August 19, 2024

**VIA ELECTRONIC MAIL TO: kevin.kelleher@amerigas.com**

Kevin Kelleher
Vice President, Supply & Logistics Operations
AmeriGas Propane, L.P.
460 N. Gulph Road
King of Prussia, PA 19406

**RE: CPF No. 5-2023-029-NOPV**

Dear Mr. Kelleher:

Enclosed please find the Decision on Petition for Reconsideration (Decision) issued in the above-referenced case. For the reasons explained therein, the Decision grants your Petition in part, to include a reduction of the civil penalty to $431,400. 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 this Decision 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. Dustin Hubbard, Director, Western Region, Office of Pipeline Safety, PHMSA
Mr. Ryan Kiley, Corporate OPS Manager, AmeriGas Pipeline, L.P., ryan.kiley@amerigas.com
Mr. Christopher Wagner, Director of Compliance and Regulatory Affairs, AmeriGas Propane, L.P., christopher.wagner@amerigas.com

Mr. Markus Drier, Vice President of Safety & OMS, AmeriGas Propane, L.P., markus.dreier@amerigas.com
Mr. Chad Krouse, Field Safety Compliance Manager, AmeriGas Propane, L.P., chad.krouse@amerigas.com
Mr. Benjamin H. Patton, Counsel for AmeriGas Propane, L.P., Reed Smith LLP, bpatton@reedsmith.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** | ) | |
| **AmeriGas Propane, L.P.,** | ) | **CPF No. 5-2023-029-NOPV** |
| **Petitioner.** | ) | |

## DECISION ON PETITION FOR RECONSIDERATION

From November 7 through 17, 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 safety inspection of the liquefied petroleum gas distribution systems of AmeriGas Propane, L.P. (AmeriGas or Petitioner) in Maui, Oahu, and the Island of Hawaii, Hawaii.

As a result of the inspection, the Director, Western Region, OPS (Director), issued to Petitioner, by letter dated June 22, 2023, a Notice of Probable Violation, Proposed Civil Penalty, and Proposed Compliance Order (Notice).[1] In accordance with 49 C.F.R. § 190.207, the Notice proposed finding that Petitioner had committed 13 violations of 49 C.F.R. Part 192, proposed assessing a civil penalty of $550,100 for the alleged violations, and proposed ordering Petitioner to take certain measures to correct the alleged violations. The Notice also included an additional five warning items pursuant to 49 C.F.R. § 190.205, which warned Petitioner to correct the probable violations or face possible future enforcement action.

After requesting and receiving an extension of time to respond, AmeriGas responded on July 24, 2023 (Response).[2] Petitioner sent a supplemental response on September 22, 2023, providing additional information and evidence of remedial actions (Supplemental Response).[3] Petitioner did not request a hearing and therefore has waived its right to one.

---

[1] Notice of Probable Violation, Proposed Civil Penalty, and Compliance Order, CPF No. 5-2023-029-NOPV, (June 22, 2023) (on file with PHMSA) [hereinafter NOPV].

[2] Response from Christopher Wagner, Dir. Compliance & Regulatory Affairs, AmeriGas Propane, L.P., to Dustin Hubbard, Western Region Director, OPS, PHMSA, Re: Notice of Probable Violation, Proposed Civil Penalty, & Proposed Compliance Order, CPF 5-2023-029-NOPV (July 24, 2023) (on file with PHMSA) [hereinafter Response].

[3] Letter from Christopher Wagner, Dir. Compliance & Regulatory Affairs, AmeriGas Propane, L.P., to Dustin Hubbard, Western Region Director, OPS, PHMSA, Re: Supplemental Response to Proposed Compliance Order, CPF 5-2023-029-NOPV (Sept. 22, 2023) (on file with PHMSA) [hereinafter Supplemental Response].

On March 27, 2024, pursuant to 49 U.S.C. §§ 60117, 60122 and 49 C.F.R. § 190.213, PHMSA issued a Final Order finding that Petitioner committed 13 violations of 49 C.F.R. Part 192 (Final Order).[4] The Final Order assessed a civil penalty of $543,400 and specified certain actions that needed to be taken by Petitioner to comply with the pipeline safety regulations.

On April 16, 2024, Petitioner filed a Petition for Reconsideration pursuant to 49 C.F.R. § 190.243 (Petition). In its Petition, Petitioner requested reconsideration of the findings of violation for Items 4, 8, 12, 15, and 18, and reconsideration of the assessed civil penalty amounts for these Items. While not contesting the findings of violation for Items 10 and 14, Petitioner requested reconsideration of the assessed civil penalty amount for these Items. Specifically, Petitioner stated that the evidence provided in its Response and Supplemental Response, as well as other mitigating factors, demonstrated that it attempted to achieve compliance with both the cited regulations and the corrective actions associated with the Proposed Compliance Order.[5] Additionally, Petitioner alleged that PHMSA failed to take into account several other factors, including the alleged violations neutral impact to the environment and human health, and Petitioner's lack of culpability.[6] Petitioner argued that it should receive a civil penalty reduction to reflect its good-faithed efforts to achieve compliance.[7] Petitioner did not request reconsideration of PHMSA's findings for Items 1, 2, 3, 5, 6, 7, 9, 11, 13, 16, or 17, nor did it request reconsideration of any of the compliance order terms for any of the Items.

