



September 21, 2021

U.S. Department of Transportation
Pipeline and Hazardous Materials Safety Administration (PHMSA)
Greg Ochs
Director, Central Region, OPS
901 Locust Street, Suite 480
Kansas City, Missouri 64106-2641

RE: CPF 3-2021-037-NOPV
Notice of Probable Violation Proposed Civil Penalty
Caliber Bear Den Interconnect LLC (CBDI)– OPID 39581

Dear Mr. Ochs,

On August 4, 2021, CBDI received Notice of Probable Violation (NOPV or Notice) Proposed Civil Penalty CPF 3-2021-037-NOPV. Below is CBDI's response to the NOPV and proposed civil penalty.

NOPV/Civil Penalty Item #1:

1. **§ 194.107 General response plan requirements.**
 - (a) ...
 - (c) **Each response plan must include:**
 - (1) **A core plan consisting of –**
 - (ix) **Drill program—an operator will satisfy the requirement for a drill program by following the National Preparedness for Response Exercise Program (PREP) guidelines. An operator choosing not to follow PREP guidelines must have a drill program that is equivalent to PREP.**

CBDI failed to make changes to its response plan after discovering deficiencies during its September 20, 2017 drill as required by PREP guidelines under § 192.107(c)(ix). Section 1.0 of the PREP guidelines states “Plan holders are responsible for addressing any issues that arise from evaluation of exercises and making changes to their respective response plans to ensure the highest level of preparedness.” The CBDI September 20, 2017 drill documentation identified communication issues occurred during the exercise. However, CBDI failed to provide any documentation identifying corresponding changes the operator made to response plan as required by PREP guidelines. Therefore, CBDI failed to comply with the requirements of § 192.107(c)(ix).

CBDI Response:

CBDI is not contesting the allegation or the proposed penalty. CBDI has improved its documentation practices relating to the drill program to ensure future compliance.

NOPV/Civil Penalty Item #2:

2. § 194.121 Response plan review and update procedures.

(a) ...

(b) If a new or different operating condition or information would substantially affect the implementation of a response plan, the operator must immediately modify its response plan to address such a change and, within 30 days of making such a change, submit the change to PHMSA. Examples of changes in operating conditions that would cause a significant change to an operator's response plan are:

(8) Any other information relating to circumstances that may affect full implementation of the plan.

CBDI failed to submit its Spill Response Plan (SRP) (revised July 27, 2018) to PHMSA within 30 days of a significant information update as required by § 194.121(b). During the inspection, PHMSA identified that a Qualified Individual noted in Section 2.1 of the SRP was incorrect as of August 2018. CBDI had not updated the address as documented in Section 2.1. CBDI also failed to correctly identify titles in Section 5.7.1 for Emergency Notification. In addition, both Sections 2.1 and 5.7.1 included the name of an individual the operator no longer employed. Therefore, CBDI failed to comply with the requirements of § 194.121(b)(8).

CBDI Response:

CBDI is not contesting the allegation or the proposed penalty. CBDI has provided its updated spill response plan to PHMSA to address the items identified in the NOPV.

NOPV/Civil Penalty Item #3:

3. § 195.403 Emergency response training.

(a) ...

(c) Each operator shall require and verify that its supervisors maintain a thorough knowledge of that portion of the emergency response procedures established under 195.402 for which they are responsible to ensure compliance.

CBDI failed to provide documentation that supervisors maintained a thorough knowledge of the emergency response procedures established under § 195.402 for which they are responsible as required by § 195.403(c). During the investigation, CBDI did provide some documentation for emergency procedure training for 2017 and 2018, but failed to provide any record verifying that supervisors maintained a thorough knowledge of the emergency response procedures. Therefore, CBDI failed to comply with the requirements of § 195.403(c).

CBDI Response:

CBDI respectfully contests this alleged violation. This allegation should be withdrawn because the facts asserted by the Notice do not constitute a violation of § 195.403(c). In other words, the Notice does not allege facts which would establish a violation of the regulation cited. In addition, the Violation Report does not provide any evidence of the statements in the Notice or any evidence of a violation of § 195.403.

As an initial matter, Section 195.403(c) requires an operator to “require and verify that its supervisors maintain a thorough knowledge of that portion of the emergency response procedures established under 195.402 for which they are responsible to ensure compliance.” This regulation does not require that an operator create or keep documentation of that activity. The Notice alleged that CBDI failed to provide documentation and failed to provide a record, which is not sufficient to establish a violation of § 195.403(c).

