

PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMINISTRATION
WASHINGTON, DC 20590

In the matter of:

ExxonMobil Pipeline Company

Respondent

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CPF No. 4-2021-029-NOPV

**PETITION FOR RECONSIDERATION
OF
EXXONMOBIL PIPELINE COMPANY**

I. INTRODUCTION

The Pipeline and Hazardous Materials Safety Administration (“PHMSA”), Office of Pipeline Safety (“OPS”), issued a Final Order (“Final Order”) imposing civil penalties and a Compliance Order upon ExxonMobil Pipeline Company (“Respondent”).

The Final Order found five violations of the pipeline safety regulations, assessed civil penalties for two violations, and issued a compliance order for one violation (Notice of Probable Violation, Proposed Civil Penalty, and Proposed Compliance Order (“NOPV”) Item 3). The violation for NOPV Item 3 relates to inspection of in-service breakout tanks, and the Compliance Order would establish a remedy; however, Respondent believes that, as to NOPV Item 3, both the Final Order finding of violation and the associated Compliance Order are the result of mistake.

The Final Order finding of violation for NOPV Item 3 is based on a factual misunderstanding. Specifically, Respondent submitted a tank inspection report during the PHMSA inspection that contained an error – an incorrect page included by the tank inspector. Respondent addressed the error in its response to the NOPV and submitted the correct page.

In addition, the Compliance Order directs an action which is impossible – repairing “illegal patches” that in fact do not exist. Therefore, the Final Order finding of violation as to NOPV Item 3 should be reconsidered in a manner that remedies these issues and at a minimum resolves the impossibility of the Compliance Order.

In this Petition, Respondent reviews the procedural background; reviews the Final Order’s NOPV Item 3 findings and conclusions; then outlines the errors in the Final Order finding of violation for NOPV Item 3 and the Compliance Order, certain of which issues are addressed in the alternative.

Two points addressed by 49 C.F.R. §190.243 warrant treatment at the outset. 49 C.F.R. §190.243(b) states that “[i]f the respondent requests the consideration of additional facts or arguments, the respondent must submit the reasons why they were not presented prior to issuance of the final order.”

First, below is a brief review of evidence excerpted from the Inspection Report which currently is in the record:

1. During the PHMSA inspection, an excerpt from the Inspection Report, containing of the “Suitability for Service” page of the Inspection Report, was provided to the PHMSA inspector.¹
2. When preparing its response to the NOPV, Respondent learned that the excerpt provided during the inspection was erroneous. Specifically, the excerpt contained a “Suitability for Service” page relating to an inspection report for a fuel oil tank at Respondent’s facility located in Providence, Rhode Island.
3. Respondent corrected the record by submitting, with its written response to the NOPV, the actual “Suitability for Service” page from the Inspection Report which relates to Tank #901 (a gasoline tank).²
4. Following receipt of the Final Order, Respondent engaged in informal discussions with the Southwest Region, during which the Region suggested that Respondent submit to the Region a copy of the complete Inspection Report; Respondent provided to the Region the complete Inspection Report on January 12, 2022, and, thus, the Inspection Report is in the record.

Second, Respondent supplements the record by submitting a complete version of the U.N.I. Engineering, Inc. report resulting from an API Std. 653 inspection of Tank #901 at Respondent’s Lockport Terminal (the “Inspection Report” and “Tank #901,” respectively); *see* Declaration of Justin Sapp, attached hereto as Exhibit 2. Respondent also submits the Declaration of Kirk O’Neal Sheppard, attached hereto as Exhibit 3, in which Mr. Sheppard attests to his knowledge of the erroneous “Suitability for Service” excerpt, his knowledge of the underlying facts, and his review of the correct Inspection Report.

Third, new arguments asserted herein are for the purpose of addressing issues raised for the first time in the Final Order and the Compliance Order. As Respondent was not aware of these issues prior to the Final Order, Respondent could not have addressed them previously. Therefore, Respondent avers that all such facts and all such arguments should be considered by the Associate Administrator.

For convenience, Respondent has attached relevant pleadings that have been filed in this proceeding.

