

September 28, 2010

**Notice of Contest, Response of Operator In Opposition to
Notice of Probable Violation – Proposed Civil Penalty,
Request for Dismissal, and Request for Hearing**

R.M. Seeley
Director, Southwest Region
Pipeline and Hazardous Materials Safety Administration
8701 South Gessner
Suite 1110
Houston, Texas 77074



Re: CPF 4-2010-5015

Dear Director Seeley:

On behalf of named respondent(s) ("TEPPCO") please accept this letter as a response to your August 27, 2010 Notice of Probable Violation – Proposed Civil Penalty, CPF 4-2010-5015 ("NOPV"). A copy of the NOPV is attached hereto as Exhibit A.

Pursuant to 49 C.F.R. § 190.209(a)(3) and 190.211, named respondent(s), TEPPCO, located at 1100 Louisiana Street, Houston, Texas 77002, requests a hearing before the agency to determine whether TEPPCO has failed to meet its obligations under applicable law, and if the presiding official determines that TEPPCO has failed to meet its obligations, what penalty, if any, should be assessed. TEPPCO will be represented by counsel at the hearing and may assert its right to call and cross-examine witnesses and present evidence. TEPPCO requests this hearing be held in Houston, Texas at a mutually agreeable date and time. TEPPCO requests at least sixty (60) days from the date of this notice to afford it the opportunity to fully prepare for the hearing. TEPPCO further requests that all material in the Agency's file pursuant to 49 C.F.R. § 190.211(e) be provided to TEPPCO 30 working days before any scheduled hearing. TEPPCO reserves the right to submit additional written material at or following the informal hearing to the presiding official, including a brief on all the issues related to the citation, pursuant to 49 C.F.R. § 190.211(i).

Additionally, and prior to the scheduling of the hearing, TEPPCO requests an informal settlement conference to discuss this matter and is agreeable to holding such a conference at a mutually agreeable time and location in order to narrow and/or eliminate potential issues to be raised at hearing. Further, this request shall not be deemed as a waiver of any other relief or due process to which TEPPCO may be entitled.

TEPPCO generally and specifically denies all allegations of violation in the NOPV or otherwise. TEPPCO further incorporates its July 22, 2010 response to PHMSA's "Notice of Probable Violation," CPF 4-2010-5011, by reference. See TEPPCO's response to CPF 4-

2010-5011 attached hereto as Exhibit B. TEPPCO reserves the right to challenge any issue of law or fact raised by the NOPV, including, but not limited to the following:

1. The NOPV did not contain a definite statement of the probable violations alleged against respondent or an adequate statement of the respondent's rights.

2. TEPPCO did not violate 49 C.F.R. § 195.402(a) as alleged in the first probable violation of the NOPV. In order to show that TEPPCO violated §195.402(a), as alleged, PHMSA must show that TEPPCO did not follow a provision of its own manual of procedures¹. In the first probable violation, PHMSA alleges TEPPCO did not comply with a specific procedure in TEPPCO's job planning process;; however, PHMSA only partially states the applicable procedure. When TEPPCO's job planning process procedure is stated correctly and in full, no such violation exists.

PHMSA's first probable violation alleges that TEPPCO violated its own manual of written procedures by "not follow[ing] its Job Planning Process procedure, *'to prevent accidents, and injuries and losses during non-routine work through a detailed and effective job planning process'* when it failed to ensure that Tank 1303 was completely free of hazardous vapors." See Ex. A, NOPV at 2 (emphasis added). This allegation is, however, flawed because PHMSA incompletely and incorrectly quoted TEPPCO's Job Planning Process, and thus changes the meaning of, the relevant TEPPCO procedure. PHMSA derives the partial internal quotation above (in italics) from EPCO Procedure 6.2, Job Planning Process. See EPCO Procedure 6.2, attached hereto as Exhibit C. When the partially quoted procedure is cited in full, it reads, "The Company requires all personnel to have the tools and resources to prevent accidents, injuries and losses during non-routine work through a detailed and effective job planning process." See Ex. C, EPCO Procedure 6.2. Reading it as a whole, TEPPCO's procedure clearly does not require it to "prevent" accidents from happening, but instead requires TEPPCO **to provide the tools and resources** necessary for the prevention of accidents.

