

141 FERC ¶ 61,229
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
Cheryl A. LaFleur, and Tony T. Clark.

Brian Hamilton

Docket No. CP12-25-000

v.

El Paso Natural Gas Company

ORDER ON COMPLAINT

(Issued December 20, 2012)

1. On December 2, 2011, Mr. Brian Hamilton filed a complaint against El Paso Natural Gas Company (El Paso). In his complaint, Mr. Hamilton asserts that El Paso violated the safety regulations at 49 C.F.R. Part 192 by improperly lowering a portion of its pipeline that extends across his property and that El Paso failed to restore properly the property after completing the line-lowering work. For the reasons discussed below, the Commission will require El Paso to perform remedial compaction and restoration work where El Paso left Mr. Hamilton's property in a disturbed condition.

I. Background

2. In 1946, the Commission authorized El Paso to construct and operate approximately 251 miles of 24-inch diameter pipeline, known as the 1101 line or Dumas line, extending in a southwesterly direction from Dumas, Texas to El Paso's Eunice Plant near Eunice, New Mexico.¹ El Paso constructed the line in 1947. In 1964, El Paso constructed a 20-inch diameter pipeline parallel to the Dumas Line.²

¹ 5 F.P.C. 115 (1946).

² See 31 F.P.C. 1543 (1964).

3. The Dumas line and the parallel 20-inch line cross 2,805 feet of land owned by Mr. Hamilton, a farmer, in Lamb County, Texas.³ El Paso's rights on Mr. Hamilton's property stem from a March 26, 1947 right-of-way deed that gives El Paso rights to construct, maintain, and operate the pipeline in a 60-foot wide right-of-way.⁴ Mr. Hamilton acquired his property subject to this 1947 right-of-way deed.⁵ The deed requires disputes regarding damages to be resolved by arbitration.⁶

4. The events giving rise to these proceedings began in February 2005 when El Paso first noticed that ground cover over a pipeline segment crossing Mr. Hamilton's field had eroded, requiring maintenance work. El Paso determined that this pipeline section extending across Mr. Hamilton's property and across the property of an adjoining landowner needed to be lowered, i.e., the pipeline needed to be excavated and reburied at a greater depth.⁷

5. El Paso began the necessary remedial work of excavating the pipeline on May 2, 2005. El Paso lowered 720 linear feet of pipeline, disturbing an area 635 feet by 106 feet on Mr. Hamilton's property and 133 feet by 126 feet on a neighbor's property, in addition to 20 feet across a road separating the two properties. While the pipeline was exposed, El Paso inspected it and recoated it where needed. Then El Paso reburied the pipeline, providing as much as three feet of cover. El Paso's work was completed on May 13, 2005, and, according to El Paso, Mr. Hamilton was apparently satisfied with how El Paso left the property.⁸ On July 11, 2005, a heavy rain storm caused settling over the pipeline,

³ El Paso Answer at 2-3; Shafer Affidavit at 2.

⁴ El Paso Answer at 3; Complaint, Exhibit A.

⁵ Complaint at 1-2.

⁶ March 26, 1947 Right-of-Way Deed at 2 ("It is mutually understood and agreed that in the event any dispute arises relative to the amount of damages suffered arising from the laying, maintaining, operating or removing any of the lines of the Grantee, said damage, if not agreed upon, shall be ascertained by three disinterested persons."). See El Paso December 14, 2011 Motion to Dismiss at 11-12.

⁷ El Paso Answer at 3.