Furthermore, the Violation Report does not provide any evidence of the statements in the Notice or any evidence of a violation of § 195.403. The key facts stated in the Notice are that “CBDI failed to provide documentation...” and “failed to provide a record...” However, there is no evidence in support of these statements. The Violation Report lists the following evidence in support of Item 3: “See Exhibit C: O&M Procedures, email correspondence, and Drill records.”¹ The Table of Contents for Exhibit C lists “O&M Procedures” and “Drill records,” but does not identify any email correspondence.² The exhibits to the Violation Report are not labeled. The O&M Procedures are included in the exhibits³ but they do not provide any evidence in support of the alleged facts. No email correspondence concerning matters relating to § 195.403(c) appears as an exhibit.⁴ The only “drill records” which appear in the Violation Report as an exhibit are those which pertain to the allegation in Item 1 of the Notice, which is about the Part 194 Response Plan. These drill records do not provide any evidence of the facts alleged in the Notice for Item 3.

The Violation Report does not identify any evidence in the form of interviews conducted or statements made by CBDI personnel during the PHMSA inspection that would support the alleged violation. As such, there is no evidence in the Violation Report that CBDI does not have “documentation that supervisors maintained a thorough knowledge of the emergency response procedures established under § 195.402 for which they are responsible as required by § 195.403(c)” as alleged in the Notice.⁵ Neither is there any evidence that CBDI actually failed to ensure and verify that its supervisors maintained this knowledge, which is what the cited regulation actually requires.

In an enforcement proceeding, PHMSA has the burden of demonstrating that a violation of the pipeline safety regulations occurred.⁶ PHMSA has the “burden of production,’ *i.e.*, . . . the obligation to come forward with the evidence at different points in the proceeding,” and the “burden of persuasion,’ *i.e.*, which party loses if the

¹ PHMSA, Pipeline Safety Violation Report, CPF #3-2021-037-NOPV (Violation Report) at 20.

² Violation Report at 34.

³ Violation Report at 207 – 340.

⁴ One email regarding valve inspection reports appears in the Violation Report, but it does not mention emergency response training or any issues relating to Section 195.403. See Violation Report at 341.

⁵ Notice at 2. Note that such documentation is not actually required by 49 C.F.R. § 195.403(c).

⁶ See 49 C.F.R. § 190.213(a)(1). See also *In re Inland Corp.*, Final Order, CPF No. 1-2017-5003, 2018 WL 2229407, at *3 (D.O.T. Mar. 7, 2018) (withdrawing alleged violation where testimony was contradictory and factual evidence provided by respondent did not support OPS’s claim); *In re Air Prods. & Chems., Inc.*, Final Order, CPF No. 4-2013-1001, 2015 WL 6758819, at *3 (D.O.T. Aug. 10, 2015) (withdrawing alleged violation because PHMSA did not produce “any evidence to support its position” and thereby did not meet its burden of proof); *In re ExxonMobil Pipeline Co.*, Final Order, CPF No. 5-2013-5007, 2015 WL 780721, at *12 (D.O.T. Jan. 23, 2015) (finding that PHMSA failed to meet burden of proving that certain measures were required under regulations); *In re So. Star Cent. Gas Pipeline, Inc.*, Final Order, CPF No. 3-2008-1005, 2011 WL 7006614, at *4 (D.O.T. Oct. 21, 2011) (finding the evidence insufficient to sustain the allegation); *In re Golden Pass Pipeline, LLC*, Final Order, CPF No. 4-2008-1017, 2011 WL 1919517, at *5 (D.O.T. Mar. 22, 2011) (finding that PHMSA did not meet its burden of proving that its interpretation of regulatory language was correct).

evidence is closely balanced.”⁷ PHMSA “bears the burden of proof as to all elements of the proposed violation.”⁸ To meet its burden of production, PHMSA must present sufficient evidence to sustain an allegation of violation.

Where PHMSA does not produce such evidence, the allegation of violation must be withdrawn.⁹ To meet its burden of persuasion, PHMSA “must prove, by a preponderance of the evidence, that the facts necessary to sustain a probable violation actually occurred.”¹⁰ This burden is carried “only if the evidence supporting the allegation outweighs the evidence and reasoning presented by Respondent in its defense.”¹¹ A respondent will prevail under this standard not by conclusively proving compliance, but where its rebuttal evidence is more persuasive than the evidence provided by PHMSA.¹² If “the evidence is closely balanced,” PHMSA has not met its burden of persuasion and the allegation of violation must be withdrawn.¹³

In this instance, PHMSA has provided no evidence that would support the statements in the Notice. Furthermore, the facts as stated in the Notice, even if true and correct, would not constitute a violation of § 195.403(c). For these reasons, CBDI respectfully requests that the Item 3 and the proposed civil penalty be withdrawn.

NOPV/Civil Penalty Item #4:

4. § 195.420 Valve maintenance.

