical analysis identifying additional information, triggering a required update of the information originally reported, but that EPNG failed to submit a supplemental report until September 2, 2010, approximately eight months after obtaining the results of the metallurgical analysis. Accordingly, I find Respondent violated 49 C.F.R. § 191.15(b), by failing to make a supplemental report as soon as practicable after obtaining additional information related to a pipeline incident for which it had filed an incident report.

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

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[10] *In the Matter of El Paso Natural Gas Western Operations Group*, Corrective Action Order, C.P.F. No. 4-2009-1021H (Nov. 10, 2009) (available at www.phmsa.dot.gov/pipeline/enforcement). The CAO required El Paso to take certain corrective actions with respect to the Failure.

[11] EPNG Hearing Submittal at Tab 6.

[12] Violation Report at 4.

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 $20,000 for the violations cited above.

Item 1: The Notice proposed a civil penalty of $20,000 for Respondent's violation of 49 C.F.R. § 191.15(b), for failing to submit a supplemental written report as soon as practicable after obtaining additional information related to the Failure. EPNG requested a reduced penalty for several reasons, including the fact that the company had no prior violations of this nature, its good-faith attempts to comply by working with PHMSA and its ongoing communications with PHMSA and the community, and its prompt corrective action after PHMSA requested the supplemental report. Further, EPNG argued that it had found no evidence that PHMSA had penalized any other operator for a failure to supplement an Incident Form.

I find these arguments unconvincing. As discussed above, I found that the company had a clear responsibility to submit a supplemental report whenever it obtained additional relevant information about an incident. Upon review of the record, I find that the eventual filing of the supplemental report after PHMSA's inquiry in September 2010 does not warrant a reduction in the proposed penalty. As demonstrated by the record, EPNG's history of compliance and the low gravity of the violation had already been factored into the proposed penalty. As stated above, PHMSA has issued civil penalties for violation of 49 C.F.R. § 191.15(b). [13] Respondent's argument that the proposed civil penalty is dissimilar to previous past cases does not support reduction or elimination of the penalty.[14]

The timely filing of written incident reports provides important information to PHMSA about an incident, in considerably more detail than can be collected when reported telephonically. In addition, data collected by the agency about incidents contributes to the effectiveness of PHMSA's safety program by developing an understanding of how and why pipeline incidents occur. Important information such as the cause and type of failure, type of pipe, and extent of harm to public and property help PHMSA determine whether there is a need to take a closer look at the operations and maintenance of a particular pipeline facility, or whether to evaluate and

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[13] See, e.g., *In the CenterPoint Energy Gas Transmission Co.*, Final Order, CPF 4-2009-1001, (Nov. 6, 2009) (available at www.phmsa.dot.gov/pipeline/enforcement).

[14] Even if the present case were similar to past ones, 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).

update current safety regulations or to issue new ones.

Accordingly, having reviewed the record and considered the assessment criteria, I assess Respondent a civil penalty of **$20,000** for violation of 49 C.F.R. § 191.15(b).

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 $20,000 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 court of the United States.

COMPLIANCE ORDER

The Notice proposed a compliance order with respect to Item 1 in the Notice for violations of 49 C.F.R. § 191.15(b). Under 49 U.S.C. § 60118(a), each person who engages in the transportation of gas or who owns or operates a pipeline facility is required to comply with the applicable safety standards established under chapter 601. The Director indicates that Respondent has taken the following actions specified in the proposed compliance order:

> 1. With respect to the violation of § 191.15(b) (**Item 1**), Respondent has submitted a supplemental incident report specifying the apparent cause of the November 5, 2009 failure on EPNG's Line 1102 pipeline.

Accordingly, I find that compliance has been achieved with respect to this violation. Therefore, the compliance terms proposed in the Notice are not included in this Order.

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

OCT 24 2012
Date Issued