



PO BOX 60469 FAIRBANKS, ALASKA 99706 TELEPHONE (907) 450-7837 FAX (907) 450-5878

June 15, 2005

Government Letter No. 5142  
APSC File No. 2.11

via fax 202-366-4566

Stan Kastanas, Enforcement Chief  
Office of Pipeline Safety  
Pipeline and Hazardous Materials Safety Administration  
U.S. Department of Transportation  
400 Seventh Street S.W.  
Washington, D.C. 20590-0001

Re: CPF No. 5-2003-5002/ Petition for Reconsideration – Alyeska Pipeline Service Company

Dear Mr. Kastanas:

Pursuant to 49 CFR §190.215, Alyeska Pipeline Service Company (Alyeska) notifies you that it hereby files a Petition for Reconsideration and a Stay of the Final Order in CPF No. 5-2003-5002, which was issued on May 19, 2005, and received by Alyeska on May 26, 2005.

In brief, Alyeska complains that the Office of Pipeline Safety:

1. Inaccurately applied the longstanding terminal facilities exception to the specific configuration at Alyeska's terminal facility;
2. Overstepped the boundaries of jurisdiction belonging to other agencies, specifically the Environmental Protection Agency and the United States Coast Guard;
3. Ignored the performance-based initiative long espoused by the agency;
4. Issued the Final Order more than two (2) years after Alyeska submitted its April 28, 2003 response;
5. Violated 49 CFR §190.213(e) in failing to issue the Final Order within 45 days of receipt of the case file, and in failing to notify Alyeska 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).

Specifically, Alyeska petitions for reconsideration and stay of the Final Order of Item 6(d) regarding the Office of Pipeline Safety's jurisdiction over the piping at the Valdez Marine Terminal (VMT).

The Final Order in this case inaccurately applies the longstanding terminal facilities exception contained in Chapter 601 of 49 U.S.C. and 49 CFR §195.1(b). In short, the Pipeline and Hazardous Materials Safety Administration (PHMSA) attempts through this enforcement action to amend these exceptions by placing additional requirements on the terminal facilities exception. Specifically, PHMSA maintains the 48-inch piping from MP 800 to the loading berths is a continuation of the mainline because the piping sees mainline pressure. Final Order at 5.

Chapter 601 is not a limitless source of regulatory jurisdiction. It specifically does not govern the "mov[ement] of hazardous liquid through gathering lines in a rural area, onshore production, refining, or manufacturing facilities, or storage or in-plant piping systems associated with on-shore production, refining, or manufacturing facilities." 49 U.S.C. §60101(a)(22) (1996). The statutory genesis for the terminal facilities exception is found in the Hazardous Liquid Pipeline Safety Act (HLPESA) (formerly 49 U.S.C. App. 2001(3) (1979)). In 1981, PHMSA's forerunner published a "final rule" to conform Part 195 to the repeal of the Transportation of Explosives Act (formerly 18 USC 831-835) and the adoption of HLPESA. Pointedly, the new rule did "not impose any new requirements." 46 Fed. Reg. 38,357 (Jul. 27, 1981). The terminal exception language excepted from Part 195 the transportation of hazardous liquid by vessel, aircraft, tank truck, tank car, other vehicle or terminal facilities used exclusively to transfer hazardous liquid between such modes of transportation. 49 CFR §195.1(b)(7) (1981).

The 1994 amendments to Part 195 brought additional clarity to the (b)(7) exception. In the proposed rulemaking, the agency stated, "The language of this terminal facilities exception leaves unclear the applicability of Part 195 to transfer lines that exit terminal grounds to effect transfers. Also, because the pipeline mode of transportation is not mentioned, §195.1(b)(7) has led some to conclude that terminal facilities used to transfer hazardous liquid between a pipeline and another mode of transportation are covered by part 195. However, this inference is incorrect, since part 195 does not apply to facilities at pipeline terminals other than breakout tanks, as defined in §195.2, and associated piping ... The terminal facilities exception does not include breakout tanks and associated piping, for these facilities are not used exclusively for transfers between non-pipeline and pipeline modes." 57 Fed. Reg. 56,305 (Nov. 27, 1992).

