



U.S. Department
of Transportation

Pipeline and Hazardous
Materials Safety
Administration

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

APR 03 2015

Mr. Mark Kissel
President
El Paso Natural Gas Company, L.L.C.
2 North Nevada Avenue
Colorado Springs, CO 80903

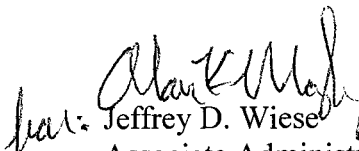
Re: CPF No. 5-2013-1012

Dear Mr. Kissel:

Enclosed please find the Final Order issued in the above-referenced case. It makes a finding of violation, assesses a reduced civil penalty of \$27,500, 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, Western 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. Chris Hoidal, Director, Western Region, OPS
Ms. Jessica Toll, Assistant General Counsel, Kinder Morgan, Inc.
370 Van Gordon St., Lakewood, CO 80228

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

¹ EPNG is a subsidiary of Kinder Morgan Energy Partners, L.P., operating approximately 10,000 miles of pipeline transporting natural gas primarily in Texas, New Mexico, and Arizona. This information is reported by EPNG for calendar year 2013 pursuant to 49 C.F.R. § 191.17.

§192.707 Line markers for mains and transmission lines.

(a) *Buried pipelines.* Except as provided in paragraph (b) of this section, a line marker must be placed and maintained as close as practical over each buried main and transmission line:

- (1) At each crossing of a public road and railroad; and
- (2) Wherever necessary to identify the location of the transmission line or main to reduce the possibility of damage or interference.

The Notice alleged that Respondent violated § 192.707(a) by failing to have line markers over the L2000 pipeline wherever necessary to identify the location of the line to reduce the possibility of damage or interference. The Notice alleged that the pipeline had been struck and damaged by a third-party excavator on April 23, 2013. At the time of the event, the Notice alleged, there were no line markers in the area identifying the location of Respondent's pipeline. The Notice alleged that the closest marker was between 0.25 and 0.50 miles away from the excavation site. The Notice also stated that EPNG had previously been issued a warning for the same conduct after it had allegedly failed to place adequate line markers on its 2103 pipeline in South Tucson, Arizona.

EPNG contested the alleged violation and offered additional information. Respondent stated that the excavator who damaged the pipeline was working for the owner of an adjacent farm in a rural agricultural area. Without providing advance notice of the excavation through a one-call notification system, the excavator operated a trackhoe in a ditch along a private dirt road and struck Respondent's pipeline. The strike caused several gouges and a pin hole leak that began slowly releasing gas. EPNG responded to the event by closing valves on both sides of the damage, initiating a controlled blowdown, and repairing the pipe.

Respondent maintained that it had complied with § 192.707(a) by placing four line markers in the area of the L2000 pipeline. Respondent asserted that it had one line marker 2063 feet (approximately 0.39 miles) to the west of the excavation damage and one line marker 670 feet (approximately 0.13 miles) to the east.² Respondent stated that two additional line markers were installed where the pipe crosses the private road, but those markers were likely knocked down prior to or during the excavation on April 23, 2013. After the event, EPNG again placed additional line markers at the location as a precautionary measure. Respondent argued that while markers are required at public road crossings, the regulation does not require markers at private road crossings or require that they be visible from the immediately preceding and following markers.

Respondent also contested the relevance of the previous warning that was referenced in the Notice. In the earlier case, Respondent asserted, a line marker had been vandalized and new markers were installed the day after EPNG became aware of the issue.

² Brief at 3.

A. Location of Line Markers in the Area of the Excavation

PHMSA first determines as a factual matter whether Respondent had line markers present in the vicinity of the excavation site on April 23, 2013.

OPS produced evidence that its Inspector arrived at the incident site on April 23, 2013. He stayed through the morning of April 25, 2013. During this period, he walked around the area of the excavation and could only locate one line marker belonging to Respondent. The marker was adjacent to the closest public roadway, Harquahala Valley Road, at an estimated distance of 0.25 to 0.50 miles west of the damage site. The Inspector did not see any other line markers for Respondent's pipeline during his time at the site. The Inspector's visual observations were corroborated by several photographs that depict the landscape around the pipeline.³ Other than the marker at Harquahala Valley Road, no other markers can be seen in the photographs.

