

FEB 17 2011

Mr. Martin Fritz
President, Midstream Operations
EQT Corporation
625 Liberty Ave. Suite 1700
Pittsburgh, PA 15222

Mr. John C. Mollenkopf
Senior Vice President, Chief Operations Officer
MarkWest Energy Partners, L.P.
1515 Arapahoe Street
Tower 1, Suite 1600
Denver, CO 80202

Re: CPF No. 2-2006-5001

Dear Messrs. Fritz and Mollenkopf:

Enclosed please find the Final Order issued in the above-referenced case. It makes findings of violation and assesses a reduced civil penalty of \$692,500. The civil penalty apportionment between Equitable and MarkWest and the penalty payment terms are set forth in the Final Order. This enforcement action closes automatically upon receipt of payment. Service of the Final Order by certified mail is deemed effective upon the date of mailing, or as otherwise provided 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. Wayne Lemoi, Director, Southern Region, PHMSA
Mr. J. Gordon Arbuckle, *Attorney for Equitable*
Patton Boggs LLP, 2550 M St. NW, Washington, DC 20037
Mr. Patrick D. Traylor, *Attorney for MarkWest*
Hogan Lovells LLP, 555 13th St. NW, Washington, DC 20004

CERTIFIED MAIL – RETURN RECEIPT REQUESTED [7005 1160 0001 0041 0718]

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

In the Matter of)	
)	
Equitable Production Company,)	
a division of EQT Corporation,)	
)	
and)	CPF No. 2-2006-5001
)	
MarkWest Hydrocarbon, Inc.,)	
a subsidiary of)	
MarkWest Energy Partners, L.P.,)	
)	
Respondents.)	

FINAL ORDER

From November 8 to December 17, 2004, pursuant to 49 U.S.C. § 60117, representatives of the Pipeline and Hazardous Materials Safety Administration (PHMSA), Office of Pipeline Safety (OPS), conducted an investigation of a hazardous liquid pipeline accident that occurred on November 8, 2004, in Ivel, Kentucky (Accident). The pipeline is owned by Equitable Production Company (Equitable or EQT) and at the time of the Accident was operated by MarkWest Hydrocarbon, Inc. (MarkWest) (collectively, Respondents or Companies).¹

EQT owns or operates approximately 11,000 miles of natural gas and highly volatile liquid (HVL) pipeline in Kentucky, Virginia, West Virginia, and Pennsylvania. MarkWest owns or operates approximately 600 miles of pipelines transporting natural gas, crude oil, and HVLs in several states, including Texas, Oklahoma, and Michigan.

On the morning of November 8, 2004, MarkWest was performing a pigging operation on the four-inch highly volatile liquids pipeline when the line ruptured beneath a driveway in the residential neighborhood of Rolling Acres, in the town of Ivel, Kentucky. The ruptured pipeline released natural gas liquid vapors that were subsequently ignited by an unknown source, causing a series of explosions that destroyed five homes and injured twelve people, four of whom required medical attention.

¹ On February 9, 2009, the parent of Equitable Production Co., Equitable Resources, Inc., changed its name to EQT Corporation. On February 21, 2008, MarkWest Hydrocarbon, Inc., became a wholly owned subsidiary of MarkWest Energy Partners, L.P.

The pipeline segment that ruptured is between Flow Stations 3 and 4 on Respondents' Appalachian Liquid Pipeline System, running between the Maytown liquids extraction plant, near Langley, Kentucky, and Ranger, West Virginia.² The pipeline has been owned by Equitable since its construction in 1956, but has had different operators over the years. Between 1979 and 1999, Ashland Pipeline Company (Ashland) operated the pipeline. MarkWest operated the line from 2000 until November 2007. Equitable has since resumed operational responsibilities for the pipeline, although the pipeline is not presently in service.

As a result of the accident investigation, the Director, Southern Region, OPS (Director), issued to Respondents, by letter dated June 15, 2006, a Notice of Probable Violation and Proposed Civil Penalty (Notice). In accordance with 49 C.F.R. § 190.207, the Notice proposed finding that Equitable and MarkWest had committed various violations of 49 C.F.R. Part 195 and proposed assessing a civil penalty of \$1,070,000 for the alleged violations.

After both Companies requested and received an extension of time to respond, Equitable responded on its own behalf by letter dated November 30, 2006.³ Equitable requested that Item 1 be dismissed, requested a hearing on the remaining items in the Notice, and asserted that the case file received from OPS pursuant to 49 C.F.R. § 190.211(e) lacked a sufficient evidentiary basis for all the items in the Notice despite representations made by OPS that the information constituted the complete administrative case file.

On March 15, 2007, the designated hearing officer from the Office of Chief Counsel, PHMSA (Hearing Officer), convened a conference call during which the Companies expressed concern that certain documentation collected by OPS during its accident investigation had not been included in the administrative case file. The Hearing Officer postponed setting a hearing date to provide Respondents and OPS with the opportunity to review any additional materials and to ensure a complete case file. Respondents subsequently provided lists of documents they believed were produced during the investigation and requested that OPS locate and determine if such documents were "material in the case file pertinent to the issues to be determined" as set forth in § 190.211(e).⁴ By letter dated February 12, 2009, OPS confirmed that the administrative record was complete as originally produced, but, following a second conference call on April 15, 2009, provided certain additional documentation to the Companies.⁵

By letters dated May 29, 2009, Equitable filed a supplement to its request to dismiss Item 1, and MarkWest filed its first substantive response to the Notice by similarly requesting that Item 1 be dismissed.⁶ The Hearing Officer denied the Companies' requests to dismiss Item 1 on the ground that a decision would be rendered on the matter in the final order, and set a hearing date

² Equitable refers to this line as the Kentucky Hydrocarbon pipeline system.

³ Response of Equitable Production Company Including Motion to Dismiss Count 1, Request for Hearing, and Statement of Issues, November 30, 2006.

⁴ Letter from Equitable counsel to the Hearing Officer, dated March 28, 2007; Letter from Equitable counsel to the Hearing Officer, dated April 13, 2007.

⁵ Letter from OPS counsel to Equitable and MarkWest counsel, dated May 13, 2009.

⁶ Equitable Production Company's Supplemental Motion to Dismiss Count 1, May 29, 2009 (Equitable's Supp. Motion to Dismiss); MarkWest Hydrocarbon Inc.'s Motion to Dismiss Count 1, May 29, 2009 (MarkWest's Motion to Dismiss).

for November 3, 2009.⁷ The Companies then filed briefs responding to various other allegations in the Notice,⁸ and OPS submitted responses for the record,⁹ to which Respondents also replied.¹⁰ By letters dated October 19, 2009, the Companies withdrew their requests for a hearing, thereby waiving their rights to one and allowing this Final Order to be issued without further notice based on the written record.¹¹

FINDINGS OF VIOLATION

The Notice alleged that Equitable and MarkWest violated 49 C.F.R. Part 195, as follows:

Item 1: The Notice alleged that Respondents violated 49 C.F.R. § 195.401(b), which states:

§ 195.401 General requirements.

(a)

(b) Whenever an operator discovers any condition that could adversely affect the safe operation of its pipeline system, it shall correct it within a reasonable time. However, if the condition is of such a nature that it presents an immediate hazard to persons or property, the operator may not operate the affected part of the system until it has corrected the unsafe condition.

The Notice alleged that Respondents violated 49 C.F.R. § 195.401(b) by failing to correct two conditions that could adversely affect the safe operation of the pipeline system. Specifically, the Notice alleged that Respondents never corrected two anodic conditions discovered during electrical surveys performed in 1982 and 1987, respectively, conditions which could adversely affect pipeline safety.¹² The Notice further alleged that these violations were “continuous and ongoing.”

Equitable and MarkWest contested the allegations of violation on several grounds. First, the Companies argue that the evidence in the record does not support a finding that either

⁷ Decision on Preliminary Motion to Dismiss, June 12, 2009; Letter from the Hearing Officer to Equitable and MarkWest counsel, dated July 30, 2009. The Hearing Officer denied the requests for preliminary withdrawal on the ground that 49 C.F.R. § 190.213 provided for resolution of all material issues in the case by Final Order, and noted that the Companies’ arguments for withdrawal would be considered in the Final Order.

⁸ Equitable Production Company’s Hearing Brief, July 22, 2009 (Equitable’s Brief); MarkWest Hydrocarbon, Inc.’s Response to PHMSA Notice of Probable Violation and Proposed Civil Penalty, July 22, 2009 (MarkWest’s Brief).

⁹ Opposition to Respondent’s Motion to Dismiss, directed to Equitable, August 27, 2009 (OPS Response to Equitable); Opposition to Respondent’s Motion to Dismiss, directed to MarkWest, August 27, 2009 (OPS Response to MarkWest).

¹⁰ Equitable Production Company’s Reply to Opposition Brief, September 15, 2009 (Equitable’s Reply); MarkWest Hydrocarbon, Inc.’s Reply in Support of its Motion to Dismiss, September 15, 2009 (MarkWest’s Reply).

¹¹ Respondent’s Request for a Ruling without a Hearing, October 19, 2009 (Equitable’s Withdrawal); MarkWest Hydrocarbon, Inc.’s Withdrawal of its Request for a Hearing, October 19, 2009 (MarkWest’s Withdrawal).

¹² An anodic condition is an environment conducive to external corrosion of the pipeline absent adequate cathodic protection.

Respondent violated § 195.401(b). Second, the Companies argue that PHMSA is precluded from bringing an enforcement action for this Item because it is time-barred under the federal statute of limitations. Finally, Equitable argues that the allegations were already asserted in a previous enforcement matter by PHMSA, and that the issues were resolved by final agency action.¹³ These arguments are addressed in turn.

A. Whether the evidence demonstrates Respondents violated § 195.401(b).

Respondents correctly note in their briefs that the appropriate standard of proof for OPS in this proceeding is the “preponderance of the evidence” standard. Accordingly, I review the evidence in the record to determine whether the greater weight of evidence supports a finding that the violations alleged in the Notice occurred.

