

**Before the
U.S. Department of Transportation
Pipeline and Hazardous Materials Safety Administration
Office of Pipeline Safety**

_____)	
In the Matter of)	
)	
Buckeye Partners, LLC)	CPF 1-2016-5007
)	
Respondent)	PRE-HEARING BRIEF
)	
_____)	

Issue Presented

This case presents a simple question: was it proper for the Pipeline and Hazardous Materials Safety Administration (PHMSA) to revise a Proposed Compliance Order (PCO) nearly a year after the associated Notice of Proposed Violation (NOPV) was acknowledged and expressly not contested by Buckeye when there were no new facts, legal issues or rationale presented? The essential facts are also straightforward: Buckeye constructed a new horizontal directional drill (HDD) crossing of the Genesee River in 2015, and after construction was complete and the line had been placed in service, a state inspector sent an email questioning whether the welding method used was properly qualified in Buckeye’s O&M Manual. Buckeye promptly qualified the procedure, corrected the paperwork, had a third party expert (DNV) evaluate the procedure, tested similar welds to confirm their validity, and replied to the state inspector summarizing these actions and noting that the welding procedure used is common throughout the industry and thus presented no safety issue.

Factual Background

Almost a full year after the new river crossing had been placed in operation (after having successfully passed nondestructive examination (NDE) testing and hydrostatic pressure testing), PHMSA issued a NOPV, Proposed Civil Penalty and PCO, asserting only one violation of the pipeline safety regulations (Part 195.214; “Welding Procedures”). The Proposed Civil Penalty was \$38,200 and the PCO allowed Buckeye to qualify a new procedure and perform confirmatory testing with field test welds. Even though Buckeye felt confident in the integrity of the subject welds, Buckeye did not contest the NOPV, the PCO or the Proposed Civil Penalty, and responded to PHMSA with its acceptance in September of 2016. *See Exhibit A, Letter from S. Collier (Buckeye) to B. Coy (PHMSA) re: NOPV, Proposed Civil Penalty and PCO* (Sep. 14, 2016). Buckeye’s acceptance, however, was predicated on the terms and conditions in the PCO which allowed field testing of new welds made using the qualified procedure versus removal and testing of any of the current pipeline crossing welds.

At that point, it appeared that the issue was resolved. Buckeye committed to pay the penalty¹ and for purposes of complying with the PCO, it retained pipe leftover from the project in order to test field welds made with the qualified procedure. Unfortunately, eight months later – after Buckeye agreed to the NOPV and confirmed the acceptability and suitability of the widely used welding procedure with third party review – PHMSA sent a letter to Buckeye on May 4, 2017, stating that it was revising the PCO, to effectively require further disturbance of the river crossing area to test in service welds. *See Exhibit C, Letter from R. Burrough (PHMSA) to S. Collier (Buckeye) (May 4, 2017)*. The letter did not allege any new facts or legal issues, nor did it include any rationale for the change, or assert any finding of a hazardous condition or safety issue.

Buckeye questioned the intent and need for the revision, which PHMSA responded to with another letter, dated May 22, 2017, reiterating its request to revise the PCO even though no new facts, no new law or any explanation of rationale were presented. *See Exhibit D, Email from S. Collier (Buckeye) to R. Burrough (PHMSA) (May 16, 2017); Exhibit E, Letter from R. Burrough (PHMSA) to S. Collier (Buckeye) (May 22, 2017)*. In June of 2017, Buckeye requested a Hearing on these letters as “reviewable, final Agency action.” *See Exhibit F, Buckeye Request for Hearing on PHMSA Final Agency Action (Jun. 1, 2017)*. The Agency did not respond formally to that Hearing request, but verbally advised Buckeye that it was reviewing the matter further.

On July 31, 2017, PHMSA issued an Amended NOPV, Proposed Civil Penalty, and Amended PCO, the only change being a revision of the PCO. *See Exhibit G, Redline of PCO and Amended PCO*. The Amended PCO would now require either (1) testing of pipe from an overpull of pipe from the HDD, which (as communicated to both the state inspector and PHMSA prior to the Amended PCO) does not exist, or (2) testing of existing in service welds on the directional drill crossing (*i.e.*, already underground), which would be an unnecessary environmental disturbance and overly burdensome. Again, there were no new facts or legal issues presented, and there was no new alleged violation of law. In short, the Amended PCO was issued without any stated rationale, or any legal or technical explanation, but it would effectively require Buckeye to dig up and cut out at least 4 existing in service girth welds (as opposed to field test comparable welds) to further confirm welding procedure qualification. This background is detailed in Buckeye’s Request for Hearing and Written Response to this matter (incorporated by reference at Exhibit H), and in a timeline summarizing the relevant dates (Exhibit I).

