Navajo Nation Oil & Gas Co.
50 Narbono Cir W.
Window Rock, AZ 86515

Via Email

May 24, 2022

Mr. Gregory A. Ochs
Director, Central Region, Office of Pipeline Safety
Pipeline and Hazardous Materials Safety Administration
901 Locust Street, Suite 480
Kansas City, Missouri 64106-2641

RE: Response of Navajo Nation Oil and Gas Co.
CPF 3-2022-037-NOPV

Dear Mr. Ochs,

Pursuant to 49 C.F.R. § 190.208(a) & (b) (2020), the Navajo Nation Oil and Gas Co. (NNOGC) submits this response to the Notice of Probable Violation, Proposed Civil Penalty, and Proposed Compliance Order (Notice) issued by the Pipeline and Hazardous Materials Safety Administration (PHMSA) on March 1, 2022, in CPF No. 3-2022-037-NOPV. PHMSA issued the Notice after a control room management (CRM) records and procedure inspection conducted by the Office of Pipeline Safety (OPS) May 24 to 28, 2021 with respect to NNOGC's Running Horse Pipeline (RHP). On March 15, 2022, PHMSA approved an extension until May 27, 2022 to respond to the Notice. Therefore, this response is timely.

NNOGC is committed to public safety and operating the RHP in accordance with the PHMSA's regulations. NNOGC takes PHMSA's allegations of violation seriously, however, NNOGC contests Item 1 because the storage tanks at Montezuma Creek Pump Station (Montezuma Creek) are not breakout tanks and are not subject to the requirements of Part 195 of the regulations. NNOGC requests that Item 1 and the associated proposed compliance order be withdrawn. NNOGC does not contest Item 2 and will remit the proposed civil penalty. NNOGC also does not contest Item 3 and Item 4 and describes planned actions to satisfy the provisions of associated proposed compliance orders.

NNOGC requests that it continue to be provided with all documents or communications from OPS pertaining to the case or the case file, which includes "all agency records pertinent to the matters of fact and law asserted,"[1] including, but not limited to inspector notes or other materials the region intends to rely on to support the Notice, and the Region Director's "written

[1] 49 U.S.C. § 60117(b)(1)(C).

evaluation of response material submitted by the respondent and recommendation for final action, if one is prepared."[2] Please consider this a standing request. NNOGC reserves the right to supplement this response if PHMSA provides any additional materials to the case file.

Item 1 - § 195.446(e)(3)

Item 1 of the Notice alleges that NNOGC violated § 195.446(a) for failing "to provide an adequate procedure to verify correct safety related set point values during the calibration of overfill protection systems as required by Sections § 195.446(e)(3) and § 195.428(d)."[3] The Notice's proposed compliance order would require that NNOGC:

> develop a procedure to calibrate the overfill protection systems to complete the calibration and verification of tanks LT-1430, LT-10431, LT-1432. The procedure must also include coordination with the control room to verify correct alarm set points and alarm descriptions in SCADA. Alleged safety concerns that restricted employees from conducting the tank overfill protection system test must be addressed. With the procedure in place, complete the calibration and verification test for all related tanks.[4]

NNOGC requests that Item 1 be withdrawn because the storage tanks at Montezuma Creek are not breakout tanks and are not subject to Part 195. The tanks cannot receive surge from a regulated pipeline. In addition, the tanks receive oil from non-PHMSA regulated gravity-fed pipelines. Because the tanks are not breakout tanks, they are not subject to § 195.428(d)'s requirement to inspect and test overfill protection systems. Therefore, NNOGC requests that Item 1 of the Notice and the related proposed compliance order be withdrawn.

A. The Storage Tanks at the Montezuma Creek Station Are Not Breakout Tanks and Are Not Regulated Under Part 195.

1. The Running Horse Pipeline

The RHP is a 16-inch diameter crude oil pipeline extending 88 miles from Montezuma Creek in southwest Utah to the Bisti Transfer Station in northwest New Mexico. The RHP is a single direction pipeline that serves one customer and does not flow crude oil bi-directionally.

