



U.S. Department
of Transportation

**Pipeline and Hazardous
Materials Safety
Administration**

MAY 22 2015

1200 New Jersey Avenue SE
Washington, DC 20590

Harry N. Pefanis
President
Plains All American Pipeline, L.P.
Plains Pipeline, L.P.
333 Clay Street, Suite 1600
Houston, TX 77002

Re: CPF No. 4-2013-5007

Dear Mr. Pefanis:

Enclosed please find the Final Order issued in the above-referenced case. It makes findings of violation, assesses a reduced civil penalty of \$102,900, and specifies corrective action that must be completed. 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. Service of the Final Order is made pursuant to 49 C.F.R. § 190.5.

Thank you for your cooperation in this matter.

Sincerely,

Jeffrey D. Wiese
Associate Administrator
for Pipeline Safety

Enclosure

cc: Mr. R.M. Seeley, Director, Southwest Region, OPS
Mr. Trent M. Doyle and Mr. Eric P. Gotting, Keller and Heckman LLP
1001 G Street NW, Ste 500 West, Washington, D.C. 20001

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

¹ Plains is a subsidiary of Plains All American Pipeline, L.P., and operates approximately 6,000 miles of pipeline transporting crude oil and refined products in Oklahoma, Wyoming, and other states, as reported by Plains for 2013 pursuant to 49 C.F.R. § 195.49.

Item 5: The Notice alleged that Respondent violated 49 C.F.R. § 195.563, which states:

§ 195.563 Which pipelines must have cathodic protection?

(a) Each buried or submerged pipeline that is constructed, relocated, replaced, or otherwise changed after the applicable date in § 195.401(c) must have cathodic protection. The cathodic protection must be in operation not later than 1 year after the pipeline is constructed, relocated, replaced, or otherwise changed, as applicable

(d) Bare pipelines, breakout tank areas, and buried pumping station piping must have cathodic protection in places where regulations in effect before January 28, 2002 required cathodic protection as a result of electrical inspections. See previous editions of this part in 49 CFR, parts 186 to 199.

§ 195.565 How do I install cathodic protection on breakout tanks?

After October 2, 2000, when you install cathodic protection under § 195.563(a) to protect the bottom of an aboveground breakout tank you must install the system in accordance with API Recommended Practice 651. However, installation of the system need not comply with API Recommended Practice 651 on any tank for which you note in the corrosion control procedures established under § 195.402(c)(3) why compliance with all or certain provisions of API Recommended Practice 651 is not necessary for the safety of the tank.

The Notice alleged that Respondent failed to have cathodic protection in accordance with § 195.563 on breakout tanks at the Cushing Terminal. Specifically, the Notice alleged that between 2007 and 2011, Respondent replaced cathodic protection systems on at least 16 tanks with systems that used volatile corrosion inhibitors and resistance probes (VCI). The Notice alleged that §§ 195.563 and 195.565 require cathodic protection and do not permit the use of VCI as a substitute for cathodic protection. The Notice further alleged Respondent did not have supporting documentation in its corrosion control procedures under § 195.565 to justify why compliance with the provisions of API Recommended Practice 651 (API RP 651) was not necessary.²

In its written submissions and at the hearing, Respondent contested the alleged violation and argued that the use of VCI in lieu of cathodic protection is permitted under §§ 195.563 and 195.565. Respondent explained that it began using VCI in 2006 when the original cathodic protection systems on certain breakout tanks became difficult to maintain. The tanks were originally constructed with dielectric high density polyethylene (HDPE) liners approximately one foot below each tank bottom. Due to the presence of the liners, Respondent found there was inadequate space to easily replace the cathodic protection anodes as they began to deteriorate. Retrofitting the tanks with new cathodic protection systems was found to be cost prohibitive, as it would involve taking the tank out of service, removing the tank bottom and liner, and installing

² API RP 651 is incorporated by reference at § 195.3.

a new tank floor.³ Also, since the HDPE liner was non-conductive, Respondent could not simply increase the impressed current.

Respondent concluded that VCI was an available alternative to cathodic protection. VCI involves the injection of a vapor corrosion inhibitor slurry into the space between the tank floor and liner. Electrical resistance probes are installed to monitor corrosion rates in real-time. Respondent stated that it installed VCI on 22 tanks between 2006 and 2012. For some of the tanks equipped with VCI, where possible, Respondent kept the original cathodic protection system in operation. For other tanks, VCI completely replaced cathodic protection. According to Respondent, VCI is a “proven technology with an established history of providing corrosion protection.”⁴

Respondent argued that §§ 195.563 and 195.565 allow operators to use VCI instead of cathodic protection. Respondent noted that § 195.565 allows operators to document “why compliance with all or certain provisions of API Recommended Practice 651 is not necessary for the safety of the tank.”⁵ Respondent stated that cathodic protection is not necessary for its tanks because VCI provides adequate corrosion control. Respondent produced documentation, including its procedures for using VCI, a memorandum from a VCI vendor with information about the technology, expert reports, technical and engineering documentation, and a summary of corrosion rate monitoring data for the breakout tanks.

Respondent also argued that its own use of VCI at the Cushing Terminal was previously audited and approved by OPS in 2009. By approving the Company’s procedures for using VCI, Plains contended that OPS adopted the position that VCI is an acceptable substitute for cathodic protection. Respondent argued further that OPS may not change its position to accept VCI.

At the hearing, OPS denied ever taking a position during the prior audit that Respondent could discontinue the use of cathodic protection without a special permit.⁶

A. Whether §§ 195.563 and 195.565 allow the use of VCI in lieu of cathodic protection

To determine whether it was permissible for Respondent to replace cathodic protection with VCI, PHMSA examines the plain language of the rule. PHMSA has adopted safety standards in 49 C.F.R. Part 195, Subpart H (§§ 195.551 – 195.589) to reduce the risks of pipeline accidents caused by corrosion. Among other things, the standards govern corrosion prevention, inspection, monitoring, corrosion repair, and employee qualifications.

³ Post-hearing Brief at 2.

