

Issued on: October 7, 2016.

Larry W. Minor,

Associate Administrator for Policy.

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DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration (PHMSA)

[Docket No. PHMSA–2016–0101]

Pipeline Safety: General Policy Statement; Civil Penalties

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: Notice.

SUMMARY: The purpose of this policy statement is to advise pipeline owners and operators that the Pipeline and Hazardous Materials Safety Administration (PHMSA) has now made a civil penalty framework accessible on its Web site and, effective October 17, 2016, a respondent in an enforcement case may request a proposed civil penalty calculation related to that case. It further advises pipeline owners and operators that PHMSA will, as appropriate, issue higher penalties in order to apply stronger deterrence and drive down incident risk.

DATES: A respondent in an enforcement case may request the proposed civil penalty calculation associated with its case, effective October 17, 2016. In addition, the civil penalty summary attached to this policy statement is now available on PHMSA's Web site.

FOR FURTHER INFORMATION CONTACT: Rod Dyck, Enforcement Director, *rod.dyck@dot.gov*, 202–366–3844.

SUPPLEMENTARY INFORMATION: In accordance with chapter 601 of Title 49, United States Code, after notice and an opportunity for a hearing, the Associate Administrator may assess a civil penalty for a violation of a pipeline safety regulation or order (49 U.S.C. 60122). In order to provide summary guidance to operators about the penalty ranges for proposed penalties, PHMSA currently provides a civil penalty framework upon request, as referenced in an earlier notice “Pipeline Safety: Administrative Procedures; Updates and Technical

Corrections” (78 FR 58897; September 25, 2013). PHMSA will now post the civil penalty framework on its Web site in order to provide greater transparency regarding administrative civil penalties. This summary will be updated periodically and is available at <http://www.phmsa.dot.gov>. Effective October 17, 2016, PHMSA will also provide a more detailed proposed civil penalty calculation upon request to a respondent, along with the violation report, and any other items in the case file, as defined in 49 CFR 190.209.

PHMSA's proposed penalty calculation methodology is based upon 49 U.S.C. 60122 and 49 CFR 190.225. The Associate Administrator must consider:

(1) The nature, circumstances and gravity of the violation, including adverse impact on the environment; (2) The degree of the respondent's culpability; (3) The respondent's history of prior offenses; (4) Any good faith by the respondent in attempting to achieve compliance; and (5) The effect on the respondent's ability to continue in business. The Associate Administrator may consider: (1) The economic benefit gained from violation, if readily ascertainable, without any reduction because of subsequent damages; and (2) Such other matters as justice may require.

Consistent with this statutory direction, enforcement personnel use a proposed civil penalty calculation to document consideration of these factors and how its personnel arrive at a proposed civil penalty.

The Pipeline Safety Act of 2011 (“the 2011 Act”) increased the maximum administrative civil penalties for violation of the pipeline safety laws and regulations to \$200,000 per violation per day, with a maximum of \$2,000,000 for a related series of violations. These administrative civil penalty maximums apply to violations that occur or are discovered after January 3, 2012. In order to apply stronger deterrence and drive down incident risk, PHMSA intends to exercise its current authority, as appropriate, which will result in higher penalties across the board for any violation of Federal pipeline safety standards. In addition, PHMSA will give greater weight to certain factors when assessing civil penalties, specifically for violations that: (1) Are causal to incidents or that increase the severity of incidents, including those involving

smaller hazardous liquid spills or resulting in methane releases; (2) are “repeat offenses” or violations of the same safety standard in the past five years; and (3) involve multiple instances of the same violation. Finally, PHMSA recently increased its maximum civil penalties to account for changes in inflation. (Pipeline Safety: Inflation Adjustment of Maximum Civil Penalties, 81 FR 42564, June 30, 2016).

Administrative civil penalties constitute only one of the enforcement tools that PHMSA employs to promote compliance with the pipeline safety regulations. While PHMSA is providing greater transparency to the regulated community, the agency retains broad discretion in its evaluation of the assessment considerations outlined in its regulations. The release of these additional materials regarding the proposed calculation of civil penalties will not otherwise alter the administrative enforcement process.

Civil Penalty Framework

This summary provides a general overview to assist the public in understanding civil penalty calculations. Following an inspection or investigation of a pipeline facility that reveals a probable violation, the Office of Pipeline Safety prepares a Violation Report to document the violation. For any violation that warrants a civil penalty, data from the completed Violation Report is used to calculate risk-based civil penalties considering the statutory assessment factors in 49 U.S.C. 60122 and 49 CFR 190.225.

The assessment factors are listed below in the left side column of the table. The middle column explains the range of potential conduct that was observed by PHMSA in connection with the violation, generally from least to most severe. A Violation Report must make a selection within this range for each assessment factor. The right side column provides a range for the civil penalty that may be assessed under each assessment factor.

A civil penalty for a single violation is arrived at by combining the amounts assigned under each assessment factor. Application of the assessment factors in an individual case will depend on the facts specific to that case.