Neither Chapter 601, Part 195, nor regulatory interpretations enunciated in the Federal Register have ever contained pipeline diameter or pressure criteria relative to the terminal facilities exception. Consequently, PHMSA cannot do so in this enforcement action because: 1) Chapter 601 does not permit such attempted regulation; 2) even if Chapter 601 permits such attempted regulation, PHMSA must submit its newfound position to public notice and comment through a rulemaking; and 3) constitutional due process requires the government to provide "fair notice" to the regulated public of the conduct required or prohibited. *U.S. v. Chrysler Corp.*, 158 F.3d 1350, 1354 (D.C. Cir. 1998).

PHMSA also maintains that Part 195 applies in this enforcement action because "the configuration is such that the tanks *could be bypassed* and the crude oil *could flow* directly from MP 800 to the berths" (emphasis added). Final Order at 5. The regulation's plain language, however, states the exception applies "through facilities located on the grounds of a materials transportation terminal that *are used exclusively* to transfer hazardous liquid ... not including any device and associated piping that are necessary to control pressure in the pipeline under §195.406(b)" (emphasis added). 49 CFR §195.1(b)(8)(ii) (1994). The distinction between potential and actual usage is important. Alyeska has detailed operating procedures in its operating manual describing normal terminal configuration. "Incoming crude is routed through the back pressure control valves. Crude is then routed through the inlet meters to tankage." OM-1, Section 2.1.4. The §195.406(b) device to control pressure is the back pressure control valves located between Milepost (MP) 800 and the breakout tanks. This is not merely semantics. Bypassing the tanks as PHMSA postulates would be unsafe and is prohibited by Alyeska.

Further detailed directives are found in the department operating procedures for the Operations Control Center. OCC-7.09. Safe operations require a containment area in the event of an unplanned relief event while loading vessels at the berths. Bypassing the storage tanks would be extremely high risk and would not make good business sense. Alyeska would be in non-compliance with Part 195, and other agencies' regulations, if it knowingly operated in an unsafe manner. Alyeska practice and procedures dictate that the terminal piping could not bypass the tanks and flow directly from MP 800 to the berths as stated in the Final Order at 5; therefore, the terminal piping is "used exclusively to transfer hazardous liquid ... between a non-pipeline mode and a pipeline." 49 CFR §195.1(b)(8)(ii) (1994).

PHMSA has overstepped the bounds of jurisdiction belonging to other agencies, specifically the Environmental Protection Agency (EPA) and the United States Coast Guard (USCG). EPA has jurisdiction over the non-transportation storage tanks and related piping at the facility. 40 CFR Part 112, App. A, §11(1)(F), App. B. When a storage tank is also used as a breakout tank, as defined by 49 CFR §195.2, EPA and Office of Pipeline Safety (OPS) have concurrent jurisdiction. *Memorandum from EPA to OPS re: Jurisdiction over Breakout Tanks/Bulk Oil Storage Tanks (Containers) at Transportation-Related and Non-Transportation-Related Facilities*, Feb. 4, 2000. However, OPS' jurisdiction at the terminal facility ends at the breakout tanks and associated piping. See Exhibit 1 depicting EPA, OPS and Coast Guard jurisdiction at a complex facility.

The Coast Guard has jurisdiction over the terminal facility as well. Under the Ports and Waterways Act, the USCG is authorized to "insure that the handling of dangerous articles and substances on the structures in, on, or immediately adjacent to the navigable waters of the United States is conducted in accordance with established standards and requirements." 33 U.S.C. §1221(c)(4) (1978). Additionally, the USCG is directed to establish "procedures, measures, and standards for the handling, loading, unloading, storage, stowage, and movement on the structure (including the emergency removal, control, and disposition) of explosives or other dangerous articles and substances, including oil or hazardous material as those terms are defined in section 2101 of Title 46." 33 U.S.C. §1225(a)(2)(A) (1978).