(c) ...

(d) Each operator shall, at intervals not exceeding 7 ½ months, but at least twice each calendar year, inspect each mainline valve to determine that it is functioning properly.

⁷ *Schaeffer v. Weast*, 546 U.S. 49, 56 (2005) (quoting *Dir., Office of Workers’ Comp. Programs, Dep’t of Labor v. Greenwich Collieries*, 512 U.S. 267, 272 (1994)); see also *In re Butte Pipeline Co.*, Final Order, CPF No. 5-2007-5008, 2009 WL 3190794, at *1 (D.O.T. Aug. 17, 2009) (“PHMSA carries the burden of proving the allegations set forth in the Notice, meaning that a violation may be found only if the evidence supporting the allegation outweighs the evidence and reasoning presented by Respondent in its defense.”).

⁸ *In re ANR Pipeline Co.*, Final Order, CPF No. 3-2011-1011, 2012 WL 7177134, at *3 (D.O.T. Dec. 31, 2012) (finding that evidence in violation report was insufficient to prove that ANR Pipeline Co. (ANR) knew of probable existence of safety-related condition based on in-line inspection (ILI) data alone); see also *In re CITGO Pipeline Co.*, Decision on Petition for Reconsideration, CPF No. 4-2007-5010, 2011 WL 7517716, at *5 (D.O.T. Dec. 29, 2011) (finding lack of evidence demonstrating that breakout tank was not receiving adequate cathodic protection).

⁹ See, e.g., *In re EQT Corp.*, Final Order, CPF No. 1-2006-1006, 2010 WL 2228558, at **6-7 (D.O.T. May 13, 2010) (finding that OPS did not present evidence or analysis proving that choice of “critical elements” was inadequate or why it was essential to know exact location of pipe transitions); *In re Plains Pipeline, L.P.*, Final Order, CPF No. 4-2009-5009, 2011 WL 1919520, at **4-5 (D.O.T. Mar. 15, 2011) (ordering withdrawal of allegation when limited evidence in the record was not conclusive); *In re Bridger Pipeline Co.*, Decision on Reconsideration, CPF No. 5-2007-5003, 2009 WL 2336991, at **5-6 (D.O.T. June 16, 2009) (finding evidence introduced by PHMSA insufficient to establish whether pressure transmitters were integral to overpressure control system).

¹⁰ *In re Alyeska Pipeline Serv. Co.*, Decision on Petition for Reconsideration, CPF No. 5-2005-5023, 2009 WL 5538655, at *3 (D.O.T. Dec. 16, 2009) (citing *In re Butte Pipeline*, 2009 WL 3190794 at *1, n.3; *Schaeffer*, 546 U.S. at 56-58).

¹¹ *In re Butte Pipeline*, 2009 WL 3190794 at *1.

¹² See *In re ANR Pipeline*, 2012 WL 7177134 at *3. In *ANR Pipeline*, PHMSA found that ANR’s “plausible” explanation regarding the discovery of a reportable condition on its pipeline was sufficient to warrant withdrawal of the allegation of violation because the “Violation Report contain[ed] no evidence which would rebut ANR’s argument.” *Id.*

¹³ *In re Alyeska Pipeline*, 2009 WL 5538655 at *3 (quoting *Schaeffer*, 546 U.S. at 56). Cf. *In re Buckeye Partners, LP*, Final Order, CPF No. 1-2009-5002, 2012 WL 3144486, at *7 (D.O.T. May 30, 2012) (where neither party “present[s] sufficient proof to prove its position,” the violation must be withdrawn because PHMSA bears the burden).



CBDI failed, at intervals not exceeding 7-1/2 months, but at least twice each calendar year, to inspect each mainline valve to determine that it is functioning properly as required by § 195.420(b).

During the inspection, CBDI only provided mainline valve inspection records dated January 11, 2019. The CBDI pipeline was commissioned on March 3, 2017. Therefore, CBDI was missing mainline valve maintenance inspection records for 2017 and 2018 for three inspection cycles (one 2017 inspection and two 2018 inspections). According to CBDI records, there were a total of nine (9) mainline valves in the Bear Den system. Therefore, CBDI failed to inspect its mainline valves at intervals not exceeding 7¹/₂ months, but at least twice each calendar year, as required under § 195.420(b).

CBDI Response:

CBDI has improved its procedures to ensure compliance with the requirement to conduct inspections of mainline valves at the required interval in accordance with § 195.420.

Please feel free to contact me directly concerning any questions or comments at (720) 630-2658 or at cbutero@calibermidstream.com.

Sincerely,

Carol Butero
Director of Regulatory, Safety, and Compliance