May 21, 2004

The Honorable John D. Dingell
Ranking Member, Committee on Energy and Commerce
U.S. House of Representatives
Washington, DC  20515

Subject: Pipeline safety – DOT RSPA enforcement activities

Dear Congressman Dingell:

The Pipeline Safety Trust (PST) appreciates very much your efforts to increase the safety of our Nation’s gas and hazardous liquid pipelines. The PST was established in 2003 as a nonprofit organization dedicated to improved fuel transportation safety. The PST strongly believes that safe pipeline operation depends on strict enforcement of pipeline safety regulations, particularly in cases where the failures are numerous and severe.

Recently, in your letter to Samuel Bonasso, Deputy Administrator of Research and Special Programs Administration (RSPA) dated February 20, 2004, you inquired about enforcement activities related to safety violations associated with two fatal pipeline accidents. The PST has reviewed your letter and Mr. Bonasso’s response to you in a letter dated March 17, 2004.

We find some of Mr. Bonasso’s statements misleading and we disagree with RSPA’s handling of the administrative proceedings following its proposed civil penalty related to the Olympic Pipeline tragedy in Bellingham, Washington. Although we believe that the Office of Pipeline Safety (OPS) has made significant progress in its rulemaking, the agency continues to lag in its enforcement of those rules.

As you have pointed out, OPS has a long history of weak enforcement of pipeline safety regulations, the purpose of which is to protect the public, communities and the environment. Unfortunately, we find nothing in Mr. Bonasso’s letter that gives us reason to hope that RSPA and OPS intend to use penalties as an enforcement tool to turn that record around.

Following are some of our specific comments and observations about Mr. Bonasso’s letter to you.

Item #3 excerpt from Congressman Dingell’s letter

“Is the administrative procedure referred to above still pending? If so, does OPS intend to pursue the full amount of the penalty announced on June 2, 2000. If not, why not?”

Mr. Bonasso: [He describes DOJ/EPA criminal and civil penalties totaling $36 million and injunctive relief estimated at $75 million] “In light of the government’s enforcement
achievements in the Bellingham matter…it is unlikely that pursuing the last increment of an additional $3 million penalty would appreciably increase the deterrent effect of the enforcement action.”

Mr. Bonasso’s statement is at odds with his agency’s position when DOT announced the civil penalty one year after the accident. At that time, DOT Secretary Rodney Slater and RSPA Administrator Kelly Coyner appropriately described the reason for the penalty and its purpose:

"Tragic events like this pipeline failure must never happen again," U.S. Transportation Secretary Rodney E. Slater said. "This civil penalty is one of a series of actions we have and are taking to help protect the people and environment along this pipeline – we strive continuously to ensure the highest level of safety because it is our highest priority."

The penalty action includes fines against Olympic for safety violations identified during OPS’ investigation following the failure, which resulted in the deaths of three young people. Each of the penalties proposed carries the maximum fine allowed under current pipeline safety law.

"Today we are seeking the largest civil penalty in the history of our pipeline safety program," said RSPA Administrator Kelley S. Coyner, head of the agency that oversees the Office of Pipeline Safety. "In cases like this, where a pipeline operator fails to take appropriate actions to ensure safety, we will penalize the company to the fullest extent possible to ensure full compliance with federal safety rules." [Emphasis added.]

The DOJ/EPA enforcement efforts and the proposed RSPA/OPS civil penalty are complimentary enforcement tools. It is clear from the record that while both efforts are responding to the same incident, each responds to different violations of law. Together they provide penalties “to the fullest extent possible to ensure full compliance with federal safety rules.” The RSPA/OPS penalty responds to violations that caused the accident, while the DOJ/EPA penalties respond to the end result of the accident. Although Olympic and Equilon were required to pay fines and make improvements to their pipeline systems, the companies have not been punished for the violations that caused the accident. To date, no-one has been held accountable for causing the accident in the first place.

By way of explanation, in the DOJ proceedings, four of the defendants were convicted of violating 49 C.F.R. § 195.403, requiring that persons who operate pipelines be trained to do so. Their plea agreements expressly noted that those training failures were not the cause of the accident. The only other allegations settled by DOJ pertained to violations of water pollution laws. Therefore, the DOJ proceedings did not punish the defendants for the improper pipeline management behavior that caused the accident.

Furthermore, the plea agreements with Olympic and Equilon noted that they settled only the criminal allegations and did not limit the right of the United
States to take civil or administrative action against the companies. Hence, the DOJ proceedings do not prevent OPS from taking further administrative action.

