

**NOTICE OF PROBABLE VIOLATION
PROPOSED CIVIL PENALTY**

**VIA ELECTRONIC MAIL TO: john.d'andrea@bp.com; john.page@bp.com;
Jim.Bruen@bp.com; amy.lafata@bp.com**

December 21, 2023

John D'Andrea
Vice President
BP Pipeline (North America) Inc.
30 S. Wacker Drive, Floor 10S
Chicago, IL 60606

CPF 2-2023-020-NOPV

Dear Mr. D'Andrea:

From July 28 to September 15, 2023, a representative of the Pipeline and Hazardous Materials Safety Administration (PHMSA), Office of Pipeline Safety (OPS), pursuant to Chapter 601 of 49 United States Code (U.S.C.), inspected the BP Pipeline (North America) Inc. (BP) drug and alcohol program in Merrillville, Indiana.

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

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?¹

(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.

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 check.

The certified BP Management Information System (MIS) report for calendar year 2022 showed 41 pre-employment tests were conducted in 2022.² 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.

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.

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

¹ The PHMSA regulations in § 199.5 state that violations of the DOT Procedures in 49 CFR part 40 are violations of 49 CFR part 199 with respect to the anti-drug and alcohol programs required by part 199.

² A review of testing documentation during the inspection revealed that BP only conducted 30 pre-employment tests.

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.

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.

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.

Proposed Civil Penalty

Under 49 U.S.C. § 60122 and 49 CFR § 190.223, you are subject to a civil penalty not to exceed \$257,664 per violation per day the violation persists, up to a maximum of \$2,576,627 for a related series of violations. For violation occurring on or after March 21, 2022, and before January 6, 2023, the maximum penalty may not exceed \$239,142 per violation per day the violation persists, up to a maximum of \$2,391,412 for a related series of violations. For violation occurring on or after May 3, 2021, and before March 21, 2022, the maximum penalty may not 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 violations and recommend that BP be preliminarily assessed a civil penalty of \$ 41,600 as follows:

<u>Item number</u>	<u>PENALTY</u>
1	\$ 20,400
2	\$ 21,200

Warning Item


With respect to item number 3, we have 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.

Enclosed as part of this Notice is a document titled *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 your receipt of this Notice, you have 30 days to respond as described in the enclosed *Response Options*. 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. The Region Director may extend the period for responding upon a written request timely submitted demonstrating good cause for an extension.

In your correspondence on this matter, please refer to **CPF 2-2023-020-NOPV** and, for each document you submit, please provide a copy in electronic format whenever possible.

Sincerely,

A handwritten signature in blue ink, appearing to read "J. Urisko". The signature is stylized with a large initial "J" and a cursive "Urisko".

James A. Urisko
Director, Southern Region, Office of Pipeline Safety
Pipeline and Hazardous Materials Safety Administration

Enclosures: *Response Options for Pipeline Operators in Enforcement Proceedings*