U.S. Department
of Transportation

**Pipeline and Hazardous
Materials Safety
Administration**

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

FEB 5 2013

Mr. David Minielly
Vice President of Operations
SemGroup Corporation
White Cliffs Pipeline, LLC
3030 NW Expressway
Suite 1100
Oklahoma City, OK 73112

Re: CPF No. 3-2011-5012

Dear Mr. Minielly:

Please find the enclosed Final Order issued in the above-referenced case. It makes findings of violation and assesses a reduced civil penalty of $11,200. The penalty payment terms are set forth in the Final Order. This enforcement action closes automatically upon receipt of payment. Service of the Final Order by certified mail is deemed effective upon the date of mailing as 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. Chris Paul, McAfee & Taft, 1717 S. Boulder, Suite 900, Tulsa, OK 74119
Mr. David Barrett, Director, Central Region, OPS
Mr. Alan Mayberry, Deputy Associate Administrator for Field Operations, OPS

CERTIFIED MAIL - RETURN 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	)	
White Cliffs Pipeline, LLC,	)	**CPF No. 3-2011-5012**
Respondent.	)	

FINAL ORDER

On May 23-27 and June 20-23, 2011, pursuant to 49 U.S.C. § 60117, a representative of the Pipeline and Hazardous Materials Safety Administration (PHMSA), Office of Pipeline Safety (OPS), conducted an on-site pipeline safety inspection of the facilities and records of White Cliffs Pipeline, LLC (White Cliffs or Respondent) in Kansas and Colorado. White Cliffs is a subsidiary of SemGroup Corporation, which owns and operates the 527-mile crude oil pipeline in Colorado, Kansas, and Oklahoma.[1]

As a result of the inspection, the Director, Central Region, OPS (Director), issued to Respondent, by letter dated September 21, 2011, a Notice of Probable Violation and Proposed Civil Penalty (Notice). In accordance with 49 C.F.R. § 190.207, the Notice alleged that White Cliffs committed two violations of the hazardous liquid pipeline safety regulations in 49 C.F.R. Part 195 and proposed a civil penalty of $27,600 for the alleged violations.

White Cliffs responded to the Notice by letter dated October 11, 2011 (Response), contested the proposed civil penalty and requested a hearing. In accordance with 49 C.F.R. § 190.211, a hearing was held on March 28, 2012, in Kansas City, Missouri, before the Presiding Official from the Office of Chief Counsel, PHMSA. After the hearing, Respondent submitted additional information for the record by letter dated April 27, 2012 (Closing).

FINDINGS OF VIOLATION

The Notice alleged that Respondent violated the pipeline safety regulations in 49 C.F.R. Part 195, as follows:

[1] System information for calendar year 2011 was reported by White Cliffs pursuant to 49 C.F.R. § 195.49. *See also* SemGroup Corporation SEC Form 10-K, February 2012, at 10.

Item 1: The Notice alleged that Respondent violated 49 C.F.R. § 195.214(b), which states:

> **§ 195.214 Welding procedures.**
> (a) Welding must be performed by a qualified welder in accordance with welding procedures qualified under Section 5 of API 1104 or Section IX of the ASME Boiler and Pressure Vessel Code (incorporated by reference, *see* § 195.3). The quality of the test welds used to qualify the welding procedure shall be determined by destructive testing.
> (b) Each welding procedure must be recorded in detail, including the results of the qualifying tests. This record must be retained and followed whenever the procedure is used.

The Notice alleged that White Cliffs failed to retain the results of the qualifying test for welding procedure BW-2. Specifically, the Notice alleged that welding procedure BW-2 was used during the installation of two 12-inch block valves near the Arkansas River crossing in November 2009, but during the OPS inspection in 2011, Respondent could not locate the results of the qualifying test for the welding procedure.

In its written submissions and at the hearing, White Cliffs explained that procedure BW-2 had been qualified in accordance with § 195.214(a), but a record of the qualifying test most likely was misplaced when Respondent's engineering manager left the company. When Respondent realized the record was missing around the time of the OPS inspection in 2011, it took action to locate the record by contacting the former employee as well as the contractor who performed the qualification test. Once Respondent determined that it could not locate the results of the qualifying test, it performed a second qualification test to verify that procedure BW-2 was appropriate for the material being welded. The requalification test was completed June 15, 2011, before the conclusion of the OPS inspection. Respondent submitted the new qualification record along with a letter from the retired engineering manager, dated June 21, 2011, stating that BW-2 and several other procedures were destructively tested and qualified four years ago. Respondent stated that it will maintain the Welding Manual in hard copy and in electronic format with the engineering materials to prevent similar issues in the future.