Likewise, settled PHMSA decisions have previously rejected the imposition of no-fault liability, which is precisely what PHMSA seeks to do in these probable violations. Like the plain language of TEPPCO's procedure, applicable law does not require TEPPCO to "ensure" the prevention of accidents. PHMSA's interpretation of 49 C.F.R. §195.422 expressly rejects the notion that an operator is a guarantor of safety or that liability should be imposed without fault. Instead, PHMSA interprets the regulation to obligate the operator to take all practical steps to see that work is conducted in a safe manner. Accordingly, TEPPCO's procedures, when read in full and alongside the applicable agency interpretation, do not require TEPPCO to guarantee Tank 1303 was vapor free, but rather to adequately provide the tools and resources necessary to render Tank 1303 vapor free. TEPPCO complied with this obligation and should not be faulted for its contractor's failure to follow the contractor's job plans and procedures.

¹ TEPPCO's procedures were revised and approved by PHMSA prior to the Tank 1303 incident. See PHMSA Letter dated February 5, 2009, attached hereto as Exhibit D.

In accordance with its job planning procedures and accepted industry practices to identify and use qualified contractors, TEPPCO used the service ISNetworld, an industry leading "Contractor and Supplier Safety Management" service, to vet Veolia, C&C Welding, Inc., and O&M Construction Inc. See ISN website, at <http://www.isnetworld.com> (retrieved on Sept. 20, 2010) attached hereto as Exhibit E. As evidenced by over 100 client-companies, including forty midstream petrochemical a/k/a pipeline companies and a host of other upstream and downstream petrochemical companies throughout the oil and gas industry, all of which utilize ISNetworld's services, it is clear that utilizing ISNetworld's service for this purpose and in this manner is an industry accepted best practice. See ISN website, at <http://www.isnetworld.com/operatorlist.asp> (retrieved Sept. 20, 2010) attached hereto as Exhibit F. Accordingly, ISNetworld appropriately holds itself out as an industry leading service for connecting operators with safe and qualified contractors to perform work with a high level of expertise. ISNetworld describes its service in this way: "ISNetworld collects contractor information, verifies that it meets internal and regulatory requirements, and then connects organizations with these safe, reliable third-party resources." See ISN website, at <http://www.isnetworld.com/net/General/TeamPages/SubContractorMgtNew.aspx> (retrieved Sept. 20, 2010) attached hereto as Exhibit G. Specifically, ISNetworld holds itself out as a vetting service and expert in the pipeline industry. "Midstream operators - companies that transport, store, distribute, liquid and natural gas products . . . use ISN to efficiently manage their contractors/suppliers in the face of increasingly complex and ever-changing regulatory, insurance, and quality control standards." See ISN website, at <http://www.isnetworld.com/net/General/TeamPages/MidstreamNew.aspx> (retrieved Sept. 20, 2010) attached hereto as Exhibit H. Furthermore, EPCO Holdings, Inc. ("EPCO") on behalf of TEPPCO contracts with ISNetworld to serve as EPCO/TEPPCO's primary contractor information management system provider. See EPCO Holdings, Inc. Letters attached hereto as Exhibit I; see also ISN print outs verifying Veolia, C&C, and O&M qualifications attached hereto as Exhibit J. As a result of this action, all contractors performing services for EPCO/TEPPCO must be a subscriber to ISNetworld and its online compliance recordkeeping system. See *id.* Thus, by utilizing ISNetworld in this manner, to vet and retain Veolia, C&C and O&M in the Tank 1303 project, TEPPCO took the steps appropriate to provide the tools and resources necessary to prevent accidents.

Here, TEPPCO complied with its obligation to provide personnel with the necessary tools and resources to conduct tank cleaning work in a safe manner and render Tank 1303 vapor free when it retained Veolia Environmental Services ("Veolia") as the tank cleaning contractor for the project. TEPPCO recognizes the desirability of contracting with companies who possess a specialized expertise in cleaning tanks and in ensuring and working in safe, vapor free environments. Veolia represents that it is a multi-national company recognized internationally for its expertise in the type of work it was contracted to perform on Tank 1303. As Veolia's website says:

Veolia Environmental Services - Industrial Services (VES-IS) offers proven experience in environmental, industrial cleaning and maintenance solutions. We are committed to safety excellence where 'Our Values Drive our Words and our Actions.'

