



U S Department
of Transportation
**Pipeline and Hazardous
Materials Safety
Administration**

1200 New Jersey Ave. S E
Washington DC 20590

JUL 14 2008

VIA OVERNIGHT COURIER AND FACSIMILE TO: (303) 866-0200

Mr. Hank True
President
Belle Fourche Pipeline Company
455 N. Poplar St.
Casper, WY 82601-1783

Re: CPF No. 5-2007-5002

Dear Mr. True:

Enclosed is the decision on the petition for reconsideration filed by Belle Fourche Pipeline Company in the above-referenced case. For the reasons specified therein, the decision affirms the Final Order and denies your request for a stay. However, the deadline for completion of the Compliance Order has been extended to 40 days from receipt of the decision.

This decision is the final administrative action in this proceeding. Your receipt of the document constitutes service 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: Colin G. Harris, Esq.
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**U.S. DEPARTMENT OF TRANSPORTATION
PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMINISTRATION
OFFICE OF PIPELINE SAFETY
WASHINGTON, D.C. 20590**

_____)
In the Matter of)

Belle Fourche Pipeline Company,)

Petitioner.)
_____)

CPF No. 5-2007-5002

DECISION ON RECONSIDERATION

In accordance with 49 U.S.C. § 60118 and 49 C.F.R. § 190.213, the Pipeline and Hazardous Materials Safety Administration (PHMSA) issued a Final Order in this matter on April 28, 2008, finding that Belle Fourche Pipeline Company (Belle Fourche or Petitioner) committed certain violations of the agency’s hazardous liquids pipeline safety regulations. Specifically, the Final Order found that Belle Fourche had violated § 195.110(a), relating to a lack of proper supports for external loads and vibration on its pipeline facilities (Item 1), and § 195.583, relating to a failure to perform inspections for atmospheric corrosion (Item 8). In addition, it found that Belle Fourche had committed 10 other probable violations and advised the company to correct them or face possible future enforcement action. Finally, the Final Order included a compliance order for Items 1 and 8 but did not seek any civil penalties.

Under § 190.215, a respondent may file a petition for reconsideration of a final order issued pursuant to § 190.213, requesting that the Associate Administrator reconsider his decision. Although the Associate Administrator does not consider repetitious information, arguments or petitions, a respondent may request consideration of additional facts or arguments, provided that the company submits the reason they were not presented prior to issuance of the final order. § 190.215. The purpose of this rule is to allow a respondent to present information or arguments that were unavailable or unknown prior to issuance of the final order, as well as to allow the agency to correct any error in the final order, but not to provide the operator an appeal or *de novo* review. Belle Fourche’s Petition for Reconsideration in this case does not request consideration of additional facts but presents a mixture of legal issues, some of which are based upon alleged errors in the Final Order. Petitioner’s arguments are discussed in greater detail below.

Item 1: The Final Order found that Petitioner violated 49 C.F.R. § 195.110(a) by failing to provide for anticipated external loads, vibration, thermal expansion, and contraction in the design of certain facilities that had been constructed in 2000. Petitioner contends that PHMSA erred in stating in the Final Order that Belle Fourche did not “contest” this allegation. Belle Fourche also contends that the agency failed to meet its burden of proving the allegation.

As for the first contention, it is true that Petitioner did not admit the allegations set forth in the Notice and, in fact, presented evidence that it had taken efforts to address the issue of temporary supports by making certain repairs. The statement in the Final Order that Belle Fourche did not “contest” the allegation merely reflected the fact that the company had not presented any evidence disputing the basic factual allegation that, as of the date of the inspection, Belle Fourche’s facilities at the Sussex pump station and breakout tank still had temporary supports, which failed to meet the requirements of § 195.110(a).