The regulation cited, 49 C.F.R. § 195.401(b), requires that each operator correct within a reasonable time any condition discovered that could adversely affect the safe operation of a pipeline system. A company may be found to have violated this requirement if (1) there was a condition that could adversely affect the safe operation of the pipeline system, (2) the company discovered the condition, and (3) the company failed to correct it within a reasonable time. I must consider each of these elements to determine whether the evidence in the record shows by a preponderance of the evidence that Respondents violated § 195.401(b) as alleged.

(1) Whether the conditions identified during the 1982 and 1987 surveys could adversely affect the safe operation of the pipeline system.

PHMSA’s investigation following the Accident revealed that in 1982, the prior operator, Ashland, had conducted a cathodic protection survey that identified nine locations along the pipeline between Flow Stations 3 and 4 that showed signs of inadequate protection against corrosion. These locations all had negative pipe-to-soil potentials and soil resistivity readings below 10,000 ohm/cm.¹⁴ Following the 1982 survey, Ashland installed anodes to increase cathodic protection at eight of the nine locations, but did not install an anode at survey station 43+80 because the company incorrectly concluded that the line was cased.¹⁵ The location of this anomaly was approximately 120 feet from the site of the Accident.

In 1987, Ashland conducted another electrical survey of the pipeline and found 44 locations between Flow Stations 3 and 4 that required additional cathodic protection. In particular, the reading at station 98+60, the eventual site of the Accident, had a soil resistivity reading of only

¹³ MarkWest did not make this third argument.

¹⁴ A soil resistivity of below 10,000 ohm/cm is generally considered to be a corrosive environment, with varying degrees of corrosivity ranging from very corrosive (0 ohm/cm) to mildly corrosive as the value approaches 10,000. A.W. Peabody, *Control of Pipeline Corrosion* 88 (R.L. Bianchetti ed., NACE Press 2001).

¹⁵ In some instances, pipelines are cased when they cross under rivers, roads and railroads. A cased crossing is essentially one where a “carrier” pipe is placed within an outer pipe called a “casing” and centralizers are used to maintain an equal axial distance between the carrier pipe and the casing. The space between the pipes can be filled with wax, open to the atmosphere, or sealed. An electrical survey reading alone at a cased location typically would not indicate an accurate potential for external corrosion of the carrier pipe, since the latter is usually electrically isolated from the casing.

680 ohm/cm, well below 10,000 ohm/cm. The reading was so low that, given the location of the test point beneath a concrete driveway, Ashland concluded the reading must be incorrect and that it had been improperly influenced by interference from the driveway itself. There is no evidence that Ashland conducted any further investigation of the unusually low reading. PHMSA's accident investigation also did not find any evidence that an anode had ever been installed at or near either location 43+80 or 98+60.¹⁶

The survey performed in 1987 did not identify the same condition that was identified in 1982 at 43+80, nor did subsequent surveys performed by Ashland in 1992 and 1997 detect either the 1982 or 1987 conditions at 43+80 or 98+60, respectively. The 1992 and 1997 surveys identified a number of other anodic conditions between Flow Stations 3 and 4, but those other conditions are not at issue in this case.

In 2002, MarkWest performed its own electrical survey of the pipeline that also failed to identify anodic conditions at either location, but the company later discovered that the survey had not been performed correctly. The survey wire had been connected to the vent pipe or pipeline casing and therefore the readings for that section of the pipeline were likely not accurate.

In its brief, Equitable argues that the two 1982 and 1987 readings did not reflect conditions that could adversely affect the safe operation of the pipeline system. The company asserts that the readings had been analyzed by a technician at the time they were taken and "based upon his expertise, experience, and all of the information available to him," he determined that "there was no active corrosion at the specified locations."¹⁷ MarkWest similarly argues that the 1982 and 1987 surveys concluded that the readings did not constitute safety-related conditions based on the technician's analysis and that subsequent surveys conducted in 1992, 1997, and 2002 confirmed the absence of safety-related conditions at the two locations.¹⁸

With regard to the 1982 condition, the evidence in the record demonstrates that the technician identified an anodic condition with a soil resistivity of only 3,000 ohm/cm at test station 43+80 and that he indicated this on an inspection form by marking a box that meant an anode was needed to correct the condition.¹⁹ At some point, this recommendation was cancelled by writing over it "Do Not Install" on the grounds that the "Line Is Cased."²⁰ The belief that the line was cased was incorrect. Since the line was not cased, the reading demonstrated that an anodic condition existed in fact, meaning there was a risk of external corrosion that needed to be corrected. In his affidavit, the technician did not explain why he believed a cased pipeline would not require an anode, or at least why further investigation was not warranted despite the low reading, stating only that he "believed the pipeline in this area was cased, which explained the data and determined the lack of any need for an anode there."²¹

¹⁶ Violation Report, at 3. Anodes are typically installed to remediate inadequate cathodic protection.

¹⁷ Equitable's Supp. Motion to Dismiss, at 10.

¹⁸ MarkWest's Motion to Dismiss, at 5.

¹⁹ Violation Report Evidence, Exhibit 9, at 5, "Ashland Pipe Line Company, Surface Potential Survey & MG Anode Installation Data, Aug. 3, 1982."

²⁰ *Id.*

²¹ Equitable's Supp. Motion to Dismiss, Attachment B (Hendricks Affidavit), at 2.

Inadequate protection against corrosion, as evidenced by electrical survey data or low cathodic protection readings, is a condition that can adversely affect the safe operation of a pipeline system.²² Since this pipeline was not cased, the 1982 reading at test station 43+80 indicated a condition that could adversely affect the safety of the pipeline under § 195.401(b), regardless of the reasonableness of the technician's mistaken belief.

With regard to the 1987 condition, the evidence in the record demonstrates that the technician had identified a soil resistivity of only 680 ohm/cm at test station 98+60, which was at the "centerline [of a] concrete driveway."²³ The location was identified as a "spot," which meant that the survey had identified the location as an anodic area with a change in voltage potential from positive to negative and a corresponding negative potential remote.²⁴ The technician explained in his testimony that "the soil resistivity reading of 680 ohm/cm was . . . entirely inconsistent with the typical soil characteristics of the area," and therefore he "concluded the data was inaccurate and did not represent an anodic condition."²⁵ He also explained that it is "not possible to get an accurate potential measurement when there is blacktop and/or concrete."²⁶

Had the technician believed the reading was inaccurate due to the presence of the concrete driveway or for any other reason, a new reading at this location would have been required, such as taking readings at both sides of the driveway or by drilling a hole in the concrete, to ensure that a complete electrical survey was performed. Absent additional information taken during the 1987 survey, I find no justification for the operator to disregard the low reading taken at 98+60 and to assume that adequate cathodic protection existed. PHMSA expects operators to take additional precautions to ensure that they have accurate readings where pipe is located under concrete or asphalt.²⁷ Because the only reading at this location during the 1987 survey demonstrated a condition consistent with inadequate protection against corrosion, I find that the anodic area was a condition that could adversely affect the safety of the pipeline. This condition was also the site of the Accident, which further shows that the condition may have actually affected the integrity of the pipeline. The reason the low readings were not later detected during subsequent surveys is not apparent in the record, but at the time the conditions were identified, they met the criteria for being corrected under the regulation.

In conclusion, the readings at issue taken during electrical surveys in 1982 and 1987 indicated inadequate protection against corrosion and therefore were conditions that could adversely affect the safe operation of the pipeline system.

²² *In the Matter of Colonial Pipeline Co.*, Final Order, CPF No. 1-2002-5009 (December 10, 2003), at 3 (finding a violation of § 195.401(b) because the operator had failed to correct low cathodic protection readings, indicating a risk of corrosion, which is a condition that can adversely affect the safe operation of a pipeline system). PHMSA enforcement decisions are available online at <http://www.phmsa.dot.gov/pipeline/enforcement>.

²³ Violation Report Evidence, at 43, "Ashland Pipe Line Co., 1987 Cell-to-Cell Surface Potential Summary Sheet," Exhibit 11.

²⁴ *See, e.g.*, Violation Report Evidence, "Project Summary for 1992 electrical survey," Exhibit 12.

²⁵ Hendricks Affidavit, at 3.

²⁶ *Id.*

²⁷ PHMSA Fact Sheet: Close Interval Survey, available at <http://primis.phmsa.dot.gov/comm> (follow "Pipeline Library" hyperlink; then follow "Close Interval Surveys" hyperlink).

(2) Whether Respondents discovered the conditions.

Equitable argued that even though Ashland, as the operator of the pipeline at the time of the 1982 and 1987 electrical surveys, discovered the anodic conditions at the two locations in question, Equitable, as the owner of the pipeline, cannot not be held in violation of the regulation because it never actually “discovered” the conditions.

The regulation at issue sets forth requirements for “an operator” of a pipeline, but under 49 C.F.R. § 195.2, the requirements also apply to pipeline owners because the term “operator” is defined in the regulations to include any person “who owns or operates” a pipeline facility. Federal law also specifies that the pipeline safety standards established by PHMSA “apply to owners and operators of pipeline facilities.”²⁸ As PHMSA has previously explained, it is not uncommon for a pipeline owner to contract with a third party for the operation and maintenance of a pipeline, but such a “contractual arrangement does not absolve the owner from responsibility” for compliance with the pipeline safety regulations.²⁹ “Whether the owner is an active participant in the business operation or not is of no consequence,” and the action may be commenced against either the owner or operator of the pipeline, or both, for the actions conducted by either party with respect to the facility.³⁰

As the owner of the pipeline in question, Equitable was not only responsible for its own conduct with respect to the operation and maintenance of the pipeline, but for the conduct of any third party performing such activities on its facility. The evidence demonstrates that the two anodic conditions were “discovered” by the operator of the facility, notwithstanding the technician’s incorrect decision that the conditions did not require further action. As the owner of the pipeline, Equitable was responsible for correcting these conditions, which could (and, ultimately, may have) adversely affected the safety of its pipeline system. Therefore, I find that Equitable may be held liable for any failure to comply with § 195.401(b) with respect to the conditions discovered on its pipeline requiring remediation.³¹

MarkWest argues that it never discovered the conditions in 1982 and 1987 either, insofar as it did not begin operating the pipeline until 2000. MarkWest further contends that by the time it assumed operations, there was no indication that conditions existed at the two locations based on electrical surveys conducted by the prior operator in 1992 and 1997. The company also noted that it conducted its own survey in 2002, which did not identify any conditions at those locations, although MarkWest acknowledged that the survey was not conducted properly and may not have produced accurate readings.³²

²⁸ 49 U.S.C. § 60102.

