



U.S. Department
of Transportation

Pipeline and Hazardous Materials
Safety Administration

DEC 30 2010

1200 New Jersey Ave., SE
Washington, DC 20590

Mr. Rodney L. Reese
Vice President
Valero Natural Gas Pipeline Company
One Valero Way
San Antonio, TX 78249-1112

Re: CPF No. 1-2007-1013

Dear Mr. Reese:

Enclosed please find the Final Order issued in the above-referenced case. It makes findings of violation and assesses a civil penalty of \$42,000. 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, 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. Byron Coy, Director, Eastern Region, PHMSA

Andrew J. Dalton, Counsel
Valero Services, Inc.
Room F2-160
One Valero Way
San Antonio, Texas 78249-1112

CERTIFIED MAIL – RETURN RECEIPT REQUESTED [7005 1160 0001 0039 9945]

**U.S. DEPARTMENT OF TRANSPORTATION
PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMINISTRATION
OFFICE OF PIPELINE SAFETY
WASHINGTON, D.C. 20590**

_____)
In the Matter of)

Valero Natural Gas Pipeline Company,)

Respondent.)
_____)

CPF No. 1-2007-1013

FINAL ORDER

During the week of May 29, 2007, 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 Valero Natural Gas Pipeline Company (Valero or Respondent) in Paulsboro, New Jersey. Respondent's 2.7-mile natural gas pipeline runs from the Philadelphia Airport, under the Delaware River, to a refinery on the New Jersey side of the river.

As a result of the inspection, the Director, Eastern Region, OPS (Director), issued to Respondent, by letter dated November 7, 2007, a Notice of Probable Violation and Proposed Civil Penalty (Notice). In accordance with 49 C.F.R. § 190.207, the Notice proposed finding that Valero had violated 49 C.F.R. §§ 192.465, 192.705, and 192.745 and proposed assessing a civil penalty of \$42,000 for the alleged violations.

Respondent responded to the Notice by letter dated January 18, 2008 (Response). Respondent stated that it would present evidence at hearing to establish that the alleged missed inspections and maintenance actually occurred. Respondent further stated that it would "raise issues concerning the reasonableness of the penalty," and requested a hearing. By letter dated May 21, 2009, however, Respondent withdrew its request for a hearing and asked for the right to submit a Brief in Lieu of In-Person Hearing (Brief). Respondent submitted its Brief on June 25, 2009.

FINDINGS OF VIOLATION

The Notice alleged that Respondent violated 49 C.F.R. Part 192 as follows:

Item 1: The Notice alleged that Respondent violated 49 C.F.R. § 192.465(b), which states:

(a)

(b) Each cathodic protection rectifier or other impressed current power source must be inspected six times each calendar year, but with intervals not exceeding 2½ months, to insure that it is operating.

The Notice alleged that Valero violated 49 C.F.R. § 192.465(b) by failing to inspect a certain rectifier adjacent to the Valero Paulsboro Refinery at least six times each calendar year, but with intervals not exceeding 2½ months, to insure that it was operating. Specifically, the Notice alleged that Valero only inspected the rectifier five times during 2006, instead of the required six times. Also, the Notice alleged that the inspection interval exceeded 2½ months on two occasions: (1) September 6, 2006 – January 3, 2007 (three months, 28 days); and (2) January 3, 2007 - April 9, 2007 (three months, six days).

In its Response, Valero stated that it would present evidence at the hearing showing that it had performed inspections at the required frequency. However, Respondent withdrew its request for a hearing and subsequently stated in its Brief that it did not contest the above-cited alleged violation.¹ Accordingly, based upon a review of all of the evidence, I find that Respondent violated 49 C.F.R. § 192.465(b) on two occasions by permitting more than 2½ months to pass between inspections of the rectifier located adjacent to Valero Paulsboro Refinery in Paulsboro, New Jersey.

Item 2: The Notice alleged that Respondent violated 49 C.F.R. § 192.705(b), which states:

§ 192.705 Transmission Lines: Patrolling.

(a)

(b) The frequency of patrols is determined by the size of the line, the operating pressures, the class location, terrain, weather, and other relevant factors, but intervals between patrols may not be longer than prescribed in the following table:

Class location of the line	At highway and railroad crossings	At all other places
1, 2	7½ months; but at least twice each calendar year	15 months; but at least once each calendar year
3	4½ months; but at least four times each calendar year	7½ months; but at least twice each calendar year.

