JAN 6 2012

Mr. Martin Fritz
President, Midstream Operations
EQT Corporation
625 Liberty Ave. Suite 1700
Pittsburgh, PA 15222

Mr. John C. Mollenkopf
Senior Vice President, Chief Operations Officer
MarkWest Energy Partners, L.P.
1515 Arapahoe Street
Tower 1, Suite 1600
Denver, CO 80202

Re: CPF No. 2-2006-5001

Dear Messrs. Fritz and Mollenkopf:

Enclosed is the Decision on the Petitions for Reconsideration filed by Equitable and MarkWest in the above-referenced case. The Decision grants, in part, and denies, in part, Equitable's Petition, and denies MarkWest's Petition in all respects. The remaining terms of the Final Order are in effect as modified by this Decision, including assessment of a reduced civil penalty of $192,500. The civil penalty payment terms are set forth in the Decision. This enforcement action closes automatically upon receipt of payment. Service of this document by certified mail is effective upon the date of mailing as 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. Alan Mayberry, Deputy Associate Administrator for Field Operations, Pipeline Safety
Mr. Wayne Lemoi, Director, Southern Region, PHMSA
Mr. J. Gordon Arbuckle, Attorney for Equitable
Patton Boggs LLP, 2550 M St. NW, Washington, DC 20037
Mr. Patrick D. Traylor, Attorney for MarkWest
Hogan Lovells LLP, 555 13th St. NW, Washington, DC 20004

CERTIFIED MAIL – RETURN RECEIPT REQUESTED [71791000164202865739]

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

In the Matter of	
Equitable Production Company, a division of EQT Corporation,	
and	**CPF No. 2-2006-5001**
MarkWest Hydrocarbon, Inc., a subsidiary of MarkWest Energy Partners, L.P.,	
Petitioners.	

DECISION ON PETITIONS FOR RECONSIDERATION

On February 17, 2011, pursuant to 49 U.S.C. § 60122 and 49 C.F.R. § 190.213, the Pipeline and Hazardous Materials Safety Administration (PHMSA), Office of Pipeline Safety (OPS), issued a Final Order in this proceeding finding that Equitable Production Company (Equitable) and MarkWest Hydrocarbon, Inc. (MarkWest) committed violations of the hazardous liquid pipeline safety regulations in 49 C.F.R. Part 195. The Final Order assessed a civil penalty of $692,500 for the violations.

By letters dated March 25, 2011, Equitable and MarkWest (collectively, Petitioners or the Companies) submitted separate Petitions for Reconsideration. Equitable requested reconsideration of the finding in the Final Order that it violated 49 C.F.R. § 195.401. MarkWest requested reconsideration of the civil penalties assessed for violations of §§ 195.440, 195.52, 199.105, and 199.225.

Pursuant to 49 C.F.R. § 190.215, a respondent may petition PHMSA for reconsideration of a final order issued pursuant to § 190.213. Section 190.215 provides that PHMSA does not consider repetitious information or arguments, but may consider additional facts or arguments if the respondent 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 as deemed appropriate.

I. Background

On November 8, 2004, in Ivel, Kentucky, a pipeline owned by Equitable and operated by MarkWest ruptured beneath a driveway in a residential neighborhood, releasing natural gas liquid vapors that were ignited by an unknown source. The ignition of the flammable vapors resulted in a series of explosions that destroyed five homes and injured twelve people, four of whom required medical attention. Pursuant to 49 U.S.C. § 60117, PHMSA conducted an investigation of the accident.

As a result of the investigation, the Director, Southern Region, OPS (Director), issued to the Companies, by letter dated June 15, 2006, a Notice of Probable Violation and Proposed Civil Penalty (Notice). In accordance with 49 C.F.R. § 190.207, the Notice proposed finding that Equitable and MarkWest had committed certain violations of the hazardous liquid pipeline safety regulations in 49 C.F.R. Part 195 and proposed civil penalties of $1,070,000 for the violations.

