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February 8, 2010

Government Letter No. 20450  
APSC File No. 2.11via fax 202-366-4566  
via email to jeff.wiese@dot.gov

Jeffrey D. Wiese, Associate Administrator for Pipeline Safety  
Pipeline and Hazardous Materials Safety Administration  
U.S. Department of Transportation  
1200 New Jersey Avenue, SE  
East Building, 2nd Floor  
Washington, DC 20590

Re: CPF No. 5-2006-5018/ Petition for Reconsideration – Alyeska Pipeline Service Company

Dear Mr. Wiese:

Pursuant to 49 CFR §190.215, Alyeska Pipeline Service Company (Alyeska) notifies you that it hereby files a Petition for Reconsideration and a Stay of the Final Order in CPF No. 5-2006-5018, which is dated January 13, 2010, and was received by Alyeska on January 19, 2010. Alyeska acknowledges that 49 CFR §190.5(c) states that service by certified mail is complete upon mailing and that an official receipt from the US Postal Service constitutes prima facie evidence of service. The Final Order was sent certified mail to Alyeska's Sr. VP, Mike Joynor, and Alyeska's counsel. However, Alyeska does not have access to the date of mailing by the agency, only the official date of receipt by Alyeska. See Exhibits 1 and 2. Alyeska is missing critical data to calculate the twenty (20) days from date of service to determine the deadline for filing its Petition.<sup>1</sup> In light of the agency's substantial delay in issuing the Final Order, Alyeska requests that PHMSA accept this Petition for Reconsideration as timely filed, based on twenty (20) days from receipt of the Final Order.<sup>2</sup>

In brief, Alyeska petitions that the Office of Pipeline Safety:

1. Failed to comply with all the requirements of 49 CFR §190.225 in assessing the civil penalty;
2. Ignored the facts in the administrative record and issued an arbitrary and capricious Final Order;
3. Failed to base the compliance order requirements on statutory or regulatory authority;
4. Violated 49 CFR §190.213(e) in failing to issue the Final Order within 45 days of receipt of the case file, and in failing to notify Alyeska of the reason for the substantial delay and date by which the Final Order was expected to be issued;
5. Issued the Final Order almost three (3) years after closing the case file with Alyeska's March 16, 2007 Closing Statement after the hearing held January 18, 2007; and
6. Violated the Executive Order 12988 that directs agencies to "develop specific procedures to reduce delay in decision-making ... and to invest maximum discretion in fact-finding officers to encourage appropriate settlement of claims as early as possible." 61 Fed. Reg. 4729, 4732 (Feb. 7, 1996).

<sup>1</sup> Up until August 2009, PHMSA has accepted as timely without comment, Alyeska's petitions for reconsideration filed based on twenty (20) days from receipt of the final order.

<sup>2</sup> Administrator v. Carlos, NTSB Order EA-4936 at 10 (2002)(explaining that general legal principles should permit a private citizen a reasonable time to respond when the Administrator has four months to issue an order).

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Specifically, Alyeska petitions for reconsideration of the civil penalty assessed for Finding 1 regarding Alyeska's knowledge from the baseline assessment of anomalous conditions discovered on the pipeline that presented a potential threat to its integrity. Alyeska also petitions for reconsideration of the compliance order for Finding 1 requiring a root cause study of the failure of the ILI tools used on TAPS, a written plan to mitigate potential impacts identified by the study, and documentation of the safety improvement costs associated with fulfilling the compliance order. Further, Alyeska requests a stay of the compliance order, pending the decision on this Petition for Reconsideration.

### Finding 1 Civil Penalty

For Finding 1, PHMSA's case file and Final Order lack accurate and verifiable evidence to support the criteria set forth in §190.225(a). While the Final Order addressed §190.225(a)(1), which requires consideration of the nature, circumstances and gravity of the violation, including adverse impact on the environment, PHMSA has failed to meet its burden of persuasion by providing sufficient evidence to support the assessment of the civil penalty under the additional subsections of §195.225(a).<sup>3</sup>