The OPS Notice of Probable Violation made the following findings that were not resolved by the DOJ proceedings and which, according to the NTSB, did contribute to the accident: (1) 49 C.F.R. § 195.442 – damage prevention program; (2) 49 C.F.R. § 195.401 – correction of conditions that adversely affect the safe operation of a pipeline; and (3) 49 C.F.R. § 195.262 – testing pumps under conditions approximating actual operating conditions. To date, no sanction has been assessed for these very significant failures.

Two additional failures should be noted. First, OPS found that the company failed to maintain adequate records (49 C.F.R. § 195.404), because when OPS sought records of the pump discharge pressure at the time of the accident, Olympic explained that the recording chart had run out of paper the day before the accident. Second, according to the NTSB, Olympic employees were not tested for alcohol as required by DOT regulations because Olympic failed to inform the medical personnel that such tests were required. It is indeed disheartening to see OPS waive enforcement action when such basic tasks were performed incorrectly.

OPS is the agency that's supposed to be the primary regulator of pipelines. The public looks to OPS for assurances that communities are safeguarded against potential hazards of pipelines. Based on this experience it seems clear that the DOJ proceeding would probably never have occurred, were it not for the Olympic Pipeline spill affecting a navigable waterway and the resulting participation of EPA.

The Shell settlement. We now know that the administrative procedure against Equilon/Shell is no longer pending as a result of a settlement agreement with RSPA (dated 12/31/2003, CPF No. 5-2000-5013). What is remarkable about this agreement is the degree of difference between DOT’s stated position on this incident when it announced the civil penalty in June 2000, and the agency’s agreed position when it signed the agreement (excerpt below):

“Since the Notice [of Probable Violation] was issued, OPS has determined that significant questions exist whether Equilon Pipeline Company LLC (now Shell Pipeline Company LP) participated in the operational decisions and activities at the relevant facilities that gave rise to the alleged violations.

Respondent Shell Pipeline Company LP specifically denies that it is an appropriate respondent and that it and/or Equilon Pipeline Company LLC was the owner or operator of Olympic Pipeline within the meaning of 49 CFR Part 195. Nothing herein shall be construed as an admission or finding contrary to such denial.

Respondent Shell Pipeline Company LP further does not admit that it and/or Equilon Pipeline Company LLC committed or contributed to the commission of any of the alleged violations or that the facts are as alleged by OPS in the Notice. Payment of the amount provided in this Order is not an admission of any fact, fault or liability with regard to any matters alleged in the Notice.”
Despite the fact that for years prior to and at least up until the Notice of Probable Violation was issued, Equilon had always been the respondent and operator of record, RSPA/OPS is now agreeing that Equilon might not have been the operator. And given the success of the DOJ/EPA prosecution, the fact that RSPA/OPS would sign an agreement wherein Equilon/Shell admit to no violations makes very little sense. It makes even less sense to the community that suffered the costs of these tragic violations.

Mr. Bonasso: “Within a year of the respective accidents, RSPA had issued Notices of Probable Violation (NOPV) indicating violations that were believed to have occurred and proposing penalty amounts. After receiving an NOPV, a respondent may respond in writing or request a hearing or both.” And, “In May of 2002, before RSPA could schedule a hearing on the NOPV, the United States Attorney’s office asked RSPA to defer administrative action pending resolution of the criminal case.”

From our reading of events and the evidence available to the PST to date, OPS and RSPA did not attempt to pursue the assessment or collection of the civil penalty it announced on June 2, 2000. OPS is authorized to move swiftly after filing a Notice of Probable Violation. Instead, as the U.S. Attorney noted in a February, 2002, memorandum to U.S. District Court in Seattle,

“...Equilon appears to have been exempted from the time periods that are specified in these regulations. Indeed, under the regulations, Equilon had 30 days in which to request a hearing in response to the June 2, 2000, Notice of Probable Violation. Equilon filed its Request for Hearing on October 3, 2001, more than 16 months later. Furthermore, the regulations provide that the failure to timely request a hearing constitutes a waiver of the right to contest the Notice of Probably Violations, allowing OPS to issue a final order. 49 CFR § 190 209(c ). However, Equilon appears to be exempt from this provision as well, since OPS has refrained from invoking this regulation. Suffice it to say that based on this history, the Court simply has no way of knowing when OPS might act on Equilon’s Request for Hearing.”

Given the U.S. Attorney’s observations, Mr. Bonasso’s statement above, “In May of 2002, before RSPA could schedule a hearing on the NOPV...” seems disingenuous at best and is certainly misleading.

