

**DEC 29 2011**

Mr. Jim Sanders  
General Manager, Terminal and Pipelines  
CITGO Petroleum Corporation  
1293 Eldridge Parkway  
Houston, TX 77077

**Re: CPF No. 4-2007-5010**

Dear Mr. Sanders:

Enclosed please find the Decision on Reconsideration issued in the above-referenced case. It grants your Petition for Reconsideration, in part. Service of the Decision 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. Rod Seeley, Director, Southwest Region, OPS  
Mr. Alan Mayberry, Deputy Associate Administrator for Field Operations, OPS  
Mr. Bruce Oakley, Partner, Hogan Lovells US LLP, 700 Louisiana Street,  
Suite 4300 Houston, TX 77002

**CERTIFIED MAIL – RETURN RECEIPT REQUESTED [71791000164203033168]**

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

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| <b>In the Matter of</b> )        |                            |
| )                                |                            |
| <b>CITGO Pipeline Company,</b> ) | <b>CPF No. 4-2007-5010</b> |
| )                                |                            |
| <b>Petitioner.</b> )             |                            |
| _____ )                          |                            |

**DECISION ON RECONSIDERATION**

In an April 14, 2011 Final Order, I found that CITGO Pipeline Company (CITGO or Petitioner) had committed several violations of the hazardous liquid pipeline safety regulations. I assessed Petitioner a civil penalty of \$82,000 and ordered the company to complete certain remedial actions for committing those violations. On June 10, 2011, after receiving an extension of the 20-day filing deadline in 49 C.F.R. § 190.215(a), CITGO submitted this timely Petition for Reconsideration (Petition).

Petitioner seeks reconsideration of two of the findings of violation and associated civil penalties and compliance items in the Final Order. First, CITGO argues that I erred in finding that the company violated 49 C.F.R. § 195.412(a) by failing to perform adequate inspections of the right-of-way (ROW) for the Eagle Pipeline. Petitioner further argues that even if the evidence substantiates that violation, the terms of the resulting compliance order are unlawful, and that its sale of the Eagle Pipeline to Explorer Pipeline Company (Explorer) on October 31, 2007, has rendered that aspect of this case moot. Second, CITGO argues that I erred in finding that it violated 49 C.F.R. § 195.573(d) and (e) by failing to have adequate cathodic protection for the aboveground breakout tanks at its Sour Lake Tank Farm. Petitioner asks that this finding of violation be withdrawn, and that the associated \$50,000 civil penalty be rescinded.

I am denying CITGO's request for reconsideration of the finding that it violated the ROW inspection requirements of 49 C.F.R. § 195.412(a). However, I am granting Petitioner's request for reconsideration of the finding that it violated the cathodic protection requirements of 49 C.F.R. § 195.573(d) and (e). The \$50,000 civil penalty and associated compliance items for that violation are withdrawn for lack of sufficient evidence.

**Background**

From February to June 2006, the Pipeline and Hazardous Materials Safety Administration (PHMSA), Office of Pipeline Safety (OPS), conducted an on-site pipeline safety inspection of CITGO's facilities and records in Texas and Oklahoma. As a result that inspection, the Director,

Southwest Region, OPS (Director), issued to Petitioner, by letter dated April 2, 2007, a Notice of Probable Violation, Proposed Civil Penalty, and Proposed Compliance Order (Notice).

The Notice alleged that CITGO had committed several violations of the hazardous liquid pipeline safety regulations. Two of those violations related to Petitioner's failure to comply with the ROW inspection requirements of 49 C.F.R. § 195.412(a) and cathodic protection requirements in 49 C.F.R. § 195.573(d) and (e). The Notice proposed assessing the company a total civil penalty of \$94,000 and ordering Petitioner to perform certain remedial measures for committing those violations. The Notice further proposed finding that CITGO had committed certain other probable violations of 49 C.F.R. Part 195 and warning the company to take appropriate corrective action to address them or be subject to future enforcement action.

Petitioner responded to the Notice by letters dated May 4, 2007 (Response) and June 25, 2007 (Supplemental Response). CITGO contested several of the alleged violations and the proposed civil penalty amounts and compliance activities. Petitioner also requested a hearing, which was held on July 24, 2007, at the PHMSA Southwest Region Office in Houston, Texas. Mr. Christian A. Garza represented Petitioner as counsel. CITGO later submitted post-hearing material for the record by letter dated August 23, 2007 (Closing).

