

November 30, 2006

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VIA ELECTRONIC MAIL

Ms. Linda Daugherty
Regional Director
Office of Pipeline Safety, Southern Region
Pipeline and Hazardous Materials Safety Administration
United States Department of Transportation
233 Peachtree Street, Suite 600
Atlanta, GA 30303

**Re: CPF No. 2-2006-5001 RESPONSE OF EQUITABLE PRODUCTION
COMPANY INCLUDING MOTION TO DISMISS COUNT ONE, REQUEST
FOR HEARING, AND STATEMENT OF ISSUES**

Dear Ms. Daugherty:

Equitable Production Company ("Equitable"), pursuant to 49 C.F.R. §§ 190.209 and 190.211, hereby responds to the Notice of Probable Violation and Proposed Civil Penalty, CPF No. 2-2006-5001, issued by the Office of Pipeline Safety (OPS), Pipeline and Hazardous Materials Safety Administration of the United States Department of Transportation. Equitable requests a hearing, under the provisions of 49 C.F.R. § 190.211, the procedural requirements under Independent Safety Board Act of 1972, as amended ("NTSB Act"), Pipeline Safety Improvement Act ("PSA"), the Administrative Procedure Act (APA) and as otherwise provided or required by law, to review issues related to allegations in the Notice of Probable Violation ("NPV") served on June 29, 2006, as those issues pertain to Equitable, and to the proposed civil penalties set forth in the NPV to the extent that they may pertain to Equitable. This hearing is requested on all matters alleged in said NPV, as more fully set forth hereinafter in the Statement of Issues. Equitable is represented in this matter and will be represented at the hearing by the undersigned counsel.

A pre-hearing conference was held in this matter at OPS Headquarters on October 12, 2006, attended by Senior Attorneys Renita Bivins and Larry White of OPS and counsel for Equitable and MarkWest Hydrocarbon, Inc. As discussed in that conference, and pursuant to the agreement reached during that meeting, Equitable includes within this response a Motion to Dismiss all of the allegations contained in Count 1 of the NPV as they might pertain to Equitable. As set forth below, those allegations appear to have been issued by mistake and without observance of required procedures, are unsupported by evidence, and are precluded as a

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matter of law by reason of the applicable statute of limitations and the effect of prior agency decision.

Please note that this Request for Hearing, Motion to Dismiss, and Statement of Issues is submitted on behalf of Equitable.¹ Neither Equitable nor the undersigned is authorized to respond to the NPV on behalf of MarkWest Hydrocarbon, Inc. ("MarkWest"). The NPV is addressed to both Equitable and MarkWest, and fails to distinguish allegations or assertions made against those respective entities. Equitable has not been responsible for pipeline operations at any time relevant to the allegations contained herein. We are therefore uncertain what aspects of the NPV, if any, are in fact addressed to Equitable, and, as a result, Equitable is submitting this Request for Hearing and Statement of Issues out of an abundance of caution and because certain purported findings in the NPV appear to address and affect Equitable's interests. Equitable reserves the right to amend this Response to respond to any new information or further understanding of the allegations that will arise as a result of efforts by OPS to specify which allegations or proposed fines might apply to Equitable.

Please further note that OPS has transmitted a file of documents to the undersigned counsel for Equitable on or about November 8, 2006, which OPS has represented to be the complete OPS administrative case file, including all of the evidence pertinent to the issues to be determined against Equitable in this matter. The case file lacks sufficient evidentiary basis for any of the claims in the NPV as they may pertain to Equitable. Equitable submits this response under a general objection that the NPV fails to include a statement of the evidence upon which the allegations are based, and that the allegations are unsubstantiated by the evidence in the case file.

Finally, Equitable submits this response under a general objection that the OPS investigation and enforcement efforts to date have violated Equitable's due process rights. Contrary to the requirements of the National Transportation Safety Board Act, the Pipeline Safety Improvement Act, the Administrative Procedure Act, OPS Regulations and Agency Practice thereunder and fundamental principles of administrative due process, Equitable was not timely notified that it was a target of the investigation, was not given access to information and the right to know and comment upon the allegations against it, and has not, even to this date, been properly advised of the source of such allegations.²

¹ The Notice of Probable Violation states that "the affected pipeline is owned by Equitable . . . and is operated by MarkWest MarkWest and Equitable are hereinafter referred to jointly as *Companies*."

² We note, for example, that the space on the Violation Report for identification of persons interviewed in connection with Count 1 was apparently intentionally left blank, but that the written record which we have been provided does not fully address the conclusions upon which Count 1 is predicated.

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MOTION TO DISMISS COUNT 1

As noted above, Count 1 of the NPV is tainted by irregularities in the process by which OPS reached the conclusions upon which the Count is predicated. Because Equitable was improperly excluded from that process, it has not had the opportunity to comment on and correct the erroneous assumptions underlying the Count. Since the NPV has been produced in discovery in the civil case seeking damages related to the event in question, Equitable has been and is being severely and unfairly impacted by the improper issuance of this Count and requests that it be withdrawn forthwith. The grounds for this request are set out below.

Count 1 fails to allege or provide evidence in support of any allegation that Equitable violated the regulations.

Count 1 alleges that “Companies did not correct discovered conditions in 1982 and 1987 that could adversely affect the safe operation of the pipeline within a reasonable time as required of 195.401(b).”

