

February 9, 2018

Mr. Mark A. Maki  
President  
Enbridge Storage (Cushing), LLC  
1100 Louisiana St., Suite 3300  
Houston, Texas 77002

**Re: CPF No. 4-2015-5016**

Dear Mr. Maki:

Enclosed is the Decision on the Petition for Reconsideration filed by Enbridge Storage (Cushing), LLC, in the above-referenced case. For the reasons explained therein, the Decision grants the Petition, in part, but affirms the civil penalty and compliance terms of the March 24, 2017 Final Order. The civil penalty was paid in full, by wire transfer, dated April 11, 2017. When the terms of the Compliance Order are completed, as determined by the Director, Southwest Region, this enforcement action will be closed. This Decision constitutes the final administrative action in this proceeding. Service of this Decision is made pursuant to 49 C.F.R. § 190.5.

Thank you for your cooperation in this matter.

Sincerely,

Alan K. Mayberry  
Associate Administrator  
for Pipeline Safety

Enclosure

cc: Director, Southwest Region, Office of Pipeline Safety, PHMSA  
Mr. David Stafford, Senior Manager, U.S. Pipeline Compliance, Enbridge Energy  
Partners, LP, 119 North 25th Street East, Superior, WI 54880

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

**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>Enbridge Storage (Cushing), LLC,</b> )	<b>CPF No. 4-2015-5016</b>
<b>a subsidiary of Enbridge Energy Partners, LP,</b> )	
)	
<b>Petitioner.</b> )	
)	
_____ )	

**DECISION ON PETITION FOR RECONSIDERATION**

Between July 23, 2012, and April 20, 2015, pursuant to 49 U.S.C. § 60117, a representative of the Pipeline and Hazardous Materials Safety Administration (PHMSA), Office of Pipeline Safety (OPS), conducted an on-site pipeline safety inspection of the facilities and records of Enbridge Storage (Cushing), LLC (Enbridge or Petitioner), in Cushing, Oklahoma, specifically the procedures and records related to the Enbridge BP/Amoco Pipe Modification Project (BP/Amoco Project). Enbridge operates a terminal facility in Cushing, Oklahoma, that is part of the Ozark Pipeline, which begins in Cushing and terminates in Wood River, Illinois. Enbridge has approximately 75 breakout tanks at the Cushing Terminal, with additional tanks under construction.<sup>1</sup>

As a result of the inspection, the Director, Southwest Region, OPS (Director), issued to Enbridge, by letter dated August 25, 2015, a Notice of Probable Violation, Proposed Civil Penalty, and Proposed Compliance Order (Notice). In accordance with 49 C.F.R. § 190.207, the Notice proposed finding that Enbridge had violated 49 C.F.R. § 195.214, and proposed assessing a civil penalty of \$40,300 for the alleged violation. The Notice also proposed ordering Enbridge to take certain measures to correct the alleged violation.

Enbridge responded to the Notice by letter dated October 2, 2015 (Response). The company contested the allegation, offered additional information in response to the Notice, and requested that the proposed civil penalty be reduced or eliminated. Enbridge did not request a hearing.

On March 24, 2017, pursuant to 49 C.F.R. § 190.213, PHMSA issued a Final Order in this proceeding, finding that Enbridge had committed one violation of § 195.214, as alleged in the

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<sup>1</sup> Pipeline Safety Violation Report (Aug. 25, 2015) (Violation Report) (on file with PHMSA), at 1.

Notice.<sup>2</sup> The agency assessed a reduced civil penalty of \$33,100 for the violation and ordered that Enbridge take certain corrective actions, as set forth in the Compliance Order that was part of the Final Order.

In accordance with § 190.243, Enbridge filed a “Petition for Reconsideration or, in the Alternative, Petition to Amend Language of the Final Order” on April 19, 2017. Enbridge did not seek reconsideration of the finding of violation, civil penalty assessment, or compliance order. Instead, Enbridge requested the amendment of certain language in the Final Order regarding two factual findings.

### **STANDARD OF REVIEW**

Pursuant to 49 C.F.R. § 190.243, an operator may petition the Associate Administrator for reconsideration of a final order issued under § 190.213. Reconsideration does not constitute an appeal or an opportunity to seek a *de novo* review of the record. It is instead an opportunity for respondents to request that errors in the final order be corrected or to present information that was not previously available, provided the petitioner submits a valid reason explaining why such information was not presented prior to issuance of the final order. PHMSA may grant or deny, in whole or in part, a petition for reconsideration without further proceedings, but may request additional information or comment if deemed appropriate. Under § 190.243(b), the respondent must submit reasoning why any additional facts or arguments were not presented prior to issuance of the final order.

### **DISCUSSION**

**Item 1** in the Final Order found that Petitioner violated 49 C.F.R. § 195.214, which states:

**§ 195.214 Welding procedures.**

(a) Welding must be performed by a qualified welder in accordance with welding procedures qualified under Section 5 of API 1104 or Section IX of the ASME Boiler and Pressure Vessel Code (incorporated by reference, *see* § 195.3). The quality of the test welds used to qualify the welding procedure shall be determined by destructive testing.

