

**NOTICE OF PROBABLE VIOLATION
PROPOSED CIVIL PENALTY
and
PROPOSED COMPLIANCE ORDER**

VIA E-MAIL TO MR. JOSEPH ISRAEL

August 11, 2021

Mr. Joseph Israel
President & CEO
Wyoming Refining Company
825 Town & Country Lane, Suite 1500
Houston, TX 77024

CPF 5-2021-031-NOPV

Dear Mr. Israel:

From March 17, 2021, to May 7, 2021, representatives of the Pipeline and Hazardous Materials Safety Administration (PHMSA), pursuant to Chapter 601 of 49 United States Code (U.S.C.), inspected the Wyoming Refining Company (WRC)¹ Drug and Alcohol (D&A) Program using email, the internet, and other virtual methods.

As a result of the inspection, it is alleged that WRC has committed probable violations of the Pipeline Safety Regulations, Title 49, Code of Federal Regulations (CFR).² The items inspected and the probable violations are as follows:

¹ Par Pacific Holdings, Inc. owns the Wyoming Refining Company [OPID 30756] (WRC) and the Wyoming Pipeline Company [OPID 32537] (WPC), which are PHMSA regulated pipeline operators that must meet the PHMSA D&A regulations. WRC manages the PHMSA D&A program. WPC is included as a business unit in the WRC PHMSA D&A program.

² Pursuant to §199.5, violations, as alleged in this Notice, of the DOT Procedures in 49 CFR Part 40 for anti-drug and alcohol programs required by Part 199 would be violations of Part 199.

1. §40.25 Must an employer check on the drug and alcohol testing record of employees it is intending to use to perform safety-sensitive duties?

(a) Yes, as an employer, you must, after obtaining an employee's written consent, request the information about the employee listed in paragraph (b) of this section. This requirement applies only to employees seeking to begin performing safety-sensitive duties for you for the first time (i.e., a new hire, an employee transfers into a safety-sensitive position). If the employee refuses to provide this written consent, you must not permit the employee to perform safety-sensitive functions.

WRC did not obtain the written consent of employees so that it could request the information about the employees listed in §40.25(b).

Section 40.25 requires employers to check on the DOT D&A testing record of employees it is intending to use to perform safety-sensitive duties³ for the employer. To initiate the process, the employer must first get a “wet ink” signature from each employee for each prior DOT employer who employed the employee during any period during the two years before the date of the employee’s application with the employer. This D&A testing record information includes positive drug and alcohol tests, refusals, other DOT agency D&A testing violations, and information on the employee’s successful completion of the return-to-duty requirements, if applicable.

In calendar year 2019, WRC conducted pre-employment DOT drug tests on six employees⁴ it intended to hire to perform D&A covered functions on its PHMSA regulated pipelines. PHMSA inspectors asked for copies of the signed DOT consent forms for those six employees. WRC did not provide the required consent forms. Instead it provided generic background check forms that did not meet the regulatory requirements in §40.25.

2. §40.347 What functions may C/TPAs perform with respect to administering testing? As a C/TPA, except as otherwise specified in this part, you may perform the following functions for employers concerning random selection and other selections for testing.

...
(b) You may combine employees from more than one employer or one transportation industry in a random pool if permitted by all the DOT agency drug and alcohol testing regulations involved.

...
(2) Employees not covered by DOT agency regulations may not be part of the same random pool with DOT covered employees.

WRC, or its C/TPA, placed employees not covered by DOT agency regulations in the same random drug test pool with DOT covered employees.

³ The PHMSA D&A regulations define safety-sensitive duties as covered functions in §199.3.

⁴ Pursuant to §40.3, an employee includes applicants for employment subject to pre-employment testing.

In calendar year 2018 and 2019, WRC failed to properly distinguish its DOT/PHMSA covered employees as defined in §199.3 from its non-covered employees. WRC, or its C/TPA,⁵ then placed employees not covered by the PHMSA D&A regulations into the same random drug testing pool with DOT/PHMSA covered employees.