⁸ Mr. Billie King Affidavit at 2 ("At the conclusion of the project on May 13, 2005, I measured the areas of disturbance and talked to Mr. Hamilton . . . and Mr. Hamilton indicated he was satisfied . . ."). Mr. Hamilton has not disputed this statement.

as well as a wash out around the culverts. El Paso returned to Mr. Hamilton's field on August 8, 2005, to recover soil that washed off the right-of-way down a slope to the southwest.⁹ According to El Paso, however, before the company could correct the problem, Mr. Hamilton told El Paso on August 9, 2005, to vacate his property.¹⁰

6. More than four years later, Mr. Hamilton requested a hearing before an arbitration panel in Texas under the terms of the 1947 right-of-way deed to determine damages arising out of El Paso's activities in May and August 2005. On May 16, 2011, the arbitration panel awarded Mr. Hamilton \$16,745 as "compensation for all past, present, and future damages suffered by [Mr. Hamilton] as a result of [El Paso's] activities undertaken through the date of signing of this judgment in arbitration on and around [Mr. Hamilton's] land or [El Paso's] easement across such land."¹¹

7. Mr. Hamilton appealed the arbitration panel's judgment, asserting that the panel mistakenly failed to include attorney fees and costs in the award. A Texas district court confirmed the arbitration panel's award.¹²

II. Notice

8. On December 2, 2011, the Commission issued notice of Mr. Hamilton's complaint, which was published in the *Federal Register* on December 8, 2011.¹³ The Commission set December 21, 2011, as the comment deadline. The El Paso Municipal Customer Group and its members filed a timely motion to intervene. Timely, unopposed motions to intervene are granted by operation of Rule 214 of the Commission's Rules of Practice and Procedure.¹⁴

⁹ King Affidavit at 3.

¹⁰ El Paso Answer at 5.

¹¹ El Paso Answer at 5 (capitalization omitted). The record in this proceeding does not contain any specific findings of fact by the arbitration panel.

¹² *Hamilton v. El Paso Natural Gas Co.*, Cause No. 099835-00-E, Potter County Dist. Ct. (November 18, 2011).

¹³ 76 Fed. Reg. 76,707 (2011). On December 8, 2011, the Commission issued an additional notice changing the docket number for the proceeding but leaving the comment deadline unchanged. The Commission published this additional notice in the *Federal Register* on December 15, 2011. 76 Fed. Reg. 77,994 (2011).

¹⁴ See 18 C.F.R. § 385.214(c)(1) (2012).

9. On December 14, 2011, El Paso filed a motion to dismiss the complaint and an answer. Also, on December 14, 2011, Mr. Hamilton supplemented his complaint and, on January 18, 2012, Mr. Hamilton filed a late answer to El Paso's answer, which he also supplemented on January 24, 2012.¹⁵ El Paso filed a motion, asking the Commission to reject Mr. Hamilton's January 18, 2012 answer and any subsequent filings as untimely.

10. Answers to answers are not allowed under the Commission's rules. Nevertheless, the Commission will accept Mr. Hamilton's answer because it provided information that assisted in the decision making process.

III. Analysis

A. Complaint

11. Mr. Hamilton, a farmer who relies on a center pivot irrigation system for his farming operations, complains that El Paso violated the Department of Transportation's Pipeline and Hazardous Materials Safety Administration's (PHMSA) safety regulations when it lowered the Dumas line, resulting in "'swagging' or declination of the lowered pipeline due to insufficient distance, support, and space for a safe lowering."¹⁶ Specifically, Mr. Hamilton states that El Paso created excessive stress on the pipeline by lowering the line between two and four feet over a distance of only 740 feet, failed to properly space pylon supports, and failed to use proper embedment materials.¹⁷ In addition, Mr. Hamilton alleges that El Paso failed to: (1) use a crane or similar equipment to control the load and stress on the pipeline; (2) properly compact the soil; and (3) properly supervise the lowering with qualified personnel.

12. Mr. Hamilton also alleges that El Paso violated section 2.55(b) of the Commission's regulations, contending that "excavation of the pipeline for inspection and replacement may not be accomplished without requesting and receiving an exemption from [the Commission] unless all construction related activities remain in the original

¹⁵ Because Mr. Hamilton's answer was filed in response to El Paso's answer, Mr. Hamilton's answer was required to be filed within 15 days. 18 C.F.R. § 385.213(d) (2012).

¹⁶ Complaint at 1, 3.