Section 195.214(b) requires operators to record the results of qualifying tests for welding procedures and to retain those records. In this case, Respondent performed a qualification test of procedure BW-2, but misplaced the record of the qualification test sometime during the next four years.

Accordingly, after considering all of the evidence, I find that Respondent violated 49 C.F.R. § 195.214(b) by failing to retain a record of the qualifying test for welding procedure BW-2.

Item 2: The Notice alleged that Respondent violated 49 C.F.R. § 195.260(e), which states:

> **§ 195.260 Valves: Location.**
> A valve must be installed at each of the following locations:
> (a) . . . .

> (e) On each side of a water crossing that is more than 100 feet (30 meters) wide from high-water mark to high-water mark unless the Administrator finds in a particular case that valves are not justified.

The Notice alleged that White Cliffs failed to install valves on each side of the Arkansas River crossing, which is more than 100 feet wide from high-water mark to high-water mark. Specifically, the Notice alleged that Respondent's pipeline was placed into service on June 1, 2009, and operated for several months before Respondent measured the river crossing to be 120 feet and installed valves on each side of the crossing.

In its written submissions and at the hearing, White Cliffs explained that the river is narrow at this point and dry a significant portion of the year. Respondent stated that the contractor who designed the pipeline may have missed identifying this crossing as requiring valves because the high water mark to high water mark "may not have been readily apparent when originally surveyed."[2]

Respondent further explained that it discovered the issue when it was conducting an emergency response exercise in November 2009, several months after the pipeline was placed in service. During the exercise, personnel noted that the Arkansas River crossing might need valves on either side. "It was not readily apparent what the width of the river was 'high water mark to high water mark,'" but the company made a conservative measurement of 120 feet, and decided to retroactively install valves on either side of the river on November 18, 2009.[3] Respondent produced pictures of the crossing at the hearing.[4]

Based on the pictures of the crossing and Respondent's description of the narrow and normally dry conditions, it is reasonable to conclude that the applicability of § 195.260 may not have been apparent at certain times during the design and construction of the pipeline. Respondent is indeed credited for installing valves once it determined water levels had reached a point at which the crossing exceeded 100 feet.

The regulation, however, does not make exceptions for crossings that exceed 100 feet only during certain months of the year. According to the evidence in the record, seasonal fluctuations in water level at this location are typical. The crossing should have been measured when water was present in the river and the width from high water mark to high water mark was at or near its expected maximum levels to determine if valves would be required under the regulation.

As measured by Respondent in November 2009, the water crossing was 120 feet wide and valves had not been installed. Accordingly, after considering all of the evidence, I find that Respondent violated 49 C.F.R. § 195.260(e) by failing to install valves on each side of the water crossing prior to placing the pipeline in service.

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[2] Respondent hearing presentation at 15 (Mar. 28, 2012).

[3] Closing at 5 (citing Violation Report, Exhibit F).

[4] Respondent hearing presentation at 19-20.

These findings of violation will be considered prior offenses 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 $100,000 per violation for each day of the violation, up to a maximum of $1,000,000 for any related series of violations.[5] The Notice proposed a total civil penalty of $27,600 for the violations cited above.

In determining the amount of a civil penalty under 49 U.S.C. § 60122 and 49 C.F.R. § 190.225, I must consider the following criteria: the nature, circumstances, and gravity of the violation, including adverse impact on the environment; the degree of Respondent's culpability; the history of Respondent's prior offenses; any effect that the penalty may have on Respondent's 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.

Item 1: The Notice proposed a civil penalty of $11,200 for Respondent's violation of 49 C.F.R. § 195.214(b), for failing to retain a record of the qualifying test for welding procedure BW-2.

With regard to the *nature, circumstances, and gravity of the violation*, the failure to retain records to demonstrate that a welding procedure is safe to use poses a risk to safety. In this case, there is evidence that Respondent performed the qualification test to ensure the procedure was safe, but simply did not retain the record. Respondent completed a second qualification test after it realized the record could not be located, which demonstrated procedure BW-2 was safe. Also, Respondent explained that procedure BW-2 was identical to a procedure the company had used in the past, which Respondent did have the qualification records for. Accordingly, I find the violation minimally affected safety. A civil penalty of $11,200 appropriately reflects the nature, circumstances, and gravity of this violation.

With regard to *culpability*, Respondent objected to the "harsh and unsupported" designation by OPS that the company exhibited "a severe level of culpability" for the violation.[6] Respondent contested the notion that it had failed to take any action or minimally attempted to comply. The company claimed that it was cognizant of the regulatory requirement and took some steps to address the issue, but simply misplaced the record. Respondent also asserted there were extenuating circumstances. Specifically, SemGroup Corporation, the parent of White Cliffs, had unexpectedly filed for bankruptcy and Respondent's integrity engineer left the company shortly thereafter. It was during this transition that Respondent believes the record was misplaced.