²⁹ *In the Matter of Ozark Gas Transmission, L.L.C.*, Decision on Petition for Reconsideration, CPF No. 2-2002-1004, 2003 WL 25429903 (Dec. 31, 2003).

³⁰ *Id.*

³¹ In its July 22, 2009 brief, Equitable cited the PHMSA stakeholder’s communication website for the proposition that a single reading cannot be the basis for discovering an anodic condition. Equitable’s Brief at 2. I am unaware of any public statement by PHMSA that supports such an assertion, and the company did not quote or otherwise cite any specific language from that website.

³² MarkWest Motion to Dismiss, at 10-11.

The fact that the initial discovery of the conditions occurred before MarkWest began operating the pipeline does not necessarily require that PHMSA find that the company had no knowledge of the conditions. Under § 195.401(b), a subsequent operator of a pipeline facility may be held responsible for correcting conditions discovered by a prior operator if the new operator was aware of them, or if the company had reason to know about them, such as by obtaining the necessary information from the prior operator. Thus, if MarkWest was aware of the conditions discovered by the prior operator, or should have known about them, then the company would be required to correct the conditions.

In the present case, the conditions at issue were first discovered in 1982 and 1987, dates that were 18 and 13 years prior to MarkWest assuming operations of the pipeline. When MarkWest began operating the pipeline in 2000, subsequent surveys had been conducted in 1992 and 1997 that did not identify anodic conditions at the 43+80 and 98+60 sites. There is no other evidence in the record to suggest that MarkWest had reason to believe that anodic conditions existed at those locations or that they had not already been corrected. Therefore, it does not appear that MarkWest knew, or should have known, that any conditions existed at those sites when it assumed operations in 2000.

I reach different conclusions about whether Equitable and MarkWest discovered the conditions, because they were in fundamentally different positions with respect to the actions that took place in the 1980s, prior to MarkWest becoming the operator of the pipeline. Equitable was the owner of the pipeline at the time in question, and was therefore responsible for the discovery of the conditions that took place at that time, whereas MarkWest did not own, operate, or have any other involvement with the pipeline until years later and had no reason to suspect the conditions were present or had not been corrected.

In conclusion, I find that Equitable, as the owner during the period in question, discovered the conditions at 43+80 and 98+60 as a result of the electrical surveys performed in 1982 and 1987. I further find there is insufficient evidence to conclude that MarkWest discovered the conditions after it began operating the pipeline in 2000. Since I find insufficient evidence to prove that MarkWest discovered the conditions, I must withdraw the allegation of violation with respect to that company.

(3) Whether Equitable corrected the conditions within a reasonable time of discovery.

With regard to the 1982 condition at 43+80, the evidence in the record demonstrates that the technician performing the survey decided not to install an anode to correct the condition because he believed the pipeline was cased at this particular location. The investigation following the Accident found the pipeline was not cased, and there was no evidence that an anode had ever been installed to correct the condition at 43+80. In its Response, Equitable did not provide any evidence that it took action to correct the anodic condition discovered in 1982. Accordingly, I find that Equitable failed to correct this condition within a reasonable time.

With regard to the 1987 condition at 98+60, the evidence in the record demonstrates that the technician decided not to install an anode to correct the condition because he improperly assumed that the reading was in error. Despite failing to take any additional readings, the technician simply assumed that the pipeline had adequate protection against corrosion. The investigation following the Accident found there was no evidence that an anode had ever been

installed to correct the condition at 98+60 identified during the 1987 survey. Accordingly, I find that Equitable failed to correct this condition within a reasonable time.

Equitable argues that the subsequent electrical surveys in 1992 and 1997 demonstrated that any anodic conditions that may have existed earlier at these two locations had been corrected, because those surveys did not indicate conditions existed at either 43+80 or 98+60. As evidence to support this assertion, Equitable submits the statement of an expert witness who testified that “the 1987 survey confirmed that no anodic condition existed at the 43+80 location identified in the 1982 survey,” and “[t]he conclusion that no anodic condition existed at the 43+80 location was further confirmed by the subsequent surveys in 1992 and 1997.”³³ He further stated that “the surveys performed in 1992 and 1997 . . . did not identify anodic conditions at . . . the site designated in the 1987 survey as Station No. 98+60.”³⁴

Since the decisions to not remediate the anodic conditions were in error, and since Equitable never took any action by itself or through its operator to remediate either condition, Equitable never could rightfully assume that the conditions had been remediated. Therefore, I find that Equitable failed to correct within a reasonable time of discovery the conditions at 43+80 and 98+60, which were identified during electrical surveys performed in 1982 and 1987, respectively.

Accordingly, after considering all of the evidence, I find that Equitable violated 49 C.F.R. § 195.401(b) by failing to correct two conditions that it discovered in 1982 and 1987, which were conditions that could adversely affect the safe operation of the pipeline system.

After considering all of the evidence, I find that there is insufficient evidence to prove that MarkWest violated 49 C.F.R. § 195.401(b) as alleged in the Notice.

B. Whether enforcement is barred under the statute of limitations.

Both Equitable and MarkWest argue that enforcement of Item 1 is barred by the five-year statute of limitations found in 28 U.S.C. § 2462. Specifically, the Companies contend that the enforcement window for the violation expired five years after “the expiration of a reasonable time from the discovery of a safety-related condition.”³⁵ MarkWest further suggests that a “reasonable time” in which to correct such conditions would be six months, and therefore the enforcement period should expire five-and-a-half years after the conditions were discovered in 1982 and 1987, respectively.³⁶

In support of its position that the violation occurred at the end of a reasonable period following the 1982 and 1987 surveys and did not constitute a “continuing violation,” MarkWest relies largely on judicial decisions involving pre-construction permits issued by the Environmental Protection Agency (EPA). MarkWest cites several decisions in which courts have found that a violation of certain pre-construction permitting requirements occurred at the time a facility was

³³ Equitable’s Supp. Motion to Dismiss, Attachment A (Garrity Affidavit), at 3.

³⁴ *Id.* at 4.

³⁵ MarkWest’s Motion to Dismiss, at 14; *see* Equitable’s Supp. Motion to Dismiss, at 9.

³⁶ MarkWest’s Motion to Dismiss, at 15.

constructed or modified, and did not continue after that.³⁷ MarkWest argues that the failure to correct a dangerous condition on a pipeline is analogous to a failure to obtain a pre-construction permit.³⁸

Equitable further objects to OPS's characterization of violations as "continuous and ongoing" on the ground that the text of the pipeline safety statute in effect in 1987 "does not create the basis for a potential continuing violation theory."³⁹ This is because, the company argues, the law did not provide that a new violation accrued each day a violation continued.⁴⁰ MarkWest also argues that a continuing violation must "be occasioned by continual unlawful acts, not continual ill effects from a lawful violation,"⁴¹ and that OPS had alleged "a continuous and ongoing *consequence* of an earlier violation," "not a continuous and ongoing *violation*."⁴²

Equitable notes the policy reason for statutes of limitations is "to require actions to be brought while the facts are fresh, and before such time as 'evidence has been lost, memories have faded, and witnesses have disappeared,'"⁴³ and maintains that the circumstances surrounding the decision not to install anodes in 1982 and 1987 occurred so long ago that they cannot be fairly evaluated now.⁴⁴ MarkWest similarly notes that policy interests in pipeline safety cannot trump those favoring statutes of limitations.⁴⁵ Finally, MarkWest argues that a "limitations bar against PHMSA's civil penalty claim is not inconsistent with the goal of pipeline safety," because even if a civil penalty is barred, PHMSA still retains the authority to order corrective action.⁴⁶

In its brief, OPS contends that the "statute of limitations defense does not apply to this instance because the violation was a *continuing* offense or, in the alternative, there was not one but instead a *series of discrete violations*."⁴⁷ OPS contends that the failure to repair the defects at issue in this case was a continuing violation dating from the time of the 1982 and 1987 surveys until the date of the Accident.⁴⁸ OPS also argues, in the alternative, that the failure to correct the conditions constitutes a series of discreet daily violations, and that the agency may charge

³⁷ *Id.* at 16-17.

³⁸ *Id.* at 17-18.

³⁹ Equitable's Supp. Motion to Dismiss, at 9

⁴⁰ *Id.* Equitable contrasted this to, for example, the Toxic Substances Control Act (TSCA), which the company suggested might allow for the accrual of daily violations because it reads, "Each day such a violation continues . . . constitutes a separate violation." *Id.*, quoting 15 U.S.C. § 2615(a)(1) (1986).

⁴¹ MarkWest's Motion to Dismiss, at 15, quoting *New York v. Niagara Mohawk Power Corp.*, 263 F.Supp.2d 650, 660 (W.D.N.Y. 2003).

⁴² MarkWest's Motion to Dismiss, at 16 (emphasis in original).

⁴³ Equitable's Reply, at 3, quoting *Order of R.R. Telegraphers v. Railway Express Agency*, 321 U.S. 342, 349 (1944).

⁴⁴ Equitable's Supp. Motion to Dismiss, at 9.

⁴⁵ MarkWest's Motion to Dismiss, at 18.

⁴⁶ *Id.* at 17-18.

⁴⁷ OPS Response to Equitable, at 15-16; OPS Response to MarkWest, at 9. Emphasis in original.

⁴⁸ OPS Response to Equitable, at 15-16.

