

VIA CERTIFIED MAIL – RETURN RECEIPT REQUESTED [7005 0390 0005 6162 5579]

Mr. Hank A. True III
President
Belle Fourche Pipeline Company
455 North Poplar Street
P. O. Box 2360
Casper, WY 82602

RE: CPF No. 5-2004-5010

Dear Mr. True:

Enclosed is this agency's decision on the Petition for Reconsideration filed by Belle Fourche Pipeline Company in the above-referenced case. For the reasons stated in the decision, the Petition is granted in part and denied in part. When the terms of the Compliance Order have been completed, as determined by the Director, Western Region, this enforcement action will be closed. Your receipt of this decision constitutes service 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. Manuel A. Lojo, Esq., Belle Fourche Pipeline Company
Mr. Chris Hoidal, Director, Western Region, PHMSA

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

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In the Matter of)	
)	
Belle Fourche Pipeline Company,)	CPF No. 5-2004-5010
)	
Petitioner.)	
)	

DECISION ON PETITION FOR RECONSIDERATION

On December 11, 2006, pursuant to 49 C.F.R. § 190.213, the Acting Associate Administrator for Pipeline Safety, Pipeline and Hazardous Materials Safety Administration (PHMSA), issued a Final Order finding that Belle Fourche Pipeline Company (Belle Fourche or Petitioner) had violated various pipeline safety regulations,¹ assessing Petitioner a total civil penalty of \$61,500 for four of the violations, and ordering the company to take certain actions to comply with the pertinent regulations.

On December 18 and 22, 2006, Belle Fourche received personal service of the Final Order,² and on December 29, 2006, the company paid the entire penalty. Six weeks later, on February 16, 2007, Belle Fourche filed this Petition for Reconsideration (Petition) pursuant to 49 C.F.R. § 190.215. By letter dated February 17, 2009, PHMSA granted Petitioner an additional 60 days to supplement the record, and Belle Fourche did so by letter dated April 15, 2009.

Petitioner seeks reconsideration of only two of the seven Findings of Violation in the Final Order. First, Belle Fourche contests the finding in Item 3 that Belle Fourche incorrectly applied 49 C.F.R. § 195.303, the regulation providing a risk-based alternative to the pressure-testing requirements of 49 C.F.R. § 195.302, as applied to three of Belle Fourche’s pipeline segments constructed with pre-1970 electric resistance-welded and lapwelded (ERW) pipe. Second, Petitioner contests the finding in Item 10 that Belle Fourche incorrectly applied 49 C.F.R.

¹ 49 C.F.R. §§ 195.1(a), (b)(1)-(4), 195.50(b), 195.54(a), 195.303, 195.402(a), 195.406, 195.408, 195.428(a), 195.432(b), and 195.436.

² On December 18, 2006, Mr. Greg Vineyard signed a U.S. Postal Service Domestic Return Receipt, PS Form 3811, at Petitioner’s official corporate mailing address, acknowledging receipt of the Final Order on behalf of Mr. Manual A. Lojo, counsel for Belle Fourche.
<https://wyobiz.wy.gov/Ecommerce/Common/FilingDetail.aspx?FilingNum=1980-000073155> (corporate information on Belle Fourche obtained on January 21, 2009, from official website of the Wyoming Secretary of State). On December 22, 2006, Mr. Vineyard signed another PS Form 3811, at Petitioner’s Casper, Wyoming office, acknowledging receipt of the Final Order on behalf of Mr. Hank A. True III, president of Belle Fourche.

§ 195.406(a)(1) in establishing the maximum operating pressure (MOP) of two other pipeline segments because the company lacked adequate documentation of the design specifications or materials testing of the pipe in those segments. The Final Order assessed Belle Fourche a civil penalty of \$20,000 for Item 10 and directed it to take certain actions to correct the violations found in both Items 3 and 10. No penalty was assessed for Item 3.

As provided in 49 C.F.R. § 190.215(a)-(e), the pipeline safety regulations afford a respondent the opportunity to file a petition with the Associate Administrator for reconsideration of a final order. The purpose of this procedure is not to provide a right of appeal or de novo review, but to allow for the presentation of previously unknown or unavailable information or arguments and to permit the agency to reconsider and correct any errors in the final order. Consistent with these principles, the regulations provide that the Associate Administrator is not obliged to consider repetitious information, arguments, or petitions, and that a petitioner must provide valid reasons why any additional facts or arguments were not presented in a timely manner.