## STANDARD OF REVIEW

Under 49 C.F.R. § 190.243, a petitioner may petition the Associate Administrator for reconsideration of a Final Order that has been issued pursuant to § 190.213. Reconsideration is not an appeal or a completely new review of the record.[8] A petitioner may ask for correction of an error or, in limited circumstances, may present previously unavailable information. If a petitioner requests consideration of additional facts or arguments, the petitioner must submit the reasons they were not presented prior to the issuance of the final order. § 190.213(b). The Associate Administrator may grant or deny, in whole or in part, a petition for reconsideration without further proceedings. § 190.213(d).

## DISCUSSION

**Item 4:** The Notice alleged that Petitioner violated 49 C.F.R. § 192.453, which states:

---

[4] *In re AmeriGas Propane, L.P.*, Final Order, CPF No. 5-2023-029-NOPV (March 27, 2024) (on file with PHMSA) [hereinafter Final Order].

[5] Petition for Reconsideration In the Matter of AmeriGas Propane, L.P., CPF No. 5-2023-029-NOPV, 2-3 (Apr. 16, 2024) (on file with PHMSA) [hereinafter Petition].

[6] *Id.*, at 3.

[7] *Id.*, at 2-3.

[8] 49 C.F.R. § 190.243(a)-(d).

**§ 192.453 General.**

The corrosion control procedures required by § 192.605(b)(2), including those for the design, installation, operation, and maintenance of cathodic protection systems, must be carried out by, or under the direction of, a person qualified in pipeline corrosion control methods.

The Notice alleged that Petitioner failed to ensure the operation and maintenance of its cathodic protection (CP) systems were carried out by a person qualified in corrosion control methods, based on PHMSA's observations during the inspection and a lack of records demonstrating that the observed employees were adequately trained and qualified personnel to collect pipe-to-soil measurements.[9]

In its Response and Supplemental Response, Petitioner contested the allegation of violation and provided additional information and training records. Petitioner argued that all operator qualified employees who performed corrosion control testing on the Hawaiian Islands underwent qualification training within the five years prior to the November 2022 site visits and alleged that it provided supporting documentation. Petitioner explained that during the employee qualification process all employees demonstrated competency through the performance of a skills assessment and were able to properly perform the tasks identified within Petitioner's O&M. Additionally, Petitioner argued that it trained additional employees about corrosion control during the week of December 5, 2022.

The Final Order found that because the only operator qualification (OQ) documentation that Petitioner provided regarding the personnel conducting the CP tests in November 2022 was dated after PHMSA's inspection, there was nothing in the record to indicate that the two relevant personnel were OQ qualified at the time of the inspection.[10] Consequently, Item 4 of the Final Order found that Petitioner had violated 49 C.F.R. § 192.453 by failing to ensure the operation and maintenance of its CP systems were carried out by a person qualified in corrosion control methods.[11] The Final Order required Petitioner to pay a civil penalty of $75,200 for the violation of § 192.453.[12]

In its Petition, Petitioner again asserted that it had not violated 49 C.F.R. § 192.453 because the two relevant employees were trained and qualified.[13] Petitioner maintained that both employees "underwent qualification training within the five years prior to the PHMSA inspection."[14] Petitioner submitted new evidence showing OQ training records of both employees demonstrating that they were qualified in Petitioner's pipeline corrosion control operations and

---

[9] NOPV, at 3.

[10] Final Order, at 3-4.

[11] *Id.*

[12] *Id.*, at 12.

[13] Petition, at 4.

[14] *Id.*

maintenance methods for CP in June 2021 and April 2022, which Petitioner asserts were made available to PHMSA at the time of the inspection.[15] Petitioner had not provided these records prior to issuance of the Final Order, and provided no explanation for failing to have done so.

Despite having provided no explanation for having failed to provide these records prior to issuance of the Final Order, based on these newly submitted records, I find that Petitioner has satisfactorily demonstrated that the two relevant employees had been qualified in Petitioner's pipeline corrosion control methods in June 2021 and April 2022 for CP in accordance with 49 C.F.R. § 192.453. In making this determination, I evaluated all of the evidence of record, including the evidence and statements provided in Petitioner's Responses and Petition. After reviewing all of the evidence of record, I find it appropriate to withdraw Item 4 of the Final Order and its associated civil penalty.

**Item 8:** The Notice alleged that Petitioner violated 49 C.F.R. § 192.481(a), which states:

> **§ 192.481 Atmospheric corrosion control: Monitoring.**
> (a) Each operator must inspect and evaluate each pipeline or portion of the pipeline that is exposed to the atmosphere for evidence of atmospheric corrosion, as follows:

| **Pipeline type:** | **Then the frequency of inspection is:** |
|---|---|
| **(1) Onshore other than a Service Line** | **At least once every 3 calendar years, but with both intervals not exceeding 39 months.** |
| **(2) Onshore Service Line** | **At least once every 5 calendar years, but with intervals not exceeding 63 months, except as provided in paragraph (d) of this section.** |
| **(3) Offshore** | **At least once each calendar year, but with intervals not exceeding 15 months.** |

The Notice alleged that Petitioner failed to complete atmospheric corrosion inspections at the required intervals for two of its systems: Coconut Grove (Maui) and Wahiawa Town Center (Oahu), based on the most recent documented atmospheric corrosion inspections.[16] Specifically, the Notice alleged the evidence demonstrated that Coconut Grove was last inspected on January 8, 2014, and Wahiawa Town Center was inspected on January 8, 2014, and July 28, 2020, which exceeded the 39-month required inspection frequency.[17]

---

[15] *Id.*, at 4-5; *see* Exhibit 3.

