

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

**VIA ELECTRONIC MAIL TO: [Matthew.gunn@cenovus.com](mailto:Matthew.gunn@cenovus.com)**

June 27, 2024

Mathew Gunn  
General Manager  
Superior Refining Company LLC  
2407 Stinson Ave.  
Superior, WI 54880

**CPF 2-2024-001-NOPV**

Dear Mr. Gunn:

From February 24, 2024, to April 12, 2024, 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 Superior Refining Company LLC (Superior) Drug and Alcohol (D&A) Program using email and other virtual methods.

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

**1. § 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; ...**

Superior did not maintain and follow a written anti-drug plan that conforms to the requirements of Part 199 and the DOT Procedures.<sup>1</sup>

PHMSA requested a copy of Superior's written anti-drug plan. In response, Superior provided a nine-page document titled Cenovus Energy I Superior Refinery Drug, Alcohol and Substance Abuse Program; Revision Date:12-30-2020.<sup>2</sup> The following are non-compliant issues with the document. The document

- Did not contain the specific methods and procedures required for compliance with all the requirements of Part 199 and the DOT Procedures,
- Did not contain the name and address of the laboratory Superior used to analyze drug test specimens,
- Did not contain the name and address of Superior 's Medical Review Officer,
- Did not contain the name and address of Superior 's Substance Abuse Professional,
- Failed to distinguish company policies from PHMSA/DOT regulations,
- Failed to distinguish DOT from non-DOT requirements, and,
- Contained outdated and incorrect statements.

## **2. § 199.113 Employee assistance program.**

**... (c) Training under each EAP for supervisory personnel who will determine whether an employee must be drug tested based on reasonable cause must include one 60-minute period of training on the specific, contemporaneous physical, behavioral, and performance indicators of probable drug use.**

Superior's training for supervisory personnel who will determine whether an employee must be drug tested based on reasonable cause did not include one 60-minute period of training on the specific, contemporaneous physical, behavioral, and performance indicators of probable drug use.

PHMSA requested training records for Superior's supervisors to show they were trained for reasonable cause DOT drug testing. Superior responded via emails stating they had recently rolled out the DOT drug and alcohol testing training for supervisors. The emails showed Superior had completed "Fit for Duty - Leader Training" for some supervisors starting in November 2022.<sup>3</sup>

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<sup>1</sup> **§ 199.3 Definitions.**

*DOT Procedures* means the Procedures for Transportation Workplace Drug and Alcohol Testing Programs published by the Office of the Secretary of Transportation in part 40 of this title [49].

<sup>2</sup> See Violation Report Exhibits A-1 and A-2.

<sup>3</sup> See Violation Report Exhibits B-1, B-2, B-3, and B-4.

However, Superior's 30-minute "Fit for Duty - Leader Training" did not meet the 60-minute minimum requirement<sup>4</sup> and, according to a course description provided by Superior, the training did not include the specific, contemporaneous physical, behavioral, and performance indicators of probable drug use as required by the PHMSA regulations.

**3. § 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.**

Superior did not maintain a written alcohol misuse plan that conforms to the requirements of Part 199 and the DOT Procedures concerning alcohol testing programs.

PHMSA requested a copy of Superior's written alcohol misuse plan. In response, Superior provided a nine-page document titled Cenovus Energy | Superior Refinery Drug, Alcohol and Substance Abuse Program; Revision Date:12-30-2020.<sup>5</sup> The following are some, but not all, of the non-compliant issues with the document. The document

- Did not contain the specific methods and procedures required for compliance with all the requirements of Part 199 and the DOT Procedures,
- Failed to distinguish company policies from PHMSA/DOT regulations,
- Failed to distinguish DOT from non-DOT requirements, and,
- Contained outdated and incorrect statements.

**4. § 199.239 Operator obligation to promulgate a policy on the misuse of alcohol.**

**(a) General requirements. Each operator shall provide educational materials that explain these alcohol misuse requirements and the operator's policies and procedures with respect to meeting those requirements.**

**(1) The operator shall ensure that a copy of these materials is distributed to each covered employee prior to start of alcohol testing under this subpart, and to each person subsequently hired for or transferred to a covered position.**

Superior did not provide educational materials that explain the alcohol misuse requirements and its policies and procedures with respect to meeting those requirements and did not distribute these materials to each covered employee prior to start of alcohol testing under Part 199, Subpart C, and to each person subsequently hired for or transferred to a covered position.