After a lengthy effort by the Companies and OPS to validate the completeness of the evidence in the record, the Companies formally responded to the Notice by written motions and briefs contesting many of the allegations.[1] OPS submitted written responses to the Companies' briefs, to which the Companies were also permitted to reply.[2] Although a hearing had been scheduled, the Companies eventually withdrew their request for a hearing, resulting in issuance of the Final Order based on the written record.[3]

The Final Order issued on February 17, 2011, determined that Equitable violated 49 C.F.R. § 195.401 (Item 1) and that both Companies violated §§ 195.440 (Item 2), 195.52 (Item 4), 199.105 (Item 8), and 199.225 (Item 9), but withdrew the alleged violation of § 195.402 (Item 5D). The remaining Items 3, 5A, 5B, 5C, 6, and 7 were warning items. The civil penalty for the violation of § 195.401 was reduced to $500,000 from the proposed amount of $825,000 based on mitigating circumstances. The civil penalties for the violations of §§ 195.440, 195.52, 199.105, and 199.225 were assessed at the amounts proposed in the Notice.

II. Equitable's Petition

At the outset, Equitable requested that PHMSA hold an in-person conference with the company prior to issuing any formal decision on the substantive issues raised in its Petition.

Upon review of the record, including the Companies' motions, briefs, and other filings submitted prior to issuance of the Final Order, as well as their petitions for reconsideration, I find Petitioners have established their positions on the issues in this case, creating a full record upon

[1] Equitable Supplemental Motion to Dismiss (May 29, 2009); MarkWest Motion to Dismiss (May 29, 2009); Equitable Hearing Brief (Jul. 22, 2009); MarkWest Response to Notice of Probable Violation (Jul. 22, 2009).

[2] OPS Opposition to Equitable Motion to Dismiss (Aug. 27, 2009); OPS Opposition to MarkWest Motion to Dismiss (Aug. 27, 2009); Equitable Reply to Opposition Brief (Sept. 15, 2009); MarkWest Reply in Support of its Motion to Dismiss (Sept. 15, 2009).

[3] Hearing Officer letter scheduling hearing (Jul. 30, 2009); Equitable Request for a Ruling without a Hearing (Oct. 19, 2009); MarkWest Withdrawal of its Request for a Hearing (Oct. 19, 2009).

which to make a decision on their petitions. Accordingly, this Decision is issued without further proceedings in accordance with § 190.215. Equitable's request for an in-person conference is ***denied***.

Item 1: In its Petition, Equitable requested reconsideration of the finding in the Final Order that the company violated § 195.401. Item 1 in the Final Order determined that Equitable violated § 195.401(b), which, at the time in question, stated as follows:

> **§ 195.401 General requirements.**
>
> (a) . . . .
>
> (b) Whenever an operator discovers any condition that could adversely affect the safe operation of its pipeline system, it shall correct it within a reasonable time. However, if the condition is of such a nature that it presents an immediate hazard to persons or property, the operator may not operate the affected part of the system until it has corrected the unsafe condition.[4]

The Final Order determined that Equitable failed to correct conditions that could adversely affect the safe operation of its pipeline. Specifically, the Order found the company failed to address two anodic conditions that were discovered on its pipeline during electrical surveys performed in 1982 and 1987, respectively. The Order rejected legal arguments raised by the Companies, determining that enforcement of the violations was not barred by the statute of limitations because the regulation created an ongoing obligation to correct conditions that could adversely affect safe pipeline operation, and the continuous failure by Equitable to correct the conditions constituted a series of violations that continued through the limitations period.[5] The Final Order also determined that enforcement was not barred by an earlier case against the operator of the pipeline, both because the earlier case did not address the specific issue in the present matter and because resolution of the earlier case did not constitute blanket approval of the operator's compliance with all cathodic protection requirements.

As more fully explained in the Final Order, the operator of the pipeline in 1982 conducted an electrical survey that identified certain locations along the pipeline with signs of inadequate protection against corrosion. The operator installed anodes to increase protection at all of the locations, except one. An anode was not installed at survey station 43+80 despite the low reading because the company incorrectly believed the line was cased. This location was approximately 120 feet from the site of the 2004 accident.