On April 14, 2011, I issued the Final Order in this case. I found that Petitioner had committed all but two of the alleged violations, assessed the company a reduced civil penalty of \$84,000, and ordered CITGO to take certain actions to comply with the hazardous liquid pipeline safety regulations. On April 21, 2011, Petitioner's new counsel, Mr. Bruce D. Oakley, asked for an extension of the 20-day deadline for seeking reconsideration of the Final Order. 49 C.F.R. § 190.215. That request was granted, and on June 10, 2011, CITGO filed this timely Petition.

Petitioner seeks reconsideration of two of the findings of violation and associated civil penalties and compliance activities in the Final Order. First, CITGO argues that I erred in finding that the company violated 49 C.F.R. § 195.412(a) by failing to perform adequate inspections of the Eagle Pipeline ROW. Petitioner further argues that even if the evidence substantiates that violation, the compliance activities imposed in the Final Order are unlawful and, have become moot as a result of its sale of the Eagle Pipeline to Explorer on October 31, 2007. Second, CITGO argues that I erred in finding that the company violated 49 C.F.R. § 195.573(d) and (e) by failing to have adequate cathodic protection for the aboveground breakout tanks at its Sour Lake Tank Farm. Petitioner asks that this finding of violation be withdrawn, and that the associated \$50,000 civil penalty be rescinded. CITGO included a number of exhibits with its Petition in support of these arguments.

### Standard of Review

A respondent may petition the Associate Administrator for reconsideration of a final order. Reconsideration is not a right of appeal or to seek a de novo review of the record.<sup>1</sup> It is an opportunity to present the Associate Administrator with previously unavailable information or to request that any errors in the final order be corrected. Requests for consideration of additional facts or arguments must be supported by a statement of reasons as to why those facts or

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<sup>1</sup> 49 C.F.R. § 190.215(a)-(e).

arguments were not presented prior to the issuance of the final order. Repetitious information or arguments will not be considered.

### Analysis

#### *I. Request for consideration of additional facts or arguments under 49 C.F.R. § 190.215(b).*

Section 190.215(b) of the Pipeline Safety Regulations states that “[i]f the respondent requests the consideration of additional or arguments, the respondent must submit the reasons they were not presented prior to issuance of the final order.” CITGO included 26 exhibits with its Petition. Six of those exhibits consist of materials submitted prior to the issuance of the Final Order in this case, i.e., Petitioner’s Response, Supplemental Response, Closing, and certain attachments. Two other exhibits contain documents related to the actions of Explorer, the operator who purchased the Eagle Pipeline after the July 2007 hearing. The remaining exhibits contain a variety of materials not submitted prior to the issuance of the Final Order, including:

- Excerpts from CITGO’s Non-Refining Operations Manual, dated February 2, 2006;
- A blank CITGO surface inspection report;
- ROW inspection logs from 2006 and 2007;
- An undated CITGO Pipeline Compliance List with information on its ROW inspection program;
- Documents related to a September 2004 ROW maintenance contract between CITGO and a third party, J B L Plant Services;
- An August 2005 service contract between CITGO and J B L Plant Services;
- Additional documentation, dated July and August 2006, on the ROW maintenance contract between CITGO and J B L Plant Services.
- Invoices, purchase orders, and emails for ROW maintenance from J B L Plant Services to CITGO from 2007;
- Work orders for ROW maintenance and clearing from June 2006 to August 2007;
- A May 10, 2011 third-party analysis of the cathodic protection program for the breakout tanks at the Sour Lake Tank Farm;
- November 13, 2003, December 2, 2004, July 26, 2005, and September 26, 2006 facility surveys for the Sour Lake Tank Farm; and
- Additional information, including prior inspection and operating reports, for the rectifier at the Sour Lake Tank Farm.

With the exception of the two exhibits related to the activities of Explorer, CITGO did not provide any explanation as to why the new exhibits submitted with its Petition should be considered at this stage of the proceeding. Such an explanation is required under § 190.215(b). Accordingly, I find that Petitioner did not comply with the requirements of § 190.215(b) and am excluding Exhibits 1, 5, 6A-6B, 7A-7G, 10, 11A-11D, and 12A-12B from the record.

