



U.S. Department
of Transportation

**Research and
Special Programs
Administration**

400 Seventh St., S.W.
Washington, D.C. 20590

JUN 23 2004

Ms. Sheila Doody Bishop
Attorney-at-Law
Alyeska Pipeline Service Company
P. O. Box 60469
Fairbanks, Alaska 99706

RE: Alyeska Pipeline Service Company - CPF No. 5-2000-5006

Dear Ms. Bishop:

Enclosed is the Decision on the Petition for Reconsideration filed in the above-referenced case. The Associate Administrator for Pipeline Safety has denied the relief sought by Respondent. On December 31, 2003, a Final Order was issued to Alyeska Pipeline Service Company by the Associate Administrator for the Office of Pipeline Safety. It made findings of violation with respect to Items 1a, 2, 3a, and 8, withdrew the allegations of violation with respect to Items 1b, 3b, 6a and 7, and required certain corrective actions and assessed a civil penalty of \$62,500. At such time that the civil penalty is paid and the terms of the compliance order are completed, as determined by the Director, Western Region, this enforcement action will be closed.

Your receipt of this Decision on the Petition for Reconsideration constitutes service under 49 C.F.R. § 190.5.

Sincerely,

James Reynolds
Pipeline Compliance Registry
Office of Pipeline Safety

Enclosure

cc: Mr. Rob Shoaf, Vice President, Alyeska Pipeline
Chris Hoidal, Director, OPS Western Region

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

**DEPARTMENT OF TRANSPORTATION
RESEARCH AND SPECIAL PROGRAMS ADMINISTRATION
OFFICE OF PIPELINE SAFETY
WASHINGTON, DC 20590**

In the Matter of _____)
Alyeska Pipeline Service Company, _____)
Respondent _____)

CPF No. 5-2000-5006

DECISION ON PETITION FOR RECONSIDERATION

On December 31, 2003¹, pursuant to 49 U.S.C. § 60112, the Associate Administrator for the Office of Pipeline Safety issued a Final Order in this case, assessing Respondent a civil penalty of \$62,000 for violations of 49 C.F.R. §§ 192.179, 192.463, 195.401, 195.406(a)-(b) and 195.420(b). The Final Order also required Respondent to take certain measures to correct the alleged violations. On February 2, 2004, Respondent filed a Petition for Reconsideration (Petition) requesting reconsideration of that Final Order. The Petition maintained that the Office of Pipeline Safety: 1) Conducted a rule making through the enforcement action; 2) Ignored the performance-based initiative long espoused by the agency; 3) Failed to base the Final Order on a single legal precedent; 4) Issued the Final Order more than (3) three years after Respondent submitted its April 14, 2000 response; 5) Violated 49 C.F.R. § 190.213(e) in failing to issue the Final Order within 45 days of receipt of the case file, and in failing to notify Respondent of the reason for the substantial delay and date by which the Final Order was expected to be issued; and 6) Violated the Executive Order 12988 that directs agencies to "develop specific procedures to reduce delay in decision making . . . and to invest maximum discretion in fact-finding officers to encourage appropriate settlement of claims as early as possible." 61 Fed. Reg. 4729, 4732 (Feb.7, 1996).

In accordance with 49 C.F.R. § 190.213, in the event the Associate Administrator, OPS reconsiders a final order, a final decision on reconsideration may be issued without further proceedings. Respondent's Petition did not request that the civil penalty be withdrawn or reduced waiving further right to appeal.

Violation #1

1. **OPS Interpretation**

In its petition, Respondent objected to a finding that it violated §192.179(b) by failing to protect a block valve because nothing was in place for several months to alert anyone in the vicinity of the presence of the valve. Respondent argued that OPS' interpretation of the regulation is misplaced and goes beyond the regulatory language, as the regulation does not

¹The time period for filing the Petition was extended to January 14, 2004 due to a mix up with the mailing location, which resulted in resending the Final Order.

require the regulated public to erect fences or put up signage. Respondent further argued that OPS failed to provide it with fair notice or fair warning that the agency's interpretation of the phrase "protected from tampering and damage" included a warning barrier and sign placed near the valve.

