

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

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In the Matter of )  
)  
Rover Pipeline, LLC ) CPF No. 1-2019-1001  
) Notice of Probable Violation  
)  
Respondent. )  
\_\_\_\_\_)

**Rover Pipeline, LLC  
Post-Hearing Brief**

**I. Introduction**

The Pipeline and Hazardous Materials Safety Administration (PHMSA or the Agency) issued a Notice of Probable Violation (NOPV) and Proposed Civil Penalty to Rover Pipeline, LLC (Rover or the Company) which was received by Rover on June 3, 2019. The NOPV alleges one violation of Part 192.241(c) and proposes a civil penalty of \$143,000. Rover requested a hearing under 49 C.F.R. Parts 190.208 and 190.211 and a pre-hearing settlement conference. The parties convened a settlement conference on August 28, 2019 in West Trenton, New Jersey, but the parties were unable to reach a resolution. The parties submitted prehearing materials and convened a Hearing on November 7, 2019 in West Trenton, New Jersey. Rover timely files this Post-Hearing Brief reiterating its request that the NOPV be withdrawn in its entirety along with the Proposed Civil Penalty.

This matter presents a single issue: whether Rover adhered to API Standard 1104 Section 9 in determining the acceptability of nondestructively tested welds as required by 49 C.F.R. Part 192.241(c) when it performed a re-audit that identified imperfections in a small percentage of welds. As set forth below, Rover believes that it complied with the applicable law and that there is no factual or legal support for PHMSA to assert otherwise or impose a Proposed Civil Penalty. Further, Rover contends that basing a finding of violation on an audit performed to confirm the integrity of welds – as part of an agreed upon mitigation plan and corrective measure required in a prior NOPV – is procedurally unusual, factually unnecessary and poor policy.

**II. Background and Relevant Timeline**

The Rover pipeline system consists of a 713 mile pipeline that transports natural gas from production areas in the Marcellus and Utica Shale to markets in the U.S. and Canada. Rover was constructed in 2017 and 2018 pursuant to comprehensive construction specifications and

procedures designed to meet and in certain respects exceed 49 C.F.R. Part 192 pipeline safety regulations. The last portion of the Rover pipeline's mainline was approved for service by the Federal Energy Regulatory Commission (FERC) on May 31, 2018. The pipeline laterals were approved separately by FERC on August 23, 2018 and November 2, 2018.

Specific to the construction of pipeline welds on the Rover pipeline, 49 C.F.R. Part 192.243(d) generally requires nondestructive testing (NDT) of 10% of a random selection of every day's field welds in class 1 locations (the location of the majority of the welds at issue in this NOPV). Rover procedures far exceeded the 10% regulatory requirement by requiring NDT of every single weld, or 100% of the welds, on the Rover Pipeline. In addition, even though not required by Part 192 regulations, Rover procedures required independent auditing of the certified technicians who performed the NDT to confirm that the testing was performed in accordance with approved welding procedures and acceptability of the welds met the requirements of API 1104, Section 9.

It is this additional auditing review – beyond the regulatory requirement – that forms the basis of two NOPVs issued to Rover within 7 months of one another as reflected in the Figure 1 timeline below. Following the PHMSA Eastern Region's investigation of a hydrostatic test failure and nondestructive examination auditing, Rover prepared a mitigation plan in March 2018 to address certain weld auditor qualification issues, including performing a re-audit of certain welds which had been previously x-rayed and audited to confirm their acceptability. Rover implemented that plan and reviewed nearly 14,000 welds and identified a small percentage of welds where the API 1104 weld acceptability interpretation was changed. Specifically, that review identified 20 welds that had been completed but not yet placed into service and 13 in service welds. As reported to PHMSA on June 30, 2018, Rover cut out or repaired all of those welds. All of these activities were performed in coordination and communication with PHMSA.

On September 10, 2018, PHMSA issued Rover a NOPV, CPF 1-2018-1018 (2018 NOPV), alleging three violations and including an extensive Proposed Compliance Order, with a requirement to re-audit a sampling of certain welds as well as the 33 welds already identified and cut out or repaired by Rover. Notably, PHMSA did not allege a violation of 49 C.F.R. Part 192.241(c) or propose a penalty. Rover did not contest the 2018 NOPV and agreed to implement the terms of the Proposed Compliance Order, much of which it had already implemented such as re-audit and repair of the 33 welds.

