**OCT 02 2009**

***VIA CERTIFIED MAIL – RETURN RECEIPT REQUESTED** [7004 2510 0003 6895 8709]*

Mr. Richard Adams
Vice President
Operations & Technology
Enbridge Energy Company, Inc.
1100 Louisiana
Suite 3300
Houston, TX 77002

**Re: CPF No. 4-2005-8004**

Dear Mr. Adams:

Enclosed is the decision on the Petition for Reconsideration filed by Enbridge Energy Company, Inc., in the above-referenced case. For the reasons specified in the decision, the Petition is granted in part and denied in part. Payment of the reduced civil penalty of $70,000 is due within 20 days of service. The findings of the Final Order are unaltered and stand as stated therein. When the civil penalty has been paid, this enforcement action will be closed. Your receipt of this decision 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: Mr. Rod Seeley, Director, Southwest Region, OPS
Edward C. Lewis, Esq., Fulbright & Jaworski, LLP
1301 McKinney, Suite 5100, Houston, Texas 77010

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

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| **In the Matter of** | ) | |
| **Enbridge Energy Company, Inc.,** | ) | **CPF No. 4-2005-8004** |
| **Petitioner.** | ) | |

## DECISION ON PETITION FOR RECONSIDERATION

On August 22, 2007, pursuant to chapter 601, title 49, of the United States Code, the Associate Administrator for Pipeline Safety (Associate Administrator), Pipeline and Hazardous Materials Safety Administration (PHMSA), issued a Final Order (Order) in this case against Enbridge Energy Company, Inc. (Enbridge or Petitioner), finding that Petitioner had committed two violations of the Pipeline Safety Regulations, codified at 49 C.F.R. Parts 192 and 195, and assessing a civil penalty in the amount of $100,000. Petitioner operates natural gas and hazardous liquid pipeline systems throughout the United States and Canada. Both violations concerned Petitioner's Operator Qualification Plan (OQ Plan).

The Pipeline Safety Regulations allow a respondent to file a petition with the Associate Administrator for reconsideration of a Final Order.[1] The purpose of this procedure is not to provide a right of appeal or *de novo* review, but, rather, to allow the presentation of previously unknown or unavailable information or arguments and to allow the agency to correct any errors in the Final Order. For these reasons, the regulations state that the Associate Administrator is not obliged to consider repetitious information, arguments or petitions, and that a petitioner must provide valid reasons why new facts or arguments were not presented in a timely manner.

In this case, Petitioner filed a timely Petition for Reconsideration (Petition) on September 17, 2007. In its Petition, Enbridge argues that the Order should be set aside because PHMSA: (1) made Findings of Violation in the Order that were not alleged in the Notice of Probable Violation (Notice), thereby depriving Petitioner of proper notice of the allegations; (2) failed to meet its burden of proving the violations cited in the Notice and the Findings of Violations in the Order; and (3) failed to meet its burden of proving the assessment of the civil penalty in the Order. Petitioner further requests that PHMSA stay the effectiveness of the Order to allow

[1] 49 C.F.R. § 190.215.

further proceedings in this matter. Petitioner also requests that PHMSA withdraw the Findings of Violation or, alternatively, reduce the amount of the civil penalty assessed in the Order.

***Discussion***

As a preliminary procedural matter, Petitioner acknowledges that 49 C.F.R. § 190.215(b) requires that if Enbridge "requests the consideration of additional facts or arguments, the [petitioner] must submit the reasons they were not presented prior to issuance of the final order." The company bases its Petition on the fact that

> [t]his Petition for Reconsideration represents the first opportunity for Enbridge to raise these issues due to the manner in which the record was considered and allegations were raised, sua sponte, without providing the required notice and opportunity for hearing to Enbridge.[2]

As explained more fully below, there is nothing in the record to support this claim. There is no evidence or finding in the Order that lies outside the scope of the Notice and the administrative record upon which it was based. Further, Enbridge was not only given the opportunity to a full administrative hearing under 49 C.F.R. § 190.211 on all the issues presented in the Notice, including the proposed $100,000 penalty, but the company actually requested a hearing by letter dated October 11, 2005. Enbridge subsequently withdrew this request voluntarily, by letter dated February 3, 2006. Therefore, Enbridge waived its right to a hearing on the Notice and the case was decided on the basis of the written record alone.