During the inspection, the Inspector also interviewed the manager of the third-party excavator who struck Respondent's pipeline. The manager stated that he did not see any line markers in the area before breaking ground. During the incident, farm personnel were evacuated from the area. One individual located a nearby line marker belonging to another pipeline company. The person called the number on the marker to report the incident, and that company notified Respondent.

Respondent agreed there was a line marker about 0.39 miles west of the incident site at Harquahala Valley Road. Respondent asserted that a second marker was closer to the site of the damage, approximately 0.13 miles to the east of the site. At the hearing, Respondent claimed that the marker could be seen in one of the photographs offered by OPS. Respondent also presented an affidavit and testimony of its Operations Specialist, who stated that two additional EPNG pipeline markers, one of which was damaged, were discovered in a ditch near the excavation site during the pipeline repair.

Having considered the evidence, PHMSA finds the testimony and documents presented by OPS were credible and substantial. Evidence of two eyewitnesses were offered, both of whom were present on April 23, 2013. Both witnesses noted a lack of line markers at and around the area of the excavation. The eyewitness evidence was corroborated by photographs taken the date of the incident. The evidence presented by Respondent, on the other hand, consisted mostly of conclusory statements with little to no corroboration. Respondent stated that it had a line marker placed 0.13 miles east of the incident location, but no documentation in the form of photographs, business records, or eyewitness testimony was offered to corroborate the claim. Although Respondent asserted the marker could be seen in one of the photographs already in evidence, after a careful review PHMSA finds no marker can be seen in that photograph.

In addition, Respondent's Operations Specialist stated in an affidavit that he found two line markers at the scene of the incident. This testimony purportedly corroborated Respondent's contention that two additional line markers had been placed at the site of the incident and then

³ OPS Pipeline Safety Violation Report (Aug. 16, 2013), Exhibit A-2.

were removed or damaged unbeknownst to Respondent. Accepting as true that two line markers were discovered in a ditch at the scene of the incident, the evidence is still insufficient to show how recently the markers were present in their original location, or that they were present at the time of the incident. Respondent stated that it patrolled its pipeline twice annually, but presented no records from those patrols to document observation of the markers. The markers could have been knocked down long before the incident.⁴

Having considered the evidence, PHMSA finds the closest line marker in the area of Respondent's pipeline on the date of the excavation was 0.39 miles west of the site at Harquahala Valley Road. There is insufficient evidence that any other EPNG line markers were present and observable on that date.

B. Compliance with Applicable Safety Standards

Having found there was only one line marker in the area, PHMSA must determine whether that marker satisfied the applicable standards for pipeline marking.

Section § 192.707(a) requires operators of gas transmission pipelines to have line markers as close as practical over each pipeline.⁵ The markers must be placed and maintained at each crossing of a public road and railroad and "[w]herever necessary to identify the location of the transmission line . . . to reduce the possibility of damage or interference."⁶ The purpose of this regulation is to "increase the likelihood that outsiders will seek assistance in locating underground lines before excavating."⁷

As explained in prior enforcement cases, the regulations for line marking do not establish a uniform distance between markers along every pipeline.⁸ The regulations provide some flexibility for operators to mark their pipelines in a manner appropriate for their system, as long as placement of the markers is sufficient to identify the location of the pipeline to reduce the possibility of third-party excavation damage.

⁴ There were also some inconsistencies between the Operations Specialist's affidavit and his testimony at the hearing, specifically with regard to when the markers were found and when they were disposed of. The Operations Specialist testified that he had taken pictures of the markers, but the pictures were subsequently lost. The agency Inspector denied ever seeing any markers discovered while he was there.

⁵ There are certain exceptions to this requirement in § 192.707(b), which are not relevant here.

⁶ § 192.707(a).

