

April 16, 2013

Mr. John Mollenkopf
Senior Vice President, Chief Operations Officer
MarkWest Ranger Pipeline Company, LLC
1515 Arapahoe Street, Tower 2, Suite 700
Denver, CO 80202-2126

Re: CPF No. 2-2012-5007

Dear Mr. Mollenkopf:

Enclosed please find the Final Order issued in the above-referenced case. It makes findings of violation, assesses a civil penalty of \$17,600, and specifies actions that need to be taken by MarkWest Ranger Pipeline Company, LLC to comply with the pipeline safety regulations. 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, Southern Region, this enforcement action will be closed. Service of the Final Order by certified mail is deemed effective upon the date of mailing, or as otherwise provided under 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. Christopher Rimkus, Associate Counsel
1515 Arapahoe St. Tower 1, Suite 1600, Denver, CO 80202-2137
Mr. Alan Mayberry, Deputy Associate Administrator for Field Operations, OPS
Mr. Wayne Lemoi, Director, Southern Region, OPS, PHMSA

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

§ 195.440 Public awareness.

(a) Each pipeline operator must develop and implement a written continuing public education program that follows the guidance provided in the American Petroleum Institute's (API) Recommended Practice (RP) 1162 (incorporated by reference, *see* § 195.3).

(b) The operator's program must follow the general program recommendations of API RP 1162 and assess the unique attributes and characteristics of the operator's pipeline and facilities.

The Notice alleged that Respondent violated 49 C.F.R. § 195.440 by failing to assess the unique characteristics and attributes of its pipeline facilities in its continuing public education program. Specifically, the Notice alleged that MarkWest distributed baseline message or continuing public education brochures to the affected public, excavators, emergency responders, and public officials for calendar years 2009, 2010, and 2011 that did not identify the product transported as a natural gas liquid (NGL) or as a highly volatile liquid (HVL). Furthermore, the Region alleged that the brochures distributed in 2011 erroneously identified the product transported in ALPS as natural gas rather than HVL. In the Notice and at the hearing, the Region stated that MarkWest's references to natural gas in its public education program materials violated § 195.440(b) because natural gas has different characteristics and attributes than HVL. Furthermore, at the hearing, the Region argued that Respondent's failure to properly describe HVL characteristics and inclusion of incorrect information could endanger the public and potentially cause incorrect response(s) to a pipeline release.

In its Response and at the hearing, MarkWest explained that it provided baseline messages (i.e. public awareness information via brochures) in collaboration with other operators for the years indicated above. MarkWest stated that the collaborative brochures did mention the presence of HVLs and that, from a public information perspective, the characteristics of natural gas and HVL are similar, so the references to natural gas were not misleading. MarkWest also argued that it believed its collaborative approach was less confusing to landowners who may live near various rights of way because the landowners or affected public might otherwise be inundated with information from different operators.

With respect to MarkWest's arguments about the benefits of its collaborative approach, the Southern Region maintained that the intent of the regulation, rather than educating the public at large about general pipeline safety, is to educate specific targeted audiences about pipelines that may affect them. I agree that § 195.440(b) requires that operators provide specific information about its facilities. On the other hand, API RP 1162 does encourage operators to, "convey important information about the company, the industry, pipeline safety," etc. to its target audiences. See API RP 1162, 5.1.1. Therefore, the presence of information about different types of pipelines does not, on its own, violate the regulation.

To determine whether violations occurred, it is necessary to examine the content of MarkWest's public education materials for each year listed, to evaluate whether: 1.) the material described unique attributes of MarkWest's ALPS pipeline, 2.) recipients of the brochure would be able to distinguish between information relevant to ALPS and general pipeline information, and 3.) information was accurate.

MarkWest's 2009 brochure does not list NGLs or HVLs as the product transported in its pipeline, nor does it include HVLs in its list of pipeline products included in the section entitled, "Potential Hazards of Pipeline Products." This list includes hazardous liquids, refined products, crude oil, natural gas, oxygen, chemicals, etc. In the section entitled, "Recognizing a Pipeline Leak," the brochure lists the following various signs of a pipeline leak, "a pool of liquid on the ground near a pipeline, a dense white cloud or fog over a pipeline, . . .an unusual dry spot in otherwise moist field, . . .an unusual smell or gaseous odor . . ., frozen ground at the pipeline in warm weather, . . ." The "white cloud" reference is an accurate description of an HVL release, but a reader of the materials would not be able to distinguish that description from the others listed as the one relevant to ALPS. Furthermore, the "white cloud" reference is the only information specific reference to HVLs in the 2009 brochure.¹ The brochure did not state that HVLs are heavier than air and can settle in low lying areas, causing increased ignition hazard and asphyxiation risk, nor did the brochure state that HVLs cause eye and nose irritation.