⁴ Respondent also indicated that VCI has been specifically accepted by various States as an alternative to cathodic protection for “storage tanks.” Response at 5.

⁵ § 195.565.

⁶ See § 190.341. A special permit is an order by which PHMSA waives compliance with a pipeline safety regulation upon a showing by the operator that it would not be inconsistent with pipeline safety.

Cathodic protection is a method of protecting steel pipelines from corrosion by making the pipe act as the cathode of an electrochemical cell. Section 195.563 is titled “Which pipelines must have cathodic protection?” and states that “each buried or submerged pipeline . . . must have cathodic protection.”⁷ The term *buried* means covered or in contact with the soil.⁸ The term *pipeline* means all parts of the pipeline facility through which hazardous liquids move, including breakout tanks.⁹ Accordingly, this rule states that each breakout tank in contact with the soil must have cathodic protection.¹⁰

The next regulation, § 195.565 is titled “How do I install cathodic protection on breakout tanks?” and states that when operators install cathodic protection to protect the bottom of an aboveground breakout tank as required under § 195.563(a), the installation must be consistent with API RP 651, *Cathodic Protection of Aboveground Petroleum Storage Tanks*. API RP 651 is a consensus standard containing recommended practices and procedures for designing, operating, and maintaining cathodic protection systems on the bottom of breakout tanks. Compliance with API RP 651 is not always required, however. Section 195.565 states that an operator is not required to follow the provisions of API RP 651 if the operator demonstrates that all or certain provisions of the recommended practice are not necessary for the safety of the tank.

Respondent argued that § 195.565 allows operators to protect against corrosion using something other than cathodic protection.¹¹ Respondent bases this assertion on the fact that § 195.565 permits operators under certain circumstances to forego compliance with API RP 651. In addition, certain provisions in the recommended practice recognize that cathodic protection may not be appropriate in some situations, such as when there is an impervious liner.¹² Respondent noted the recommended practice is not particularly prescriptive and “identifies factors to consider when deciding whether or not to use cathodic protection.”¹³

PHMSA finds § 195.563 is clear from its title and text of the rule that each breakout tank in contact with the soil must have cathodic protection. Cathodic protection is explicitly required by the regulation and there is no qualification or exception to this statement in the rule.

PHMSA disagrees with Respondent’s interpretation that § 195.565 allows it to employ VCI in lieu of cathodic protection. Section 195.565 reaffirms the requirement to have cathodic protection by stating in the first sentence: “when you install cathodic protection under § 195.563(a)” The title of § 195.565 also clarifies that the purpose of the rule is to explain

⁷ § 195.563(a). The applicability date for interstate pipelines was March 31, 1970. § 195.401(c).

⁸ § 195.553.

⁹ § 195.2.

¹⁰ In addition, under § 195.563(d) certain other types of facilities, such as bare pipelines and certain breakout tank areas must have cathodic protection in places where regulations in effect before January 28, 2002, required cathodic protection as a result of electrical inspections.

¹¹ Pre-hearing Submission at 5-6.

¹² Pre-hearing Submission at 6-7.

¹³ Post-hearing Brief at 10.

how cathodic protection is to be installed on breakout tanks. Even if API RP 651 itself discusses alternative corrosion control methods or recognizes certain instances where another method may be used, the requirements stated in the regulations control. In this instance, the regulations explicitly require cathodic protection. VCI does not meet the regulatory requirement.

PHMSA rejects Respondent's suggestion that when an operator determines it is unnecessary to comply with API RP 651, as permitted by § 195.565, that means the operator may use something other than cathodic protection.¹⁴ PHMSA finds no basis in the regulation to support this contention. An operator who documents why it is unnecessary to comply with API RP 651 when installing cathodic protection is permitted to install the cathodic protection in a manner that does not follow the recommended practice. Nothing in the regulation permits an operator to avoid installation of cathodic protection entirely.

Moreover, when PHMSA adopted API RP 651 and other consensus standards in 1999, there was already a 30-year history of explicitly requiring cathodic protection on breakout tanks.¹⁵ There is no support in the regulatory history, as Respondent might suggest, that PHMSA ever intended to create a new exception to the longstanding requirement in 1999. In fact, the regulatory history demonstrates that PHMSA permitted operators to document if a recommended practice is not necessary because such recommended practices do not have the same level of prescriptiveness as other types of consensus standards.¹⁶

Respondent pointed out that another regulation, § 195.573(d) "envisions circumstances where operators are using something other than cathodic protection." The title of that regulation also refers more broadly to "corrosion control" instead of cathodic protection.¹⁷

Respondent's argument ignores the fact that like § 195.565, § 195.573(d) confirms the requirement for operator's to have cathodic protection. The regulation requires operators to "inspect each cathodic protection system" for breakout tanks. The title of the section may be worded more broadly because a separate provision concerns unprotected pipe.¹⁸

For the above reasons, PHMSA finds the plain language of § 195.563 requires cathodic protection for each breakout tank in contact with the soil. Section 195.565 confirms the requirement to install cathodic protection, but provides that the cathodic protection may or may

¹⁴ Post-hearing Brief at 10.

¹⁵ Section 195.242(a) (1970) stated "a cathodic protection system must be installed for all buried facilities to mitigate corrosion deterioration that might result in structural failure." Pipeline meant "all parts of a carrier's physical facilities . . . including, but not limited to . . . breakout tankage." § 195.2 (1970).

¹⁶ Adoption of Industry Standards for Breakout Tanks, 63 Fed. Reg. 27903, 27905 (*proposed* May 21, 1998) (stating that "codes" and "specifications" were required to be complied with as though they were printed in full into Part 195, but recommended practices were only expected to be followed unless the operator documented why compliance is not necessary for safety). *See also* Adoption of Consensus Standards for Breakout Tanks, 64 Fed. Reg. 15926, 15929 (Apr. 2, 1999).

¹⁷ Post-hearing Brief at 13.

¹⁸ § 195.573(b).

not have to comply with API RP 651 depending on whether the operator can demonstrate it is not necessary to use the consensus standard. These rules do not permit operators to forgo having cathodic protection entirely.