49 C.F.R. § 195.401(b) requires that:

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.

Count 1 does not allege, or provide any evidence to support a contention that, Equitable “discover[ed] any [such] condition that could adversely affect . . . safe operation,” determined active corrosion to exist, failed to correct any condition within a reasonable period of time or “operate[d] the affected part of the system” after discovery of any imminent hazard. Thus, regardless of the question of whether Equitable may be defined to be an *operator* (and we argue that it cannot), it cannot be held responsible for violation of the cited regulation unless it actually discovered the condition and failed to correct within a reasonable time or actually operated the line after such conditions presented an imminent hazard. There is no evidence in the record that Equitable did either of these and, accordingly, the Count should be dismissed.

Count 1's allegations of continuing violation are contrary to the evidence in the record, and Count 1 is thus barred by the Statute of Limitations.

Count 1 A alleges “Additional cathodic protection was not provided subsequent to discovery of an indicated anodic condition on bare pipe during an electrical survey performed in 1982 . . . indicating that a sacrificial anode was required at survey station 43+80 . . .” and that because “no

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evidence of an anode was found when the pipe was excavated in 2005 . . . [t]his condition has been continuous and ongoing.”

Count 1 B alleges that “additional cathodic protection was not provided subsequent to a 1987 electrical survey of bare pipe at the survey-indicated station 98+60, identified as ‘centerline of concrete driveway spot # 2.’” These conditions were alleged to be “continuous and ongoing” again because at the time the line was excavated in 2005, no evidence of an anode was found.

The point to be made in response to these allegations at this stage of the proceeding is that, even though experts might differ on the question of whether the readings suggested the need for corrective action, the evidence in the record specifically rebuts any allegation of continuing violation.

Thus, while experts may differ as to whether the 1982 data indicated a need to install an anode at station 43+80 at that time, it is undisputed that subsequent surveys in 1987, 1992 and 1997 did not identify anodic conditions or suggest any active corrosion at that location and clearly demonstrated that any such condition that may have existed in 1982 ceased to exist more than twenty years ago. In this regard, it bears emphasis that survey station 43+80 is not proximate to either the location at which an alleged anodic condition is alleged to have been discovered in 1987 or the location of the 2004 incident. The evidence is clear that the anodic condition at station 43+80, if one ever existed, did not persist in 1987 or beyond.

Similarly, while Count 1 B's allegation that the 1987 survey data indicated an anodic condition at station 98+60 is debatable, it is not debatable that the location indicated in the 1982 survey is different from the location identified in the 1987 survey. Thus the 1987 results do not support a conclusion that an anodic location continued to exist between 1982 and 1987, and fail to provide any evidence suggesting a continuing condition.

Most importantly, subsequent and more reliable surveys of the line failed to identify an anodic condition at either of these locations and these findings clearly demonstrate that any prior anodic conditions, if any existed, did not continue. The allegation of continuous and ongoing violation ignores the fact that this same section of pipeline has been routinely surveyed using technology and interpretation procedures that have improved significantly since 1982 and 1987. Subsequent surveys conducted in 1992 and 1997 demonstrate that the conditions identified in 1982 and 1987 were either the result of erroneous readings, as originally surmised by the Corrosion Technician who performed the survey, or did not continue. These subsequent surveys were conducted and interpreted by a reputable independent contractor of the highest technical qualifications. In addition, these subsequent surveys employed improved technology that yielded more reliable and precise data as a result of ongoing and documented technical advances in the industry.

In 1992 there were no anodic conditions found in the vicinity of the conditions identified in the prior surveys. A subsequent survey conducted in 1997 yielded data indicating two locations in the vicinity of the subdivision requiring anodes, and both anodes were installed appropriately.

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Based on the results of the 1992 and 1997 survey data and the documented responses thereto, there can be no claim that any prior violations were continuous and ongoing. If any non-compliant conditions did exist in 1982 or 1987, the evidence shows that they did not exist in 1992. Furthermore, there is no dispute that all anodic conditions found to exist in 1997 were properly addressed and that the pipeline was deemed at that time to be in full compliance with the regulations cited.³

As a result of the subsequent surveys conducted in 1992 and 1997, and the documented and approved responses to the 1997 survey, it is clear that the conditions specified in the NPV were not "continuous and ongoing." As a result, it is indisputable as a matter of law that the alleged 1982 or 1987 violations are barred by the statute of limitations. Under 28 U.S.C. § 2462, which applies to this matter, enforcement actions must be commenced within five years of an alleged violation.⁴ This means that the present NPV may only include violations that occurred on or after June 15, 2001. Thus, even if the alleged 1982 and 1987 violations could be supported by credible evidence, they may only be brought in this action if it can be demonstrated that the cited conditions were continuous and ongoing beyond June 15, 2001. There is no evidence in the case file to suggest any violation within the statutory period. Moreover, as noted above, there is affirmative evidence resulting from subsequent and more reliable survey results that the cited conditions did not exist as of 1992 and that any non-compliant conditions existing at the time of the 1997 survey were properly addressed. This subsequent data and evidence of compliance completely contradict any theory of a continuous and ongoing violation and preclude enforcement of any allegations contained in Count 1.