The NOPV that is the subject of this contested matter was not received until almost 7 months later on June 3, 2019, even though it arises out of the *same* set of inspections, facts, and circumstances as the 2018 NOPV. In fact, the NOPV at issue in this challenge involves the *same* remedial measures undertaken to address the weld qualification issues that were the subject of the 2018 NOPV and which had been completed well in advance of that 2018 NOPV. In this 2019 NOPV, PHMSA alleged a violation of 49 C.F.R. Part 192.241(c) and proposed a civil penalty.

**Figure 1, Timeline of Relevant Events on Rover Pipeline**

Date	Event
Jun. – Dec. 2017	<b><u>Radiographic X-ray and Audit:</u></b> Rover performs radiographs of relevant welds on Rover pipeline to confirm acceptability under API 1104 Section 9. Rover performs audit of applicable welds as quality assurance and quality control of weld integrity.
Jan. - Feb. 2019	<b><u>Hydrostatic Test Failure and PHMSA Investigation:</u></b> Through coordination with Rover, PHMSA investigated a December 18, 2017, hydrostatic test failure on the Sherwood lateral and discovers that certain weld audit technicians did not maintain radiographic interpretation certifications as required by Rover procedures.
Mar. 12, 2018	<b><u>Mitigation Plan Proposal:</u></b> Rover provides a remediation plan and re-audit proposal to PHMSA, including a focus on film of certain auditor technicians who lacked requisite certifications required by Rover procedures.
Jun. 28-30, 2018	<b><u>Re-audit and Repair:</u></b> Rover performs a re-audit of nearly 14,000 weld x-ray radiographs and reports to PHMSA that 33 weld acceptability calls were changed on re-audit (0.23%), and only 13 of which had been placed into service. Rover also reported that it had already completed cut out or repair of <u>all</u> 33 welds.
Sep. 10, 2018	<b><u>First PHMSA NOPV:</u></b> PHMSA issues NOPV, CPF 1-2018-1018, alleging 3 violations, one associated with failure to perform NDE in accordance with Rover's written procedures and by persons qualified on those procedures (Part 192.243), and including an extensive Proposed Compliance Order with a requirement to perform a 10% re-audit of the weld auditors at issue and 100% re-audit of radiographs where different calls were made (work which had already been completed).
Oct. 9, 2018	<b><u>Rover Response, Acceptance of NOPV, and Summary of Remedial Measures:</u></b> Rover responds to PHMSA NOPV, does not request a hearing, and continues to implement its proposed remediation consistent with the Proposed Compliance Order.
Dec. 6, 2018	<b><u>Rover Updated Response and Summary of Remedial Measures:</u></b> Rover provides an updated response to PHMSA confirming that all requirements of the Proposed Compliance Order Item 1 are complete.
Jun. 3, 2019	<b><u>Second PHMSA NOPV (at issue here):</u></b> PHMSA issues NOPV, CPF 1-2019-1001, alleging a single violation of 192.241(c) for the weld interpretations that were identified and overturned by the re-audit discussed above and proposing a civil penalty of \$143,000.

### **III. Rover Complied with 49 C.F.R. 192.241(c)**

PHMSA and Rover ultimately disagree on whether a violation of 49 C.F.R. Part 192.241(c) occurs *ipso facto* when an operator conducts an additional level of auditing – not required by regulation – which in several instances (33 out of nearly 14,000) reach a different interpretation from prior audit calls regarding weld acceptability under API 1104, Section 9. Based on the purpose and plain language of the rule, Rover contends that it does not in this case. In addition, Rover maintains that such a conclusion would both establish precedent that would discourage operators from conducting inspections and audits beyond those minimally required and establish bad policy that would be inconsistent with existing DOT enforcement policy and precedent.

#### **A. Part 192 Weld NDT Requirements**

Pursuant to 49 C.F.R. Part 192, Subpart E, pipeline welders must pass qualification tests to work on a particular pipeline construction activities. Further, an operator’s welding procedures must be approved for use (i.e., qualified) in accordance with federally adopted welding standards. An additional level of quality assurance is required after a pipeline weld is created to ensure the quality of the ongoing welding operation. Qualified technicians are responsible for reviewing radiographic x-rays of pipe welds, a form of NDT, to ensure that the completed welds meet federally prescribed quality standards.