PHMSA requested a copy of Superior's written alcohol misuse policy. In response, Superior provided a nine-page document titled Cenovus Energy | Superior Refinery Drug, Alcohol and Substance Abuse Program; Revision Date:12-30-2020.<sup>6</sup>

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<sup>4</sup> Superior's "Fit for Duty - Leader Training" was a total of 30 minutes. The training for supervisors who will determine if an employee must be reasonable cause drug tested per § 199.113(c) requires a minimum of 60 minutes and/or reasonable suspicion alcohol tested per § 199.241 requires 60 minutes; 120 minutes total.

<sup>5</sup> See Violation Report Exhibits A-1 and A-2.

<sup>6</sup> See Violation Report Exhibits A-1 and C-1.

The document did not contain all of the education materials required by § 199.239(b) or explain how all the required materials were to be distributed to each covered employee and to each person subsequently hired for, or transferred to, a covered position prior to start of alcohol testing under Part 199, Subpart C.

**5. § 199.241 Training for supervisors.**

**Each operator shall ensure that persons designated to determine whether reasonable suspicion exists to require a covered employee to undergo alcohol testing under § 199.225(b) receive at least 60 minutes of training on the physical, behavioral, speech, and performance indicators of probable alcohol misuse.**

Superior did not ensure that persons designated to determine whether reasonable suspicion exists to require a covered employee to undergo alcohol testing under § 199.225(b) receive at least 60 minutes of training on the physical, behavioral, speech, and performance indicators of probable alcohol misuse.

PHMSA requested training records for Superior's supervisors to show they were trained for reasonable suspicion DOT alcohol testing. Superior responded via emails stating they had recently rolled out the DOT drug and alcohol testing training for supervisors. The emails showed Superior had completed "Fit for Duty - Leader Training" for some supervisors starting in November 2022.<sup>7</sup>

However, Superior's 30-minute "Fit for Duty - Leader Training" did not meet the 60-minute minimum requirement and, according to a course description provided by Superior, the training did not include the specific physical, behavioral, speech, and performance indicators of probable alcohol misuse.

**6. § 40.13 How do DOT drug and alcohol tests relate to non-DOT tests? <sup>8</sup>**

**... (h) No one is permitted to conduct a DOT drug or alcohol test on an individual who is not a DOT-regulated employee, as defined by the DOT agency regulations.**

Superior conducted a DOT drug test on individuals who were not DOT-regulated employees, as defined by the DOT agency regulations.

Superior failed to differentiate its PHMSA D&A "covered employees" as defined in §199.3 from its non-DOT employees. As a result, it conducted DOT drug tests in calendar year 2023 on employees who were not DOT-regulated employees; i.e. covered employees. Superior provided an Excel spreadsheet showing that it conducted DOT drug tests on non-DOT-regulated employees in calendar year 2023.<sup>9</sup>

The following are drug tests conducted on employees who were not DOT-regulated employees.

- Random drug test of a Manager Maintenance Execution on July 18, 2023,
- Random drug test of an Environmental Specialist on October 19, 2023; and,
- Random drug test of a Sr. Manager Technical Services on November 14, 2023.

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<sup>7</sup> See Violation Report Exhibits B-1, B-2, B-3, and B-4.

<sup>8</sup> 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.

<sup>9</sup> See Violation Report Exhibits D-1, D-2, D-3, and D-4.

**7. § 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)(1) Yes, as an employer, you must, after obtaining an employee's written consent, request the information about the employee listed in paragraphs (b) through (j) 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 transferring 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.**

Superior did not obtain an employee's written consent and request the information listed in paragraphs (b) through (j) of § 40.25 about employees seeking to begin performing safety-sensitive duties for Superior for the first time (*i.e.*, a new hire, an employee transferring into a safety-sensitive position).

PHMSA requested copies of the written consent forms signed by the four employees listed on Superior's 2021 MIS report as having been given pre-employment drug tests in 2021 along with a redacted copy of the D&A background check for each of the four employees.<sup>10</sup>

Superior responded via email stating that they were unable to locate the records requested. In a subsequent email, Superior stated that they only completed pre-employment tests on three employees in 2021, not four, and that the background checks on these three employees did not meet all the requirements of § 40.25. Moreover, Superior did not provide any records of a background check for any of these three employees.

**Proposed Civil Penalty**

Under 49 U.S.C. § 60122 and 49 CFR § 190.223, you are subject to a civil penalty not to exceed \$266,015 per violation per day the violation persists, up to a maximum of \$2,660,135 for a related series of violations. For violations occurring on or after January 6, 2023, and before December 28, 2023, the maximum penalty may not 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 violations 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 violations 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 violations 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 violations 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 violations 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.