The violations contained in Count 1 have been resolved in a prior agency decision.

As noted above, the only alleged violations legally actionable in this matter are those that occurred on or after June 15, 2001. As demonstrated above, there is no record in the OPS case file, or otherwise, of any Count 1 violation occurring on or after that date, and there is affirmative evidence in the file of surveys conducted in 1992 and in 1997 demonstrating compliance. The fact that the pipeline was in compliance and that any potential prior violations terminated before June 15, 2001 is further confirmed by administrative resolution of a Notice of Probable Violation issued on March 16, 1999, and withdrawn by letter from William Gute, Director OPS Eastern Region, dated December 8, 1999. According to the withdrawal letter, which is attached hereto as Attachment A, the actions taken in response to the 1997 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.⁵ In light of this determination, made after a comprehensive administrative investigation of the pipeline and in resolution of an enforcement action, OPS is estopped from reversing this 1999 decision and determining now that an ongoing violation of cathodic protection regulations existed on December 8, 1999. This nullifies any argument that

³ Attachment A, Letter from William Gute, Notification to Withdraw NOPV/PCO, Dec. 8, 1999.

⁴ See also OPS Final Order *In the Matter of Distrigas of Massachusetts LLC*, CPF 1-2002-3003 5 (2005).

⁵ Attachment A, Letter from William Gute, Notification to Withdraw NOPV/PCO, Dec. 8, 1999.

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the alleged violations in 1982 or 1987 continued to exist during the statutory period beginning June 15, 2001.

To summarize, OPS' allegations in Count 1 and the major magnitude of the penalty proposed therefore are based on erroneous assumptions that the 1982 and 1987 survey results are somehow connected and somehow support a conclusion that there was a continuing violation at the point where the accident occurred. The evidence in the record clearly shows (1) that no unsafe condition was ever discovered at the accident location or any point which could have affected it and (2) that no data suggesting an anodic condition ever persisted at any location throughout any survey interval. There is no evidence in support of a conclusion that any violation was continuing and there is substantial evidence to support the opposite conclusion.

The violations alleged in Count 1 are not sustainable based on evidence in the record but can only be based on wholly unsupported assumptions that:

1. Equitable discovered anodic conditions and active corrosion at the specified locations;
2. Such conditions persisted and continued in at least one of the locations in question from survey to survey (i.e., the 1982 and 1987 surveys showed anodic conditions at the same location);
3. Equitable discovered the condition and failed to correct it within a reasonable time or operated the pipeline in an imminently hazardous condition;
4. The 1992 and 1997 surveys, which found no anodic conditions other than those that were corrected, were inaccurate; and
5. OPS erred in its 1999 conclusion that the pipeline was, at that time, fully compliant with cathodic protection requirements.

Such assumptions are obviously unsustainable and could have been corrected had Equitable been accorded the rights of a party during the investigative process. Particularly in light of the prejudicial impacts and procedural irregularities discussed above, Count 1 must be immediately withdrawn.

STATEMENT OF ISSUES

Equitable submits the following statement of issues pursuant to 49 C.F.R. § 190.211:

Issues outlined above are adopted and incorporated by reference herein. In addition, Equitable states the following issues:

1. As to Count 1: That there was a failure to properly apply cathodic protection in violation of 49 C.F.R. § 195.401(b).

The Notice of Probable Violation (“NPV”) alleges that “Companies did not correct discovered conditions in 1982 and 1987 that could adversely affect the safe operation of the pipeline within a reasonable time as required of 195.401(b).”

The issues with regard to this alleged violation are:

- a. Whether the Pipeline Safety Improvement Act (“PSA”) or any valid regulation or other requirement promulgated thereunder imposed on Equitable any obligation to discover conditions of the referenced pipeline or to respond to any such findings as alleged in Count 1;
- b. Whether any condition existed that could adversely affect the safe operation of the referenced pipeline system;
- c. Whether Equitable discovered such a condition and whether or not such discovery was based on technically valid and reliable evidence;
- d. Whether correction was necessary to address the potential to affect the safe operation of the pipeline system;
- e. Whether Equitable operated the pipeline and operated it in an unsafe condition;
- f. Whether any condition was of such a nature that it presented an immediate hazard to persons or property under the meaning imposed by the regulations;
- g. Whether such a condition was corrected within a reasonable time under the meaning of the regulations;
- h. Whether the alleged condition and set of circumstances remained continuous and ongoing;
- i. Whether any statutory or regulatory duties to the federal government and the public, described above, were assumed by, conferred upon or otherwise born by Equitable by legally effective means;
- j. Whether Equitable was the operator of, and operated, the pipeline at the time of the alleged violation and during any portion of the limitations period applicable to the alleged violation;

- k. Whether the PSA or any valid regulation or other requirement promulgated thereunder imposed upon Equitable a duty to the federal government and the public to perform the duties described above;
- l. Whether applicable regulations or other information provided fair notice of the responsibility alleged hereunder;
- m. Whether such claims have been properly alleged against Equitable, in a manner that complies with the PSA, applicable regulations, the Administrative Procedure Act and all other requirements of law and procedure;
- n. Whether admissible facts and law support a finding that Equitable failed to perform any of the duties described above as to which it had responsibility to the federal government and the public;
- o. Whether, as to Equitable, the allegations contained in Count 1 are barred by the PSA, applicable statute of limitations, or equitable doctrines of laches, waiver or estoppel;
- p. Whether a fine, as assessed against Equitable, would be supported by admissible facts and law. This set of issues includes, without limitation, such elements as whether or not the alleged condition was a causative factor in the November 8, 2004 pipe failure as suggested in the NPV;
- q. Whether there is sufficient evidence in the case file to support the proposed findings;
- r. Whether the NPV is rendered null and void as a result of improper procedures; and
- s. Whether the NPV conforms to the requirements of applicable law and regulations.

