U.S. Department
of Transportation

Pipeline and Hazardous Materials Safety Administration

1200 New Jersey Avenue, SE
Washington, D.C. 20590

NOV 1 9 2012

Mr. Charlie Smith
Chief Executive Officer
CountryMark Cooperative, LLP
225 South East Street, Suite 144
Indianapolis, IN 46202

Re: CPF No. 3-2010-5009

Dear Mr. Smith:

Enclosed please find the Final Order issued in the above-referenced case. It makes findings of violation and assesses a civil penalty of $180,800. The penalty payment terms are set forth in the Final Order. This enforcement action closes automatically upon receipt of payment. Service of the Final Order by certified mail is deemed effective upon the date of mailing, or as otherwise provided under 49 C.F.R. § 190.5.

Thank you for your cooperation in this matter.

Sincerely,

Jeffrey D. Wiese
Associate Administrator
for Pipeline Safety

Enclosure

cc: Mr. David Barrett, Director, Central Region, OPS
Mr. Alan Mayberry, Deputy Associate Administrator for Field Operations, OPS
Mr. Richard Streeter, Counsel for CountryMark Cooperative, LLP
Mr. Pat Ward, Vice President of Operations, CountryMark Cooperative, LLP

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

U.S. DEPARTMENT OF TRANSPORTATION
PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMINISTRATION
OFFICE OF PIPELINE SAFETY
WASHINGTON, D.C. 20590

In the Matter of	)	
CountryMark Cooperative, LLP,	)	**CPF No. 3-2010-5009**
Respondent.	)	

FINAL ORDER

Beginning November 7, 2009, pursuant to 49 U.S.C. § 60117, a representative of the Pipeline and Hazardous Materials Safety Administration (PHMSA), Office of Pipeline Safety (OPS), conducted an investigation of an accident involving the pipeline system operated by CountryMark Cooperative, LLP (CountryMark or Respondent), in Mt. Vernon, Indiana. The system consists of 229 miles of pipeline that transports refined product from a refinery in Mt. Vernon, Indiana, to terminals in Switz City, Jolietville, and Peru, Indiana, including approximately 162 miles of pipeline that could affect High Consequence Areas (HCAs).[1] The investigation arose out of an accident which occurred when a third party struck the pipeline on November 6, 2009. As a result of the accident, approximately 200 barrels of diesel fuel were spilled in an HCA.

As a result of the investigation, the Director, Central Region, OPS (Director), issued to Respondent, by letter dated August 12, 2010, a Notice of Probable Violation and Proposed Civil Penalty (Notice). In accordance with 49 C.F.R. § 190.207, the Notice proposed finding that CountryMark had violated 49 C.F.R. §§ 195.442(a), 199.105(b), and 199.225(a), and proposed assessing a civil penalty of $180,800 for the alleged violations.

CountryMark responded to the Notice (Response) and submitted a statement of issues and request for hearing (Statement of Issues) by letters dated September 9, 2010. CountryMark contested two of the allegations. A hearing was subsequently held on March 17, 2011, in Kansas City, Missouri, with an attorney from the Office of Chief Counsel, PHMSA, presiding. At the hearing, Respondent was represented by counsel. After the hearing, Respondent provided additional written material for the record, by letter dated April 4, 2011 (Closing).

[1] 49 C.F.R. § 195.452.

FINDINGS OF VIOLATION

The Notice alleged that Respondent violated 49 C.F.R. Parts 195 and 199, as follows:

Item 1: The Notice alleged that Respondent violated 49 C.F.R. § 195.442(a), which states:

> **§ 195.442 Damage prevention program.**
> (a) Except as provided in paragraph (d) of this section, each operator of a buried pipeline must carry out, in accordance with this section, a written program to prevent damage to that pipeline from excavation activities. For the purpose of this section, the term "excavation activities" includes excavation, blasting, boring, tunneling, backfilling, the removal of aboveground structures by either explosive or mechanical means, and other earthmoving operations.