No Safety Issue is Presented

Prior to placing the pipeline crossing into service, every weld successfully passed NDE testing. *See Exhibit J, Radiographic Examination Reports (Oct.-Nov. 2015)*. The new crossing also successfully passed hydrostatic pressure testing. *See Exhibit K, Hydrostatic Test Record (Oct.*

¹ As stated in its prior Request for Hearing documents, Buckeye thought it had already paid the civil penalty, but it had not. Payment was completed on January 12, 2018. *See Exhibit B, Confirmation of Buckeye Payment of Penalty (Jan. 12, 2018)*. Civil penalties are not due in an enforcement action until twenty days after receipt of a PHMSA Final Order (49 C.F.R. Part 190.227). The penalty is not in issue in this matter; the sole issue is whether PHMSA can amend a PCO after issuance, and a Respondent’s acceptance, without alleging any “new material allegations of fact” or rational justification for the revision (*see 49 C.F.R. Part 190.207(c)*).

14, 2015). Since being placed in service in 2015, the pipeline crossing has operated safely without incident. Further, when Buckeye discovered that the welding procedure used to make the girth welds was not formally qualified under its written procedures, Buckeye demonstrated the suitability of the welds that were used within a matter of days, and corrected the related paperwork. *See Exhibit L, Procedure Qualification Record (Nov. 13, 2015).*

In consultation with a third party expert, DNV, Buckeye qualified the welding procedure using surplus line pipe from the HDD and performed axial tensile testing. *See Exhibit M, Affidavit of W. Bruce (DNV) (Jan. 10, 2018).* The testing demonstrated that the strength of the weld is greater than the strength of the actual line pipe consistent with API Standard 1104 and PHMSA rules. *Id.* at ¶¶ 12-13. DNV evaluated the welding procedure specification and found that it complied with API 1104 requirements, which is incorporated by reference in PHMSA 49 C.F.R. Part 195.214 regulations (as an acceptable method for qualifying a weld procedure). *Id.* ¶ 14. DNV also reviewed the results of the axial tensile testing which confirmed the strength of the weld and that it even *exceeds* API 1104 requirements. *Id.* at ¶¶ 16-17. William Bruce, DNV Senior Principal Engineer & Group Leader of Welding Technology, who reviewed these results explained “Based on my experience, it is my opinion that the use of [the rod at issue] for girth welds in the [...] line pipe material used for the HDD installed under the Genesee River in 2015 was completely appropriate from a technical perspective.” *Id.* at ¶ 19.

As reflected in industry literature and industry welding procedures, the procedure that was employed on the Genesee River crossing is routinely and commonly used by the pipeline industry and is compliant with API 1104 and PHMSA regulations. Use of the welding rod at issue to make girth welds on the pipe used in the Genesee River crossing is “very common in the pipeline industry” and manufacturers “routinely recommend [the welding rod] for use” on this type of pipe. *See Exhibit N, DNV Letter Report E7010 Usage (Jan. 12, 2018).* Based on third party expert review by DNV, “all specification information and essential variables were appropriately and adequately addressed by [Buckeye’s welding qualification procedure used to confirm the integrity of the welds on the Genesee River crossing]” and Buckeye’s procedure was “found to be compliant” with API 1104 (20th edition). *See Exhibit O, DNV Letter Report regarding Welder Procedure Review Process (Jan. 12, 2018).*

Argument

PHMSA has never before revised a Proposed Compliance Order proposing new or additional remedial action after an operator accepted an NOPV, without a stated rationale for doing so. The Agency’s rules allow PHMSA to amend a NOPV at any time prior to issuance of a final order, but that allowance presumes “new material allegations of fact.” 49 C.F.R. Part 190.207(c) (*emphasis added*). No new material facts were presented in PHMSA’s May 2017 letters, or in PHMSA’s July 2017 Amended NOPV. There is simply no precedent for the Agency’s Amended NOPV and Amended PCO.

The Agency’s Amended NOPV also violates the federal Administrative Procedure Act (APA), 5 U.S.C. § 706, because the action is “*unwarranted in law and without justification in fact.*” 5 U.S.C. § 706; Cross v. United States, 512 F.2d 1212, 1218 (5th Cir. 1975) (cited by PHMSA Final Order, CPF 1-2007-1013, dated Dec 30, 2010). Under the APA standard, an agency’s

actions must “*examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.*” Alpharma, Inc. v. Leavitt, 460 F.3d 1, 6 (D.C. Cir. 2006) (citing Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)). The Amended NOPV and Amended PCO lack any legal or technical explanation or rationale.