PHMSA regulation 49 C.F.R. Part 192.243(d) relates to the minimum number of welds that must be NDT and 49 C.F.R. Part 192.241(c) requires that the acceptability of NDT welds be determined according to API Standard 1104 Section 9 or Appendix A. API Standard 1104 is an industry standard that addresses numerous topics with respect to welds, including in relevant part the acceptance standards for nondestructive testing of welds at Section 9. The acceptance standards apply to “imperfections” defined as a discontinuity or irregularity located by radiographic as well as other testing methods. *API Std. 1104, Sec. 9.*

The purpose of Part 192.241(c) and 192.243(d) collectively is to require operators to review a percentage of the welds completed each day to confirm that they are free from imperfections that might impact pipeline integrity under API Standard 1104. As explained above, PHMSA only requires radiographic review of 10% of welds in class 1 areas (where most of the welds at issue are located). The intent of the regulations is for operators to (1) monitor the performance of the qualified welder and welding process through random monitoring; (2) identify welds that may be unacceptable and repair them; and (3) then communicate the results of their findings back to the welders to prevent recurrence. The Part 192 rules therefore anticipate that some pipeline welds will not be NDT (and thus may not meet the acceptability standards of API Section 9), but further provide that the entire pipeline be subjected to a hydrostatic test (destructive) to ensure the soundness of the welds.

Weld radiographic x-rays are reviewed and interpreted by qualified/certified technicians. Review of radiographic weld x-rays can be more qualitative than quantitative depending on the imperfection at issue. As with medical x-rays, qualified radiographic technicians can and often do interpret weld x-rays differently. Similar to doctors, one technician may see an imperfection where another does not.

## **B. Rover's NDT Review Complied with API 1104, Section 9**

From June through December 2017, the 33 welds at issue were reviewed and identified by qualified technicians as acceptable in meeting API 1104 criteria, Section 9, and 49 C.F.R. Part 192.241(c). *Pre-Hearing Exhibit 5, Rover Weld Daily Radiographic Reports*. The initial determination that these 33 welds were acceptable was a judgment call made by a qualified welding technician, fully within the bounds of and anticipated by API 1104, which the Company subsequently chose to re-evaluate in light of questions about certain weld auditors conducting a second level of review of the welds. Simply because Rover in a third level of review consisting of a re-audit of nearly 14,000 welds identified a very small percentage of welds for additional review – only 0.23% – does not prove noncompliance with API 1104 Section 9 criteria or Part 192.241(c) requirements. Moreover, Rover voluntarily elected to re-examine these welds and implement any necessary repairs and it now finds itself being penalized for doing so.

## **IV. NOPV and Proposed Civil Penalty Should be Withdrawn**

Based on the above, the NOPV should be withdrawn in its entirety. In the event that the NOPV allegation is not withdrawn, however, the Proposed Civil Penalty should be either withdrawn or reduced because it is not consistent with (1) PHMSA enforcement procedures regarding when a penalty is appropriate or (2) statutory and regulatory civil penalty assessment criteria.

PHMSA instructs its staff that a civil penalty is appropriate where a probable violation was (among other things):

- a causal factor in an accident/incident or increased the consequences of an accident/incident;
- egregious or willful;
- systemic (i.e., if it had repetitive characteristics or demonstrated underlying deficiency in operator system, practices or procedures);
- significantly increased the likelihood of a pipeline failure;
- involved the absence of corrective action by the operator over an extended period of time.

*PHMSA Pipeline Safety Enforcement Procedures, Sec. 3, p. 4 (Apr. 27, 2018)*. None of these circumstances applies to the instant case. Rather, the initial weld audit was performed in excess of regulatory requirements, Rover voluntarily and proactively conducted the re-audit in coordination with PHMSA, reevaluated prior weld reviews and implemented weld repairs, and self-reported the results to PHMSA.

As detailed below, PHMSA did not provide sufficient mitigating credit under the factors of circumstances, gravity, culpability, good faith and other matters as justice requires. *Compare* 49 U.S.C. § 60122(b) (outlining civil statutory penalty factors) and 49 C.F.R. Part 190.225 (detailing civil penalty assessment considerations) with *PHMSA Proposed Civil Penalty Worksheet CPF No. 1-2019-1001*. PHMSA's own counsel acknowledged this at the Hearing, "Regarding the fact that they went above and beyond and reviewed all 100 percent of the welds and created a mitigation plan once they discovered [...], all those things might go to mitigating the penalty." *Hearing Transcript, p. 31*.