The RHP is fed by a network of approximately 35 miles of low-pressure pipelines, ranging from 4 to 16 inches in diameter, that all originate at tank batteries in the hills above

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[2] 49 C.F.R. § 190.209(b)(7).
[3] Notice at 2.
[4] *Id.* at 6 ¶ A.

Montezuma Creek. The crude oil in these pipelines is transported by gravity from the tank batteries to the station. A map showing the elevations of the tank batteries where the low pressure gravity lines originate is attached as Attachment A.

These gravity-fed pipelines and NNOGC's ownership and operational responsibility begin at the outlets of metering devices adjacent to the tank batteries. The metering devices, known as Lease Automated Custody Transfer (LACT) units, contain small pumps that are designed to smooth the flow of crude oil through the portion of the LACT unit that measures the volume of oil, thereby ensuring accurate measurement. These small pumps are not intended to, and do not provide, motive force to transport oil through NNOGC's low pressure lines, and oil would flow without the LACT units. The tank batteries operate at atmospheric pressure and are fed, in turn, by a series of low-pressure wells and flow lines owned and operated by upstream producers. Wellhead pressures range from 0 to 150 psi, with most wellheads operating at pressures below 100 psi.

NNOGC's gravity-fed pipelines feed into three storage tanks located at Montezuma Creek. Two of these gravity-fed pipelines also transport oil from a nearby truck unloading facility. From the storage tanks, the oil flows through a header system at the Montezuma Creek and is pumped into the 16-inch RHP. A check valve located in the header system between the tanks and the pumps prevents oil from flowing from the RHP into the storage tanks, thereby preventing the storage tanks from receiving surge from the RHP. The process and instrumentation diagram for Montezuma Creek, showing the check valve and the storage tanks, is attached as Attachment B.

The operation of the RHP is determined based on the oil inventory levels at the Montezuma Creek storage tanks and on the shipper's ability to receive oil at Bisti. The RHP has one control room which is located at Montezuma Creek. The control room contains one computer console with a single screen that contains a Supervisory Control and Data Acquisition (SCADA) display. The only storage tank information reflected on the SCADA display is the level of oil inventory. The RHP's User Configurable Open System (UCOS) SCADA system is programed to terminate pumping operations and automatically shut down pipeline operations in a failsafe mode if certain operational parameters are met and in response to a SCADA communications failure. In addition, the pipeline may be shut down for commercial reasons. It is not unusual for the pipeline to not be operating.

2. NNOGC's Gravity-Fed Pipelines Are Not Subject to Part 195.

Except for certain reporting requirements, the "transportation of hazardous liquid through a pipeline by gravity" is specifically excepted from the requirements of Part 195.[5] This exception has existed since the first hazardous liquid pipeline safety regulations were adopted in 1967.[6] The original gravity pipeline exception provided that "pipelines which move commodities from one point to another by gravity rather than by pumping are exempt from this part."[7] This provision was changed to the present-day language shortly after the initial rules were promulgated,[8] but its meaning was largely unchanged. In later rulemaking proceedings in which certain low-stress pipelines, for example, were made subject to Part 195, the agency retained the "gravity-powered" exception.[9] The gravity exception is one of a several exceptions for facilities "that were determined to not pose a significant risk to public safety at the time the rule was promulgated."[10]

The structure of PHMSA's applicability regulation at § 195.1 provides that the gravity exception is a threshold exception. Once it is determined that a pipeline moves hazardous liquid by gravity, the pipeline is excepted from Part 195 and no further analysis is required. As detailed above, the pipelines that feed into the Montezuma Creek storage tanks are located at elevations entirely above the Station. The wellheads that feed the production system upstream of the tank batteries operate at low pressures, and the tank batteries feeding the gravity pipelines are at atmospheric pressure. While there are small pumps located in the LACT units at the tank batteries upstream of NNOGC's low-pressure pipelines, the purpose of these pumps is to ensure the measurement accuracy of the LACT units. These pumps do not provide motive power for the oil in NNOGC's low-pressure pipeline system. Therefore, these pipelines rely entirely on gravity to move the oil to Montezuma Creek, and are subject to the exception for such lines in § 195.1(b)(2).

