

January 9, 2024

VIA ELECTRONIC MAIL TO: todd.dunn@linde.com

Todd Dunn
Vice President of Operations – HyCO
Linde Inc.
1585 Saw Dust Road, Suite 300
The Woodlands, Texas 77300

Re: CPF No. 4-2023-005-NOPV

Dear Mr. Dunn:

Enclosed please find the Final Order issued in the above-referenced case. It withdraws one of the allegations of violation, makes another finding of violation, and assesses a civil penalty of \$20,400. The penalty payment terms are set forth in the Final Order. This enforcement action closes automatically upon receipt of payment. Service of the Final Order by e-mail is effective upon the date of transmission and acknowledgement of receipt as provided under 49 C.F.R. § 190.5.

Thank you for your cooperation in this matter.

Sincerely,

Alan K. Mayberry
Associate Administrator
for Pipeline Safety

Enclosure

cc: Mr. Bryan Lethcoe, Director, Southwest Region, Office of Pipeline Safety, PHMSA
Mr. John Maitino, National Regulated Pipeline Compliance Manager, Linde Inc.,
john.maitino@linde.com
Mr. Shannon Hensarling, Pipeline Manager, Linde Inc., shannon.hensarling@linde.com
Mr. James Willis, Director, Maintenance & Reliability, Linde Inc., james.willis@linde.com
Mr. Sean Bingham, Pipeline Regulatory Specialist, Linde Inc., sean.bingham@linde.com

CONFIRMATION OF 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)	
)	
Linde Inc.,)	CPF No. 4-2023-005-NOPV
)	
Respondent.)	
_____)	

FINAL ORDER

From March 30, 2022, through September 6, 2022, pursuant to 49 U.S.C. § 60117, a representative of the Pipeline and Hazardous Materials Safety Administration (PHMSA), Office of Pipeline Safety (OPS), conducted an on-site pipeline safety inspection of the facilities and records of Linde Inc.’s (Linde or Respondent) hydrogen pipeline system in Louisiana and Texas.

As a result of the inspection, the Director, Southwest Region, OPS (Director), issued to Respondent, by letter dated February 22, 2023, 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 Linde had violated 49 C.F.R. Parts 191 and 192, proposed assessing a civil penalty of \$20,400 for the alleged violations, and proposed ordering Respondent to take certain measures to correct the alleged violations. The Notice also included an additional warning item pursuant to 49 C.F.R. § 190.205, which warned the operator to correct the probable violation or face possible future enforcement action.

Linde responded to the Notice by letter dated May 5, 2023 (Response). Linde contested one of the allegations, offered additional information in response to the Notice, and requested that the proposed civil penalty be eliminated. Respondent did not request a hearing and therefore has waived its right to one.

FINDING OF VIOLATION

The Notice alleged that Respondent violated 49 C.F.R. Parts 191 and 192, as follows:

Item 1: The Notice alleged that Respondent violated 49 C.F.R. § 191.22, which states:

§ 191.22 National Registry of Operators.

- (a) ...
- (c) *Changes.* Each operator of a gas pipeline, gas pipeline facility, UNGSF, LNG plant, or LNG facility must notify PHMSA electronically through the

National Registry of Operators at <https://portal.phmsa.dot.gov> of certain events.

(1) An operator must notify PHMSA of any of the following events not later than 60 days before the event occurs:

- (i) ...
- (ii) Construction of 10 or more miles of new pipeline;

The Notice alleged that Respondent violated 49 C.F.R. § 191.22(c)(1)(ii) by failing to notify PHMSA of the construction of 10 or more miles of new pipeline 60 days prior to the construction. Specifically, the Notice alleged that Linde began construction on approximately 17.39 miles of a new 14-inch hydrogen pipeline on March 15, 2020, but did not file a notification for the project as required until September 9, 2022, 968 days after the date notification was required.

In its Response, Linde stated that it did not contest this Item but requested that the allegation of violation be reduced to a warning, or alternatively, that the proposed civil penalty be withdrawn. Respondent provided the following reasons: (1) pipeline safety was not significantly affected by its delay in reporting, (2) this was the first instance in which Respondent failed to comply with this pipeline safety regulation, (3) Respondent took swift corrective action after it became aware of the violation, and (4) PHMSA brought a similar allegation as a warning in another case, specifically *In the Matter of Tristate NLA, LLC*, Final Order 4-2020-006-NOPV, 2021 WL 4055261 (August 9, 2021).

Considering each of Linde's arguments and whether they warrant withdrawing the violation or reducing it to a warning, I first evaluate the argument that its failure to report timely did not significantly affect pipeline safety. While the safety impact of a violation is relevant when deciding an appropriate civil penalty,¹ when determining whether a violation of the pipeline safety regulations occurred in the first place, I must rely on the facts before me. In this instance, there is no question that Respondent began construction on March 15, 2020, but did not file the required notification until over two years later on September 9, 2022. This evidence proves that a violation occurred. Therefore, Respondent's argument that the violation did not affect pipeline safety is not a reason to withdraw or reduce this allegation to a warning. Similarly, the argument that this was the first time Linde violated this regulation does not negate that a violation occurred. Likewise, Linde's contention that it took swift correction action upon learning of the violation also does not warrant withdrawing the violation or reducing it to a warning.