Respondents for each day the violation occurred within the five-year period preceding issuance of the Notice.⁴⁹

OPS further contended that the language of the pipeline safety statute indicates “that a violation occurring over a number of days is actually more than one violation *with each new day that the violation occurs constituting a new violation,*” because the law provides that “[a] separate violation occurs for each day the violation continues.”⁵⁰ OPS cited a court decision that found the failure of a facility owner to obtain a preconstruction permit from the EPA was an ongoing offense even after the facility was constructed, and a new violation accrued each day that the owner operated the facility without a permit.⁵¹ OPS contended that the daily violations in this case continued until the date of the pipeline explosion, and therefore the agency’s enforcement of the violations falls within the statute of limitations.⁵²

(1) Discussion

In accordance with 28 U.S.C. § 2462, the statute of limitations for an enforcement action under the pipeline safety regulations is five years.⁵³ A claim generally accrues for statute of limitations purposes—meaning that the five-year period begins to run—on the date the violation occurs and the claim must be brought within five years.⁵⁴ Certain exceptions to the rule that a case may not be brought after five years have been established by courts for violations that are “continuing,” as well as for violations that are considered a “series of daily violations.”⁵⁵ These exceptions permit claims to be brought after the statutory limitations period would otherwise have expired. Since the Notice in this case was issued more than five years after the date the violations first occurred, I evaluate the relevant law to determine whether either of these exceptions apply.

The key question for courts seeking to determine whether one of these doctrines applies in the regulatory context is whether a defendant had an ongoing obligation to comply. For example, in *Newell Recycling Co., Inc. v. EPA*, the court upheld the decision of the EPA that found the

⁴⁹ *Id.* at 18-19; OPS Response to MarkWest, at 11-12.

⁵⁰ OPS Response to MarkWest, at 13.

⁵¹ *Id.* at 12; OPS Response to Equitable, at 18-19, *citing National Parks Conservation Ass’n, Inc. v. TVA*, 480 F.3d 410 (6th Cir. 2007).

⁵² OPS Response to MarkWest, at 13-14.

⁵³ 28 U.S.C. § 2462 provides, “Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.” *See also 3M v. Browner*, 17 F.3d 1453 (D.C. Cir. 1994), which determined that 28 U.S.C. § 2462 applies to administration adjudications.

⁵⁴ Accrual for statute of limitations purposes should be distinguished from accrual defined as the first date on which a claim may be brought. A claim may be brought—and therefore “accrues”—on the date the violation occurs. As the Companies state, a violation is generally considered to have occurred on the date it actually began, not on the date the government discovers it. *See 3M*, 17 F.3d at 1460-63.

⁵⁵ *See, e.g., Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1980). A “continuing violation” tolls the statute of limitations until the violation ends, and a claim may be brought for the entire period of the violation. A “series of daily violations,” on the other hand, does not toll the statute of limitations, but a claim may be brought as to the daily violations within the applicable limitations period that precedes issuance of the claim.

failure to satisfy a safety-related regulatory requirement was an ongoing violation that tolled the statute of limitations.⁵⁶ In that case, the defendant had failed to comply with a regulation requiring proper disposal of certain chemical waste that was “taken out of service.” The defendant had taken waste out of service but had not properly disposed of it for ten years. The EPA brought a claim more than five years after the waste was first taken out of service, and the defendant claimed that the statute of limitations barred enforcement. The court agreed with the EPA, however, that the violation had continued for as long as the company failed to dispose of the waste properly.

In another decision, *Mayer v. EPA*, the court determined that regulations established under the Resource Conservation and Recovery Act (RCRA) created a continuing obligation of compliance that permitted EPA to assess civil penalties for the discrete daily violations that accrued each day the party remained out of compliance.⁵⁷ The regulations at issue required owners of certain underground storage tanks to provide notice of the existence of such tanks within 30 days of taking ownership, and required tank owners to install certain technology by a specific date. The EPA brought its action 14 years after notice should have been given under the first regulation, and 8 years after the technology should have been installed. The defendant claimed that the actions were barred by the statute of limitations, but the court ruled that the regulations created “a continuing obligation of compliance, with the initial date of non-compliance occurring on the date established by the regulations.” The court determined that a discrete violation accrued each day a party remained out of compliance, and permitted civil penalties for all daily violations within the limitations period.

The court’s decision in *Mayer v. EPA* was consistent with “the overarching goal of the regulations . . . to protect human health and the environment, a goal that could not be achieved if the regulations at issue did not create an ongoing duty to comply with the regulations.” The court stated specifically that:

To rule otherwise would defeat the purpose of RCRA and the regulations promulgated under it. Any other ruling would also reward attempts at concealing the existence of [underground storage tanks] from regulatory authorities, which would be at odds with the statute’s stated spirit and purpose of protecting human health and the environment.⁵⁸

Respondents also cited numerous decisions regarding EPA preconstruction permits to support their position that the violation was not continuing. After reviewing these and other decisions, it does not appear that the law in this area is as one-sided as the Companies suggested.⁵⁹ The courts seem to be split on the precise question of whether the failure to obtain an EPA preconstruction permit constitutes a continuing violation.⁶⁰ In fact, the first case MarkWest cited

⁵⁶ *Newell Recycling Co., Inc. v. EPA*, 231 F.3d 204 (5th Cir. 2000).

⁵⁷ *Mayer v. EPA*, No. 3:05-CV-478, 2008 WL 65178 (E.D. Tenn. Jan. 4, 2008).

⁵⁸ *Id.*

⁵⁹ MarkWest’s Motion to Dismiss, at 16-17; Equitable’s Supp. Motion to Dismiss, at 8.

⁶⁰ See, e.g., *National Parks Conserv. Ass’n, Inc. v. Tennessee Valley Auth.*, 480 F.3d 410, 419 (6th Cir. 2007); *U.S. v. East Kentucky Power Co-op., Inc.*, 498 F.Supp.2d 970, 975 (E.D. Ky. 2007). But see, e.g., *Sierra Club v. Otter*

in its motion as support for its position, *National Parks Conserv. Assoc., Inc. v. Tennessee Valley Auth.*, 2005 WL 5165704 (E.D. Tenn. 2005), was reversed by the court of appeals.⁶¹

MarkWest still argued that “the continued presence of a safety-related condition arising out of a failure-to-correct violation is no more a continuing violation than the continued presence of additional air pollution arising out of a failure to secure a preconstruction permit and install pollution controls.”⁶² In the cases cited by MarkWest where the failure to obtain a preconstruction permit was determined not to constitute a continuing violation, the requirement to obtain a preconstruction permit was found to have ended once construction commenced.⁶³ In other words, the violation was temporally limited to the single act of obtaining a permit. In the present case, however, the regulation requires an operator to correct a condition that threatens the safety of a pipeline, an obligation that continues every day until the condition is corrected.

In a Supreme Court decision cited by Equitable, *Toussie v. United States*, the Court found that the failure to register for the draft was not a continuing violation for statute of limitations purposes.⁶⁴ This decision, however, is not directly relevant to the present enforcement action, because, as a subsequent decision found, the “holding was limited to criminal statutes of limitations. . . . Those considerations have little relevance to the problems of limitations in civil cases.”⁶⁵

MarkWest’s argument that OPS has alleged “a continuous and ongoing *consequence* of an earlier violation,” “not a continuous and ongoing *violation*,”⁶⁶ is also unpersuasive, based on a review of relevant case law. In the case cited above, in which the court found that a failure to obtain a preconstruction permit was not a continuing violation, the court wrote: “In determining whether to characterize a violation as ‘continuing,’ it is important to distinguish between the ‘present consequences of a one-time violation,’ which do not extend the limitations period, and ‘a continuation of a violation into the present,’ which does.”⁶⁷ In the present case, § 195.401(b) requires operators to correct conditions that could affect the pipeline’s safety, an obligation that Equitable violated by failing to carry out the necessary corrective action. It is the “continuation of the violation into the present,” meaning the continued failure to repair the condition, that is at issue here.

Tail Power Co., --- F.3d ---, 2010 WL 3168434, *4 (8th Cir. 2010); *National Parks and Conserv. Ass’n, Inc. v. Tennessee Valley Authority*, 502 F.3d 1316, 1321 (11th Cir. 2007).

⁶¹ *National Parks Conserv. Assoc., Inc. v. Tennessee Valley Auth.*, 480 F.3d 410 (6th Cir. 2007). The district court decision MarkWest cited as support of its position was reversed prior to MarkWest filing its motion with PHMSA.

⁶² MarkWest’s Motion to Dismiss, at 17.

⁶³ See, e.g., *Niagara Mohawk Power Corp.*, 263 F.Supp.2d at 661 (W.D.N.Y. 2003) (stating, “Once the construction or modification is complete, the window in which to apply for and obtain a preconstruction permit is gone.”).

⁶⁴ 397 U.S. 112 (1970). Equitable’s Reply, at 4.

⁶⁵ *Diamond v. United States*, 427 F.2d 1246, 1247 (Ct. Cl. 1970).

⁶⁶ MarkWest Motion to Dismiss, at 16 (emphasis in original).

⁶⁷ *National Parks*, 502 F.3d 1316, 1321 (quoting *Ross v. Buckeye Cellulose Corp.*, 980 F.2d 648, 658 (11th Cir.1993)).