The regulations promulgated under this authority "appl[y] to the transfer of oil or hazardous material on the navigable waters or contiguous zone of the United States to, from, or within each vessel with a capacity of 250 barrels or more." 33 CFR §156.100 (1990). The Coast Guard's jurisdiction at a marine transportation-related facility extends from the connection with the vessel to the first valve inside the secondary containment surrounding tanks in the non-transportation-related portion of the facility. (See Exhibit 1). 33 CFR §156.105 (1994). Therefore, the USCG has jurisdiction over the terminal facility, from EPA jurisdiction at the storage tanks inside the secondary containment, and then downstream up to and including the vessel. Included in the regulatory authority the USCG exercises at the terminal are annual equipment tests and inspections on the transfer piping system. 33 CFR §156.170 (1996). Failure to comply with these regulations makes the operator subject to civil and criminal penalties. 33 U.S.C. §1232 (1978). The USCG promulgated its regulations in consultation with interested Federal department and agencies. 33 U.S.C. §1231(b)(1) (1978). PHMSA, and its predecessor Research and Special Programs Administration (RSPA), recognized that its jurisdiction potentially overlapped in port areas with the Coast Guard and pledged to "act

Stan Kastanas, Enforcement Chief  
Office of Pipeline Safety  
Pipeline and Hazardous Materials Safety Administration  
U.S. Department of Transportation  
Government Letter No. 5142  
June 15, 2005  
Page 4

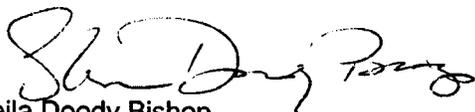
appropriately to resolve any unnecessary regulatory burden." 59 Fed. Reg. 33,390 (June 28, 1994). PHMSA can avoid this situation by deferring jurisdiction to the Coast Guard.

The piping that is the subject of this Notice of Probable Violation, CPF 5-2003-5002, is located at the Valdez Marine Terminal, between West Metering and Berth 4 and between Berth 4 and Berth 5. This piping is located downstream of the storage tank farms regulated by EPA. This is facility piping used exclusively to transfer hazardous liquid from a pipeline to a non-pipeline, i.e. vessel, mode of transportation. It is not OPS jurisdictional piping, as plainly stated in the language of the exception in the regulations. Alyeska maintains this facility piping in compliance with the USCG regulations regarding equipment tests and inspections, and appropriate national codes and standards as a matter of sound engineering and business practices.

PHMSA's enforcement of Part 195, in the face of its own plain language exception for terminal facilities, and in spite of Coast Guard regulations that ensure the safe operations of terminal piping, is an unnecessary regulatory burden on Alyeska. Therefore, Alyeska petitions for reconsideration of the finding that the VMT facility piping at issue in this enforcement action is regulated under Part 195.

Pursuant to 49 CFR §190.215(e), Alyeska requests it be given 90 days to fully brief these issues. If you should have any further questions, please do not hesitate to contact me at 907-450-7837.