Section 190.225(a)(2) requires consideration of the degree of respondent's culpability. Under "Degree of Culpability," PHMSA's case file states "the non-compliances are basic compliance issues and indicate a compliance program which is not yet meeting Part 195." This statement has no relevance or relationship to culpability. Neither the regulations nor the enabling statute define or explain culpability. Black's Law Dictionary provides context for usage here. "A person's culpability requires a showing that he acted purposely, knowingly, recklessly, or negligently, ... with respect to each material element of the violation." Other federal agencies use the concept of culpability as part of assessing civil penalties as a means to include the person's acts. See, *In the Matter of Donald Cutler*, 2005 EPA ALJ LEXIS 79, 38, Oct. 12, 2005. Culpability is equated with wanton, reckless disregard for consequences. See, *In the Matter of Roger Barber, d/b/a Barber Trucking*, 2007 EPA ALJ LEXIS 17, 150, May 11, 2007. The Final Order at 9 states "Respondent is responsible for compliance with the applicable pipeline safety regulations as the operator of TAPS and is therefore the culpable party, absent some showing that the responsibility for the violations rests with another entity." This equates culpability with responsibility. However, as both Black's Law Dictionary and administrative caselaw demonstrate, culpability is not synonymous with responsibility. PHMSA has not and cannot support its allegations that Alyeska acted with culpability. There is no evidence of culpability in the case file, nor was any evidence presented at the hearing showing any degree of culpability on the part of Alyeska. PHMSA's finding of culpability is arbitrary and capricious, and as such, should be withdrawn.

Section 190.225(a)(3) requires consideration of respondent's history of prior offenses. PHMSA's case file included a chart of PHMSA's records of Alyeska's compliance history, which contains inaccuracies and incomplete entries. Additionally, the Final Order at 9 states,

Respondent has been the subject of numerous enforcement actions, including at least ten cases in the six-year period prior to the issuance of the Notice [April 19, 2006]. These prior offenses involved civil penalties and compliance terms for violations of the pipeline safety regulations. Alyeska's history of prior offenses supports the penalties proposed in this case.

<sup>3</sup> *In the Matter of Butte Pipeline Co. (Butte)*, Final Order, CPF 5-2007-5008, p.2 (Aug. 17, 2009)(explaining that a violation may be found only if evidence supporting the allegation outweighs evidence presented by Respondent).

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In past hearings, Jim Curry, attorney for the Western Region, has stated that the history of prior offenses was used by the Compliance Officer in issuing proposed civil penalties.<sup>4</sup> Curry explained that if the regulations the company was previously cited for do not match up with the current citations, then the company is not considered a repeat offender for calculation of proposed penalties. Repeat offenses would show a pattern of recidivism which would be reflected in increased penalties.

A review of the data on Alyeska's compliance history in PHMSA's case file and Final Order shows PHMSA's information is not accurate or complete. The chart in the case file includes history dating back to 1981. Even limiting review to the six-year period from the date of this NOPV (April 19, 2006), the file contains errors inflating the amount of civil penalties paid and fails to account for four Petitions for Reconsideration and a consent agreement that reduced penalties, withdrew findings, and eliminated compliance orders.

More troubling is the implication in the Final Order at 9 that at least ten cases in the six-year period are all findings against Alyeska. In fact, as of the date of the NOPV (April 19, 2006), over half of these cases (6 out of 11) did not have final orders issued.<sup>5</sup> Of the five that did have final orders issued, two of them had findings withdrawn and penalties reduced, and two had Petitions for Reconsideration filed, one of which was settled with a consent agreement.<sup>6</sup>

Finally, looking at Alyeska's compliance history, none of the final orders cite §195.452(h)(2).<sup>7</sup> There is no previous allegation or final order that creates a pattern of violations or recidivism that would support an increased penalty. The assessment of this penalty is not consistent with the explanation provided by Curry. It does not comply with PHMSA's requirements for how to consider the history of prior offenses. The civil penalty is unsupported by the evidence in the case file. Indeed, PHMSA did not introduce any substantial evidence into the record to support its penalty. This civil penalty is excessive and does not comply with PHMSA's regulatory and enforcement authority. Therefore, PHMSA's penalty is arbitrary and capricious and should be withdrawn.