An analysis of the language of the pipeline safety statute is also relevant in determining whether the violation of § 195.401(b) should be considered ongoing.⁶⁸ In *InterAmericas Investments v. Federal Reserve System*, a court upheld an agency decision finding that the defendants' non-compliance with the Bank Holding Company Act (BHCA) was a continuing violation. In deciding the matter, the court looked closely at the penalty provisions of the applicable statute, which read: "Any company which violates . . . any provision of this chapter, or any regulation or order issued pursuant thereto, shall forfeit and pay a civil penalty of not more than \$25,000 for each day during which such violation continues." The court determined that "[w]here the civil penalty provision at hand contemplates per diem penalties for violations, then continuing violations are cognizable under the general statute of limitations." The court pointed out that the statute not only provided for per diem penalties, but also explicitly referred to "continuing violations," making it reasonable to read it as contemplating continuing violations. The court noted further that "the BHCA—and, indeed, common sense—preclude control of a bank, in violation of the BHCA, simply because such continuing control began more than five years before the Board initiated action."⁶⁹

Likewise, in this case, the civil penalty provision in the current federal pipeline safety statute, 49 U.S.C. § 60122(a), states that a person who has violated the pipeline safety regulations "is liable to the United States Government for a civil penalty of not more than \$100,000 for each violation. A separate violation occurs for each day the violation continues." Like the civil penalty statute in *InterAmericas*, not only does § 60122(a) provide for per diem penalties, but it also explicitly refers to continuing violations. Unlike the BHCA, the pipeline statute goes even further, and states that a separate violation occurs for each day the violation continues. Thus, according to the *InterAmericas* test, the language of the pipeline safety statute establishes that non-compliance with the regulations may be a continuing violation. Therefore, based upon the express language of 49 U.S.C. § 60122(a) and relevant case law, I find that the federal Pipeline Safety Law authorizes findings and penalties for continuing violations and that § 195.401(b) creates an ongoing obligation for operators to correct unsafe conditions within a reasonable time.

Equitable further argued that the version of the statute that was in effect in 1987 should govern this action, and that it did not permit continuing violations. This argument is also unpersuasive. The 1987 statute was not materially different from the present statute or the statute at issue in *InterAmericas*. In 1987, PHMSA's civil penalty statute provided, "Any person who is determined by the Secretary to have violated . . . any regulation or order issued under this chapter . . . shall be liable to the United States for a civil penalty of not more than \$1,000 for each violation *for each day that violation persists*."⁷⁰ Like the civil penalty statute in *InterAmericas*, this statute provided for per diem penalties and explicitly referred to "persisting," that is, continuing, violations. The only relevant difference between the 1987 and current versions of

⁶⁸ See *InterAmericas Investments v. Federal Reserve System*, 111 F.3d 376 (5th Cir. 1997).

⁶⁹ *Id.* at 383. See also *In re Harmon Electronics*, 7 E.A.D. 1, Docket No. VII-91-H-0037 (March 24, 1997), *rev'd on other grounds*, *Harmon Industries, Inc. v. Browner*, 19 F.Supp.2d 988 (W. D. Mo. 1998). In this decision, the Environmental Appeals Board undertook a similar analysis and determined that RCRA contemplated continuing violations. The Board found that "[a]lthough RCRA does not contain any explicit language stating that violations under the Act are continuing, it does contain language that clearly contemplates the possibility of continuing violations. . . . [T]he important point for our purposes is that the language of the two provisions, by expressly contemplating daily penalties for a violation of the Act, clearly assumes the possibility of continuing violations."

⁷⁰ 49 U.S.C. § 2007 (1987) (emphasis added).

the pipelines statute is that the former statute did not explicitly provide that *separate* violations occurred daily, but this distinction was not a factor in the *InterAmericas* decision. Thus, under the analysis laid out in that case, PHMSA's 1987 statute still contemplated continuing violations and penalties of not more than \$1,000 for each day of violation.

This interpretation is further supported by agency precedent. In a prior PHMSA enforcement action, PHMSA determined that a failure to provide training to two employees was a continuing violation that tolled the statute of limitations until the training was completed.⁷¹ Specifically, PHMSA found that the operator's procedures had required security personnel to receive training within a certain period of time, but that many personnel either never received such training, or received it late by several years. Two employees had started work in 1995 and were required to have their training completed by 1996. The Notice in the case was issued in 2002, six years after the violations commenced. While the claim initially accrued as to those employees more than five years before the enforcement action was issued, PHMSA determined that the statute of limitations did not preclude enforcement, because "the violation continues until the training is completed. In this case, the training was not completed until well after June 17, 1997."⁷² In that case, the failure to train the employees constituted a continuing violation that tolled the statute of limitations.

Finally, there are compelling policy reasons why § 195.401(b) creates an ongoing obligation to correct known safety-related conditions. There is a strong governmental interest in ensuring the safe operation and maintenance of pipelines transporting hazardous liquids and gases by imposing a continuing obligation to remediate any discovered condition that affects safety. Common sense requires that an obligation to correct a safety condition applies until the condition is corrected, and companies should not be allowed to avoid remediating a safety-related condition simply by waiting five years. Such a result would be inconsistent with the purpose of the pipeline safety regulations, which is to protect the public, property, and the environment from the risks associated with pipeline transportation. It is also inconsistent with the purpose of § 195.401(b), which is to require operators and owners to remain vigilant in addressing known safety-related conditions that may often worsen over time.

Such a result does nothing to belittle or ignore the legitimate policy reasons underlying statutes of repose such as the five-year general statute of limitations at issue here. As the court stated in *3M v. Browner*, "The concern that after the passage of time 'evidence has been lost, memories have faded, and witnesses have disappeared' pertains equally to fact-finding by a court and fact-finding by an agency."⁷³ These concerns have been weighed by the courts, and in the context of ongoing violations of regulatory standards for which there is a continuing obligation to comply, courts have found they do not override the government's interest in enforcement. For this reason, I reject Respondent's suggestion that PHMSA would be disregarding the need for statutes of limitations if it were to enforce Item 1 for two pipeline conditions first discovered in the 1980s.⁷⁴ On the contrary, having weighed the competing interests of public safety and the

⁷¹ *In the Matter of Distrigas of Massachusetts LLC*, Final Order, CPF No. 1-2002-3003, 2005 WL 5010143 (Nov. 2, 2005).

⁷² *Id.* at 7.

⁷³ *3M*, 17 F.3d at 1457, quoting *Order of R.R. Telegraphers v. Railway Express Agency*, 321 U.S. 342, 349 (1944).

⁷⁴ MarkWest's Motion to Dismiss, at 18.

need to limit the time period for initiating administrative enforcement actions, I must conclude that public safety is paramount.

(2) Conclusion

Accordingly, I find that 49 C.F.R. § 195.401(b) places an ongoing obligation on an operator to correct discovered conditions that could affect the safety of the pipeline, and that an operator commits a separate and discrete violation for every day that it fails to correct such a condition within a reasonable time. I further find that these daily violations continue to occur until the condition is corrected.⁷⁵ Since there was a series of daily violations in this case, PHMSA is not precluded under the default statute of limitations from enforcing the violations of § 195.401(b) committed within the five-year period prior to issuance of the Notice. In other words, PHMSA may enforce against Equitable's violations dating back to June 15, 2001.

C. Whether the allegations were resolved in a prior PHMSA enforcement action.

Equitable further argues that PHMSA is barred from finding the company in violation of Item 1 because, in 1999, the agency issued, but later withdrew, a Notice of Probable Violation (1999 Notice) relating to the pipeline's cathodic protection system.⁷⁶ The 1999 Notice issued by the Director, Eastern Region, OPS, to an Equitable subsidiary, Kentucky Hydrocarbon, alleged violations with respect to the same pipeline at issue in the present case.⁷⁷ First, it alleged that Equitable had failed to comply with the cathodic protection requirements on approximately four miles of coated pipe, as evidenced by a close internal survey performed in 1997, and that although the company had begun to carry out repairs of certain deficiencies identified by the survey, "the coated segments haven't been brought into compliance as yet." Second, it alleged that Equitable had failed to conduct annual inspections of segments of cathodically protected pipe.

In a letter to OPS dated April 8, 1999, the operator of the pipeline at the time, Ashland, acknowledged the survey had indicated the pipeline was out of compliance, as alleged in the first item. As to the second item, the company explained that it had in fact conducted annual inspections of those segments of the line that were cathodically protected and provided documentation for those inspections. Ashland sent OPS a second letter dated June 10, 1999, in which it documented that the four miles of coated pipeline had been brought into compliance.

On December 8, 1999, the Director withdrew the 1999 Notice on the basis of Ashland's response and documentation. In the withdrawal letter, the Director explained that an OPS inspector had studied the results of the 1997 survey and subsequent cathodic protection measurements, and had conducted field tests to assess compliance. The letter also noted that the inspector had documentation regarding newly-installed anodes. The Director wrote, referring to the segments

⁷⁵ Given this finding, it is unnecessary to reach a conclusion as to whether a *single continuing violation* existed from the time each violation was first committed. See, e.g., *Mayes*, 2008 WL 65178, at *10 (finding the charges covered only the preceding five years of discrete, per-day violations, and therefore the court did not need to reach the issue of whether the violations were also continuing in nature).

⁷⁶ Equitable's Reply, at 6.

⁷⁷ Notice of Probable Violation and Proposed Compliance Order, CPF No. 19502, issued to Kentucky Hydrocarbon by the Director, Eastern Region, Office of Pipeline Safety, March 16, 1999.

of coated pipeline that were found out of compliance, “The p/s potential readings were satisfactory No further action is required from your part. This office, however, expects future compliance with the cathodic protection requirements.”

In its brief, Equitable claimed that OPS is “estopped from reversing this 1999 decision and determining now that an ongoing violation of cathodic protection regulations existed on December 8, 1999.”⁷⁸ The company maintained that “[a]ccording to the withdrawal letter . . . the actions taken in response to the 199[9] Notice were deemed fully sufficient and no further action was deemed necessary at that time to bring the pipeline into compliance with cathodic protection requirements.”⁷⁹ Equitable stated that the Director’s decision to withdraw the Notice “applied to the entire pipeline, and not simply the portions of the pipeline that were initially thought to be in violation.”⁸⁰

I have reviewed the record in the prior enforcement matter and concluded that the 1999 Notice and related inspection did not, in fact, relate to the specific section of pipeline or to the cathodic protection problems involved in the present case. The 1999 Notice alleged violations with respect to *coated* pipe, whereas the conditions at issue in this proceeding relate to segments involving *uncoated* pipe.⁸¹ There is no evidence that OPS reviewed Equitable’s survey records from 1982 and 1987 during the prior inspection, or made any assessment at that time regarding compliance with § 195.401(b) for the conditions at issue in the present case.