It is common for a Respondent found in violation of OPS regulations to claim that OPS' interpretation of the regulation is misplaced; or that the agency's interpretation of the statute, even if permissible, renders the statutory language sufficiently vague that reasonable persons could not have been expected to understand that their conduct was unlawful; or that OPS, through the procedures which it used to interpret the statute, violated some aspect of the Administrative Procedure Act. The ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation. Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. There is nothing erroneous or inconsistent with the regulations or OPS' related statements, interpretations and advisory bulletins related thereto, as signs are intended to educate the public as to the hazard while at the same time preventing tampering and damage to property, persons and the environment. Dangerous contact with the pipeline may occur if one is not warned of its presence. Deference is given to the agency's interpretation unless an alternative reading is compelled by the regulation's plain language or by other indications of the agency's intent at the time of the regulation's promulgation.

In furtherance, 49 C.F.R. §190.11 provides for informal guidance and interpretive assistance about compliance with pipeline safety regulations, 49 CFR parts 190-199. If Respondent needs clarification, information on, and advice about compliance with pipeline safety regulations, then Respondent should take advantage of §190.11 to resolve any questions or concerns regarding compliance. Such resources along with OPS' related statements, interpretations and advisory bulletins provided Respondent with ample warning or notice of required conduct, allowed Respondent to identify the standards with which OPS expects it to conform and enhanced the transparency of the regulatory process. An agency's interpretation of its own regulation is 'of controlling weight unless it is plainly erroneous or inconsistent with the regulation'.

2. **Agency Violated the Constitution's Due Process Clause by failing to provide Fair Notice of its interpretation to Alyeska**

Respondent argued that OPS violated the Constitution's Due Process Clause by failing to provide fair notice of its interpretation to Respondent and by failing to state with ascertainable certainty what the regulation required. Respondent further argued that without fair notice of the agency's interpretation it cannot be held responsible for a regulatory violation.

Respondent is considered to have received fair notice of the agency's interpretation if a prudent person familiar with the pipeline industry and the safety purposes of the standard would have recognized the safety requirement. In applying the reasonable person standard to the notice issue, consideration is given to a variety of factors, including the language of the regulation, its purpose, its placement in the overall regulatory scheme, its regulatory history, the agency's enforcement, and OPS' advisory notices and interpretations informing the regulated community of its interpretation. Pre-enforcement efforts such as advisory bulletins, agency interpretations and 49 C.F.R. §190.11 provide notice and enable Respondent to identify with ascertainable certainty the standards with which OPS expects parties to conform.

Respondent's knowledge of the interpretation can be gleaned from the fact that it had done more to protect the area by installing a fence, which it removed and did not replace. Respondent's installation of a fence, which protects the valve from damage by anyone or anything that happens upon the area, suggests that it recognized the need for damage protection. Once Respondent removed the fence, the area was left without anything to alert the public that it was encroaching upon a pipeline facility, a hidden danger. After removal of the protective barrier, Respondent failed to take further steps to protect the valve from damage by alerting the public, licensees, or trespassers to the valve's presence and thereby reduce the possibility of damage. While the padlock offered some protection from tampering, it failed to protect the valve from damage. A failure to address "protection from damage" is inconsistent with regulations. OPS has not recently changed, altered or revised its policy, practice or interpretation of 192.179(b).

Recent events have created a heightened awareness of security at the nation's infrastructure and pipeline facilities, which are potentially vulnerable to different kinds of terrorist threats, not to mention third party damage, pranks and vandalism. While there is no requirement for 100% security, instituting safeguards that address these and other types of damage and tampering risks are not an overly burdensome task. Adequate protection from tampering and damage help reduce the risk, minimize danger and prevent injury to the public, licensees, trespassers or damage to property or the environment. It would be a violation of the public's trust to weaken physical protection standards making pipeline facilities vulnerable to tampering and damage, accidental contact, and third party damage.

Respondent could have availed itself to numerous OPS resources to make a good faith effort to clarify the agency's position through normal regulatory processes. Such knowledge prohibits Respondent from raising a defense that OPS failed to provide fair notice of its interpretation. OPS has correctly interpreted its regulations and applied them with reasonable discretion to the facts.

3. **Litigation Position**

It is the Respondent's contention that OPS' interpretation is nothing more than a "convenient litigation position." Respondent further contends that OPS' interpretation of the phrase "protected from tampering and damage" required signage and fencing, with chaining and padlocking the valve being inadequate is not due any deference.

