

**MAR 1 2010**

Mr. Mike Joynor  
Senior Vice President  
Oil Movements, Engineering and Pipeline  
Alyeska Pipeline Service Company  
900 E. Benson Blvd.  
P.O. Box 196660  
Anchorage, AK 99519

**Re: CPF No. 5-2006-5018**

Dear Mr. Joynor:

Enclosed is the Decision on the Petition for Reconsideration filed by Alyeska Pipeline Service Company in the above-referenced case. The decision denies your petition in all respects except that Requirement 3 in the Compliance Order has been stricken. The remaining terms of the Final Order are in effect, including the assessment of a civil penalty in the amount of \$263,000, and the actions specified therein to comply with the pipeline safety regulations. When the civil penalty has been paid and the terms of the compliance order completed, as determined by the Director, Western Region, this enforcement action will be closed. Service of this document is in accordance with 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. Chris Hoidal, Director, Western Region, PHMSA

Sheila Doody Bishop, Counsel, Alyeska Pipeline Service Co.  
900 E. Benson Blvd., P.O. Box 196660, Anchorage, AK 99519

**CERTIFIED MAIL – RETURN RECEIPT REQUESTED [7009 1410 0000 2472 5057]**

**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>Alyeska Pipeline Service Company,</b>	)	<b>CPF No. 5-2006-5018</b>
	)	
<b>Petitioner.</b>	)	
	)	

**DECISION ON PETITION FOR RECONSIDERATION**

On January 13, 2010, the Pipeline and Hazardous Materials Safety Administration (PHMSA) issued a Final Order in this case finding that Alyeska Pipeline Service Company (Alyeska or Petitioner) had committed two violations of the hazardous liquid pipeline safety regulations. In Item 1 of the Final Order, Alyeska was found to have violated 49 C.F.R. § 195.452(h)(2) by failing to promptly obtain, within 180 days after an integrity assessment, sufficient information about anomalous conditions on the pipeline to determine if they present a potential threat to integrity. In Item 2, Alyeska was found to have violated § 195.452(h)(3) and (h)(4)(i)(C) by failing to complete remediation of an anomalous condition according to a schedule for immediate repair, and by failing to temporarily reduce operating pressure or shut down the pipeline until completing the repair. The Final Order assessed a total civil penalty of \$263,000 for the violations, reduced from the proposed amount of \$350,000. The Final Order also specified actions to be taken by the company to comply with the pipeline safety regulations (Compliance Order).

Alyeska responded to the Final Order as permitted under § 190.215 by submitting a Petition for Reconsideration dated February 8, 2010 (Petition). In its Petition, Alyeska requested reconsideration of the civil penalty and the associated compliance terms for Item 1.<sup>1</sup>

Section 190.215 provides that a respondent may petition the Associate Administrator for reconsideration of a final order. The Associate Administrator does not consider repetitious information, arguments, or petitions, but may consider additional facts or arguments, provided that the respondent submits a valid reason why such information was not presented prior to issuance of the final order. The Associate Administrator may grant or deny, in whole or in part, a petition for reconsideration without further proceedings, but may request additional information, data, and comment as deemed appropriate. This rule allows a respondent to present information or arguments that were unavailable or unknown prior to issuance of the final order, and gives PHMSA an opportunity to correct any errors. Section 190.215 further provides that a petition must be received by PHMSA no later than 20 days after service of the final order.

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<sup>1</sup> Alyeska also requested a stay of the compliance order pending PHMSA's issuance of a decision on its petition, but that request is rendered moot by this decision.

At the outset, Alyeska noted that PHMSA's regulation provides that service of a final order by certified mail "is complete upon mailing."<sup>2</sup> Alyeska maintained that it could not determine the precise date of mailing, and therefore could not calculate 20 days from the date of service to determine the deadline for filing its Petition. For this reason, the company requested that PHMSA accept its Petition as timely filed. I find nothing in the record demonstrating the precise date PHMSA mailed the Final Order. Therefore I find no reason to deny that Alyeska's petition is timely.