[16] NOPV, at 5-6.

[17] *Id.*

In its Response and Supplemental Response, Petitioner contested the allegation of violation in part. Petitioner did not contest PHMSA's allegation that it did not have the required documentation of atmospheric corrosion inspections of the Coconut Grove and Waipahu Town Center systems within a 39-month interval. Petitioner provided inspection records demonstrating that the Coconut Grove system was inspected on September 18, 2022, and noted that it transitioned to an electronic work order tracking system from 2019 to 2021 and "[d]uring this period some locations misunderstood the expectations for continued documentation of pipeline related activities on the paper forms…in addition to the new electronic work order system."[18]

The Final Order, after reviewing the evidence, found the record showed that (1) the inspections of Coconut Grove were conducted on January 8, 2018, and September 18, 2022, an interval of 56 months; and (2) the inspections of the Wahiawa Town Center inspections were conducted on January 8, 2014, and July 28, 2020, an interval of 78 months.[19] Consequently, Item 8 of the Final Order found that Petitioner violated 49 C.F.R. § 192.481(a) by failing to complete atmospheric corrosion inspections at the required intervals for two of its systems. The Final Order required Petitioner pay a civil penalty of $35,700 for the violation of § 192.481(a).[20]

In its Petition, Petitioner again asserted that it had not violated 49 C.F.R. § 192.481(a).[21] Petitioner maintained that, while hard copy documentation of inspections of the Coconut Grove and Wahiawa Town Center locations were not maintained, that the inspections still occurred. Petitioner alleged that its "electronic records [in the form of customer acknowledgement of service receipts] clearly indicate the alleged missing 2020 inspection for Coconut Grove was completed."[22] Petitioner further argued there is no requirement for documentation of inspections, "only that the inspections be performed on a certain frequency, which they were."[23] Petitioner argued the same for the Wahiawa Town Center system but conceded "[Petitioner] does not have records in support" of this argument.[24] Petitioner further argued that since PHMSA inspected the Wahiawa Town Center system in November 2019 and did not allege a violation, that there were likely hard-copy records for a 2017 inspection available at that time.[25] Petitioner requested that the penalty for this Item be reduced to no more than $8,900, because "the gravity of the alleged offense was low and the alleged violation did not result in any harm to public safety or the environment."[26]

---

[18] Supplemental Response, at 42.

[19] Final Order, at 7.

[20] *Id.*, at 12.

[21] Petition, at 6.

[22] *Id*., at 6-7.

[23] *Id.*, at 6-7.

[24] *Id.*, at 7.

[25] *Id.*

[26] *Id.*, at 6-7.

After reviewing the evidence and the new context explained in Petitioner's Petition, I disagree with the Petition that a reduction in the penalty is warranted. The record contained in the Supplemental Response is not a sufficient record under 49 C.F.R. § 192.491(c), which provides that "[e]ach operator shall maintain a record of each test, survey, or inspection required by this subpart *in sufficient detail to demonstrate the adequacy of corrosion control measures or that a corrosive condition does not exist*. These records must be retained for at least 5 years…." (emphasis added). The customer acknowledgement of receipt provided is not an adequate record to demonstrate that an inspection occurred. This is because the receipt is not an inspection record and does not provide any detail sufficient to determine that an inspection occurred, that the inspection demonstrated the adequacy of corrosion control measures, or that corrosive conditions did not exist. Therefore, Petitioner still has not provided sufficient evidence that it appropriately inspected the Coconut Grove location in 2020. Therefore, the number of instances of violation should not be reduced.

Petitioner points towards PHMSA's lack of enforcement following its inspection of the Wahiawa Town Center system in November 2019 as evidence that documentation of the inspection at that location in 2017 existed.[27] However, I find no basis to overturn the violation as to the Wahiawa Town Center system. Per 49 C.F.R. § 192.491(c), operators must maintain a record of each test, survey, or inspection required by this subpart in sufficient detail to demonstrate the adequacy of corrosion control measures or that a corrosive condition does not exist. These records must be retained for at least five years, with certain limited exceptions not applicable in this instance. Petitioner was unable to produce any documentation to show that the inspection did in fact occur in the interim gap between January 8, 2014, and July 28, 2020. PHMSA not previously bringing an enforcement action alleging a violation of § 192.481(a) following a previous inspection does not certify that Petitioner met the recordkeeping requirement in § 192.491(c).

Petitioner argues that "the gravity of the alleged offense was low and the alleged violation did not result in any harm to public safety or the environment."[28] In Section E6-Gravity of the of the Pipeline Safety Violation Report (Violation Report), PHMSA selected "pipeline safety was minimally affected." Therefore, PHMSA already appropriately considered this factor in assessing the civil penalty. Thus, no reduction to the assessed civil penalty is warranted under the gravity consideration.

In sum, I find no reason to reduce the total assessed civil penalty of $35,700 for the violation of 49 C.F.R. § 192.723(b)(1). In making this determination, I evaluated all of the evidence of record, including the evidence and statements provided in Petitioner's Responses and Petition.