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[5] After issuance of the Notice in this case, the Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011, Pub. L. No. 112-90, § 2(a), 125 Stat. 1905, increased the civil penalty liability for a pipeline safety violation to $200,000 per violation for each day up to a maximum of $2,000,000 for a related series of violations.

[6] Closing at 2.

Respondent's characterization of culpability as "harsh" and "severe" is not representative of the way PHMSA considers this assessment factor. PHMSA does not consider "severe culpability" or "high level culpability," nor does it consider culpability to be an aggravating factor. When evaluating an operator's culpability, PHMSA considers the extent to which the operator deserves the blame for the violation that occurred.[7] A pipeline operator is expected to be cognizant of the regulatory requirements applicable to its operations and is held responsible for complying with those requirements. Thus, an operator will generally be considered culpable for any failure to comply with the requirements absent some justification for the failure, such as an unforeseeable event outside of its control. Finding an operator culpable does not increase the level of the penalty, but if there is a lesser degree of blameworthiness, such as where there is some justification for a failure to comply, PHMSA may find it appropriate to reduce the civil penalty.

In this case, Respondent is culpable for its failure to retain the qualification test record and there was no justification for not retaining the record. The filing for bankruptcy by Respondent's parent company should not have interfered with the operator's routine maintenance of safety records. Employee turnover is also not an unforeseeable event. Respondent's subsequent efforts to locate the missing record and to requalify the procedure to come into compliance were prudent, but for the limited purpose of this assessment factor, such efforts do not lessen culpability for the violation that had already occurred. Likewise, evidence that Respondent qualified the procedure in the first place is not material to the question of whether Respondent is to blame for not retaining the test record. Finally, mere cognizance of the regulatory requirement does not itself justify a penalty reduction.

Respondent also suggested that the penalty should be reduced because the company is a "small or new operator." I find the record does not support reducing the penalty for this reason. Even a small or new operator is expected to comply with straightforward record keeping requirements, such as § 195.214(b). Moreover, Respondent operates over 500 miles of interstate pipeline and has been operating for several years.

Lastly with regard to culpability, Respondent objected to a reference in the Violation Report that the operator experienced issues with the quality of x-ray film in 2008. Respondent argued it was inappropriate to rely on such information. After reviewing the record, I find the reference to the 2008 issue does not impact the finding of culpability. In addition, the issue was not cited as a prior offense.[8] Accordingly, the reference did not influence the civil penalty.

With regard to *good faith in attempting to comply*, Respondent argued that it was unfair for OPS to suggest the company had acted in "bad faith" solely based on a single missing record, particularly since the company had qualified the welding procedure.[9] Respondent argued it had acted in good faith by following the required welding procedures, by believing the appropriate

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[7] *Belle Fourche Pipeline Co.*, CPF No. 5-2009-5042, at 19, 2011 WL 7006607 (Nov. 21, 2011). Final orders are also available at http://primis.phmsa.dot.gov/comm/reports/enforce/Enforcement.html; click Enforcement Actions.

[8] Violation Report at 13.

[9] Closing at 3-4.

qualification records were retained, by taking action to locate the missing record, and by immediately requalifying the welding procedure once it determined the record was missing.

There is no allegation in the record that White Cliffs acted in "bad faith." For purposes of guiding the determination of an appropriate penalty, OPS checked a box in the Violation Report that amounts to an allegation that there did not exist sufficient conduct on the part of the operator in attempting to comply to warrant a penalty reduction. When PHMSA finds there is not sufficient reason to reduce a penalty under the good faith consideration, it does not mean the agency has determined that the operator acted in bad faith or that the operator did not otherwise exhibit good faith in attempting to comply with the pipeline safety regulations in general.[10]

When considering good faith in attempting to comply, PHMSA looks at the attempt by the operator to comply with the cited regulation prior to the occurrence of the violation.[11] If an operator made a clear, demonstrable effort to comply with the cited regulation when the violation occurred, PHMSA may find it appropriate to reduce the civil penalty. In this case, there is an absence of evidence demonstrating what actions Respondent took to maintain the qualification test records during the four-year period following performance of the qualification test. The operator believed a particular employee had it, but such a belief does not indicate an attempt to comply that is sufficient to warrant reducing the penalty.[12]

Having reviewed the record and considered the assessment criteria, I find the proposed civil penalty is appropriate. Accordingly, Respondent is assessed a civil penalty of $11,200 for violation of 49 C.F.R. § 195.214(b).