Moreover, the withdrawal letter did not contain a blanket finding that the entire pipeline was in full compliance with all cathodic protection requirements. The statement in the Director’s letter that “No further action is required from your part” was not a finding of complete compliance with all applicable requirements.⁸² Nor did the closure letter immunize Equitable against future enforcement relating to issues not identified or addressed in the 1999 Notice. Rather, the withdrawal letter ended that particular enforcement action, finding only that Equitable had corrected the specific issues described in the 1999 Notice and therefore did not need to perform any further action with respect to those specific issues.

Therefore, the prior enforcement action against Equitable does not preclude the enforcement of Item 1 in the present case.

D. Conclusion

⁷⁸ Equitable’s Reply, at 6.

⁷⁹ *Id.* at 5.

⁸⁰ *Id.*

⁸¹ Marathon Ashland, the former operator, acknowledged the distinction between bare and coated pipe in its April 1999 letter. Marathon wrote: “The Kentucky Hydrocarbons pipeline system was constructed as a bare unprotected pipeline and has been governed by (CFR), Part 195.416(d). Only the coated replacements contained in the pipeline fall under 195.416(a).” Letter from Terry Hendricks, Marathon Ashland, to William Gute, PHMSA, April 8, 1999.

⁸² Equitable cites the Hendricks Affidavit to support its claim that OPS’s “determination applied to the entire pipeline, and not simply the portions of the pipeline that were initially thought to be in violation.” Equitable’s Reply, at 5. Mr. Hendricks’s testimony, however, cannot expand the scope of the underlying case or the scope of the closure letter that applied only to the matters involved in that case.

For the above reasons, I find that Equitable violated 49 C.F.R. § 195.401(b) by failing to correct, within a reasonable time, two conditions that it had first discovered in 1982 and 1987 and that those conditions were ones that could adversely affect the safe operation of the pipeline system. I further find that enforcement of those violations is not precluded by the statute of limitations or prior agency action.

With regard to MarkWest, I find there is insufficient evidence to find that the company violated 49 C.F.R. § 195.401(b), as alleged in the Notice, and therefore withdraw Item 1 as it relates to MarkWest.

Item 2: The Notice alleged that Respondents violated 49 C.F.R. § 195.440, which, as of the date of violation, stated:

§ 195.440 Public education.

Each operator shall establish a continuing educational program to enable the public, appropriate government organizations and persons engaged in excavation-related activities to recognize a hazardous liquid or a carbon dioxide pipeline emergency and to report it to the operator or the fire, police, or other appropriate public officials. The program must be conducted in English and in other languages commonly understood by a significant number and concentration of non-English speaking population in the operator's operating areas.⁸³

The Notice alleged that Respondents violated § 195.440 by failing to establish an adequate continuing public education program to enable the public, appropriate government organizations and persons engaged in excavation-related activities to recognize and report a pipeline emergency. Specifically, the Notice alleged that residents in the immediate area of the pipeline, who had observed hazardous liquid spewing out of the ground and flowing across the street during the initial phase of the Accident, did not recognize that a pipeline emergency was occurring. The Notice further alleged that even though the MarkWest procedure implementing a public education program, *Operations, Maintenance and Maintenance and Emergencies Manual (O&M Manual) Procedure 7.6, Public Education*, indicated that such a program must be established, the records and documents cited in the Violation Report failed to include information to educate the public on recognizing and reporting a pipeline emergency.

The Violation Report included statements from two men residing at the site of the Accident and who suffered injuries from the explosion and fire. The men stated to the inspector that they did not recognize the “spewing liquid stream” as a pipeline emergency despite “getting pretty dizzy” while they attempted to turn off their water valve, thinking it was a water line break. Other residents in the neighborhood also failed to recognize that the liquid flowing across the street, which was producing a noticeable “fog,” was a pipeline emergency, as they apparently believed that the liquid was simply water.

Respondents withdrew their request for a hearing on this Item and did not otherwise respond substantively to this allegation of violation. Accordingly, after considering all of the evidence in

⁸³ Section 195.440 was amended by Pipeline Safety: Pipeline Operator Public Awareness Program, 70 Fed. Reg. 28,833 (May 19, 2005).

the record, I find that Respondents violated 49 C.F.R. § 195.440 by failing to establish an adequate continuing public education program.

Item 4: The Notice alleged that Respondents violated 49 C.F.R. § 195.52, which states, in relevant part:

§ 195.52 Telephonic notice of certain accidents.

(a) At the earliest practicable moment following discovery of a release of the hazardous liquid or carbon dioxide transported resulting in an event described in § 195.50, the operator of the system shall give notice, in accordance with paragraph (b) of this section, of any failure that: . . .

(2) Resulted in either a fire or explosion not intentionally set by the operator;

(b) Reports made under paragraph (a) of this section are made by telephone to 800-424-8802 (in Washington, DC, 20590-0001 (202) 372-2428)

The Notice alleged that Respondents violated § 195.52 by failing to give telephonic notice of the Accident at the earliest practicable moment following its discovery.⁸⁴ Specifically, the Notice alleged that the Accident involved a release of the hazardous liquid transported that resulted in a fire or explosion not intentionally set by the operator at approximately 8:34 a.m. on November 8, 2004, that the Companies shut down the pump at the Maytown plant at 8:58 a.m., but that they failed to make the required telephonic notice until 1:49 p.m., a lapse of nearly four hours.⁸⁵

Respondents withdrew their request for a hearing on this Item and did not otherwise respond substantively to this allegation of violation. Accordingly, after considering all of the evidence, I find that Respondents violated 49 C.F.R. § 195.52 by failing to give telephonic notice at the earliest practicable moment following discovery of the Accident.

Item 8: The Notice alleged that Respondents violated 49 C.F.R. § 199.105(b), which states:

§ 199.105 Drug tests required.

Each operator shall conduct the following drug tests for the presence of a prohibited drug:

(a)

(b) *Post-accident testing.* As soon as possible but no later than 32 hours after an accident, an operator shall drug test each employee whose performance either contributed to the accident or cannot be completely discounted as a contributing factor to the accident. An operator may decide not to test under this paragraph but such a decision must be based on the best information available immediately after the accident that the

⁸⁴ Under § 195.50, “[a]n accident report is required for each failure in a pipeline system subject to this part in which there is a release of the hazardous liquid or carbon dioxide transported resulting in any of the following:

(a) Explosion or fire not intentionally set by the operator”

⁸⁵ Pipeline Safety Alert Notice ALN-91-01 (Apr. 15, 1991) and Advisory Bulletin. ADB-02-04 (Aug. 30, 2002) conveyed to pipeline owners and operators that telephonic notifications should be made within one to two hours after discovering an accident covered by § 195.50.

employee's performance could not have contributed to the accident or that, because of the time between that performance and the accident, it is not likely that a drug test would reveal whether the performance was affected by drug use.

The Notice alleged that Respondents violated § 199.105(b) by failing to drug test two individuals whose performance either contributed to the Accident, or whose performance could not be completely discounted as a contributing factor. Specifically, the Notice alleged that Respondents failed to drug test a MarkWest employee who had been operating the valve that failed in the closed position, leading to an increase in pressure and ultimately the Accident. The Notice further alleged that Respondents failed to drug test a Kentucky Hydrocarbon Co. employee who was operating the Maytown Plant pipeline pump when low flow-rate alarms occurred due to the closed valve. This employee had allegedly communicated her analysis of the pipeline pump information to the MarkWest employee immediately prior to the Accident.

Equitable withdrew its request for a hearing on this Item, and did not otherwise substantively respond to this allegation of violation.

In its brief, MarkWest argued that it did not have to drug test either individual. With regard to the MarkWest employee, Respondent indicated that it had discounted the individual's performance as a possible contributing factor to the Accident because the person had heard a "popping noise" during the operation of the valve and had consulted various other personnel and management, who told him that it was not abnormal. Given the person's "diligent, multiple inquiries," Respondent contended, the company "had no reason to think" that his performance contributed to the pipeline failure.⁸⁶

The record demonstrates that the MarkWest employee had been operating several valves immediately prior to the Accident. During his performance of that activity, one of the valves failed in the closed position, leading to an increase in pipeline pressure that caused the pipeline failure. I do not find that MarkWest justifiably discounted the individual's performance, based solely on the fact that he had asked questions about the noises he heard and was reassured that operations were normal. Asking questions about a condition that appeared to be abnormal does not justify a conclusion that his performance could not have contributed to the Accident, even if the individual had been reassured that operations were normal. Therefore, his performance could not have been completely discounted as a contributing factor to the Accident and Respondents were required to drug test the employee as soon as possible, but no later than 32 hours after the Accident, which they did not.

With regard to the Kentucky Hydrocarbon employee, MarkWest argued that it had no obligation to drug test the other company's employee, as she was not in MarkWest's employee pool for random testing, and that MarkWest's lease agreement with Kentucky Hydrocarbon provided that MarkWest only had responsibility, generally, for actions of its own employees.⁸⁷

⁸⁶ *Id.* 19.

⁸⁷ *Id.* at 20.

Section 199.105(b) requires post-accident testing of each “employee” whose performance may have contributed to an accident. The definitions in Part 199 define “employee” as “a person who performs a covered function, including persons employed by operators, contractors engaged by operators, and persons employed by such contractors.”⁸⁸ In the present case, the Kentucky Hydrocarbon worker was not an employee of the operator, MarkWest, but according to MarkWest, was an employee of Equitable.⁸⁹ The operation of the pipeline pump was a covered function, because it was “an operations, maintenance, or emergency-response function regulated by part 192, 193, or 195 of this chapter that is performed on a pipeline . . . facility.”⁹⁰ Because the employee operated the pipeline pump that pressurized the pipeline that failed with notice of the low flow-rate alarms that had occurred due to the valve closure, the employee’s performance could not have been completely discounted as a contributing factor to the accident. Therefore, both Respondents were obliged to drug test the Kentucky Hydrocarbon employee as soon as possible, but no later than 32 hours after the Accident, which they did not.