**Item 10:** The Notice alleged that Petitioner violated 49 C.F.R. § 192.619(a)(1), which states:

> **§ 192.619 Maximum allowable operating pressure: Steel or plastic pipelines.**
>
> (a) No person may operate a segment of steel or plastic pipeline at a pressure that exceeds a maximum allowable operating pressure (MAOP)

[27] *Id.,* at 7.

[28] *Id.*, at 6-7.

> determined under paragraph (c), (d), or (e) of this section, or the lowest of the following:
>
> (1) The design pressure of the weakest element in the segment, determined in accordance with subparts C and D of this part. However, for steel pipe in pipelines being converted under § 192.14 or uprated under subpart K of this part, if any variable necessary to determine the design pressure under the design formula (§ 192.105) is unknown, one of the following pressures is to be used as design pressure:

The Notice alleged that Petitioner operated a segment of steel or plastic pipeline at a pressure that exceeds a maximum allowable operating pressure (MAOP), based on a review of Petitioner's records and PHMSA's observations during the inspection.[29] Specifically, the Notice alleged Petitioner's records demonstrated that its systems' established MAOPs are 10 psi, which is the maximum allowable inlet pressure of the second-stage service regulators, and PHMSA observed and documented clock gauges showing the operating pressures of several systems operating at pressures greater than 10 psi in five separate instances.[30]

In its Response and Supplemental Response, Petitioner contested the allegation of violation in part. Petitioner asserted the clock gauge used to measure the pressure in one instance (the EWA Point Marketplace) was defective and, when replaced, the pressure measured was less than the MAOP.[31] PHMSA's Western Region reviewed the documents provided by Petitioner and, in a Region Recommendation dated September 5, 2023, concluded that based on the information provided, the evidence supported Petitioner's argument that the EWA Point Marketplace system was not operating above the MAOP.

The Final Order agreed with Western Region's assessment and withdrew the one instance of violation at the EWA Point Marketplace location.[32] Consequently, Item 10 of the Final Order found that Petitioner violated 49 C.F.R. § 192.619(a)(1) by operating a segment of steel or plastic pipeline at a pressure that exceeded a MAOP at the other four locations. The Final Order included a reduced civil penalty of $162,300 for the violation of § 192.619(a)(1).[33] The Final Order also included a Compliance Order that required Petitioner to take certain measures to correct the alleged violations.[34]

In its Petition, Petitioner requested reconsideration of the reduction of the Final Order's assessed civil penalty for this Item.[35] Petitioner did not request reconsideration of the underlying finding

---

[29] NOPV, at 6.

[30] *Id.*

[31] Response, at 12-13.

[32] Final Order, at 8.

[33] *Id.*, at 12.

[34] *Id.*, at 15.

[35] Petition, at 7-8.

of violation, or the terms of the compliance order. Petitioner argued that since the Final Order withdrew one instance of violation—for the EWA Point Marketplace system in Oahu—that the assessed civil penalty should be reduced proportionately by one fifth.[36] Petitioner also argued that the penalty should be further reduced "because the gravity of the alleged violation was significantly low and did not and would not result in any harm to public safety or the environment."[37] Additionally, Petitioner stated that it did not have any culpability, because it was "not aware that the valves were operating outside of specification," and that once made aware, it "promptly addressed and replace the components in a good faith effort to demonstrate compliance."[38]

Having considered these arguments, I find that a reduction in the penalty is not warranted. First, when determining a civil penalty, PHMSA considers the number of instances of violation as an element of the gravity factor.[39] The number of instances does not function as a simple civil penalty multiplier, where each instance of violation is assigned a proportional violation penalty. Rather, the number of instances is considered as a factor in the determination of the level of gravity of the violation.[40] In this case, the reduction to the number of instances was taken into account in calculating the reduced civil penalty. Per PHMSA's policy, there was no error in the re-calculation of the penalty.

Second, in Section E6-Gravity of the of the Violation Report, PHMSA considered the location of the violation to determine the severity of the violation.[41] One of the categories is whether "[t]he violation occurred within an HCA or 'could affect' HCA, or within an area required to be covered by a gas distribution system integrity management program, or whether the violation is against 49 C.F.R. Part 193."[42] In this case, the systems in question were liquified petroleum gas distribution systems and the violations occurred within high consequence areas (HCAs). Operating the system above MAOP in an HCA does impact the safety of the system. Thus, no reduction to the assessed civil penalty is warranted under the gravity consideration.

Third, in Section E7-Culpability of the Violation Report, an operator may receive a civil penalty credit if, after finding the non-compliance, the operator took documented action to address the cause of the non-compliance, and was in the process of correcting the noncompliance, or corrected it, before PHMSA learned of the violation.[43] In this case, Petitioner did not take

---

[36] *Id.*, at 8.

[37] *Id.*

[38] *Id.*

[39] Violation Report, at E6-Gravity.

[40] *Id.*

[41] *Id.*, at E8-Gravity.

[42] *Id.*

[43] *Id.*, at E7-Culpability.

documented action to correct the noncompliance until after PHMSA discovered the violation. Thus, no reduction to the assessed civil penalty is warranted under the culpability consideration. When assessing the level of culpability, PHMSA determined that "[Petitioner] failed to comply with an applicable requirement."[44] Petitioner, in its Petition, did not dispute that it failed to comply with the regulation; thus, this selection for the level of culpability was appropriate.