2. As to Count 2: That the Companies' public education program was not adequately established in violation of § 195.440 [in effect on 11/08/04].

The NPV states that the "Companies' public education program was not adequately established, in that the program did not enable the public in the pipeline area to recognize a hazardous liquid pipeline emergency and to report it to the operator or the fire, police, or other appropriate public officials." It further alleges that the "[i]mmediate recognition and reporting of the observed liquid release as a hazardous liquid pipeline emergency could have prompted an immediate evacuation prior to ignition, thus possibly preventing or reducing injuries." It asserts that

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“[i]mmediate reporting of the emergency also could have reduced the amount of liquids released” and that “[t]he fact that residents in the area of the incident lacked knowledge constituted a potential threat to the public safety.”

The issues with regard to this alleged violation are:

- a. Whether the PSA or any valid regulation or other requirement promulgated thereunder imposed on Equitable the duties to the federal government and the public, to establish a continuing educational program as alleged in Count 2;
- b. Whether the statutory or regulatory duties to the federal government and the public, described above, were assumed by, conferred upon or otherwise born by Equitable by legally effective means;
- c. Whether Equitable was the operator of and operated the pipeline at the time of the alleged violation or during any portion of the limitations period applicable to the alleged violation;
- d. Whether the PSA or any valid regulation or other requirement promulgated thereunder imposed upon Equitable a duty to the federal government and the public to perform the duties described above;
- e. Whether applicable regulations or other information provided fair notice of the responsibility alleged hereunder;
- f. Whether such claims have been properly alleged against Equitable, in a manner that complies with the PSA, applicable regulations, the Administrative Procedure Act and all other requirements of law and procedure;
- g. Whether admissible facts and law support a finding that Equitable failed to perform any of the duties described above as to which it had responsibility to the federal government and the public;
- h. Whether the public, appropriate government organizations, and persons involved in excavation-related activities, relative to the referenced pipeline system, were reasonably enabled to recognize a hazardous liquid pipeline emergency and to report it to the operator or the fire, police or other appropriate public officials;
- i. Whether, as to Equitable, the allegations contained in Count 2 are barred by the PSA, applicable statute of limitations, or equitable doctrines of laches, waiver, or estoppel;

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- j. Whether a fine, as assessed against Equitable, would be supported by admissible facts and law: This set of issues includes, without limitation, such elements as the amount to which the alleged violation, if proven, might have contributed to the amount of liquids released or the impacts of the release on public safety;
- k. Whether there is sufficient evidence in the case file to support the proposed findings;
- l. Whether the NPV is rendered null and void as a result of improper procedures; and
- m. Whether the NPV conforms to the requirements of applicable law; and regulations.

3. As to Count 3: That there was inadequate placement and/or maintenance of line markers in violation of 49 C.F.R. § 195.410.

The NPV states that “Companies did not place and maintain line markers over the buried 4” MarkWest Pipeline where it crosses Mockingbird Lane in Rolling Acres Subdivision, as required of § 195.410(a)(1). No markers were found at this crossing on the day after the accident (November 9, 2004).”

The issues with regard to this alleged violation are:

- a. Whether the PSA or any valid regulation or other requirement promulgated thereunder imposed the duties, to the federal government and the public, to place and maintain line markers as alleged to have been violated in Count 3;
- b. Whether the statutory or regulatory duties to the federal government and the public, described above, were assumed by, conferred upon or otherwise born by Equitable by legally effective means;
- c. Whether Equitable was the operator of the pipeline at the time of the alleged violation or during any portion of the limitations period applicable to the alleged violation;
- d. Whether the PSA or any valid regulation or other requirement promulgated thereunder imposed upon Equitable a duty to the federal government and the public to perform the duties described above;
- e. Whether applicable regulations or other information provided fair notice of the responsibility alleged hereunder;

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- f. Whether such claims have been properly alleged against Equitable, in a manner that complies with the PSA, applicable regulations, the Administrative Procedure Act and all other requirements of law and procedure;
 - g. Whether admissible facts and law support a finding that Equitable failed to perform any of the duties described above as to which it had responsibility to the federal government and the public;
 - h. Whether, as to Equitable, the allegations contained in Count 3 are barred by the PSA, applicable statute of limitations, or equitable doctrines of laches, waiver, or estoppel;
 - i. Whether any fine that might be assessed against Equitable in connection with this allegation would be supported by admissible facts and law;
 - j. Whether there is sufficient evidence in the case file to support the proposed findings;
 - k. Whether the NPV is rendered null and void as a result of improper procedures; and
 - l. Whether the NPV conforms to the requirements of applicable law and regulations.
4. **As to Count 4: That there was a failure to give proper telephonic notice and/or other notice in violation of 49 C.F.R. § 195.52 and/or § 195.50.**

The NPV states "Companies did not give notice at the earliest practicable moment following discovery of the hazardous liquid release from the 4" MarkWest Pipeline in Rolling Acres subdivision on the morning of November 8, 2004, as required of § 195.52(a)."