The Notice alleged that Respondent violated 49 C.F.R. § 192.705(b) by failing to conduct patrols of its pipeline at one particular railroad crossing in a Class 3 location within the required interval of 4½ months, but at least four times each calendar year. Specifically, the Notice alleged that at the location where Respondent's pipeline intersected with a railroad crossing near the Philadelphia Airport, Respondent performed only two patrols in 2005 and three patrols in 2006, the last being on October 11, 2006. The only patrol that had occurred in 2007 as of the May 29,

¹ Brief, at 1.

2007 OPS inspection occurred was May 1, 2007. Therefore, according to the Notice, over 5½ months had passed between the last two pipeline/railroad crossing patrols.

In its Response, Valero stated that it would show at the hearing that this particular section of pipeline near the Philadelphia Airport was not in a Class 3 but a Class 2 location and that the required patrol frequency was twice a year, with inspection intervals not to exceed 7½ months. Respondent also stated that it would show that it had completed six patrols of its pipeline at this location during 2006. However, Respondent subsequently withdrew its request for hearing and stated in its Brief that it was not contesting the above-cited alleged violations.² Accordingly, based upon a review of all of the evidence, I find that Respondent violated 49 C.F.R. § 192.705(b) on four occasions by permitting more than 4½ months to pass between inspections of its gas transmission pipeline where it intersected a railroad crossing near the Philadelphia Airport.

Item 3: The Notice alleged that Respondent violated 49 C.F.R. § 192.475(a), which states:

§ 192.745 Valve Maintenance: Transmission Lines

(a) Each transmission line valve that might be required during any emergency must be inspected and partially operated at intervals not exceeding 15 months, but at least once each calendar year.

The Notice alleged that Respondent violated 49 C.F.R. § 192.745(a) by failing to inspect and partially operate two transmission line valves that might be required during an emergency, at maintenance intervals not exceeding 15 months but at least once each calendar year. Specifically, it alleged that Valero failed to perform valve maintenance on valves 2A and 2B, adjacent to the Valero Paulsboro Refinery, during calendar year 2006.

In its Response, Valero stated that it would provide evidence at the hearing to show that the required annual maintenance was performed in September 2006. However, Respondent subsequently withdrew its request for hearing and stated in its Brief that it was not contesting the above-cited alleged violations. Accordingly, based upon a review of all of the evidence, I find that Respondent violated 49 C.F. R. § 192.745(a) when it failed to perform required annual maintenance on valves 2A and 2B.

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. 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; the Respondent's ability to pay the penalty

² Brief, at 1.

culpability; the history of Respondent's prior offenses; the Respondent's ability to pay the penalty 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 \$42,000 for the violations cited above.

Item 1: The Notice proposed a civil penalty of \$14,000 for Respondent's violation of 49 C.F.R. § 192.465(b), for failing to inspect a certain rectifier at the appropriate intervals. In its Brief, Respondent did not contest the alleged violation but did challenge the amount of the civil penalty proposed in the Notice.

Valero argues that the \$14,000 civil penalty proposed for this violation is "clearly excessive in light of the agencies (sic) prior decisions" and that "it would be arbitrary and capricious for PHMSA to assess the proposed \$14,000 penalty." Respondent cites several PHMSA final orders from prior years that assessed civil penalties for violations of this same 49 C.F.R. § 192.465(b). The following table summarizes the cited cases, including the instant case:

Operator and CPF	Duration(s) of Violation	Number of Instances	Proposed Civil Penalty
Pacific Operators Offshore 5-2004-2002	2/10/2000 – 3/10/2000	1	\$1,000
Venoco Inc. 5-2002-0008	11/16/1998 – 9/25/2001	1	\$3,000
City of Danville 1-2002-0004	8/21/2000 - 12/4/2000 (inspected but not recorded)	1	0
Questar Pipeline Company 5-2003-1010	10/18/01 – 9/24/02	1	\$5,000
Valero Energy Corporation 1-2007-1013	11/22/06 – 1/3/07 AND 3/19/07 – 4/9/07	2	\$14,000

Respondent is correct that the above-listed enforcement actions resulted in varying civil penalties and that the proposed civil penalty in the instant case is the highest of those listed. However, this does not indicate that the proposed civil penalty is either excessive or improper.

Although the cases that Respondent cites all contain findings of violation of 49 C.F.R. § 192.465(b), the facts surrounding each violation differ. First, the violations occurred at different times. Respondent's violations of § 192.465(b) began at least five years after the ones cited in the other cases. In the most recent of the earlier cases, Questar Pipeline was assessed a civil penalty of \$5,000 for its violation of § 192.465(b); further, Pacific Operators Offshore was assessed a \$1,000 civil penalty for violation of § 192.465(b) two-and-a-half years earlier. Although the civil

penalties assessed in these cases have varied in amount, they show a consistent upward trend in civil penalties assessed. This trend is informed by a growing body of information about the dangers of external corrosion and the need to encourage compliance with Part 192.