Since the Findings of Violation are based solely on the record that was fully available to Enbridge prior to entry of the Order, the Petition fails to present any valid reason why the additional facts or arguments raised in the Petition could not have been presented prior to issuance of the Order. Therefore, the Petition could be summarily dismissed for failure to comply with the procedural requirements of 49 C.F.R. § 190.215(b). Notwithstanding the insufficiency of the Petition, I have reviewed the entire record and the Petition so that Enbridge may be afforded every opportunity to receive full consideration of all the issues raised in the Petition. The following decision discusses each of the issues raised by Petitioner in light of the standard of review set forth in 49 C.F.R. § 190.215 and other applicable law. For the reasons discussed below, I deny the Petition in part and grant it in part.

**I. The Order Did Not Violate Petitioner's Right of Due Process.**

As noted above, Petitioner requests that PHMSA withdraw the Findings of Violation in the Order because the agency "raised allegations, sua sponte, and seeks to hold Enbridge in violation of those allegations that have never been brought to Enbridge's attention, in violation of Enbridge's due process rights."[3] Petitioner compares the language PHMSA used in describing the alleged violations in the Notice with the language used in the Order to describe the Findings

[2] Petition, at 2.

[3] Petition, at 1

of Violation. Item 1 of the Notice alleged two separate violations of 49 C.F.R. §§ 192.805(a) and 195.505(a). These provisions, the former for gas and the latter for hazardous liquid pipeline facilities, require that "[e]ach operator shall have and follow a written qualification program. The program shall have provisions to: (a) Identify covered tasks…." The Notice alleged that Enbridge violated § 195.505(a), because "Enbridge Transportation Group South's (Enbridge TGS) written OQ plan did not address any covered tasks that were performed on the hazardous liquid portions of their facilities. It was noted that the plan had not been revised since Enbridge TGS acquired hazardous liquid facilities." [4]

In its Response, Enbridge stated that it had acquired the TGS hazardous liquid facilities prior to 2002, that those facilities and personnel were indeed addressed in its OQ Plan,[5] and that although the original Enbridge OQ Plan was dated April 27, 2001, there had been numerous revisions after that date. The Order discounted this evidence, however, and found that although Petitioner had included some *references* to its hazardous liquid pipelines in the OQ Plan, the covered tasks list included only two covered tasks that pertained specifically to the company's hazardous liquid pipelines. It also found that although the company had made various revisions to its plan, it "still failed to update the plan to identify each covered task performed on the liquid pipelines. Therefore, Respondent did not comply with § 195.505(a)."[6]

In its Petition, Enbridge argues that because PHMSA alleged in the Notice that Enbridge had not addressed *any* hazardous liquid covered tasks yet found in the Order that the company had included *two*, this somehow reflects a fatal variance between the allegations in the Notice and the findings in the Order. In other words, Petitioner contends that because PHMSA found that two covered tasks had been identified, the alleged violation of 195.505(a) was disproved entirely. This is incorrect. The evidence shows, and the Order acknowledges, that Enbridge's OQ Plan specified only two covered tasks with respect to its hazardous liquid facilities. Petitioner has failed to produce any evidence that its OQ Plan complied with the requirements and intent of § 195.505(a) by identifying each and every covered task performed on its liquid pipelines. The cited pipeline regulations cannot be interpreted to mean that an operator need only identify *a couple* of covered tasks; on the contrary, it must identify them *all*.

Petitioner argues that this variance between the Notice and the Order violates the company's right of due process by failing to provide the company with adequate notice of all of the details of the allegations that were outlined in the Violation Report and reiterated in the Order. Petitioner states that the entire record consists of only two documents, namely, "the inspection report,"[7] which it contends it never received before issuance of the Order, and the Notice itself.

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[4] Notice, at 2.

[5] "The Enbridge OQ plan lists liquid specific knowledge requirements and additional covered tasks specific to liquids systems." Response, at 2.

[6] Order, at 3.