B. Prior Enforcement Activity

Respondent argued that during a previous enforcement proceeding, OPS inspected and approved the Company's practice of using VCI in place of cathodic protection. Specifically, in April 2008, representatives of OPS conducted an inspection of the pipeline facilities, records, and procedures of Plains. The inspection involved reviewing the Company's procedures for operations and maintenance (O&M). During the inspection, Respondent contended, Plains and OPS discussed the use of VCI as an alternative to cathodic protection and OPS did not express any concerns.¹⁹

Following the inspection, the Director issued to Plains a Notice of Amendment on March 4, 2009 (NOA). The NOA contained approximately 20 items of apparent inadequacies in the Company's procedures. One of the alleged inadequacies, Item 5H, concerned the procedures for using VCI. The Item cited § 195.565 and alleged that "Plains does not have procedures for the installation or monitoring of the VpCI system, nor does Plains have it noted why the use of cathodic protection is not needed for the tank bottom protection due to the use of the VpCI system."²⁰

Item 5H stated further that "Plains must modify the procedures to provide specific details within the O&M manual to include VpCI," but a separate paragraph at the end of the NOA stated that no further action was necessary on this issue. The paragraph read, "In regard to Items . . . 5G through 5O, listed above, Plains provided finalized documentation . . . of various changes made to their O&M Manual. After considering the material provided, PHMSA deemed the modifications adequate, and no further action is required in response to this Notice."²¹

In February 2010, the Director issued a follow-up letter closing the NOA. The closure letter stated that Plains had provided amended procedures in response to all the items. It stated further that after reviewing the amended procedures, "it appears that the inadequacies outlined in this Notice of Amendment have been corrected." The letter concluded by saying "no further action is necessary and this case is now closed."²²

¹⁹ Pre-hearing Submission at 2-3.

²⁰ Pre-hearing Submission, Exhibit F, Notice of Amendment at 8. VpCI is a proprietary VCI system.

²¹ Pre-hearing Submission, Exhibit F, Notice of Amendment at 12. Respondent indicated that its modified procedures noted explicitly that breakout tanks with HDPE liners were exempt from cathodic protection requirements. Pre-hearing Submission at 4.

²² Pre-hearing Submission, Exhibit H, Closure Letter. Respondent also noted that in conjunction with the NOA, OPS issued a separate notice of probable violation. That case alleged only one violation concerning the use of VCI, but the violation was limited to the identification of "covered tasks" under the operator qualification rules. Pre-hearing Submission at 4.

Respondent argued that by reviewing its procedures and closing the case, OPS officially accepted the Company's use of VCI as a substitute for cathodic protection. Respondent contended that "after reviewing the updated procedures, PHMSA approved them without limitation . . . and as a result interpreted [§] 195.565 to mean that operators like Plains can replace cathodic protection with another technology."²³

PHMSA disagrees with this contention for several reasons. First, PHMSA dismisses the general notion that by reviewing a company's procedures in connection with an inspection or notice of amendment, PHMSA must thereby adopt the operator's regulatory interpretations. OPS inspectors routinely review operators' procedures during inspections—procedures which may differ widely due to the specific nature of an operator's system. It is not reasonable to presume that PHMSA subscribes to an operator's regulatory interpretations implemented in its procedures, even if the agency finds the operator's procedures are adequate for safety.

PHMSA also dismisses the assertion that the NOA and closure letter constituted a regulatory interpretation. PHMSA issues official interpretations through the process codified at 49 C.F.R. § 190.11.²⁴ PHMSA may also interpret a regulation in an enforcement case if necessary to resolve conflicting assertions about a regulation's application.²⁵ Whether issued as a standalone interpretation or as part of an enforcement decision, a written interpretation will contain clear language that it is the agency's purpose to decide a question of regulatory application. The interpretation will explain the reasoning behind the particular decision, and if an alternative interpretation was considered and rejected, it will explain why it was not adopted.

The 2009 NOA and closure letter documents issued to Plains contained no language indicating an interpretation of §§ 195.563 or 195.565. The NOA only contains allegations of procedural inadequacies and both documents contain statements of general applicability, such as "the inadequacies outlined in this Notice of Amendment have been corrected." These do not constitute a definitive interpretation of any regulation. Likewise, any conversations between Plains and individual inspectors during the audit did not constitute an official interpretation by the agency.

Furthermore, the NOA proceeding never adjudicated whether Respondent's procedures complied with §§ 195.563 or 195.565. A notice of amendment issued pursuant to § 190.206 alleges that an operator's plans or procedures are inadequate to assure safe operation of a pipeline facility.²⁶ If there is a finding in the case, it is whether or not the procedures are adequate for safety.

²³ Post-hearing Brief at 9.

²⁴ Section 190.11 states that operators may obtain a regulatory interpretation by submitting a written request to PHMSA.

²⁵ See, e.g., *Magellan Pipeline Company*, CPF No. 4-2012-5010, Item 1, 2014 WL 5431188 (Sept. 2, 2014) (interpreting § 195.575(a) to require that operators clear shorted casings, unless the pipeline and casing are electrically interconnected and cathodically protected as a single unit.)

²⁶ This differs from a notice of probable violation issued pursuant to § 190.207, which alleges an operator committed a violation of the safety regulations.

Contrary to Respondent's assertions, there were never any findings rendered in the earlier proceeding that "concluded that Plains had complied with Section 195.565."²⁷

For the above reasons, PHMSA rejects Respondent's contention that the 2009 NOA and closure letter constituted an official adoption of agency position by PHMSA. Likewise, the agency rejects the assertion that PHMSA has interpreted §§ 195.563 or 195.565 to permit the use of VCI instead of cathodic protection.

C. Whether Respondent complied with § 195.563

Respondent submitted expert reports and other evidence to demonstrate that the use of VCI achieves an adequate level of safety. OPS countered by alleging a number of issues with VCI.²⁸ Ultimately, the safety performance of VCI is not relevant. PHMSA must decide as a factual matter whether Respondent had cathodic protection as required under the regulation.