⁷ Line Markers for Mains and Transmission Lines, 40 Fed. Reg. 13502 (Mar. 27, 1975).

⁸ Magellan Pipeline Company, LP, CPF 4-2012-5010, Item 2, 2014 WL 5431188 (Sept. 2, 2014) (discussing line marking requirements and "line-of-sight" for hazardous liquid pipelines). Prior enforcement materials can be viewed at <http://www.phmsa.dot.gov/pipeline/enforcement> (follow links for enforcement actions since 2002 and then actions issued by year).

The aerial photograph of Respondent's L2000 pipeline demonstrates the pipeline runs west to east along a private dirt access road in a rural agricultural area.⁹ In the area of the incident, the pipeline bends abruptly north, crosses under the private roadway and irrigation ditch where the excavation occurred, and then turns abruptly eastward again.

While § 192.707(a) does not state that line markers are required at each crossing of a *private* road like it does for "each crossing of a public road," the regulation does require operators to place line markers if necessary to identify the location of the pipeline to reduce the possibility of damage, including at or near a private road crossing if necessary.¹⁰

In this case, the closest line marker to the excavation site was 0.39 miles—a distance of more than five football fields. This distance coupled with the change in direction of the pipeline at the road crossing was not enough to alert people to the location of the L2000 pipeline to reduce the possibility of damage at the incident site. Accordingly, PHMSA finds Respondent did not have sufficient line markers at the time of the incident to identify the location of the pipeline.

C. Previous Warning and Other Issues Raised by Respondent

Respondent objected to a statement in the Notice that EPNG had previously been issued a warning for the same issue. Respondent argued the prior warning had to do with line markers that were vandalized, which is distinct from the line marking issue in the present case.

PHMSA recognizes the factual differences between the two cases. Based on a review of the Violation Report in this case, PHMSA confirms the prior warning was not considered a "prior offense" for purposes of determining whether a violation occurred in this case, or for purposes of calculating an appropriate civil penalty.¹¹

Respondent also noted that the third-party excavator in this case never made a one-call notification before starting to excavate as required by law.¹² Respondent indicated the excavator had received Respondent's public awareness mailings on multiple occasions, including on December 7, 2012.¹³ Respondent contended that if a one-call notification been made, the damage would have been avoided because EPNG would have marked the location of the line and would have been present during the excavation if planned within 25 feet of its line.

⁹ Pre-hearing Submittal, Exhibit C.

¹⁰ § 192.707(a)(2).

¹¹ The Violation Report noted that the alleged violation in the present case was not a repeat violation.

¹² Excavators have a duty before engaging in excavation to make a one-call notification to establish the location of underground facilities in the area. 49 U.S.C. § 60114(d).

¹³ Under § 192.616, pipeline operators must have a program for making the public aware of nearby buried pipelines and steps for preventing and responding to incidents.

PHMSA recognizes damage prevention is the responsibility of many parties, not only pipeline operators. Respondent's conduct was not alleged to be a causal factor in the accidental release of natural gas. While the incident could have potentially been avoided if the excavator used one-call, that does not impact whether Respondent had adequate markers under § 192.707(a).

D. Conclusion

PHMSA finds Respondent violated § 192.707(a) as alleged in the Notice, by failing to have line markers over the L2000 pipeline wherever necessary to identify the location of the line to reduce the possibility of damage or interference.

This finding of violation will be considered a prior offense 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 civil penalty of \$31,200 for the violation cited in Item 2. Respondent requested that the civil penalty be withdrawn or reduced.

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.

The proposed penalty amount was based on assertions in the Notice and Violation Report relevant to the penalty assessment criteria. With regard to nature, circumstances and gravity of the violation, the Violation Report stated that a civil penalty was appropriate because the lack of line markers in the area gave a false impression that the area was clear of any buried natural gas lines. The Violation Report suggested a lower level of gravity due to the rural area in which the violation occurred. The Violation Report did not suggest the violation was a causal factor in the pipeline incident.

Based on a review of the evidence, PHMSA finds these assertions are accurate and the proposed civil penalty amount is supported by the nature, circumstances and gravity of the violation.