The issues with regard to this alleged violation are:

- a. Whether the PSA or any valid regulation or other requirement promulgated thereunder imposed the duties, to the federal government and the public, to give notice as alleged to have been violated in Count 4;
- b. Whether the statutory or regulatory duties to the federal government and the public, described above, were assumed by, conferred upon or otherwise born by Equitable by legally effective means;

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- c. Whether Equitable was the operator of the pipeline at the time of the alleged violation or during any portion of the limitations period applicable to the alleged violation;
- d. Whether the alleged failure to perform the duties described above was within the responsibility and control of an employee or employees who were working exclusively for Equitable;
- e. Whether the PSA or any valid regulation or other requirement promulgated thereunder imposed upon Equitable a duty to the federal government and the public to perform the duties described above;
- f. Whether applicable regulations or other information provided fair notice of the responsibility alleged hereunder;
- g. Whether such claims have been properly alleged against Equitable, in a manner that complies with the PSA, applicable regulations, the Administrative Procedure Act and all other requirements of law and procedure;
- h. Whether admissible facts and law support a finding that Equitable failed to perform any of the duties described above as to which it had responsibility to the federal government and the public;
- i. Whether, as to Equitable, the allegations contained in Count 4 are barred by the PSA, applicable statute of limitations, or equitable doctrines of laches, waiver or estoppel;
- j. Whether a fine, as assessed against Equitable, would be supported by admissible facts and law;
- k. Whether there is sufficient evidence in the case file to support the proposed findings;
- l. Whether the NPV is rendered null and void as a result of improper procedures; and
- m. Whether the NPV conforms to the requirements of applicable law and regulations.

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5. As to Count 5: That there was a failure to maintain and follow a manual of written procedures in violation of 49 C.F.R. § 195.402(a).

The NPV states that “A. Companies did not keep appropriate parts of their procedural manual at the Maytown extraction plant operator’s building (separation building). . . . B. The Maytown Plant Superintendent . . . did not follow written procedures as ‘Form 121 pipeline emergency Log’ was not used to document the information received from the initial emergency call for his supervisor reporting that an explosion had occurred at Davidson [cemetery which is near the pipeline] C. Companies did not follow written public education program procedures, as there were no records of actual public education notifications made to the public adjacent to the pipeline. . . . D. Companies did not follow written corrosion procedures to determine the effectiveness of the pipe-to-casing insulation at the MarkWest Pipeline cased road crossing at U.S. Highway 23 at Ivel, Kentucky. . . .”

The issues with regard to this alleged violation are:

- a. Whether the PSA or any valid regulation or other requirement promulgated thereunder imposed the duties, to the federal government and the public, to prepare, maintain and follow a manual of written procedures alleged to have been violated in Count 5;
- b. Whether the statutory or regulatory duties to the federal government and the public, described above, were assumed by, conferred upon or otherwise born by Equitable by legally effective means;
- c. Whether Equitable was the operator of the pipeline at the time of the alleged violation and during any portion of the limitations period applicable to the alleged violation;
- d. Whether the alleged failure to perform the duties described above was within the responsibility and control of an employee or employees who were working exclusively for Equitable;
- e. Whether the PSA or any valid regulation or other requirement promulgated thereunder imposed upon Equitable a duty to the federal government and the public to perform the duties described above;
- f. Whether applicable regulations or other information provided fair notice of the responsibility alleged hereunder;
- g. Whether such claims have been properly alleged against Equitable, in a manner that complies with the PSA, applicable regulations, the Administrative Procedure Act and all other requirements of law and procedure;

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- h. Whether admissible facts and law support a finding that Equitable failed to perform any of the duties described above as to which it had responsibility to the federal government and the public;
 - i. Whether, as to Equitable, the allegations contained in Count 5 are barred by the PSA, applicable statute of limitations, or equitable doctrines of laches, waiver or estoppel;
 - j. Whether a fine, as assessed against Equitable, would be supported by admissible facts and law;
 - k. Whether there is sufficient evidence in the case file to support the proposed findings;
 - l. Whether the NPV is rendered null and void as a result of improper procedures; and
 - m. Whether the NPV conforms to the requirements of applicable law and regulations
6. **As to Count 6: That there was a failure to maintain maps and records in violation of 49 C.F.R. § 195.404(a)(2).**

The NPV states that “[m]aps and records of the Kentucky – West Virginia Gas Company (KY-WV) Line No. 38 crossing the 4" MarkWest Pipeline on the northeast side of U.S. Highway 23 at Ivel, Kentucky were not found in records or corrosion surveys performed after 1997. KY-WV records indicate that a KY-WV above-ground test station at this crossing was installed in 1991.”