MarkWest's 2010 public education brochure provides more information to the affected public of the unique attributes and characteristics of its HVL facility but still exhibits problems. The brochure does not specifically mention the ALPS or that the relevant pipeline transports HVLs. It describes how to recognize leaks from different types of pipelines, including HVLs and other products, such as natural gas and landfill gas. The brochure correctly describes a "vaporous fog" as one sign of a pipeline leak. Furthermore, it states, "HVL vapors are heavier than air and can collect in low areas such as ditches, sewers, etc." Despite this useful information, the brochure also states, "Highly Volatile Liquids (HVL's) can be odorless and colorless in their natural state and most are considered irritants to eyes and nose. Commercial odorants are added to many HVL's to assist in detection of a leak." While the above statement may be true, the NGLs/HVLs in the ALPS are *not* odorized, so the statement that "Commercial odorants are added to many HVL's to assist in the detection of a leak" could lead to the expectation by recipients of the brochure that the ALPS is odorized.² Therefore, in the absence of the distinctive "rotten eggs"/mercaptan smell, members of the public might not detect a leak or might take longer to detect/report a leak of the ALPS.

Finally, MarkWest's 2011 public education materials contain further improvements from the previous years but also a major flaw. The first page of the brochure contains only information relevant to HVLs, including that HVLs are heavier than air. Unlike the prior years, the first page does not include information specific to other pipeline products. The brochure also includes the following accurate statement about odorization, "Natural Gas and Highly Volatile Liquids are colorless, tasteless and odorless unless commercial odorants or Mercaptan is added." However, page 4 of the 2011 brochure includes a material safety data sheet (MSDS) for natural gas, which is incorrect. The specific inclusion of the natural gas MSDS and no other MSDS would give the impression that it is specific to the ALPS. The MSDS describes natural gas as "Lighter than air and will generally rise and dissipate. May gather in a confined space and travel to a source of

¹ I say "only 'possible' reference to HVLs" because neither HVLs nor NGLs are explicitly mentioned in the 2009 brochure.

² MarkWest email correspondence, March 3, 2013.

ignition.”³ This information is inaccurate and potentially dangerous, as HVLs are not lighter than air, will not necessarily dissipate, and may gather in areas other than “a confined space.”

In its post-hearing submission (Closing), MarkWest argued that PHMSA’s allegation of violation was based on a “subjective standard” that PHMSA interpreted inconsistently with its plain meaning. According to MarkWest, the regulation does not require that the educational materials name the product and only requires general pipeline safety information that includes some information relevant to its facilities, even if the relevant information is presented alongside non-relevant information. MarkWest also argued that its brochures complied with the “letter of the law” because each included some information relevant to an HVL pipeline release. More specifically, MarkWest pointed to mention in the 2009 brochure of “a dense white cloud or fog over a pipeline,” and a “vaporous fog” in the 2010 brochure. It argued that this language, applicable to an HVL release, described what a member of the public might witness were a release to occur, and that this is the type of “unique attributes and characteristics” the regulation is referring to. MarkWest acknowledged at the hearing that the inclusion of the natural gas MSDS was “misleading and a mistake,” but it maintained that many of the attributes of natural gas and NGLs are the same and that the MSDS inclusion, “did not detract from the information presented in the brochure.”⁴

I am not persuaded by MarkWest’s position. Section 195.440(b) requires that operators include information about the “*unique* attributes and characteristics of the operator’s pipeline and facilities” (emphasis added). This standard cannot be met by providing general pipeline safety information alone or relevant information alongside non-relevant information as MarkWest did in its 2009 and 2010 brochures. More specifically, the purpose of the 2009 brochure was plainly to provide general pipeline safety information and was not specific to HVL pipelines; the descriptions of various types of pipeline releases such as crude oil alongside description of an HVL release would not convey to the resident that the reason it was receiving the materials was the presence of an HVL pipeline. Also, the presentation of such different products/risks together is likely to result in confusion or the reader forgetting much of the material due to “information overload,” further diminishing the likelihood that the reader will come away with an understanding of the “unique attributes and characteristics” of the pipeline that affects it. Furthermore, although the 2010 brochure included more information about HVLs, it still included information about natural gas, which has different attributes and characteristics. The 2010 brochure also exemplifies why providing materials that are not facility-specific is risky. The statement in that brochure that many HVL facilities are odorized is relevant to HVLs and not necessarily incorrect. However, given that the NGLs in the ALPS are not odorized, the statement is misleading and potentially dangerous. Finally, the 2011 brochure violated the regulation due to the inclusion of the incorrect MSDS that stated that natural gas is, “Lighter than air and will generally rise and dissipate.”

³ MarkWest also provided PHMSA with a copy of a letter, dated 2011, for school administrators that included the erroneous “Natural Gas” MSDS, including the incorrect statement regarding ALPS, “Lighter than air and will generally rise and dissipate. May gather in a confined space and travel to a source of ignition.”