OPS' advisory notices and interpretations that inform the regulated community of its interpretation are available on its website. 49 C.F.R. §190.11 is another resource available to the regulated industry to provide guidance and clarification of regulations. Contrary to Respondent's position, OPS did not make an interpretation that the term "protected from tampering and damage" required signage and fencing nor did OPS make an interpretation that the padlock was insufficient for the prevention of "tampering and damage." 49 CFR §192.179(b) indicates the required result "protecting from tampering and damage" rather than specifically prescribing how operators are to comply with the regulations. A finding that Respondent is in violation of the regulation is not an interpretation but a determination that the required end result for compliance with the regulation has not been met. In this case, the end result is "protection from tampering and damage." While the padlock may provide protection from tampering, the required protection from damage has not met. This is not a "convenient litigation position" but a compliance issue.

4. **Violates the Administrative Procedure Act (APA)**

Respondent argued that OPS violated the APA by failing to provide any notice of the terms of its interpretation prior to initiating this enforcement action. Respondent further argued that OPS' interpretation which has future effect qualifies as a rule and as such the process by which OPS reached that result must be "logical and rational." Respondent asserted that nothing about OPS' interpretation of the phrase "protected from tampering and damage" was or is "logical and rational" and that OPS' explanation that "further protection" beyond a padlocked valve is required to "alert" anyone in the area of a valve's presence is not evidence of a logical and rational approach.

Often, Respondents found in violation of OPS regulations claim that OPS' interpretation of the regulation violated some aspect of the Administrative Procedure Act. When an agency interprets a statute through informal adjudication, the agency can rely on that decision, and use or cite it as precedent in future adjudications as long as the agency has indexed the decision and made it available for public inspection or copying. OPS' advisory notices, Corrective Action Orders, Final Orders and interpretations informing the regulated community of its interpretation are available for public inspection on the agency's website and accessible through document rooms, which ensures public access to agency records and information. The APA does not require the agency to solicit any public input to develop a policy statement or interpretation. Even though an agency does not provide notice to the public that it has interpreted a regulation in a particular way in the context of an informal

adjudication, the agency may interpret the regulation in the same way in a subsequent adjudication against a party that has no knowledge of the prior decision, as long as the agency independently justifies the interpretation of the regulation in the subsequent adjudication.

Interpretation begins with the language of the statute or regulation itself and is based largely on reading the language of the regulation being interpreted, in light of the purpose of the regulation and the agency's general policy goal. In this case, it is the broad powers and authority to enforce pipeline safety. The meaning depends on the context of the regulation as it relates to the objective, policy and the purpose of the regulation as a whole. Consideration must be given to whether the interpretation would frustrate or advance the purpose. Regulations must be read as a whole for the true nature of the intent and purpose sought to be accomplished. The primary purpose of the construction being the safe operation of pipelines. The regulations' spirit and purpose should prevail over its strict letter. The intent of the regulatory requirement to "protected from tampering and damage" is not limited to the scope of §192.179(b).

Interpretations are not subject to the APA notice and comment requirements that apply to rulemakings, unless notice or hearing is required by an agency's enabling legislation, because interpretations do not establish or amend laws or regulations. Instead, they merely clarify laws and regulations that already exist. Accordingly, OPS did not violate the APA as the interpretation is not a rule.

5. **Violates the Executive Order 12988**

Respondent argued that because OPS had not defined "protected from tampering and damage" or included any "alert" language in the regulation, OPS violated Executive Order 12988. Respondent argues that Executive Order 12988 was issued "in order to improve access to justice for all persons who wish to avail themselves of court and administrative adjudicatory tribunals to resolve disputes . . ." 61 Fed. Reg. 4,729 (Feb. 7, 1996). It directs agencies to "review their administrative adjudicatory process and develop specific procedures to reduce delay in decision-making . . . and to invest maximum discretion in fact-finding officers to encourage appropriate settlement of claims as early as possible." Executive Order 12988 61 Fed. Reg. 4,732 (Feb. 7, 1996). The Executive Order places a "general burden" on agencies to "review existing regulations" and "make every reasonable effort to ensure" that their regulations "define key terms." Executive Order 12988 §§ 3(a) and (b)(2)(F) 61 Fed. Reg. 4,731 (Feb. 7, 1996). Respondent argues that OPS, therefore, must dismiss the violation.