¹⁷ Complaint at 3-4. El Paso's filed documentation indicates the lowered segment of line was 720 (as opposed to 740) feet. King Affidavit at 2.

right-of-way footprint.” He states that El Paso exceeded the boundaries of its right-of-way agreement.¹⁸

13. Finally, Mr. Hamilton contends that El Paso violated Subpart F of Part 157 of the Commission’s blanket certificate regulations, alleging that El Paso failed to provide notice of its activities at least 45 days in advance of its work,¹⁹ failed to obtain Commission approval for replacing a tap on the Dumas line,²⁰ failed to file a report of its activities, and failed to comply with Commission staff’s Upland Erosion Control, Revegetation, and Maintenance Plan (Upland Erosion Control Plan).

14. Mr. Hamilton asserts that El Paso’s violations could damage the integrity of the Dumas line and result in a catastrophic explosion.²¹ He also contends that he is unable to irrigate over or near El Paso’s pipeline easement because his center-pivot irrigation system is unable to cross the field where the work was done because of improper soil compacting.²²

15. Mr. Hamilton acknowledges that an arbitration panel awarded him monetary compensation for damages arising out of El Paso’s activities. However, he states that he is not seeking damages for the matters already tried and decided by the arbitration panel, but is seeking “relief which only [the Commission] has the power to provide: namely, enforcement of [the Commission’s] Regulations, and imposition of fines and remedial action by El Paso.”²³ Specifically, as remedial measures, Mr. Hamilton requests that the Commission: (1) order El Paso to excavate the pipeline again and position it such that it

¹⁸ See 18 C.F.R. § 2.55(b) (2012). Complaint at 9.

¹⁹ In the complaint, Mr. Hamilton that states that “El Paso failed to provide a notice of commencement of operations with appropriate phone numbers to contact [the Commission] as required by law.” Complaint at 10. In a subsequent filing, Mr. Hamilton states that El Paso’s employee orally contacted Mr. Hamilton just a few days before the project began and told him that El Paso was digging the line. Mr. Hamilton January 24, 2012 filing at 5.

²⁰ Complaint at 11. Mr. Hamilton contends that “a portion of new line was in fact welded to the old line in order to replace the old corroded tap.”

²¹ Complaint at 6. Mr. Hamilton hired an engineering consultant who believes that the pipeline should be re-excavated and re-buried.

²² Complaint at 18.

²³ Complaint at 6.

does not pose a safety risk; (2) order El Paso to return Mr. Hamilton's field to a condition suitable for his agriculture operations; (3) assess a penalty against El Paso; (4) award legal fees and associated costs; and (5) publicly reprimand El Paso for its violations.

B. Answer

16. In its answer, El Paso states that the complaint should be dismissed because Mr. Hamilton: (1) alleges violations of regulations over which the Commission does not have jurisdiction; (2) alleges violations of El Paso's blanket certificate, while the lowering of the line was not undertaken pursuant to El Paso's blanket certificate; and (3) is barred from raising the issues in the complaint by the doctrines of *res judicata* and collateral estoppel. El Paso also contends that Mr. Hamilton's request to impose fines and civil penalties are beyond the Commission's authority and is barred by the federal statute of limitations and the equitable doctrine of laches.²⁴ Each of these arguments will be discussed below.

C. Commission Determination

1. Commission Jurisdiction Over Pipeline Safety Matters

17. Mr. Hamilton contends that El Paso violated the safety regulations in 49 C.F.R. Part 192.

18. PHMSA, not the Commission, has jurisdiction for promulgating and enforcing pipeline safety standards.²⁵ PHMSA, through the pipeline safety standards in Title 49 of the Code of Federal Regulations,²⁶ regulates the design, materials, operating pressure, and amount of ground cover of interstate natural gas pipelines, as well as many other elements, in order to "provide adequate protection against risks to life and property posed

²⁴ El Paso Answer at 1.

