December 9, 2019

Mr. Kelcy L. Warren
Chief Executive Officer
Energy Transfer, LP
8111 Westchester Drive
Dallas, Texas 75225

Re: CPF No. 4-2016-5022

Dear Mr. Warren:

As you may know, PHMSA issued a Final Order to your subsidiary, Sunoco Logistics Partners, LP, in the above-referenced case on November 8, 2019. As noted in my email to you on December 3, this office recently discovered, due to a clerical error, that the order inadvertently included two copies of page 13 and omitted page 14. Therefore, enclosed please find a corrected final order that includes the missing page. There are no other changes from the original order.

As noted in the cover letter to you on November 8, the Final Order withdraws three allegations of violation, makes other findings of violation, assesses a reduced civil penalty of $1,019,200, and withdraws the proposed compliance order. The penalty payment terms are set forth in the Final Order. When the civil penalty has been paid, as determined by the Director, Southwest Region, this enforcement action will be closed. Service of the corrected Final Order is effective upon the date of mailing this letter by certified mail, as provided under 49 C.F.R. § 190.5. Please note that due to PHMSA's error, the deadline for filing a petition for reconsideration is hereby extended until 20 days after your receipt of service of this letter.

Thank you for your cooperation in this matter.

Sincerely,

James M. Pates
Assistant Chief Counsel
for Pipeline Safety

Enclosure

cc: Ms. Mary McDaniel, Director, Southwest Region, Office of Pipeline Safety, PHMSA
Mr. Todd Nardozzi, Senior Manager, DOT Compliance, Energy Transfer, LP, 1 Fluor Daniel Drive, Building A Level 3, Sugar Land, Texas 77478

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	)	
Sunoco Logistics Partners, LP, a subsidiary of Energy Transfer, LP,	)	**CPF No. 4-2016-5022**
Respondent.	)	

FINAL ORDER

From March to September 2015, pursuant to 49 U.S.C. § 60117, representatives of the Pipeline and Hazardous Materials Safety Administration (PHMSA), Office of Pipeline Safety (OPS), conducted an accident investigation of the facilities and records of Sunoco Logistics Partners, LP (Respondent), in Wortham, Texas. Sunoco owned[1] the West Texas Gulf Pipeline Company (WTG), a 26-inch, 580-mile pipeline system that transports crude oil from Colorado City to Longview, Texas, with additional delivery points along the Gulf Coast. On March 4, 2015, following an information request from the public, OPS initiated an investigation into an accident at Respondent's Wortham facility in Texas. On or about February 19, 2013, vapors ignited while welders were performing a pipeline modification, resulting in a serious injury.

As a result of the investigation, the Director, Southwest Region, OPS (Director), issued to Respondent, by letter dated July 7, 2016, a Notice of Probable Violation, Proposed Civil Penalty, and Proposed Compliance Order (Notice). In accordance with 49 C.F.R. § 190.207, the Notice proposed finding that Sunoco committed violations of 49 C.F.R. Parts 195 and 199 and proposed assessing a civil penalty of $1,539,800 for the alleged violations. The Notice also proposed ordering Respondent to take certain measures to correct the alleged violations.

Sunoco responded to the Notice by letter dated August 4, 2016 (Response). Sunoco contested all of the allegations, offered additional information in response to the Notice, and requested a hearing. A hearing was subsequently held on March 28, 2017, in Houston, Texas, with an attorney from the Office of Chief Counsel, PHMSA, presiding. At the hearing, Respondent was represented by counsel.

[1] At the time of the accident, Sunoco owned WTG. On April 28, 2017, Energy Transfer Partners (ETP) and Sunoco Logistics Partners merged. This pipeline is now fully owned by Energy Transfer Partners (ETP). *See* https://ir.energytransfer.com/news-releases/news-release-details/sunoco-logistics-partners-and-energy-transfer-partners-announce/. (last accessed October 1, 2019).

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. § 195.204, which states:

> **§ 195.204 Inspection–general.**
> Inspection must be provided to ensure that the installation of pipe or pipeline systems is in accordance with the requirements of this subpart. Any operator personnel used to perform the inspection must be trained and qualified in the phase of construction to be inspected. An operator must not use operator personnel to perform a required inspection if the operator personnel performed the construction task requiring inspection. Nothing in this section prohibits the operator from inspecting construction tasks with operator personnel who are involved in other construction tasks.

The Notice alleged that Respondent violated 49 C.F.R. § 195.204 by failing to ensure that the operator personnel, or third-party inspector, that it used to perform inspections was trained and qualified in the phase of construction to be inspected. On the day of the accident, Respondent's third-party contractor, Sprint Pipeline Services (Sprint), was tying in a 50-foot section of pipe. Mustang Engineering (Mustang) was overseeing the construction work as a third-party inspector. Specifically, the Notice alleged that Mr. Tolbert (Mustang employee) was performing inspections on February 18-19, 2013, despite the fact that he was neither trained nor qualified in the construction tasks being performed.