I have reconsidered the record and still can find no indication that Belle Fourche presented any evidence that would contradict the allegations in the Notice. In Belle Fourche’s March 8, 2007 Response, the company simply stated, “This matter has been addressed.” Response at 3. In its October 11, 2007 Post-Hearing Submittal (Brief), Belle Fourche addressed Item 1 only by stating, “OPS also alleged that Belle Fourche was using temporary blocks as supports at a station. As the testimony demonstrated, this matter has been corrected.” Brief at 14. Finally, in its Petition, Belle Fourche noted that it had submitted “both direct testimony and an affidavit regarding this matter. Specifically, Belle Fourche’s live witness . . . testified that the supports at the Sussex station were repaired after OPS’ inspection that identified the issue.” Petition at ¶ 2.

All of these statements and evidence speak to the company’s efforts to address the noncompliant condition *after* PHMSA had already identified it. Regardless of whether or not Petitioner “contested” the allegation, Petitioner’s only evidence consisted of statements concerning subsequent actions to remedy the violation, which are irrelevant to the issue of whether or not a violation occurred in the first place.

As for the second contention that PHMSA did not meet its burden of proving this violation, I have reconsidered the record and find that the agency has indeed met its burden of proving the allegations in Item 1. The evidence showed that during the agency’s 2005 inspection, the PHMSA inspector observed that the company was still using temporary supports for pipeline facilities that had been constructed in 2000. The inspector photographed the areas at issue and those photos are in the record. Belle Fourche was using stacked wooden and concrete block supports that were not securely fastened to the ground or other permanent feature. Excessive vibration could cause such temporary wooden and concrete blocks to topple.

For the reasons stated above, I find no reason to alter the finding in the Final Order that Belle Fourche violated § 195.110(a). The finding of violation and terms of the compliance order associated with the violation remain in effect, subject to the revised deadline set forth below.

Item 8: The Final Order also found that Petitioner violated 49 C.F.R. § 195.583 by failing to inspect each pipeline or portion of pipeline exposed to the atmosphere for evidence of atmospheric corrosion, with particular attention given to pipe surfaces at pipe supports. Petitioner contends, first, that because the proposed compliance order in the Notice contained a typographical error that referenced “Item 9” instead of “Item 8,” there was no valid compliance term associated with Item 8 in the Final Order. Furthermore, Petitioner contends that PHMSA would be required to amend the Notice in order to obtain such relief, but that to allow such an amendment at this point would violate the company’s due process rights and be arbitrary,

capricious, and contrary to law. Second, Belle Fourche contends that PHMSA is apparently willing to accept only written “documentation” of Belle Fourche’s actions regarding this Item and unwilling to consider direct testimony or other forms of relevant and reliable evidence. These two issues warrant separate discussion.

Procedural Issue. The Notice contained eight probable violations (Items 1 – 8). Each probable violation included a “[s]tatement of the . . . regulations . . . which the respondent is alleged to have violated and a statement of the evidence upon which the allegations are based,” as required by § 190.207. The probable violation identified as “Item 8” in the Notice alleged that Belle Fourche violated § 195.583 by failing to inspect its pipeline for atmospheric corrosion. The proposed compliance order in the Notice specified that Belle Fourche would be required to inspect its pipeline for atmospheric corrosion to come into compliance.

The proposed compliance order, however, mistakenly referred to this alleged violation as “Item 9” instead of “Item 8.” Notice at 6. This error was compounded elsewhere in the Notice when Item 8 was included in a list of warning items for which the agency “decided not to conduct additional enforcement.” Notice at 4. There were several indications early in the proceeding that this was a typographical error. First, the subject matter of the proposed compliance order (atmospheric corrosion inspections) was clearly associated with the allegation in Item 8 stating that Belle Fourche had violated § 195.583 by failing to inspect its pipeline for atmospheric corrosion. Second, there was no probable violation listed as “Item 9” in the Notice. Third, an earlier Notice of Probable Violation issued to Belle Fourche on February 21, 2006, had charged the company with the same violation of § 195.583 and had proposed a compliance order (without an error); that Notice was withdrawn and reissued in the form of the present Notice.¹ Finally, on April 24, 2007, roughly four months prior to the hearing, PHMSA provided Belle Fourche with a copy of the agency’s Violation Report that indicated on pages 4 and 5 that PHMSA had proposed a compliance order for the alleged violation of § 195.583.