The 16 breakout tanks at issue were all originally constructed with cathodic protection systems and are in contact with the soil.²⁹ Under § 195.563, these tanks must have cathodic protection to protect the bottom of the tank from external corrosion.

Between 2006 and 2012, Respondent installed VCI systems on 22 of the tanks at the Cushing Terminal. For many of the tanks, the VCI system replaced the cathodic protection system as the method for corrosion protection. Respondent did not have cathodic protection on these tanks as required by the regulation. Therefore, Respondent was not in compliance with § 195.563.

D. Additional Arguments Raised by Respondent

In lengthy legal briefs, Respondent argued that PHMSA would contravene requirements of fair notice, rulemaking, retroactivity, and various other legal doctrines if PHMSA found Plains in violation for failure to have cathodic protection. PHMSA addresses these arguments below.

(1) Fair Notice

Respondent argued that PHMSA cannot find Plains in violation because the Company did not have "fair notice" that using VCI in lieu of cathodic protection was a violation. Respondent bases this argument on the doctrine that agencies may not penalize a person for violating a rule without first providing adequate notice of the rule's requirement, especially when the party's interpretation of the rule was reasonable.³⁰

²⁷ Post-hearing Brief at 6.

²⁸ E.g., OPS Pipeline Safety Violation Report (Apr. 5, 2013), Exhibit E-4.

²⁹ Violation Report, Exhibits E-1 and E-2. Response, Attachment 4.

³⁰ Post-hearing Brief at 7.

PHMSA recognizes the importance of not assessing a civil penalty unless an operator has fair notice of what constitutes a violation.³¹ When considering whether notice was adequate in an enforcement proceeding, PHMSA has stated “the issue of notice rests on ‘whether the regulated party received, or should have received, notice of the agency’s interpretation in the most obvious way of all: by reading the regulations.’”³²

The regulations at issue in this matter are plain on their face. Section 195.563 states that cathodic protection is required for breakout tanks. Section 195.565 confirms this requirement by describing how to install cathodic protection on breakout tanks. Accordingly, Respondent had notice from the regulations that cathodic protection is required.

Nevertheless, Respondent argued that it did not have fair notice because the current enforcement proceeding is “contrary to past agency action,” notably the 2009 NOA proceeding.³³ Respondent also pointed out that OPS acknowledged Respondent’s interpretation was “reasonable,” “credible,” and in “good faith.”³⁴

As discussed above, there is no evidence that PHMSA ever adopted a position consistent with Respondent’s belief that VCI should be permitted in lieu of cathodic protection. Further, PHMSA does not find Respondent’s position constituted a reasonable interpretation in light of the regulatory language. Respondent’s contention that it did not have fair notice is rejected.

(2) Notice and Comment Rulemaking

Respondent next argued that PHMSA cannot require cathodic protection under §§ 195.563 and 195.565 unless the agency goes through notice and comment rulemaking under the Administrative Procedure Act (APA).³⁵ Respondent cited a court decision and argued that notice and comment is required because the current enforcement proceeding “constitute[s] a substantial change in its position.”³⁶

The APA requires federal agencies to provide public notice of proposed rules and to give interested persons an opportunity to submit their views.³⁷ The comments must be considered by

³¹ See, e.g., *Butte Pipeline Co.*, CPF No. 5-2007-5008, Item 4, 2009 WL 3190794 (Aug. 17, 2009) (recognizing that PHMSA may not violate a person’s right of due process by depriving the person of property without providing a minimum level of “fair notice” as to what may constitute a violation of law).

³² *Butte Pipeline Co.*, quoting *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995).

³³ Post-hearing Brief at 8, citing *U.S. v. Chrysler Corp.*, 158 F.3d 1350, 1356 (D.C. Cir. 1998) (“[A]n agency is hard pressed to show fair notice when the agency itself has taken action in the past that conflicts with its current interpretation of a regulation.”).

³⁴ Second Post-hearing Statement at 4.

³⁵ Post-hearing Brief at 15-16.

³⁶ Post-hearing Brief at 7, citing *Shell Offshore Inc. v. Babbitt*, 238 F.3d 622 (5th Cir. 2001).

³⁷ 5 U.S.C. § 553.

the agency before publishing a final rule. The notice and comment process is required for the adoption of each substantive rule, but the process “does not apply . . . to interpretative rules.”³⁸

The current enforcement decision does not implicate the APA’s notice and comment requirements because the agency is not adopting any new substantive rules. The current decision merely clarifies and explains existing regulations based on their plain language. Such an explanation is necessary in this case to address an alternative reading advocated by Respondent.³⁹

The current decision also does not constitute any change to agency position. Unlike the court decision cited by Respondent where an agency had a “long established and consistently followed practice” that was suddenly reversed,⁴⁰ in this case there is no reversal of an existing agency practice. In fact, for the entire 45-year history of the regulations in question, they have explicitly required cathodic protection for breakout tanks. For all the above reasons, PHMSA rejects Respondent’s contention that notice and comment rulemaking is required.

(3) Retroactive Application

Respondent next argued that PHMSA “cannot apply retroactively” a requirement that Plains have cathodic protection. Respondent bases this argument on the theory that an agency may not use a new policy to impose liability for actions that were taken in good-faith reliance on a former policy.⁴¹ Respondent argued that it relied on PHMSA’s prior interpretation announced during the 2009 NOA proceeding that allowed the Company to stop using cathodic protection.

Again, PHMSA rejects Respondent’s position because the agency never announced or applied a policy permitting operators to stop using cathodic protection to protect breakout tanks. Moreover, Respondent’s contention that it relied on the outcome of the 2009 NOA proceeding is questionable in light of evidence that Respondent had already begun replacing cathodic protection with VCI years prior to the 2009 proceeding.⁴²

Respondent argued that it would face substantial costs if it had to retrofit tanks with cathodic protection, including costs between \$28 million and \$35 million,⁴³ but substantial costs alone are not a valid reason for an operator to be out of compliance. For the above reasons, PHMSA rejects Respondent’s arguments.