[7] Petitioner is apparently referring to the "Pipeline Safety Violation Report," dated April 11, 2005 (Violation Report), that serves as the evidentiary basis for the Notice.

According to Enbridge, "This [Violation Report] was not provided to Enbridge, and Enbridge had no opportunity to contradict any issues raised therein."[8]

Petitioner is correct that these two documents, plus Enbridge's Response and supporting evidence, constitute the entire record in this case. The company is also correct that PHMSA did not provide a copy of the Violation Report to Enbridge at the time the agency issued the Notice. Section 190.207 of the Pipeline Safety Regulations provides that to begin an enforcement proceeding, the Regional Director must serve a notice on the respondent that includes a "[s]tatement of the provisions of the laws, regulations or orders which the respondent is alleged to have violated and a statement of the evidence upon which the allegations are based." PHMSA complied with this provision, as the Notice included a statement that the allegations were based on the "onsite pipeline safety inspection of your Operator Qualification (OQ) records and procedures at your headquarters in Houston, Texas" on November 17-18, 2004.[9]

If a respondent wishes to contest a Notice of Probable Violation in an enforcement action, it may either submit written explanations, information or other materials in answer to the allegations or in mitigation of the proposed penalty, or it may request a hearing. In this case, Petitioner initially requested a hearing. Under 49 C.F.R. § 190.211(e) and in accordance with other applicable law, a respondent has the right to request the contents of the entire case file upon which the Notice is based, including a copy of the Violation Report.[10] Petitioner, however, never made any request for the Violation Report or any other portion of its case file until April 9, 2008, after filing the Petition. If Enbridge had wanted to learn more about the evidence supporting the allegations in the Notice or the basis for the proposed penalty, it could have easily requested the case file in a timely manner, rather than waiting until after the Order had already been issued.

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[8] Petition, at 4.

[9] Petitioner cites several cases in support of its argument that its due process rights were violated by PHMSA's failure to provide the company with an opportunity to submit evidence on the "new" allegations in the Final Order. None of the cases cited by Petitioner is applicable. None involves administrative enforcement proceedings or a respondent/applicant who declines to avail itself of a right to a hearing or to obtain copies of the evidence in the administrative record. In *Chocolate Mfrs. Ass'n of U.S. v. Block*, 755 F.2d 1098 (4th Cir. 1985), the court found that the Department of Agriculture had promulgated a final rule that was "a complete reversal from its treatment in the proposed rule." The court ordered the rulemaking comment period reopened because "ultimate changes in the proposed rule were [not] in character with the original scheme or a logical outgrowth of the notice.) (*Id*. at 1107). Petitioner also cites *Williston Basin Interstate Pipeline Co. v. F.E.R.C.*, 165 F.3d 54, 63 (D.C. Cir. 1999), in which F.E.R.C. made factual findings in a ratemaking proceeding using a methodology not discussed by either party. The court found that use of the new methodology prohibited the pipeline from understanding "the issues on which the decision will turn." *Id*. Finally, Petitioner cites *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc*., 419 U.S. 281, 288 (1974), where the court held that an agency must apprise a party of the facts and issues on which the agency relies so that the party may rebut them. In the current case, by contrast, the Notice informed Petitioner of the regulations that Petitioner allegedly violated, based upon the agency's review of Petitioner's own OQ Plan. The Order made findings of violation based upon the same OQ Plan and did not rely upon any new facts or allegations not contained in the record.

[10] 49 C.F.R. § 190.211(e) states: "Upon request by respondent, and whenever practicable, the material in the case file pertinent to the issues to be determined is provided to the respondent 30 days before the hearing. The respondent may respond to or rebut this material at the hearing."

It is fallacious to suggest that the Order somehow reflected new allegations not set forth in the record, since all of the allegations and findings came directly from the Violation Report, which relied in turn upon Enbridge's own OQ Plan. The Violation Report and the Notice simply alleged that certain elements were missing from Petitioner's OQ Plan. Since Enbridge chose to rely upon the written record rather than to exercise its right to a hearing or to obtain a copy of the case file, it is specious to suggest that the company was somehow unduly surprised when the Order relied upon that same record as the basis for its Findings of Violation.

