AUGUST 1, 2013

Mr. Clark Smith
President & Chief Executive Officer
Buckeye Partners, LP
One Greenway Plaza
Suite 600
Houston, TX 77046

Re: CPF No. 3-2010-5006

Dear Mr. Smith:

Enclosed please find the Decision on the Petition for Reconsideration filed by Buckeye Partners, LP, in the above-referenced case. It denies your Petition and affirms the Final Order without modification. Service of the Decision by certified mail is deemed effective upon the date of mailing, or as otherwise 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: Robert E. Hogfoss, Esq., Counsel for Buckeye Partners, LP, Hunton & Williams, Bank of America Plaza, 600 Peachtree Street, N.E., Suite 4100, Atlanta, Georgia 30308
Mr. Alan Mayberry, Deputy Associate Administrator for Field Operations, OPS
Mr. David Barrett, Director, Central Region, OPS

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

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

In the Matter of	)	
Buckeye Partners, LP,	)	**CPF No. 3-2010-5006**
Petitioner.	)	

DECISION ON PETITION FOR RECONSIDERATION

On November 19, 2012, the Pipeline and Hazardous Materials Safety Administration (PHMSA), Office of Pipeline Safety (OPS), issued a Final Order in this case to Buckeye Partners, LP (Buckeye or Petitioner), finding that Buckeye had committed five violations of the hazardous liquid pipeline safety regulations and assessing a total civil penalty of $402,500.[1] The Final Order also required Buckeye to take certain corrective measures.

On December 10, 2012, Buckeye filed a Petition for Reconsideration (Petition) seeking review of Items #1 (timeliness of reporting a release), #4 (covered tasks), and #5 (training on a particular covered task).[2] Buckeye requested that PHMSA withdraw all three items or, in the alternative, withdraw Item #1, convert Items #4 and 5 to either a Notice of Amendment or Warning Item, and withdraw the associated civil penalty amounts. Buckeye did not dispute the other findings or civil penalty assessments. It is noteworthy that pursuant to the pipeline safety regulations, "[t]he filing of a petition…stays the payment of any civil penalty assessed. However, unless the Associate Administrator, OPS otherwise provides, the order, including any required corrective action, is not stayed."[3] To date, Buckeye has not completed the compliance order included in the November 19, 2012 Final Order.

[1] The assessed civil penalty represented a $79,300 reduction from the proposed civil penalty amount.

[2] Pursuant to 49 C.F.R. § 190.215, a petition must be received no later than 20 days after service of the final order upon the respondent. Service is defined as being complete upon mailing. *See* 49 C.F.R. § 190.5. The Final Order was mailed on or around November 19, 2012. The petition was received on December 11, 2012, 22 days after service was completed. Buckeye stated in its Petition that the Final Order was received on November 26, 2012, and therefore the December 10, 2012 Petition was timely. A review of the certified mail tracking database on the United States Postal Service website confirms that the Final Order was indeed received on November 26, 2012, and therefore the December 10, 2012 Petition is timely.

[3] *See* 49 C.F.R. § 190.215(d).

Section 190.215 provides that a respondent may petition the Associate Administrator for reconsideration of a final order. It states that the Associate Administrator will not consider repetitious information, arguments, or petitions, but may consider additional facts or arguments, provided the respondent submits a valid reason why such information was not presented prior to issuance of the final order. 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. The Associate Administrator may grant or deny, in whole or in part, a petition for reconsideration without further proceedings, or may request additional information, data, and comment as deemed appropriate.

Item 1: Finding of Violation of § 195.52

Petition

In the Final Order, PHMSA stated that Buckeye failed to provide telephonic notice to the National Response Center (NRC) at the earliest practicable moment, or within 1-2 hours, following the company's discovery of a release of 85 barrels of gasoline. Buckeye notified the NRC 15 hours after the release occurred. PHMSA held that this was a violation of § 195.52. In its Petition, Buckeye objected to this finding, arguing: (1) that the pipeline safety regulations do not explicitly require an operator to report a release within 1-2 hours and therefore Item #1 is not a violation; (2) that Buckeye did in fact report the release within 1-2 hours of discovering that *the release was reportable*; and (3) that PHMSA's rulemaking and enforcement cases have not consistently supported the 1-2 hour interpretation.

Analysis

Petitions for reconsideration provide a vehicle for respondents to submit evidence not previously available during the proceeding. As stated above, the Associate Administrator does not consider repetitious information 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. Buckeye has not provided any additional documents or arguments in its Petition that were not previously reviewed. All of the evidence and arguments that Buckeye relies on in its Petition were previously submitted in the Response, Post-Hearing Brief, and at the hearing.