Accordingly, after considering all of the evidence, I find that Respondents violated 49 C.F.R. § 199.105(b) by failing to drug test two employees whose performance could not be completely discounted as a contributing factor to the Accident.

Item 9: The Notice alleged that Respondents violated 49 C.F.R. § 199.225(a), which states:

§ 199.225 Alcohol tests required.

Each operator shall conduct the following types of alcohol tests for the presence of alcohol:

(a) *Post-accident.* (1) As soon as practicable following an accident, each operator shall test each surviving covered employee for alcohol if that employee’s performance of a covered function either contributed to the accident or cannot be completely discounted as a contributing factor to the accident. The decision not to administer a test under this section shall be based on the operator’s determination, using the best available information at the time of the determination, that the covered employee’s performance could not have contributed to the accident.

(2)(i) If a test required by this section is not administered within 2 hours following the accident, the operator shall prepare and maintain on file a record stating the reasons the test was not promptly administered. If a test required by paragraph (a) is not administered within 8 hours following the accident, the operator shall cease attempts to administer an alcohol test and shall state in the record the reasons for not administering the test.

The Notice alleged that Respondents violated § 199.225(a) by failing to test for alcohol the same two individuals discussed above whose performance either contributed to the Accident, or could not be completely discounted as a contributing factor to the Accident. Specifically, the Notice

⁸⁸ 49 C.F.R. § 199.3. Note also that the term operator is defined to mean “a person who owns or operates pipelines facilities subject to [Part 195].”

⁸⁹ MarkWest’s Brief, at 22.

⁹⁰ 49 C.F.R. § 199.3.

alleged that Respondents failed to test the MarkWest employee for alcohol following the Accident. He was operating the valve that failed in the closed position, which led to an increase in pressure and ultimately the pipeline failure. The Notice further alleged that Respondents failed to test the Kentucky Hydrocarbon Co. employee for alcohol following the Accident. She had been operating the Maytown Plant pipeline pump when low flow-rate alarms occurred due to the closed valve. She had also communicated her analysis of the pipeline pump information to the MarkWest employee.

Equitable withdrew its request for a hearing on this Item and did not otherwise respond substantively to the allegation of violation.

In its brief, MarkWest contended that it did not have to test either employee for alcohol following the Accident, for the same reasons set forth for Item 8 above.⁹¹

For the reasons explained above, I find that the two individuals' performance could not have been completely discounted as a contributing factor to the Accident and that Respondents were required to test for alcohol both employees as soon as practicable following the Accident. Accordingly, after considering all of the evidence, I find that Respondents violated 49 C.F.R. § 199.225(a) by failing to test the employees for alcohol following the Accident.

These findings of violation will be considered prior offenses in any subsequent enforcement action taken against Respondents.

WITHDRAWAL OF ALLEGATION

Item 5D: The Notice alleged that Respondents violated 49 C.F.R. § 195.402(a), which states:

§ 195.402 Procedural manual for operations, maintenance, and emergencies.

(a) *General.* Each operator shall prepare and follow for each pipeline system a manual of written procedures for conducting normal operations and maintenance activities and handling abnormal operations and emergencies. This manual shall be reviewed at intervals not exceeding 15 months, but at least once each calendar year, and appropriate changes made as necessary to insure that the manual is effective. This manual shall be prepared before initial operations of a pipeline system commence, and appropriate parts shall be kept at locations where operations and maintenance activities are conducted.

The Notice alleged that Respondents violated § 195.402(a) by failing to follow section 9.6.1 of their O&M Manual during an electrical survey conducted in 2002 at U.S. Highway 23 in Ivel, Kentucky. Respondents' written procedure specified the manner in which to determine the effectiveness of the pipe-to-casing insulation at the cased road crossing.⁹² The Violation Report

⁹¹ MarkWest's Brief, at 21-22.

⁹² See Violation Report, Exhibit 64.

further explained that the technician performing the survey had incorrectly connected the test wire to an upstream casing vent pipe, rather than to the carrier pipeline itself.

In its brief, MarkWest explained that the technician had reasonably concluded that the test lead was connected to the pipeline and therefore properly followed the Companies' procedures when performing the 2002 close interval survey. Equitable withdrew its request for a hearing on this Item, and did not otherwise substantively respond to the allegation of violation.

After considering the evidence in the record, I find that MarkWest followed the procedure as written at the time the electrical survey was conducted in 2002. Based upon the foregoing, therefore, I am withdrawing this allegation of violation.

ASSESSMENT OF PENALTY

Under 49 U.S.C. § 60122, a person that violates the pipeline safety regulations is liable for administrative civil penalties not to exceed \$100,000 per violation for each day of the violation, up to a maximum of \$1,000,000 for any related series of violations.⁹³

In determining the amount of a civil penalty under 49 U.S.C. § 60122 and 49 C.F.R. § 190.225, I must consider the following criteria: the nature, circumstances, and gravity of the violation, including adverse impact on the environment; the degree of Respondents' culpability; the history of Respondents' prior offenses; Respondents' ability to pay the penalty and any effect that the penalty may have on their ability to continue doing business; and the good faith of Respondents in attempting to comply with the pipeline safety regulations. In addition, I may consider the economic benefit gained from the violation without any reduction because of subsequent damages, and such other matters as justice may require.

The Notice proposed a total civil penalty of \$1,070,000 for the violations cited above.

With respect to prior history, the Violation Report noted that EQT had been found to have committed five violations of the pipeline safety regulations in the five years prior to the issuance of the Notice,⁹⁴ while MarkWest was found to have committed four violations.⁹⁵

Item 1: The Notice proposed a civil penalty of \$825,000 for Respondents' violation of 49 C.F.R. § 195.401, for failing to correct two conditions that could adversely affect the safety of the pipeline system. Since Item 1 has been withdrawn as to MarkWest, MarkWest is not liable for the penalty proposed for that Item. Therefore, any assessment of a civil penalty for this Item relates only to Equitable.

⁹³ The Pipeline Safety Improvement Act of 2002, Pub. L. No. 107-355, § 8(b)(1), 116 Stat. 2992, 2993.

⁹⁴ *In the Matter of Nora Transmission Pipeline, an affiliate of Equitable Production*, Final Order, CPF No. 2-2004-1006, 2005 WL 5010196 (May 5, 2005).

⁹⁵ *In the Matter of Mark West Hydrocarbon, Inc.*, Final Order, CPF No. 2-2004-5018, 2005 WL 5010197 (Mar. 29, 2005). Violation Report, at 19.

Equitable argues in its brief that any civil penalty for Item 1 must be calculated under the terms of the pipeline safety statute in force in 1987, which limited penalties to “not more than \$1,000 for each violation for each day that violation persists, except that the maximum civil penalty shall not exceed \$200,000 for any related series of violations.”⁹⁶ According to Equitable, the maximum permissible penalty for Item 1 is \$200,000.

While the conduct giving rise to this violation commenced in 1982 and 1987, respectively, the penalty is proposed for the violations within the statutory limitations period, as discussed in more detail above. In other words, the violations encompassed by this Item occurred between June 15, 2001, and the date of the Accident. Therefore, I find the applicable penalty provisions are those contained in the statute in effect as of June 15, 2001, which provided for maximum daily penalties of \$25,000 per violation and maximum penalties of \$500,000 for each related series of violations.⁹⁷ In addition, the two violations constituted two separate related series of violations. Accordingly, the proposed penalty is authorized by the applicable statute, because it does not exceed two instances of \$500,000, or a total of \$1,000,000.

Failure to correct a condition that could adversely affect the safety of a pipeline can seriously threaten public safety and the environment, as it increases the likelihood of a pipeline accident. As discussed more fully above, Equitable’s failure to correct two separate anodic conditions adversely affected the safe operation of its HVL pipeline, which failed in 2004 at the site of one of these conditions. The results of the Accident were severe, including the destruction of five homes and injuries to twelve people, four of whom required medical attention. For these reasons, I find the nature, circumstances, and gravity of the violation justify the civil penalty as proposed.

On the other hand, there are certain mitigating circumstances that I am required to give consideration to. First, with regard to culpability, “I determine [the extent to which] the company deserves the blame for the violation that occurred.”⁹⁸ As owner of the pipeline in question, Equitable is ultimately responsible for the failure to correct conditions on its pipeline. I note, however, that the evidence in the record demonstrates that over the 22 (and 17) years following the initial discovery of these conditions, multiple subsequent surveys conducted on the pipeline gave no indication of a continuing corrosion problem at these locations that would have raised additional alarms for Equitable. I find this fact serves to reduce the company’s culpability.

Finally, with regard to good faith, I recognize that Equitable had been performing timely electrical surveys during the same period of time and had apparently remediated all other anodic conditions discovered on the pipeline, suggesting that it did in fact make good-faith attempts to address corrosion problems discovered during the course of its surveys. Weighing these competing considerations, I find it appropriate to reduce the penalty.

⁹⁶ 49 U.S.C. § 2007 (1987). See Pipeline Safety Act of 1979, Pub. L. No. 96-129, § 208, 93 Stat. 989, 1009. Equitable Hearing Brief, at 3-4.

⁹⁷ Pipeline Safety Reauthorization Act of 1988, Pub. L. No. 100-561, § 205, 102 Stat. 2805, 2811; and Pipeline Safety Act of 1992, Pub. L. No. 102-508, § 211, 106 Stat. 3289, 3304 (prior to further increases enacted in the Pipeline Safety Improvement Act of 2002).

⁹⁸ *In the Matter of Alyeska Pipeline Service Co.*, Decision on Petition for Reconsideration, CPF No. 5-2006-5018, 2010 WL 2228550, at 2-3 (Mar. 1, 2010).

Accordingly, having reviewed the record and considered the assessment criteria, I assess Equitable a reduced civil penalty of \$500,000 for the violation of 49 C.F.R. § 195.401.