³⁸ 5 U.S.C. § 553(b)(3)(A).

³⁹ *E.g.*, *Conf. Group, LLC v. FCC*, 720 F.3d 957, 965 (D.C. Cir. 2013) (finding an order issued by the FCC was “simply an interpretation given in the course of informal adjudication” and consequently not subject to notice and comment rulemaking).

⁴⁰ *Shell Offshore*, 238 F.3d at 630.

⁴¹ Post-hearing Brief at 18.

⁴² Post-hearing Brief at 3.

⁴³ Pre-hearing Submission at 5.

(4) *Res Judicata and Estoppel*

Finally, Respondent argued that PHMSA is precluded under doctrines of *res judicata*, collateral estoppel, and equitable estoppel from revisiting issues decided in the 2009 NOA proceeding.⁴⁴

Res judicata and collateral estoppel are traditionally judicial doctrines intended to prevent a court from having to re-litigate claims and issues between parties that were already decided by a prior adversarial proceeding. The doctrines have been applied in some instances to decisions by administrative agencies acting in their judicial capacity.⁴⁵

Respondent argued the doctrines should be applied here because the present case raises the same claims and issues that were resolved in the 2009 NOA proceeding. Specifically, both cases cited to the same regulation and both claimed Plains failed to provide information sufficient to support the use of VCI. By closing the earlier case, Respondent argued that PHMSA may not reopen the matter in this proceeding to allege a violation.

Res judicata and collateral estoppel do not apply here in the manner suggested by Respondent. First, an earlier proceeding may only have preclusive effect if the administrative agency acted in its judicial capacity to resolve the claim, which means the agency “resolved disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate.”⁴⁶

That did not happen in the earlier proceeding. After issuance of the 2009 NOA by the Director, the Director closed the case after Plains submitted amended procedures. As a result of the NOA being closed, there were never any disputed issues adjudicated or resolved.⁴⁷

The second reason *res judicata* and collateral estoppel do not apply here is that the two proceedings raised different issues. The relevant issue in the 2009 NOA was whether Respondent’s written O&M procedures were adequate for safety. The NOA did not alleged any conduct by Respondent constituted a violation of either §§ 195.563 or 195.565, whereas in the present case the issue of compliance is the fundamental issue presented. The two proceedings involved claims and issues that are distinct.⁴⁸

⁴⁴ Post-hearing Brief at 18.

⁴⁵ See, e.g., *Astoria Fed. Sav. & Loan Ass’n v. Solimino*, 501 U.S. 104, 107 (1991) (recognizing the historical application of these doctrines to final determinations of agencies).

⁴⁶ *United States v. Utah Const. & Min. Co.*, 384 U.S. 394, 421-22 (1966).

⁴⁷ See § 190.206 providing procedures for the adjudication of an NOA.

⁴⁸ Respondent also failed to cite any specific language in the Pipeline Safety Act that contemplates the application of *res judicata* and collateral estoppel to PHMSA’s pipeline safety enforcement proceedings. See *Duvall v. Attorney General of the United States*, 436 F.3d 382, 387 (3rd Cir. 2006) (noting it is relevant whether the enabling statute requires an agency to apply the doctrine).

Respondent also argued that equitable estoppel applies because the Company relied on the agency's representations and incurred substantial costs as a result, including approximately \$850,000 spent installing VCI since 2009.⁴⁹

Again, the doctrine of equitable estoppel does not apply here. PHMSA did not make representations that "expressly informed Plains that [by using VCI] the company had satisfied its obligations under § 195.565."⁵⁰ Second, the record demonstrates Respondent had already begun replacing cathodic protection with VCI several years prior to the 2009 NOA proceeding.⁵¹

Accordingly, PHMSA rejects Respondent's contention that these doctrines preclude enforcement in this case.

E. Conclusion

PHMSA finds the plain language of §§ 195.563 and 195.565 requires operators to have cathodic protection for breakout tanks in contact with the soil to protect against corrosion. The regulations do not permit operators to substitute another technology for cathodic protection absent a waiver of the regulatory requirement by order of a special permit.

Having reviewed the evidence and considered the positions of the parties, PHMSA finds Respondent violated § 195.563 by failing to have cathodic protection on at least 16 breakout tanks at the Cushing Terminal.

Item 6: The Notice alleged that Respondent violated 49 C.F.R. § 195.571, which states:

§ 195.571 What criteria must I use to determine the adequacy of cathodic protection?

Cathodic protection required by this subpart must comply with one or more of the applicable criteria and other considerations for cathodic protection contained in paragraphs 6.2 and 6.3 of NACE SP 0169 (incorporated by reference, *see* § 195.3).

The Notice alleged that Respondent violated § 195.571 by failing to ensure that cathodic protection on several other breakout tanks complied with the applicable criteria in paragraphs 6.2 and 6.3 of NACE International Standard Practice 0169 (NACE SP0169). Specifically, the Notice alleged that Respondent had at least 27 tanks with cathodic protection that failed to meet the criteria for adequate corrosion control. The evidence produced by OPS included cathodic protection survey records from 2009, 2010, and 2011 that recorded low cathodic protection readings.⁵²

⁴⁹ Post-hearing Brief at 3, 11.

⁵⁰ Pre-hearing Submission at 11.

⁵¹ Respondent also failed to address whether equitable estoppel would even be applicable against PHMSA. *See* Office of Pers. Mgmt. v. Richmond, 496 U.S. 414, 419 (1990) (noting that equitable estoppel is not applied to the Government in the same way it would be applied against a private party).

⁵² Violation Report at 34 and Exhibit F-1.

In its Response and at the hearing, Respondent contested the violation and argued that of the 27 breakout tanks identified in the Notice, 7 tanks had survey data demonstrating compliance with the applicable criteria, 7 tanks had low readings due to a bad reference cell, and 13 tanks were protected from corrosion using VCI. Respondent produced additional survey records from 2011 and 2012.⁵³

At the hearing, Respondent argued the scope of the alleged violation should be limited to only conduct that occurred in 2011 because the Notice did not allege any violations in 2009 or 2010. OPS argued, however, that survey records from 2009 and 2010 were included in the Violation Report and were relevant to the alleged violation.