Fourth, Petitioner misinterprets the "good faith" language of 49 C.F.R. 190.225(a)(4). In Section E8-Good Faith of the Violation Report, PHMSA considers whether the operator had a reasonable justification for its noncompliance, and provides a civil penalty credit for an operator that can demonstrate it took action in good faith to try and comply with the pipeline safety regulation.[45] Good Faith does not consider, however, "corrective actions taken by the Operator after PHMSA discovered the violation."[46] In this case, Petitioner took action to implement the proposed compliance order after PHMSA discovered the alleged violation and issued the Notice. Thus, no reduction to the assessed civil penalty is warranted under the good faith consideration.

In sum, I find no reason to reduce the total assessed civil penalty of $162,300 for the violation of 49 C.F.R. § 192.619(a)(1). In making this determination, I evaluated all of the evidence of record, including the evidence and statements provided in Petitioner's Responses and Petition.

**Item 12:** The Notice alleged that Petitioner violated 49 C.F.R. § 192.723(b)(1), which states:

> **§ 192.723 Distribution systems: Leakage surveys.**
>
> (a) . . . .
>
> (b) The type and scope of the leakage control program must be determined by the nature of the operations and the local conditions, but it must meet the following minimum requirements:
>
> (1) A leakage survey with leak detector equipment must be conducted in business districts, including tests of the atmosphere in gas, electric, telephone, sewer, and water system manholes, at cracks in pavement and sidewalks, and at other locations providing an opportunity for finding gas leaks, at intervals not exceeding 15 months, but at least once each calendar year.

The Notice alleged that Petitioner failed to conduct leak surveys of its systems in business districts at intervals not exceeding 15 months but at least once each calendar year.[47] Specifically, the Notice alleged Petitioner's records demonstrated that Petitioner did not conduct leak surveys at (1) the

---

[44] *Id.*

[45] For example, operators may be found to have a reasonable justification for a noncompliance if their interpretation of a regulatory requirement was reasonable, or if the operator failed to achieve compliance for reasons such as unforeseeable events or conditions that were partly or wholly outside its control. *See Id.*, at E8-Good Faith.

[46] *Id.*

[47] NOPV, at 7.

Shops at Wailea (Maui) location in 2020, (2) the Tosei (Maui) location in 2020, and (3) the Shops at Mauna Lani (Hawaii) location in 2019, 2020, or 2021.[48]

In its Response, Petitioner stated that it did "not contest the findings of PHMSA that [Petitioner was] unable to locate the required documentation of patrolling of mains in the listed years for the listed systems."[49] In its Supplemental Response, Petitioner stated again that it did not contest it was unable to produce records to demonstrate the proper documentation of completion of leakage survey inspections, but that it "did not admit to not having completed the inspections."[50] In its Supplemental Response, Petitioner provided three screenshots,[51] but it did not provide an explanation of them. PHMSA interpreted Petitioner's statements of non-contestation as Petitioner not contesting the allegation of violation, without admitting it violated the regulation. Petitioner also did not provide a basis for reducing or eliminating the proposed penalty.[52] Accordingly, and after reviewing the evidence, the Final Order concluded that Petitioner violated 49 C.F.R. §192.723(b)(1) by failing to conduct leak surveys of its systems in business districts at intervals not exceeding 15 months, but at least once each calendar year.[53] The Final Order required Petitioner to pay a civil penalty of $83,400 for the violation of § 192.723(b)(1).[54]

In its Petition, Petitioner now states the screenshots submitted with its Supplemental Response were "documentation from its work order system for the two alleged violation instances for the 2020 surveys at the Shops at Wailea and Tosei systems in Maui" showing that no violation occurred for two of the three systems.[55] Petitioner argues that its electronic records indicated that the missing 2020 inspections were completed at the Shops at Wailea and Tosei systems in Maui.[56] Petitioner also argues that the inspection was similarly performed at the appropriate interval for the Shops at Mauna Lani system in Hawaii, but that it does not have supporting records.[57] Additionally, Petitioner argues that this violation should have been brought as a recordkeeping violation and the civil penalty should be reduced on that basis.[58] Petitioner

---

[48] *Id.*

[49] Response, at 14.

[50] Supplemental Response, at 43.

[51] *Id.*, at 43-44.

[52] *Id.*, at 43.

[53] Final Order, at 8.

[54] *Id.*, at 12.

[55] Petition, at 9.

[56] *Id.*

[57] *Id.*, at 10.

[58] *Id.*

further argues the assessed civil penalty should be "reduced to no more than…a third of the initial penalty" and that the gravity of the offense alleged as low.[59]

After reviewing the evidence, with the new context explained in Petitioner's Petition, I agree with the Petition that a reduction in the penalty is warranted based on an adjustment to the number of instances of violation. PHMSA considers the number of instances of violation as an element of the gravity factor.[60] The number of instances does not function as a simple civil penalty multiplier, where each instance of violation is assigned a proportional violation penalty. Rather, the number of instances is considered as a factor in the determination of the level of gravity of the violation.[61] Since Petitioner now presents records demonstrating that the inspections did occur at the systems located in Shops of Wailea in 2020 and Tosei (Maui) in 2020,[62] the number of instances should be reduced from five to three.

However, while Petitioner argued that the inspections were performed at the appropriate interval for the Shops at Mauna Lani system in Hawaii,[63] I find no basis to overturn the violation, as Petitioner was unable to produce any documentation to show that the inspection did in fact occur.