Section 190.225(a)(5) requires consideration of any good faith by respondent in attempting to achieve compliance. The PHMSA case file states "Alyeska has made good faith in achieving compliance." However, the Final Order at 9 states "I have considered the extent to which Respondent was cognizant of the relevant requirements and took good faith steps to comply with the regulations. In light of the other assessment criteria, however, I find that such efforts do not warrant further reduction in the proposed penalties." No evidence was provided in the case file, or at hearing, to refute Alyeska's explanation of its good faith efforts to work with the data provided by its ILI vendor to discover anomalous conditions on the pipeline that presented a potential threat to its integrity. The Final Order references no supporting evidence that Alyeska's good faith was insufficient to justify reducing the penalty. This is an arbitrary and capricious exercise of PHMSA's obligation to follow its own regulations.

For all of the above reasons, the civil penalty assessed against Alyeska should be withdrawn because PHMSA did not provide evidence to support the penalty and it also did not follow its own regulations in the course of determining the amount of the penalty to be assessed.

<sup>4</sup> Alyeska has been unable to locate any official explanation of the process used by PHMSA's Compliance Officer to assess civil penalties.

<sup>5</sup> CPF 5-2005-5023 Final Order dated 7/28/09; CPF 5-2005-0009 Closure letter dated 5/21/07; CPF 5-2004-5015 Final Order dated 9/24/07; CPF 5-2004-5011M Final Order dated 6/19/06; CPF 5-2002-5035 Final Order dated 7/19/06; CPF 5-2001-0012 Final Order dated 5/16/07.

<sup>6</sup> CPF 5-2002-5003 Final Order dated 4/28/04 cited §195.401(b), penalty \$20K, reduced by \$5K; §195.422, penalty \$25K; §195.428(a), penalty withdrawn. CPF 5-2000-5006 Final Order dated 12/31/03 cited §192.463(a), compliance order; §195.401(a) & (b), penalty \$12.5K, reduced by \$12.5K and partial finding withdrawn; §195.406(a) & (b), penalty \$50K; §195.420(b), compliance order, Petition for Reconsideration, settled with consent agreement. CPF 5-2003-5002 Final Order dated 5/19/05 cited §195.420(a), penalty \$10K, compliance order; §195.571 and §195.573, penalty \$7.5K, reduced by \$1K and finding withdrawn after Petition for Reconsideration.

<sup>7</sup> Id.

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## **Finding 1 Compliance Order**

### Root cause study and written implementation plan

PHMSA ignored the facts in the administrative record regarding the work already completed by Alyeska that renders the issuance of the compliance order arbitrary and capricious. Both in its initial briefing, and again in its presentation at hearing, Alyeska provided details to PHMSA of its actions taken in determining root causes and mitigating the potential impacts to changing conditions on TAPS. Addressing the requirement for a root cause study, Alyeska has long been aware that the wax content in the crude oil delivered to TAPS at Pump Station 1 from the North Slope oil fields has been increasing. This increased wax has made it more difficult to obtain complete and accurate smart pig data on the pipe segment Pump Station 4 to Valdez.<sup>8</sup> Alyeska's ILI vendor, BJ Pipeline Inspection Services, shared its conclusions from its root cause analysis, which included electronics failures and use of sub-optimal material for sensor heads.<sup>9</sup> Alyeska conducts ongoing engineering analysis of changing conditions such as Strategic Reconfiguration (SR) and reduced throughput. In the almost four (4) years since PHMSA issued this NOPV, Alyeska has continued to analyze and adapt to changing throughput as it brings SR pump stations online.<sup>10</sup>

As for mitigating the potential impacts from the root causes, Alyeska directs PHMSA to the information in the record. Alyeska's actions include running an aggressive cleaning pig more frequently; segregating the smart pig in batch oil containing the least amount of waxy oil; working with ILI vendors to improve data capture; running a disc cleaning pig directly in front of the smart pig; and maximizing throughput for pig runs.<sup>11</sup> PHMSA has not provided any evidence in the case file, nor presented at hearing, which outweighs or even refutes Alyeska's evidence of knowledge of the root causes and mitigation of the potential impacts to future ILI runs from changing conditions on TAPS. By failing to meet its burden of persuasion, PHMSA has issued a Final Order that includes an arbitrary and capricious compliance order.