Sincerely,

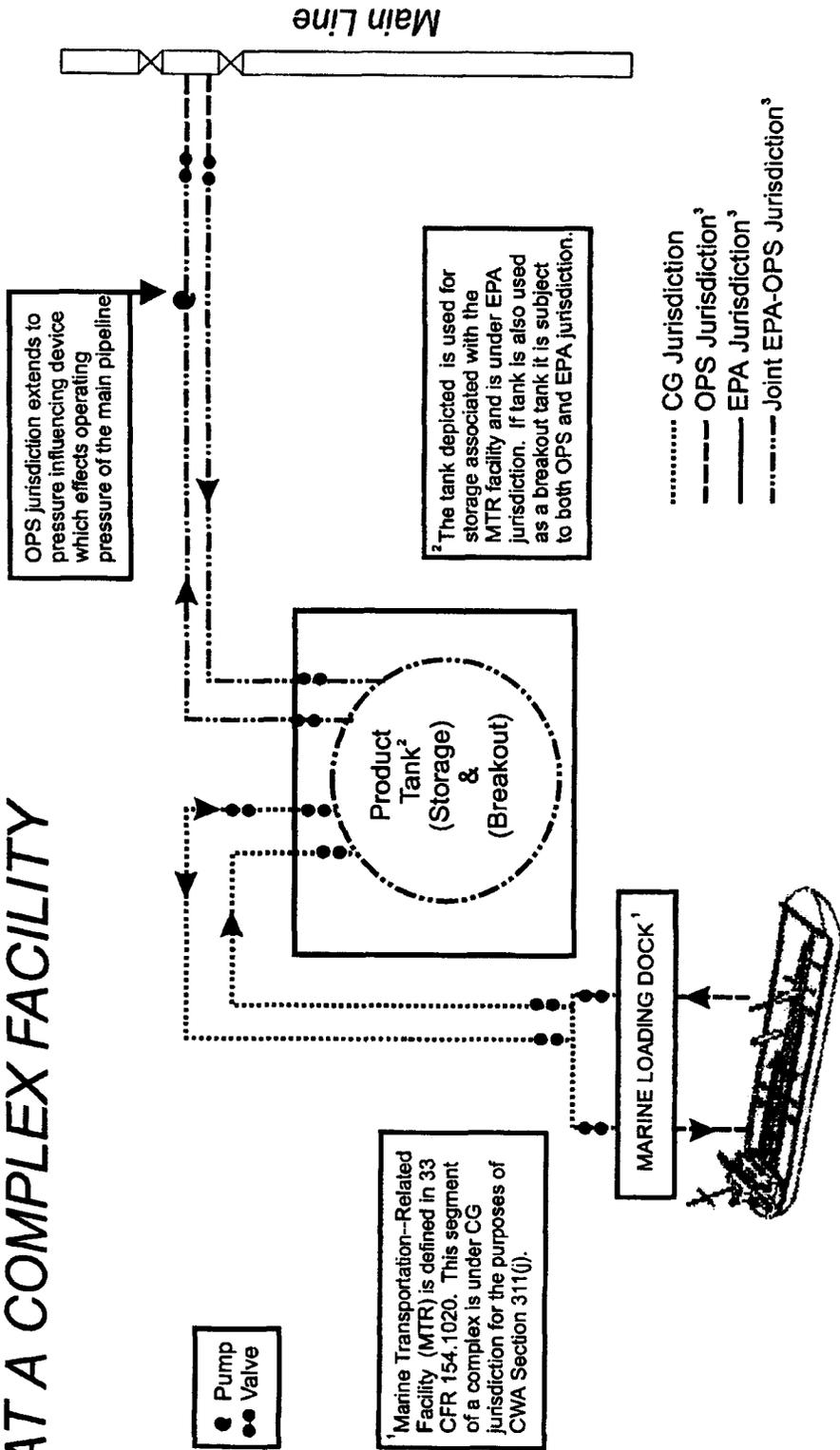


Sheila Doody Bishop  
Fairbanks Counsel

Attachment: Exhibit 1 – EPA, OPS, and Coast Guard Jurisdiction at a Complex Facility

cc: Stacey Gerard  
Chris Hoidal  
Jon Strawn  
Jerry L. Brossia

# EPA, OPS, AND COAST GUARD JURISDICTION AT A COMPLEX FACILITY



This diagram does not identify the precise location where the change in jurisdiction occurs between EPA and OPS for the purpose of the Clean Water Act, Section 311(j) (33 USC 1321(j)). When the pipeline operator and the storage or breakout tank operator remain the same, the change in jurisdiction occurs at the first and last pressure influencing device, meter, valve, or isolation flange, at or inside the facility property line. When the pipeline operator and the storage or breakout tank operator are not the same, the change in jurisdiction occurs at the change in operational responsibility or at the first and last pressure influencing device, valve, or isolation flange, at or inside the facility property line. In either of the above situations, the location of the property line should not solely be used to determine jurisdiction when operational activities (loading/offloading) extend beyond the property line.

SOURCE: US EPA REV: 12/13/99

ATTACHMENT 10