Regarding Petitioner's argument that the violation should have been brought as a recordkeeping violation, in Section E4-Nature of the Violation Report, PHMSA provides examples of what "activities" and "records" violations include. "Activities" violations include, but are not limited to, "performance or conduct of activities/processes: inspections, tests, maintenance, meetings, notifications, reports, emergency response, not preparing procedures, not complying with a special permit, not complying with a PHMSA order, or not following procedures;" examples of "records" include, but are not limited to, "missing, inaccurate, or incomplete records."[64] Here, "activities" is the correct nature of the violation. The underlying allegation is a failure to conduct leak surveys of Petitioner's systems in business districts at intervals not exceeding 15 months but at least once each calendar year; the underlying allegation was not a failure to maintain records of the leak surveys.[65] While Petitioner asserted that the leak surveys were done for the remaining three instances, it has not provided evidence showing it carried out the leak surveys.

Petitioner argued that the "gravity of the alleged offense was low and the alleged violation did not and was not likely to result in any harm to public safety or the environment."[66] In Section

---

[59] *Id.*

[60] Violation Report, at E6-Gravity.

[61] *Id.*

[62] Petition, at 9; Supplemental Response, at 43-44.

[63] Petition, at 9.

[64] *Id.*

[65] Final Order, at 8.

[66] Petition, at 10.

E6-Gravity, PHMSA selected the factor "pipeline safety was minimally affected." [67] Therefore, PHMSA already appropriately considered this factor in assessing the civil penalty. Thus, no reduction to the assessed civil penalty is warranted under the gravity consideration.

In sum, I find a reason to reduce the number of instances of violation and correspondingly reduce the assessed civil penalty of $83,400 to $82,600 for the violation of 49 C.F.R. § 192.723(b)(1). In making this determination, I evaluated all of the evidence of record, including the evidence and statements provided in Petitioner's Responses and Petition.

**Item 14:** The Notice alleged that Petitioner violated 49 C.F.R. § 192.739(a)(2), which states in relevant part:

> **§ 192.739 Pressure limiting and regulating stations: Inspection and testing.**
>
> (a) Each pressure limiting station, relief device (except rupture discs), and pressure regulating station and its equipment must be subjected at intervals not exceeding 15 months, but at least once each calendar year, to inspections and tests to determine that it is –
>
> (1) . . . .
>
> (2) Adequate from the standpoint of capacity and reliability of operation for the service in which it is employed;

The Notice alleged that Petitioner failed to correct deficiencies identified during the inspection of the regulating equipment at Shops at Wailea (Maui) system.[68] Specifically, the Notice alleged that Petitioner's personnel who conducted the regulator inspection of that system recognized it was inadequate from the standpoint of capacity and reliability for the service in which it is employed and, on March 19, 2019, generated a Sales and Service Order stating that Petitioner "need[s] to install a monitoring regulator." Thus, the Notice alleged, Petitioner was aware as early as March 19, 2019, that the regulating equipment as it was configured at the Shops of Wailea (Maui) system was inadequate and failed to correct it by PHMSA's inspection.

In its Response and Supplemental Response, Petitioner did not contest the allegation of violation, nor did it present any evidence or argument justifying a reduction in or elimination of the proposed penalty. Accordingly, Item 14 of the Final Order found that Petitioner violated 49 C.F.R. § 192.739(a)(2) by failing to correct deficiencies identified during the inspection of the regulating equipment at Shops at Wailea (Maui) system.[69] The Final Order required Petitioner pay a civil penalty of $72,600 for the violation of § 192.729(a)(2).[70] The Final Order also

---

[67] Violation Report, at Section E6-Gravity.

[68] NOPV, at 8.

[69] Final Order, at 9.

[70] *Id.* at 13.

included a Compliance Order that required Petitioner to take certain measures to correct the alleged violations.[71]

In its Petition, Petitioner requested reconsideration of the reduction of the Final Order's assessed civil penalty for this Item.[72] Petitioner pointed to its prompt corrective actions following its receipt of the Notice as evidence of a good faith attempt to achieve compliance and argued that should be taken into account in determining the assessed penalty.[73]

Having considered these arguments, I disagree a reduction in the penalty is warranted. As discussed above, the "good faith" language of § 190.225(a)(4) pertains to an operator's good faith attempts to comply with the regulation prior to discovery of the violation by PHMSA.[74] In Section E8-Good Faith of the Violation Report, PHMSA considers whether the operator had a reasonable justification for its noncompliance, which does not consider "corrective actions taken by the Operator after PHMSA discovered the violation."[75] In this case, Petitioner took action to correct the alleged violation after PHMSA discovered the alleged violation and issued the Notice. Thus, no reduction to the assessed civil penalty is warranted under the good faith consideration.

In sum, I find no reason to reduce the total assessed civil penalty of $72,600 for the violation of 49 C.F.R. § 192.739(a)(2). In making this determination, I evaluated all of the evidence of record, including the evidence and statements provided in Petitioner's Responses and Petition.

**Item 15:** The Notice alleged that Petitioner violated 49 C.F.R. § 192.747(a), which states:

> **§ 192.747 Valve maintenance: Distribution systems.**
>
> (a) Each valve, the use of which may be necessary for the safe operation of a distribution system, must be checked and serviced at intervals not exceeding 15 months, but at least once each calendar year.