Accordingly, upon review of the entire record, including the Petition, I find that PHMSA did not violate Petitioner's right of due process by making findings of violation in the Order that were based upon evidence contained in the Violation Report and Petitioner's own records but that were not fully described in the Notice.

**II. PHMSA Met its Burden of Proving the Findings of Violation in the Order.**

The Petition also challenges the Findings of Violation in Items 1A and 1B of the Order on the ground that PHMSA failed to meet its burden of proof. Item 1A found that Enbridge violated 49 C.F.R. § 195.505(a) by failing to have and follow an OQ program that identified each covered task performed on the company's hazardous liquid pipeline system. Item 1B found that Enbridge violated 49 C.F.R. § 192.805(a) by failing to have and follow an OQ program that identified each covered task performed on the company's natural gas pipeline system.

As for Item 1A, Petitioner argues that PHMSA failed to meet its burden of proof because it failed to rebut evidence submitted by Petitioner in its Response. Enbridge argues that in its Response, it "submitted clear evidence showing that hazardous liquid systems are addressed in Enbridge's qualification program; and that Enbridge had revised its qualification program on numerous occasions to address hazardous liquid systems and to make other necessary changes."[11] The Petition highlights certain language in the OQ Plan referring to liquid pipelines and covered tasks that was in effect at the time of the inspection. None of these references or tasks, however, adds new information or additional evidence to the record, as these documents were considered as part of the record prior to issuance of the Order.

The key document here is the covered tasks list. The Order found that Enbridge's OQ Plan only identified two covered tasks specifically applicable to its hazardous liquid facilities.[12] Petitioner has still not produced any evidence or information refuting this finding. As PHMSA stated in the Order, Petitioner's other *references* to hazardous liquid pipelines in its OQ Plan are inconsequential in determining whether Petitioner properly identified all covered tasks for such facilities; only the covered tasks list itself is probative on that issue.

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[11] Petition, at 5.

[12] The Order states, " . . . I find Respondent had included some references to its hazardous liquid pipelines and the applicable regulations. However, with respect to the requirement that Respondent identify each covered task performed on its hazardous liquid pipelines, I find that Respondent had identified only two specific covered tasks that pertained to hazardous liquid pipelines."

I have reviewed the record for Item 1A and affirm the finding that Petitioner's list of 65 covered tasks ("Evaluation Requirements for Covered Tasks")[13] in effect at the time of inspection specifically speaks in terms of natural gas operations and does not mention liquid products, except for two tasks that are identified as applying to hazardous liquid products.

Accordingly, upon review of all of the evidence and the Petition, I deny Petitioner's request for reconsideration of Item 1A on two grounds. First, Petitioner has failed to present any valid reason why the additional facts or arguments raised in the Petition were not presented prior to issuance of the Order, as required under 49 C.F.R. § 190.215(a). Second, I find that PHMSA has sustained its burden of proving that Petitioner violated 49 C.F.R. § 195.505(a) by failing to identify each covered task on its hazardous liquid pipeline facilities.

As for Item 1B, Petitioner challenges the finding that Enbridge's covered tasks list for its natural gas pipeline facilities failed to include certain covered tasks such as start-up, shut-down, compressor station inspection, testing of remote control shut down devices, remediation of internal corrosion, maintenance and repair of relief valves, etc. Upon review of the record, I find that all of the missing tasks listed in the Order qualify as "covered tasks," as defined in 49 C.F.R. § 192.801.[14]

Petitioner argues, however, that its covered tasks list complied with § 192.801 because it comported with "the original intent of the negotiated rulemaking committee that drafted the rules at issue in this matter."[15] On the contrary, I believe that the meaning of § 192.801 is clear from the plain language of the regulation; therefore, no consideration of the intent of the negotiated rulemaking committee is necessary or relevant.[16] Petitioner's argument is both untimely and unsupported. First, this is an argument that Petitioner could have easily made in its Response or at a hearing but chose not to do so; therefore, there is not need to consider it here. Furthermore,

