



U.S. Terminals and Pipelines

**BP Pipelines (North America) Inc.
30 S. Wacker Drive, 10th Floor
Chicago, Illinois 60606**

January 16, 2024

VIA EMAIL

Mr. James A. Urisko
Director, Southern Region
U.S. Department of Transportation
PHMSA, Office of Pipeline Safety
230 Peachtree Street N.W
Suite 2100
Atlanta, GA 30303

Re: CPF No. 2-2023-020-NOPV

Dear Mr. Urisko:

BP Pipelines (North America) Inc. (bp) is writing in response to the referenced Notice of Probable Violation (NOPV) and Proposed Civil Penalty letter, received in our offices on December 21, 2023, regarding the July 28, 2023 through September 15, 2023 inspection of the bp drug and alcohol testing programs.

bp is not contesting the NOPV and proposed civil penalty but wishes to submit additional information to clarify the alleged findings. For ease of response, the code citation and DOT's statements have been copied below in italics and are followed by the bp response.

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.***

Finding

BP, an employer, did not obtain the information listed in § 40.25(b) about employees seeking to begin performing safety-sensitive duties for BP for the first time in calendar year 2022. The information in § 40.25(b) includes, but is not limited to, alcohol tests with a result of 0.04 or higher alcohol concentration; verified positive drug tests; refusals to be tested (including verified adulterated or substituted drug test results); other violations of DOT agency D&A testing

regulations; and with respect to any employee who violated a DOT D&A regulation, documentation of the employee's successful completion of DOT return-to-duty requirements (including follow-up tests). Obtaining this information is commonly referred to as a drug and alcohol (D&A) background history checks.

The certified BP Management Information System (MIS) report for calendar year 2022 showed 41 pre-employment tests were conducted in 2022. During the inspection, BP did not produce any records indicating the required D&A background history checks had been completed for any of the 41 employees seeking to begin performing safety-sensitive duties for BP for the first time. In a follow up email to PHMSA from BP compliance personnel, BP stated that it had incorporated into the BP preemployment verification process a new consent form that BP would utilize to complete future D&A background history checks.

bp Response

By request during the inspection, bp provided consent forms for review. However, it was determined that the documentation provided did not contain explicit reference and information related to DOT drug and alcohol (D&A) background checks. As a result, bp revised its preemployment background screening consent form to more clearly reference DOT D&A testing background checks. The revised consent form was shared with the PHMSA inspection representative during the inspection closure process. The revised consent form will be used in the process for hiring future candidates who will begin performing safety sensitive functions for bp for the first time.

2. § 199.105 Drug tests required.

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

(a) . . .

(e) Return-to-duty testing. A covered employee who refuses to take or has positive drug test may not return to duty in the covered function until the covered employee has complied with applicable provisions of DOT Procedures concerning substance abuse professionals and the return-to-duty process. BP improperly conducted DOT return-to-duty drug tests of covered employees for the presence of a prohibited drug when these employees had not complied with applicable provisions of DOT Procedures concerning substance abuse professionals and the return-to-duty process.

Finding

BP improperly conducted DOT return-to-duty drug tests of covered employees for the presence of a prohibited drug when these employees had not complied with applicable provisions of DOT Procedures concerning substance abuse professionals and the return-to-duty process.

BP removed two employees from its PHMSA drug testing pool who BP stated were on leave due to injuries. These employees were required to take and pass a DOT pre-employment drug test before returning to perform covered functions on PHMSA regulated pipelines and LNG facilities. Because these employees had not refused to take a drug test and did not have a positive drug test result, they were not required to comply with the DOT Procedures concerning substance abuse professionals and the return-to-duty process. Instead of conducting the required pre-employment drug tests, however, BP incorrectly conducted return-to-duty drug tests on these two employees in 2022.

DOT return-to-duty tests are only completed after an employee has violated a DOT or PHMSA D&A regulation and the employee has completed the return-to-duty process in the DOT Procedures. While return-to-duty drug test samples are analyzed by the laboratory using the same analyses as pre-employment drug tests, the urine sample collection process varies significantly between these tests. That is, DOT return-to-duty tests are conducted under direct observation, which is not allowed under pre-employment drug testing except for very limited circumstances (as outlined in Part 40) such as when tampering with the sample is suspected during the initial collection process.

bp Response

bp would like to reiterate that both employees noted in the finding were DOT drug tested prior to returning to their safety-sensitive roles and performing functions. The “return-to-duty” and “pre-employment” tests are similar in process with the primary difference being “return-to-duty” testing requires specimens to be obtained under direct observation. bp has reviewed DOT’s finding as well as the applicable DOT drug testing regulatory definitions and correct utilization of “pre-employment” and “return-to-duty” testing with bp drug and alcohol testing program personnel to ensure compliance with DOT’s regulatory requirements.

3. § 199.119 Reporting of anti-drug testing results.

(a) ...

(f) A service agent (e.g., Consortia/Third Party Administrator as defined in 49 CFR Part 40) may prepare the MIS report on behalf of an operator. However, each report shall be certified by the operator’s anti-drug manager or designated representative for accuracy and completeness.

Finding

BP submitted an annual Management Information System (MIS) report to PHMSA of its anti-drug testing for the calendar year 2022. However, the MIS report was inaccurate and incomplete. Thus, BP improperly certified the MIS report for accuracy and completeness.

BP submitted its certified calendar year 2022 MIS report to PHMSA on March 15, 2023. The calendar year 2022 report included 2 post-accident tests that were conducted under FMCSA (not PHMSA) authority, 112 random drug tests instead of 107, 2 return-to-duty tests improperly completed (see above item) and 6 follow-up tests incorrectly marked as “other” on the federal chain of custody form.

In addition, JTI, a contractor that performs work for BP, reported two pre-employment and six random tests conducted under FMCSA regulations, not PHMSA regulations. Employees tested under FMCSA must be reported to FMCSA and not to PHMSA.

bp Response

The annual Management Information System (MIS) anti-drug testing report submitted to PHMSA for the calendar year 2022 inadvertently included both PHMSA and FMCSA data. bp will ensure future MIS submissions are thoroughly reviewed for accuracy and completeness prior to submittal. Responsible person(s) involved in the MIS review and submittal process have been advised that PHMSA and FMCSA MIS data must be compiled separately with PHMSA specific data being submitted into the DAMIS tool, and FMCSA MIS report information submitted as defined in FMCSA 49 CFR Part 382 requirements.

CPF No. 2-2023-020-NOPV
January 16, 2024

Should you have any questions or require any further information, please free to contact me at 331-239-9745.

Sincerely,

Timothy J. R. Smith

Timothy J. R. Smith
Compliance Manager
BP Pipelines (North America) Inc.

cc: Chris Vodicka - Vice President, BP Pipelines (North America) Inc.