After the fact rationalizations, made in response to an administrative challenge are also impermissible. Motor Vehicle Mfrs. Ass’n, 463 U.S. at 50 (1983) (“*It is well established that an agency’s action must be upheld, if at all, on the basis articulated by the agency itself.*”); Nat’l Oilseed Processors Ass’n v. Browner, 924 F. Supp. 1193, 1204 (D.D.C. 1996) (“*[A]n agency must defend its actions on the basis on which they were originally taken, not on some new basis that is developed in litigation to justify the decision.*” (citing Motor Vehicle Mfr. Ass’n., 463 U.S. at 50); Gose v. U.S. Postal Serv., 451 F.3d 831, 839 (Fed. Cir. 2006) (“*We must ensure that the agency is not now masquerading a post hoc rationalization as a then-existing “interpretation.”*”). The Fifth Circuit Court of Appeals recently struck down a similar type of after the fact Agency enforcement that is unwarranted in law and without justification in fact. ExxonMobil Pipeline Co v. U.S. DOT, No. 16-60448, 2017 U.S. App. LEXIS 15144 (5th Cir. Aug. 14, 2017).

Further, the Amended NOPV and Amended PCO violate the common law doctrine of equitable estoppel. Heckler v. Cmty. Health Servs., 467 U.S. 51, 60 n. 12 (1984) (stating that equitable estoppel “*underlies the doctrine that an administrative agency may not apply a new rule retroactively when to do so would unduly intrude upon reasonable reliance interests*”). Buckeye had already qualified the procedure on November 13, 2015 under API Standard 1104 and PHMSA regulation, 49 C.F.R. Part 195.214, shortly after the inspection and prior to the NOPV and issuance of the Agency’s revised PCO in May and July 2017. *See Exhibit L, Weld Procedure Qualification Record (Nov. 13, 2015)*. Prior to issuance of the original NOPV, the integrity of all of the welds at issue was confirmed by successful NDE and hydrostatic testing. *See Exhibit J, Radiographic Examination Results (Oct.-Nov. 2015), Exhibit K, Hydrostatic Test Record (Oct. 14, 2015)*.

Finally, PHMSA’s Amended PCO simply defies common sense. There is no additional pipe from an overpull as anticipated by the Amended PCO. Testing of existing in service welds is overly burdensome and would disturb the river crossing area. If given effect, it would have a pipeline operator dig up the bank(s) of a river crossing to conduct additional weld inspections even though those welds were qualified with a procedure widely used in the industry and compliant with industry standards, subjected to NDE testing, and subjected to a hydrostatic pressure test. There is no safety concern alleged or presented. It defies common sense to require an operator to dig up the river crossing area, causing considerable environmental disturbance at significant cost given this record, without any new facts or rationale to justify imposing new and different remedial action. It may also be extremely difficult to obtain all necessary permits or authorizations to cause further disturbance of the river bank(s) in this instance.

The Amended PCO is flawed both procedurally and substantively, and should be withdrawn or dismissed.

Relief Requested

For the reasons discussed above and in Buckeye's pleadings, and such other matters as justice may require, the Company respectfully requests that PHMSA withdraw the Amended NOPV and Amended PCO, and finalize the original NOPV and PCO as issued to Buckeye on August 25, 2016. Alternatively, Buckeye requests that the parties enter into a negotiated Consent Agreement that allows for field testing of the welds using leftover pipe purchased and delivered to the job site with the same specifications and material characteristics, which would not require disturbance of the existing crossing.

Respectfully Submitted,



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List of Exhibits

Exhibit A, *Letter from S. Collier (Buckeye) to B. Coy (PHMSA) re: NOPV, Proposed Civil Penalty and PCO (Sep. 14, 2016)*

Exhibit B, *Confirmation of Buckeye Payment of PHMSA Proposed Civil Penalty (Jan. 12, 2018).*

Exhibit C, *Letter from R. Burrough (PHMSA) to S. Collier (Buckeye) (May 4, 2017).*

Exhibit D, *Email from S. Collier (Buckeye) to R. Burrough (PHMSA) (May 16, 2017).*

Exhibit E, *Letter from R. Burrough (PHMSA) to S. Collier (Buckeye) (May 22, 2017).*

Exhibit F, *Buckeye Request for Hearing, Written Response and Statement of Issues on PHMSA Final Agency Action (Jun. 1, 2017) (filing incorporated by reference only).*

Exhibit G, *Redline of PCO (Aug. 25, 2016) and Amended PCO (Jul. 31, 2017).*

Exhibit H, *Buckeye Request for Hearing, Written Response and Statement of Issues (Aug. 25, 2017) (filing incorporated by reference only).*

Exhibit I, *Timeline of Buckeye Genesee River Crossing Replacement.*

Exhibit J, *Radiographic Examination Results (Oct.-Nov. 2015).*

Exhibit K, *Hydrostatic Test Record (Oct. 14, 2015).*

Exhibit L, *Procedure Qualification Record (Nov. 13, 2015).*

Exhibit M, *Affidavit of W. Bruce (DNV) (Jan. 10, 2018).*

Exhibit N, *DNV Letter Report E7010 Usage (Jan. 12, 2018).*

Exhibit O, *DNV Letter Report regarding Welder Procedure Review Process (Jan. 12, 2018).*