The issues with regard to this alleged violation are:

- a. Whether the PSA or any valid regulation or other requirement promulgated thereunder imposed the duties, to the federal government and the public, to maintain maps and records alleged to have been violated in Count 6;
- b. Whether the statutory or regulatory duties to the federal government and the public, described above, were assumed by, conferred upon or otherwise born by Equitable by legally effective means;
- c. Whether Equitable was the operator of the pipeline at the time of the alleged violation and during any portion of the limitations period applicable to the alleged violation;

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- d. Whether the alleged failure to perform the duties described above was within the responsibility and control of an employee or employees who were working exclusively for Equitable;
 - e. Whether the PSA or any valid regulation or other requirement promulgated thereunder imposed upon Equitable a duty to the federal government and the public to perform the duties described above;
 - f. Whether applicable regulations or other information provided fair notice of the responsibility alleged hereunder;
 - g. Whether such claims have been properly alleged against Equitable, in a manner that complies with the PSA, applicable regulations, the Administrative Procedure Act and all other requirements of law and procedure;
 - h. Whether admissible facts and law support a finding that Equitable failed to perform any of the duties described above as to which it had responsibility to the federal government and the public;
 - i. Whether, as to Equitable, the allegations contained in Count 6 are barred by the PSA, applicable statute of limitations, or equitable doctrines of laches, waiver or estoppel;
 - j. Whether a fine, as assessed against Equitable, would be supported by admissible facts and law;
 - k. Whether there is sufficient evidence in the case file to support the proposed findings;
 - l. Whether the NPV is rendered null and void as a result of improper procedures; and
 - m. Whether the NPV conforms to the requirements of applicable law and regulations
7. **As to Count 7: That there was a failure to maintain proper procedural manual for operations, maintenance, and emergencies in violation of 49 C.F.R. § 195.402(e)(2)&(4).**

The NPV states that the “emergency response procedures in OM&E Manual Section 5 were not in the detail required, in the situation where an employee is not at the scene of the accident, to necessitate 1) a prompt and effective response to a notice of a fire or explosion occurring near or

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directly involving the pipeline, and 2) an emergency shutdown or pressure reduction, to minimize the volume of hazardous liquid that is released from any section of the pipeline in the event of a failure.”

The issues with regard to this alleged violation are:

- a. Whether the PSA or any valid regulation or other requirement promulgated thereunder imposed the duties, to the federal government and the public, to prepare and maintain emergency procedures in the specified detail alleged to have been violated in Count 7.
- b. Whether the statutory or regulatory duties to the federal government and the public, described above, were assumed by, conferred upon or otherwise born by Equitable by legally effective means;
- c. Whether Equitable was the operator of the pipeline at the time of the alleged violation and during any portion of the limitations period applicable to the alleged violation;
- d. Whether the alleged failure to perform the duties described above was within the responsibility and control of an employee or employees who were working exclusively for Equitable;
- e. Whether the PSA or any valid regulation or other requirement promulgated thereunder imposed upon Equitable a duty to the federal government and the public to perform the duties described above;
- f. Whether applicable regulations or other information provided fair notice of the responsibility alleged hereunder;
- g. Whether such claims have been properly alleged against Equitable, in a manner that complies with the PSA, applicable regulations, the Administrative Procedure Act and all other requirements of law and procedure;
- h. Whether admissible facts and law support a finding that Equitable failed to perform any of the duties described above as to which it had responsibility to the federal government and the public;
- i. Whether, as to Equitable, the allegations contained in Count 7 are barred by the PSA, applicable statute of limitations, or equitable doctrines of laches, waiver or estoppel;

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- j. Whether a fine, as assessed against Equitable, would be supported by admissible facts and law;
- k. Whether there is sufficient evidence in the case file to support the proposed findings;
- l. Whether the NPV is rendered null and void as a result of improper procedures
- m. Whether the NPV conforms to the requirements of applicable law and regulations

8. As to Count 8: That there was a failure to make a decision and take action regarding post-accident drug testing in violation of 49 C.F.R § 195.105(b).

The NPV states that “Companies did not make a decision, under the requirements of § 199.105(b), regarding a post-accident drug test of the two “employees” whose performance of covered functions could have contributed to the November 8, 2004 accident. The two employees were not drug tested as soon as possible but no later than 32 hours after the accident.”

The issues with regard to this alleged violation are:

- a. Whether the PSA or any valid regulation or other requirement promulgated thereunder imposed the duties, to the federal government and the public, to drug test the identified employees alleged to have been violated in Count 8;
- b. Whether the statutory or regulatory duties to the federal government and the public, described above, were assumed by, conferred upon or otherwise born by Equitable by legally effective means;
- c. Whether Equitable was the operator of the pipeline at the time of the alleged violation and during any portion of the limitations period applicable to the alleged violation;
- d. Whether the alleged failure to make a decision and take action as described above was within the responsibility and control of an employee or employees who were working exclusively for Equitable;
- e. Whether the operator knew or reasonably should have known that the conduct of either of the referenced employees contributed to the accident;
- f. Whether the duties of each of the referenced employees were covered by the PSA and cited regulations;