OPS has complied with Executive Order 12988. Since, 1992, OPS has undertaken extensive reviews of the pipeline safety regulations to identify those that need to be clarified, impede economic growth, cause an unnecessary burden, or are no longer necessary. In addition, OPS conducted its own review by seeking public comment on its regulations. Industry, State and

Federal public safety agencies, and trade associations responded but none of the comments suggested or inferred that the terms "protected from tampering and damage" should be defined. Nor did OPS's internal review find that the lack of a definition for "protected from tampering and damage" were a positive or negative factor in achieving compliance. OPS continues to review and revise its regulations. Therefore, OPS is not precluded from enforcing a safety regulation because it did not define a term that appears in its regulations.

6. **Performance-Based Initiative**

Respondent contends that OPS regulations are performance-based and that Respondent's chain and padlock provided the desired protection. Respondent argues that it fully satisfied the requirements of the OPS performance-based regulation when it chained and padlocked the valve.

Respondent is correct in its position that §192.179(b) is written in performance language and that performance language does not specifically require a set of steps. While there is no requirement for 100% security, instituting safeguards that address these and other types of damage and tampering risks require the exercise of care and sound judgment in using reasonable care to prevent potential damage that might threaten a pipeline facility. Not every regulation provides specific steps just as it does not identify every possible damaging activity. Adequate protection from tampering and damage help reduce the risk, minimize danger and prevent injury to the public, licensees, trespassers or damage to property or the environment. Performance-based regulations are not intended to be exhaustive of all the possible steps or sources to achieve compliance. When in doubt, 49 C.F.R. §190.11 provides for informal guidance and interpretive assistance about compliance with pipeline safety regulations, 49 CFR parts 190-199. If Respondent needs clarification, information on, and advice about compliance with pipeline safety regulations, then Respondent should take advantage of §190.11 to resolve any questions or concerns regarding compliance.

The regulation sets forth the framework for operators to follow and gives them some flexibility in achieving compliance. In this case, the end result is "protection from tampering and damage." While the padlock may provide protection from tampering, the required protection from damage has not been met.

Violation #2

7. **Estoppel**

In its petition, Respondent objected to a finding that it violated §192.463(a) by failing to have adequate cathodic protection (CP) on the fuel gas line (FGL) inside Pump Station 1. Respondent contended that the October 23, 1996 agreement between OPS and Alyeska provided Respondent a waiver from cathodically protecting the main fuel gas line. Respondent further contended that when OPS changed its position that the agreement was

not a legal waiver, it resulted in the finding of violation. Respondent argued that the OPS is equitably estopped from finding a violation. Respondent further argued that the violation should be dismissed. Or in the alternative, the Final Order should be modified to reflect that the 1996 agreement and that Respondent's action pursuant to the agreement were consistent with pipeline safety.

Under our well-established law, any claim of estoppel is predicated on proof of two essential elements: the party against whom estoppel is claimed must do or say something calculated or intended to induce another party to believe that certain facts exist and to act on that belief; and the other party must change its position in reliance on those facts, thereby incurring some injury. The purpose of equitable estoppel is to protect those who have been misled by false and inconsistent statements.

A waiver is a formal written statement of relinquishment, a freeing from regulations or an exemption from an obligation or duty. The October 23, 1996 Agreement (Agreement) between OPS and Alyeska (APSC) is entitled "Risk-based Plan for Monitoring Corrosion Control on the Fuel Gas Line." Express terms of an agreement always govern, which reads, in pertinent part:

"TO WIT THE PARTIES AGREE that . . . the following risk-based plan describes the application and monitoring of the CP systems to be used on the FGL . . .

- *APSC will continue to record pipeline condition and corrosion information as required by 49 CFR §192.459 when FGL is uncovered for any reason.*
- *APSC will continue to obtain annual CP systems currently in operation*
- *APSC will continue to obtain annual CP readings at test stations using instant off and depolarization if appropriate*

Nowhere in the Agreement is the term "waiver" mentioned, nor are the concepts or elements of a waiver suggested. In fact, the Agreement refers to a risk-based plan and repeatedly states that "APSC will continue to," "will perform," "will conduct," "will run a high resolution corrosion pig." Nothing in the language of the Agreement states or suggest that it is a waiver of §192.463(a). The language of the agreement states nothing specific concerning a regulatory waiver of compliance with §192.463(a).

