JUN 16 2010

Mr. Dwayne Burton
Vice President
Engineering & Operations
Kinder Morgan Energy Partners, L.P.
One Allen Center
500 Dallas Street, Suite 1000
Houston, TX 77002

RE: CPF No. 3-2009-1024H

Dear Mr. Burton:

I am writing in response to your March 9, 2010 letter, entitled "Petition for Reconsideration." In that letter, you request that I clarify the terms of the February 17, 2010 Corrective Action Order (CAO) in this case, address several "other factual errors or omissions" in the language of the CAO, and make certain corrections to the record in this proceeding.

Before responding to your specific concerns, I note that your letter presumes that Kinder Morgan Energy Partners, L.P. (Kinder Morgan) has the right to file a petition for reconsideration in this case. However, the Pipeline Safety Laws do not afford you such a right.[1] Nonetheless, to resolve any doubt about the terms of the CAO, the record in this matter, or the legality of this proceeding, I will address your concerns as a matter of discretion.

Your first concern relates to the terms of the CAO. In particular, you note that Kinder Morgan has recently taken actions that may be relevant to the CAO's implementation, that some of the timelines in the order may be obsolete or no longer necessary, and that there is a typographical error in one of the items in the order.

[1] The authority relied upon in your letter, 49 C.F.R. § 190.215, states, in relevant part, that "[a] respondent may petition the Associate Administrator, OPS for reconsideration of a final order issued § 190.213." I note that only "enforcement proceedings commenced under § 190.207"—i.e., those proceedings that "begin[]" when "a Regional Director . . . serv[es] a notice of probable violation on a person charging that person with a probable violation of 49 U.S.C. 60101 et seq. or any regulation or order issued thereunder"—result in a final order issued under § 190.213. As this proceeding commenced under 49 C.F.R. § 190.233(c)(1) when the Director, Central Region, OPS, served your company with written notice of his intent to find that Spread I was a hazardous facility, and I issued my CAO in support of that finding under 49 C.F.R. § 190.233(a) and (d)-(e), the right to seek reconsideration under 49 C.F.R. § 190.215 is not applicable.

I have delegated my authority to oversee the implementation of the CAO to the Director, Central Region, OPS (Director). I am confident that the Director will use that authority to resolve any issues that may arise in that respect, and that he will consider all actions Kinder Morgan has taken to abate the hazard posed by the operation of Spread I in determining compliance with the terms of the order. [2]

Your second concern relates to the conduct of the January 29, 2010 hearing in this matter—i.e., you state that the Hearing Officer "admonished" Kinder Morgan not to present any witnesses at that hearing. You also question the validity of the testimony offered by Mr. Gery Bauman, an OPS welding expert, and its subsequent use as evidence in the CAO.

With regard to the first issue, I note that in a letter dated January 12, 2010, the Hearing Officer informed your attorney, Mr. Robert E. Hogfoss, that Kinder Morgan would be afforded a hearing in this matter on January 29, 2010. He further advised Mr. Hogfoss that Kinder Morgan should provide a "statement of the issues that you intend to raise at the hearing and a list of your attendees . . . no later than the close of business on January 22, 2010."

On January 25, 2010, three days after expiration of that deadline, the Hearing Officer sent another letter to Mr. Hogfoss. In that letter, the Hearing Officer confirmed that the hearing would proceed as scheduled and stated: "As you have not submitted a list of witnesses, I assume that none will be appearing on your client's behalf and that your arguments will be based solely on the documents previously-submitted to the agency. *If that is not correct, please let me know.*"

In a letter dated January 26, 2010, Mr. Hogfoss replied that "it [wa]s, at a minimum, inefficient to proceed with a Hearing in this instance." He went on to state, however, that "in order to preserve our legal rights, [Kinder Morgan] w[ould] appear at the hearing as scheduled." Mr. Hogfoss also noted that your company would be represented by three attorneys at the upcoming hearing, himself, Ms. Catherine Little, and Ms. Shelia Tweed. He also indicated that you would be attending the hearing as an "observer," and that he understood that the issues would be limited to those raised in the record.