It is clear from the record in this case that the Petition could be summarily dismissed as untimely filed. Under the controlling regulation, a petition must be “received no later than 20 days after service of the final order upon the respondent.”³ PHMSA did not receive the Petition in this case until approximately seven weeks after the president of Belle Fourche and its counsel received personal service of the Final Order. Furthermore, Petitioner has not offered any valid reason why the additional evidence and arguments raised in this Petition were not submitted prior to issuance of the Final Order. Despite these deficiencies, I have reviewed the entire record of these proceedings as a matter of administrative discretion and concluded that the case presents a significant legal question that should be addressed. Based upon such review and for the reasons cited below, I am granting the Petition in part and denying it in part.

I. Discussion

A. Item 3 - Belle Fourche's Violation of 49 C.F.R. § 195.303

Item 3 of the Final Order found that Belle Fourche failed to comply with 49 C.F.R. § 195.303, as applied to three pipeline segments constructed with pre-1970 ERW pipe. Before discussing the specific circumstances of Petitioner's request for reconsideration, I will provide some useful background information on 49 C.F.R. § 195.302, the regulation that imposes a pressure-testing requirement on all hazardous liquid pipelines, and 49 C.F.R. § 195.303, the regulation that establishes an elective, risk-based alternative to such testing.

³ 49 C.F.R. § 190.215(a).

Section 195.302 prohibits the operation of a hazardous liquid pipeline that has not been subjected to a valid pressure test.⁴ However, that regulation includes certain exemptions, two of which are relevant to this proceeding. First, an interstate hazardous liquid pipeline constructed before January 8, 1971, may be operated without a pressure test, so long as the operator of that line established its MOP under 49 C.F.R. § 195.406(a)(5) on or before December 7, 1998.⁵ This exemption ensures that an adequate margin of safety exists in the absence of a pressure test⁶ by limiting the MOP of such a line to no more than “80 percent of the test pressure or highest operating pressure to which the pipeline was subjected for 4 or more continuous hours that can be demonstrated by recording charts or logs made at the time the test or operations were conducted.”⁷

Second, older hazardous liquid pipelines, including those constructed with pre-1970 ERW pipe, may be operated without a pressure test if the operator elects to use the risk-based alternative provided in 49 C.F.R. § 195.303 and a pressure test is not otherwise required under the criteria specified in that regulation.⁸ Those criteria require that each pipeline segment be classified on the basis of several risk indicators, such as location, product, volume, and probability of failure,⁹ and that a pressure test be performed on any segment constructed with pre-1970 ERW pipe unless a supplementary engineering analysis shows that the line is not susceptible to longitudinal seam failure.¹⁰

In this case, the Final Order found that Petitioner elected to use the 49 C.F.R. § 195.303 risk-based alternative to pressure testing for three pipeline segments constructed with pre-1970 ERW pipe.¹¹ It also found that while Belle Fourche had performed a metallurgical seam evaluation on samples from one of those lines (i.e., the Donkey Creek to Guernsey line), Petitioner was not able to adequately document that the pipe used throughout that line was qualitatively similar to the samples tested. The Final Order further found that Petitioner had not completed an adequate seam analysis of the Alzada to Belle Creek or the Belle Creek to Highway 14-16 pipeline segments. Therefore, the Final Order

⁴ Specifically, that regulation provides that “no operator may operate a pipeline unless it has been pressure tested under this [Subpart E] without leakage.” 49 C.F.R. § 195.302(a). The specific terms and conditions that must be followed in conducting such tests, including test-pressure and time requirements, are prescribed in 49 C.F.R. §§ 195.304-310.

⁵ 49 C.F.R. § 195.302(b)(1)(i), (c)(1)(ii).

⁶ Department of Transportation, Research and Special Programs Administration, Pressure Testing Older Hazardous Liquid and Carbon Dioxide Pipelines, 59 Fed. Reg. 29379 (Jun. 7, 1994) (providing reasons or bases for the adoption of 49 C.F.R. § 195.302).

⁷ 49 C.F.R. § 195.406(a)(5).

⁸ 49 C.F.R. § 195.302(b)(4).

⁹ 49 C.F.R. § 195.303(a)-(b).

¹⁰ 49 C.F.R. § 195.303(c)-(d).