⁴ Response at 2.

Therefore, the presence of general pipeline information alongside information relevant to the operator's facilities can serve to confuse or diffuse the relevant information about the unique attributes and characteristics of the operator's facilities. In that case, the reader comes away with no specific information about the pipeline that could affect him/her, and he/she may even become confused about what to look/hear/smell for in identifying a leak. On the other hand, if MarkWest had specified that the ALPS carried NGLs, it could have then provided information about the characteristics of NGLs and supplemental information about other pipelines if it desired to educate about general pipeline safety.

Accordingly, after considering all of the evidence and legal issues presented, I find MarkWest violated 49 C.F.R. § 195.440(b) because its public education materials failed to properly assess the unique attributes and characteristics of its pipeline and facilities when the materials contained either only general pipeline information (i.e. relevant information comingled with non-relevant information) or inaccurate information about the ALPS pipeline.

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; and any effect that the penalty may have on its ability to continue doing business; and the good faith of Respondent in attempting to comply with the pipeline safety regulations. 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 \$17,600 for the violations cited above.

Item 1: The Notice proposed a civil penalty of \$17,600 for Respondent's violation of 49 C.F.R. § 195.440(b), for failing to assess the unique characteristics and attributes of its pipeline facilities in its continuing public education program.

In its Closing, MarkWest argued that its efforts to comply with the regulation were "in good faith." PHMSA agrees that MarkWest acted in good faith and calculated the proposed civil penalty accordingly. MarkWest did not specifically challenge the civil penalty or request a reduction, as it focused its arguments on whether a violation occurred. However, I will briefly evaluate PHMSA's considerations in determining the proposed civil penalty. With respect to the "nature" of these violations, PHMSA considered the fact that this was mainly a records violation, rather than a maintenance or equipment violation. Next, for the "circumstances," PHMSA considered that this violation occurred three years in a row. With respect to "gravity," PHMSA considered that although it was a recurring violation, the threat to safety or the environment was

⁵ The Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011, Pub. L. No. 112-90, § 2(a)(1), 125 Stat. 1904, January 3, 2012, increased the civil penalty liability for violating a pipeline safety standard to \$200,000 per violation for each day of the violation, up to a maximum of \$2,000,000 for any related series of violations.

minimal. As for “culpability,” PHMSA noted that MarkWest did make good faith attempts to comply with the regulation, despite the violation.

After review of the record and the assessment criteria, I find that the civil penalty proposed in the Notice is reasonable.

Accordingly, having reviewed the record and considered the assessment criteria, I assess Respondent a total civil penalty of \$17,600 for violation of 49 C.F.R. § 195.440(b).

Payment of the civil penalty must be made within 20 days of service 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 (AMZ-341), P.O. Box 269039, Oklahoma City, Oklahoma 73125. 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 (AMZ-341), Federal Aviation Administration, Mike Monroney Aeronautical Center, P.O. Box 269039, Oklahoma City, Oklahoma 73125. The Financial Operations Division telephone number is (405) 954-8893.

Failure to pay the \$17,600 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 1 in the Notice for violation of 49 C.F.R. §§ 195.440. Under 49 U.S.C. § 60118(a), each person who engages in the transportation of hazardous liquids 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. With respect to the violation of § 195.440 (**Item 1**), Respondent must develop and distribute new baseline message material to affected municipalities, school districts, businesses, and residents near pipeline facility locations that adequately addresses the unique attributes and characteristics of the NGLs transported in the ALPS.

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

WARNING ITEMS

With respect to Items 2 and 3, the Notice alleged probable violations of Part 195.440 but did not propose a civil penalty or compliance order for these items. Therefore, these are considered to be warning items. The warning(s) were for:

49 C.F.R. § 195.440(i) **(Item 2)** — Respondent’s alleged failure to have program documentation, evaluation results, or other records to demonstrate that it had conducted a substantive review of Respondent’s Public Awareness Program, as required by API RP 1162 and § 195.400; and

49 C.F.R. § 195.440(a) **(Item 3)** — Respondent’s alleged failure to properly develop and implement a written continuing public education program that follows API RP 1162.

MarkWest did not contest these allegations. If OPS finds a violation of any of these items in a subsequent inspection, Respondent may be subject to future enforcement action.

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.

Under 49 C.F.R. § 190.215, Respondent has a right to submit a Petition for Reconsideration of this Final Order. The petition must be sent to: 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. PHMSA will accept petitions received no later than 20 days after receipt of service of this Final Order by the Respondent, provided they contain a brief statement of the issue(s) and meet all other requirements of 49 C.F.R. § 190.215. The filing of a petition automatically stays the payment of any civil penalty assessed. Unless the Associate Administrator, upon request, grants a stay, all other 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

Date Issued