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[13] Although Petitioner's OQ Plan contains various lists related to operator knowledge and that contain references to "LPG" and 49 C.F.R. Part 195, the list entitled "Evaluation Requirements for Covered Tasks" is identified as the "covered tasks" list by the following language: "Covered tasks below are geared towards natural gas operations. In cases when individuals are qualifying on liquid pipeline systems, natural gas specified evaluations such as K1 should be substituted with liquid specific evaluations such as K1A." Furthermore, it is noteworthy that all but two (63 total) covered tasks contain "K1" evaluations and specific mention of natural gas, yet only the two covered tasks mentioned in the Order and this Decision related to "LPG" contain "K1A" evaluations. Therefore, by Petitioner's own admission, the 63 listed covered tasks with no "K1A" evaluations or references to "LPG" apply only to natural gas facilities.

[14] 49 C.F.R. § 192.801 defines a "covered task" as "an activity, identified by the operator, that: (1) Is performed on a pipeline facility; (2) Is an operations or maintenance task; (3) Is performed as a requirement of this part; and (4) Affects the operation or integrity of a pipeline."

[15] Petition, at 7.

[16] *Solis v. Summit Contractors, Inc.*, 558 F.3d 815, 823 (8th Cir. 2009) ("In examining the meaning of § 1910.12(a), our inquiry begins with the regulation's plain language. We look to see 'whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.'").

Petitioner presented no evidence or discussion as to how the intent of the negotiated rulemaking committee supports its development of a covered tasks list.

Finally, Petitioner argues that various tasks were not included in its covered tasks list because the company had conducted an in-depth analysis of such tasks and determined that they were not "covered tasks," based upon its interpretation of 49 C.F.R. § 192.801.[17] The Order identified a number of covered tasks that were not identified as such by Enbridge, including:

- Isolation of a gas compressor unit
- Compressor station inspection and testing of remote control shutdown devices
- Start-up
- Shutdown
- Operation of a turbine-driven gas compressor unit
- Maintenance of rectifiers
- Electrical inspection of bare pipe
- Remediation of internal controls
- Maintenance and repair of relief valves, and
- Preparation of lines for ILI runs.

The Order found that the documentation provided by Enbridge to justify its "non-covered tasks list" did not address the issue of *why* these particular tasks were not considered "covered." Likewise, the Petition fails to present any evidence or explanation as to why these tasks were not included.

Accordingly, upon review of the record and the Petition, I deny Petitioner's request for reconsideration of Item 1B on two grounds. First, Petitioner has failed to present any valid reason why the additional facts or arguments raised in the Petition were not presented prior to issuance of the Order, as required under 49 C.F.R. § 190.215(a). Second, I find that PHMSA sustained its burden of proving that Petitioner violated 49 C.F.R. § 192.805(a) by failing to identify all covered tasks performed on its natural gas pipeline facilities.

## III. The Penalty Imposed in the Order Is Insufficiently Supported by the Record and Should Be Reduced.

The Petition challenges the civil penalty imposed in the Order on the ground that PHMSA failed to meet its "burden of proof" in assessing the penalty. Petitioner makes three distinct arguments for elimination or reduction of the penalty. First, Petitioner contends that there is no evidence in the record indicating how the penalty was "calculated," that the Order contains only a brief discussion of "the facts related to the statutory and regulatory factors to be considered in the assessment of the penalty," and that such discussion is both incomplete and inaccurate.[18] Second, it contends that the Order failed to address any of the information submitted by Enbridge or to make any adjustment in the penalty based upon such evidence. Third, it contends that

[17] Petition, at 5, 6.

[18] Petition, at 8-11.

PHMSA has been inconsistent in its assessment of civil penalties in cases involving violations of 49 C.F.R. §§ 192.805 and 195.505 and that the agency is legally required "to provide an adequate explanation before treating similarly situated parties differently."[19]

As for the first argument regarding the failure to show how the penalty was calculated, both 49 U.S.C. § 60122 and 49 C.F.R. § 190.225 set forth the criteria by which PHMSA must determine the amount of a civil penalty.[20] In this case, the Violation Report expressly listed and considered these factors in proposing the $100,000 penalty.[21] Moreover, the Order made specific findings of fact that served as the basis for assessing the penalty and elaborated on the statutory criteria that had been discussed in the Violation Report.