²⁵ See *Tennessee Gas Pipeline Co.*, 93 FERC ¶ 61,100, at 61,262 (2000) ("Further, the [Department of Transportation], not the Commission, has exclusive authority to promulgate and enforce pipeline safety standards for natural gas pipelines."), *order on reh'g*, 95 FERC ¶ 61,169, at 61,551 (2001) ("The Commission is mindful of the safety issues; however, . . . [DOT] has exclusive jurisdiction over the safety of gas pipelines."), *Williams Gas Pipelines Central, Inc.*, 96 FERC ¶ 61,084, at 61,361 (2001) (stating that the DOT "has exclusive jurisdiction over the safety of gas pipelines").

²⁶ 49 C.F.R. Part 192 (2012).

by pipeline transportation and pipeline facilities”²⁷ The Title 49 safety regulations “are intended to ensure adequate protection for the public and to prevent natural gas facility accidents and failures.”²⁸ While the Commission seeks assurances that pipelines will comply with PHMSA’s guidelines,²⁹ the primary responsibility for pipeline safety resides with PHMSA.

19. In this regard, El Paso’s answer contains a letter, dated June 7, 2011, from PHMSA to U.S. Congressman Randy Neugebauer, the Congressman representing Mr. Hamilton’s district, stating that “[t]here is no indication the integrity of the pipeline has been compromised or that any violation of the pipeline safety regulations has occurred” and that “[b]ased on available information, PHMSA does not see a need for further action and considers the matters closed.”³⁰ In light of the PHMSA determination, the Commission will dismiss Mr. Hamilton’s complaint to the extent it alleges violations of PHMSA’s regulations.

2. Authority for El Paso’s Work on Mr. Hamilton’s Property

20. Mr. Hamilton asserts the line-lowering work was performed pursuant to either section 2.55(b) of the Commission’s regulations³¹ or the Commission’s blanket construction certificate program under Subpart F of Part 157, i.e., section 157.208(a).³² However, El Paso states that the lowering operation was conducted neither pursuant to its blanket certificate nor a replacement operation pursuant to section 2.55(b), as maintained by Mr. Hamilton. Rather, El Paso states, the work was conducted as routine operation

²⁷ Pipeline Safety Laws, 49 U.S.C. § 60102(a)(1) (2006).

²⁸ See *Tennessee Gas Pipeline Co.*, 136 FERC ¶ 61,173, at P 71 (2011) and *Transcontinental Gas Pipe Line Corp.*, 119 FERC ¶ 61,039, at P 46 (2007).

²⁹ *Tennessee Gas Pipeline Co., L.L.C.*, 139 FERC ¶ 61,008, at P 16 (2012) (“As part of the Commission’s review of applications for the construction and operation of natural gas pipeline facilities, the Commission must ensure that the applicant will comply with the DOT safety regulations.”).

³⁰ El Paso Answer, Exhibit L.

³¹ 18 C.F.R. § 2.55 (2012).

³² See 18 C.F.R. 157.208 (2012).

and maintenance authorized by the original Natural Gas Act (NGA) section 7(c) certificate.³³

21. Section 2.55(b) provides for the replacement of facilities which “have or soon will become physically deteriorated or obsolete, to the extent that replacement is deemed advisable” where (1) the replacement will not result in a reduction or abandonment of service and (2) the replacement facilities will have a substantially equivalent design delivery capacity, will be in the same right-of-way as the facilities being replaced, and will be constructed using the temporary work space used to construct the original facility.

22. El Paso did not replace any facilities but merely reburied the existing line deeper. The Commission finds that El Paso’s activities do not constitute a replacement of facilities under section 2.55(b). Since there was no replacement of facilities, the Commission finds that section 2.55(b) of the regulations does not apply here.

23. Alternatively, Mr. Hamilton contends that El Paso’s pipeline lowering operation was performed under section 157.208(a).³⁴ The Commission agrees with El Paso that its lowering operation on Mr. Hamilton’s property does not constitute a “miscellaneous rearrangement” as that phrase is used at section 157.208(a). Rather, the Commission believes it is reasonable to view El Paso’s reburial of the pipeline at a greater depth after finding evidence of the loss of ground cover over the line as falling within the routine operation and maintenance of an existing facility, which is authorized under the original certificate the Commission issued for the pipeline.

