

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

VIA ELECTRONIC MAIL TO: Brad.Barron@nustarenergy.com;
gary.koegeboehn@nustarenergy.com

February 2, 2023

Mr. Brad Barron
President and Chief Executive Officer
NuStar Pipeline Operating Partnership L.P.
19003 IH-10 West
San Antonio, Texas 78257

CPF 3-2023-004-NOPV

Dear Mr. Barron:

From October 11 to December 8, 2022, representatives 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 NuStar Logistics, L.P.'s (NuStar) PHMSA drug and alcohol program in San Antonio, Texas.

As a result of the inspection, it is alleged that NuStar 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. § 40.15 May an employer use a service agent to meet DOT drug and alcohol testing requirements?¹**
 - (a)**
 - (c) You remain responsible for compliance with all applicable requirements of this part and other DOT drug and alcohol testing regulations, even when you use a service agent. If you violate this part or other DOT drug and alcohol testing regulations because a**

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.

service agent has not provided services as our rules require, a DOT agency can subject you to sanctions. Your good faith use of a service agent is not a defense in an enforcement action initiated by a DOT agency in which your alleged noncompliance with this part or a DOT agency drug and alcohol regulation may have resulted from the service agent's conduct.

NuStar, an employer, used service agents² to meet DOT drug and alcohol testing requirements and was responsible for compliance with all applicable requirements of 49 CFR part 40 and other DOT drug and alcohol testing regulations.

NuStar used collectors during calendar year 2021 to collect urine specimens from its employees for DOT drug testing, but those collectors had not subscribed to the ODAPC list-serve. Collectors must subscribe to the ODAPC list-serve.³ In addition, NuStar did not ensure a collector, who made a mistake in the urine specimen collection process that caused a DOT drug test to be cancelled, completed “error correction training.”⁴

PHMSA inspectors requested qualifications records for collectors that performed drug test urine specimen collections for NuStar during calendar year 2021. NuStar did not provide proof of the registration to these collectors to the ODAPC list-serve. PHMSA inspectors also requested the error correction training records of a collector that conducted a urine specimen collection that resulted in a cancellation dated May 5, 2021. NuStar did not provide the records or any evidence that the training had been completed.⁵

2. § 199.105 Drug tests required

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

(a)

(c) Random testing.

(1)

(6) The operator shall randomly select a sufficient number of covered employees for testing during each calendar year to equal an annual rate not less than the minimum annual percentage rate for random drug testing determined by the Administrator. If the operator conducts random drug testing through a consortium, the number of employees to be tested may be calculated for each individual operator or may be based on the total number of covered employees covered by the consortium who are subject to random drug

² § 40.3 defines service agent as any person or entity, other than an employee of the employer, who provides services to employers and/or employees in connection with DOT drug and alcohol testing requirements. This includes, but is not limited to, collectors, BATs and STTs, laboratories, MROs, substance abuse professionals, and C/TPAs. To act as service agents, persons and organizations must meet DOT qualifications, if applicable.

³ § 40.33(a) requires collectors to subscribe to the ODAPC list-serve to keep current with DOT agency regulations, the Urine Specimen Collection Procedure Guidelines, and other materials available from ODAPC.

⁴ § 40.33(f) requires a collector to undergo error correction training if the collector makes a mistake in the collection process that causes a test to be cancelled. The training must occur within 30 days.

⁵ § 199.117 requires operators to keep records of collector qualifications and to make them available to PHMSA inspectors upon request.

testing at the same minimum annual percentage rate under this subpart or any DOT drug testing rule.

NuStar did not randomly select a sufficient number of covered employees for testing during calendar year 2020 to equal an annual rate not less than the minimum annual percentage rate for random drug testing determined by the Administrator, which was 50 percent during calendar year 2020.⁶

NuStar submitted to the Drug and Alcohol Management Information System (DAMIS) database an MIS report that showed a total of 666 covered employees subject to DOT drug testing in calendar year 2020. That same report indicated that NuStar did not conduct any DOT random drug testing in calendar year 2020.

3. § 199.105 Drug tests required

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

(a)

(c) Random testing.

(1)

(7) Each operator shall ensure that random drug tests conducted under this subpart are unannounced and that the dates for administering random tests are spread reasonably throughout the calendar year.

NuStar did not ensure that the dates for administering random drug tests were spread reasonably throughout the calendar year.

During the inspection NuStar provided spreadsheets containing the dates of their drug random testing conducted during calendar years 2019, 2020, and 2021. The 2019 spreadsheet showed a pattern of administering the random drug tests during the last month of each quarter, while the 2021 spreadsheet shows all the random drug tests occurred within six months. NuStar did not conduct any random drug tests in calendar year 2020.

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

⁶ Federal Register Notice December 30, 2019 (84 FR 72134).

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 violation and recommend that you be preliminarily assessed a civil penalty of \$ 5,500 as follows:

<u>Item number</u>	<u>PENALTY</u>
2	\$ 5,500

Warning Items

With respect to Items 1 and 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 these items. Failure to do so may result in additional enforcement action.

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 the 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 the 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 3-2023-004-NOPV** and, for each document you submit, please provide a copy in electronic format whenever possible.

Sincerely,

Gregory Ochs
Director, Central Region, Office of Pipeline Safety
Pipeline and Hazardous Materials Safety Administration

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

cc: Gary Koegeboehn, VP of Pipeline Operations, gary.koegeboehn@nustarenergy.com