

WARNING LETTER

VIA ELECTRONIC MAIL TO: jbenning@duluthmn.gov; eshaffer@duluthmn.gov; jgerard@duluthmn.gov

December 28, 2023

Jim Benning
Director of Public Works & Utilities
City of Duluth Public Works & Utilities
411 West First Street, RM 240
Duluth, MN 55802

CPF 3-2023-035-WL

Dear Mr. Benning:

From May 14, 2023, to June 25, 2023, a representative of the Pipeline and Hazardous Materials Safety Administration (PHMSA) pursuant to Chapter 601 of 49 United States Code (U.S.C.) inspected the City of Duluth Public Works & Utilities (City of Duluth) PHMSA drug and alcohol (D&A) program in Duluth, Minnesota.

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

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.**

The City of Duluth did not maintain and follow a written anti-drug plan that met the requirements of part 199 and the DOT procedures.

The City of Duluth submitted an anti-drug plan to PHMSA inspectors, but the plan was not maintained in that it contained outdated and misleading information and it lacked methods and procedures to meet all the drug testing regulations in part 199 and in the DOT Procedures.

2. § 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.

The City of Duluth submitted an annual Management Information System (MIS) report to PHMSA of its anti-drug testing for calendar year 2022 but failed to properly certify that MIS report for accuracy and completeness because the report was both inaccurate and incomplete. The City of Duluth submitted its certified calendar year 2022 MIS report to PHMSA on March 15, 2023. The report indicated 169 covered employees for calendar year 2022. But the MIS report was inaccurate because the 2022 drug testing data provided to PHMSA during the inspection by Hanco, a City of Duluth contractor, showed that 40 of the 169 employees were tested under FMCSA regulations, not PHMSA regulations. Employees tested under FMCSA must be reported to FMCSA and not to PHMSA.

Additionally, the certified calendar year 2022 MIS report the City of Duluth submitted to PHMSA on March 15, 2023 was incomplete. The drug testing data provided to PHMSA by the City of Duluth during the inspection showed that the City of Duluth conducted 21 pre-employment drug tests in calendar year 2022; yet, the calendar year 2022 MIS report certified by the City of Duluth shows no pre-employment drug test were completed.

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 \$2,391,142 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 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 correct the items identified in this letter. Failure to do so will result in the City of Duluth Public Works & Utilities being subject to additional enforcement action.

No reply to this letter is required. If you choose to reply, in your correspondence please refer to **CPF 3-2023-004-WL**. Be advised that all material you submit in response to this enforcement action is subject to being 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).

Sincerely,

Gregory A. Ochs
Director, Central Region, OPS
Pipeline and Hazardous Materials Safety Administration

cc: Eric Shaffer, DOT Compliance (eshaffer@duluthmn.gov)
Joe Gerard, DOT Compliance Assistant (jgerard@duluthmn.gov)