3. §199.101 Anti-drug plan.

- (a) Each operator shall maintain and follow a written anti-drug plan that conforms to the requirements of this part and the DOT Procedures. The plan must contain—**
- (1) Methods and procedures for compliance with all the requirements of this part, including the employee assistance program;**
 - (2) The name and address of each laboratory that analyzes the specimens collected for drug testing;**
 - (3) The name and address of the operator's Medical Review Officer, and Substance Abuse Professional; and**
 - (4) Procedures for notifying employees of the coverage and provisions of the plan.**

WRC did not maintain and follow a written anti-drug plan that conformed to the requirements of Part 199 and the DOT Procedures.⁶

When asked during the inspection to provide the written “Anti-drug plan” required by §199.101, WRC submitted to the PHMSA inspectors its Drug and Alcohol Policy (D&A Policy) that pertained to WRC and to WPC; a business unit covered by the WRC D&A Program. The D&A Policy was last revised June 20, 2018.

WRC’s D&A Policy did not distinguish between the PHMSA drug policy regulations in §199.113 and the PHMSA written anti-drug plan regulations in §199.101. Instead, the D&A Policy conflated the terms “policy” and “plan” and used them interchangeably throughout as if these terms had the same meaning, which they do not.

While the WRC D&A Policy contained the acronym PHMSA over 40 times, it did not contain methods and procedures for compliance with all the requirements of Part 199. Moreover, the D&A Policy listed the incorrect name and address of the HHS laboratory it used to analyze urine specimens, conflated non-DOT with DOT drug testing requirements, conflated company policies with the DOT/PHMSA regulatory requirements, and contained numerous statements that have no basis in the PHMSA/DOT drug testing regulations.

4. §199.105 Drug tests required.

Each operator shall conduct the following drug tests for the presence of a prohibited drug:

⁵ The DOT regulations in §40.11 state that the employer is responsible for meeting all applicable requirements and procedures of part 40 and is responsible for all actions of its officials, representatives, and agents (including service agents) in carrying out the requirements of the DOT agency regulations.

⁶ Section 199.3 defines the *DOT Procedures* to mean the *Procedures for Transportation Workplace Drug and Alcohol Testing Programs* published by the Office of the Secretary of Transportation in 49 CFR Part 40.

...

(b) *Post-accident testing.* (1) As soon as possible but no later than 32 hours after an accident, an operator must drug test each surviving covered employee whose performance of a covered function either contributed to the accident or cannot be completely discounted as a contributing factor to the accident. An operator may decide not to test under this paragraph but such a decision must be based on specific information that the covered employee's performance had no role in the cause(s) or severity of the accident.

WRC improperly conducted PHMSA/DOT post-accident drug tests on employees who were not performing any covered functions that either contributed to the accident or could not be completely discounted as a contributing factor to the accident and for incidents that were not reportable pipeline accidents.⁷

In calendar year 2018, WRC experienced at least eight incidents that involved non-pipeline related equipment such as forklifts, grinders, and vehicles and which had nothing to do with a PHMSA reportable pipeline accident or D&A covered functions. Yet, WRC improperly conducted DOT drug tests on eight employees involved in these non-pipeline accidents.

5. §199.105 Drug tests required.

Each operator shall conduct the following drug tests for the presence of a prohibited drug:

...

(c) *Random testing.*

(1) Except as provided in paragraphs (c)(2) through (4) of this section, the minimum annual percentage rate for random drug testing shall be 50 percent of covered employees.

(2) Each year, the Administrator will publish in the Federal Register the minimum annual percentage rate for random drug testing of covered employees. The new minimum annual percentage rate for random drug testing will be applicable starting January 1 of the calendar year following publication.

WRC did not conduct random drug tests for the presence of a prohibited drug at the minimum annual percentage rate of 50 percent of its covered employees.

PHMSA published in the Federal Register the minimum annual random drug test rate of 50 percent for calendar year 2019 on December 11, 2018 (83 FR 63701). In calendar year 2019, WRC conducted 46 random DOT drug tests on 128 covered employees for a random drug test rate of 36 percent.