Under the pipeline safety regulations, pipeline operators must ensure that cathodic protection complies with one or more of the applicable criteria contained in paragraphs 6.2 and 6.3 of NACE SP0169, *Control of External Corrosion on Underground or Submerged Metallic Piping Systems*.⁵⁴ One of the criteria described in paragraph 6.2 of NACE SP0169 is: “A negative (cathodic) potential of at least 850 mV with the CP applied Voltage drops other than those across the structure-to-electrolyte boundary must be considered for valid interpretation of this voltage measurement.” This is commonly known as the -850 mV “on” criterion.

Under this criterion, operators must consider the voltage (IR) drop to accurately determine if cathodic protection meets the standard. If IR drop is not properly considered, cathodic protection may appear to meet the -850 mV criterion when, in fact, it does not. One method of considering IR drop is to measure or calculate the drop by interrupting the current and taking an “instant-off” reading.⁵⁵

Another criteria described in paragraph 6.2 of NACE SP0169 is: “A minimum of 100 mV of cathodic polarization between the structure surface and a stable reference electrode contacting the electrolyte.” This is commonly known as the 100 mV criterion.

To determine whether evidence of a cathodic protection deficiency constitutes a violation of § 195.571, it is necessary to understand that pipeline operators are required to conduct tests annually to determine if cathodic protection complies with the applicable criteria.⁵⁶ If there is a deficiency in the cathodic protection, the operator must correct it “within a reasonable time.”⁵⁷ Under normal conditions, PHMSA considers a “reasonable time” for correcting a cathodic protection deficiency to be before the next annual test or scheduled monitoring.⁵⁸

⁵³ Response, Attachment 9; and Pre-hearing Submission, Enclosure 4.

⁵⁴ § 195.571.

⁵⁵ Panhandle Energy, CPF No. 3-2010-1006M, Item 19, 2012 WL 7177132 (Dec. 31, 2012).

⁵⁶ § 195.573(a)(1).

⁵⁷ § 195.401(b)(1). *See also* § 195.573(e) (requiring operators to correct deficiencies in corrosion control as required under §§ 195.401(b) or 195.452(h)).

⁵⁸ *See, e.g.,* Navajo Nation Oil & Gas Co., CPF No. 4-2006-5029, Item 11, 2010 WL 1323383 (Mar. 17, 2010) (finding a violation for failing to correct a deficiency for 20 months).

To evaluate whether any cathodic protection deficiencies were not corrected within a reasonable time, PHMSA must review multiple years of an operator's survey records. Respondent's survey records from 2009, 2010, and 2011 are all relevant to whether Respondent complied with the regulation by correcting any cathodic protection deficiencies within a reasonable time. Respondent received a copy of this evidence prior to the hearing and has had an opportunity to respond to the material at the hearing and in its post-hearing submission.

PHMSA reviewed the evidence in the record to determine if the 27 tanks had cathodic protection in compliance with the above-referenced criteria. The survey records contain -850 mV "on" readings for most tanks and "instant off" readings for some of the tanks. The records also contain a native reading for some of the tanks to evaluate compliance with the 100 mV criterion.⁵⁹ Based on a review of these records, PHMSA finds each of the 27 tanks identified in the Notice had deficiencies in cathodic protection spanning multiple years.

The following 10 tanks had survey records that proved cathodic protection did not comply with the applicable criteria for consecutive years:

Tanks 2000, 2700, 3000 and 3500 – In 2009, cathodic protection "on" levels for these tanks exceeded -850 mV, but there was no data indicating IR drop had been considered as required for application of the criterion. In 2010 and 2011, cathodic protection "on" levels did not meet -850 mV or the criterion was not met when considering IR drop. Data did not indicate any of the tanks met the 100 mV criterion during those years.

Tanks 2100 and 3200 – In 2009 and 2010, cathodic protection "on" levels were less negative than -850 mV. In 2011, data indicated the -850 mV criterion was not met when considering IR drop. Data did not indicate any of the tanks met the 100 mV criterion during those years.

Tanks 2600 and 2900 – In 2009 and 2010, cathodic protection "on" levels were less negative than -850 mV. In 2011, data indicated the -850 mV criterion was not met when IR drop was considered. Data indicated these tank may have met the 100 mV criterion in 2011, but not 2009 or 2010.

Tanks 3400 and 3700 – In 2009, cathodic protection "on" levels exceeded -850 mV, but there was no data regarding consideration of IR drop. In 2010 and 2011, either cathodic protection "on" levels were less negative than -850 mV or the criterion was not met when considering IR drop. Data indicated these tank may have met the 100 mV criterion in 2011, but not 2009 or 2010.

The following 16 tanks had survey records proving either that cathodic protection did not comply with the criteria or the records were missing necessary information to demonstrate compliance with the applicable criteria for consecutive years:

⁵⁹ At the hearing, OPS questioned the reliability of the native readings, but the reliability of the native readings does not impact the findings of violation in this decision.

Tanks 1900, 2300, and 2800 – In 2009, cathodic protection “on” levels were less negative than -850 mV. In 2010, cathodic protection “on” levels exceeded -850 mV, but there was no data regarding consideration of IR drop. In 2011, data indicated the -850 mV criterion was not met on these tanks when considering IR drop. Data also indicated these tanks did not meet the 100 mV criterion any of those years.

Tanks 2200, 2400, and 2500 – In 2009, cathodic protection “on” levels were less negative than -850 mV. In 2010, cathodic protection “on” levels exceeded -850 mV, but there was no data regarding consideration of IR drop. In 2011, cathodic protection “on” levels again were less negative than -850 mV. Data also indicated the tanks did not meet the 100 mV criterion any of those years.

Tanks 3100 and 3800 – In 2009 and 2010, cathodic protection “on” levels exceeded -850 mV, but there was no data regarding consideration of IR drop. In 2011, data indicated the -850 mV criterion was not met when IR drop was considered. Data indicated these tanks may have met the 100 mV criterion in 2011, but not 2009 or 2010.