II. PROCEDURAL BACKGROUND

By letter dated June 3, 2021, Respondent received an NOPV from the Director, Southwest Region, PHMSA, OPS, (a) alleging five probable violations of the pipeline safety regulations promulgated

¹ See excerpt of Exhibit B-2 to Pipeline Safety Violation Report; attached hereto as Exhibit 1.

² See Exhibit 5, Exhibit A to Respondent’s Written Response.

at 49 C.F.R. Part 195,³ (b) proposing civil penalties for two of the alleged violations,⁴ and (c) proposing to impose a compliance order for three of the alleged violations⁵ (along with warnings for another five alleged violations⁶). A true and correct copy of the NOPV is attached hereto as Exhibit 4.

Following an extension of time to respond granted by the Director, by letter dated August 16, 2021, Respondent submitted a written response which objected to the NOPV and responded to the factual and regulatory bases of the alleged violations (“Response”). A true and correct copy of the Response is attached hereto as Exhibit 5.

By letter dated December 28, 2021, the Associate Administrator for Pipeline Safety issued the Final Order which found five violations of the pipeline safety regulations,⁷ assessed civil penalties for two of those violations,⁸ and issued a compliance order for one separate violation (NOPV Item 3). A true and correct copy of the Final Order (which contains the Compliance Order) is attached hereto as Exhibit 6.

By letter dated January 12, 2022, the Associate Administrator stated that the due date to file a Petition for Reconsideration would be January 18, 2022. As such, this Petition is timely filed.

III. DISCUSSION AND ANALYSIS

A. The Final Order Finding of Violation for NOPV Item 3

i. Overview of the NOPV and Final Order

NOPV Item 3 alleged the following:

ExxonMobil Pipeline failed to complete its inspection of in-service atmospheric breakout tanks in accordance with API Std 653, and its written operating procedures. ExxonMobil’s written procedure *Facilities Inspection and Maintenance Management System (FIMMS) Tank Inspection Program* procedure (Dated 9/12/2019) for inspecting the physical integrity of in-service atmospheric breakout tanks according to API Std 653. “Section D. Corrective Action” of the Tank Inspection Program Procedures includes a requirement that “potential deficiencies identified by API Std 653 in-service and out-of-service inspections will be reviewed by the Tank Maintenance Specialist (TMS), Program Steward, and/or Environmental Advisors. Corrective actions that cannot be taken while the tank is in service shall be completed before returning the tank back in to service.”

³ NOPV Item 2, Item 3, Item 4, Item 5, and Item 10.

⁴ NOPV Item 2 and Item 4.

⁵ NOPV Item 3, Item 5, and Item 10.

⁶ NOPV Item 1, Item, 6, Item 7, Item 8, and Item 9.

⁷ NOPV Item 2, Item 3, Item 4, Item 5, and Item 10.

⁸ NOPV Item 2 and Item 4.

PHMSA reviewed an out-of-service inspection report for its in-service Breakout Tank #901 at Lockport Terminal (Date: 5/17/17). The "Suitability for Service" section includes a statement regarding illegal patches under the shell section that states that these illegal patches must be addressed when the tank bottom is replaced.⁹

The NOPV reached the conclusion that "ExxonMobil Pipeline did not provide any documentation that the illegal patch deficiency was reviewed or addressed by the TMS in accordance with the Tank Inspection Program Procedure."¹⁰ The NOPV further concluded that "[f]ailure to complete the inspection process to address the identified deficiencies resulted in an incomplete inspection."¹¹

In turn, the Final Order found that Respondent "violated 49 C.F.R. § 195.432(b) by failing to inspect the physical integrity of in-service atmospheric breakout tanks in accordance with API Std 653 and its written operating procedures."¹²

The following bases for the finding of violation for NOPV Item 3 are stated in the Final Order: (1) that, "[i]n its Response, ExxonMobil stated it had erroneously included the page listing the illegal patches" for a tank "not related to Breakout Tank #901," (2) that "Respondent provided an updated API Std 653 report page," (3) that Respondent "stated that the TMS verified the API Std 653 report and associated repair plan for Tank #901," and (4) that Respondent "believes that the inspection was completed as per [ExxonMobil's] procedures."¹³ Notable is that no specific provision of API Std 653 is cited in the NOPV or in the Final Order; however, the specific section of Respondent's procedure is identified in detail.¹⁴

ii. Respondent Fulfilled the Requirements of 49 C.F.R. § 195.432(b)