¹¹ Those pipeline segments were the 8-inch Alzada to Belle Creek line, the 10-inch Belle Creek to Highway 14-16 line, and the 12-inch Donkey Creek to Guernsey line.

concluded that Belle Fourche violated § 195.303 as applied to each of these three segments.

While not entirely clear, Petitioner appears to seek reconsideration of these findings on the basis of 49 C.F.R. §§ 195.302(b)(1)(i) and (c)(1)(ii). In particular, Petitioner contends that the three segments in question were all constructed prior to January 8, 1971, thereby qualifying for the § 195.302(b)(1)(i) exception to mandatory pressure testing. On April 15, 2009, Belle Fourche also submitted a pressure chart from October 14, 2000, showing that “the Donkey Creek line” was continuously operated on that date at 1440 psi for more than four hours. Petitioner therefore argues that the “lawful” MOP of that line under §§ 195.302(b)(1)(i), (c)(1)(ii) and 195.406(a)(5) is 1150 psi (or 80% of 1440 psi), and that Item 3 of the Final Order should be withdrawn.

Petitioner’s argument, however, is not persuasive. First, Belle Fourche elected *not* to seek an exemption from the mandatory pressure-testing requirement under §§ 195.302(b)(1)(i) and (c)(1)(ii) for the three segments at issue.¹² Therefore, Petitioner’s compliance with those regulations is not relevant to whether it violated the requirements of § 195.303, the regulation that Belle Fourche *chose* to apply to these three pipeline segments.

Second, even if §§ 195.302(b)(1)(i) and (c)(1)(ii) were somehow relevant to Petitioner’s violation of § 195.303, Belle Fourche has not shown that it established the MOP of the Donkey Creek line under § 195.406(a)(5) on or before December 7, 1998. On the contrary, Petitioner’s pressure chart for that line is dated October 14, 2000, nearly two years *after* the deadline for establishing MOP on the basis of the highest continuous 4-hour operating pressure. Accordingly, Belle Fourche has not shown that it complied with §§ 195.302(b)(1)(i) and (c)(1)(ii), even if those regulations were applicable.

In sum, an operator is not required to use the risk-based alternative provided in § 195.303. However, if an operator *elects* to use that alternative and the segment in question is constructed with pre-1970 ERW pipe, then a valid engineering analysis must be performed to rebut the presumption that the line is susceptible to longitudinal seam failure and therefore requires pressure testing.¹³ There is no factual dispute here that the three segments at issue were all constructed, at least in part, with pre-1970 ERW pipe,¹⁴ and that Petitioner elected to use the § 195.303 risk-based alternative to pressure testing for those lines. Since the record does not reflect any valid engineering analysis to rebut the presumption of longitudinal seam failure for any of the three lines, I must deny

¹² Belle Fourche’s written procedures at the time of the inspection, attached as Exhibit 4 to the OPS inspector’s original violation report, state that the company had “elected to follow the risk-based alternative to pressure testing per 195.303” for these three lines.

¹³ 49 C.F.R. § 195.303(c)-(d).

¹⁴ The record indicates that the Alzada to Belle Creek line was constructed in 1966 with ERW pipe, that the Belle Creek to Highway 14-16 line was constructed in 1966 with ERW pipe, and that the Donkey Creek to Guernsey line was constructed in 1968 with ERW pipe.

Petitioner's request for reconsideration of Item 3 of the Final Order and affirm the finding that Belle Fourche violated 49 C.F.R. § 195.303.

B. Item 10 - Belle Fourche's Violation of 49 C.F.R. § 195.406

Item 10 of the Final Order found that Petitioner failed to comply with 49 C.F.R. § 195.406 in calculating the MOP of two lines constructed with pre-1970 ERW pipe. Specifically, it found that Belle Fourche lacked adequate documentation of the specified minimum yield strength (SMYS) and other material specifications of the pipe in the Twentymile to Guernsey line and the Highway 450 Station to 12-inch Junction line. The Final Order also found that as a result of such inadequate documentation, Petitioner had to use certain default values in establishing the MOP for those two lines under § 195.406(a)(1), the regulation that limits MOP on the basis of the internal design pressure of the pipe. Because the company had exceeded the MOP that PHMSA concluded should have been calculated on the basis of these default values, the Final Order concluded that Belle Fourche violated 49 C.F.R. § 195.406.

