

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

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

**Rover Pipeline, LLC
Pre-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) on May 31, 2019, which Rover received on June 3, 2019. This matter presents one issue: whether Rover adhered to API Standard 1104 Section 9 criteria as required by 49 C.F.R. Part 192.241(c) in determining the acceptability of nondestructively tested 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.

Rover timely 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 unfortunately unable to reach a resolution. Accordingly, PHMSA issued a Notice of Hearing for November 7, 2019 in West Trenton, New Jersey and set a deadline of October 28, 2019, for submission of prehearing materials.

In advance of the hearing, Rover timely files this pre-hearing brief and supporting exhibits reiterating its request that the NOPV should be withdrawn in its entirety along with the Proposed Civil Penalty.

II. Background

The NOPV was issued as a result of inspections conducted by PHMSA between January and June 2018. The NOPV alleges one violation of Part 192.241 asserting that Rover failed to determine the acceptability of nondestructively tested welds according to API Standard 1104, Section 9 or Appendix A. The NOPV also proposes a civil penalty of \$143,000.

Notably, PHMSA previously issued an NOPV to Rover on September 18, 2018, CPF 1-2018-1018 as a result of the same inspections and alleging welding deficiencies (2018 NOPV). The 2018 NOPV alleged violations related to the inspection of welds by nondestructive testing (NDT) and examination (NDE), in relevant part alleging a violation of Part 192.243 and proposing an extensive compliance order (but no penalty). Rover did not contest the 2018 NOPV and agreed to implement the terms of the proposed compliance order, some of which it had already completed at the time the 2018 NOPV was issued, while also requesting an alternative method for compliance with an unrelated NOPV item.

As reflected in Rover's June 30, 2018 NDE Audit and Repair Tracker Summary Report, Rover had already completed a re-audit and repair of all x-ray welds performed previously by Rover's NDT and NDE auditors. *Exhibit 1, Rover NDE Audit and Repair Summary (Jun. 30, 2018)*. The re-audit went beyond Part 192 regulations and was more thorough than the requirements of the 2018 NOPV proposed compliance order that was subsequently issued. The results of the Company's re-audit were provided to PHMSA. Further, Rover notified the Agency of its discovery of 33 welds that, upon further review, were found to warrant remediation. This occurred prior to PHMSA's issuance of the 2018 NOPV, which did not allege a violation of 192.241(c). Instead, those same 33 welds are the subject of this 2019 NOPV, which was issued over seven months later.

III. Rover Determined Weld Acceptability in Full Compliance with API 1104

PHMSA regulation 49 C.F.R. Part 192.241(c) requires that the acceptability of nondestructively tested welds be determined according to API Standard 1104 Section 9 or Appendix A. *See also Part 192.7(b)(9)* (incorporating API Standard 1104 into Part 192 by reference). API Standard 1104 is an industry standard that provides methods for producing "high-quality welds through the use of qualified welders using approved welding procedures, materials, and equipment." *Exhibit 2, API Standard 1104, Sec. 9 (20th edition)*. This standard 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" located by radiographic as well as other testing methods. *API Std. 1104, Sec. 9*. An imperfection is defined to be "a discontinuity or irregularity that is detectable by methods outlined in this standard." *API Std. 1104, Sec. 3.2.5*.

A. Rover's Weld Examinations Far Exceeded the Regulatory Requirements

Part 192.243(d) generally requires nondestructive testing of 10% of a random selection of every day's field welds in class 1 locations, such as the location of the majority of the welds at issue on the Rover pipeline. Rover far exceeded the 10% regulatory requirement, however, by nondestructively testing 100% of the welds on the Rover Pipeline. In addition, Part 192 regulations do not require independent auditing of nondestructive testing, yet Energy Transfer procedures require this review.

Due to some NDE auditor qualification issues identified in 2017, Rover performed a re-audit of some of those welds. In particular, Rover opted to re-audit 100% of a certain NDT contractor's radiographic film due to concerns with weld acceptability. Rover used qualified auditors and qualified procedures for the purpose of re-auditing the welds to determine their acceptability in

accordance with referenced standards in Section 9 of API Standard 1104 and 49 C.F.R. Part 192.241(c). *Exhibit 3, Rover NDE Standard ETWS.060 (Rev. 2/1/17); Exhibit 4, Rover Level II Radiographer Qualifications*. During Rover's re-audit for additional quality assurance and quality control review, 13,859 x-ray welds were further examined. Through multiple reviews of that testing consistent with API 1104 Section 9 criteria, Rover only identified 33 welds for further review, excavation and repair (i.e., 0.23% of the welds).