The PHMSA regulation applied in this case is titled "Inspection of in-service breakout tanks," 49 C.F.R. § 195.432(b) which requires pipeline operators to "inspect the physical integrity of in-service atmospheric and low-pressure steel above-ground breakout tanks according to API Std 653."

The evidence provided by Respondent demonstrates that an inspection of Tank #901 was conducted. Respondent acknowledges that, during the course of PHMSA's 2020 inspection, it provided the PHMSA inspector with a version of the tank inspection documentation that contained an erroneous "Suitability for Service" page. The Suitability for Service page contained within the Inspection Report in fact related to a fuel oil tank at Respondent's facility located in Providence, Rhode Island. Upon discovering this error, Respondent submitted the correct "Suitability for Service" page of the Inspection Report for Tank #901 as an exhibit to its written response to the NOPV.¹⁵ Further, a copy of the complete Inspection Report was delivered to the Region, at its

⁹ Exhibit 4, NOPV at 3.

¹⁰ *Id.*

¹¹ *Id.*

¹² Exhibit 6, Final Order at 3.

¹³ *Id.*

¹⁴ Exhibit 4, NOPV at 2-3.

¹⁵ Exhibit 5, Exhibit A to Respondent's Written Response.

request, on January 12, 2022 and is also attached to the Declaration of Mr. Sapp.¹⁶ Respondent has provided evidence sufficient to establish that the physical integrity of Tank #901 was inspected as required by 49 C.F.R. § 195.432(b) and that there are no “illegal patches” associated with Tank #901.

PHMSA “must prove, by a preponderance of the evidence that the facts necessary to sustain a probable violation actually occurred.”¹⁷ PHMSA satisfies this burden “only if the evidence supporting the allegation outweighs the evidence and reasoning presented by Respondent in its defense.”¹⁸ PHMSA also “bears the burden of proof as to all elements of the proposed violation.”¹⁹ Where PHMSA fails to produce evidence in support of its allegation or provides insufficient evidence, the allegation must be withdrawn.²⁰

The preponderance of the evidence in the record of this case demonstrates that an inspection of the physical integrity of Tank #901 was conducted as required by 49 C.F.R. § 195.432(b). The evidence presented by PHMSA in support of NOPV Item 3, the erroneous “Suitability for Service” excerpt which the agency attached to the Pipeline Safety Violation Report,²¹ was corrected by Respondent in its written response to the NOPV. To the extent that was not sufficient for PHMSA, the complete Inspection Report was produced to the Region Director, via Region counsel, the same document that is attached to the Declaration of Justin Sapp.²² Thus, PHMSA has not met its burden of persuasion and has provided no evidence to support the allegation asserted in NOPV Item 3.

On this ground, both the NOPV Item 3 finding of violation and the Compliance Order should and must be withdrawn.

iii. “Completion” of the Inspection

PHMSA takes the position (1) that Respondent’s TMS did not review or address “the illegal patch deficiency” in the Inspection Report, and (2) that this failure to follow Respondent’s procedure resulted in a finding that the inspection of Tank #901 constituted “an incomplete inspection.”²³

No agency precedent supports the Region’s contention that a physical “inspection” is not complete until the operator, pursuant to the operator’s procedures, completes a review of any deficiencies identified by the inspection. The Inspection Report constitutes substantial evidence that the inspection was in fact completed, and the matter of follow-up on the findings is irrelevant to determining whether the inspection of the physical integrity of Tank #901 was completed.

¹⁶ Exhibit 2, Declaration of Justin Sapp.