Buckeye's argument that PHMSA cannot enforce its interpretation of "earliest practicable moment" is unpersuasive. First, courts have held that an agency can formulate requirements through enforcement decisions. An agency is "not precluded from announcing new principles in an adjudicative proceeding."[4] Federal courts have held that an order issued in an adjudicatory proceeding is not subject to the notice and comment procedures of the Administrative Procedure Act.[5] PHMSA can and does develop such interpretations in its enforcement decisions, just as

[4] *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 292-94 (1974) (finding that prior case law dictates that the agency is "not precluded from announcing new principles in an adjudicative proceeding and that the choice between rulemaking and adjudication lies in the first instance within the [agency's] discretion") (citing *SEC v. Chenery Corp.*, 332 U.S. 194,202 (1947) and *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969)).

[5] *R/T 182, LLC v. FAA*, 519 F.3d 307, 310 (6th Cir. 2008) (emphasis added).

courts routinely apply statutes in civil and criminal enforcement decisions.[6] Second, PHMSA has consistently found that "earliest practicable moment" means between 1-2 hours. As mentioned in the Final Order, this particular interpretation dates back to at least 1971, when the agency stated that "in most cases this telephonic report can and should be made within one to two hours after discovery…"[7] Numerous enforcement cases have reinforced the agency's position on the reporting requirement.[8] In the referenced cases, operators exceeded the required time frame from just a few hours to more than 24. In addition, as discussed in the Final Order in this proceeding, PHMSA has addressed the reporting requirements in a 1991 Alert Notice and a 2002 Advisory Bulletin.[9]

Contrary to Buckeye's argument in its Response, Post-Hearing Brief, and now in the Petition, the word "discovery" means discovery of the *release* itself, not the discovery or acknowledgment that the accident meets the reporting requirements listed in the regulation. This point was discussed at length in the Final Order on pages 2 and 3:

> PHMSA has applied this interpretation in various enforcement actions and found that "discovery" relates to the actual release, not to the realization that an incident has resulted in circumstances (e.g. property damage) that renders the release reportable.[10]

Furthermore, the rationale for this position was summarized in detail:

> The reason for this interpretation is both logical and practical. In *Enstar Natural Gas Company,* PHMSA stated that "[i]f the regulation were read to

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[6] *See In the Matter of ANR Pipeline Company*, Final Order, CPF No. 3-2007-1006 (available at www.phmsa.dot.gov/pipeline/enforcement).

[7] *See* PI-71-011, located at http://www.phmsa.dot.gov/pipeline/regs/interps.

[8] *In the Matter of Public Service Company of New Mexico*, Final Order, CPF No. 44003 (March 2, 1998); *In the Matter of Hunt Refining Company*, Final Order, CPF No. 2-2005-5002 (November 15, 2005); *In the Matter of Amerigas Propane*, L.P., Final Order, CPF No. 57702 (October 20, 2005); *In the Matter of Chevron Pipe Line Company*, Final Order, CPF No. 4-2002-5013 (March 15, 2004); *In the Matter of Belle Fourche Pipeline Company, CPF No. 52514 (April 28, 1998).*

[9] *See* ALN 91-01 and ADB-02-04, located at http://phmsa.dot.gov/pipeline/regs/advisory-bulletin. In its Petition, Buckeye makes reference to the statutory mandates of the Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011, signed into law on January 3, 2012. As noted in PHMSA's January 30, 2013 Advisory Bulletin on reporting requirements, PHMSA is required by this statute to issue a proposed rule to revise telephonic reporting requirements to require notification not later than one hour following the time of confirmed discovery. *See "Pipeline Safety: Accident and Incident Notification Time Limit,"* 78 Fed. Reg. 6402 (January 30, 2013) (citing The Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011). In referencing this new statutory mandate, Buckeye attempts to argue that the agency should not enforce the existing reporting requirement until these new regulations are issued. Obviously, the regulatory mandate created by the 2011 legislation does not affect the Buckeye case, as the May 2005 release predates the statute by almost seven years. The existing reporting requirements of 1-2 hours have been enforced for decades. The new mandate from Congress seeks to tighten the reporting deadline even more than exists under the current regulation by requiring releases to be reported within one hour and has no bearing on this case.

[10] Final Order, at 3 (citing *In the Matter of Enstar Natural Gas Company*, CPF No. 52016 (May 14, 1997)).