3. El Paso’s responsibility

24. It does not necessarily follow, however, that El Paso has no responsibilities merely because the activity neither falls within the replacement of facilities under section 2.55(b) nor under the blanket construction provisions. When the Commission authorizes a natural gas company to construct and operate pipeline facilities, the authority must necessarily include authority to maintain the pipeline. Indeed, section 157.14(a)(9)(vi) requires that an applicant for a certificate of public convenience and necessity shall

³³ El Paso Answer at 4 (“The activity was authorized through, and conducted in accordance with, [El Paso’s] internal environmental review procedures.”); Answer at 9-11.

³⁴ Section 157.208(a) provides that a blanket certificate holder is authorized to “make miscellaneous rearrangements of any facility, or acquire, construct, replace, or operate any eligible facility,” if the cost does not exceed an amount set forth in section 157.208(d) or if the project is required to restore service in an emergency.

certify in its application, among other things, that it will “maintain the facilities for which a certificate is requested in accordance with Federal safety standards.” Further, the eminent domain authority at NGA section 7(h) gives the certificate holder the right to “construct, operate, and *maintain* a pipe line.”³⁵ The eminent domain authority under NGA section 7(h) can only be as broad as the Commission’s certificate authorization.

25. The certificate obligation to maintain a pipeline is embedded in the Commission’s regulations. Rule 380.15(b) of the Commission’s regulations, for example, provides:

(b) Landowner consideration. The desires of landowners should be taken into account in the planning, locating, clearing, and maintenance of rights-of-way and the construction of facilities on their property, so long as the result is consistent with applicable requirements of law, including laws relating to land-use and any requirements imposed by the Commission.³⁶

26. Further, section 380.12(i)(5) of the Commission’s regulations³⁷ requires an applicant for an NGA section 7(c) construction certificate to explain how its construction plan provides environmental protection equivalent to or greater than that found in Commission staff’s Upland Erosion Control Plan.

27. The Commission staff’s Upland Erosion Control Plan and Wetland and Waterbody Construction and Mitigation Procedures represents the minimum expectations for pipelines operating and maintaining their facilities in perpetuity for all future activities

³⁵ (Emphasis added.)

³⁶ 18 C.F.R. § 380.15(b) (2012).

³⁷ 18 C.F.R. § 380.12(i)(5) (2012). Section 380.12(i)(5) of the Commission’s Rules and Regulations require an NGA application to:

(5) Describe proposed mitigation measures to reduce the potential for adverse impact to soils or agricultural productivity. Compare proposed mitigation measures with the staff’s current "Upland Erosion Control, Revegetation and Maintenance Plan", which is available from the Commission Internet home page or from the Commission staff, and explain how proposed mitigation measures provide equivalent or greater protections to the environment.

without regard to whether the activity was performed under the pipeline's blanket certificate, under section 2.55, or as a routine operation and maintenance activity. The NGA section 7(c) certificate gives El Paso certain rights of operation and maintenance, but along with those rights come certain responsibilities such as the responsibility to restore property to the condition in which it was found, i.e., "maintain" the property. Given the existence of these responsibilities, the Commission finds that compliance with Commission staff's Upland Erosion Control Plan and Wetland and Waterbody Construction and Mitigation Procedures is a minimum responsibility.