6. §199.117 Recordkeeping.

⁷ Section 199.3 defines *Accident* to mean an incident reportable under Part 191 involving gas pipeline facilities or LNG facilities, or an accident reportable under Part 195 involving hazardous liquid pipeline facilities

(a) Each operator shall keep the following records for the periods specified and permit access to the records as provided by paragraph (b) of this section:

...

(5) Records of decisions not to administer post-accident employee drug tests must be kept for at least 3 years.

WRC did not keep records of decisions not to administer post-accident employee drug tests for at least three years.

WPC (a business unit covered by the WRC D&A Program) had a PHMSA reportable accident on March 6, 2019. A review of the PHMSA Accident Report (Form PHMSA F 7000.1), Part F, submitted to PHMSA shows that WRC did not conduct post-accident drug testing of any of the WPC employees or of any contractor employees. Yet, WRC did not provide any records of its decisions not to administer post-accident employee drug tests after this PHMSA reportable accident.

7. §199.119 Reporting of anti-drug testing results.

(a) Each large operator (having more than 50 covered employees) must submit an annual Management Information System (MIS) report to PHMSA of its anti-drug testing using the MIS form and instructions as required by 49 CFR part 40 (at §40.26 and appendix H to part 40), not later than March 15 of each year for the prior calendar year (January 1 through December 31). The Administrator may require by notice in the PHMSA Portal (<https://portal.phmsa.dot.gov/phmsaportal> landing) that small operators (50 or fewer covered employees), not otherwise required to submit annual MIS reports, to prepare and submit such reports to PHMSA.

WRC, a large operator (having more than 50 covered employees), did not properly submit an annual Management Information System (MIS) report to PHMSA of its anti-drug testing using the MIS form and instructions as required by 49 CFR part 40 (at §40.26 and appendix H to part 40), not later than March 15 of each year for the prior calendar year (January 1 through December 31).

WRC submitted an incomplete annual MIS report to PHMSA of its calendar year 2018 DOT anti-drug testing. The MIS form submitted showed that WRC had 128 covered employees, but the form did not contain any information on the number, types, or results of its 2018 DOT drug testing. During the inspection, WRC provided PHMSA with a spreadsheet showing it completed 83 DOT drug tests in 2018, but none of these drug tests were reported in Section III, Drug Testing, on its CY 2018 annual MIS report.

Additionally, WRC incorrectly reported its annual MIS reports to PHMSA for calendar years 2018, 2019, and 2020 by using the name Hermes Consolidated, LLC, with OpID 30756, which is the OpID of Wyoming Refining Co., not Hermes Consolidated, LLC.

8. §199.202 Alcohol misuse plan.

Each operator must maintain and follow a written alcohol misuse plan that conforms to the requirements of this part and DOT Procedures concerning alcohol testing programs. The plan shall contain methods and procedures for compliance with all the requirements of this subpart, including required testing, recordkeeping, reporting, education and training elements.

WRC did not maintain and follow a written alcohol misuse prevention plan that conformed to the requirements of Part 199 and the DOT Procedures.⁸

When asked during the inspection to provide the written “Alcohol misuse prevention plan” required by §199.202, WRC submitted to the PHMSA inspectors its WRC D&A Policy; last revised June 20, 2018. The WRC D&A Policy did not distinguish between the PHMSA alcohol policy regulations contained in §199.239 and the PHMSA written alcohol misuse prevention plan regulations in §199.202. Instead, the D&A Policy conflates the terms “policy” and “plan” and uses them interchangeably throughout as if these terms had the same meaning, which they do not.

While the WRC D&A Policy contained the acronym PHMSA over 40 times, it did not contain methods and procedures for compliance with all the requirements of part 199. Moreover, the D&A Policy conflated non-DOT with DOT alcohol testing requirements, conflated company policies with the DOT/PHMSA regulatory requirements, and contained numerous statements that have no basis in the PHMSA or DOT alcohol testing regulations.

