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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	)	Response to Amended NOPV and Amended PCO

The Pipeline and Hazardous Materials Safety Administration (PHMSA or the Agency) issued a Notice of Probable Violation (NOPV) to Buckeye Partners, LLC (Buckeye or the Company) on August 25, 2016, following an inspection of Buckeye's Genesee River relocation project. The inspection was conducted in October and November 2015, by an inspector from the New York Department of Public Safety, on behalf of PHMSA. The NOPV alleged one violation of PHMSA regulation, 49 C.F.R. Part 195.214, regarding qualification of welding procedures. The NOPV also contained a Proposed Compliance Order (PCO) and a Proposed Civil Penalty. On September 14, 2016, Buckeye responded to the NOPV indicating that it was not contesting the violation, thereby accepting the terms of the PCO. Buckeye subsequently paid the penalty of $38,200.

Almost a year later, PHMSA issued an Amended NOPV and Amended PCO that revised the original PCO consistent with two letters PHMSA issued to Buckeye, dated May 4, 2017 and May 22, 2017. This Amended PCO was issued and revised without any explanation or stated rationale, with no new alleged facts or new alleged violations. As revised by the Agency, the alternative provided in the original PCO was made illusory, requiring an extremely expensive action that would cause significant environmental disturbance at a settled site.

There is no regulatory provision expressly allowing the Agency to revise a Proposed Compliance Order after a Respondent has not contested that order or related proceedings, and has already paid the Proposed Civil Penalty. Although Part 190 allows the Agency to amend notices of probable violations before a Final Order issues, that allowance presumes discovery of new facts supporting existing allegations or giving rise to new allegations; it does not sanction second thoughts. To that point, there is no precedent of the Agency doing this previously. Such after the fact revision of an enforcement action by an administrative agency is *ultra vires*, and should be dismissed on that ground alone.

There is no legal or factual basis for the Agency to issue this Amended NOPV (which, notably, only amends the PCO— no new facts or alleged violations are leveled, and the Respondent has already paid the Proposed Civil Penalty). Since the October and November 2015 inspection of the Genesee River relocation project, Buckeye worked cooperatively with PHMSA to resolve issues related to qualification of its welding procedures. Buckeye is willing to meet with PHMSA to discuss this issue further and the Company believes that the issues presented can be resolved by withdrawal of the Amended NOPV and Amended PCO or the entry of a negotiated Consent Agreement, either of which would allow the Company to confirm the integrity of the welds without the unnecessary cost or environmental disturbance, and without the need for a hearing.

Due to the impasse with the Agency created by its revision of this PCO, however, Buckeye is submitting this Written Response to the Agency's Amended NOPV and Amended PCO and requests an in-person hearing.

Background

The New York State Department of Public Service (NYSDPS), as a certified interstate agent of PHMSA, conducted an inspection in October 2015 of piping that Buckeye was installing under the Genesee River. During that inspection, the NYSDPS observed field welding and reviewed records associated with the project. As a result of that inspection and subsequent communications, it was identified that—contrary to Buckeye's project specifications—the contractor welder used a welding rod (E7-010-P1) that had not been qualified under Buckeye's welding procedures for the 36 girth welds used in the Genesee River crossing.

After the inspection, Buckeye investigated the issue further and proceeded to demonstrate the suitability of the welding rod used for the project by qualifying the procedure with the rod in accordance with API Standard 1104, Welding of Pipelines and Related Facilities, and 49 C.F.R. Part 195.214. The procedure was qualified on November 13, 2015 and Buckeye communicated this to PHMSA and the NYSDPS on November 20, 2015. The Company also confirmed that the 36 girth welds at issue on the Genesee River successfully passed nondestructive examination (NDE) testing and hydrostatic testing, confirming the integrity of the welds.

Since being placed into service, the pipeline crossing has operated safely without incident.

PHMSA NOPV, Proposed Compliance Order, and Proposed Civil Penalty

On August 25, 2016, PHMSA issued an NOPV as a result of the 2015 inspection, which included a PCO that provided Buckeye with two options for compliance:

(1) Remove the river crossing, cut out all 36 existing in service welds and make new girth welds per 49 C.F.R. Part 195.214(a); or

(2) qualify a new welding procedure by making "field test welds" using the welding rod in the same manner used to weld the existing in service welds and then cut out four "field test welds" to perform confirmatory testing.