At the hearing, Sunoco acknowledged that it was unable to present any evidence that Mr. Tolbert was qualified at the time of OPS' accident investigation. However, Sunoco produced some evidence in support of its contention that Mr. Tolbert was trained to the regulatory standard. First, Sunoco noted that OPS' investigator, Ms. Molly Atkins, had attached Mr. Tolbert's 2010 resume to the Violation Report. This resume lists various qualifications. Second, Sunoco pointed to a deposition transcript[2] that discusses the general process that Mustang used to qualify its inspectors. It argued that, even if it was not able to produce any direct evidence linking this process to Mr. Tolbert, given the time frame of the inspection services (February 18-19, 2013), Mr. Tolbert would have undergone a training and qualification process. Third, Respondent stated that its contract with Mustang required them to ensure that its inspectors were appropriately qualified.

OPS countered that Sunoco is ultimately responsible for ensuring that its personnel, including its third-party contractors, are "trained and qualified in the phase of construction to be inspected." Sunoco provided no direct evidence that Mr. Tolbert was qualified to oversee the work being performed on February 18-19, 2013. While the regulation does not require an operator to have a specific qualification process, it must ensure that its personnel are "trained and qualified" to the task by establishing a standardized process that itemizes the training and qualification process for

[2] Sunoco presented evidence throughout the hearing that was produced pursuant to a third-party civil litigation related to the Wortham accident. This litigation will be referred to as "the Talbot litigation."

different construction phases. Despite the fact that Sunoco was able to produce Mr. Tolbert's resume and provide evidence that it established an inspector vetting process around the time of the accident, it has no direct evidence that Mustang (or Sunoco) followed any process to establish Mr. Tolbert's qualifications for the specific phases of work that he was overseeing on February 18-19, 2013.[3] In its Post-Hearing Brief, Sunoco focuses on the phase of construction (demagnetization) that was occurring at the time of the accident. However, the Notice alleges, and I agree, that Mr. Tolbert was required to be properly qualified for all of the phases of construction that he was overseeing on February 18-19, 2013.

Accordingly, after considering all of the evidence, I find that Sunoco failed to ensure that the operator personnel used to perform inspections were trained and qualified in the phases of construction to be inspected.

Item 2: The Notice alleged that Respondent violated 49 C.F.R. § 195.402, which states in relevant part:

> **§ 195.402 Procedural manual for operations, maintenance and emergencies.**
>
> (a) *General*. Each operator shall prepare and follow for each pipeline system a manual of written procedures for conducting normal operations and maintenance activities and handling abnormal operations and emergencies. This manual shall be reviewed at intervals not exceeding 15 months, but at least once each calendar year, and appropriate changes made as necessary to insure that the manual is effective. This manual shall be prepared before initial operations of a pipeline system commence, and appropriate parts shall be kept at locations where operations and maintenance activities are conducted.
>
> (c) *Maintenance and normal operations*. The manual required by paragraph (a) of this section must include procedures for the following to provide safety during maintenance and normal operations:
>
> (1) ….
>
> (13) Periodically reviewing the work done by operator personnel to determine the effectiveness of the procedures used in normal operation and maintenance and taking corrective action where deficiencies are found.

The Notice alleged that Respondent violated 49 C.F.R. § 195.402(c)(13) by failing to follow its own procedures for periodically reviewing its work and determining the effectiveness of the procedures used in normal operation and maintenance and taking corrective action where deficiencies are found. Specifically, the Notice alleged that Sunoco failed to follow these procedures at the Wortham facility: *Hot Work Procedure HS-P-009, Lockout-Tagout Program HS-P-005, and Overview of Work Permits Procedure HS-G-012*. Each procedure required Sunoco to conduct evaluations at certain intervals to ascertain whether Hot Work, Lockout/Tagout (LOTO), and Work Permit procedures were being followed. During OPS'

[3] "Mr. Herring: Right, he didn't specifically mention Mr. Tolbert…What we have available is Mustang's representations of the process that they followed (Hearing Transcript, at 44)."

yearlong investigation[4], Sunoco was unable to provide any records for the Wortham facility that demonstrated it performed these evaluations.

At the hearing, Sunoco produced records that it claimed were discovered in paper form just prior to the hearing. These included: (1) a collection of executed permits (Hearing Exhibit 1) and (2) a collection of lockout-tagout inspection checklists (Hearing Exhibit 2). In the Regional Director's written evaluation of the response material submitted in the Post-Hearing Brief, the Director noted that Exhibit 1 does not indicate whether the required audit occurred or include the required review. After reviewing the documents submitted in these exhibits, the Director stated that each form either lacked specific detail or was not signed by authorized representatives.

After conducting a review of these documents and Sunoco's own procedures, I find that Sunoco did not fully comply with any of these procedures. The Respondent argues that, as an unmanned facility, Wortham was not required to comply with the annual evaluation requirements enumerated in these three procedures. I do not agree. The procedures themselves do not include an exception for unmanned facilities, and there is no question that the Wortham facility did not conduct an evaluation of the Hot Work Procedure in 2013. In addition, as noted by the Director, the evaluations that were submitted appear incomplete (unsigned).