Upon receipt of the Notice, Belle Fourche apparently recognized the typographical error and acknowledged the proposed compliance terms in its Response, stating, “There is no ‘Item 9’ to the NPV. Accordingly, this purported remedial requirement is a nullity. On the other hand, to the extent the order requires the requested relief, and assuming a violation existed . . . [the corrective action is unnecessary or excessive].” Response at 3. If there were still any confusion as to whether Item 8 was an allegation of violation with a proposed compliance order, PHMSA brought up the issue at the hearing and explained that the alleged violation of § 195.583 was not merely a warning but included the proposed corrective action mistakenly ascribed to “Item 9” in the proposed compliance order. At that point, Belle Fourche was given an opportunity to respond to the allegation, both at the hearing and through written materials submitted after the hearing.

Belle Fourche took advantage of both opportunities. Discussion at the hearing and testimony by the company’s witnesses concerned Belle Fourche and the other co-respondents’ compliance

¹ The original notice of probable violation was withdrawn and reissued to Belle Fourche and two other companies in response to objections by Belle Fourche that the proper entities had not been named Final Order at 1

with § 195.583 without distinguishing between them.² Petitioner's counsel also filed a joint Post-Hearing Submittal on behalf of Belle Fourche and the other respondents. Although he neglected to mention Belle Fourche by name in his discussion of § 195.583, the statements and evidence put forward in the Post-Hearing Submittal were found by PHMSA to be applicable in Belle Fourche's defense because they repeated the same discussion that took place at the hearing regarding all three companies' compliance with § 195.583 and because the allegations against all three companies raised the same factual questions about whether or not the companies' *single* manual of procedures was compliant and whether the companies' personnel actually performed the required inspections.³

The Final Order found that Belle Fourche had been provided actual notice of the proposed compliance terms for Item 8 despite the typographical error in the Notice and had "availed itself of the opportunity to contest the allegation" by submitting evidence and statements to defend against the charge it violated § 195.583. Final Order at 3. The evidence and statements submitted by Belle Fourche were fully considered and duly reflected in the Final Order.

Petitioner nevertheless argues that since the Notice contained a typographical error, the issue of compliance with § 195.583 was not a subject of the proceeding. Petitioner further argues that the only way such a defect can now be cured is for PHMSA to amend the Notice. Since PHMSA has not amended the Notice, Petitioner argues that any decision on the issue at this point would violate its right to due process. On the contrary, I am aware of no legal requirement that PHMSA must formally amend a Notice to correct a typographical error that has been pointed out by the agency in a timely manner and acknowledged by the respondent. PHMSA regulations state, "The Associate Administrator, OPS may amend a notice of probable violation at any time prior to issuance of a final order," but do not specify the circumstances under which amendment is required. § 190.207(c). Nor does the Administrative Procedure Act set forth any procedural requirements that apply to this informal adjudication, because the Federal pipeline safety laws do not require that this adjudication be "on the record" pursuant to 5 U.S.C. § 554(a).

Belle Fourche claims that the issuance of the Final Order without formal amendment would violate due process but cites no authority to support its position. Federal courts have held the contrary, stating that "technical flaws in a notice can be cured if the actual conduct of the administrative proceedings provides notice to the participants of that which is under consideration." Nat'l Steel & Shipbuilding Co. v. Office of Workers' Comp. Programs, 616 F.2d 420, 421 (9th Cir. 1980), citing, among other cases, Golden Grain Macaroni Co. v. FTC, 472 F.2d 882 (9th Cir. 1972). In Golden Grain, the court held there was no due process violation even though the complaint did not explicitly allege a violation of the law the respondent was ultimately found to have violated. An examination of the proceedings by the court showed "that

² The hearing concerned Belle Fourche and two separate cases against related companies. All three respondents were charged with the same violation of § 195.583 because they shared both the same manual of written procedures, as well as certain employees whose actions served as the basis for the alleged violations. A single hearing was held and the companies jointly submitted a single Post-Hearing Submittal.