3. The Montezuma Creek Storage Tanks Are Not Breakout Tanks.

PHMSA's Part 195 regulations apply to hazardous liquid breakout tanks. Section 195.2 defines a breakout tank as "a tank used to (a) relieve surges in a hazardous liquid pipeline system or (b) receive and store hazardous liquid transported by a pipeline for reinjection and

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[5] 49 C.F.R. § 195.1(b)(2). *See also* 49 C.F.R. § 195.13.

[6] Carriers by Pipeline, Final Rule, 32 Fed. Reg. 16,040, 16,141 (Nov. 22, 1967). The original hazardous liquid pipeline safety rules were promulgated at 49 C.F.R. Part 180.

[7] 32 Fed. Reg. at 16, 141.

[8] Transportation of Liquids by Pipeline, Final Rule, 34 Fed. Reg. 15,473, 15,476 (Oct. 4, 1969). The rulemaking history does not explain why the gravity exception was re-worded.

[9] Low-Stress Hazardous Liquid Pipelines Service Plants and Terminals, 62 Fed. Reg. 31,364, 31,365 (June 9, 1997).

[10] Pipeline Safety: Safety of On-Shore Hazardous Liquid Pipelines, 75 Fed. Reg. 63,774, 63,775 (Oct. 18, 2010).

continued transportation by pipeline."[11] The Montezuma Creek storage tanks do not satisfy either definition of a breakout tank.

First, the storage tanks cannot receive surge from the RHP. A check valve is located in the Montezuma Creek header system between the storage tanks and the mainline pumps. This check valve prevents oil from flowing from the RHP mainline back toward the tanks.[12]

The storage tanks also do not satisfy the second definition because they receive oil from non-PHMSA-regulated gravity-fed lines. Therefore, the storage tanks are not "used to . . . receive and store hazardous liquid transported by a pipeline for reinjection and continued transportation by pipeline."[13] This conclusion is supported by PHMSA guidance and enforcement decisions.

Given difficulties in determining whether the regulations of PHMSA or the Environmental Protection Agency (EPA) apply to certain tank facilities, including breakout tanks, PHMSA and EPA entered into a February 4, 2000 agreement, known as the Felder-Luftig Memo, to clarify jurisdictional issues related to breakout tanks and bulk oil storage tanks.[14] This agreement, attached as Attachment C, provides several facility diagrams specifying what parts of the facility, including facility tanks, are regulated by DOT and/or EPA. The Felder-Luftig Memo states that the purpose of these diagrams is to "minimize potential confusion over regulatory responsibility."[15] This document built on the existing division of regulatory responsibility between transportation-related facilities, regulated by DOT, versus non-transportation-related facilities, regulated by EPA, that had been announced in a 1971 Memorandum of Understanding between the agencies.[16]

Attachment 8 to the Felder-Luftig Memo is a diagram that depicts a tank fed by a non-PHMSA-regulated gathering system. The diagram indicates that the tank is a storage tank subject to EPA regulation, rather than a breakout tank subject to PHMSA regulation. Attachment 8 provides guidance regarding the application of PHMSA's § 195.2 definition of breakout tank. In particular, Attachment 8 helps to clarify what constitutes the second type of tank that qualifies as a breakout tank under § 195.2, that is, "a tank used to . . . receive and

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[11] 49 C.F.R. § 195.2.

[12] *See* Attachment B showing the check valve.

[13] 49 C.F.R. § 195.2.

[14] Memorandum from Richard B. Felder, Assoc. Administrator, Office of Pipeline Safety, U.S. Department of Transportation (DOT) and Stephen D. Luftig, Dir., Office of Emergency and Remedial Response, EPA, to DOT OPS Regional Directors, Dir. Office of Site Remediation and Restoration EPA Region I, et al., "Jurisdiction over Breakout Tanks/Bulk Oil Storage Tanks (Containers) at Transportation-Related and Non-Transportation-Related Facilities" (Feb. 4, 2000) (Felder-Luftig Memo), Attachment C hereto.

[15] *Id.* at 2.

[16] *Id.* at 1.

store hazardous liquid transported by a pipeline for reinjection and continued transportation by pipeline." Under Attachment 8, a tank that receives product from a non-PHMSA-regulated gathering or production system is not such a breakout tank.