The Notice alleged that Respondent violated 49 C.F.R. § 195.442(a) by failing to carry out its written program to prevent damage to its pipeline from excavation activities. Specifically, the Notice alleged that CountryMark failed to carry out its written program by failing to adequately mark the pipeline prior to commencement of excavation activity by a tiling contractor. Respondent did not contest this allegation of violation.[2]

Accordingly, based upon a review of all of the evidence, I find that Respondent violated 49 C.F.R. § 195.442(a) by failing to carry out its written program to prevent damage to its pipeline from excavation activities.

Item 2: The Notice alleged that Respondent violated 49 C.F.R. § 199.105(b), which states:

> **§ 199.105 Drug tests required.**
> Each operator shall conduct the following drug tests for the presence of a prohibited drug:
> (a) ...
> (b) *Post-accident testing.* As soon as possible but no later than 32 hours after an accident, an operator shall drug test each employee whose performance 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 the best information available immediately after the accident that the employee's performance could not have contributed to the accident or that, because of the time between that performance and the accident, it is not likely that a drug test would reveal whether the performance was affected by drug use.

The Notice alleged that Respondent violated 49 C.F.R. § 199.105(b) by failing to perform post-accident drug testing of each employee whose performance could not be completely discounted

[2] While Respondent did not contest this allegation of violation, the company did note that "no CountryMark employee authorized the third-party to begin excavation activities." Statement of Issues at 1.

as a contributing factor to the accident as soon as possible but no later than 32 hours after the accident. Specifically, the Notice alleged that CountryMark failed to perform post-accident drug tests on two employees meeting these criteria, the line locator and an employee who was assisting him. It further alleged that CountryMark did not have sufficient information immediately after the accident to determine that employee performance could not have contributed to the accident.

The circumstances surrounding the accident are undisputed. On November 5, 2009, CountryMark received a pipeline location request so that a third party, Southern Indiana Drainage, Inc., (SID) could perform excavation activities near the pipeline the following day. On November 6, CountryMark sent one of its employees, Mr. Donald Ray Goodson, to the site to perform the line location. He placed flags along the route where he thought the pipeline was buried, but was unable to confirm the location of the pipeline by probing the ground along the putative route.

CountryMark then sent a second employee, Mr. Derek Almon, to assist Goodson. Almon began probing for the pipeline along the route that Goodson had marked while Goodson continued using the line-detection equipment. Approximately 30 minutes after Almon arrived at the site, the SID crew's trenching machine struck the pipeline, which began to release product. Goodson and Almon notified CountryMark's control room and supervisors, and the company began efforts to mitigate the effects of the accident. CountryMark closed nearby block valves and sent additional employees, including managers, to the site. The company realized soon thereafter that Goodson had marked a route approximately 200 feet north of the actual location of the pipeline. Goodson and Almon were not tested for drugs until November 9, at which time the test results were negative.

In its Response and at the hearing, CountryMark did not contest the allegation as related to Goodson, the line locator, but did contest it as related to Almon. Respondent argued that Almon's activities had nothing to do with the accident and that the company's managers had determined that Almon's performance had not contributed to the accident. CountryMark asserted that soon after the accident, its managers determined that Goodson was "solely responsible" for the erroneous marking which led to the accident, and that therefore Almon was not required to be tested for drugs.[3] In addition, the company argued that because the erroneous marking of the pipeline was the cause of the accident, and Almon arrived at the site after the erroneous marking had been made, the company could rationally conclude that Almon's activities could not have been a contributing factor to the accident.[4]

I do not find these arguments convincing. Almon was sent to the site to assist the line locator in his activities; his task was to probe for the pipeline along the route that Goodson had marked, to confirm that the pipeline had been accurately marked. The pipeline had not been accurately marked, however. If Almon had notified the excavator or CountryMark management that he had not found the pipeline along the marked route, it's possible the accident would not have occurred. Therefore it is impossible to completely discount Almon's activities from being a

[3] Closing at 3.