See Veolia Environmental Services website, at <http://veoliaes-is.com/home> (retrieved on September 15, 2010) attached hereto as Exhibit K. More specifically, Veolia's expertise is manifested in its extensive "Veolia ES Industrial Services, Inc. (VESIS) Tank Cleaning Standards," of which TEPPCO was provided prior to job planning with Veolia. See VESIS Tank Cleaning Standards attached hereto as Exhibit L. Among these standards, and known to TEPPCO, was standard 6.0, "Vapor/Gas Free Tank Certification." See *id.* Veolia's standard states, "**Once the tank has been cleaned, the atmosphere inside the tank must be tested for oxygen, flammable vapors, and other toxics Tests shall also be made of steel roof pontoon chambers with the covers removed . . .**" See *id.* (emphasis added). These Veolia standards include but are not limited to the following:

- 1.0 INTRODUCTION: "The objective of this document is to establish procedures consistent with industry best practices intended to satisfy minimum requirements for the safe preparation, entry, and cleaning of above ground atmospheric storage tanks."
- 2.2 TANK HISTORY REVIEW: "Prior to cleaning any tank, The Tank Cleaning Checklist will be completed."
- 3.0 PRODUCT REMOVAL; 3.1 COMPLETE JSA: "Prior to performing any work and at the start of each new shift, the Tank Cleaning JSA will be completed and signed by all crew members."
- 3.2 EMPTYING THE TANK: "The tank must first be emptied of all recoverable product . . ."
- 3.4 CONTROL OF IGNITION SOURCES: "Prior to performing any operations that may release vapors from the tank (tank entry . . .) ensure the following measures are taken: . . . continuously monitor work area to ensure <10% LEL levels are maintained in the work area."
- 3.5 RESIDUAL PRODUCT REMOVAL: "Removal of residual product should be completed without manned-entry . . ."
- 4.1 VAPOR/GAS FREEING THE TANK: "Refer to CS Ventilation Requirements for specific details;" "Various techniques for vapor/gas freeing tanks with a . . . floating roof . . . are discussed further in API Recommended Practice 2016, Guidelines and Procedures for Entering and Cleaning Petroleum Storage Tanks, Section 5;" "Frequent vapor/gas testing is the only safe way to determine progress of this important phase in the tank cleaning procedure."
- 4.2 MECHANICAL VENTILATION: "**Continuous monitoring of hydrocarbon vapors and oxygen content is required from the time a 10% LEL**

concentration has been reached until the tank is certified vapor/gas free.” (emphasis in original).

- 6.0 VAPOR/GAS FREE TANK CERTIFICATION: “Once the tank has been cleaned, the atmosphere inside the tank must be tested for oxygen, flammable vapors, and other toxics (e.g., benzene, lead). Tank ventilation must be stopped for at least 15 minutes prior to gas testing. Tests shall also be made of steel roof pontoon chambers with covers removed, floating roof legs, foam seals, and other parts that may contain residual hydrocarbons. Additional cleaning and testing may be required before the tank is considered vapor and toxics free. The Assigned Plant Supervisor will either personally certify, or endorse certification that the tank is vapor/hazard free. Following the vapor/gas free certification, respiratory protection is not necessary for personnel entering the tank.”

See id. Furthermore, in its contractual agreement with TEPPCO, Veolia agreed that it must conform to its own safety policies and that it warrants its safe performance of work. See EPCO Holdings, Inc. Service Agreement with Veolia at paragraphs IX and XXXIV attached hereto as Exhibit M. These specific provisions read:

- IX. COMPANY PREMISES. “**Contractor shall conform** and shall require its employees, agents and subcontractors to conform, while at or near the location at the Work or on Company’s premises to all requirements of Company, including, but not limited to, Company’s rules of conduct, **safety rules, Contractor safety policies, . . .**” (emphasis added).
- XXXIV. CONTRACTOR WARRANTIES. “A. Contractor is engaged in the business of performing Services with respect to waste materials and has **developed the requisite expertise to perform the Services** agreed to by Company and Contractor hereunder. . . . C. Contractor will perform Work for Company **in a safe and workman like manner**, and in compliance with all statutes, ordinances, laws, orders, rules and regulations applicable to the Work.” (emphasis added).