¹⁷ *In re Alyeska Pipeline Serv. Co.*, Decision on Petition for Reconsideration, CPF No. 5-2005-5023, 2009 WL 5538655, at *3 (DOT Dec. 16, 2009) (citing *In the Matter of Butte Pipeline Co.*, Final Order, CPF No. 5-2007-5008 (DOT Aug. 17, 2009) 2009 WL 3190794, at *1, n.3; *Schaeffer v. Weast*, 546 U.S. 49 at 56-58 (2005)).

¹⁸ *Butte Pipeline Co.* 2009 WL 3190794, at *1.

¹⁹ *In re ANR Pipeline Co.*, Final Order, CPF No. 3-2011-1011, 2012 WL 7177134 at *3 (DOT Dec. 31, 2012); see also *In re CITGO Pipeline Co.*, Decision on Pet. for Reconsideration, CPF No. 4-2007-5010, 2011 WL 7517716, at *5 (Dec. 29, 2011).

²⁰ *Alyeska Pipeline Service Co.*, 2009 WL 5538655, at *3.

²¹ Exhibit 1, excerpt of Exhibit B-2 to Pipeline Safety Violation Report.

²² Exhibit 2, Declaration of Justin Sapp.

²³ Exhibit 4, NOPV at 3.

The NOPV does not identify any specific provision of API Std 653 as the basis for its allegations and therefore fails to meet the fundamental precepts of due process – notice and an opportunity to be heard.²⁴ The NOPV does, however, allege that Respondent failed to complete a review of deficiencies, on the basis that such a review is required by Respondent’s procedures.

The Final Order concludes that Respondent “violated 49 C.F.R. § 195.432(b) by failing to inspect the physical integrity of in-service atmospheric breakout tanks in accordance with API Std 653 and its written operating procedures.”²⁵ Again, Respondent has demonstrated that Tank #901 was inspected pursuant to API Std 653. Aside from addressing API Std 653 Section 6.4.3 (inspection intervals), not relevant here, 49 C.F.R. § 195.432(b) is silent regarding procedures.

49 C.F.R. § 195.432(b) requires that tanks be inspected, and Tank #901 was inspected. To the extent PHMSA believes Respondent failed to follow its procedures, that claim should have been brought under 49 C.F.R. § 195.402, Procedural manual for operations, maintenance, and emergencies.

iv. Lack of Fair Notice

PHMSA interprets the word “inspection,” in 49 C.F.R. § 195.432(b), to include the execution of a review pursuant to an operator’s procedures; Respondent, however, lacked fair notice of the regulatory expectation associated with that interpretation.

Before a government agency deprives a person of property, the person must first have received a minimum level of “fair notice” as to what constitutes a violation of law. “Due process requires that parties receive fair notice before being deprived of property.”²⁶ “In the absence of notice—for example, where the regulation is not sufficiently clear to warn a party about what is expected of it—an agency may not deprive a party of property by imposing civil or criminal liability.”²⁷ An administrative agency such as PHMSA must give “fair warning of the conduct it prohibits or requires,” and an agency “must provide a reasonably clear standard of culpability to circumscribe the discretion of the enforcing authority and its agents.”²⁸

When an agency interprets a regulation through enforcement rather than pre-enforcement efforts, the issue of notice rests on –

[w]hether 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. If, by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with “ascertainable

²⁴ *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 1190, 14 L.Ed.2d. 62 (1965).

²⁵ Exhibit 6, Final Order at 3.

²⁶ *Gen. Elec. Co. v. U.S. EPA*, 53 F.3d 1324, 1328 (D.C. Cir. 1995), citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950).

²⁷ *Id.* at 1328-29 (citations omitted); see also *Trinity Broad. of Fla., Inc. v. FCC*, 211 F.3d 618, 628 (D.C. Cir. 2000); *United States v. Chrysler Corp.*, 158 F.3d 1350, 1354 (D.C. Cir. 1998).