Lastly, I consider whether the case Linde cites to is a basis to withdraw or reduce this allegation to a warning. In the enforcement action *In the Matter of Tristate NLA, LLC*, the Final Order includes a warning item for failing to notify PHMSA in accordance with § 191.22(c)(2)(iv).² In that case, the operator notified PHMSA 196 days after the required notification date that it had acquired 100.47 miles of gas transmission pipeline.³ The circumstances in that case were different in comparison to the present enforcement action. First, the notice of probable violation issued in that case brought the item as a warning in the first instance. The final order therefore repeated the warning that had

¹ § 190.225(a)(1).

² *In the Matter of Tristate NLA, LLC*, Final Order 4-2020-006-NOPV, 2021 WL 4055261, at 3 (August 9, 2021).

³ *Id.*

already been issued. Issuance of a warning is a permissible enforcement option under § 190.205 and does not imply that violations of the same or similar regulations in the future will also be warnings.⁴ In addition, the warning *In the Matter of Tristate NLA, LLC*, alleged a probable violation of a different pipeline safety regulation that required reporting the acquisition of pipelines already subject to part 192. In the present case, Respondent failed to notify PHMSA of the construction of new pipe, which could have impacted PHMSA's ability to perform inspections before and during construction of the pipeline. Therefore, I decline to find *In the Matter of Tristate NLA, LLC*, is a basis to reduce this allegation to a warning.

Accordingly, after considering all of the evidence, I find that Respondent violated 49 C.F.R. § 191.22(c)(1)(ii) by failing to notify PHMSA 60 days prior to beginning construction on the 14-inch hydrogen pipeline discussed above.

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

Item 3: The Notice alleged that Respondent violated 49 C.F.R. § 192.937, which states:

§ 192.937 What is a continual process of evaluation and assessment to maintain a pipeline's integrity?

(a) ...

(b) *Evaluation.* An operator must conduct a periodic evaluation as frequently as needed to assure the integrity of each covered segment. The periodic evaluation must be based on a data integration and risk assessment of the entire pipeline as specified in § 192.917. For plastic transmission pipelines, the periodic evaluation is based the threat analysis specified in [§] 192.917(d). For all other transmission pipelines, the evaluation must consider the past and present integrity assessment results, data integration and risk assessment information (§ 192.917), and decisions about remediation (§ 192.933) and additional preventative and mitigative actions (§ 192.935). An operator must use the results of this evaluation to identify the threats specific to each covered segment and the risk represented by these threats.

The Notice alleged that Respondent violated 49 C.F.R. § 192.937(b) by failing to conduct a periodic evaluation as frequently as needed to assure the integrity of each covered segment as required. Specifically, the Notice alleged Linde had failed to conduct a risk analysis of its pipeline to identify additional preventative and mitigative actions after constructing 17 miles of covered segments. Additionally, the Notice alleged Linde had not conducted a risk analysis since 2010 and failed to include a requirement to conduct a risk analysis in its procedures.

In its Response, Linde disputed the allegations in the Notice, arguing that the 17 miles of pipeline referenced in the Notice did not contain any covered segments that required a risk assessment as the pipeline segments referenced were not located in a high consequence area. Respondent further maintained that it did conduct frequent risk assessments on pipeline located within high consequence areas as required and provided documentation of its latest risk assessments, conducted in January 2022. Linde also asserted that it had made voluntary updates to its procedures regarding periodic

⁴ Pursuant to § 190.205, a Regional Director may issue a written warning notifying an operator of a probable violation.

evaluations of new covered segments.

In a recommendation for final action submitted pursuant to § 190.209(b)(7), the Director recommended withdrawing the alleged violation of § 192.937(b).

Accordingly, after considering all of the evidence, I hereby order that Item 3 and the corresponding proposed compliance order be withdrawn.

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.⁵

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; any effect that the penalty may have on its ability to continue doing business; the good faith of Respondent in attempting to comply with the pipeline safety regulations; and self-disclosure or actions to correct a violation prior to discovery by PHMSA. 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 \$20,400 for the violation cited above.