B. Rover Should Not Be Penalized for Undertaking Subsequent Audits

Through re-examination of 13,859 welds by qualified NDE auditors and in accordance with applicable law, Rover identified just 33 welds for further examination and/or remediation. The initial determination that the 33 welds were acceptable was simply a judgment call by a qualified welding technician, fully within the bounds of and anticipated by API 1104, which the Company subsequently chose to re-evaluate. *Exhibit 5, Rover Weld Daily Radiographic Reports*. Review of radiographic weld tests can be more qualitative than quantitative depending on the imperfection at issue.

All three levels of review were conducted in accordance with API 1104, Section 9. The Part 192 regulations requiring NDT and review of weld acceptability anticipate that operators will identify welds that should be excavated and repaired. Simply because Rover identified a very small percentage of welds – only 0.23% – that had been initially identified as acceptable does not prove noncompliance with API 1104 Section 9 criteria or Part 192.241(c) requirements. More to the point, Rover elected to re-examine these welds of its own volition, taking remedial action before being ordered to do so.

IV. NOPV and Proposed Civil Penalty Should be Withdrawn

PHMSA bears the burden of proving by a preponderance of the evidence all elements of a proposed violation in an enforcement proceeding. *Final Order, In the Matter of Butte Pipeline Co., CPF No. 5-2007-5008 (Aug. 17, 2009)*. PHMSA has not met its burden of proof here. PHMSA has not shown that the Company failed to adhere to Section 9 of API Standard 1104, and thereby Part 194.241(c). The NOPV and the proposed civil penalty should be withdrawn.

In the event that the NOPV allegation is not withdrawn, the proposed civil penalty should be withdrawn or reduced because it is not consistent with statutory and regulatory penalty assessment criteria and in particular gravity, circumstances, 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 *Exhibit 6, PHMSA Proposed Civil Penalty Worksheet CPF No. 1-2019-1001*. The re-audit which overturned the initial 33 weld acceptability determinations was voluntarily performed, in excess of the regulatory requirements, and the results were self-reported to PHMSA. Further, contrary to the Agency's Proposed Civil Penalty Worksheet, very few of the welds were located in high consequence areas and a large majority of the welds were discovered and addressed prior to putting the line in service.

A civil penalty "should generally be proposed if the characteristics of the probable violation are consistent with" certain criteria outlined by PHMSA, none of which are apparent here (e.g., where

the probable violation was a causal factor in an accident/incident, egregious or willful, systemic, significantly increased the likelihood of a pipeline failure, involved the absence of corrective action by the operator over an extended period of time, etc.). *PHMSA Pipeline Safety Enforcement Procedures, Sec. 3, p. 4 (Apr. 27, 2018)*. As such, the proposed civil penalty should be withdrawn or significantly reduced.

V. Procedural and Policy Concerns

The NOPV raises both procedural and policy concerns. Procedurally, prior to issuance of the 2019 NOPV at issue in this proceeding, PHMSA had previously issued a detailed and lengthy NOPV in 2018 regarding these same issues that were identified in the very same inspections. PHMSA knew the results of the weld re-audit in 2018 and could have alleged a violation of Part 192.241(c) in the 2018 NOPV, but it did not. As such, the 2019 NOPV is factually unnecessary and procedurally inappropriate.

From a policy standpoint, 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. If this NOPV allegation 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 issues, errors, or make more conservative judgment calls. Further, the Department of Transportation's Office of General Counsel has advised in a recent policy statement that DOT inspectors, "must not use [their] authorities as a game of 'gotcha' with regulated entities" but rather "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)*. Rather than issue the separate 2019 NOPV for one issue arising out of the same set of facts and circumstances as the 2018 NOPV, DOT should have instead addressed all matters in the context of the 2018 NOPV.

VI. Conclusion and Request for Relief

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

Respectfully submitted,



TROUTMAN SANDERS LLP
Counsel for Rover Pipeline, LLC
Catherine D. Little, Esq.
Annie Cook, Esq.
600 Peachtree Street NE, Suite 3000
Atlanta, Georgia 30308
(404) 885-3056

Date: October 28, 2019

Pre-Hearing Exhibits

1. Rover NDE Audit and Repair Summary (Jun. 30, 2018).
2. API Standard 1104, Section 9 (20th edition).
3. Rover NDE Standard ETWS.060 (Rev. Feb. 1, 2017).
4. Rover Level II Radiographer Qualifications.
5. Rover Weld Daily Radiographic Reports.
6. PHMSA Proposed Civil Penalty Worksheet, CPF No. 1-2019-1001.