As these letters show, the Hearing Officer never admonished Kinder Morgan to forgo its right to present witnesses at the hearing. Rather, he simply asked counsel to submit a list of attendees and, when that list was not provided in a timely manner, asked Mr. Hogfoss if Kinder Morgan did, in fact, intend to present any witnesses. "That was" not, as your letter states, "an unusual procedural response" by the Hearing Officer.

Your letter also questions the significance of the testimony of Mr. Gery Bauman. In particular, you state that Mr. Bauman was not "physically present at the Hearing," and that he was not "introduced or referred to as a witness, much less a primary witness." You also suggest that Mr. Bauman's statements about what he observed during the construction of your pipeline are not evidence and cannot be used to support a material finding of fact.

[2] As Kinder Morgan correctly notes, Item 15 of the CAO should reference the pressure restriction imposed in Item 8 of the CAO, not Item 5. The Director is advised to make note of that change.

I note that the Pipeline Safety Regulations do not prohibit a witness' participation by telephone;[3] that the Pipeline Safety Laws do not require the use of any particular designation when introducing a witness; and that a witness' testimony about his personal observations, including those of a welding expert who actually observed unsound construction methods during a field inspection, are evidence and can be used to support a material finding of fact.[4] I also note that none of the three attorneys who appeared on your behalf objected to Mr. Bauman's testimony, and that they did not question him at that time.

You also state that PHMSA "missed" the "point of your argument" by "addressing . . . mootness[,]" a concept that, in your opinion, "may be more familiar to judicial review than administrative process." I note that counsel raised the issue of mootness in his written response to the Notice, that he has done so in other enforcement actions brought by this agency, and that I have an obligation to consider the merits of that argument if the record indicates that it is not frivolous.[5]

You also state that the CAO "appears to criticize" your company "for undertaking prompt and effective remedial actions on its own accord." The order does not support that assertion. Indeed, I noted in the order that "Kinder Morgan has taken significant remedial action in response to the November 14 accident," that it "has cooperated with PHMSA throughout this proceeding," and that the purpose of the CAO was "not to 'punish'" your company "for experienc[ing] a pipeline failure." I also explained in the order that Kinder Morgan's remedial actions did not eliminate the need to issue a CAO. With respect to your offers to enter into a consent agreement, PHMSA will certainly consider such proposals, but is under no obligation to accept them.

Finally, you state that you "are especially surprised by the statement at page seven of the CAO that PHMSA now believes that the transport of natural gas by pipeline, even at reduced pressure and in compliance with all pipeline safety laws and regulations, may nonetheless 'support a hazardous facility finding.'" I have carefully reviewed the entire CAO, including the page cited in your letter, and note that the order contains no such statement.

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[3] *See also* 49 C.F.R. 190.211(b) (permitting telephonic hearings if the amount of a proposed civil penalty or cost of a proposed corrective action is less than $10,000).

[4] *See e.g.*, Fed. R. Evid. 601-602, 701-702; *Layno v. Brown*, 6 Vet.App. 465, 469-470 (1994) (discussing the concepts of competency of a witness, lay testimony, and expert testimony in the context of an administrative proceeding); *but see also* 49 C.F.R. § 190.233(c)(3) (noting that CAO hearings are "conducted without strict adherence to the formal rules of evidence").

[5] *In the Matter of Kinder Morgan, Inc.*, Final Order, C.P.F. 5-2007-1008 (Sep. 1, 2009) (available at www.phmsa.dot.gov/pipeline/enforcement) (rejecting present counsel's argument that the actions taken by Kinder Morgan after the commencement of an enforcement proceeding rendered an allegation of probable violation and proposed civil penalty moot).

In summary, I am confident that the Director will ensure that the terms of the CAO are consistent with the actions taken by Kinder Morgan to abate the hazards associated with the operation of Spread I. I am also confident that the Hearing Officer conducted this proceeding in compliance with the Pipeline Safety Laws and Regulations, and that the record supports the CAO's finding that your pipeline is a hazardous facility.

Sincerely,

Jeffrey D. Wiese
Associate Administrator
for Pipeline Safety

cc: Mr. David Barrett, Director, Central Region, PHMSA

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