Item 2: The Notice proposed a civil penalty of $16,400 for Respondent's violation of 49 C.F.R. § 195.260(e), for failing to install a pipeline valve on each side of a river crossing.

With regard to the *nature, circumstances, and gravity of the violation*, the failure to install valves near a water crossing can potentially compromise public safety and the environment in the event of a release. Fortunately, Respondent remediated the issue shortly after placing the line in service. The area was not a high consequence area, as defined in § 195.450.

OPS noted in the Violation Report that the agency discovered this violation during the 2011 inspection; however, the facts demonstrate that Respondent discovered the noncompliance on its own in November 2009 and remediated the issue the same month. This was well before the OPS inspection in 2011. Accordingly, the penalty should be adjusted to reflect that Respondent discovered and remediated the violation on its own prior to an inspection by OPS.

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[10] *See, e.g., Enron Transportation Services Co.*, CPF No. 4-2002-1003, at 2, 2003 WL 25429892 (Dec. 30, 2003) (finding that it did not appear the operator acted in "bad faith" even though respondent's personnel knew the telephone number on line markers had not been working for over three years).

[11] *Kinder Morgan Liquids Terminals LLC*, CPF No. 1-2011-5001, at 11, 2012 WL 6184429 (Oct. 17, 2012).

[12] Similarly to *culpability*, this finding does not *increase* the penalty.

With regard to *culpability*, Respondent noted that the river is narrow at the location of the crossing and dry a significant portion of time, which may have been why the contractor did not identify the crossing as requiring valves. Even when measured by Respondent several months after the pipeline was placed in service, "it was not readily apparent what the width of the river was 'high water mark to high water mark,'" but the company made a conservative measurement of 120 feet and installed valves.[13] Respondent argued that it was inaccurate for OPS to allege that the company had failed to attempt to adhere to the regulation, citing the company's installation of 37 main line block valves during construction, including 8 valves at river crossings.

The evidence in the record supports finding that the crossing was narrow and dry a significant portion of the time. Since the condition of the river most likely contributed to Respondent's failure to identify the crossing as requiring valves under the regulation, I find a penalty reduction is appropriate under this assessment factor.

With regard to *good faith in attempting to comply*, Respondent again objected to any allegation that it did not have good faith intentions to comply with the regulation, citing the number of valves that were installed during the construction project and the condition of the river that led to a conclusion, at the time, that the regulation did not apply.

Respondent has demonstrated that it made a good faith attempt to comply with the cited regulation by installing valves along the pipeline, including at a number of river crossings. The condition of the river most likely contributed to Respondent's failure to identify the crossing as requiring valves. Accordingly, I find a reduction to the penalty is warranted.

Finally, Respondent argued that to the extent PHMSA relied on any internal guidelines in arriving at the civil penalty amount, such agency action "would not be in compliance with federal rule-making requirements and [would be] arbitrary and capricious" under the Administrative Procedure Act (APA).[14]

The rulemaking requirements referred to by Respondent in the APA require, among other things, that federal agencies publish a notice in the *Federal Register* giving interested persons an opportunity to submit comments on a proposed rule before it is adopted by the agency.[15] The requirement to publish in the *Federal Register* does not apply to "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice."[16] Since internal guidelines would fall into the latter category of materials, publication in the *Federal Register* is not required.

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[13] Closing at 5 (citing Violation Report, Exhibit F).

[14] Closing at 6.

[15] 5 U.S.C. § 553.

[16] § 553(b)(A).

Accordingly, having reviewed the record and considered the assessment criteria, I withdraw the proposed penalty for violation of 49 C.F.R. § 195.260(e).

Respondent does not have a *history of prior offenses*. The company did not assert that the penalty would have an effect on its *ability to continue doing business*.

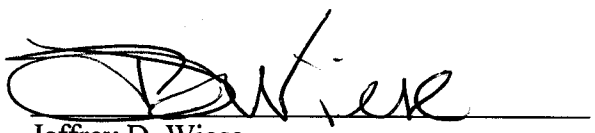
In summary, having reviewed the record and considered the assessment criteria for each of the Items cited above, I assess Respondent a total civil penalty of **$11,200**.

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 (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 $11,200 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.

Under 49 C.F.R. § 190.215, 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, DC 20590, no later than 20 days after receipt of the Final Order by the Respondent. Any petition submitted must 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. If Respondent submits payment of the civil penalty, the Final Order becomes the final administrative decision and the right to petition for reconsideration is waived.

The terms and conditions of this Final Order are effective upon service in accordance with 49 C.F.R. § 190.5.



Jeffrey D. Wiese
Associate Administrator
for Pipeline Safety

FEB 5 2013

Date Issued