> mean at the earliest practicable moment following discovery of the cause of the incident, the operator would never be required to report an incident until the cause of the incident was definitely determined."[11] In addition, PHMSA has stated that "[t]he delay to reporting caused by an operator waiting until it definitely decides an event meets the reporting criteria would frustrate a fundamental purpose of the regulation, which is to give OPS and other agencies the earliest opportunity to assess whether an immediate response to a pipeline incident is needed. Therefore, OPS requires pipeline operators to report incidents to the NRC at the earliest practicable moment following discovery of the incident, even if at the time of reporting there is some question as to whether reporting will be required."
>
> There are also valid public safety reasons why an operator needs to make a NRC report within 1-2 hours, including PHMSA's need for immediate information to determine whether the line or facility should be shut down. PHMSA must evaluate the cause of a release as soon as possible, not after the evidence is stale. [12]

Enstar is not the only case that supports this position; PHMSA has issued numerous decisions in agreement on this point. The agency stated *In the Matter of the City of Richmond, Virginia,* that "…OPS interprets "discovery" to mean discovery of the incident itself, not discovery that the reporting criteria have been met…[t]his gives OPS and other Federal and state agencies the ability to assess whether an immediate response to a pipeline incident is needed."[13]

In support of its Petition, Buckeye argued that there was no need for a federal response in this case, so therefore the rationale that PHMSA needs operators to report releases within 1-2 hours for public safety reasons did not apply here. The decision to roll out a federal response and accident investigation is the agency's decision, not the operator's, and is necessitated upon proper reporting of a release. If an operator waits 15 hours to report a release of 85 barrels, as occurred in this case, then PHMSA is delayed by 15 hours from initiating its accident investigation, should it find a need to do so.

In a similar argument, Buckeye contended that the agency's past rulemaking and enforcement cases contradict the Final Order here. Buckeye is referring to a final rule issued in 1994 that increased the property damage threshold for reporting from $5,000 to $50,000.[14] As discussed in the rulemaking documents, this Final Rule acknowledged that there was confusion as to which cost estimates operators were using to estimate property damage. The agency noted that operators were frequently not including the fair market value of lost product when calculating property damage and therefore the agency amended § 195.52(a)(3). In addition, the agency decided that increasing the property damage threshold from $5,000 to $50,000 would match the

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[11] *Enstar*, at 2.

[12] Final Order, at 3.

[13] *In the Matter of the City of Richmond, Virginia*, CPF No. 1-2004-0006 (January 12, 2006)

[14] *"Regulatory Review: Hazardous Liquid and Carbon Dioxide Pipeline Safety Standards"*, 59 FR 33388 (June 28, 1994).

existing Part 192 reporting requirement and eliminate the need to report minor accidents under $5,000. I fail to see how these changes, 11 years prior to Buckeye's accident, support its position. The 2005 release that is the focus of this case involved 85 gallons of spilled product and $60,100 in estimated property damage.

Buckeye also argued in its Petition that the cases used by PHMSA to support its finding in the Final Order were inapposite because they involved natural gas operators; in addition, it argued that PHMSA's interpretation has not been applied consistently across enforcement cases. In its Petition, Buckeye argued that the references to *In the Matter of Texas Eastern Transmission Corporation,* CPF No. 4-2001-1003 (May 5, 2005) and *In the Matter of Enstar Natural Gas Company,* CPF No. 52016 (May 14, 1997) are inapposite because those matters involved the violation of the natural gas reporting requirement at § 191.5 and not the hazardous liquid reporting requirement at § 195.52. Although both cases happen to focus on natural gas pipeline requirements, the language of both regulations is identical. They both require the reporting of certain incidents or releases "at the earliest practicable moment following discovery." Buckeye also suggested that PHMSA has not enforced this provision consistently. I disagree. As noted above, there have been numerous enforcement cases issued by PHMSA where both gas and hazardous liquid operators failed to report a release within 1-2 hours.

Finally, the fact that the Central Region chose to issue a Notice four years after the inspection does not bar the agency from taking such action. There is no question that this case was initiated within the applicable five-year statute of limitations under 28 U.S.C. §2462.

Accordingly, I find no basis for a withdrawal of this violation or a reduction of the $10,500 civil penalty assessed in the Final Order. This item stands as written in the Final Order.

Item 4: Finding of Violation of § 195.505(a)

In the Final Order, PHMSA found that Buckeye failed to include "all necessary covered tasks" in its Operator Qualification (OQ) program, in particular, to include delivery operations at regulated tank facilities. In its Petition, Buckeye objected to this finding of violation, stating that the regulation is vague and PHMSA should be estopped from bringing a violation because this specific facility had been previously inspected without any allegation of a § 195.505(a) violation. Buckeye argued that this item should either be withdrawn or converted to a Notice of Amendment or Warning Item.