Because Veolia’s Tank Cleaning Standards apply to “any” work involving tank cleaning, these standards, which require vapor/gas monitoring and certification of the whole tank, apply to cleaning just the floor of Tank 1303.² Veolia’s own standards and its obligations to follow those standards would not have allowed Veolia’s own employees to

² Note: TEPPCO has requested the production of PHMSA’s file regarding the issues to be determined, pursuant to 49 C.F.R. § 190.211(e), which includes the dictated document by the Veolia supervisor describing the work performed by Veolia and submitted to PHMSA. Accordingly, until TEPPCO can inspect that document and examine Veolia witnesses it cannot determine the work actually performed by Veolia. TEPPCO maintains that at a minimum, Veolia’s work included cleaning the floor, thereby mandating Veolia’s responsibility to comply with its own Tank Cleaning Standards. Note also: The EPCO-SF33 forms as referenced on page 3 of the NOPV, which PHMSA alleges to define Veolia’s scope of work, are dated post - accident in the NOPV.

enter and work in Tank 1303 without Veolia initially and continuously rendering Tank 1303, including the pontoons, vapor/gas free. This is the service for which EPCO/TEPPCO contracted, and is the service Veolia was to provide.

Because the law does not allow PHMSA to impose strict liability on operators, the regulations do not require TEPPCO to verify Veolia's compliance with Veolia's own Tank Cleaning Standards, which required the tank to be rendered vapor/gas free. Veolia's Service Receipt dated May 9, 2009, which is signed as approved by a TEPPCO representative, describes the work as "job completed in cleaning & washing Tank #1303 . . ." See Veolia Service Receipts attached hereto as Exhibit N. The May 9, 2009 Veolia Service Receipt, as well as any other Veolia Service Receipt, does not excuse Veolia complying with its own safety standards and thereby rendering the tank vapor/gas free, which Veolia warranted in its contract with TEPPCO/EPCO. *See id.* The NOPV seeks to hold TEPPCO responsible not for TEPPCO's policies and procedures; but as an insurer that Veolia followed its own policies and procedures. PHMSA's application and interpretation of 49 CFR 195.402(a) in this NOPV would have a far reaching impact on every operator and would result in significant public policy implications as it would require every operator to retain separate experts or specialists to observe and verify the work of each contractor. For example, in this situation, to satisfy PHMSA's NOPV, TEPPCO would have had to retain separate tank cleaning specialists to review Veolia procedures, provide monitoring equipment, and observe every step of Veolia work to ensure strict compliance by Veolia with its own procedures. PHMSA regulations do not require an operator to retain one specialist contractor to do the work per its own procedures and a second equally qualified specialist to observe and determine compliance by the first. Such as result is not only untenable; but could actually undermine safety by placing additional personnel within a confined space. such as Tank 1303.

Finally, TEPPCO's efforts to vet contractors through ISNetworld and its retention of Veolia for their expertise in Tank Cleaning should be found sufficient not only as a matter of job planning procedure, but for public policy reasons as well. It is clearly in the public's and the agency's best interest for work on the pipeline system to be performed by companies and individuals with a specialized level of expertise and safety. Accordingly, if this alleged violation is upheld and it becomes settled law that an operator will be liable regardless of its good faith efforts to provide a safe working environment through using specialized experts, the pipeline operators throughout the industry will be forced to keep the work in house. The likely result of this will be diminished expertise because internal employees would inevitably perform the specialized work less frequently than contractors.

3. TEPPCO did not violate 49 C.F.R. § 195.402(a) as asserted in the second probable violation of the NOPV. PHMSA, in support of this probable violation, mistakenly classifies the contents of a job plan as part of TEPPCO's manual of written procedures as laid out in § 195.402(a). In order to show that TEPPCO violated §195.402(a), PHMSA must show that TEPPCO did not adhere to a portion of TEPPCO's own manual of procedures. The specific procedure referred to by PHMSA (that the "atmosphere inside the tank above and below the floating roof, inside all pontoons and the drain dry sump underground pipe will be checked (LEL and O2) prior to entry and will be continuously monitored when

anyone is inside the tank”) is not part of TEPPCO’s manual of procedures, but rather a variable portion of the job plan stating the work a contractor has agreed to perform. Thus, TEPPCO’s obligation to follow its manual of procedures set out in § 195.402(a) ends at its completion of form EPCO-SF20 and does not extend to those procedures set out in form EPCO-SF20, which the contractor agrees to perform.