Specifically, the Order found that Enbridge had failed to identify all but two specific covered tasks on its hazardous liquid pipeline system and had omitted "many" of the covered tasks being performed on its natural gas system. It noted that the OQ regulations were first promulgated in 1999, became effective in April 2001, and had to be implemented by all operators not later than October 2002, thus giving Enbridge ample time to develop a covered tasks list that met regulatory requirements.

The Order also emphasized the gravity of the offense, noting that Enbridge had a large workforce, with 179 employees and approximately 50 contractor personnel. It stated that the OQ regulations are designed to ensure that all operators have a qualified work force "to reduce the probability and consequence of pipeline incidents caused by human error." A key component of the program is to ensure that operators can "identify each activity that could affect the safe operation and integrity of its pipelines." In addition, operators must "ensure through evaluation that individuals performing such covered tasks can perform them safely and recognize and react to abnormal operating conditions." None of this is possible if an operator fails to take the first step of properly identifying all covered tasks. Having considered all of these factors, the Order concluded that the combination of violations involving two separate pipeline systems "constituted a significant safety risk, considering their potential to affect the safe operation and

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[19] Petition, at 11. Petitioner cites two cases as legal support for this proposition. *Burlington Northern and Santa Fe Ry. Co. v. Surface Transp. Bd*., 403 F.3d 771, 776-777 (D.C. Cir. 2005); *Willis Shaw Frozen Express, Inc. v. I. C. C.*, 587 F.2d 1333, 1338 (D.C. Cir. 1978). Both cases, however, are distinguishable from the instant case. First, those cases involve administrative proceedings that are substantially different than an enforcement case, namely, a ratemaking case and the issuance of a certificate of public convenience. In both, the complainants were private businesses seeking to maintain competitive parity with one or more of its competitors. In *Willis Shaw*, the court upheld the agency's administrative decision, stating that "[w]here the issue is whether an agency's action is arbitrary, capricious, and an abuse of discretion, the scope of review is narrow, and the court may not substitute its judgment for that of the agency."

[20] 49 U.S.C. § 60122 and 49 C.F.R. § 190.225 require that, in determining the amount of the civil penalty, PHMSA consider the following criteria: the nature, circumstances, and gravity of the violation, including adverse impact on the environment; the degree of Respondent's culpability; the history of 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 Respondent in attempting to comply with the pipeline safety regulations. In addition, PHMSA may consider the economic benefit gained from the violation and such other matters as justice may require.

[21] Violation Report, at 6.

integrity of Respondent's pipelines, the number of workers concerned, and the long period of noncompliance."[22]

Therefore, I reject Petitioner's argument that the record somehow fails to show that the agency considered the statutory criteria in determining the penalty. Both the Violation Report and the Order show that the agency carefully considered the facts and circumstances of this particular case in terms of the criteria set forth in the statute.

As for the second argument that the Order failed to take into consideration any of the information submitted by Enbridge or to make any adjustment in the penalty based upon such evidence, I believe this statement is partially correct. Item 1A of the Notice alleged that Enbridge's OQ Plan failed to address *any* covered tasks on its hazardous liquid facilities, yet the Order acknowledged that the company had indeed identified *two* specific tasks that were applicable to such system. Item 1A also alleged that Enbridge had not revised its OQ Plan since the company had acquired its hazardous liquid facilities, yet the Order acknowledged that revisions had indeed been made but that the covered tasks list was still inadequate. Therefore, the Order *did* address and take into consideration the information submitted by Petitioner in making its Findings of Violation.

On the other hand, Petitioner is correct that the evidence submitted by Enbridge and reflected in the Order did not result in any mitigation of the penalty. In fact, the Order expressly rejected any reduction in the penalty, stating:

> Although Respondent contested the allegation of violation, Respondent did not present any information specific to mitigating the proposed civil penalty in accordance with the assessment criteria. Therefore, Respondent has not justified a reduction in the civil penalties.[23]

Upon full review of the evidence, I still believe that PHMSA was justified in declining to reduce the proposed penalty based upon the evidence supplied by Enbridge and acknowledged in the Findings of Violation. The fact that the company had only specified two covered tasks on its entire hazardous liquid pipeline system and that it had made various revisions in its OQ Plan unrelated to its covered tasks list does not warrant any reduction in the proposed penalty.