In addition, the cited violations differ in the length and number of violation. Respondent's violation of § 192.465(b) is unique in that Valero came into compliance after a period of non-compliance and then immediately again exceeded the required inspection interval in the following cycle.

It is widely recognized that administrative agencies have wide latitude in enforcing the statutes that Congress has entrusted to them. As the Supreme Court stated in 1973, "The employment of a sanction within the authority of an administrative agency is... not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases."³ In the absence of statutory language mandating "uniformity of sanctions for similar violations," agencies are free to assess penalties in a manner that "best serves to deter violations and achieve the objectives of that statute."⁴ The Pipeline Safety Law (PSL) lists the factors that the Secretary "shall" and "may" consider in assessing civil penalties. Nowhere in the statute or in 49 C.F.R. Part 190 is there any provision requiring that the Secretary consider civil penalties assessed in other cases for similar violations in calculating a proposed penalty.⁵

Respondent's contention that it would be "arbitrary and capricious" for PHMSA to assess the proposed \$14,000 for this violation suggests, but does not explicitly state, an argument based upon requirements of the Administrative Procedure Act (APA). The APA states that courts will set aside agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."⁶ The courts have interpreted the term "arbitrary and capricious" under the APA to mean "unwarranted in law or without justification in fact."⁷ While administrative penalties have been set aside for such reasons, courts have been reluctant to set aside disparate remedies just because they vary in size or because different remedies are selected.

In *Butz*, the court declined to overturn the Department of Agriculture's suspension of a stockyard operator's registration as being overly harsh, noting that Congress had plainly intended to give the Secretary broad discretion in fashioning appropriate remedies. "Therefore, mere unevenness in the application of the sanction does not render its application in a particular case 'unwarranted in

³ *Butz v. Glover Livestock Commission Company, Inc.*, 411 U.S. 182, 187 (1973).

⁴ *Id.*

⁵ 49 U.S.C. § 60122(b) states: "Penalty considerations.--In determining the amount of a civil penalty under this section--(1) the Secretary shall consider-- (A) the nature, circumstances, and gravity of the violation, including adverse impact on the environment; (B) with respect to the violator, the degree of culpability, any history of prior violations, the ability to pay, and any effect on ability to continue doing business; and (C) good faith in attempting to comply; and (2) the Secretary may consider-- (A) the economic benefit gained from the violation without any reduction because of subsequent damages; and (B) other matters that justice requires."

⁶ 5 U.S.C. § 706(2)(A).

⁷ *Cross v. United States*, 512 F.2d 1212, 1218 (5th Cir. 1975).

law.”⁸ Once the fact of a violation had been properly established, “the views of the Secretary as to the appropriate sanction in a given case of violation are entitled to very great, if not conclusive, weight.”⁹

In its Brief, Respondent cited two Commodity Futures Trading Commission (CFTC) cases to support its contention that PHMSA’s imposition of the proposed penalty here would be arbitrary and capricious.¹⁰ However, those cases are inapposite because the CFTC had a policy that explicitly required the Commission to review and consider penalties imposed in other cases as part of its assessment of civil penalties.¹¹ Furthermore, in *R & W Technical Services v. CFTC*, the court found that the Commission had improperly excluded evidence from the record, and the civil penalty issued was \$2.745 million, whereas the next highest civil penalty ever assessed by the Commission had been less than \$100,000. In *Monieson v. CFTC*, the court similarly reduced the penalty because the CFTC had not appropriately construed the facts relied upon in assessing a \$500,000 penalty.

In this case, Respondent did not dispute PHMSA’s allegations of violation and has not alleged that PHMSA violated its own procedures or policies in proposing the penalty. Given that the company’s failure to monitor rectifier operability could result in accelerated corrosion and pose a public safety hazard, I find that the proposed civil penalty is not arbitrary and capricious. Accordingly, having reviewed the record and considered the assessment criteria, I assess Respondent a civil penalty of \$14,000 for violation of 49 C.F.R. §192.465(b).