Further, as a matter of public policy, the regulatory law should not be read to include in the definition of a §195.402 “manual of procedures,” the particular type of content referred to in the second probable violation. The relevant procedure, which PHMSA alleges is part of TEPPCO’s “manual of procedures,” is not something prepared and maintained by TEPPCO as part of its manual, but instead is content entered into form EPCO-SF20 after establishing a job plan, which the contractor, C&C, agreed to carry out. The relevant procedure referred to by PHMSA appears in a portion of EPCO-SF20 entitled, “Detailed Step by Step Procedure.” When compared with other EPCO-SF20 job plan forms it becomes clear that these step -by -step procedures include a description of the work the contractor has agreed to perform and thus change with every job contracted. *See* EPCO-SF20 for C&C’s installation contract attached hereto as Exhibit O; *compare with* EPCO-SF20 for Veolia’s Tank Cleaning contract attached hereto as Exhibit P. Accordingly, if this probable violation is upheld, and operators are held strictly liable by PHMSA for not double checking the procedures a specialized contractor, with superior expertise, has agreed to undertake, then operators will be forced to perform normally contracted work internally. The very premise of Pipeline Safety Regulations is based upon the avoidance of prescriptive measures in lieu of performance regulations intended to afford the operator flexibility in meeting the regulations. Such a broad interpretation would upend this very philosophy and is not consistent with the spirit and intent of PHMSA/OPS’ regulatory regime.

Similarly, any finding which includes content such as that alleged by PHMSA to be part of an operator’s “manual of procedures” will render an operator’s ability to rely on contractor’s knowledge, skills, and expertise as set out in 49 C.F.R. § 195.10 moot. Accordingly, 49 C.F.R. §195.10 sets out a pipeline operator’s ability to rely on these types of representations, set forth by contractors in a job plan, so long as the operator is still in compliance with the PHMSA regulations. However, in the second alleged violation, PHMSA does not state an operator’s ability to rely on arrangements made with its contractors to the fullest extent. PHMSA’s attempt to paraphrase 49 C.F.R. § 195.10 reads, “pipeline operators may make arrangements with other entities for the performance of actions on their pipeline facilities, but the operator is ultimately responsible for the safe operation of work performed on their pipeline facility.” *See* Ex. A, NOPV at 4. Instead, the actual regulation itself reads somewhat differently. The actual regulation reads, “An operator may make arrangements with another person for the performance of any action required by this part. However, the operator is not thereby relieved from the responsibility for compliance with any requirement of this part.” 49 C.F.R. § 195.10. Accordingly, an operator is not “ultimately liable for the safe operation of work,” as the NOPV would suggest, but rather is entitled to rely on its contractors as long as it maintains compliance with the PHMSA regulations found in 49 C.F.R. Part 195, which TEPPCO did by retaining vetted contractors with specialized knowledge, skills, and ability in the work they were charged with performing.

Here, as referenced by the EPCO-SF20 job plan, C&C Welding represented to TEPPCO that C&C would apply confined space protocol and perform continuous atmospheric monitoring of Tank 1303 during its work. *See* Ex. O. Furthermore, C&C, in its contractual agreement with TEPPCO, agreed to conform to C&C's own safety policies, which included its representation in EPCO-SF20 to carry out atmospheric monitoring of Tank 1303 and applicable safety regulations. *See* EPCO Holdings, Inc. Service Agreement with C&C Welding at paragraph X attached hereto as Exhibit Q. The same was required of O&M. TEPPCO retained the specialized services, knowledge, skills, and ability of O&M for the Tank 1303 work, and O&M was obliged to work safely per applicable regulations. In sum, TEPPCO did not violate its manual of procedures under §195.402(a) because the language on which PHMSA relies is not part of TEPPCO's manual and TEPPCO is entitled to rely on its contractors' representations.