²⁸ *ExxonMobil Pipeline Co. v. U.S. Dep’t of Transp.*, 867 F.3d 564, 578 (5th Cir. 2017) (quoting *Diamond Roofing Co. v. OSHARC*, 528 F.2d 645 (5th Cir. 1976)).

certainty,” the standards with which the agency expects parties to conform, then the agency has fairly notified a petitioner of the agency’s interpretation.²⁹

The U.S. Court of Appeals for the Fifth Circuit has “warned that fair notice requires the agency to have ‘state[d] with ascertainable certainty what is meant by the standards [it] has promulgated.’”³⁰ “[T]he relevant inquiry is whether the agency’s interpretation of the pipeline ... regulations could have been understood with ‘ascertainable certainty’ ... at the time [respondent] engaged in the conduct that allegedly exposed it to [an] enforcement action”³¹ “Such ‘ascertainable certainty’ may not be possible where an agency has given conflicting public interpretations of a regulation. In addition, even if an

agency does not issue contradictory public statements, it may fail to give sufficient fair notice to justify a penalty if [1] the regulation is so ambiguous that a regulated party cannot be expected to arrive at the correct interpretation using standard tools of legal interpretation, [2] must therefore look to the agency for guidance, and [3] the agency failed to articulate its interpretation before imposing a penalty.”³²

The regulation in question, 49 C.F.R. § 195.432(b), does not provide Respondent with notice that a review or follow up of an inspection, pursuant to an operator’s procedures, is required for an inspection to be “complete,” nor does any agency guidance or enforcement precedent support the interpretation PHMSA has assigned to the word “inspection.” As such, PHMSA cannot now come forward with an interpretation of which neither Respondent nor the regulated public had any notice, much less fair notice. Further, if PHMSA wished to require operators to perform actions in addition to inspection of the physical integrity of a tank, PHMSA could have promulgated regulations to that effect.³³

The evidence in the record of this case clearly establishes that an API Std 653 inspection did in fact occur. To the extent additional actions were expected, Respondent lacked fair notice of the agency’s *post hoc* interpretation of the word “inspection.” Respondent could not have known of PHMSA’s interpretation with ascertainable certainty, and PHMSA has made no such demonstration. Upon the foregoing grounds, the NOPV Item 3 finding of violation, along with the associated Compliance Order, should and must be withdrawn.

B. The Compliance Order

As an initial matter, PHMSA has neither asserted nor established that “the nature of the violation and the public interest” warrant the issuance of a compliance order, as required by 49 C.F.R. § 190.217. The Final Order and the Compliance Order are silent in this regard. Further, the Final Order does not contain the statutorily required factual finding that the “illegal patches” exist in the first instance, and in fact, the record contains evidence to support the opposite – that no “illegal

²⁹ *Id.* at 578-579 (citing *General Elec. Co.*, 53 F.3d at 1329); see also *Diamond Roofing Co.*, 528 F.2d at 649.

³⁰ *ExxonMobil Pipeline Co.*, 867 F.3d. at 578-579.

³¹ *Id.*

³² *United States v. Lachman*, 387 F.3d 42, 57 (1st Cir. 2004) (citation omitted) (numbering added).

³³ *ExxonMobil Pipeline Co.*, 867 F.3d. at 575.

patches” exist on Tank #901.³⁴

Further, Respondent asserts in the alternative that, should the finding of violation for NOPV Item 3 be upheld, the Compliance Order should and must be reformed to remove the requirement to provide remediation records addressing the non-existent “illegal patches.” In past enforcement cases, PHMSA’s practice has been to withdraw a Compliance Order where the underlying alleged violation was not proven and itself was withdrawn.

i. Overview of the Compliance Order

The Compliance Order, which is presented within the Final Order, states that, “[w]ith respect to the violation of § 195.453(b) (**Item 3**), Respondent must review all potential deficiencies identified by API Std 653 out-of-service inspections for the Lockport Terminal Tank #901 (Date: 5/17/17), and provide documentation of the review and any remediation records that address the illegal patches mentioned in the inspection report.”³⁵

In short, the Compliance Order directs two actions: (1) review potential deficiencies identified during the inspection of Tank #901 and provide documentation of the review, and (2) provide remediation records that address the “illegal patches.”