The Notice alleged that Petitioner failed to inspect or record the inspection of valves that might be needed in an emergency annually at intervals not to exceed 15 months.[76] Specifically, the Notice alleged the evidence demonstrated that that (1) the Coconut Grove (Maui) system's worksheets were not completed in 2019, (2) the Tosei (Maui) system's worksheets were not completed in 2020, and (3) the Residences of Laule-a (Hawaii) system's worksheets were not completed in 2021.[77]

---

[71] *Id.*, at 15-16.

[72] Petition, at 10.

[73] *Id.*

[74] Violation Report, at E8-Good Faith; *see* discussion *infra* Section III, at Item 10.

[75] Violation Report, at E8-Good Faith.

[76] NOPV, at 9.

[77] *Id.*, at 9.

In its Response and Supplemental Response, Petitioner contested the allegation of violation in part. In its Response, Petitioner located inspection records showing valves had been inspected at the correct intervals for one of the three facilities cited in the Notice (Coconut Grove).[78] In its Supplemental Response, Petitioner pointed to its transition to a new electronic work order tracking system from 2019 to 2021 as the reason it was unable to demonstrate completion of the two other valve inspections.[79] Petitioner also provided three screenshots in its Supplemental Response, but it failed to provide an explanation of them.[80]

The Final Order found, after reviewing the evidence, that the Coconut Grove inspection records demonstrated that the valves were inspected within the required timeframe.[81] However, the Final Order determined that Petitioner was unable to demonstrate that the valves at the Tosei and Residences of Laule-a facilities were serviced at the required intervals.[82] Accordingly, Item 15 of the Final Order found that Petitioner has violated 49 C.F.R. § 192.747(a) by failing to inspect or record the inspection of valves that might be needed in an emergency annually at intervals not to exceed 15 months in two instances.[83] The Final Order included an Assessed Civil Penalty that requires Petitioner pay a civil penalty of $36,200 for the violation of § 192.747(a).

In its Petition, Petitioner requested reconsideration of the two instances of violation.[84] Petitioner explained that it provided the screen shots in its Supplemental Response as documentation of inspections occurring at the Tosei (Maui) system in 2020 and the Residences of Laule-a (Hawaii) system in 2021.[85] Petitioner argued these screenshots indicate the alleged missing inspections were completed.[86] After reviewing the evidence, with the new context explained in Petitioner's Petition, I find that Petitioner has satisfactorily demonstrated that a valve inspection did occur for the Tosei (Maui) system in 2020 and the Residences of Laule-a (Hawaii) system in 2021.

Based on these submitted records, I find that Petitioner has satisfactorily demonstrated that the two locations had been inspected in 2020 and 2021 in accordance with 49 C.F.R. § 192.747(a). In making this determination, I evaluated all of the evidence of record, including the evidence and statements provided in Petitioner's Responses and Petition. Accordingly, I find it appropriate to withdraw Item 15 of the Final Order and its associated civil penalty.

---

[78] Response, at 17, 35.

[79] Supplemental Response, at 44.

[80] *Id.*, at 45-46.

[81] Final Order, at 9.

[82] *Id.*, at 9-10.

[83] *Id.*

[84] Petition, at 10.

[85] *Id.*, at 11; *see* Supplemental Response, at 44-46.

[86] Petition, at 11.

**Item 18:** The Notice alleged that Petitioner violated 49 C.F.R. § 192.805(b), which states in relevant part:

> **§ 192.805 Qualification program.**
> Each operator shall have and follow a written qualification program. The program shall include provisions to:
> (a) . . . .
> (b) Ensure through evaluation that individuals performing covered tasks requalified;

The Notice alleged that Petitioner failed to ensure through evaluation that individuals performing covered tasks were qualified to recognize and react to abnormal operating conditions (AOC).[87] Specifically, the Notice alleged the evidence demonstrated that Petitioner (1) failed to train and qualify the operator of record for odorant testing for the Maui systems on how to recognize and respond to inadequate levels of odorization, which is an AOC relevant to that task, and (2) failed to train and qualify the operator of record for corrosion control practices for their Oahu systems to recognize and test for shorted pipe, an AOC relevant to that task.[88]

In its Response and Supplemental Response, Petitioner contested this allegation of violation, providing additional information and training records. Petitioner claimed that "[a]ll operator qualified employees who performed OQ tasks on the Hawaiian Islands underwent qualification training within the five years prior to the November 2022 site visits performed by PHMSA."[89] In its Supplemental Response, Petitioner provided the OQ Field Evaluation/Qualification Report Forms for one of the relevant employees demonstrating that after the inspection, on August 17, 2023, he underwent OQ qualification for (1) "Odorization – Testing Levels Using an Instrument – (Odorator),"[90] (2) "Corrosion Control – Applying Cathodic Protection,"[91] and (3) "Corrosion Control – Measure Pipe to Soil Potential."[92] Petitioner did not provide any documentation regarding the other employee.

The Final Order found, after reviewing the evidence, that Petitioner's training and qualification exam materials for the odorant testing task made no mention of AOCs or appropriate responses.[93] Moreover, the Notice detailed observations of operator personnel who could not describe what values were outside of an acceptable range, an AOC relevant to the odorant testing task, and the operator personnel collecting CP readings could not recognize and respond to a

---

[87] NOPV, at 10.