Tanks 3300 and 3600 – In 2009 and 2010, cathodic protection “on” levels exceeded -850 mV, but there was no data regarding consideration of IR drop. In 2011, data indicated the -850 mV criterion was not met when considering IR drop. Data did not indicate the tanks met the 100 mV criterion any of those years.

Tanks 3900 and 4400 – There was no survey data from 2009 for these tanks. In 2010, cathodic protection “on” levels exceeded -850 mV, but there was no data regarding consideration of IR drop. In 2011, data indicated the -850 mV criterion was not met when considering IR drop. Data also indicated the tanks did not meet the 100 mV criterion any of those years.

Tanks 4000, 4300, 5000, and 5300 – There was no survey data from 2009 for these tanks. In 2010, cathodic protection “on” levels exceeded -850 mV, but there was no data regarding consideration of IR drop. In 2011, data indicated the -850 mV criterion was not met when IR drop was considered. Data indicated these tank may have met the 100 mV criterion in 2011, but not in 2009 or 2010.

Finally, Tank 1800 had survey data indicating cathodic protection “on” levels exceeded -850 mV, but there was no data regarding consideration of IR drop. No cathodic protection survey data was provided for 2010 or 2011.

Respondent argued that some of the tanks had inadequate readings due to bad reference cells. Attributing low readings to bad cells, however, does not prove adequate cathodic protection was present at the location of the bad cells. In addition, Respondent’s records indicated that other reference cells on the same tanks had inadequate cathodic protection as well.

Respondent argued further that many of the tanks were protected from corrosion using VCI. Under § 195.571, however, the tanks must have cathodic protection that complies with the applicable criteria. The use of VCI is not an acceptable substitute for regulatory compliance.

For the above reasons, PHMSA finds Respondent violated § 195.571 by failing to ensure that cathodic protection complied with applicable criteria on 27 breakout tanks.

The findings of violation in this Final Order will be considered prior offenses 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 \$200,000 per violation for each day of the violation, up to a maximum of \$2,000,000 for any related series of violations. The Notice proposed a total civil penalty of \$103,400 for the violations cited above in Items 5 and 6.

In determining the amount of a civil penalty under 49 U.S.C. § 60122 and 49 C.F.R. § 190.225, PHMSA 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 good faith of Respondent in attempting to comply with the pipeline safety regulations; and the effect on Respondent's ability to continue in business. In addition, PHMSA may consider the economic benefit gained from the violation and such other matters as justice may require.

Item 5: The Notice proposed a civil penalty of \$32,800 for Respondent's violation of 49 C.F.R. § 195.563. Respondent violated § 195.563 by failing to have cathodic protection on a number of breakout tanks at the Cushing Terminal facility. Respondent had installed VCI systems as a substitute, believing incorrectly that it was permissible under the regulations.

The proposed penalty amount was based on assertions in the Notice and Violation Report relevant to the penalty assessment criteria specified in § 190.225. With regard to the nature, circumstances and gravity of the violation, the Violation Report suggested that the violation potentially compromised pipeline integrity and safe operation at the terminal facility, because failure to maintain adequate cathodic protection could result in corrosion and a release potentially threatening the public and environment.

With regard to whether the violation compromised public safety, Respondent submitted technical and engineering documentation, corrosion rate monitoring, and expert reports in support of its position that the use of VCI achieves an adequate level of safety. Respondent alleged that OPS had previously reviewed some of the documentation and found it was adequate for safety.⁶⁰ At the hearing, OPS countered that there were potential safety issues with the use of VCI and questioned whether it provides the level of safety claimed.

⁶⁰ Pre-hearing Submission at 11.

Given the materials submitted and positions of the parties, PHMSA finds the evidence is inconclusive as to whether VCI indeed compromised pipeline safety, but PHMSA finds the failure to have cathodic protection in accordance with the regulation did have the potential to compromise safety at the terminal facility.

With regard to the degree of Respondent's culpability and good faith, the Notice proposed a moderately reduced penalty based on assertions in the Violation Report that Respondent was cognizant of the regulatory requirement and should be given credit for taking significant steps to use an alternative methodology to address the risk of corrosion, even though the methodology was not in accordance with the regulation. The Violation Report also asserted that Respondent had some degree of justification for not taking all practicable steps to achieve compliance because the operator believed using the alternative methodology was permissible under the code. Based on a review of the evidence, PHMSA finds these assertions support the penalty proposed.

With regard to the history of Respondent's prior offenses, the Violation Report noted ten prior offenses in the five-year period prior to issuance of the Notice.

Accordingly, having reviewed the record and considered the assessment criteria, Respondent is assessed a civil penalty of \$32,800 for the violation of § 195.563.

Item 6: The Notice proposed a civil penalty of \$70,600 for Respondent's violation of § 195.571. Respondent violated § 195.571 by failing to ensure that cathodic protection complied with applicable criteria on 27 breakout tanks during 2009, 2010, and 2011. Records showed at least 10 of the tanks did not comply with applicable criteria during consecutive years, 16 additional tanks either had cathodic protection that did not comply or were missing information necessary to demonstrate compliance, and 1 tank was missing information necessary to demonstrate compliance for all three years.

With regard to the nature, circumstances and gravity of the violation, the Violation Report suggested that the violation potentially compromised pipeline integrity and safe operation at the terminal facility because corrosion of the tank bottoms could result in the potential release of commodity, which is harmful to operating personnel, the public, and the environment. The Violation Report also suggested there were 29 instances of the violation. Based on a review of the evidence in the record, PHMSA finds the above assertions are accurate with the exception that 27—not 29—tanks were proven to be in violation.⁶¹

With regard to the degree of Respondent's culpability and good faith, the Notice proposed a slightly reduced penalty based on assertions in the Violation Report that Respondent was cognizant of the regulatory requirement and took some steps to address the issue by maintaining other tanks at the Cushing Terminal with adequate cathodic protection. Based on a review of the

⁶¹ When a civil penalty is assessed for more than one instance of a violation (e.g., 27 tanks with inadequate cathodic protection), each additional instance beyond the first typically elevates the total penalty by less than the amount assessed for the first instance.

evidence in the record, PHMSA finds these assertions are accurate to support the penalty proposed.