ii. No Patches Exist on Lockport Tank #901

As demonstrated above, the record contains substantial evidence which proves Respondent performed an API Std 653 inspection of Tank #901. Respondent’s evidence, consisting of (1) the complete Inspection Report, (2) the Declaration of Jason Sapp which confirms that the “Suitability for Service” page including the reference to “illegal patches” was erroneously included in the Inspection Report, and (3) the Declaration of Kirk O’Neal Sheppard which confirms that the “shell of Tank 901 has no patches whatsoever, ‘illegal’ or otherwise.” Mr. Sheppard also testified in his declaration that he reviewed the potential deficiencies identified through the inspection, found in the “Suitability for Service” section, and found that “no concerns exist regarding the suitability of Tank 901 for gasoline service.”³⁶

Again the preponderance of the evidence holds sway – no “illegal patches” exist on Tank #901, and indeed no patches of any kind exist on Tank #901. As such, to the extent the finding of violation is upheld, the Compliance Order must be reformed to remove the requirement that Respondent provide remediation records that address the non-existent “illegal patches.”³⁷

iii. The Compliance Order Directs an Impossible Action

The evidence in the record clearly establishes that no patches of any kind exist on Tank #901. Thus, the Compliance Order, which directs that Respondent provide remediation records that

³⁴ Protecting Our Infrastructure of Pipelines and Enhancing Safety Act of 2020, Pub.L.No. 1160, 134 Stat. 1182; 49 U.S.C. § 60117(b)(1)(G), (Dec. 27, 2020).

³⁵ Exhibit 6, Final Order at 8.

³⁶ Exhibit 3, Declaration of Kirk O’Neal Sheppard at 1.

³⁷ Exhibit 6, Final Order at 8.

address the “illegal patches” directs an action which is impossible.³⁸ Respondent cannot remediate a patch that does not exist, and cannot produce a record of a repair that did not occur. As such, performance is impossible and compliance is impossible.³⁹

Upon reconsideration, PHMSA should reach a finding of fact as to the “illegal patches,” to the effect that they do not exist. And, on that basis, PHMSA should reform the Compliance Order to remove any requirement that related in any way to “illegal,” or any other type, of patches.

iv. Review of Potential Deficiencies

The Compliance Order directs that Respondent “review all potential deficiencies identified” by the API Std 653 inspection of Tank #901 and “provide documentation of the review.”⁴⁰

Mr. Sheppard testifies in his declaration that he reviewed the “Suitability for Service” findings at Section IV-1 of the Inspection Report (referenced therein as the “UNI Report”), which sets forth potential deficiencies identified by the inspection of Tank #901, and that, upon his review of the potential deficiencies, he is of the opinion that Tank #901 is suitable for gasoline service.⁴¹

Upon the foregoing grounds, to the extent the NOPV Item 3 finding of violation is upheld on reconsideration, the Compliance Order should be reformed (a) to eliminate all requirements relating to “illegal patches,” and (b) Respondent should be found to have satisfied the requirement to document that all potential deficiencies have been reviewed.

IV. CONCLUSION

Based upon the foregoing authorities, evidence and arguments, the NOPV Item 3 finding of violation should and must be withdrawn, and the Compliance Order should be withdrawn.

In the alternative, to the extent the NOPV Item 3 finding of violation is not withdrawn, the Compliance Order should be withdrawn given that (a) the “illegal patches” do not exist and cannot be remediated, and (b) the remainder of the Compliance Order has been satisfied.

COUNSEL FOR RESPONDENT EXXONMOBIL PIPELINE COMPANY

January 18, 2022



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³⁸ *In the Matter of AmeriGas Propane, LP*, Final Order, CPF No. 2-2013-0021 (DOT June 30, 2014), 2014 WL 4063368 (2014) at *2 (acknowledging impossibility as a defense); see also *Secretary of Labor v. Marion Power Shovel Company, Inc.*, 8 O.S.H. Cas. (BNA) 2244 (O.S.H.R.C.), 1980 O.S.H.D. (CCH) P 24915, 1980 WL 10690 (for example of another federal agency acknowledging the defense of impossibility of compliance and impossibility of performance).

³⁹ *Id.*

⁴⁰ Exhibit 6, Final Order at 8.

⁴¹ Exhibit 3, Declaration of Kirk O’Neal Sheppard.

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