### **I. Civil Penalty for Item 1**

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

Item 1 in the Final Order assessed a civil penalty of \$173,000 for the violation of § 195.452(h)(2). This penalty was reduced from the proposed amount of \$260,000. The reduction and final assessment of the penalty in the Final Order were based on the above-referenced assessment criteria. In particular, I found the nature and circumstances of Petitioner's failure to obtain complete and accurate information about anomalous conditions on its pipeline for more than five months beyond the regulatory deadline justified the assessment of the full proposed penalty amount. On the other hand, I found Petitioner had received some preliminary information that permitted the company to determine, at least initially, that there were no conditions that necessitated immediate repair—supporting my conclusion that the gravity of the violation warranted some reduction to the proposed amount.

I further determined that Alyeska was culpable for the violations, and that the company's history of prior offenses supported the penalty. I also found Alyeska was able to pay the penalty without adversely affecting its ability to continue in business. Finally, I considered the extent to which the company had taken good faith steps to comply with the regulations, but in light of the other assessment criteria, I found such efforts did not warrant further reduction to the already-reduced penalty.

In its Petition, Alyeska argued that PHMSA failed in several respects to properly consider the assessment criteria and to meet its burden of persuasion by providing sufficient evidence to support the assessment of the civil penalty.

#### *A. Culpability*

First, Alyeska contended the Final Order erroneously considered culpability. Petitioner argued that PHMSA equated culpability with "responsibility," contrary to the definition of culpability in Black's Law Dictionary and in two administrative decisions from the Environmental Protection

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<sup>2</sup> § 190.5.

Agency, which defined culpability to mean purposely, knowingly, recklessly, negligently, or in wanton or reckless disregard for consequences. Alyeska argued further that the Final Order did not support the proposition that Alyeska acted with culpability as there is no evidence of culpability in the record. For this reason, Petitioner contended that PHMSA's finding of culpability is arbitrary and capricious, and must be withdrawn.

A standard dictionary definition of culpability is “[d]eserving of blame or censure as being wrong, evil, improper, or injurious.”<sup>3</sup> When evaluating an operator's culpability, I determine whether the company deserves the blame for the violation that occurred. The Final Order found that Alyeska operated the subject pipeline during the time in question, and therefore was responsible for compliance with the applicable pipeline safety regulations. This fact is well-supported in the record. Moreover, Alyeska neither contended that another entity was responsible for compliance nor that another entity deserves the blame for the violations that occurred. For these reasons, the Final Order found that Alyeska was culpable, that is, the company deserves the blame for the violations that occurred on the pipeline system during the time in question. I find nothing in Alyeska's Petition that warrants altering this determination.

#### *B. History of Prior Offenses*

Second, Alyeska contended that the Final Order erroneously considered the company's history of prior offenses. Petitioner argued that PHMSA had improperly considered previous enforcement cases in which Alyeska had not violated the same regulation at issue in this case (§ 195.452), improperly considered cases that had not yet reached final resolution at the time the Notice was issued, and generally failed to account for petitions for reconsideration and consent agreements that reduced penalties, withdrew findings, and eliminated compliance orders.

While a repeat violation of the exact same regulatory section is certainly the most acute example of a prior offense, I am not precluded from considering Alyeska's overall compliance history, including all previous violations of the pipeline safety regulations regardless of regulatory section number.<sup>4</sup> Accordingly, when evaluating Alyeska's history of prior offenses, I may consider not only instances of past violations of the same regulation, but also the company's history of other offenses, such as prior violations of other regulations, the extent to which such violations resulted in civil penalties, and whether corrective action was necessary.

With respect to the finality of prior offenses, I affirm that my consideration of Alyeska's history of prior offenses included the consideration of only final determinations, that is, only decisions on reconsideration in cases where a petition for reconsideration had been filed, and only final orders and orders directing amendment in cases where a petition had not been filed. I may consider such prior offenses even if the final determinations in those cases post-date the Notice in this case, because the prior offenses and violations were committed by Alyeska prior to the Notice in this case.