[4] Closing at 9.

contributing factor to the accident, and there was no evidence available immediately after the accident to support such a conclusion.
While the act of probing did not cause the accident, probing for the pipeline did serve a function in the task of locating the pipeline. Probing is a common and appropriate practice to verify the actual location and depth of an underground pipeline before excavation activity begins. Almon's ability to probe for and confirm the location of the underground pipeline and to draw appropriate conclusions from his inability to confirm the location of the pipeline could have been impaired if he were under the influence of drugs.

The regulation authorizes the company to dispense with testing if, based on the best information available immediately after the accident, it determines that the employee's performance could not have contributed to the accident. In its Closing, CountryMark asserted that "the decision not to require Almon to submit to testing was based on readily ascertainable facts and information that were discovered within a matter of minutes following the accident."[5] A similar statement appears in the affidavit of George Morgan, which was submitted as an attachment to the Closing.[6] However, this assertion is not consistent with statements made by CountryMark personnel at the hearing. At the hearing, CountryMark's managers indicated that because there was no nexus linking Almon's activities on site to the accident, they did not test him for drugs because the idea that his performance could have contributed to the accident simply never occurred to them. They did not claim to have made a reasoned analysis as to whether his performance could be completely discounted as a contributing factor to the accident.

Furthermore, CountryMark submitted no documentation of the decision-making process by which the company decided not to require *either* Goodson or Almon to be tested for drugs immediately after the accident. CountryMark readily admitted that Goodson's performance was the primary cause of the accident[7] but the record shows that he was not tested for drugs immediately after the accident either. The company stated that the decision not to test Goodson was based upon his previous work history and the company's familiarity with his behavior.[8] However, there is no documented evidence for this conclusion. The fact that Goodson was not tested undercuts the company's claim that the decision not to test Almon was a conscious decision based on the best available evidence. Instead, it suggests that the company did not consider drug testing for any employees in the hours following the accident. Almon and Goodson were finally tested for drugs on November 9, 2009, three days after the accident and after OPS staff had reminded CountryMark of the regulatory requirement.[9]

CountryMark argued that because Almon was not qualified to perform line locator functions, he had no responsibility to mark the pipeline or to communicate with the third-party excavator

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[5] Closing at 7.

[6] *Id.*, Attachment 2, at paragraph 7.

[7] *Id.* at 5, 6, 8, 10, 11, and 14.

[8] *Id.* at 13; Response at 7.

[9] Closing, Attachment 2, at paragraph 8.

about the location of the pipeline.[10] Because he had no such responsibility, Almon could be completely discounted as a contributing factor to the accident.

This argument is not relevant. The regulation requires drug testing of those employees who perform a "covered function," which is defined as "an operations, maintenance, or emergency-response function regulated by Part 192, 193 or 195 of this chapter...."[11] The definition of a covered function in Part 199 for purposes of drug testing is broader than the definition in Part 195 of a "covered task" for purposes of operator qualification of pipeline personnel.[12] Almon was not qualified by the operator to perform the line location task, but he was performing an operations and maintenance function regulated by Part 195 as part of the company's damage prevention program.[13] Therefore, for purposes of Part 199, Almon was performing a covered function.

It is apparent from the record that because CountryMark promptly pinpointed what it considered to be the cause of the accident and saw no obvious reason to suspect drug use by either of the two employees involved in locating the pipeline, the company saw no need to drug test either one. But the drug and alcohol testing requirements found in Part 199 are deliberately designed to cast a wide net by requiring testing of persons whose contributing role in an accident might not be readily apparent. This is why § 199.105(b) requires drug testing of any person whose performance of a covered function cannot be "completely" discounted as a contributing factor.