Item 2: The Notice proposed a civil penalty of \$14,000 for Respondent’s violation of 49 C.F.R. § 192.705, for failing to patrol its pipeline at the intersection of a railroad crossing a minimum of four times per calendar, with a maximum interval between patrols of 4½ months. In its Brief, Respondent did not contest the violation or the proposed penalty of \$14,000. Respondent’s failure to conduct patrols could have allowed undiscovered excavation activity or equipment problems to persist, threatening the pipeline’s safety in a Class 3 location. Accordingly, having reviewed the record and considered the assessment criteria, I assess Respondent a civil penalty of \$14,000 for violation of 49 C.F.R. § 192.705.

Item 3: The Notice proposed a civil penalty of \$14,000 for Respondent’s violation of 49 C.F.R. § 192.745(a), for failing to test valves 2A and 2B during 2006. In its Brief, Respondent did not contest the alleged violation but did challenge the civil penalty proposed in the Notice.

⁸ *Butz*, 411 U.S. at 188.

⁹ *Cross*, 512 F.2d at 1218.

¹⁰ *R & W Technical Services LTD v. Commodity Futures Trading Commission*, 205 F.3d 165, 177 (5th Cir. 2000); *Monieson V. Commodities Futures Trading Commission*, 996 F.2d 852 (7th Cir. 1993).

¹¹ *R & W Technical Services LTD v. CFTC*, 205 F.3d at 177; *Monieson v. CFT C*, 996 F.2d at 862, 863. The court, in *Monieson*, noted that the CFTC itself had enumerated a number of factors to be considered in arriving at a specific sanction or at a combination of sanctions. These factors included “a review of the sanctions imposed in the past for similar violations” (quoting *In the Matter of The Siegel Trading Co.* [1977-1980 Transfer Binder] Comm.Fut.L.Rep. (CCH) ¶ 20,452 at 21,847 (CFTC July 26, 1977)). No equivalent PHMSA policy exists to consider or weigh the penalties imposed in other cases.

As in Item 1, Valero argues that the \$14,000 civil penalty proposed for this violation is “clearly excessive” in comparison to penalties assessed in past cases involving violations of the same regulation. Respondent argues that “it would be arbitrary and capricious for PHMSA to assess the proposed \$14,000 penalty.” Respondent cited several PHMSA final orders from prior years that assessed penalties for violation of 49 C.F.R. § 192.745(a). Respondent calculated the “per valve” in each case, based on the amount assessed for the violation and the number of missed tests. Respondent cited the following cases, with “per valve” amounts:

Operator and CPF No.	Years of Violation	“Per Valve” Calculation	Total Civil Penalty for violation of §192.745(a)
ANR Pipeline Company 2-2004-1004	2001-2001	\$277.78	\$5,000
Trunkline Gas Company 4-2004-1001	2000-2002	\$413.33	\$31,000
CenterPoint Energy Gas Transmission Company 4-2005-1008	2001-2004	\$520.59	\$88,500

Although not cited in Respondent’s Brief, the following table reflects all other recent (violations occurring during or after 2000) violations of § 192.745(a) in which a penalty was assessed, including the instant case:

Operator and CPF	Years of violation	“Per Valve” Calculation	Total Civil Penalty for Violation of §192.745(a)
Natural Gas Pipeline Company of America, a subsidiary of Kinder Morgan, Inc. 4-2005-1012	2002-2003	\$527.78	\$9,500
Dominion Transmission, Inc. 1-2004-1005	2000-2003	\$1,363.63	\$15,000
Pacific Operators Offshore 5-2007-0003	2003-2004	\$5,000	\$10,000
Valero Natural Gas Pipeline Company 1-2007-1013	2006	\$7,000	\$14,000

Respondent is correct that the listed cases show a wide range of civil penalties assessed for general violation of the § 192.745(a) when considered on a “per valve” basis. The cases suggest an upward trend in civil penalties assessed, but such a trend simply reflects an appropriate matter of agency discretion and is informed by the critical role of valves in emergencies and the need for them to function properly in the event of a release. There is nothing suspect or irrational about such a trend.

As stated above, the APA and case law interpreting it establish that once a proper agency determination has been made that a violation of law has occurred, an agency has broad discretion to assess a civil penalty that will achieve the objectives of the statute. Neither Congress nor this agency has required or recommended that PHMSA assess penalties that match those assessed in the past. Given the critical role valves play in the event of an emergency, Respondent’s failure to test valves 2A and 2B is a serious violation that could jeopardize public safety. Accordingly, having reviewed the record and considered the assessment criteria, I assess Respondent a civil penalty of \$14,000 for violation of 49 C.F.R. § 192.745(a).

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 **\$42,000**.

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 \$42,000 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 has the 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 the 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 but does not stay any other provisions of the Final Order, including any required corrective actions. 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

DEC 30 2010

Date Issued