We have reviewed the circumstances and supporting documentation involved for the above probable violation(s) and recommend that you be preliminarily assessed a civil penalty of \$68,400 as follows:

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<sup>10</sup> See Violation Report Exhibits E-1, E-2, E-3, and E-4.

<u>Item number</u>	<u>PENALTY</u>
1	\$ 31,600
6	\$ 36,800

Proposed Compliance Order

With respect to items 1, 2, 3, 4, 5, 6, & 7 pursuant to 49 U.S.C. § 60118, the Pipeline and Hazardous Materials Safety Administration proposes to issue a Compliance Order to Superior Refining Company LLC. 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 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 2-2024-001-NOPV and, for each document you submit, please provide a copy in electronic format whenever possible.

Sincerely,

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

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

## **PROPOSED COMPLIANCE ORDER**

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

- A. In regard to item # 1 of the Notice pertaining to Superior'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, Superior must develop a written anti-drug plan that contains the specific methods and procedures it will use to comply with all the requirements of 49 CFR Part 199 and 49 CFR Part 40, the name and address of all laboratories Superior uses to analyze drug test specimens, the name and address of Superior's Medical Review Officer, and the name and address of Superior's Substance Abuse Professional, and must submit the plan to PHMSA for review within 90 days of receipt of the Final Order.
- B. In regard to item # 2 of the Notice pertaining to Superior's failure to provide one 60-minute period of training on the specific, contemporaneous physical, behavioral, and performance indicators of probable drug use for supervisory personnel who will determine if an employee must be drug tested based on reasonable cause, Superior must provide the required training for supervisory personnel and submit records to verify the training to PHMSA for review within 60 days of receipt of the Final Order.
- C. In regard to item # 3 of the Notice pertaining to Superior's failure to maintain and follow a written alcohol misuse plan that conformed to the requirements of 49 CFR Part 199 and the DOT Procedures, Superior must develop an alcohol misuse plan that contains the specific methods and procedures it will use to comply with all the requirements of 49 CFR Part 199 and 49 CFR Part 40 and must submit the plan to PHMSA for review within 90 days of receipt of the Final Order.
- D. In regard to item # 4 of the Notice pertaining to Superior's failure to provide all the education materials required by § 199.239(b) or explain how all the required materials were to be distributed to each covered employee and to each person subsequently hired for, or transferred to, a covered position prior to start of alcohol testing under Part 199, Subpart C, Superior must provide all of the education materials required by § 199.239(b) to each covered employee and develop a procedure to provide all of the education materials required by § 199.239(b) to each person subsequently hired for, or transferred to, a covered position and must submit records to verify the above requirements to PHMSA for review within 60 days of receipt of the Final Order.
- E. In regard to item # 5 of the Notice pertaining to Superior's failure to provide one 60-minute period of training on the physical, behavioral, speech, and performance indicators of probable alcohol misuse for supervisory personnel who will determine if an employee must be alcohol tested based on reasonable suspicion, Superior must provide the required training for supervisory personnel and must submit records to

verify the training to PHMSA for review within 60 days of receipt of the Final Order.

- F. In regard to item # 6 of the Notice pertaining to Superior's DOT drug testing of individuals who were not DOT-regulated employees, as defined by the DOT agency [PHMSA] regulations due to Superior's failure to differentiate its PHMSA D&A "covered employees" from its non-DOT employees, Superior must develop a method or procedure to differentiate its DOT regulated employees from its non-DOT regulated employees and incorporate the method or procedure into its anti-drug and alcohol misuse plans required by Items A & C above.
- G. In regard to item # 7 of the Notice pertaining to Superior's failure to obtain an employee's written consent and to request the D&A background information required by § 40.25 paragraphs (b) through (j) about employees seeking to begin performing safety-sensitive duties for Superior, Superior must develop a method to obtain the required signed releases from employees, to complete the D&A background checks and to incorporate the method or procedure into its anti-drug and alcohol misuse plans required by Items A & C above.
- H. In lieu of Items A & C above, Superior may develop a combined anti-drug and alcohol misuse plan that meets the requirements of A & C above and must submit the combined plan to PHMSA for review within 90 days of receipt of the Final Order.
- I. In lieu of Items B & E above, Superior may combine the required anti-drug and alcohol misuse supervisor training provided the combined training includes at least 60 minutes on the specific, contemporaneous physical, behavioral, and performance indicators of probable drug use and 60 minutes on the physical, behavioral, speech, and performance indicators of probable alcohol misuse; for a total of 120 minutes.
- J. It is requested (not mandated) that Superior Refining Company LLC maintain documentation of the safety improvement costs associated with fulfilling this Compliance Order and submit the total to James A. Urisko, Director, Southern 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.