NNOGC's tanks are similar to the facility depicted in Attachment 8 of the Felder-Luftig Memo. NNOGC's tanks are fed by a non-PHMSA-regulated gravity-fed pipelines. Under the guidance provided in Attachment 8, these tanks do not serve to "receive and store hazardous liquid transported by a pipeline." [17] Therefore, NNOGC's tanks are not breakout tanks and are not subject to Part 195. These tanks are subject to EPA regulation.

Several PHMSA enforcement decisions cite the Felder-Luftig Memo when addressing the application of Part 195 regulations to breakout tanks, and support the conclusion that the Montezuma Creek storage tanks are not breakout tanks. In a 2011 enforcement case against Plains Pipeline, L.P. (Plains), PHMSA cited the Felder-Luftig Memo in addressing Plains' contention that a pipe connecting a tank to a truck manifold was subject to EPA, rather than PHMSA oversight.[18] PHMSA concluded that the pipe fell under EPA's oversight and withdrew the related allegation of violation.[19]

In a 2008 enforcement case, PHMSA addressed a situation even more analogous to the NNOGC's Montezuma Creek storage tanks finding that, where a non-DOT regulated gathering system feeds a tank, that tank is not subject to Part 195.[20] On that basis, PHMSA withdrew the portion of an allegation of violation related to that tank.[21] PHMSA made this finding without reference to, but consistent with, the Felder-Luftig Memo. Like the tank fed by a non-DOT-regulated gathering pipeline, NNOGC's tanks are fed by non-PHMSA regulated gravity-fed pipelines and, under this case, are not breakout tanks and are not subject to Part 195.

B. OPS Has Not Satisfied Its Burden of Establishing a Violation.

PHMSA has the burden of proving that NNOGC has violated the pipeline safety regulations.[22] PHMSA has the "'burden of production,' *i.e.*, . . . the obligation to come forward with the evidence at different points in the proceeding," and the "'burden of persuasion,' *i.e.*,

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[17] 49 C.F.R. § 195.2.

[18] *In re Plains Pipeline, L.P.,* Final Order, CPF No. 4-2009-5009, 2011 WL 1919520, **4-5 (Mar. 15, 2011).

[19] *Id*. at *5.

[20] *In re Chevron Pipeline Co.*, Final Order, CPF No. 5-2002-5023, 2008 WL 565349, **3, 4 (Feb. 5, 2008).

[21] *Id*.

[22] 49 U.S.C. § 60117(b)(1)(F) (2018), as amended by the Protecting our Infrastructure of Pipelines and Enhancing Safety Act of 2020, Pub. L. No. 116-260, div. R, title I, § 108(a)(2), 134 Stat. 2221, 2223 (Dec. 27, 2020). 49 C.F.R. § 190.213(a)(1). *See, e.g.*, *In re ExxonMobil Pipeline Co.*, Final Order, CPF No. 4-2017-5027, 2019 WL 3734516, **4, 5 (Apr. 3, 2019) (withdrawing allegation because PHMSA's evidence did not establish a violation).

which party loses if the evidence is closely balanced."[23] PHMSA bears the burden of proof as to all elements of the proposed violation.[24] To meet its burden of production, PHMSA must present sufficient evidence to sustain an allegation of violation. Where PHMSA does not produce such evidence, the allegation of violation must be withdrawn.[25]

To meet its burden of persuasion, PHMSA "must prove, by a preponderance of the evidence, that the facts necessary to sustain a probable violation actually occurred."[26] This burden is carried "only if the evidence supporting the allegation outweighs the evidence and reasoning presented by Respondent in its defense."[27]

OPS alleges that NNOGC violated the requirement in § 195.446(a) "to provide an adequate procedure to verify correct safety related set point values during the calibration of overfill protection systems as required by Sections [*sic*] § 195.446(e)(3) and § 195.428(d)."[28] According to the Notice, after reviewing "test records of tank overfill protection systems, it was identified that the field inspections were not completed to compare with the SCADA values during the overfill protection systems for" three storage tanks for 2019 and 2020.[29] The Notice then observes that "[s]ection 195.428(d) requires inspection and testing of overfill protection systems to determine that it is functioning properly, is in good mechanical condition, and is adequate from the standpoint of capacity and reliability of operation for the service in which it is used."[30]