#### *II. Request for reconsideration of the finding that CITGO violated the ROW inspection requirements in 49 C.F.R. § 195.412(a).*

CITGO seeks reconsideration of the finding that the company failed to perform adequate inspections of the Eagle Pipeline ROW as required under 49 C.F.R. § 195.412(a). Specifically, Petitioner contends that I erred in concluding that it was not contesting that allegations in the Notice, and that I failed to require that PHSMA meet its burden of proof in sustaining that finding of violation. CITGO further argues that I failed to consider all of the relevant exculpatory and mitigating evidence, and that the company did not receive adequate notice of the specific basis for its alleged violation of § 195.412(a). Petitioner also argues that even if the evidence substantiates that allegation, the compliance activities imposed in the Final Order are unlawful, and that its sale of the Eagle Pipeline on October 31, 2007, to Explorer Pipeline Company renders the compliance order moot.

CITGO has not presented a persuasive basis for withdrawing this finding of violation. The Pipeline Safety Regulations state, in relevant part:

**§ 190.211 Hearing.**

(a) A request for a hearing provided for in this part must be accompanied by a statement of the issues that the respondent intends to raise at the hearing. The issues may relate to the allegations in the notice, the proposed corrective action (including a proposed amendment, a proposed compliance order, or a proposed hazardous facility order), or the proposed civil penalty amount. A respondent's failure to specify an issue may result in waiver of the respondent's right to raise that issue at the hearing. . . .

In its hearing request, Petitioner did not object to the allegation that it violated the ROW inspection requirements in 49 C.F.R. § 195.412(a). Rather, CITGO acknowledged in its Response that “[t]he issue cited is that large trees overhanging the right-of-way obscure it from aerial surveillance,” and “agree[d] that this is an important issue and will undertake a focused inspection of its rights-of-way from the air to identify any areas that actually obscure the right-of-way from aerial surveillance.” Petitioner also stated in its Supplemental Response that it was “assessing its current canopy trimming program to reduce problem areas.” Such statements, particularly in a document submitted by counsel, indicate that CITGO agreed with the merits of the allegation of violation, not that the company disputed it.

Moreover, even if Petitioner intended to raise such an objection, the evidence of record supports the finding of violation. As noted in the Violation Report, the OPS inspector observed areas of overgrowth on the Eagle Pipeline ROW that would prevent the performance of adequate aerial inspections, and CITGO’s employees stated those areas would be subject to ground surveillance in the future. The OPS inspector also submitted photographic evidence of obstructed areas of the Eagle Pipeline ROW near the North Arbuckle Block Valve, the West Trinity Block Valve, Wynnewood Junction, the north Houston suburbs, and Milepost 87.6. Such evidence is more than sufficient to sustain the alleged violation. Accordingly, I am denying Petitioner’s request for reconsideration of the finding that it failed to perform adequate inspections of the Eagle Pipeline ROW as required under 49 C.F.R. § 195.412(a).

With respect to CITGO’s remaining arguments, the terms of the compliance order do not mandate that Petitioner perform aerial inspections of the Eagle Pipeline ROW. CITGO is merely required to take certain steps, e.g., identification and clearing of overgrowth, to ensure that its aerial inspections are being conducted in an appropriate manner. Nothing in the compliance

order precludes Petitioner from using other appropriate means of performing ROW inspections, including ground surveillance.<sup>2</sup>

Nor has Petitioner's sale of the Eagle Pipeline to Explorer Pipeline Company rendered the terms of the compliance order moot. CITGO is the moving party and bears the burden of establishing mootness,<sup>3</sup> i.e., that "[t]he controversy between the parties has thus clearly ceased to be 'definite and concrete' and no longer 'touch(es) the legal relations of parties having adverse legal interests[,]'"<sup>4</sup> and that it is "impossible . . . to grant 'any effectual relief whatever' [.]"<sup>5</sup> That is a "heavy burden" where, as here, the allegation of mootness arises from the moving party's own voluntary conduct, i.e., Petitioner's sale of the Eagle Pipeline.<sup>6</sup> In such a case, CITGO "bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur[.]"<sup>7</sup> and that "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation."<sup>8</sup>

Petitioner states that it sold the Eagle Pipeline to Explorer on October 31, 2007, that CITGO no longer has any authority to perform inspections of that pipeline ROW, and that Explorer has its own program for complying with the requirements in § 195.412(a). Petitioner has also submitted a September 30, 2009 letter from Explorer to OPS, which states that "Explorer has conducted an aerial survey [of the Eagle Pipeline] to determine locations where ROW clearing needs to be enhanced to facilitate weekly aerial patrol," and that "[c]ertain ROW clearing has been completed."