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- g. Whether the PSA or any valid regulation or other requirement promulgated thereunder imposed upon Equitable a duty to the federal government and the public to perform the duties described above;
 - h. Whether applicable regulations or other information provided fair notice of the responsibility alleged hereunder;
 - i. Whether such claims have been properly alleged against Equitable, in a manner that complies with the PSA, applicable regulations, the Administrative Procedure Act and all other requirements of law and procedure;
 - j. Whether admissible facts and law support a finding that Equitable failed to perform any of the duties described above as to which it had responsibility to the federal government and the public;
 - k. Whether, as to Equitable, the allegations contained in Count 8 are barred by the PSA, applicable statute of limitations, or equitable doctrines of laches, waiver or estoppel;
 - l. Whether a fine, as assessed against Equitable, would be supported by admissible facts and law;
 - m. Whether there is sufficient evidence in the case file to support the proposed findings;
 - n. Whether the NPV is rendered null and void as a result of improper procedures; and
 - o. Whether the NPV conforms to the requirements of applicable law and regulations.
9. **As to Count 9: That there was a failure to make a decision and take action regarding post-accident alcohol testing in violation of 49 C.F.R § 195.225(a).**

The NPV states that “the two ‘employees’ whose performance could have contributed to the November 8, 2004 accident . . . were not alcohol tested as soon as practicable following the accident.”

The issues with regard to this alleged violation are:

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- a. Whether the PSA or any valid regulation or other requirement promulgated thereunder imposed the duties, to the federal government and the public, to alcohol test the identified employees alleged to have been violated in Count 9;
- b. Whether the statutory or regulatory duties to the federal government and the public, described above, were assumed by, conferred upon or otherwise born by Equitable by legally effective means;
- c. Whether Equitable was the operator of the pipeline at the time of the alleged violation;
- d. Whether the alleged failure to make a decision and take action as described above was within the responsibility and control of an employee or employees who were working exclusively for Equitable;
- e. Whether the operator knew or reasonably should have known that the conduct of either of the referenced employees contributed to the accident;
- f. Whether the duties of each of the referenced employees were covered by the PSA and cited regulations;
- g. Whether the PSA or any valid regulation or other requirement promulgated thereunder imposed upon Equitable a duty to the federal government and the public to perform the duties described above;
- h. Whether applicable regulations or other information provided fair notice of the responsibility alleged hereunder;
- i. Whether such claims have been properly alleged against Equitable, in a manner that complies with the PSA, applicable regulations, the Administrative Procedure Act and all other requirements of law and procedure;
- j. Whether admissible facts and law support a finding that Equitable failed to perform any of the duties described above as to which it had responsibility to the federal government and the public;
- k. Whether, as to Equitable, the allegations contained in Count 9 are barred by the PSA, applicable statute of limitations, or equitable doctrines of laches, waiver, or estoppel;
- l. Whether a fine, as assessed against Equitable, is supported by admissible facts and law;

- m. Whether there is sufficient evidence in the case file to support the proposed findings
 - n. Whether the NPV is rendered null and void as a result of improper procedures; and
 - o. Whether the NPV conforms to the requirements of applicable law and regulations.
10. **As to all allegations as they may apply to Equitable:**
- a. The accuracy and basis for the assertion in the NPV that Equitable is the Operator of the pipeline and/or operated the pipeline at any relevant time.
 - b. The Department of Transportation (“DOT”), prior to the pipeline rupture, repeatedly approved filings and reports designating persons other than Equitable as the persons responsible for performance of designated functions on behalf of the pipeline. As a result, designating Equitable as the person responsible for such designated functions would be an impermissible retroactive modification of prior administrative determinations, in violation of the Administrative Procedure Act, United States Constitution, and administrative due process.
 - c. As a result of the improper retroactive modifications described in Issue 10.b., above, Equitable is now being held to the designated responsibilities for the pipeline without ever receiving notice that it would be so held, thereby violating the Administrative Procedure Act, United States Constitution, administrative due process and concepts of fundamental fairness.
 - d. The alleged violations in the Notice of Probable Violation are predicated on previously unstated and incorrect interpretations of the cited Regulations, adopted without proper procedure as required under the PSA and the Administrative Procedure Act, and are therefore based upon an application of the law and Regulations that is without legal force and Equitable has not been given fair notice thereof.
 - e. The application of the Regulations as set forth in the Notice of Probable Violation is not in accordance with applicable law.
 - f. Whether the regulatory duties and obligations alleged to have been violated by Equitable are established by regulation or other legally effective means with sufficient clarity to conform with the requirements of the Administrative

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Procedure Act, United States Constitution, administrative due process and concepts of fundamental fairness.

- g. The issuance of a Notice of Probable Violation to Equitable is arbitrary and inconsistent with DOT's treatment of other entities that may have (a) taken the same actions without violations being alleged or (b) committed violations of the same regulations without similar treatment.
- h. Any potential violation predicated on acts alleged to have occurred more than five years prior to the date of the Notice of Probable Violation, including potential violations alleged in Count 1, is barred by 28 U.S.C. § 2462.
- i. Whether the hearing must be conducted in accordance with the due process protections afforded under the provisions of the Administrative Procedure Act applicable to agency adjudication. Notwithstanding the provision in the PHMSA regulations, at 49 C.F.R. § 190.3, that the term "hearing" as used in this context "is not intended to require a hearing on the record in accordance with section 554 of title 5, U.S.C."

Equitable reserves the right to add issues to the above Statement of Issues to the extent that such are identified upon Equitable's review of the OPS Case File, or that come to light during the proceedings on this matter, or are otherwise identified after the date of this request.