9. §199.225 Alcohol tests required.

Each operator must conduct the following types of alcohol tests for the presence of alcohol:

(a) *Post-accident.* (1) As soon as practicable following an accident, each operator must test each surviving covered employee for alcohol if that employee's performance of a covered function either contributed to the accident or cannot be completely discounted as a contributing factor to the accident. The decision not to administer a test under this section must be based on specific information that the covered employee's performance had no role in the cause(s) or severity of the accident.

WRC improperly conducted PHMSA/DOT post-accident alcohol tests on employees who were not performing any covered functions that either contributed to the accident or could not be completely discounted as a contributing factor to the accident and for incidents that were not reportable pipeline accidents.⁹

⁸ Section 199.3 defines the *DOT Procedures* to mean the *Procedures for Transportation Workplace Drug and Alcohol Testing Programs* published by the Office of the Secretary of Transportation in 49 CFR Part 40.

⁹ Section 199.3 defines *Accident* to mean an incident reportable under Part 191 involving gas pipeline facilities or LNG facilities, or an accident reportable under Part 195 involving hazardous liquid pipeline facilities

In calendar year 2018, WRC experienced at least eight incidents that involved non-pipeline related equipment such as forklifts, grinders, and vehicles and which had nothing to do with a PHMSA reportable pipeline accident or D&A covered functions. Yet, WRC improperly conducted DOT alcohol tests on seven employees involved in these non-pipeline accidents.

10. §199.227 Retention of records.

(a) *General requirement.* Each operator shall maintain records of its alcohol misuse prevention program as provided in this section. The records shall be maintained in a secure location with controlled access.

(b) *Period of retention.* Each operator shall maintain the records in accordance with the following schedule:

...

(4) *Three years.* Records of decisions not to administer post-accident employee alcohol tests must be kept for a minimum of three years.

WRC did not keep records of decisions not to administer post-accident employee alcohol tests for at least three years.

WPC (a business unit covered by the WRC D&A Program) had a PHMSA reportable accident on March 6, 2019. A review of the PHMSA Accident Report (Form PHMSA F 7000.1), Part F, submitted to PHMSA shows that WRC did not conduct any post-accident alcohol testing of any of the WPC employees or of any contractor employees. WRC did not provide any records of its decisions not to administer post-accident employee alcohol tests.

Proposed Civil Penalty

Under 49 U.S.C. § 60122 and 49 CFR § 190.223, you are subject to a civil penalty not to exceed \$225,134 per violation per day the violation persists, up to a maximum of \$2,251,334 for a related series of violations. For violation occurring on or after January 11, 2021 and before May 3, 2021, the maximum penalty may not exceed \$222,504 per violation per day the violation persists, up to a maximum of \$2,225,034 for a related series of violations. For violation occurring on or after July 31, 2019, and before January 11, 2021, the maximum penalty may not exceed \$218,647 per violation per day the violation persists, up to a maximum of \$2,186,465 for a related series of violations. For violation occurring on or after November 27, 2018, and before July 31, 2019, the maximum penalty may not exceed \$213,268 per violation per day, with a maximum penalty not to exceed \$2,132,679. For violation occurring on or after November 2, 2015, and before November 27, 2018, the maximum penalty may not exceed \$209,002 per violation per day, with a maximum penalty not to exceed \$2,090,022.

We have reviewed the circumstances and supporting documentation involved for the above probable violation and recommend that you be preliminarily assessed a civil penalty of \$72,400 as follows:

<u>Item number</u>	<u>PENALTY</u>
3	\$ 36,200
5	\$ 36,200

Warning Items

With respect to items # 1, 4, 6, 7, 9 & 10 we reviewed the circumstances and supporting documents involved in this case and have decided not to conduct additional enforcement action or penalty assessment proceedings at this time. We advise you to promptly correct this item. Failure to do so may result in additional enforcement action.