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<sup>3</sup> The American Heritage Dictionary of the English Language 442 (4th ed. 2000).

<sup>4</sup> See also 49 U.S.C. § 60122(b)(2)(B) and 49 C.F.R. § 190.225(b)(2), which authorizes PHMSA to consider such other matters as justice may require in determining the amount of a civil penalty.

Approximately eight of the ten prior cases referred to in the Final Order resulted in findings that Alyeska violated the pipeline safety regulations.<sup>5</sup> Six of the ten cases involved a final assessment of civil penalties for violations, and nine of the ten cases involved the completion of compliance terms by Alyeska or amendment of its procedures.<sup>6</sup> These are just the cases initiated against Alyeska in the six years prior to issuance of the Notice in this case.

The Final Order found the significance of the enforcement history against Alyeska supported assessment of the penalty amount. After considering Alyeska's Petition, I find no reason to alter the determination in the Final Order.

### *C. Good Faith in Attempting to Achieve Compliance*

Finally, Alyeska contended that the Final Order improperly considered the company's good faith in attempting to achieve compliance. As stated in the Final Order, I "considered the extent to which Respondent was cognizant of the relevant requirements and took good faith steps to comply with the regulations," but found that its efforts did not warrant further reduction to the penalty "[i]n light of the other assessment criteria."<sup>7</sup> Alyeska contended that it was arbitrary and capricious to not *further reduce* the civil penalty, because the Final Order did not reference any evidence that Alyeska's good faith was insufficient to justify reducing the penalty further.

The Final Order discussed in detail the evidence of the violation, including the nature, circumstances, and gravity of the violation. The Final Order determined that such evidence and assessment criteria considerations outweighed any reason to reduce the civil penalty further for Alyeska's attempt to achieve compliance. After further review, I affirm that this determination is supported by the evidence. I find no reason to alter the decision set forth in the Final Order.

For all of the reasons discussed above, I deny Alyeska's request to modify the assessment of the civil penalty for Item 1.

Payment of the civil penalty must be made within 20 days of service of this Decision. The payment instructions are set forth in detail in the Final Order. Failure to pay the \$263,000 civil penalty will result in accrual of interest at the current annual rate in accordance with 31 U.S.C. § 3717, 31 C.F.R. § 901.9, and 49 C.F.R. § 89.23. Pursuant to those same authorities, a late penalty charge of six percent (6%) per annum will be charged if payment is not made within 110 days of service. Furthermore, failure to pay the civil penalty may result in referral of the matter to the Attorney General for appropriate action in a United States District Court.

## **II. Compliance Order for Item 1**

In accordance with 49 U.S.C. § 60118(b) and 49 C.F.R. § 190.217, PHMSA may issue an order directing compliance with the pipeline safety regulations. The Final Order included a Compliance Order that set forth corrective actions required to be taken by Alyeska to comply

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<sup>5</sup> The other two had not alleged violations, but rather inadequate procedures, resulting in the issuance of orders directing amendment under § 190.237.

<sup>6</sup> These figures already take into consideration the consent agreement.

<sup>7</sup> Final Order at 9.

with the pipeline safety regulations. In the Final Order, I acknowledged that Alyeska had argued that such actions were unnecessary because they had already been completed. I found, however, that the record lacked adequate documentation demonstrating the details of those efforts. In particular, I determined that Alyeska had not submitted documentation demonstrating the completion of the compliance terms.

In its Petition, Alyeska contended that PHMSA ignored the facts in the record regarding the work already completed by the company. Petitioner argued that it had provided details of its actions to PHMSA in its initial response to the Notice and again at the hearing. Alyeska again proceeded to explain in its Petition the actions it has taken.

Under § 190.215, I do not consider repetitious arguments that were made prior to issuance of the Final Order. I have already determined that the information provided by Alyeska to PHMSA as of the date of the Final Order did not demonstrate compliance with the terms of the Compliance Order, and Alyeska has not offered any additional documentation in its Petition demonstrating compliance that would enable me to verify that the actions taken satisfy the compliance terms. Accordingly, I do not alter the finding in the Final Order that the record does not demonstrate the compliance terms have been satisfied.