The evidence provided in the Violation Report consists of two calibration spreadsheets and a document entitled "Form-500-4 Instrumentation and Controls/Point To Point Verification."[31]

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[23] *Schaeffer v. Weast*, 546 U.S. 49, 56 (2005) (quoting *Dir., Office of Workers' Comp. Programs, Dep't of Labor v. Greenwich Collieries*, 512 U.S. 267, 272 (1994)); *see also In re Butte Pipeline Co.*, Final Order, CPF No. 5-2007-5008, 2009 WL 3190794, *1 (Aug. 17, 2009) ("PHMSA carries the burden of proving the allegations set forth in the Notice, meaning that a violation may be found only if the evidence supporting the allegation outweighs the evidence and reasoning presented by Respondent in its defense.").

[24] *In re CITGO Pipeline Co.*, Decision on Reconsideration, CPF No. 4-2007-5010, 2011 WL 7517716, *5 (Dec. 29, 2011) (finding lack of evidence demonstrating all elements of the alleged violation).

[25] *See, e.g.*, *ExxonMobil*, 2019 WL 3734516 at **4, 5 (ordering withdrawal of allegations where OPS failed to prove that Respondent engaged in conduct that would constitute a violation); *In re Plains Pipeline,* 2011 WL 1919520 at **4, 5 (ordering withdrawal of allegation when limited evidence in the record was not conclusive).

[26] *In re Alyeska Pipeline Serv. Co.*, Decision on Petition for Reconsideration, CPF No. 5-2005-5023, 2009 WL 5538655, *3 (Dec. 16, 2009) (citing *In re Butte Pipeline*, 2009 WL 3190794 at *1, n.3; *Schaeffer*, 546 U.S. at 56-58).

[27] *In re Butte Pipeline*, 2009 WL 3190794 at *1.

[28] Notice at 2.

[29] *Id.*

[30] *Id.* at 2.

[31] Pipeline Safety Violation Report, CPF No. 3-2022-037-NOPV (Mar. 3, 2022).

NNOGC requests that Item 1 be withdrawn because it assumes that NNOGC is required to inspect and test the "tank overfill protection systems" at the Montezuma Creek storage tanks.[32] This assumption is incorrect because, as established above, these storage tanks are not breakout tanks. They cannot receive surge from the RHP and they receive oil from non-PHMSA-regulated non-transportation-related pipelines. They are not subject to § 195.428(d)'s requirement to inspect and test overfill protection systems. Rather, the tanks are subject to the requirements of EPA regulations. PHMSA has not met its threshold burden of establishing that the Montezuma Creek storage tanks are subject to Part 195.[33]

The fact the storage tank oil inventory levels are reflected on the RHP SCADA display does not make the storage tanks subject to Part 195. Nor does calibrating field instruments at the storage tanks to ensure tank level readings are accurate on the SCADA display render the storage tanks regulated breakout tanks.

NNOGC requests that Item 1 be withdrawn because the Montezuma Creek storage tanks are not breakout tanks and are not subject to § 195.428(d). NNOGC is not required to inspect and test the tanks' overfill protection systems. Therefore, a key factual assumption underlying the alleged violation is inaccurate, OPS has failed to satisfy its burden of proving a violation.[34] In addition, NNOGC requests that the proposed compliance order, which would require NNOGC to "develop a procedure to calibrate the overfill protection systems to complete the calibration and verification of tanks LT-1430, LT-10431, LT-1432" be withdrawn.

Item 2 - § 195.446(c)(3)

Item 2 of the Notice alleges that NNOGC failed to test and verify its internal communication plan for manual pipeline operations at the interval required in the regulations and proposes a $22,800 civil penalty. NNOGC does not contest Item 2 and will pay the proposed civil penalty.