4. The agency can alleviate the NOPV's strained interpretations of PHMSA regulations by asserting its authority over the pipeline system as a whole, including not only operators, but contractors as well. PHMSA's authority is derived from 49 U.S.C. § 108, which states, "[i]n carrying out its duties, the Administration shall consider the assignment and maintenance of safety as the highest priority, recognizing the clear intent, encouragement, and dedication of Congress to the furtherance of the highest degree of safety in pipeline transportation and hazardous materials transportation." This language shows clearly that the congressional intent behind the creation of the agency was to give it primary authority over the whole pipeline system in order to best encourage the highest degree of safety, which cannot be achieved without the investigation of and enforcement against contractor operations. In this incident PHMSA should have all parties before the agency for purposes of inspection, enforcement and/or sanctions. This was the intent of Congress – system focused, not solely operator-focused – as shown by the referenced language. The result of PHMSA not exercising jurisdiction over all parties is the illogical application we see in this case. Justice cannot be served if PHMSA is not citing or regulating all parties performing work on pipelines.

For instance, suppose a scenario where Contractor 1 is determined to be 40% culpable, Contractor 2 is 30% culpable, Contractor 3 is 20% culpable, and the operator is 10% culpable. PHMSA is not asserting jurisdiction over or regulating 90% of culpable action. It would punish the 10% culpable operator through the imposition of strict liability for the fault of third party contractors. This situation is even more unjust – and farther from mandate of Congress – when as here, the operator, TEPPCO, is not culpable. Therefore, the two probable violations alleged in the NOPV should be vacated or dismissed.

5. TEPPCO moves to suppress and/or strike any and all PHMSA findings related to the attorney-client and work product privileged BakerRisk "Explosion Dynamics Report" ("BakerRisk Report"). Furthermore, TEPPCO moves to dismiss and/or vacate each of the probable violations set forth in PHMSA's NOPV. Each probable violation relies on the attorney-client and attorney work product privileged BakerRisk Report in support of its conclusions and thus should be dismissed and/or vacated.

The BakerRisk Report is a privileged document commissioned by Rose Law Firm, TEPPCO's outside counsel. Rose Law Firm made the arrangements with BakerRisk in anticipation of and with respect to the litigation arising from the Tank 1303 incident. The report is not, and was not represented to be, a final report on the cause of the incident. Accordingly, because BakerRisk prepared the report at the request of counsel and on behalf of TEPPCO, in anticipation of litigation, it is privileged under the attorney-client and work product privileges.

In good faith and without waiving any privilege, TEPPCO nonetheless furnished the report to PHMSA. When a "non-waiver" agreement is made, the privileged material remains protected. *See In re Natural Gas Commodities Litigation*, 232 F.R.D. 208, (S.D.N.Y. 2005)(finding that a defendants' voluntary disclosure of privileged documents to government agencies pursuant to a non-waiver agreement did not waive attorney-client and/or work product privilege). Accordingly, in legal counsel's November 20, 2009, email to PHMSA, in which he agrees to furnish the report, he unequivocally states that he has no intention of waiving TEPPCO's privileges associated with the retention of the BakerRisk Report. *See November 20, 2009 Email from R. Albrecht to R. Lopez, et al.*, attached hereto as Exhibit R. Furthermore, Mr. Richard Lopez, the PHMSA official presiding over the investigation did not object to legal counsel's explicit non-waiver provision thereby assenting to its terms by not returning the document immediately. Thus, the BakerRisk report remains under attorney-client and work product privileges and PHMSA may not rely on the BakerRisk Report's conclusions to support its probable violations.

6. The two probable violations alleged by PHMSA are duplicative. Therefore, at most, TEPPCO should only be assessed a penalty for one probable violation. According to well-established administrative law, when citations involve the same violative conduct and/or the same abatement measure, there is only one violation and only one penalty should be assessed. *See Secretary of Labor v. Cleveland Consolidated*, OSHRC Doc. No. 84-0696 (Feb. 13, 1987); *see also Secretary of Labor v. E. Smalis Painting Company*, OSHRC Doc. NO. 94-1979 (Apr. 10, 2009). PHMSA's decisions have also indicated that duplicative citations would not stand. In *The Matter of Amerigas Propane*, PHMSA's associate administrator for pipeline safety stated that he would not vacate a probable violation as duplicative of another probable violation because the regulations, although similar, had different purposes and requirements. *See 2009 WL 1211365*, CPF No. 3-2006-0004 (Apr. 15, 2009). This holding indicates that if two probable violations were based on regulations that had the same purpose and requirements, then one citation should be vacated.