Alyeska must therefore complete the actions specified in the Compliance Order within the original deadlines specified therein, except as provided below under **Section III**.<sup>8</sup>

### **III. Documentation of Safety Improvement Costs**

Among the requirements in the Compliance Order, Requirement 3 specified that Alyeska must maintain documentation of the safety improvement costs associated with fulfilling the Compliance Order and report the total costs. With regard to this requirement, Petitioner contended, among other things, that PHMSA failed to base the provision on a pipeline safety regulation that explicitly requires operators to maintain and submit documentation of compliance costs.

After reconsidering this requirement in light of Alyeska's argument, I find the provision does not direct compliance with the pipeline safety regulations because there is not a pipeline safety regulation that requires pipeline operators to maintain and submit safety improvement costs. Furthermore, I do not find the provision directs compliance with 49 U.S.C. chapter 601. While PHMSA has valid reasons to collect this information, I see no basis to order this conduct when an operator has objected to providing such information. Accordingly, Requirement 3 in the Compliance Order is stricken from the Final Order.

### **IV. Timeliness of the Final Order**

Alyeska further argued in its Petition that the issuance of the Final Order after "substantial delay" violated § 190.213(e), which Petitioner argued requires PHMSA to issue a final order

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<sup>8</sup> The filing of a petition for reconsideration does not stay required corrective action in a final order, unless otherwise provided by the Associate Administrator. § 190.215(d).

within 45 days of receipt of the case file.<sup>9</sup> Alyeska contended the case file was complete on March 16, 2007, upon submission of Alyeska's Closing Statement to the hearing officer. Petitioner also argued that PHMSA failed to notify Alyeska of the delay or expected issuance date as required in § 190.213(e), warranting withdrawal of the compliance order.

Section 190.213(e) does not specify that a final order should be issued within 45 days, but instead provides that "[i]t is the policy of the Associate Administrator, OPS to issue a final order under this section expeditiously . . . ."<sup>10</sup> Furthermore, PHMSA has held that issuing a Final Order in a timely manner under § 190.213(e) is a policy, not a requirement, and a failure to do so does not operate as a bar to PHMSA's issuance of a Final Order in furtherance of its pipeline safety mission.<sup>11</sup> Accordingly, I find no reason to withdraw the compliance order under § 190.213(e).

## Conclusion

In closing, Alyeska requested that it be given "90 days to fully brief these issues."<sup>12</sup> Section 190.215(e) provides that the Associate Administrator may issue a decision on a petition for reconsideration without further proceedings, but may also request additional information, data, and comment as deemed appropriate. I find no reason to grant Alyeska's request for an additional 90 days to brief the issues addressed above. Accordingly, I issue this decision without further proceedings.

As set forth in the Decision, the findings of violation and civil penalties assessed in the Final Order remain in effect. The terms of the Compliance Order also remain unchanged, except that Requirement 3 is stricken. All other terms of the Final Order remain in effect as set forth therein. This Decision on Reconsideration 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> Petition at 4.

<sup>10</sup> Section 190.213(e) was amended prior to issuance of the Notice by the Nomenclature Change and Technical Amendments, 70 Fed. Reg. 11,135, 11,137 (Mar. 8, 2005). The current regulation further states: "In cases where a substantial delay is expected, notice of that fact and the date by which it is expected that action will be taken is provided to the respondent upon request and whenever practicable." Alyeska never filed such a request.

<sup>11</sup> See *In the Matter of Northern States Power Co.*, Decision on Reconsideration, CPF No. 36301, 2005 WL 5010130 (Oct. 27, 2005); *In the Matter of Texaco Exploration and Production, Inc.*, Decision on Reconsideration, CPF No. 52010, 2004 WL 5150199 (Feb. 3, 2004).

<sup>12</sup> Petition at 5.