

OCT 22 2009

VIA CERTIFIED MAIL – RETURN RECEIPT REQUESTED [7004 2510 0003 6895 8778]

Mr. David Justin
Vice President, Operations
Sunoco Logistics Partners, L.P.
1735 Market Street Ste LL
Philadelphia, PA 19103-7538

RE: CPF No. 1-2007-5001

Dear Mr. Justin:

Enclosed is this agency's decision on the Petition for Reconsideration filed by your company in the above-referenced case. For the reasons stated in the decision, the Petition is denied. The penalty payment terms are set forth in the Final Order. This enforcement action closes automatically upon payment. Service of this decision by certified mail is complete upon mailing 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

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

_____)	
In the Matter of)	
)	
Sunoco Pipeline L.P.,)	CPF No. 1-2007-5001
)	
Petitioner.)	
_____)	

DECISION ON PETITION FOR RECONSIDERATION

In a September 2, 2009 Final Order, I found that Sunoco Pipeline L.P. (Sunoco or Petitioner) had failed in two respects to “follow” its “manual of written procedures for conducting normal operations and maintenance activities and handling abnormal operations and emergencies.”¹ I assessed the company a total civil penalty of \$150,000 for those violations.²

On September 15, 2009, Sunoco filed a Petition for Reconsideration of that Final Order.³ In its Petition, Sunoco asked for permission to review the presiding official’s recommendation for final action in this matter. Sunoco also offered three substantive arguments in support of its request for reconsideration of the Final Order, namely, that the Order imposed a separate and distinct duty upon Petitioner to ensure that its employees actually follow the company’s written procedures, a duty that has no basis in the pipeline safety regulations; that the imposition of a civil penalty is not supported by the facts of this case or the law; and that certain mitigating factors warrant reduction in the amount of the civil penalty assessed in the Final Order.⁴

For the reasons stated below, I am denying Sunoco’s request to review the presiding official’s recommendation for final action in this case, rejecting its substantive arguments as repetitious and unpersuasive, and affirming the September 2, 2009 Final Order without modification.

¹ 49 C.F.R. § 195.402(a).

² 49 C.F.R. § 190.213 (authorizing issuance of Final Orders by Associate Administrator).

³ 49 C.F.R. § 190.215 (filing of Petitions for Reconsideration).

⁴ Sunoco also requested that the Final Order be stayed pending the disposition of its request for the presiding official’s recommendation. As the timely filing of a Petition automatically stays the payment of a civil penalty under 49 C.F.R. 190.215(d) and given that I am denying the aforementioned request, no further action on its request for a stay is required.

I. Discussion

A. Sunoco's Request for the Presiding Official's Recommendation for Final Action

An operator who receives a notice of probable violation is afforded certain rights under the pipeline safety regulations. Those rights include the right to submit a written response to the notice; to request an informal hearing; to ask for and receive the material in the case file prior to that hearing; to offer relevant information and evidence, and to examine the information and evidence offered by PHMSA, at such a hearing; and to request an opportunity to submit additional, relevant material for the record within a reasonable time after a hearing.⁵

Moreover, the pipeline safety regulations also impose certain obligations on those tasked with adjudicating a notice. For example, though “conducted informally without strict adherence to the rules of evidence[,]” an attorney from the Office of Chief Counsel serves as the presiding official at a hearing. In that capacity, he or she is responsible for conducting the proceeding, considering all of the material of record, and “prepar[ing] a written recommendation as to final action in the case.” That recommendation is then forwarded, along with the other material in the case file, to the Associate Administrator for “final administrative action.”⁶ In most cases, such action comes by way of a final order that contains “[a] statement of findings and determinations on all material issues, including a determination as to whether each alleged violation has been proved” and, “[i]f a civil penalty is assessed, the amount of the penalty and the procedures for payment of the penalty[.]”⁷

The presiding official's recommendation for final action serves a vital role in the adjudicatory process, and that is why I carefully consider these recommendations in each and every case. However, those recommendations are privileged, intra-agency communications, the confidentiality of which must be protected to encourage open and frank discussions between the Associate Administrator and the presiding official. Moreover, a presiding official's recommendation is also a deliberative and pre-decisional document, i.e., the final decisionmaking authority in a case lies with the Associate Administrator, not the presiding official. Accordingly, the disclosure of the latter's recommendation—a recommendation which might not be adopted in the final order—is not required to avoid the disruption and public confusion that would result from the release of such advisory opinions.

⁵ 49 C.F.R. §§ 190.209-190.211.

⁶ 49 C.F.R. § 190.211

⁷ 49 C.F.R. § 190.213(c)(1)-(2).

Furthermore, the Associate Administrator is not required by the pipeline safety laws to provide an operator with a presiding official's recommendation. Rather, PHMSA is only obliged to disclose the material in the case file prior to a hearing, and a presiding official's recommendation, completed after that hearing occurs, does not fall within the scope of that requirement. For these reasons, I am denying Sunoco's request for the presiding official's recommendation for final action in this case.

B. Sunoco's Substantive Arguments for Reconsideration of the Final Order

Sunoco's first substantive argument on reconsideration is that it has no duty under the pipeline safety regulations to ensure that its employees actually follow its written procedures. The merits of that argument—already considered and rejected in the Final Order—need not be reconsidered here.⁸ Regardless, the law on this issue is unequivocal: an operator has an affirmative duty to ensure that its written procedures are followed and is responsible for any acts of non-compliance by its employees or contractors.⁹

With regard to Sunoco's second argument, the factual and legal support for imposing a civil penalty in this case is well stated in the Final Order. That includes Petitioner's culpability for failing to ensure that its employees actually followed the company's written procedures and the magnitude of the spill—some 10,000 barrels of crude oil from a breakout tank—that occurred as a result of those failures.

Finally, the post-hoc measures and other mitigating factors identified by Sunoco do not warrant a reduction in the civil penalty. As noted in the Final Order, all of those factors were carefully considered by OPS in calculating the amount proposed in the original notice.¹⁰ Having examined all of the evidence and arguments relevant to that determination again on reconsideration, I find that no grounds exist for reducing the civil penalty amount assessed in this case.

⁸ 49 C.F.R. § 190.215(c) (stating that the Associate Administrator does not consider repetitious arguments).

⁹ *In the Matter of AGL Resources, Inc.*, CPF No. 2-2006-3003, Final Order (Jul. 7, 2009) (noting that “it is well settled that pipeline operators are ultimately responsible for the acts and omissions of their employees, contractors, and agents in complying with the pipeline safety regulations[.]” that “such a policy conforms to the traditional doctrine of respondeat superior under which [an employer] is legally responsible for the acts of its employees and agents acting within the scope of their employment[.]” and that under any contrary interpretation, “no pipeline operator that had adopted adequate safety procedures but then failed to monitor or supervise its personnel in carrying them out would ever be held liable for its own regulatory violations.”).

¹⁰ *In the Matter of Sunoco Pipeline L.P.*, CPF No. 1-2007-5001, Final Order, p. 5, fn. 16 (Sep. 2, 2009) (discussing the information and analysis provided in the “Civil Penalty Assessment Considerations” portion of the Violation Report).

Accordingly, I am denying Sunoco's September 15, 2009 Petition in its entirety and affirming the September 2, 2009 Final Order without modification. This decision on reconsideration is the final administrative action in this proceeding.

Jeffrey D. Wiese
Associate Administrator
for Pipeline Safety

Date Issued