PHMSA takes into consideration Respondent's prior offenses, including the ten prior offenses in the five-year period prior to issuance of the Notice.

Having reviewed the record and considered the assessment criteria, Respondent is assessed a civil penalty of \$70,100 for the violation of § 195.571, which is a reduced amount to reflect the number of tanks that were in violation.

In summary, having reviewed the record and considered the assessment criteria for each of the Items cited above, I assess Respondent a total civil penalty of **\$102,900**. Respondent did not claim this penalty would affect its 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 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 \$102,900 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 5 and Item 6. Under 49 U.S.C. § 60118(a), each person who engages in the transportation of hazardous liquids by pipeline or who owns or operates a pipeline facility is required to comply with the applicable safety standards established under chapter 601.

Pursuant to the authority of 49 U.S.C. § 60118(b) and 49 C.F.R. § 190.217, Plains is ordered to take the following actions to ensure compliance with the pipeline safety regulations applicable to its operations:

1. With respect to the violation of § 195.563 (**Item 5**), Plains must prepare a plan to ensure that each breakout tank at the Cushing Terminal facility has cathodic protection. The plan must include a schedule for completing necessary installations of cathodic protection within one year of the plan's approval by the Director. The plan must be consistent with applicable pipeline safety requirements in 49 C.F.R. Part 195, including Subpart H. The

use of an alternative form of corrosion control is not permitted as a substitute for cathodic protection, and may only be used in conjunction if the cathodic protection otherwise complies with Part 195. Plains must submit the plan to the Director for review and approval within 30 days of receipt of this Order. Upon approval by the Director, Plains must implement the plan. Documentation must be submitted within one year of the plan's approval demonstrating the installations have been completed and each tank has cathodic protection in accordance with applicable safety requirements.

2. With respect to the violation of § 195.571 (**Item 6**), Plains must prepare a schedule for remediating the cathodic protection deficiencies within one year of the schedule's approval by the Director. Plains must submit the schedule to the Director for review and approval within 30 days of receipt of this Order. Upon approval by the Director, Plains must remediate cathodic protection deficiencies according to the schedule. Structure-to-soil readings must be submitted within one year of the schedule's approval demonstrating that cathodic protection meets at least one of the criteria specified in 49 C.F.R. Part 195.
3. The Director may grant an extension of time to comply with any of the requirements of this compliance order upon a written request timely submitted by Respondent demonstrating good cause.
4. Submissions under this compliance order must be to the Director, Southwest Region, Pipeline and Hazardous Materials Safety Administration, 8701 South Gessner, Suite 1110, Houston, TX 77074.
5. It is requested that Plains maintain documentation of the safety improvement costs associated with fulfilling this compliance order and submit the total to the Director. It is requested that these costs be reported in two categories: (1) total cost associated with preparation/revision of plans, procedures, studies and analyses, and (2) total cost associated with replacements, additions and other changes to pipeline infrastructure.

Failure to comply with this Order may result in the administrative assessment of civil penalties not to exceed \$200,000 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.

WARNING ITEMS

With respect to Items 1, 2, 3, and 4, the Notice alleged probable violations of Part 195 and stated that these were warning items. In accordance with § 190.205, warnings are not considered findings of violation, but serve to notify the operator of an issue that could result in future enforcement if not corrected. The warnings were for:

§ 195.205(b)(1) (**Item 1**) – Respondent's alleged failure to have records showing that it had addressed repairs that were recommended in accordance with API Standard 653, *Tank Inspection, Repair, Alteration, and Reconstruction* (incorporated by reference, see § 195.3). In its Response, Plains stated that it is implementing a new form to document

the company's response to recommendations from API Standard 653 inspections, as well as a new program for conducting follow-up inspections to verify and document that recommendations have been addressed.

§ 195.402(a) (**Item 2**) – Respondent's alleged failure to follow its written procedures for performing and documenting monthly security inspections of breakout tanks. In its Response, Plains stated that it is unaware of any regulation that mandates such inspections, but it has updated its procedure and inspection form to provide for monthly security checks.

§ 195.430 (**Item 3**) – Respondent's alleged failure to maintain adequate firefighting equipment at the facility. In its Response, Plains explained that it trains employees on the use of fire extinguishers to fight incipient fires, and it relies on the local fire department to fight larger fires. Respondent noted that the fire department has verified it has the correct fittings for water supply and terminal foam manifolds at the Plains terminal. Respondent also stated that it gives funding for members of the fire department to attend the Williams Fire Fighting School. Respondent submitted documentation of the training received by fire department members and equipment available to fight tank fires.

§ 195.432(b) (**Item 4**) – Respondent's alleged failure to schedule breakout tank inspections at intervals established in API Standard 653. In its Response, Plains stated that it has provided PHMSA with an updated inspection schedule and is presently performing inspections on tanks in accordance with the schedule consistent with applicable requirements.

Pursuant to § 190.205, Respondent is advised that if a violation of one of these provisions is identified in the future, Respondent may be subject to additional enforcement under Part 190.

Under 49 C.F.R. § 190.243, Respondent may submit a petition for reconsideration of this Final Order to the Associate Administrator for Pipeline Safety, PHMSA, 1200 New Jersey Avenue SE, East Building, 2nd Floor, Washington, D.C. 20590, no later than 20 days after receipt of the Final Order. Any petition submitted must contain a statement of the issue(s) and meet all other requirements of 49 C.F.R. § 190.243. The filing of a petition automatically stays the payment of any civil penalty assessed, however, the other terms of the order, including the corrective action, remain in effect unless the Associate Administrator, upon request, grants a stay.

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



Jeffrey D. Wiese
Associate Administrator
for Pipeline Safety

MAY 22 2015

Date Issued