(b) Each welding procedure must be recorded in detail, including the results of the qualifying test. This record must be retained and followed whenever the procedure is used.<sup>3</sup>

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<sup>2</sup> Enbridge Storage (Cushing), LLC, Final Order, CPF No. 4-2015-5016, 2017 WL 1363416 (Mar. 24, 2017) (available at [www.phmsa.dot.gov/pipeline/enforcement](http://www.phmsa.dot.gov/pipeline/enforcement)).

<sup>3</sup> *See*, 49 C.F.R. § 195.214 (2015). This section was amended, effective Oct. 1, 2015; however, because the violation occurred before the amendment was effective, the previous version of the regulation, as quoted above, applies in this case.

The Final Order determined the Petitioner had violated 49 C.F.R. § 195.214 by failing to ensure that certain welding was performed by a qualified welder in accordance with welding procedures qualified under Section 5 of API 1104 or Section IX of the ASME Boiler and Pressure Vessel Code (ASME IX). Specifically, the Final Order found that Enbridge violated 49 C.F.R. § 195.214 when it used two different welding procedures with different essential variables on the same weld, and therefore failed to perform the welding according to either qualified procedure. The Final Order assessed a civil penalty of \$33,100 for the violation.

Enbridge did not seek reconsideration of the finding of violation or the amount of the civil penalty, but specifically requested “that PHMSA amend the language regarding two of the [civil penalty] mitigating factors: economic benefit and good faith.”<sup>4</sup> With respect to economic benefit, the Final Order found that Enbridge “probably realized an economic benefit by not removing the work done on the first part of the welding and simply completing the work using a different procedure.”<sup>5</sup> The Final Order noted, however, that this finding did not have any impact on the penalty because “the proposed penalty was not designed to offset any economic benefit.”<sup>6</sup> Petitioner requested that the language in the final order referring to a probable economic benefit be removed because it was irrelevant to the determination of the penalty and could be misinterpreted.

Having reconsidered the record, I find that the evidence was insufficient for PHMSA to make any finding concerning economic benefit. While the Final Order stated that Enbridge “probably” realized an economic benefit by “not removing the work done on the first part of the welding and simply completing the work using a different procedure,” this finding was not supported by any probative evidence showing that Enbridge actually derived any tangible economic benefit from the process by which it completed the weld in question. Moreover, it was not necessary to conduct a factual inquiry into economic benefit because, as recognized in the Final Order, economic benefit was not actually considered by PHMSA in proposing the penalty amount. Accordingly, the finding in the Final Order that Petitioner probably realized an economic benefit from its noncompliance is hereby withdrawn.

With respect to good faith, the Final Order found that Petitioner had not acted in furtherance of a reasonable, good-faith interpretation of the regulations that would warrant a reduction in the penalty. In so holding, the Final Order rejected an argument by Enbridge that its removal of the first welding crew due to a confined-space violation constituted “good faith,” noting that the operator was already required to remove the crew under such circumstances. Petitioner argued that “the removal of the welding crew for non-compliance with confined space rules was acting in good faith, even if that does not qualify for a good-faith reduction in the civil penalty,” and suggested that this finding in the Final Order could also be misinterpreted.<sup>7</sup>

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<sup>4</sup> Petition, at 2.

<sup>5</sup> Final Order, at 10.

<sup>6</sup> *Id.*

<sup>7</sup> Petition, at 3.

To clarify the finding in the Final Order, when considering an operator's "good faith" in attempting to achieve compliance for the purpose of potentially reducing a proposed civil penalty, PHMSA looks at whether the operator attempted to comply with the cited regulation based upon "a reasonable interpretation of the requirement."<sup>8</sup> In this case, the Final Order determined that Enbridge's actions to comply with other safety regulations, such as confined-space safety requirements, were already required and therefore did not qualify as a basis for *reducing* the proposed penalty. Further, to the extent that Enbridge "believed the regulation permitted different welding procedures to be combined along the same seam, Respondent's interpretation was unreasonable and does not justify reducing the penalty."<sup>9</sup> Having reconsidered this finding, I find no grounds to amend the Final Order, but trust this clarification addresses Petitioner's concern.

### CONCLUSION

For the reasons stated above, the Petition for Reconsideration is granted in part and denied in part. The finding of violation in the Final Order, the associated penalty of \$33,100, and the associated compliance terms are hereby affirmed. Enbridge paid the civil penalty in full by wire transfer dated April 11, 2017. The Compliance Order was not stayed by the filing of the Petition and must be completed in accordance with the original terms of the March 24, 2017 Final Order.

This Decision on Reconsideration is the final administrative action in this proceeding.

February 9, 2018

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Alan K. Mayberry  
Associate Administrator  
for Pipeline Safety

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Date Issued

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<sup>8</sup> Violation Report, at 11. *See also*, White Cliffs Pipeline, LLC, Final Order, CPF No. 3-2011-5012, at 6, 2013 WL 1247518, at \*4 (Feb. 5, 2013).

<sup>9</sup> Final Order, at 10.