In 1987, the operator conducted another electrical survey of the pipeline, which again found certain locations with signs of inadequate protection against corrosion. The reading at survey station 98+60, the eventual site of the accident, was so low that, given the location of the test point beneath a concrete driveway, the operator concluded the reading was improperly

---

[4] Section 195.401 was amended by Pipeline Safety: Periodic Updates of Regulatory References to Technical Standards and Miscellaneous Edits, 75 Fed. Reg. 48,593 (Aug. 11, 2010).

[5] The Final Order determined PHMSA was not precluded under the statute of limitations, 28 U.S.C. § 2462, from enforcing violations of § 195.401(b) committed within the five-year period prior to issuance of the Notice. In this case, PHMSA may enforce against violations dating back to June 15, 2001 (the limitations period).

influenced by interference from the driveway. The operator did not investigate to confirm this assumption, and did not take action to address the low reading.

The survey performed in 1987 did not identify a low reading was still present at location 43+80, the spot indentified in 1982. In addition, the Parties acknowledged that electrical surveys conducted on the same pipeline in 1992 and 1997 did not detect low readings at either the 43+80 or 98+60 locations.[6] While the subsequent surveys identified other low readings along the pipeline, they did not indicate low readings still existed at the two locations previously identified in 1982 and 1987.[7]

In its Petition, Equitable requested reconsideration of the finding of violation on several grounds. Petitioner's primary argument concerns the electrical surveys that were performed on the pipeline in 1992 and 1997. Equitable argued that the Final Order wrongly concluded the company continuously failed to correct safety conditions at 43+80 or 98+60, because the subsequent survey data demonstrated there were not conditions at either location within the limitations period.[8] Equitable explained in its Petition that "between the time of the original 'discoveries,' and June 15, 2001, the operator obtained contradictory evidence in the form of subsequent survey data that clearly and persuasively defeated the conclusion that a condition existed that could adversely affect the safe operation of the pipeline at the location of either of the cited 1982 or 1987 anomalies. Therefore, any obligation to correct the alleged condition ceased when the subsequent contradictory information became available – long prior to June 15, 2001."[9]

In order for PHMSA to find liability based on an ongoing obligation to correct a condition, the agency must find evidence in the record demonstrating the condition was present on the pipeline during the period in question. In this case, the violation was predicated on a finding that Petitioner's ongoing obligation continued beyond June 15, 2001. Accordingly, PHMSA must give full consideration to all of the evidence relating to whether the two conditions were present during that period.

In the Final Order, PHMSA found Equitable's ongoing obligation was based on its discovery of the two conditions in 1982 and 1987. The Order dismissed the subsequent survey data, stating that "[t]he reason the low readings were not later detected during subsequent surveys is not apparent in the record, but at the time the conditions were identified [in 1982 and 1987], they met the criteria for being corrected under the regulation."[10] The Order further stated that "[s]ince

---

[6] *See, e.g.*, Equitable Response and Motion to Dismiss, at 4-5 (Nov. 30, 2006); OPS Opposition to Equitable Motion to Dismiss, at 3. Equitable explained that due to the placement of reference electrodes at 20-foot intervals during the close interval surveys, any anodic conditions would have been discovered. Equitable Petition, at 4.

[7] An electrical survey was also performed in 2002, but the survey was not performed correctly and the results are not reliable.

[8] Equitable Petition, at 3-6. The company contended it was "logically inconsistent" for PHMSA to find an ongoing violation that continued after June 15, 2001, based solely on evidence from 1982 and 1987.

[9] Equitable Petition, at 3.