³ In fact, Petitioner acknowledges in its Petition that the evidence presented at the hearing was put forward in Belle Fourche's defense, stating, "In the consolidated hearing, Belle Fourche provided direct testimony . . . about compliance with 49 C.F.R. § 195.583, based on . . . personal knowledge, and submitted [an] affidavit on the same point." Petition at ¶ 11.

while there was some confusion as to the nature of the charge, all facts relevant to the alleged unlawful acts were fully litigated.” *Id.* at 886. As stated by the court, “[T]here is no due process violation, if the party proceeded against understood the issue and was afforded full opportunity to justify its conduct.” *Id.* at 885 (internal citations omitted).

The record in this case reflects that Belle Fourche received actual notice of the nature of the allegation in Item 8 and of the nature of the proposed compliance terms in the mislabeled “Item 9” of the proposed compliance order. Petitioner was given ample opportunity to defend itself throughout the proceeding and actually presented evidence on the facts relevant to the alleged violation in Item 8. Therefore, I find there has been no violation of law or regulation arising out of the typographical error in the Notice.

Evidentiary Issue. With respect to Item 8, Petitioner further disputes “the apparent finding in the NPOV [*sic*] that the only relevant or reliable evidence to defend against liability is ‘documentation.’” Petition at ¶ 11. Petitioner cites the Federal Rules of Evidence and PHMSA’s procedural regulations in support of its argument that evidence other than documentation must be accepted. Petitioner notes that it provided testimony at the hearing about compliance with § 195.583 and submitted an affidavit based on a witness’s personal knowledge. Belle Fourche concludes, “To allow OPS to prevail because Respondent did not spoon-feed OPS some unarticulated form of ‘documentation’ that Respondent can only guess at would turn the burden of proof on its head.” Petition at ¶ 11.

Contrary to Petitioner’s assertion, PHMSA does not require operators to “spoon-feed OPS some unarticulated form of documentation,” but requires each operator to “maintain a record of each analysis, check, demonstration, examination, inspection, investigation, review, survey, and test” required by § 195.583 for a period of at least 5 years. § 195.589(c). Also contrary to Petitioner’s suggestion that PHMSA appears willing to consider only documentary evidence (or lack thereof), I have carefully reviewed and weighed *all* of the evidence submitted by Belle Fourche in accordance with the agency’s regulations. PHMSA’s regulation governing informal hearings provides that a respondent “may offer any facts, statements, explanations, documents, testimony or other items which are relevant to the issues under consideration.” § 190.211(f). In addition, pursuant to § 190.213 and prior to the issuance of a final order, I review all materials submitted by a respondent, including materials submitted by the respondent during and after a hearing.

Petitioner’s reliance on the Federal Rules of Evidence is misplaced because those rules govern proceedings in the courts of the United States and other judicial proceedings, not informal adjudications before this agency. In the present case, I have considered all of the evidence presented to the presiding official at the hearing and each written document, including affidavits, submitted by Belle Fourche throughout this proceeding. Upon reconsideration of all such evidence and legal arguments, I affirm that the evidence supports finding Petitioner violated § 195.583 by failing to perform inspections for atmospheric corrosion.

This evidence included various forms of evidence. During the PHMSA inspection, Belle Fourche could not produce any record that it had performed atmospheric corrosion inspections. The PHMSA inspector documented a statement made by Petitioner’s lead engineer to the inspector that the company had no plans to perform inspections for atmospheric corrosion. Areas of

Petitioner's pipeline facility were photographed showing atmospheric corrosion that appeared to have been there for a significant length of time. At the hearing and in an affidavit, Petitioner's lead engineer acknowledged that "specific external corrosion inspection procedures were not necessarily written down," although the company's operations and maintenance (O&M) manual included a "reference to external corrosion." Brief Ex. 6 at ¶ 28. The witness stated further that "any significant external corrosion that was found [during routine O&M inspections] would have been addressed." Brief Ex. 6 at ¶ 28.