28. In general, Commission staff's Upland Erosion Control Plan requires that pipelines return landowner's property to the pre-activity condition. Specifically, section V. A. 5. requires pipelines to "[g]rade the construction right-of-way to restore pre-construction contours and leave the soil in the proper condition for planting." Section V. C. 1. requires that pipelines "test topsoil and subsoil for compaction at regular intervals in agricultural and residential areas disturbed by construction activities, conduct tests on the same soil type under similar moisture conditions in undisturbed areas to approximate preconstruction conditions, and use penetrometers or other appropriate devices to conduct tests." Section VII. A. 2. states that "[i]n agricultural areas, revegetation shall be considered successful if crop yields are similar to adjacent undisturbed portions of the same field." Section VII. A. 2. also requires that revegetation efforts continue until revegetation is successful.³⁸

29. Nothing in the Commission regulations or precedent indicates that the obligations of certificate holders to restore disturbed property end with the completion of the original construction. Such conclusion would mean that a pipeline company could initially be required to perform extensive restoration work, but then could leave the same lands completely disrupted following later maintenance activity. The Commission finds that the routine operation and maintenance requirement under the original certificate carries with it the basic obligation to restore the land affected to its original condition.

30. In response to Mr. Hamilton's complaint, El Paso generally states that all its activities were performed in compliance with all federal regulations.³⁹ However, El Paso does not explain the difference in appearance of the zone where it conducted the routine maintenance and operations activities, and does not adequately rebut the claim that it left Mr. Hamilton's property in a condition such that it interferes with Mr. Hamilton's

³⁸ Rule 380.15(e) also provides that "[v]egetation covers established on right-of-way should be properly maintained."

³⁹ El Paso Answer at 16.

farming operations, or, more specifically, the center-pivot irrigation system. These items are examined below.

4. Site visit

31. On February 16, 2012, Commission staff conducted an environmental inspection to assess the overall condition of the 635-foot-long section of right-of-way along Mr. Hamilton's property to assist the Commission's evaluation of the complaint.⁴⁰ Mr. Hamilton's primary concern was that the soil had been washed out shortly after backfilling during the summer of 2005, and the resultant repair by El Paso resulted in soils that were not compacted enough to support the irrigation equipment as it passed over the area of the trench line. Mr. Hamilton stated that the wheels of his self-propelled center pivot irrigation system become mired in the soil upon hitting the excavated trench line. Following the inspection, Commission staff issued a field inspection report, which was placed in the public record on March 5, 2012.

32. The team inspected the entire area of disturbance to assess the condition of the right-of-way. In general, the area appeared to have been restored to approximate original grade and the site was re-vegetated at the same density as adjacent undisturbed areas. The report states that the "area of disturbance did not reflect significant problems at the time of the inspection that would require substantial agricultural mitigation measures." The report discusses more closely-concentrated rodent or other small animal burrows in the area of disturbance over the trench line. The concentrations of burrows appeared to support the notion that the soil is softer and more penetrable in the disturbed area, particularly over the trench line.

33. To determine the approximate level of soil compaction of the construction area and adjacent off-site areas, Commission staff conducted field compaction testing, using a hand penetrometer, which is a device to measure soil compaction. Samples were taken at approximately 100-foot intervals along transects perpendicular to the trench line. Measurements indicated that the upper part of the soil profile (0-59 centimeters (cm)) was consistently loosely compacted, both on and off the right-of-way, with penetrometer measurements of less than 50 pounds per square inch (PSI). At a depth of 60 cm, the soils became substantially more compacted and penetrometer measurements of greater than 100 PSI were recorded throughout the project area, both on the right-of-way and off the right-of-way. However, along an approximately five to ten-foot-wide zone over the trench line, there was little soil resistance and the compaction measured less than 50 PSI beyond the 60 cm threshold. Regarding the irrigation system, the staff observed ruts

⁴⁰ On February 2, 2012, the Commission issued notice of an onsite visit of Mr. Hamilton's property.

across the area of disturbance but did not observe a “significant difference between the ruts beyond the disturbed area and the ruts crossing the trench line.” The staff observed a higher concentration of caliche rock throughout the disturbed area, but the rock “did not appear to present a problem with regard to soil structure, ability to till the soil, and soil productivity.”