In summary, I find that Almon's activities on the day of the accident could not have been completely discounted by CountryMark from being a contributing factor to the accident and that there was no evidence available immediately after the accident that could have led the company to draw such a conclusion. Therefore, the drug testing requirement applied to Almon. Accordingly, after considering all of the evidence and the legal issues presented, I find that Respondent violated 49 C.F.R. § § 199.105(b) by failing to perform post-accident drug testing of two employees whose performance could not be completely discounted as a contributing factor to the accident, as soon as possible but no later than 32 hours after the accident.

Item 3: The Notice alleged that Respondent violated 49 C.F.R. § 199.225(a), which states:

> **§ 199.225 Alcohol tests required.**
>
> Each operator shall 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 shall 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 shall

[10] *Id.* at 2.

[11] 49 C.F.R. § 199.100. 49 C.F.R. § 199.3.

[12] 49 C.F.R. § 195.501.

[13] 49 C.F.R. § 195.442.

> be based on the operator's determination, using the best available information at the time of the determination, that the covered employee's performance could not have contributed to the accident.

The Notice alleged that Respondent violated 49 C.F.R. § 199.225(a) by failing to test for alcohol as soon as practicable following the accident each surviving covered employee whose performance of a covered function could not be completely discounted as a contributing factor to the accident. Specifically, the Notice alleged that CountryMark failed to perform post-accident alcohol tests on two employees meeting these criteria.

In its Response and at the hearing, CountryMark contested this allegation as it related to Almon but not as it related to Goodson. CountryMark's defenses to this alleged violation were the same as those for Item 2, relating to post-accident drug testing. For the reasons discussed above, I do not find these defenses convincing.

CountryMark raised an additional defense in its Response and at the hearing, stating that "it was not practicable in the absence of any indication of alcoholic consumption to test Almon after the accident."[14] CountryMark went on to explain that immediately following the accident, Almon attempted to close the nearest block valve to stem the flow of product, and then began the recovery of the diesel fuel that had spilled from the damaged pipe and continued this task until 1:30 am the next morning.

I do not find this argument convincing. CountryMark provided no evidence to demonstrate that Almon was critical to the recovery effort or that other employees were not available to perform these tasks. Indeed, had Almon's performance prior to the accident been affected by alcohol, his efforts to mitigate the damage from the spill could have been hampered. The regulation provides only one way to ascertain whether this was the case and that was through alcohol testing, to be performed "[a]s soon as practicable following an accident." The requirement makes no allowances for delay in the absence of indications of alcoholic consumption.

Accordingly, after considering all of the evidence, I find that Respondent violated 49 C.F.R. § 199.225(a) by failing to test for alcohol, as soon as practicable following the accident, two surviving covered employees whose performance of a covered function could not be completely discounted as a contributing factor to the accident.

These findings of violation will be considered prior offenses in any subsequent enforcement action taken against Respondent.

ASSESSMENT OF PENALTY

Under 49 U.S.C. § 60122, Respondent is subject to an administrative civil penalty not to exceed $100,000 per violation for each day of the violation, up to a maximum of $1,000,000 for any related series of violations. In determining the amount of a civil penalty under 49 U.S.C. § 60122 and 49 C.F.R. § 190.225, I must consider the following criteria: the nature,

[14] *Response* at 8.

circumstances, and gravity of the violation, including adverse impact on the environment; the degree of Respondent's culpability; the history of Respondent's prior offenses; the Respondent's ability to pay the penalty and any effect that the penalty may have on its ability to continue doing business; and the good faith of Respondent in attempting to comply with the pipeline safety regulations. In addition, I may consider the economic benefit gained from the violation without any reduction because of subsequent damages, and such other matters as justice may require. The Notice proposed a total civil penalty of $180,800 for the violations cited above.