[10] Final Order, at 6.

the [initial] decisions to not remediate the anodic conditions were in error, and since Equitable never took any action by itself or through its operator to remediate either condition, Equitable never could rightfully assume that the conditions had been remediated."[11]

By finding that Petitioner had a continuing obligation based solely on the original survey data, the Final Order did not give sufficient weight to the evidence that the conditions did not exist on the pipeline after 1992. Equitable was unopposed in explaining for the record that the later surveys were more accurate and more reliable due to technological improvements.[12] The evidence from the subsequent surveys should be considered persuasive as to whether or not anodic conditions existed at 43+80 or 98+60 in the years after their discovery. If the evidence proves that conditions did not exist at those locations during the limitations period, Equitable cannot be found in violation for failing to correct conditions at those locations.

In its Brief submitted prior to the Final Order, OPS argued that the anodic conditions discovered in 1982 and 1987 "resulted in the loss of metal" to the pipe, and that the subsequent survey data "is no[t] evidence that the metal loss no longer existed."[13] OPS explained that "even if an anode was installed, no anode could reverse, repair or correct metal loss, the damage was done. Therefore, the condition revealed in the 1982 survey and 1987 survey continued."[14]

This case is not about whether the Companies discovered and failed to correct damage to the pipe caused by external corrosion. Item 1 in the Notice alleged only that the Companies failed to provide additional cathodic protection to its pipeline upon discovery of anodic conditions. An anodic condition is an indication that the pipe does not have an adequate level of protection against external corrosion. A single cathodic protection reading is not, by itself, an indication that metal loss has occurred or that the pipeline requires replacement or repair. For example, operators often remediate low readings simply by increasing cathodic protection.[15]

The issue in this case is whether Equitable had an ongoing obligation to remediate low cathodic protection levels at two locations after subsequent electrical surveys demonstrated with more accuracy that low cathodic protection levels were not present at those locations.

After reconsidering the evidence, including the electrical survey data from 1982 through 1997, I find the weight of evidence proves there were not actionable anodic conditions at 43+80 or 98+60 in the years subsequent to 1992.[16] Even though it is not apparent in the record why the low readings first detected in 1982 and 1987 were not detected in subsequent surveys (whether

---

[11] Final Order, at 9.

[12] Equitable Petition, at 4.

[13] OPS Opposition to Equitable Motion to Dismiss, at 12 and 14.

[14] OPS Opposition to Equitable Motion to Dismiss, at 13.

[15] *See In the Matter of Holly Energy Partners, L.P.*, Final Order, CPF No. 4-2010-5007, 2010 WL 6539186 (Oct. 18, 2010) (ordering the operator to address a violation of § 195.571 for having inadequate cathodic protection by providing documentation that includes electrical test data to demonstrate adequate cathodic protection levels have been achieved).

[16] The survey in 1987 also demonstrated that an anodic condition was not present at the 43+80 location.

this was due to inaccurate readings in the first place, a change in environmental conditions, increased cathodic protection installed at other locations, or some other reason), the evidence confirms the conditions were not present after 1992.

Since the evidence shows there were not anodic conditions at the subject locations after 1992, Equitable cannot be found in violation of § 195.401(b) for failing to take action to correct conditions at those locations after 1992. Accordingly, after reconsidering all the evidence, I withdraw the finding that Equitable violated § 195.401(b). For these reasons, Equitable's petition to vacate the finding of violation in Item 1 is ***granted***.

In its Petition, Equitable also offered additional reasons that PHMSA should reconsider the finding in Item 1. Equitable argued the Order wrongly concluded that only MarkWest, and not Equitable, could have relied on the subsequent survey data as evidence there were no anodic conditions.[17] Equitable also contended the Order wrongly rejected its argument that resolution of the earlier enforcement matter confirmed there were no cathodic protection issues.[18] In addition, Equitable raised arguments regarding the Order's consideration of certain testimony about contemporaneous interpretations of the survey data in 1982 and 1987.[19]

Since the finding that Equitable violated § 195.401(b) is withdrawn for the reasons stated above, I do not reach determinations as to these arguments.

III. MarkWest's Petition

MarkWest requested reconsideration of the civil penalties assessed for violations of 49 C.F.R. §§ 195.440 (Item 2), 195.52 (Item 4), 199.105 (Item 8), and 199.225 (Item 9).