[88] *Id.*

[89] Response, at 20.

[90] Supplemental Response, at 37-38

[91] *Id.*, at 33-34.

[92] *Id.*, at 35-36.

[93] Final Order, at 11.

shorted pipe, which is an AOC for the corrosion control task.[94] PHMSA's observations in the field indicated that the Petitioner's qualification program did not ensure through evaluation that individuals performing covered tasks were qualified to recognize and perform AOCs for at least two covered tasks. Finally, Petitioner's qualification exam materials did not show that the relevant individuals were OQ qualified at the time of the inspection. Consequently, Item 18 of the Final Order found that Petitioner has violated 49 C.F.R. § 192.805(b) by failing to ensure through evaluation that individuals performing covered tasks were qualified to recognize and react to AOC.[95] The Final Order included a Civil Penalty of $39,400 for the violation of § 192.805(b).[96]

In its Petition, Petitioner again asserted that it had not violated 49 C.F.R. § 192.453 because the two relevant employees were trained and qualified.[97] Petitioner submitted new evidence showing OQ training records of both employees demonstrating that they were OQ qualified for odorant testing and corrosion control practices in June 2021 and April 2022, which Petitioner asserts were made available to PHMSA at the time of the inspection.[98] Petitioner had not provided these records prior to issuance of the Final Order, and provided no explanation for failing to have done so. Petitioner also argued that the penalty should be further reduced because (1) it acted in good faith to demonstrate compliance, as evidenced by its re-training of its employees following its receipt of the Notice, (2) "the alleged violation did not and was not likely to result in harm to public safety or the environment," and (3) Petitioner's lack of culpability.

Despite having provided no explanation for having failed to provide these records prior to issuance of the Final Order, based on these newly submitted records, I find that Petitioner has satisfactorily demonstrated that the two relevant employees had been OQ qualified in June 2021 and April 2022 for odorant testing, including how to recognize and respond to inadequate levels of odorization.[99] However, while the records supplied do show that the two relevant employees were OQ qualified for various corrosion control practices, the records do not show that the relevant employees were trained for recognizing and testing shorted pipe. Therefore, Petitioner has not demonstrated that the relevant employees were trained and qualified for this AOC relevant to the covered task. Thus, the number of instances of the alleged violation is reduced from two to one.

Regarding the good faith argument, in Section E8-Good Faith of the Violation Report, PHMSA considers whether the operator had a reasonable justification for its noncompliance, which does not consider "corrective actions taken by the Operator after PHMSA discovered the

---

[94] Violation Report, Exhibit P.

[95] Final Order, at 11.

[96] *Id.*, at 13.

[97] Petition, at 11-12.

[98] *Id.*, at 4-5; *see* Exhibit 3.

[99] *See* Petition, at Exhibit 3.

violation."[100] In this case, Petitioner took action to correct the alleged violation after PHMSA discovered the alleged violation and issued the Notice. Thus, no reduction to the assessed civil penalty is warranted under the good faith consideration.

Regarding Petitioner's gravity argument, in Section E6-Gravity, PHMSA selected the "pipeline safety was minimally affected." [101] Therefore, PHMSA already appropriately considered this factor in assessing the civil penalty. Thus, no reduction to the assessed civil penalty is warranted under this consideration.

Concerning Petitioner's culpability argument, in Section E7-Culpability of the Violation Report, an operator may receive a civil penalty credit if, after finding the non-compliance, the operator took documented action to address the cause of the non-compliance, and was in the process of correcting the noncompliance, or corrected it, before PHMSA learned of the violation.[102] In this case, Petitioner did not take documented action to correct the one instance of noncompliance prior to PHMSA discovering the violation. Thus, no reduction to the assessed civil penalty is warranted under the culpability consideration.

In sum, I find a reason to reduce the number of instances of violation and, correspondingly, reduce the civil penalty of $39,400 to $39,100 for the violation of 49 C.F.R. § 192.805(b). In making this determination, I evaluated all of the evidence of record, including the evidence and statements provided in Petitioner's Responses and Petition.

## CONCLUSION

For the reasons stated above, the Petition for Reconsideration is granted. After reviewing all of the evidence of record, I find it appropriate to withdraw Item 4 of the Final Order and its associated civil penalty, reduce the civil penalty assessed for Item 12 of the Final Order to $82,600, withdraw Item 15 of the Final Order and its associated civil penalty, and reduce the civil penalty for Item 18 of the Final Order to $39,100. I affirm Item 8 of the Final Order, including the assessed penalty of $35,700, Item 10 of the Final Order, including the assessed penalty of $162,300 and compliance order term, and Item 14 of the Final Order, including the assessed penalty of $72,600. The total reduced civil penalty is **$431,400**.[103]

Payment of the civil penalty must be made within 20 days of service of this Decision. 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,

---

[100] Violation Report, at E8-Good Faith, *see* discussion *infra* Section III, at Item 10.

[101] *Id.*, at Section E6-Gravity.

[102] *Id.*, at E7-Culpability.

[103] Note that Petitioner did not contest the proposed civil penalty of $39,100 for Item 17.

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 $431,400 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.

As Petitioner did not petition for reconsideration of any other Items, the rest of the Final Order remains unchanged.

This Decision on Reconsideration is the final administrative action in this proceeding.

August 19, 2024

Alan K. Mayberry
Associate Administrator
for Pipeline Safety

Date Issued