Item 1: The Notice proposed a civil penalty of $100,000 for Respondent's violation of 49 C.F.R. § 195.442(a), for failing to carry out its written program to prevent damage to its pipeline from excavation activities. Respondent neither contested the allegation nor presented any evidence or argument justifying a reduction in the proposed penalty. This violation directly led to the pipeline accident, which resulted in 200 barrels of diesel fuel being spilled in an HCA. I find that the nature, circumstances, and gravity of the violation warrant the proposed penalty. Accordingly, having reviewed the record and considered the assessment criteria, I assess Respondent a civil penalty of $100,000 for violation of 49 C.F.R. § 195.442(a).

Item 2: The Notice proposed a civil penalty of $40,400 for Respondent's violation of 49 C.F.R. § 199.105(b), for failing to perform post-accident drug testing of two employees whose performance could not be completely discounted as a contributing factor to the accident, as soon as possible but no later than 32 hours after the accident. As discussed above, I found that the drug-testing requirement applied to both employees that Respondent failed to test for drugs. Respondent's only argument for mitigation of the proposed penalty was the same as the defense discussed in the Findings section above. Considering Respondent's culpability and the nature, circumstances, and gravity of the violation, I find that the proposed penalty is warranted. Accordingly, having reviewed the record and considered the assessment criteria, I assess Respondent a civil penalty of $40,400 for violation of 49 C.F.R. § 199.105(b).

Item 3: The Notice proposed a civil penalty of $40,400 for Respondent's violation of 49 C.F.R. § 199.225(a), for failing to test for alcohol as soon as practicable following the accident two surviving covered employees whose performance of a covered function could not be completely discounted as a contributing factor to the accident. I found that the alcohol testing requirement applied to both employees whom Respondent failed to test for alcohol. Respondent's only argument for mitigation of the proposed penalty was the same as the defense discussed in the Findings section above. Considering Respondent's culpability and the nature, circumstances, and gravity of the violation, I find that the proposed penalty is warranted. Accordingly, having reviewed the record and considered the assessment criteria, I assess Respondent a civil penalty of $40,400 for violation of 49 C.F.R. § 199.225(a).

Payment of the civil penalty must be made within 20 days of service. Federal regulations (49 C.F.R. § 89.21(b)(3)) require such payment to be made by wire transfer through the Federal Reserve Communications System (Fedwire), to the account of the U.S. Treasury. Detailed instructions are contained in the enclosure. Questions concerning wire transfers should be directed to: Financial Operations Division (AMZ-341), Federal Aviation Administration, Mike Monroney Aeronautical Center, P.O. Box 269039, Oklahoma City, Oklahoma 73125. The Financial Operations Division telephone number is (405) 954-8893.

Failure to pay the $180,800 civil penalty will result in accrual of interest at the current annual rate in accordance with 31 U.S.C. § 3717, 31 C.F.R. § 901.9 and 49 C.F.R. § 89.23. Pursuant to those same authorities, a late penalty charge of six percent (6%) per annum will be charged if payment is not made within 110 days of service. Furthermore, failure to pay the civil penalty may result in referral of the matter to the Attorney General for appropriate action in a district court of the United States.

Under 49 C.F.R. § 190.215, Respondent has the right to submit a Petition for Reconsideration of this Final Order. The petition must be sent to: Associate Administrator, Office of Pipeline Safety, PHMSA, 1200 New Jersey Avenue, SE, East Building, 2nd Floor, Washington, DC 20590, with a copy sent to the Office of Chief Counsel, PHMSA, at the same address. PHMSA will accept petitions received no later than 20 days after receipt of service of the Final Order by the Respondent, provided they contain a brief statement of the issue(s) and meet all other requirements of 49 C.F.R. § 190.215. The filing of a petition automatically stays the payment of any civil penalty assessed but does not stay any other provisions of the Final Order, including any required corrective actions. If Respondent submits payment of the civil penalty, the Final Order becomes the final administrative decision and the right to petition for reconsideration is waived.

The terms and conditions of this Final Order are effective upon service in accordance with 49 C.F.R. § 190.5.

Jeffrey D. Wiese
Associate Administrator
for Pipeline Safety

NOV 1 9 2012
Date Issued