34. Taking these considerations into mind, the Commission finds that to some extent El Paso did not properly restore Mr. Hamilton’s property. The inspection report states that compaction of soil over the trench line is not consistent with the rest of Mr. Hamilton’s property. Therefore, the Commission will require El Paso to properly compact the soil over the trench line such that it is consistent with the remainder of Mr. Hamilton’s property and such that Mr. Hamilton can continue to operate his center-pivot irrigation system. The remedial work required of El Paso is not extensive, and the Commission anticipates that El Paso can perform the necessary compaction relatively quickly.

35. The Commission denies the other types of relief Mr. Hamilton seeks, namely fines, attorney fees, and an order that El Paso be required to re-excavate the pipeline.⁴¹ The Commission finds the remedy ordered herein is appropriate.⁴² The Commission has no authority to award attorney’s fees. Finally, the relief granted herein adequately addresses the issue without requiring El Paso to re-excavate the pipeline.

5. Procedural Matters: Res Judicata, Collateral Estoppel, and Laches

36. El Paso contends that Mr. Hamilton’s complaint is barred by the doctrine of *res judicata* because the 1947 right-of-way agreement requires that all disputes be submitted to arbitration, the claims were fully litigated on the merits before an arbitration panel, and the arbitration award was affirmed by the Texas District Court.⁴³ El Paso asserts that

⁴¹ The Commission also dismisses Mr. Hamilton’s allegations of other Upland Erosion Control Plan violations such as the failure to have environmental inspectors present, failure to segregate the topsoil, and the failure to mark the right-of-way. Even assuming Mr. Hamilton’s allegations of violations of these additional Upland Erosion Control Plan violations are valid, there does not appear, five years after the events giving rise to these proceedings, a reasonable remedy.

⁴² When exercising its NGA section 22 penalty authority, the Commission considers the “nature and seriousness of the violation and the efforts to remedy the violation.” 15 U.S.C. 717t-1(c) (2006).

⁴³ El Paso Answer at 11.

Mr. Hamilton is requesting the “very same relief” here that he requested before the arbitration panel; namely damages as including the cost to re-excavate the pipeline and provide proper embedment and compaction. In the alternative, if the Commission finds that Mr. Hamilton’s cause of action is different, El Paso contends that Mr. Hamilton is collaterally estopped from relitigating the same issues before the Commission that were decided by the arbitration panel and the Texas District Court.

37. *Res judicata* and collateral estoppel are similar but distinct doctrines. The Commission has defined both doctrines as follows:

Res judicata applies only where a second suit or proceeding is brought on the same cause of action between the same parties or those in privity with them. The original judgment on the merits is conclusive not only as to matters actually raised but also to matters which could have been raised and litigated. Collateral estoppel is more limited in its effect; collateral estoppel forecloses a party from relitigating the same question decided adversely to him by a prior judgment on another cause of action; the conclusive effect of the prior adjudication constitutes an estoppel only with respect to the identical issues actually litigated and necessary to support the judgment.⁴⁴

38. The Commission does not find the legal arguments raised by El Paso persuasive. *Res judicata* does not bar Mr. Hamilton’s complaint because the cause of action before the arbitration panel and the cause of action before the Commission are not the same. Here, in responding to a complaint, the Commission is enforcing its regulations which require a jurisdictional natural gas company, like El Paso, to perform routine operation and maintenance activities and restore a landowners property to pre-activity conditions. That issue was not before the arbitration panel, which was only empowered to address “damages suffered arising from the laying, maintaining, operating or removing any of the lines.” Further, that issue could not be before the arbitration panel, since questions related to an NGA-regulated pipeline’s environmental responsibilities when engaging in routine maintenance and operations activities is a question solely for the Commission to decide and the Commission’s authority under the NGA cannot be undercut by outside private litigation. In a similar vein, the Commission rejects El Paso’s argument that collateral estoppel presents a bar to Mr. Hamilton’s claim. The issue in these proceedings involves El Paso’s compliance with the Commission’s regulations. Since only the

⁴⁴ *McCulloch Interstate Gas Corp.*, 9 FERC ¶ 61,152, at 61,305 (1979) quoting *Gulf Oil Corp. v. F.P.C.*, 563 F.2d 588, 602 (3rd Cir. 1977) (citations omitted).