With respect to culpability and good faith in attempting to comply, the Violation Report suggested that no penalty reduction was appropriate because Respondent failed to take actions to comply with a regulatory requirement that was clearly applicable.

Based on a review of the evidence, PHMSA finds Respondent did take some steps to comply with the applicable requirement even though Respondent did not ultimately achieve full compliance. Respondent submitted evidence that it had installed two additional markers in the area of the incident site, but the markers were damaged at an unknown time by an unknown party. PHMSA finds the fact that additional markers were previously installed should be factored into the penalty assessment, even though there is not sufficient evidence to demonstrate the markers were present at the time of the incident.

PHMSA considers the history of Respondent's prior offenses and the effect on Respondent's ability to continue in business. The Violation Report noted a total of five prior offenses in the five-year period prior to issuance of the Notice. Respondent did not claim the proposed penalty would affect its ability to continue in business.

Accordingly, for the reasons stated above, Respondent is assessed a reduced civil penalty of \$27,500 for the violation of § 192.707(a).

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 (AMK-325), Federal Aviation Administration, Mike Monroney Aeronautical Center, P.O. Box 269039, Oklahoma City, Oklahoma 73125. The Financial Operations Division telephone number is (405) 954-8845.

Failure to pay the \$27,500 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 the violation cited in Item 2. Under 49 U.S.C. § 60118(a), each person who engages in the transportation of gas or who owns or operates a pipeline facility is required to comply with the applicable safety standards established under chapter 601.

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

1. EPNG must ensure that it has written procedures specifying that markers be placed wherever necessary to identify the location of transmission lines or mains in order to reduce the possibility of damage or interference.

2. Submit documentation demonstrating compliance within 60 days of receipt of this Order. Documentation must be submitted to the Director, Western Region, Pipeline and Hazardous Materials Safety Administration, 12300 W. Dakota Ave., Suite 110, Lakewood, CO 80228.
3. It is requested that EPNG 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 physical changes to pipeline infrastructure, including pipeline replacement and additions.

The Director may grant an extension of time to comply with any of the required items upon a written request timely submitted by the Respondent and demonstrating good cause for an extension.

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 ITEM

With respect to **Item 1**, the Notice alleged a probable violation of Part 192 and specifically considered it to be a warning item. In accordance with § 190.205, an operator may respond to a warning, but PHMSA does not adjudicate whether a violation occurred. The warning was for:

49 C.F.R. § 191.5 – Respondent’s alleged failure to report the event on April 23, 2013, at the earliest practicable moment following discovery. The Notice alleged the event met the criteria for a reportable incident because the total amount of gas lost as a result of the leak, plus the amount of gas released during Respondent’s intentional blow-down to repair the pipeline, equaled more than the 3 million cubic feet threshold for reporting.

In its written submissions and at the hearing, EPNG contested the allegation that the event was a reportable incident. In particular, Respondent noted that only approximately 200,000 cubic feet of gas was lost unintentionally as a result of the failure. After the failure was discovered and the pipeline was isolated, EPNG decided to blow down the line to make the repair. Respondent argued the subsequent blow-down was voluntary, intentional, controlled, and did not contribute to the volume of gas that was lost unintentionally for purpose of the reporting regulation.¹⁴

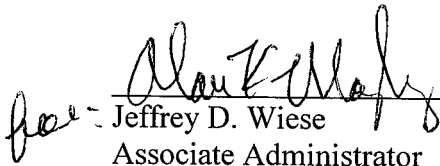
¹⁴ Under §§ 191.3(1)(iii) and 191.5(a), an immediately reportable incident includes the release of gas from a pipeline that results in an “unintentional estimated gas loss of three million cubic feet or more.”

In its Post-hearing Brief, EPNG indicated that it had resolved this issue with the OPS Western Region and no longer requested a determination as to whether the facts alleged in the Notice would support a violation.

Since this item is a warning, PHMSA makes no finding as to whether the facts alleged would constitute a violation.

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 by Respondent. 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

APR 03 2015

Date Issued