- Circumstances – Operators are provided “variable credit” where they notify PHMSA of the issue before PHMSA discovers it. PHMSA allocated -25% because Rover disclosed the violation to PHMSA, but it could have and should have awarded more.
- Gravity – Only 13 of the welds at issue had been placed into service. As such, the “instances of violation” at most could be 13, not 33 as PHMSA suggests. Only 2 of those welds were located in a high consequence area (HCA). Thus, it would have been most appropriate to state “The violation occurred, however, pipeline safety was minimally affected.”
- Culpability – PHMSA allocated 2 points for “the operator failed to comply with an applicable requirement.” It would have been more accurate, however, if PHMSA had instead noted, “After the operator found the non-compliance, the operator took documented action to address the cause of the non-compliance and corrected the non-compliance before PHMSA learned of the violation,” which carries mitigative credit in the form of negative 15 points.
- Good Faith – Rover had no reason to believe that the welds at issue contained imperfections since they passed initial radiographic NDT review and audit. As such, PHMSA should have assigned mitigative credit of -10 points because Rover “had a reasonable justification for its non-compliance.”
- Other Matters as Justice Requires – Mitigative credit under “other matters as justice requires” should have been provided because Rover’s procedures go beyond the minimum Part 192 pipeline safety regulations to require 100% weld x-ray radiograph as well as independent auditing and that x-ray review is the subject of the alleged violation. PHMSA’s Proposed Civil Penalty worksheet expressly provides for negative 10 points under these circumstances. Further, the NOPV relates to a re-audit of nearly 14,000 welds to verify their integrity and which identified only 13 in service welds for remediation or repair.

As such, the Proposed Civil Penalty should be withdrawn or significantly reduced.

## **V. Procedural and Policy Concerns**

PHMSA and Rover also disagree on the appropriateness of issuing NOPV enforcement to an operator who performed auditing and remediation in response to prior NOPV enforcement that was based on the same set of inspections and facts. Seven months prior to issuance of the NOPV at issue, in 2018, PHMSA issued a lengthy NOPV regarding the same issues that were identified in the same inspections relied on for the 2019 NOPV, and which were the subject of corrective measures that had already been completed. PHMSA knew the results of the weld re-audit in 2018 and declined to allege a violation of Part 192.241(c) in that NOPV, despite including an obligation in the Proposed Compliance Order to undertake the corrective measures already completed for the very same 33 welds. As such, the 2019 NOPV is factually unnecessary, procedurally inappropriate, and an inefficient use of Agency resources.

PHMSA should not penalize an operator for voluntarily conducting audits of any kind, let alone welding, or for making a more conservative call than required by API 1104 or Part 192 and effectuating repairs. The PHMSA inspector in this matter noted in the Hearing that “*No inspector, myself included, would ever issue a citation, pursue a citation for a company’s findings under their own QA/QC program or their non-conformance reports if they had discovered it and brought it to [...] our attention.*” *Hearing Transcript, p. 37.* Yet that is exactly what happened here.

If this NOPV is upheld in a Final Order, it will discourage operators from performing supplemental quality assurance and quality control reviews for fear that they will be issued enforcement in the event they identify any additional issues or make more conservative judgment calls. The Department of Transportation’s Office of General Counsel has advised DOT inspectors against, “us[ing] [their] authorities as a game of ‘gotcha’ with regulated entities” but rather should “promptly disclose to the affected parties the reason for the investigative review and any compliance issues identified or findings made in the course of the review.” *DOT Memo re: Procedural Requirements for DOT Enforcement Actions, p. 5 (Feb. 15, 2019)* (emphasis added). After working with PHMSA to confirm the integrity of the welds at issue in June 2018 and accepting NOPV enforcement related to those issues in September 2018, the issuance of a second NOPV seven months later based on the same facts (and required corrective measures) certainly has the appearance of a game of ‘gotcha.’

## **VI. Conclusion and Request for Relief**

For the reasons identified in this Post-Hearing Brief, Rover’s Request for Hearing and Pre-Hearing Brief, and for other reasons as justice may require, Rover respectfully requests that PHMSA withdraw the NOPV and the Proposed Civil Penalty.

Respectfully submitted,



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