Having carefully reviewed the entire record, I conclude that the Finding of Violation in Item 10 cannot be sustained, yet not for the reasons cited by Petitioner.¹⁵ Section 195.406(a)(1) limits the MOP of hazardous liquid pipelines on the basis of their internal design pressure, a value that is determined by using a formula set forth in 49 C.F.R. § 195.106.¹⁶ However, PHMSA has previously determined that pipelines designed, constructed, and installed prior to April 1, 1970, are not subject to the requirements of § 195.406(a)(1).

Specifically, in response to a request from the American Petroleum Institute on the relationship between 49 C.F.R. §§ 195.106 and 195.406(a)(1) and the potential retroactive application of those regulations to existing pipelines, PHMSA's predecessor agency, the Materials Transportation Bureau, issued a formal letter of interpretation.¹⁷ Dated October 15, 1976, the letter states that "§ 195.406(a)(1) only applies to pipelines to which § 195.106 applies (i.e., pipelines which are constructed, relocated, or otherwise changed on or after April 1, 1970, the effective date of [section] 195.106)."¹⁸ It also states that "[w]here § 195.406(a)(1) is inapplicable, one of the other standards in [section] 195.406(a) would govern the maximum

¹⁵ In its Petition, Belle Fourche asserts arguments previously considered and rejected in the Final Order. First, Petitioner argues that it has shown through credible evidence that the SMYS of the pipe used in one of the disputed lines is 60,000 psi, and that the SMYS of the pipe used in the other line is 42,000 psi. Petitioner also introduces, as Exhibit 2 to its Petition, an affidavit from the company's long-time superintendent of operations, Mr. Lyle Sessions, to corroborate the evidence previously submitted with its Response, including a construction map that allegedly shows the SMYS and other specifications of the pipe used in the two segments in question. Given the ultimate disposition of the Finding of Violation in Item 10, further consideration of this evidence is unnecessary.

¹⁶ Under 49 C.F.R. § 195.106, the internal design pressure of a pipe is calculated by inputting certain specific criteria into a predetermined formula.

¹⁷ Operating Pressure for Platform Piping; Interpretation, Department of Transportation, Materials Transportation Bureau, Docket No. OPSO-35 (Oct. 15, 1976).

¹⁸ *Id.*

allowable operating pressure.” This 1976 letter of interpretation remains valid today and is consistent with the long-standing statutory prohibition, currently codified at 49 U.S.C. § 60104(b), on the retroactive application of design, construction, and initial testing standards to pipelines in existence when such standards are adopted.¹⁹

It is undisputed that the Twentymile to Guernsey line and Highway 450 Station to 12-inch Junction line were both designed, constructed, and installed in 1968, several years before the effective dates of 49 C.F.R. §§ 195.406(a)(1) and 195.106.²⁰ Therefore, in accordance with the 1976 letter of interpretation and the statutory prohibition on retroactive application of design and construction standards, I find that Belle Fourche had no obligation to consider § 195.406(a)(1) in establishing the MOP of these two pipeline segments. Accordingly, I grant the Petition as to Item 10 of the Final Order and withdraw the Finding of Violation with respect to 49 C.F.R. § 195.406.

Relief Granted

Based on the information provided in the Petition, a review of the relevant portions of the record, and for the reasons stated above, I find that Belle Fourche did not violate 49 C.F.R. § 195.406 in calculating the MOP for the Twentymile to Guernsey and Highway 450 Station to 12-inch Junction lines. Therefore, I withdraw Item 10 of the Final Order, the \$20,000 civil penalty associated with that Finding of Violation, and the compliance actions related to that finding and outlined in paragraph 3 of the Compliance Order. The Final Order is otherwise affirmed.

A copy of this Final Order shall be forwarded to the Federal Aviation Administration for the proper disposition and refund of the \$20,000 penalty that was assessed and collected for Item 10 of the Final Order.

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

Jeffrey D. Wiese
Associate Administrator
for Pipeline Safety

Date Issued

¹⁹ 49 U.S.C. § 60104(b) (“Nonapplication.—A design, installation, construction, initial inspection, or initial testing standard does not apply to a pipeline facility existing when the standard is adopted.”); *see also*, *Bowen v. Georgetown University Hosp.*, 488 U.S. 204, 208-09 (1988) (holding that regulations are presumed not to apply retroactively).

²⁰ The Final Order did not consider whether any of the lines in question had been replaced, relocated, or otherwise changed on or after the date that the applicable standards were adopted. If so, Belle Fourche would be required to comply with 49 C.F.R. §§ 195.106 and 195.406(a)(1) in establishing the MOP of those lines.