Under the latter option, Buckeye was to provide PHMSA with 10 days advance notice of creation of weld test samples and a testing schedule to provide for the Agency to witness the testing. If the four test welds passed the qualification testing, all the 36 existing welds could remain in service and there would be no further requirements.

As noted above, Buckeye responded to the NOPV on September 14, 2016, stating that it did not contest the proposed violation and accepting the terms of the PCO. The Company subsequently paid the Proposed Civil Penalty.[1]

Subsequent PHMSA Actions Revising the PCO

Having paid the penalty, Buckeye made plans for field testing the welds under the PCO as it awaited issuance of a Final Order from PHMSA. Without explanation or rationale, however, nearly nine months after the matter was not contested, PHMSA issued a new decision by letter dated May 4, 2017 to revise the PCO, by effectively eliminating the second PCO option to make and test *field* welds as follows:

> "qualify a welding procedure ~~by making field test welds~~ using [the rod at issue] in the same manner used to weld the existing thirty-six (36) in service welds; ~~then~~ cut out four (4) field ~~test~~ welds **for testing, either from the existing thirty-size (36) in-service girth welds or from additional welded pipe that can be traced to an over-pull of the same pipe containing the girth welds currently in service**; and perform [testing] for welding procedure qualification purposes…"

Buckeye did not retain any pipe from an over-pull, and the Company was taken by surprise by this unanticipated and unexplained new Agency action. Buckeye responded to the May 4, 2017, action by requesting and participating in a conference call on the issue on May 15, 2017. In addition, Buckeye sent written correspondence on May 16, 2017, to PHMSA requesting a clarification that instead of using over-pull pipe (which did not exist) the four field welds could be made from pipe steel that was originally purchased for the project and delivered to the project, using the mill certifications matching the specifications and material properties of that used in the river crossing, instead of over-pulls. On May 22, 2017, PHMSA responded by letter confirming that such pipe steel would not be acceptable under the PCO as revised.

Buckeye responded to the Agency decisions and actions contained in the May 4 and May 22, 2017 letters by requesting a hearing on July 1, 2017. PHMSA subsequently issued an Amended NOPV, Proposed Civil Penalty, and Amended PCO on July 31, 2017, which revised the PCO without alleging any new fact or violation of PHMSA rules. In short, the Amended PCO was issued without legal or technical explanation or rationale to require Buckeye to dig up and cut

[1] In its response to the NOPV, Buckeye intended to attach to the welding procedure used on the Genesee River that it had since qualified in November 2015 and renamed as WPS No. P15A, but Buckeye inadvertently attached a different procedure with a similar name, WPS No. P15. When this inadvertent error was brought to Buckeye's attention in April 2017, the Company sent a clarifying letter to PHMSA on April 13, 2017 with the correct procedures.

out at least 4 existing in service girth welds from the river crossing, to confirm welding procedure acceptability and weld integrity.

Response to Amended PCO

Because the Agency's Amended NOPV and Amended PCO was issued without legal or technical justification, it violates the Administrative Procedure Act as well as PHMSA's own procedural requirements under the Pipeline Safety Act and implementing regulations at Part 190. Further, it violates the established legal principles of equitable estoppel and mootness.

PHMSA's Actions Violate the APA and the PSA

The Agency's revision of the PCO as stated in the May 4 and May 22, 2017, letters is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law in violation of the Administrative Procedure Act (APA), 5 U.S.C. § 706, standard of review provisions. PHMSA's actions as issued fail the test under this APA standard because they are "unwarranted in law and without justification in fact." 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)). PHMSA Amended NOPV and Amended PCO lacks any legal or technical explanation or rationale.