Proposed Compliance Order

With respect to items # 2, 3, & 8 pursuant to 49 U.S.C. § 60118, the Pipeline and Hazardous Materials Safety Administration proposes to issue a Compliance Order to Wyoming Refining Company. Please refer to the *Proposed Compliance Order*, which is enclosed and made a part of this Notice.

Response to this Notice

Enclosed as part of this Notice is a document entitled *Response Options for Pipeline Operators in Enforcement Proceedings*. Please refer to this document and note the response options. All material you submit in response to this enforcement action may be made publicly available. If you believe that any portion of your responsive material qualifies for confidential treatment under 5 U.S.C. 552(b), along with the complete original document you must provide a second copy of the document with the portions you believe qualify for confidential treatment redacted and an explanation of why you believe the redacted information qualifies for confidential treatment under 5 U.S.C. 552(b).

Following the receipt of this Notice, you have 30 days to submit written comments, or request a hearing under 49 CFR § 190.211. If you do not respond within 30 days of receipt of this Notice, this constitutes a waiver of your right to contest the allegations in this Notice and authorizes the Associate Administrator for Pipeline Safety to find facts as alleged in this Notice without further notice to you and to issue a Final Order. If you are responding to this Notice, we propose that you submit your correspondence to my office within 30 days from receipt of this Notice. This period may be extended by written request for good cause.

In your correspondence on this matter, please refer to **CPF 5-2021-031-NOPV** and, for each

document you submit, please provide a copy in electronic format whenever possible.

Sincerely,

Dustin Hubbard
Director, Western Region, Office of Pipeline Safety
Pipeline and Hazardous Materials Safety Administration

Enclosures: *Proposed Compliance Order*
Response Options for Pipeline Operators in Enforcement Proceedings

cc: PHP-60 Compliance Registry

PROPOSED COMPLIANCE ORDER

Pursuant to 49 United States Code § 60118, the Pipeline and Hazardous Materials Safety Administration (PHMSA) proposes to issue to Wyoming Refining Company (WRC) a Compliance Order incorporating the following remedial requirements to ensure the compliance of WRC with the pipeline safety regulations:

- A. In regard to Item # 2 of the Notice pertaining to WRC's placement of non-DOT employees in the same random drug test pool with its PHMSA (i.e. DOT) covered employees as defined in §199.3, WRC must undertake a study to correctly identify its DOT covered employees subject to DOT D&A testing and must submit the list of covered employees by job function or job title to PHMSA for review within 90 days of receipt of the Final Order.
- B. In regard to Item # 3 of the Notice pertaining to WRC's failure to maintain and follow a written anti-drug plan that conformed to the requirements of 49 CFR Part 199 and the DOT Procedures in 49 CFR Part 40, WRC must develop a written anti-drug plan that contains the specific methods and procedures it will use to comply with all the requirements of part 199 and part 40 and must submit the plan to PHMSA for review within 90 days of receipt of the Final Order.
- C. In regard to Item # 8 of the Notice pertaining to WRC's failure to maintain and follow a written alcohol misuse prevention plan that conformed to the requirements of 49 CFR Part 199 and the DOT Procedures in 49 CFR Part 40, WRC must develop a alcohol misuse prevention plan that contains the specific methods and procedures it will use to comply with all the requirements of part 199 and part 40 and must submit the plan to PHMSA for review within 90 days of receipt of the Final Order.
- D. In lieu of Items B & C above, WRC may develop a combined anti-drug and alcohol misuse prevention plan that contains the specific methods and procedures it will use to comply with all the requirements of 49 CFR Part 199 and the DOT Procedures in 49 CFR Part 40, and must submit the plan to PHMSA for review within 90 days of receipt of the Final Order.
- E. It is requested (not mandated) that WRC maintain documentation of the safety improvement costs associated with fulfilling this Compliance Order and submit the total to Dustin Hubbard, Director, Western Region, Office of Pipeline Safety, Pipeline and Hazardous Materials Safety Administration. It is requested that these costs be reported in two categories: 1) total cost associated with preparation/ revision of plans, procedures, studies and analyses, and 2) total cost associated with replacements, additions and other changes to pipeline infrastructure.