Item 2: The Final Order determined that Petitioners violated 49 C.F.R. § 195.440, which, at the time in question, stated as follows:

> **§ 195.440 Public education.**
>
> Each operator shall establish a continuing educational program to enable the public, appropriate government organizations and persons engaged in excavation-related activities to recognize a hazardous liquid or a carbon dioxide pipeline emergency and to report it to the operator or the fire, police, or other appropriate public officials. The program must be conducted in English and in other languages commonly understood by a significant number and concentration of non-English speaking population in the operator's operating areas.[20]

Specifically, the Final Order found that Petitioners failed to establish an adequate continuing public education program to enable the public to recognize and report the pipeline emergency. The Order assessed the proposed penalty of $142,500 after considering the assessment criteria.

---

[17] Equitable Petition, at 6-7.

[18] Equitable Petition, at 11-13.

[19] Equitable Petition, at 7-11.

[20] Section 195.440 was amended by Pipeline Safety: Pipeline Operator Public Awareness Program, 70 Fed. Reg. 28,833 (May 19, 2005).

In its Petition, MarkWest contended that the civil penalty assessment failed to consider certain facts in the record that mitigate the penalty. In particular, Petitioner argued the Final Order failed to consider that MarkWest's distribution of certain information to the public constituted a good-faith effort that lessens the nature, circumstances, and gravity of the violation.

The evidence in the record referred to by Petitioner, including the documents in the Violation Report (Documents 18-39 at pages 95-202), demonstrate that Petitioner distributed information to educate the public about Call Before You Dig programs, but did not provide any information or instructions to the public on how to recognize a pipeline emergency and report it immediately to the operator, fire, police, or other appropriate public official, as required under § 195.440. Therefore, I do not find sufficient good-faith effort warranting a reduction to the civil penalty.

MarkWest also argued that the civil penalty in the Final Order was arbitrary because it was substantially higher than similar penalties imposed by PHMSA in other cases.

PHMSA sets its civil penalties by applying the statutory assessment criteria on a case-by-case basis. Given the unique facts of each offense, including whether there were any immediate or potential safety impacts, it is common for there to be variance in the penalties assessed for different operators' violation of the same code section. Moreover, PHMSA has found it appropriate to increase many of its civil penalties in recent years to deter violations and to give effect to the amendment of 49 U.S.C. § 60122 by Congress in 2002, which raised PHMSA's maximum civil penalties. Therefore, it is appropriate for the civil penalty in this case to be higher than penalties assessed in some other cases for violation of the same code section.

The nature, circumstances, and gravity of Petitioners' violation of § 195.440, as more fully explained in the Final Order, justify the penalty assessment and nothing in the record warrants mitigating the amount that has been assessed. For the above reasons, MarkWest's petition to reduce the civil penalty for Item 2 is ***denied***.

Item 4: The Final Order determined that Petitioners violated § 195.52, which, at the time in question, stated as follows:

> **§ 195.52 Telephonic notice of certain accidents.**
>
> (a) At the earliest practicable moment following discovery of a release of the hazardous liquid or carbon dioxide transported resulting in an event described in § 195.50, the operator of the system shall give notice, in accordance with paragraph (b) of this section, of any failure that: . . .
>
> (2) Resulted in either a fire or explosion not intentionally set by the operator; . . . .
>
> (b) Reports made under paragraph (a) of this section are made by telephone to 800-424-8802 . . . .[21]

Specifically, the Final Order found that Petitioners failed to give telephonic notice at the earliest practicable moment following discovery of the 2004 accident. The Order assessed the proposed penalty of $10,000 after considering the assessment criteria.

[21] Section 195.52 was amended by Pipeline Safety: Updates to Pipeline and Liquefied Natural Gas Reporting Requirements, 75 Fed. Reg. 72,878 (Nov. 26, 2010).

In its Petition, MarkWest contended that the civil penalty assessment failed to consider the following facts in the record that mitigate the penalty: the required notification was made only a few hours late; notification was made in the midst of an emergency response; the delay resulted in no destruction of evidence; emergency responders were on-site within a short time; and the delay did not result in any additional releases to the environment.