As for the third argument that that PHMSA has been inconsistent in its assessment of civil penalties in cases involving the same violations, I do not agree that the record shows any inconsistency or arbitrariness in the assessment of the $100,000 penalty. On the one hand, Petitioner cites a Final Order issued in May 2006 against a small company operating a 10-mile jet fuel pipeline in Puerto Rico. In that case, *In the Matter of Pipelines of Puerto Rico,*[24] PHMSA found that the operator had violated various provisions of § 195.505 and assessed a civil penalty of $12,000. I have reviewed and compared the facts and circumstances of these two

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[22] Order, at 4, 5.

[23] Id.

[24] CPF No. 2-2005-6022 (May 11, 2006), 2006 WL 3825352 (D.O.T.).

cases, including the penalty assessment, and have concluded that there are significant differences between them that support a substantial difference in the amount of the penalties assessed, including the fact that Pipelines of Puerto Rico is a small operator that operates one short hazardous liquid pipeline, only 10 miles in length, whereas Enbridge is a major pipeline company operating two large systems involving 1,539 miles of hazardous liquid and natural gas pipelines, with approximately 179 employees and 50 contract personnel.

The process by which PHMSA sets administrative penalties is not formulaic and depends upon the unique facts and circumstances of each case. PHMSA is not required by the Federal Pipeline Safety Laws to produce a precise accounting of how penalties are determined, nor has Petitioner presented any information or relevant legal authority to support its assertion that the penalty calculation process used in this case was somehow inadequate.

On the other hand, I have reviewed the record in this case and cannot find a sufficient factual or legal basis for the assessment of the $100,000 penalty. While I believe there are valid reasons for the wide disparity in penalties between these two specific cases, such reasons are not readily discernible from the record or other agency documents. I have therefore decided to reconsider the penalty in light of all of the evidence in the record, the statutory penalty criteria, and the penalties assessed for similar violations in other cases.

Based upon such review, I have determined that the total penalty in this case is excessive and should be reduced to $35,000 for Item 1A of the Notice, involving Enbridge's hazardous liquid pipeline system, and $35,000 for Item 1B, involving the company's natural gas pipeline system. This reduced penalty is based, *inter alia,* on Petitioner's compliance history, the gravity and duration of the separate violations for the company's hazardous liquid and natural gas pipeline systems, the consistency of the penalty with other penalties assessed for similar violations, and the ability of the operator to pay.

***Conclusion***

For the reasons set forth above, I deny Petitioner's request for reconsideration of the Findings of Violation in the Order. Such request is denied, first, on the ground that Petitioner failed to meet the procedural requirements of 49 C.F.R. § 190.215. Second, it is denied on the ground that PHMSA did not violate Petitioner's due process rights and that the agency met its burden of proving the allegations set forth in the Notice and the Findings of Violation in the Order.

Notwithstanding the above, I grant Petitioner's request for reconsideration of the penalty imposed in the Order, despite Petitioner's failure of to meet the procedural requirements of 49 C.F.R. § 190.215. I find that there is insufficient evidence in the record to support the penalty amount assessed in this case. Accordingly, having considered the arguments raised in the Petition and reconsidered all of the evidence, I have reviewed and reduced the total civil penalty in this matter to $70,000 for the violations of 49 C.F.R. §§ 192.805(a) and 195.505(a) set forth in the Order. Finally, in light of this penalty reduction and Petitioner's failure to present any compelling reason to justify the need for further proceedings in this case, I deny Petitioner's request for rehearing.

Payment of the civil penalty must be made within 20 days of service. 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. 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, OK 73125; (405) 954-8893.

Failure to pay the 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 the 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 United States District Court.

This decision on reconsideration is the final administrative action in this proceeding.

_____ _____

Jeffrey D. Wiese
Associate Administrator
for Pipeline Safety

Date Issued