Commission can determine whether its policies and certificate conditions have been satisfied, the issues here could not have been before the arbitration panel.

39. By failing to return the property to its prior condition, the Commission finds that El Paso is in violation of the Commission's regulations and policies. This is a matter of concern to the Commission, regardless of Mr. Hamilton's past litigation strategy. Taken to its logical extreme, El Paso's contention that the doctrines of *res judicata* and collateral estoppel bar Commission action in this case could lead to some untenable results. For example, if El Paso excavated the pipeline, lowered it without backfilling, and then compensated Mr. Hamilton for the damages—presumably at a level significantly greater than the arbitration award in this case—would the Commission be without recourse to require El Paso to return the property to a suitable condition when the Commission becomes aware of the situation? The answer must be in the negative and, for that reason, the doctrines cited by El Paso cannot be used to bar the Commission from carrying out its responsibilities under the NGA.⁴⁵

40. El Paso also contends that the equitable doctrine of laches is a bar to Mr. Hamilton's complaint. Under the doctrine of laches, a claim in equity can be barred if the person bringing the claim has delayed for such a time that permitting that person to prosecute the claim would be inequitable.⁴⁶ It is not inequitable for the Commission to require El Paso to carry out its responsibilities to restore Mr. Hamilton's property to its pre-routine maintenance condition, and El Paso is not harmed by the timing of this proceeding.

41. El Paso also contends that the federal statute of limitations, 28 U.S.C. § 2462 (2006), presents a bar to the Commission imposing a fine or civil penalty. El Paso claims that when a federal statute is silent with respect to the statute of limitations, as the NGA

⁴⁵ See *Northern Natural Gas Co.*, 125 FERC ¶ 61,127, at PP 3-4, 11-12 (2008), *order on reh'g*, 127 FERC ¶ 61,038 (2009). Northern filed a lawsuit, contending that a producer was producing gas migrating from one of Northern's storage fields. The jury found that Northern did not show by a preponderance of the evidence that its storage gas had migrated after July 1, 1993 (one of the elements that Northern needed to prove). When Northern filed an application with the Commission to expand its storage field boundary, the producer protested claiming that Northern was collaterally estopped from filing an application because of the jury verdict. The Commission held that the issue of whether the public convenience and necessity required approval of Northern's application is different from the issue that was before the jury.

⁴⁶ *Jack J. Grynberg v. Rocky Mountain Natural Gas Co.*, 90 FERC ¶ 61,247, at 61,826 (2000).

is, the federal statute of limitations applies. The federal statute of limitations provides that “an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date the claim first accrued.”⁴⁷ Here, the Commission is requiring certain remedial work to restore Mr. Hamilton’s property to the condition it was in prior to the routine operation and maintenance activity, rather than “any civil fine, penalty, or forfeiture, pecuniary or otherwise.” Thus, the Commission finds the five-year federal statute of limitation cited by El Paso does not apply in this case.

IV. Conclusion

42. At a hearing held on December 20, 2012, the Commission on its own motion received and made a part of the record all evidence, including the application, as supplemented, and exhibits thereto, submitted in this proceeding and upon consideration of the record,

The Commission orders:

(A) The complaint filed by Mr. Hamilton is granted, in part, as discussed in this order.

(B) El Paso shall restore Mr. Hamilton’s property to pre-construction conditions as described above.

(C) Within 60 days of the date of this order, El Paso shall consult with Mr. Hamilton over questions of timing of remedial work and optimal soil conditions, and file a plan of action for the Commission’s review and approval prior to completing any remedial work. The plan of action shall include provisions describing compaction testing.

⁴⁷ 28 U.S.C. § 2462 (2006).

(D) Within 30 days following completion of the Commission-approved remedial work, El Paso shall submit a report documenting the work performed.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.