The importance of timely accident reporting has been the subject of several public reminders published by PHMSA over the years.[22] The agency has stressed to operators that they are expected to report all accidents within only one to two hours of discovery. In this case, MarkWest reported the accident approximately five hours after its discovery.[23] The fact that the operator was in the midst of an emergency does not lessen the duty to timely report the accident to the National Response Center (NRC). In fact, when a pipeline accident becomes a serious emergency, like in this case, it is even more important to report the emergency immediately to the NRC. Petitioner's claim that there was a lack of more significant consequences, such as the destruction of evidence, additional releases, or delayed emergency response, does not warrant mitigation of the penalty for the failure to timely report the accident.

The nature, circumstances, and gravity of Petitioners' violation of § 195.52, as more fully explained in the Final Order, justify the penalty assessment and nothing in the record warrants mitigating the amount assessed. For the above reasons, MarkWest's petition to reduce the civil penalty for Item 4 is ***denied***.

Items 8 and 9: The Final Order determined that Petitioners violated the drug and alcohol testing requirements in §§ 199.105 and 199.225, respectively, which state, in relevant part:

> **§ 199.105 Drug tests required.**
>
> Each operator shall conduct the following drug tests for the presence of a prohibited drug:
>
> (a) . . . .
>
> (b) *Post-accident testing.* As soon as possible but no later than 32 hours after an accident, an operator shall drug test each employee whose performance either contributed to the accident or cannot be completely discounted as a contributing factor to the accident. An operator may decide not to test under this paragraph but such a decision must be based on the best information available immediately after the accident that the employee's performance could not have contributed to the accident or that, because of the time between that performance and the accident, it is not likely that a drug test would reveal whether the performance was affected by drug use.
>
> **§ 199.225 Alcohol tests required.**
>
> Each operator shall conduct the following types of alcohol tests for the presence of alcohol:

[22] In 1991, and again in 2002, PHMSA's predecessor agency issued public notices to operators reemphasizing that telephonic notifications must be made within one to two hours after discovery so that PHMSA, NTSB, and other agencies can make a timely determination regarding the need for possible action. Pipeline Safety Alert Notice: ALN-91-01 (Apr. 15, 1991); Advisory Bulletin: ADB–02–04, 67 Fed. Reg. 57,060 (Sept. 6, 2002).

[23] Violation Report, at 8; MarkWest Response to Notice of Probable Violation, at 30.

> (a) *Post-accident.* (1) As soon as practicable following an accident, each operator shall test each surviving covered employee for alcohol if that employee's performance of a covered function either contributed to the accident or cannot be completely discounted as a contributing factor to the accident. The decision not to administer a test under this section shall be based on the operator's determination, using the best available information at the time of the determination, that the covered employee's performance could not have contributed to the accident.

Specifically, the Final Order determined that Petitioners failed to test two individuals whose performance either contributed to the failure, or whose performance could not be completely discounted as a contributing factor. The Order assessed the total proposed penalties of $40,000 after considering the assessment criteria.

In the Final Order, the agency rejected claims by MarkWest that the two individuals were not required to be tested. With regard to the first individual, a MarkWest employee, the company had argued that it discounted the individual's performance as a possible contributing factor to the accident, but the Final Order determined that MarkWest could not have justifiably discounted his performance given the individual's involvement in operating certain valves immediately prior to the failure. With regard to the second individual, an employee of Equitable, MarkWest had argued there was no obligation to drug test another company's employee, but the Order determined MarkWest was required to test each covered employee, regardless of whether she was an employee of the owner or the operator of the pipeline.

In its Petition, and only with regard to the MarkWest employee, Petitioner contended that the civil penalty assessment failed to consider that MarkWest did not have "actual knowledge" that the employee's actions could have contributed to the failure.[24] Specifically, MarkWest asserted that its Area Manager had not learned of the problems the employee experienced operating the pipeline valves until 48 hours after the accident. At that point, Petitioner argued, the time period for performing any drug and alcohol testing had already expired.