Item 2: The Notice proposed a civil penalty of \$142,500 for Respondents' violation of 49 C.F.R. § 195.440. As discussed above, I found that Respondents violated § 195.440 by failing to establish an adequate continuing public education program to enable the public, appropriate government organizations and persons engaged in excavation-related activities to recognize and report a pipeline emergency.

Developing and implementing an effective public education program is a critical component of the nation's pipeline safety program. Members of the public, and particularly persons living and working adjacent to pipeline rights-of-way, need to know how to recognize and react to pipeline emergencies. This Accident tragically illustrates the importance of the public awareness requirement. After the release had begun on November 8, 2004, but before the explosions occurred, residents in the immediate area of the pipeline observed the natural gas liquids spewing out of the ground and flowing across the street, but they did not recognize that a pipeline emergency was occurring. Had they recognized that a pipeline release was occurring, they could have alerted the proper authorities and evacuated the area.

For these reasons, I find the nature, circumstances, and gravity of the violation justify the proposed civil penalty. Respondents are culpable for their failure to establish an adequate continuing public education program in accordance with the regulatory requirement. Finally, I do not find any good-faith measures to comply with the regulation that would warrant a reduction in the proposed penalty.

Accordingly, having reviewed the record and considered the assessment criteria, I assess Respondents a civil penalty of \$142,500 for violation of 49 C.F.R. § 195.440.

Item 4: The Notice proposed a civil penalty of \$10,000 for Respondents' violation of 49 C.F.R. § 195.52. As discussed above, I found that Respondents violated § 195.52 by failing to give telephonic notice at the earliest practicable moment following discovery of the Accident.

The failure to promptly report an accident can compromise public safety by preventing PHMSA and other regulatory agencies from assessing the accident and determining how best to respond. Failure to provide such notice can also make it more difficult for PHMSA to investigate and determine the cause of an accident. For these reasons, I find the nature, circumstances, and gravity of the violation justify the proposed civil penalty. Respondents are culpable for their failure to report the accident at the earliest practicable moment in accordance with the regulatory requirement. I do not find Respondents have presented any evidence of good-faith measures that would warrant a reduction in the proposed penalty.

Accordingly, having reviewed the record and considered the assessment criteria, I assess Respondents a civil penalty of \$10,000 for violation of 49 C.F.R. § 195.52.

Item 5D: The Notice proposed a civil penalty of \$52,500 for Respondents' violation of 49 C.F.R. § 195.402(a), for failing to follow their written procedures for determining the effectiveness of pipe-to-casing insulation. Since this Item has been withdrawn, the proposed penalty is not assessed.

Item 8: The Notice proposed a civil penalty of \$20,000 for Respondents' violation of 49 C.F.R. § 199.105(b), for failing to drug test two individuals whose performance either contributed to the Accident or whose performance could not be completely discounted as contributing factors. Prompt post-accident drug testing of employees whose actions could possibly have contributed to an accident is an important part of identifying the cause of an accident. Respondents' failure to drug test two employees whose actions could have contributed to the Accident precluded PHMSA from collecting all the information necessary to complete a comprehensive investigation. Because of this failure, PHMSA was unable to ascertain whether drug use could have played a role in the Accident, and the agency was deprived of information that could help prevent future accidents. For these reasons, I find the nature, circumstances, and gravity of the violation justify the proposed civil penalty. Respondents are culpable for their failure to drug test the two individuals in accordance with the regulatory requirement. Finally, I do not find any good-faith measures to comply with the regulation that would warrant a reduction in the proposed penalty.

Accordingly, having reviewed the record and considered the assessment criteria, I assess Respondents a civil penalty of \$20,000 for violation of 49 C.F.R. § 199.105(b).

Item 9: The Notice proposed a civil penalty of \$20,000 for Respondents' violation of 49 C.F.R. § 199.225(a). As discussed above, I found that Respondents violated § 199.225(a) by failing to test for alcohol the same two individuals whose performance either contributed to the Accident or could not be completely discounted as contributing factors. Prompt post-accident alcohol testing of employees whose actions could possibly have contributed to an accident is an important part of identifying the cause of an accident. Respondents' failure to alcohol test two employees whose actions could have contributed to the Accident precluded PHMSA from collecting all the information necessary to complete a comprehensive investigation. Because of this failure, PHMSA was unable to ascertain whether alcohol use could have played a role in the Accident and was deprived of information that could help prevent future accidents. For these reasons, I find the nature, circumstances, and gravity of the violation justify the proposed civil penalty. Respondents are culpable for their failure to test the two individuals for alcohol in accordance with the regulatory requirement. Finally, I do not find any evidence of good-faith measures to comply with the regulation that would warrant a reduction in the proposed penalty.

Accordingly, having reviewed the record and considered the assessment criteria, I assess Respondents a civil penalty of \$20,000 for violation of 49 C.F.R. § 199.225(a).

As the pipeline safety laws are applicable both to the operator of this pipeline, MarkWest, and to the owner, Equitable, at the time of the Accident, in accordance with 49 U.S.C. § 60102, both MarkWest and Equitable may be held jointly and severally liable for the violations that they are both found to have committed.⁹⁹

Having reviewed the record and considered the assessment criteria, I assess Respondents a total civil penalty of **\$192,500** for Items 2, 4, 8, and 9, for which they are jointly and severally liable. Because the penalty is attributed jointly to both companies, either respondent may pay the full

⁹⁹ See *In the Matter of Guardian Pipeline and Panhandle Energy*, Final Order, CPF No. 3-2003-1011, 2006 WL 3825318 (Feb. 16, 2006).

penalty or apportion it between themselves as appropriate. In addition, I assess Equitable an additional penalty of **\$500,000** for Item 1, for which Equitable is solely liable.

Respondents did not provide any evidence suggesting they are unable to pay the civil penalties. Therefore, I find Respondents are able to pay their respective penalties without adversely affecting their ability to continue in business.

Payment of the civil penalties must be made within 20 days of receipt of this Final Order. Federal regulations (49 C.F.R. § 89.21(b)(3)) require this payment be made by wire transfer, through the Federal Reserve Communications System (Fedwire), to the account of the U.S. Treasury. Detailed instructions are contained in the enclosure. Questions concerning wire transfers should be directed to: Financial Operations Division (AMZ-341), Federal Aviation Administration, Mike Monroney Aeronautical Center, P.O. Box 269039, Oklahoma City, OK 73125; (405) 954-8893.

Failure to pay the **\$692,500** civil penalty will result in accrual of interest at the current annual rate in accordance with 31 U.S.C. § 3717, 31 C.F.R. § 901.9 and 49 C.F.R. § 89.23. Pursuant to those same authorities, a late penalty charge of six percent (6%) per annum will be charged if payment is not made within 110 days of service. Furthermore, failure to pay the civil penalty may result in referral of the matter to the Attorney General for appropriate action in a district court of the United States.

WARNING ITEMS

With respect to Items 3, 5A, 5B, 5C, 6, and 7, the Notice alleged probable violations of Part 195 but did not propose a civil penalty or compliance order for these items. Therefore, these are considered to be warning items. The warnings were for:

49 C.F.R. § 195.410 (**Item 3**) – the Companies’ alleged failure to place and maintain line markers over the buried Maytown pipeline at the location where it crosses Mockingbird Lane in the Rolling Acres subdivision in Ivel, Kentucky;

49 C.F.R. § 195.402(a) (**Item 5A**) – the Companies’ alleged failure to keep appropriate parts of its procedural manual at the Maytown extraction plant operator’s building, a location where operations and maintenance activities are conducted;

49 C.F.R. § 195.402(a) (**Item 5B**) – the Companies’ alleged failure to follow the O&M Manual’s requirements regarding documenting the telephone call reporting the Accident;

49 C.F.R. § 195.402(a) (**Item 5C**) – the Companies’ alleged failure to follow the O&M Manual’s requirements regarding record-keeping on public awareness notifications;

49 C.F.R. § 195.404(a)(2) (**Item 6**) – the Companies’ alleged failure to maintain current maps and records of its pipeline system, including crossings of foreign pipelines. Specifically, the Notice alleged that records of surveys performed after 1997 did not indicate the location where the Kentucky-West Virginia Gas Company Line N-38 crossed the Maytown pipeline in Ivel, Kentucky; and

49 C.F.R. § 195.402(e) (**Item 7**) – the Companies’ alleged failure to prepare a procedural manual with adequate emergency procedures. Specifically, the Notice alleged that the O&M Manual’s emergency procedures were not sufficiently detailed, particularly with respect to emergency shutdowns.

Accordingly, having considered such information, I find, pursuant to 49 C.F.R. § 190.205, that probable violations of 49 C.F.R. §§ 195.410 (Notice Item 3), 195.402(a) (Notice Items 5A, 5B, and 5C), 195.404(a)(2) (Notice Item 6), and 195.402(e) (Notice Item 7) have occurred and MarkWest and Equitable are hereby advised to correct such conditions. In the event that OPS finds a violation of these in a subsequent inspection, the Companies may be subject to future enforcement action.

Under 49 C.F.R. § 190.215, Respondents have a right to submit a Petition for Reconsideration of this Final Order. If submitting a petition, the petition must be sent to: Associate Administrator, Office of Pipeline Safety, PHMSA, 1200 New Jersey Avenue, SE, East Building, 2nd Floor, Washington, DC 20590, and a copy sent to the Chief Counsel, PHMSA, at the same address. The petition must be received within 20 days of Respondents’ receipt of this Final Order. The petition must contain a brief statement of the issue(s) and meet all other requirements of 49 C.F.R. § 190.215. The filing of the petition automatically stays the payment of any civil penalty assessed. If Respondents submit payment for the civil penalty, the Final Order becomes the final administrative decision and the right to petition for reconsideration is waived.

The terms and conditions of this Final Order are effective upon service in accordance with 49 C.F.R. § 190.5.

Jeffrey D. Wiese
Associate Administrator
for Pipeline Safety

Date Issued