Item 3 - § 195.446(3)(1)

Item 3 of the Notice alleges that NNOGC failed to implement safety-related points and alarms in its SCADA system in violation of § 195.446(e)(1) which requires that an operator "[r]eview SCADA safety-related alarm operations using a process that ensures alarm are accurate and support safe pipeline operations." The Notice alleged that there were a number

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[32] Notice at 2.

[33] *ExxonMobil*, 2019 WL 3734516 at **4, 5 (withdrawing allegation because PHMSA did not establish a violation).

[34] *Id. See also Plains Pipeline,* 2011 WL 1919520 at *5; *Chevron Pipeline*, 2008 WL 565349 at **3, 4.

of discrepancies between the UCOS Master Data Base and Table 1 of the Alarm Management Program with respect to, among other things, set points and the identification of safety-related alarms.[35]

The Proposed Compliance Order for Item 3 would require that NNOGC:

> "identify all safety related points and alarms, rationalized [*sic*] all alarms to establish the appropriate set points and verify the alarm descriptions are correct. Part of the process must be to apply, in the database, the appropriate alarm priority level as defined by procedure, along with verification of the color presentation and any audible alerts and animation (flashing) for alarms. Additionally, safety related points and alarms must be defined in the SCADA master database (if capabilities for this exist) and, at a minimum, distinguish in the alarm description if the alarm is safety related. This must be completed within 90 days of receipt of the Final Order.[36]

NNOGC's Response

NNOGC will comply with terms of this proposed compliance order.

Item 4 - § 195.446(h)

The Notice alleges that NNPGC failed to develop a structured training program with content to implement procedure 500-8 of the Control Room Management Plan which addresses on the job training. NNOGC also did not provide records for the review of their training content for years 2018, 2019, and 2020.[37]

The proposed compliance order would require that NNOGC:

> implement a structured on the job training plan that includes, at a minimum: identification specific training content, web based or instructor led training, assessments for training courses and periodic progress. This must be provided for all positions, defined in the control room, who will maintain operator qualification to operate a console for either assigned shift rotation or to fill a temporary vacancy. The training plan should be developed so that the individual trainee, mentor, and supervisor understand the requirements and can track

[35] Notice at 3.
[36] Notice at 6.
[37] Notice at 3.

progress. This must be completed within 180 days of receipt of the Final Order.[38]

NNOGC's Response

The RHP has one control room that is located at Montezuma Creek. The control room contains one computer console with a single screen that contains a SCADA display. The UCOS SCADA system is programed to terminate pumping operations and automatically shut down pipeline operations in a failsafe mode if certain operational parameters are met and in response to a SCADA communications failure.

The RHP has a small staff of pipeline personnel (*i.e.* operators) who have a variety of responsibilities for operating and maintaining the pipeline. On a rotating weekly basis, a different operator serves in the role of "on-call" controller who works an 8-hour shift and is on-call after hours. The designated on-call controller is not continually present in the control room and does not continuously monitor the SCADA display. When an alarm is generated, the system sends an email to the appropriate RHP personnel and a 24-hour answering service which receives and relays alarms to appropriate RHP personnel who then acknowledges the alarm and takes appropriate action, if any is necessary.

Consistent with PHMSA's CRM Frequently Asked Question A.14 which provides that "[e]ach control room management program can be tailored to the unique aspects of the control room and its related pipeline system,"[39] NNOGC is undertaking to develop a training program that is tailored to the RHP UCOS SCADA, control room staffing model and the functions of controllers and that is consistent with regulatory requirements.

[38] Notice at 6.

[39] Control Room Management Frequently Asked Questions (FAQs), FAQ A.14, (Jan. 16, 2018) (https://www.phmsa.dot.gov/sites/phmsa.dot.gov/files/docs/technical-resources/pipeline/control-room-management/60636/faqscontrol-room-management20180726_1.docx)

Conclusion

For the reasons set forth above, NNOGC requests that Item 1 and the associated proposed compliance order be withdrawn. NNOGC does not contest Item 2 and will pay the proposed civil penalty. NNOGC also does not contest Item 3 and Item 4, and will implement the measures described in the proposed compliance order.

If there are any questions concerning this response, please contact the undersigned.

Sincerely,

James R. McClure
Chief Executive Officer
Navajo Nation Oil and Gas Company

Attachments

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