Mr. Bonasso: “RSPA also worked cooperatively with the Justice Department and the Environmental Protection Agency to prosecute the criminal and civil enforcement cases. The State of Washington also participated in these efforts.” “The results of the coordinated efforts of these agencies are nothing short of extraordinary.”

We agree that the United States Attorney’s Office vigorously pursued this case with extraordinary results. However, it’s not clear at all from the record that RSPA or OPS can claim to have been a significant part of those efforts. The June 19, 2003, press release from the Western District of Washington U.S. Attorney’s Office does not acknowledge OPS or RSPA as having assisted in the case:
“This case was investigated by Special Agents with United States Environmental Protection Agency and Department of Transportation, Inspector General's Office, along with assistance from the Federal Bureau of Investigation, Washington Department ofEcology, and Bellingham Police Department. The case was prosecuted by Assistant United States Attorneys Helen J. Brunner and Lawrence Lincoln, and Special Assistant United States Attorney James D. Oesterle, Regional Criminal Enforcement Counsel with the EPA.”

While it could have been a mere oversight for DOJ to omit giving credit to OPS and RSPA in its press release, that explanation seems less plausible when we read the DOJ’s withering criticism of OPS and RSPA in its briefs filed in the criminal case. We would like to see documentation of exactly what RSPA did to “work cooperatively” with DOJ and EPA.

**Item #3 excerpt from Congressman Dingell’s letter:** Did OPS consider referring collection of this penalty [the $3.05 million RSPA civil penalty] to the Department of Justice?

*Mr. Bonasso failed to respond to this question.*

**Item #4 excerpt from Congressman Dingell’s letter**

*In your Feb. 20, 2004 letter, you asked Mr. Bonasso to detail the $9 million dollars in fines referred to by Ms. Ellen Engleman of RSPA in testimony to the Subcommittee on Energy and Air Quality on March 19, 2002. The exact statement from her written testimony was: "We also strengthened our enforcement efforts by making better use of all of our tools, including fines. ... To date [March 19, 2002], we proposed over $9 million in civil penalties in the past year and a half."

In his letter of response, Mr. Bonasso acknowledged your request for a detailed list but failed to provide one. He corrected the statement made by Ms. Engleman and said that there had been two instances where a fine was double counted and so that in fact, there had been $8,969,700 in proposed civil penalties for the period from Jan. 1, 2000 to March 6, 2002.

You may notice that the time period Mr. Bonasso used (Jan. 1, 2000 to March 6, 2002) is considerably longer than the time period that Ms. Engleman testified about. Her statement about $9 million dollars in fines pertained to "the past year and a half." Counting backwards for "the past year and a half" from the date of her testimony, March 19, 2002, would result in the period from September 19, 2000 to March 19, 2002.

This is a critical distinction because, as it turns out, the Bellingham fine of $3,050,000 was assessed on June 2, 2000. In other words, the Bellingham fine was included in the 26 month period referenced by Mr. Bonasso but would not have been included in the 18 month period referenced by Ms. Engleman in her Congressional testimony. Subtracting the Bellingham fine from the amount that Mr. Bonasso said was assessed since Jan. 1,
2000 would leave no more than $5,919,700 that could have been assessed during "the past year and a half" to which Ms. Engleman testified.

In sum, it appears that Ms. Engleman told Congress that RSPA had assessed 50% more in fines in the past year and a half than RSPA had actually assessed over that time period. She rounded up $5.9 million to $9 million.

In view of the fact that agency testimony before Congress is sworn, creates a written record, and is not "off the cuff," this error is substantial. We wonder if, at the least, this inaccuracy does not reflect OPS’s failure to regard assessment and collection of fines as an important part of its enforcement authority. We hope that you will insist that Mr. Bonasso provide the detailed list of fines that you originally requested.

The Pipeline Safety Trust believes that this fine is an important enforcement tool and it should stand alone from the other corrective and punitive actions because it responds to violations that the other penalties do not – violations that were found to have contributed to the tragic losses in Bellingham. Strict enforcement of the proposed penalty sends an important message to pipeline operators and to the public that the Office of Pipeline Safety is willing to treat such egregious violations seriously.

As the fifth anniversary of the Olympic Pipeline disaster approaches, we are proud of how the Bellingham community and other communities nationwide rallied to the cause of increased safety and a more accountable regulatory system, and we are grateful for your leadership in those efforts. Many positive changes ensued. Unfortunately we are left with significant unfinished business that is vitally important to the Bellingham community and is, I fear, a symptom of an agency that remains somewhat captured by its regulated community.

Sincerely,

Marlene Robinson
President, Board of Directors