Analysis

Buckeye presented the same arguments in its Petition that it had previously raised in its Response, at the hearing, and in its Post-Hearing Brief. These were all reviewed and analyzed in the Final Order. I specifically discussed Buckeye's argument regarding the content of the OQ regulations:

> Section 195.505(a) requires each operator to have and follow a written qualification program that includes provisions to identify covered tasks. Although Buckeye is correct that many of the requirements of the pipeline safety regulations are performance-based and not prescriptive, this does

> not mean that performance-based activities should not be included as "covered tasks" under an operator's OQ program. An operator is required to identify all of its covered tasks, using the four-part definition set forth in § 195.501(b). Specifically, "a covered task is an activity identified by the operator, that: (1) Is performed on a pipeline facility; (2) Is an operations and maintenance task; (3) Is performed as a requirement of this part; and (4) Affects the operation or integrity of the pipeline."[15] Buckeye's Task 412 meets this four-part test. It is performed on a pipeline facility, is an operations and maintenance task, is performed as a requirement of Part 195,[16] and, as evident from the Accident, can affect the operation or integrity of the pipeline. Therefore, Buckeye should have included Task 412 in its covered task list.[17]

I also addressed Buckeye's estoppel argument:

> I also find no merit in Buckeye's argument that since OPS did not find a violation in 2004, it is somehow estopped from asserting a probable violation following a failure and subsequent inspection. Buckeye was required to have a covered task list for tasks that met the four-part test by April 27, 2001. If another inspection in another region chose not to cite a violation at that time, it does not eliminate Buckeye's responsibility to be in compliance with the code. Since Buckeye must identify covered tasks in its OQ program and failed to include Task 412, which meets the definition of a covered task in § 195.501(a), I find that Buckeye violated § 195.505(a) and the proposed compliance order is appropriate.[18]

Finally, Buckeye contended that this item should have been a Notice of Amendment and that the only reason this violation was included in the Notice of Probable Violation was to serve as a predicate for Item #5. In the Final Order, I discussed in detail how § 195.505 violations are not necessarily handled by a Notice of Amendment, stating that a review of past enforcement cases demonstrates that § 195.505(a) violations have been addressed by civil penalties, compliance orders, or both. The fact that this item did not have a civil penalty has no bearing on the fact that Item #5 did. They are separate violations and PHMSA has the discretion to select the most appropriate enforcement tool to address them.

I find no support for Buckeye's request to either withdraw or convert this Item. This item stands as written in the Final Order.

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[15] *See* 49 C.F.R. § 195.501(b).

[16] Each operator is required under § 195.505 to scrutinize its own unique system to identify all those activities performed on its system that meet the four-part definition of a "covered task" and to develop a proper qualification process for each one. In this case, Buckeye was required under § 195.402(c) to have and follow procedures for starting up and shutting down all parts of its system and for controlling receipt and delivery of product. Task 412 was one of Buckeye's own procedures to meet this requirement.

[17] Final Order, at 6.

[18] Final Order, at 7.

Item 5: Finding of Violation of § 195.505(b)

In its Petition, Buckeye argued that Item #5 should be withdrawn for two reasons. First, the regulation itself was vague. Second, the underlying violation (Item #4) had no civil penalty, so it would be inappropriate to issue one for this item. I do not agree.

The fact that the agency did not issue a civil penalty for Item #4 does not have any bearing on this Item. As discussed earlier, the decision to assess a civil penalty or a compliance order is a discretionary enforcement decision based on the facts and evidence constituting each allegation. Each item in a Notice of Probable Violation is separate and stands on its own evidence. Buckeye was cited in Item #5 for a violation of § 195.505(b)— to ensure through evaluation that individuals performing covered tasks are qualified. Considering that the May 5, 2005 accident involved a release of 85 barrels during delivery operations, that the local operator on scene was not trained in delivery operations, and that Buckeye could not produce delivery-operations qualification records, I believe the assessed civil penalty for this item is appropriate. Having not found any of these arguments persuasive to withdraw Item #5, this item will remain as written in the Final Order.[19]

Conclusion

Based on a review of the record and the information provided in the Petition, I hereby deny the Petition and affirm the Final Order without modification, for the reasons set forth above.

Payment of the $402,500 civil penalty must be made within 20 days of service of this Decision. The payment instructions were set forth in detail in the Final Order. Failure to pay the $402,500 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. 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.

In addition, the Petitioner is reminded that the Compliance Order was not stayed by the filing of the Petition and should have been completed within the timelines listed in the Final Order. If Petitioner should need an extension, it can file such a request with the Director, Central Region.

This Decision is the final administrative action in this proceeding.

_____ _____

Jeffrey D. Wiese
Associate Administrator
for Pipeline Safety

Date Issued

[19] Buckeye argues in Section I of its Petition that Item # 5 should be converted to Notices of Amendment or Warning Items but provides no further detail in Section C of its Petition.