Furthermore, to have a valid waiver the request must go through public notice and opportunity for a hearing in accordance with 49 USCS § 60118, which states, in pertinent part:

(c) Waivers by Secretary.--On application of a person owning or operating a pipeline facility, the Secretary by order may waive compliance with any part of an applicable standard prescribed under this chapter on terms the Secretary considers appropriate, if the waiver is not inconsistent with pipeline safety. The Secretary shall state the reasons for granting a waiver under this subsection. The Secretary may act on a waiver only after notice and an opportunity for a hearing.

Respondent has not submitted evidence to prove that it was induced to believe a waiver was granted nor has Respondent argued that the Agreement complies with 49 USCS § 60118, statutory requirement for notice and an opportunity to be heard in order to have a valid waiver. Therefore, there was no waiver of Respondent's regulatory requirement to comply with §192.463(a).

Violation #8

8. OPS interpretation is not entitled to deference

In its petition, Respondent objects to the finding that it violated §192.420(b) by failing to require function tests on battery limit (BL) valves BL1 and BL2 at Pump Stations 2, 6, 8, and 10 at least twice a year at intervals not exceeding 7½ months, but at least twice each calendar year, to determine that the valves are functioning properly. Respondent contends that seven of the eight cited BL valves do not require biannual inspections because they are not operational and have been disconnected from the mainline and are closed-off by blind flanges. Respondent incorporates by reference its arguments set forth in the discussion of Violation #1.

Deference is given to the agency's interpretation unless an alternative reading is compelled by the regulation's plain language or by other indications of the agency's intent at the time of the regulation's promulgation. There is nothing erroneous or inconsistent with the regulations or OPS' related statements, interpretations and advisory bulletins related thereto. OPS has interpreted the regulation in the same way in a subsequent adjudication against a party that has no knowledge of the prior decision, as long as the agency independently justifies the interpretation of the regulation in the subsequent adjudication. This question has been previously asked by Respondent and answered by OPS. Respondent's argument was addressed in a previous decision CPF #55501. Therefore, Respondent knows with certainty the standard with which OPS expects parties to conform. OPS has not recently changed, altered or revised its policy, practice or interpretation of §192.420(b).

9. Timeliness of the Final Order

In its petition, Respondent objects to receiving the Final Order more than three(3) years after its April 14, 2000 response to the Notice of Violation. Respondent argues that the Office of

Pipeline Safety (OPS) failed to issue a Final Order within 45 days of receipt of the case, and failed to notify Respondent of the reason for the substantial delay and a date by which the Final Order was expected to be issued. Respondent further states that Executive Order 12988 directs agencies to "develop specific procedures to reduce delay in decision-making . . . and to invest maximum discretion in fact-finding officers to encourage appropriate settlement of claims as early as possible." 61 Fed. Reg. 4729, 4732 (Feb. 7, 1996). (Petition, p.1)

Failing to issue the Final Order within the stated time or notifying Respondent of any delay, is a policy, not a requirement, and does not negate OPS' authority to assess a civil penalty for violation of Federal Regulations. Moreover, Respondent incurs no hardship from a delayed Final Order. Until the Order is issued, making findings of violation, Respondent is not compelled to take any corrective action or to pay the proposed civil penalty. In fact, Respondent has been given Notice and made aware of the probable required corrective actions and probable civil penalty.

Additionally, Respondent was not denied its due process rights because of the delay in issuing the Final Order. Respondent requested and was granted a hearing in this case on February 9, 2001. Respondent further submitted a written Closing Response dated March 19, 2001. Therefore, Respondent was given the complete opportunity to fully and adequately respond to the allegations of violation. Therefore, I do not find these arguments merit withdrawing the civil penalty or amending the Final Order.

Relief Denied

I have considered Respondent's request for reconsideration. I do not find Respondent's assertions warrant withdrawal of the civil penalty or amending the Final Order.

This decision on reconsideration is the final administrative action in this proceeding.


Stacey Gerard
Associate Administrator
for Pipeline Safety

JUN 23 2004

Date Issued