The fact that Petitioner has no record of inspecting for or discovering atmospheric corrosion on its pipeline facility is indicative of a failure to perform the required inspections, particularly in light of this other evidence. Furthermore, I find unpersuasive the statements by Petitioner's lead engineer that the company's routine O&M inspections complied with § 195.583. Although he stated the company performed routine inspections, he never stated explicitly that the company always inspected for atmospheric corrosion. Instead, he merely indicated that if the company found any external corrosion during routine inspections, it would have been addressed. Brief Ex. 6 at ¶ 28.

There is a marked difference between purposefully inspecting for atmospheric corrosion and merely performing routine general inspection. In the latter, an operator may not find a condition the operator is not specifically looking for. If an operator's procedures do not require checks for atmospheric corrosion, employees may not necessarily look for and record such conditions. This appears to have been the situation in this case. Petitioner did not have any procedures for performing atmospheric corrosion inspections and photographs of Petitioner's facility showed that atmospheric corrosion had apparently been present but ignored for a significant period of time in the course of Petitioner's routine inspections.

Having reconsidered all of the evidence concerning Belle Fourche's compliance with § 195.583, I find that PHMSA put forth sufficient evidence of noncompliance to meet its burden of proof and that the greater weight of evidence supports the finding that Belle Fourche violated the regulation as alleged. Accordingly, the finding of violation and terms of the compliance order remain in effect, subject to the revised deadline set forth below.

Request for Stay or for Extension of Time. Belle Fourche requested a stay of the terms of the compliance order because "Belle Fourche believes that this case presents unique circumstances, created by OPS, that have the potential to severely prejudice Belle Fourche." Petition at ¶ 12. Petitioner provides no rationale or evidence to support this assertion but claims that it would be "manifestly unjust" to compel compliance actions "based on a claim that was never pled." Petition at ¶ 12. I find that Petitioner has failed to make an adequate showing as to why the terms of the Final Order should be stayed. Accordingly, I deny Petitioner's request for a stay.


In the alternative, Petitioner requested "at least 120 days to investigate and address the issue of compliance with 49 C.F.R. § 195.583, rather than the 60 days allowed in the Final Order." Petition at ¶ 13. As set forth in the Final Order, an extension of time to comply with any of the required corrective action items may be granted upon a written request timely submitted demonstrating good cause for an extension. Again, Petitioner has not demonstrated any good reason why an extension should be granted. Belle Fourche has had more than two years and four

months since the first Notice of Probable Violation was issued in February 2006 to “investigate and address” the compliance issues set forth in this matter and, more recently, over 10 months since the hearing was held in August 2007. Nothing has prevented the company from investigating and addressing the issues during this time.

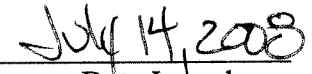
Notwithstanding the lack of merit in Petitioner’s request, I believe it would be fair and not inconsistent with pipeline safety to allow Petitioner a reasonable period of time to comply with the terms of the Final Order, upon issuance of this decision. Therefore, I hereby modify the terms of the compliance order in order to allow Petitioner additional time to achieve compliance. The applicable terms of the compliance order are amended to read as follows:

- 4. Complete each of the above items and submit documentation of compliance within 40 days of receipt of the *Decision on Reconsideration*

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



 Jeffrey D. Wiese
 Associate Administrator
 for Pipeline Safety



 Date Issued

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Thank you Mr. Harris.



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Abbreviations

HS. Host send
HR. Host receive
WS. Waiting send

PL Polled local
PR Polled remote
MS. Mailbox save

MP. Mailbox print
CP Completed
FA. Fail

TU. Terminated by user
TS Terminated by system
RP Report

G3 Group 3
EC. Error Correct