The evidence provided is not sufficient to show that the sale of the Eagle Pipeline has "completely and irrevocably eradicated the effects" of Petitioner's violation of the ROW inspection requirements. Explorer's letter indicates that aerial inspections of the Eagle Pipeline ROW are still being conducted, and that additional clearing of the ROW may be needed in certain areas. This indicates that CITGO's failure to comply with the requirements in § 195.412(a) is still adversely impacting the condition of the ROW. As important, the evidence does not make "absolutely clear" that Petitioner has no obligation to ensure that these actions are completed. The specific terms of CITGO's transaction with Explorer are not of record in this proceeding, including Petitioner's obligations, if any, for conduct that arose prior to its sale of

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<sup>2</sup> PHMSA has broad discretion to ensure compliance with the Pipeline Safety Laws and Regulations, and in cases of non-compliance such discretion can include requiring operators to take remedial actions that might not otherwise be required in the absence of a violation. 49 U.S.C. § 60118.

<sup>3</sup> *Friends of the Earth v. Laidlaw*, 528 U.S. 167, 189-90 (2000).

<sup>4</sup> *DeFunis v. Odegaard*, 416 U.S. 312, 317 (1974) (per curiam) (quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937))

<sup>5</sup> *Church of Scientology of California v. U.S.*, 506 U.S. 9, 12 (1992) (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895)).

<sup>6</sup> *Friends of the Earth*, 528 U.S. at 189-190 (citing *United States v. Concentrated Phosphate Export Assn.*, 393 U.S. 199 (1968); *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982)).

<sup>7</sup> 528 U.S. at 190.

<sup>8</sup> *Los Angeles County v. Davis*, 440 U.S. 625, 631 (1979).

the Eagle Pipeline. Therefore, I find that CITGO has not met its heavy burden of establishing that the terms of the compliance order are moot.

*III. Request for reconsideration of the finding that CITGO violated the cathodic protection requirements in 49 C.F.R. § 195.573(d) and (e).*

CITGO requests reconsideration of the finding in the Final Order that it violated 49 C.F.R. § 195.573(d) and (e) by failing to have adequate cathodic protection for the aboveground breakout tanks at its Sour Lake Tank Farm. Petitioner argues that OPS has not submitted the evidence required to sustain that violation, i.e., that its case rests solely on the fact that one of the four cathodic protection beds was out of service at the time of the inspection, but that the record does not contain any evidence to show that the breakout tank was not receiving adequate cathodic protection from the three remaining in-service beds.

I find CITGO's arguments persuasive. OPS bears the burden of proof in an enforcement action and must prove, by a preponderance of the evidence, that all of the elements necessary to sustain a violation are present in a particular case.<sup>9</sup> As Petitioner notes, OPS's case is based on the fact that one of the four cathodic protection beds for the breakout tank at the Sour Lake Tank Farm was out of service. However, the record does not contain any additional evidence, such as test results or an expert opinion, to demonstrate that the breakout tank was not receiving adequate cathodic protection from the three remaining beds. Accordingly, I am withdrawing the finding in the Final Order that CITGO violated 49 C.F.R. § 195.573(d) and (e) by failing to have adequate cathodic protection for the aboveground breakout tanks at its Sour Lake Tank Farm and rescinding the \$50,000 civil penalty for that violation.

**RELIEF GRANTED**

Based on the information provided in the Petition, a review of the relevant portions of the record, and for the reasons stated above, I am withdrawing the finding in the Final Order that CITGO violated 49 C.F.R. § 195.573(d) and (e) by failing to have adequate cathodic protection for the aboveground breakout tanks at its Sour Lake Tank Farm and rescinding the \$50,000 civil penalty for that violation. The remainder of the Final Order is affirmed without modification.

This Decision is the final administrative action in this proceeding.

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Jeffrey D. Wiese  
Associate Administrator  
for Pipeline Safety

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Date Issued

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<sup>9</sup> *In the Matter of Alyeska Pipeline Service Co.*, Decision on Reconsideration, CPF No. 5-2005-5023, p. 4-5 (Dec. 16, 2009); *In the Matter of Butte Pipeline Co.*, Final Order, CPF No. 5-2007-5008, p. 2, n. 3 (Aug. 17, 2009); see *Schaeffer v. Weast*, 546 U.S. 49, 56-58 (2005).