PHMSA's delay of almost three (3) years for a final order directly impacts the knowledge and information available to PHMSA when issuing this Final Order. The data upon which the Final Order is based is almost three (3) years out of date. Alyeska did not sit idle waiting for a response from PHMSA. The company has taken positive action to mitigate potential impacts from changing conditions on TAPS. It developed a specific procedure for running the ILI tool, with special consideration for travel over Atigun Pass when not tight lined; it changed the design of the cleaning pig to increase its effectiveness; and it installed a pig launch spool at Pump Station 8. These changes have been shared with the Western Region as they occurred. Having implemented these changes, Alyeska successfully ran the ILI tool in 2009. This is the most positive verification that the compliance order terms have already been satisfied and are no longer necessary.

Issuing this Final Order that has become moot due to the substantial delay by PHMSA is the consequence of the agency's violation of §190.213(e), which requires PHMSA to issue a final order with 45 days of receipt of the case file. The case file was complete with Alyeska's Closing Statement, submitted March 16, 2007 to the hearing officer. PHMSA not only did not issue a timely final order, but also failed to notify Alyeska of the delay or expected issuance date. As another instance of PHMSA's failure to follow its own regulations, the compliance order should be withdrawn.

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<sup>8</sup> Alyeska's Response at 4, 6.

<sup>9</sup> Alyeska's Hearing presentation at 19.

<sup>10</sup> Strategic Reconfiguration is Alyeska's project for electrification and automation of Pump Stations (PS) 1, 3, 4, and 9. Forward flow of oil occurred at PS 9 in February 2007, at PS 3 in December 2007, and at PS 4 in May 2009.

<sup>11</sup> Alyeska's Hearing presentation at 13-16.

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### Documentation of safety improvement costs

PHMSA failed to base the requirement for maintaining and submitting documentation of the safety improvement costs to the Western Region on agency authority. 49 CFR Part 190 and Part 195 do not include language to put a pipeline operator on notice that safety improvement costs are expected or required. Examination of the enabling statute, PIPES Act of 2006 and its predecessors, shows the requirement to keep records, reports and information.<sup>12</sup> The statute states the purpose for these records, reports and information is to "enable the Secretary to decide whether a person owning or operating a pipeline facility is complying" with the Act.<sup>13</sup> This plain language does not begin to authorize the detailed requirements enumerated in this Final Order. PHMSA has overstepped its agency authority and issued an arbitrary and capricious compliance order.

In addition, from a practical standpoint, when Alyeska contests the allegations in an NOPV, it does not maintain documentation of work that might, or might not, be related to the subject of the NOPV. The company position is based on a good faith expectation that it will be afforded due process from the agency, including a reasonable and knowable final order that acknowledges Alyeska's facts and information in the record that refute the allegations in the NOPV. Many years later, when the agency issues an arbitrary and capricious final order, it is unreasonable, and impracticable, to expect Alyeska to create documentation retroactively that is not kept in the usual course of business.

For all of the above reasons, the compliance order issued to Alyeska should be withdrawn because the Final Order is arbitrary and capricious and PHMSA did not follow its own regulations in issuing the Final Order.

### Request for stay of compliance order

Alyeska requests a stay of the compliance order pending PHMSA's decision on the Petition for Reconsideration. For the reasons discussed in detail above, requiring Alyeska to comply with a final order that should be withdrawn is arbitrary and capricious. Additionally, as the regulations do not impose any time requirement on the agency to issue a decision on the petition, it is likely that compliance with the terms of the Final Order will be required (90 days from receipt of the Final Order) before the decision is issued. Therefore, PHMSA should stay the Final Order until the decision on this Petition for Reconsideration is issued.

Pursuant to 49 CFR §190.215(e), Alyeska requests it be given 90 days to fully brief these issues. If you should have any further questions, please do not hesitate to contact me at 907-787-8904.

Sincerely,



Sheila Doody Bishop  
Senior Counsel

Attachments: Exhibit 1 United States Postal Service Track & Confirm – Joynor  
Exhibit 2 United States Postal Service Track & Confirm – Bishop

<sup>12</sup> 49 U.S.C. 60117(b)

<sup>13</sup> Id.

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cc: Chris Hoidal  
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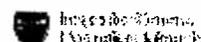
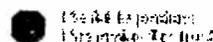


Exhibit 1  
Alyeska Pipeline Service Company  
Petition for Reconsideration  
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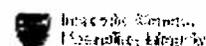
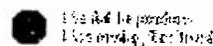


Exhibit 2  
Alyeska Pipeline Service Company  
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