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Assessment Consideration	Range of Conduct	Civil Penalty Range
Nature	<ul style="list-style-type: none"> - Records: <ul style="list-style-type: none"> ▪ Examples: Missing, inaccurate, or incomplete records - Activities: <ul style="list-style-type: none"> ▪ Examples: Performance or conduct of activities such as inspections, tests, maintenance, meetings, notifications, reports, emergency response, not preparing procedures, or not following procedures - Equipment/Facilities: <ul style="list-style-type: none"> ▪ Examples: Equipment not installed, missing, defective, inoperative, not properly sized, or not compatible with transported commodity 	<p>\$1,728</p> <p>↓</p> <p>\$8,640</p>
Circumstances	<ul style="list-style-type: none"> - Operator self-reported the violation to PHMSA (PHMSA includes State Partners) before it was discovered by PHMSA - PHMSA discovered the violation - Public reported the violation to PHMSA (including State Partners) or public inquiry lead to investigation, verified by PHMSA 	<p>Variable credit</p> <p>↓</p> <p>\$13,824</p>
Gravity	<ul style="list-style-type: none"> - Records violation - Pipeline safety or integrity was minimally affected - Pipeline safety or integrity was compromised in areas that are not in an HCA or, for Hazardous Liquids, also if not in an HCA “could affect” segment - Pipeline safety or integrity was significantly compromised in areas that are not in an HCA or, for Hazardous Liquids, also if not in an HCA “could affect” segment. - Pipeline safety or integrity was compromised in an HCA (High Consequence Area¹) or, for Hazardous Liquids, also if in an HCA “could affect” segment - Pipeline safety or integrity was significantly compromised in an HCA or, for Hazardous Liquids, also if in an HCA “could affect” segment - Probable violation increased the severity of an accident/incident - Probable violation was a causal factor for an accident /incident 	<p>\$1,728</p> <p>↓</p>

¹ See 49 CFR Parts 192 and 195 for definition of a high consequence area.

	<ul style="list-style-type: none"> - The number of instances of a violation incrementally increases the penalty <p>Accident/Incident Consequences Factor Multipliers for the base penalty applied to all assessment considerations:</p> <ul style="list-style-type: none"> - Reportable accident or incident - Unintentionally released Gas - Hazardous Liquid releases - Hospitalization injuries - Fatalities 	Unlimited
Culpability	<p>Based on operator actions before the violation occurred:</p> <ul style="list-style-type: none"> - After the operator found the non-compliance, the operator took documented action to address the cause of the non-compliance, and corrected the non-compliance before PHMSA learned of the violation. Does not apply for operator Post-accident actions. - After the operator found the non-compliance, the operator took documented action to address the cause of the non-compliance, and was in the process of correcting the non-compliance before PHMSA learned of the violation. Does not apply for operator Post-accident actions. - The operator took significant steps to comply with a requirement but failed to achieve compliance for reasons such as unforeseeable events/conditions that were partly or wholly outside its control. - The operator took significant steps to comply with a requirement but did not achieve compliance. - The operator failed to take appropriate action to comply with a requirement that was clearly applicable. - The operator made a conscious decision not to comply with a requirement that was clearly applicable. - The operator took egregious action (such as manipulation of records or reconfiguration of equipment) that evidenced an effort to evade compliance or conceal non-compliance. 	<p>-\$25,920</p> <p>↓</p> <p>\$2,056,320</p>
History of Prior Offenses	<ul style="list-style-type: none"> - Prior findings of violation include a civil penalty or compliance order in the five years that precede the date of the Notice. The prior findings of violation may be the same, similar, or different violations. 	<p>\$0</p> <p>↓</p> <p>\$17,280</p>
	Based on operator actions before the violation occurred:	

Good Faith	<ul style="list-style-type: none"> - The operator's interpretation of the requirement was reasonable, and it had a credible justification for its actions or lack of actions. - The operator did not make a reasonable interpretation of the requirement or did not have a credible justification for its actions or lack of actions. 	<p>-\$17,280</p> <p>↓</p> <p>\$0</p>
<p>Other Matters as Justice May Require</p> <p>(Any and all appropriate factors will be applied to the violation)</p> <p>Other Matters (cont'd)</p>	<p>Examples of individual Matters :</p> <ul style="list-style-type: none"> - Operator's written procedures exceeded a regulatory requirement and the non-compliance was against the requirements of the procedure that exceeded the regulation. - Violation of Section 60129, Protection of employees providing pipeline safety information - Reporting- Not reporting a known death with a telephonic or accident/incident report; Not reporting a known reportable injury in water with a telephonic or accident/incident report; Telephonic or accident/incident report not submitted before PHMSA discovers it was not submitted. - Additional penalty for LNG violation per (190.223(c)) - Failure to comply with any PHMSA order including CAO or SO - Repeat Violation - Repeat of a Repeat Violation 	<p>-\$17,280</p> <p>↓</p> <p>\$2,056,320</p>
Economic Benefit	<ul style="list-style-type: none"> - Economic Benefit gained from not complying with the regulation. 	Variable addition
Ability to Pay and/or Ability to Continue in Business	<ul style="list-style-type: none"> - Determination based on additional information that is presented later by operator (Ability to pay is not valid for violations occurring after 1/2/2012). 	Variable credit

The total civil penalty per violation is calculated based on these assessment considerations and adjusted for the applicable daily and series limit. If a calculated penalty exceeds the maximum amount permitted by statute, the penalty will be reduced by the amount exceeding the cap. An administrative civil penalty under 49 U.S.C. 60122(a)(1) is capped at \$200,000 per day for violations occurring after January 3, 2012. The maximum civil penalty for a related series of violations is \$2,000,000 for violations occurring after January 3, 2012.

For an administrative civil penalty that occurs on or after August 1, 2016, the maximum civil penalty limit was increased to \$205,638 per day and \$2,056,380 for a related series of violations pursuant to the requirements of Section 701 of the "Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015" (Pub. L. 114-72), which amended the "Federal Civil Penalties Inflation Adjustment Act of 1990" (Pub. L. 101-410) (Inflation Adjustment Act).

Issued in Washington, DC, on October 11, 2016, under authority delegated in 49 CFR 1.97.

Linda Daugherty,

Deputy Associate Administrator for Field Operations.

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