Sections 199.105(b) and 199.225(a)(1) require post-accident drug and alcohol testing of covered employees whose performance either contributed to the accident or cannot be completely discounted as a contributing factor to the accident. The regulations do not condition such testing on actual knowledge by a senior manager that an employee's performance potentially contributed to an accident. Rather, the regulations mandate that operators test any employee whose performance cannot be completely discounted as a contributing factor "based on the best information available immediately after the accident."

The evidence in the record supports Petitioner's assertion that the Area Manager learned of the employee's problems operating the valves after discussing the matter with field personnel roughly 48 hours after the accident. The record shows, however, that four or five other employees were fully aware of the problem the individual was having with the valves that contributed to the pipeline failure and that such persons had been in contact with each other

[24] MarkWest Petition, at 5.

around the time of the failure to discuss the issue.[25] This information was available to Petitioner immediately after the accident. It does not appear from the record that MarkWest used this information to decide whether or not to test the employee within the time periods specified in the regulations. Petitioner has focused on the Area Manager's knowledge roughly 48 hours after the accident, but that person's knowledge alone is not exculpatory if the company's decision whether to test the individual was not based on the best information available immediately after the accident.

In its Petition, MarkWest argued further that this finding of violation implies that operators must now test "all individuals operating the line at the time [of a failure], regardless of their duties."[26] To the contrary, §§ 199.105(b) and 199.225(a)(1) only require that operators test persons whose "performance may be causally linked to the accident" or whose performance cannot be completely discounted as a contributing factor.[27] A pipeline operator has a duty to determine whether or not an employee's performance could have contributed to the accident using the best available information within the time period prescribed in the regulation.

The nature, circumstances, and gravity of Petitioners' violation of §§ 199.105 and 199.225, as more fully explained in the Final Order, justify the penalty assessments and nothing in the record warrants mitigating the amounts assessed. For the above reasons, the petitions to reduce the civil penalties for Items 8 and 9 are ***denied***.

As a result of granting Equitable's Petition as to Item 1, and denying all other petitions submitted in this matter, the civil penalty assessed against the Companies is reduced to **$192,500** (for Items 2, 4, 8, and 9), for which they are jointly and severally liable. Because the penalty is attributed jointly to both companies, either party may pay the full penalty or apportion it between themselves as appropriate.

Payment of the civil penalties must be made within 20 days of receipt of this Decision. Federal regulations (49 C.F.R. § 89.21(b)(3)) require this payment be made by wire transfer, through the Federal Reserve Communications System (Fedwire), to the account of the U.S. Treasury. Detailed instructions are contained in the enclosure. Questions concerning wire transfers should be directed to: Financial Operations Division (AMZ-341), Federal Aviation Administration, Mike Monroney Aeronautical Center, P.O. Box 269039, Oklahoma City, OK 73125; (405) 954-8893.

Failure to pay the $192,500 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. Failure to pay the civil penalty may result in referral of the matter to the Attorney General for appropriate action in a district court of the United States.

---

[25] MarkWest Response to Notice of Probable Violation, at 18-19 (citing MarkWest Supplemental Record, July 22, 2009, at MW-000103 and -000107).

[26] MarkWest Petition, at 5.

[27] Control of Drug Use In Natural Gas, Liquefied Natural Gas, and Hazardous Liquid Pipeline Operations, 53 Fed. Reg. 47,084, 47,090 (Nov. 21, 1988).

IV. Conclusion

For the reasons set forth above, Equitable's petition for an in-person conference prior to issuance of this Decision is denied. Equitable's petition for the withdrawal of the finding in the Final Order that the company violated 49 C.F.R. § 195.401 (Item 1) is granted. Finally, MarkWest's petitions for the mitigation of civil penalties assessed in the Final Order for violations of §§ 195.440 (Item 2), 195.52 (Item 4), 199.105 (Item 8), and 199.225 (Item 9) are denied. 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.

_____ _____

Jeffrey D. Wiese Date Issued
Associate Administrator
for Pipeline Safety