The Amended PCO also fails to comply with Pipeline Safety Act and PHMSA procedural rules under 49 C.F.R. Part 190. The Pipeline Safety Act authorizes PHMSA to "issue orders directing compliance with a regulation, where the order state[s] clearly the action a person must take to comply." *49 U.S.C. § 60118(b)*. Further, 49 C.F.R. Part 190.217 requires the Agency to issue a proposed compliance order "if the nature of the violation and the public interest so warrant." In addition, although Part 190.207(c) provides for PHMSA to amend a notice of probable violation at any time prior to issuance of a final order, that allowance presumes discovery of new facts in support of existing allegations or giving rise to new allegations; it does not sanction Agency second thoughts developed nearly a year later without any supporting legal or technical justification. There is simply no precedent for the Agency's Amended NOPV and Amended PCO. In practice, PHMSA rarely issues Amended NOPVs and this is the first time that it has ever issued an Amended NOPV that revises the PCO without any rational basis for doing so.

The Amended NOPV and PCO are not supported by any explanation provided to Buckeye or in the record. Any subsequent explanation would be an impermissible after the fact post hoc rationalization. Motor Vehicle Mfrs. Ass'n, 463 U.S. at50 (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 has 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).

The actions outlined in the Amended PCO are not warranted in light of the nature of the violation and the public interest. Buckeye has already made a demonstration that no safety issue exists and substantiated the validity of the procedure and the integrity of the welds in issue. Within a month of the NYSDPS' inspection questioning the weld procedure, the Company proactively qualified a new procedure using the welding rod that was used on the Genesee River crossing. This procedure is common in the industry and it was qualified in accordance with API Standard 1104 and 49 C.F.R. Part 195.214. All of the welds were successfully nondestructively tested without any issue and their integrity was further confirmed through successful hydrostatic testing prior to placing the line into service.

PHMSA issued the Amended NOPV and Amended PCO nearly a year after the NOPV was issued and Buckeye had already accepted its terms and paid the Proposed Civil Penalty. No new facts were alleged and new allegations of law were included in the Amended NOPV and Amended PCO which simply amended the terms of the PCO to eliminate Buckeye's chosen method of compliance. Yet as issued, the Amended PCO imposes much more restrictive, costly and environmentally damaging corrective measures with no justification. There is no public safety concern, as no finding of endangerment was ever made and no information exists to support such a concern after the fact (especially since the Agency, if not the State, is on notice that the welding procedure used is commonly accepted in the industry and by the Agency). The Agency's new decisions create more harm and expense, with no justification.

PHMSA's Actions Violate Principles of Equitable Estoppel and Mootness

Finally, the PHMSA Amended NOPV and Amended PCO violates 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 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 new decisions in May 2017. Prior to issuance of the NOPV, the integrity of all of the welds at issue was confirmed by successful nondestructive testing and hydrostatic testing. In addition, upon receipt of the NOPV, Buckeye expressly notified PHMSA that it was not contesting the NOPV, PCO and Proposed Civil Penalty.

In accepting the terms of the original PCO, Buckeye proceeded to begin to make arrangements for the field testing pending a Final Order. By amending the PCO and making the compliance option which Buckeye chose to take unavailable *after* Buckeye took actions to meet that compliance option, the Agency essentially sought to retroactively apply a new agency action to Buckeye's detriment. Further, the revised PCO in this case is moot as the procedure was properly qualified before the NOPV issued. See Gwaltney of Smithfield v. Chesapeake Bay

Found., 484 U.S. 49, 66 (1987) ("Longstanding principles of mootness . . . prevent the maintenance of suit when there is no reasonable expectation that the wrong will be repeated.").

Relief Requested

For the reasons identified in this Response, Buckeye's Request for Hearing, and in its Statement of Issues, and because Buckeye has cooperated with PHMSA from the outset of this matter, Buckeye respectfully requests that PHMSA withdraw the Amended NOPV and Amended PCO and enter into a negotiated Consent Agreement that allows for a less restrictive, costly and environmentally damaging method to further confirm the welding procedure qualification at the site and weld integrity. In the alternative, Buckeye requests that PHMSA withdraw the Amended NOPV and Amended PCO and acknowledge that Buckeye has already complied in part with the PCO through demonstrations that the welding procedure is properly qualified and used throughout the industry and that the integrity of the welds is not in question.

Respectfully Submitted,

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