PROCEDURAL MATTERS

In view of the pendency of related proceedings, the confidentiality of these proceedings and the information presented during their conduct will be an essential element of a fair hearing on these matters. Based on prior statements and publications of the Pipeline and Hazardous Materials Safety Administration ("PHMSA"), it is our understanding that evidence, information and testimony presented at the hearings conducted under the applicable regulations will be accorded appropriate protections for as long as such protections are necessary. The precise nature of these protections presumably can be agreed upon prior to a hearing on this matter. The issues set forth in the above Statement of Issues are specific to Equitable.

We presume that the hearing will be conducted and governed in a manner that affords Equitable all protections of due process and fundamental fairness that are guaranteed under applicable law, including the PSA, the regulations implementing the PSA, the Administrative Procedure Act, and the United States Constitution.

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In particular, and without limitation, we note that the PSA requires that we be given the right to (1) submit evidence, call witnesses, and examine the evidence and witnesses presented by the government; (2) review the case file at least 30 days in advance of the hearing; (3) offer facts, statements, explanations, documents, testimony and other relevant evidence at the hearing; (4) respond to any government rebuttal to the evidence and arguments that we present; and (5) submit additional written material for inclusion in the case file.

Prior to the hearing date, we will submit information requests and requests for subpoenas or the making available of witnesses for examination at least thirty days before the hearing.

We appreciate the opportunity to submit this response and motion and look forward to working with OPS to resolve the issues enumerated above.

Respectfully submitted,



J. Gordon Arbuckle
PATTON BOGGS LLP

cc: Renita Bivins, Senior Attorney, PHMSA
Sandra Fraley, Equitable Production Company
Patrick Traylor, Hogan & Hartson LLP

Attachment A



U.S. Department
of Transportation

Research and
Special Programs
Administration

Eastern Region, Pipeline Safety

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

December 8, 1999

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Mr. Keith Hayes
Plant Manager
Kentucky Hydrocarbon
72 Maple Street
Langley, KY 41645

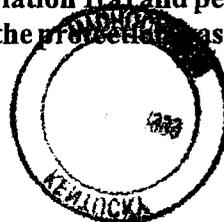
Re: Our CPF No. 19502/Kentucky Hydrocarbon
Notification to Withdraw NOPV/PCO

Dear Mr. Hayes:

Following an on-site inspection of Kentucky Hydrocarbon's (KY-Hydro) highly volatile liquid (HVL) pipeline facilities from February 22-25, 1999, performed pursuant to Chapter 601 of 49 United States Code (USC), I sent you a Notice of Probable Violation (NOPV) and Proposed Compliance Order (PCO) dated March 16, 1999. The inspection alleged that § 195.416 (a) - External Corrosion Control of Title 49 of our Code of Federal Regulations (CFR) wasn't being complied with.

Specifically, probable violation 1(a) identified about four miles of coated pipe that did not meet KY-Hydro's -850 mv pipe-to-soil (p/s) potential in 1997. This criterion was identified in your Operations and Maintenance (O&M) manual. KY-Hydro's consultant recommended the installation of 96 anodes in 1998. At the time of the standard inspection, the remediation was not complete. Probable violation 1(b) addressed the fact that cathodic protection p/s readings were not taken for a period of three years. According to the corrosion technician, he had been instructed to treat the pipeline as a bare pipeline.

The PCO directed KY-Hydro to provide adequate cathodic protection to the approximately four miles of pipeline identified in probable violation 1(a) and perform p/s potential tests on all protected segments to determine whether the protection was adequate to address probable violation 1(b).



KY-Hydro responded with two letters dated April 8, 1999, and June 10, 1999. According to the first letter, the Corrosion Technician that was interviewed during the inspection was recently assigned to KY-Hydro's pipeline department and was not familiar with the pipeline. Enclosed with this letter were 1996-1998 cathodic protection p/s readings of the complete pipeline system.

According to the June 10, 1999-letter, the reasons for the inadequate cathodic protection readings on the coated segments of pipe were determined to be shorted or partially shorted casings, coated pipe inadvertently connected to bare segments of pipe and anode depletion due to time in service. Corrective actions included repairing the shorted casings, and addition of insulating flanges and the installation of anodes to insure protection.

My representative performed a follow-up inspection from November 17-19, 1999, to study the close-interval survey documentation, review the p/s readings along segments of the pipeline that were recorded on October 5, 1999, and review continuing compliance with § 195.416(a), by performing additional field checks at various test stations along the HVL pipeline. The p/s potential readings were satisfactory, i.e., they exceeded the -850mv criteria specified in your O&M manual. My representative also reviewed documentation that identified the location and number of all the newly installed anodes and the adjacent soil resistivity readings which determined the placement of anodes on segments of the bare pipeline.

This letter, therefore, serves to advise you that I am withdrawing CPF No. 19502 (NOPV and PCO) issued to you on March 16, 1999. No further action is required from your part. This office, however, expects future compliance with the cathodic protection requirements in our Federal pipeline safety code. I am also taking this opportunity to thank you for your efforts in remedying the problem and for the courtesies extended to my staff.

Please refer to CPF No. 19502 in any correspondence/communication on this matter. This case is hereby closed.

Sincerely,

William H. Gute

William H. Gute
Director, Eastern Region
Office of Pipeline Safety