In both probable violations alleged in the NOPV, PHMSA alleges that the Tank 1303 incident occurred as a result of TEPPCO's failure to follow its own Job Planning Processes. *See Ex. A, NOPV*. Accordingly, to prevent future, similar violations, TEPPCO must follow its own written policies and procedures before doing work on tanks. The second probable violation, therefore, is duplicative of the first probable violation since the purpose and abatement measures are the same. At the most, TEPPCO should be cited for one probable violation and assessed one penalty.

7. If probable violations are not vacated the \$200,000 penalty should be reduced because it is excessive. In assessing a penalty, 49 U.S.C. 60122 and 49 C.F.R. § 190.225 direct consideration of the following factors:

- a. The nature, circumstances, and gravity of the violation;
- b. With respect to the violator, the degree of culpability, any history of prior violations, the ability to pay, and any effect on ability to continue doing business;
- c. Good faith in attempting to comply;
- d. The economic benefit gained from the violation without any reduction because of subsequent damages; and
- e. Other matters that justice requires.

At least two of the mandatory assessment factors require mitigation of the penalties proposed by PHMSA.

First, TEPPCO was not culpable. As described in detail above, Veolia represented that it would follow its own policies and procedures when cleaning Tank 1303, which included ensuring that the pontoons and tank did not contain vapors. Also, C&C and O&M represented to TEPPCO that they would follow the procedures outlined by TEPPCO in the Job Plan for cleaning Tank 1303 and applicable safety regulations. TEPPCO relied in good faith on these representations. Therefore, any penalties assessed against TEPPCO must be reduced, because TEPPCO was not culpable.

Second, TEPPCO also acted in good faith by attempting to comply with its own policies and procedures. As described in detail above, TEPPCO made a good faith effort to comply with its own Job Planning Process Procedure to provide the tools and resources necessary to provide a safe working environment by contracting Veolia to clean and prepare Tank 1303 for welding operations. TEPPCO relied upon ISNetwork to vet Veolia, and relied on Veolia's representations and detailed cleaning procedures. TEPPCO then retained Veolia to clean that tank and apply its detailed vapor free tank cleaning procedures. TEPPCO complied with its own procedure to complete a job plan prior to allowing a contractor to perform work onsite. TEPPCO and C&C completed the job plan prior to C&C beginning the hot work in Tank 1303. As part of that job plan, C&C was required to monitor the atmosphere inside of the tank before and during work. TEPPCO also made a good faith effort by contracting with O&M—a tank inspection service—to assist with the work. As these examples show, TEPPCO made a good faith effort to comply with its own policies and procedures as required by § 195.402(a).

Last, TEPPCO acted in good faith when it assisted PHMSA in its investigation of the accident. For instance, on March 12, 2010, TEPPCO provided to PHMSA the "Explosion Dynamics Report" prepared by BakerRisk. See March 12, 2010 Email from R. Albrecht to R. Lopez, *et al.*, attached hereto as Exhibit S. That report was commissioned by Rose Law

Firm to assist in evaluating the explosion dynamics of the McRae incident. Because BakerRisk prepared the report at the request of counsel and in anticipation of litigation, it is privileged. Nonetheless, Mr. Albrecht furnished the report to PHMSA without waiving any privilege, in a good faith effort to cooperate with the investigation by providing information. TEPPCO made a good faith effort to provide as much information as possible to PHMSA, including a privileged report. This shows a good faith commitment by TEPPCO to assist PHMSA with the investigation and ensure compliance with all applicable statutory and regulatory law.

This Response is submitted without the waiver, express or implied, of any right, and without the admission of any fact or liability by Operator/Respondent(s). The Operator/Respondent(s) reserve(s) the right to modify, amend, or supplement this response and/or presentation of any fact, defenses, or theories of law at any stage of this or other proceeding(s).

Please contact me if you have any questions regarding this response and my request for an informal settlement conference to be held prior to hearing.

Sincerely,

A handwritten signature in blue ink, appearing to read "Terry Hurlburt", with a large, sweeping flourish extending to the right.

Terry Hurlburt

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Encls. included