Item 1: The Notice proposed a civil penalty of \$20,400 for Respondent's violation of 49 C.F.R. § 191.22(c)(1)(ii), for failing to notify PHMSA 60 days prior to beginning construction of over 17 miles of pipeline, as required. In its Response, Linde averred that the proposed civil penalty for this Item should be withdrawn for the same four reasons discussed above. First, Linde argued that it should be withdrawn because its failure to comply did not significantly affect pipeline safety. Second, it argued that this instance was its first time it had failed to provide the required notice. Third, it argued it had updated its existing procedures to assure future compliance by incorporating the 60-day notice requirement. Finally, Respondent contended that while the facts were different, its violation of the procedures were similar to the enforcement action, *In the Matter of Tristate NLA, LLC*, CPF No. 4-2020-006-NOPV, where PHMSA did not pursue a civil penalty for failure to comply with the 60-day notice requirement.

As stated above, when determining the amount of a civil penalty, I must take into consideration several specific factors. In its Response, Linde makes an argument for the withdrawal of the proposed civil penalty based on two of these factors: gravity and history of Respondent's prior offenses, as well as additional arguments regarding a prior case and changes to its procedures. However, upon reviewing the case file, I note that the proposed civil penalty amount already included in the calculation consideration that Linde had no prior history of this violation, and that pipeline safety was minimally affected by Linde's failure to timely file a notification.⁶ Given these

⁵ These amounts are adjusted annually for inflation. See 49 C.F.R. § 190.223 for adjusted amounts.

⁶ See Violation Report

considerations are already factored into the proposed penalty amount, neither of these reasons are a basis for a reduction or withdrawal of the proposed penalty.

Further, as stated above, *In the Matter of Tristate NLA, LLC*, regards a violation of a different regulation and involves circumstances that were substantially different in comparison to this enforcement action where I have found Linde in violation of the pipeline safety regulations for failing to notify PHMSA until 968 days after the required notification date. Therefore, I decline to find *In the Matter of Tristate NLA, LLC*, is a basis to withdrawal or reduce the proposed civil penalty in this case. Moreover, as stated in prior enforcement actions, “PHMSA sets penalties...on a case-by-case basis. Given the unique facts of each offense...it is not uncommon for there to be some variance in the penalties assessed for different operators’ violation of the same code section.”⁷

Finally, while Respondent’s actions to strengthen its pipeline safety program by amending its procedures to prevent future non-compliance is encouraged and applauded, that is also not a basis for reduction or withdrawal of a proposed civil penalty.⁸ Accordingly, having reviewed the record and considered the assessment criteria, I assess Respondent a civil penalty of \$20,400 for violation of 49 C.F.R. § 191.22(c)(1)(ii).

Payment of the civil penalty must be made within 20 days after receipt of this Final Order. Payment may be made by sending a certified check or money order (containing the CPF Number for this case), made payable to “U.S. Department of Transportation,” to the Federal Aviation Administration, Mike Monroney Aeronautical Center, Financial Operations Division (AMK-325), 6500 S MacArthur Blvd, Oklahoma City, Oklahoma 79169. Federal regulations (49 C.F.R. § 89.21(b)(3)) also permit 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 (AMK-325), Federal Aviation Administration, Mike Monroney Aeronautical Center, 6500 S MacArthur Blvd, Oklahoma City, Oklahoma 79169. The Financial Operations Division telephone number is (405) 954-8845.

Failure to pay the 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 3 in the Notice for violation of 49 C.F.R. § 192.937(b). Under 49 U.S.C. § 60118(a), each person who engages in the transportation of

⁷ *In the Matter of Belle Fourche Pipeline Company*, Final Order 5-2009-5042, 2011 WL 7006607 at 19 (November 21, 2011).

⁸ *See In the Matter of Oasis Midstream Partners LP, a General Partner of Oasis Petroleum Inc.*, Final Order 3-2019-5020, 2020 WL 6870720, at 7 (August 19, 2020) (“While Oasis is to be commended for improving its internal processes to ensure compliance with the pipeline safety regulations, such post-inspection activities do not warrant the withdrawal of, or a reduction in, a proposed civil penalty.”)

gas or who owns or operates a pipeline facility is required to comply with the applicable safety standards established under chapter 601. As discussed above, Item 3 has been withdrawn. Therefore, the compliance term proposed in the Notice is also withdrawn.

WARNING ITEM

With respect to Item 2, the Notice alleged a probable violation of Part 192, but identified it as a warning item pursuant to § 190.205. The warning was for:

49 C.F.R. § 192.459 (**Item 2**) — Respondent’s alleged failure to examine two exposed portions of buried pipelines for evidence of external corrosion.

Linde presented information in its Response showing that it had taken certain actions to address the cited item. If OPS finds a violation of this provision in a subsequent inspection, Respondent may be subject to future enforcement action.

Under 49 C.F.R. § 190.243, Respondent may submit a Petition for Reconsideration of this Final Order to the 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. The written petition must be received no later than 20 days after receipt of the Final Order by Respondent. Any petition submitted must contain a brief 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. The other terms of the order, including any corrective action, remain in effect unless the Associate Administrator, upon request, grants a stay. 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.

January 9, 2024

Alan K. Mayberry
Associate Administrator
for Pipeline Safety

Date Issued