Accordingly, based upon a review of all of the evidence, I find that Respondent violated 49 C.F.R. § 195.402(c)(13) by failing to follow its own procedures for periodically reviewing its work and determining the effectiveness of the procedures used in normal operation and maintenance and taking corrective action where deficiencies are found.

Item 3: The Notice alleged that Respondent violated 49 C.F.R. § 195.402, which states in relevant part:

> **§ 195.402 Procedural manual for operations, maintenance and emergencies**
>
> (a) *General.* Each operator shall prepare and follow for each pipeline system a manual of written procedures for conducting normal operations and maintenance activities and handling abnormal operations and emergencies. This manual shall be reviewed at intervals not exceeding 15 months, but at least once each calendar year, and appropriate changes made as necessary to insure that the manual is effective. This manual shall be prepared before initial operations of a pipeline system commence, and appropriate parts shall be kept at locations where operations and maintenance activities are conducted.
>
> (e) *Emergencies.* The manual required by paragraph (a) of this section must include procedures for the following to provide safety when an emergency condition occurs:
>
> (1) ….
>
> (9) Providing for a post accident review of employee activities to determine whether the procedures were effective in each emergency and taking corrective action where deficiencies are found.

[4] The investigation was initiated on March 4, 2015, and continued until issuance of the Notice on July 7, 2016.

The Notice alleged that Respondent violated 49 C.F.R. § 195.402(e)(9) by failing to follow its own procedures to provide for a post-accident review of employee activities to determine whether the procedures were effective in an emergency and taking corrective action where deficiencies are found. Specifically, the Notice alleged that Sunoco failed to conduct a review following the Wortham accident to determine whether its procedures were effective or to take any corrective action. Sunoco's procedure OPER-PR-002 (Paragraph 4.3.3), *Spill Reporting, Root Cause Analysis and Documentation*, required Sunoco to prepare a Serious Incident Investigation Report (SII) following the Wortham accident. Pursuant to the SII, Sunoco was to develop a "Lessons Learned" document that complies with § 195.402(e)(9), or "provide(s) for a post-accident review of employee activities to determine whether the procedures were effective in each emergency and taking corrective action where deficiencies are found." However, at the time of OPS' inspection, Mr. Todd Nardozzi, Compliance Manager, Sunoco, stated that Sunoco had never completed a "Lessons Learned" document.[5]

At the hearing and in its Post-Hearing Brief, Sunoco acknowledged that it never developed a "Lessons Learned" document and therefore failed to follow its own procedure.[6] However, it contended that Item 3 was duplicative of the allegation in Item 4 and relies on the same failure to follow OPER-PR-002, or to prepare a complete and accurate Serious Incident Investigation Report for the Wortham accident. I will discuss this argument further in the discussion of Item 4. However, this Item alleges, and I so find, that Sunoco failed to complete its Serious Incident Investigation Report, an integral part of complying with the regulatory requirement to conduct a post-accident review.

Accordingly, based upon a review of all of the evidence, I find that Respondent violated 49 C.F.R. § 195.402(e)(9) by failing to follow its own procedures to provide a post-accident review of employee activities to determine whether its procedures were effective and taking corrective action where deficiencies were found.

Item 4: The Notice alleged that Respondent violated 49 C.F.R. § 195.402, which states in relevant part:

> **§ 195.402 Procedural manual for operations, maintenance and emergencies**
>
> (a) *General.* Each operator shall prepare and follow for each pipeline system a manual of written procedures for conducting normal operations and maintenance activities and handling abnormal operations and emergencies. This manual shall be reviewed at intervals not exceeding 15 months, but at least once each calendar year, and appropriate changes made as necessary to insure that the manual is effective. This manual shall be prepared before initial operations of a pipeline system commence, and appropriate parts shall be kept at locations where operations and maintenance activities are conducted.
>
> (c) *Maintenance and normal operations*. The manual required by

[5] Violation Report, at 22.

[6] "Mr. Dunleavy: We have not located a lessons-learned (Transcript, at 76)."

> paragraph (a) of this section must include procedures for the following to provide safety during maintenance and normal operations:
> (1) ….
> (5) Analyzing pipeline accidents to determine their causes.

The Notice alleged that Respondent violated 49 C.F.R. § 195.402(c)(5) by failing to follow its own procedures for analyzing pipeline accidents to determine their causes. Specifically, the Notice alleged that the Respondent failed to perform a complete analysis into the cause of the accident, as required by OPER-PR-002. This procedure comprises 11 pages and "defines the process by which spills are reported and documented." The Notice alleges that the operator failed to comply in the following ways: (1) failure to provide complete and accurate photographs from the accident scene, as required by OPER-PR-002, Section 4.2; and (2) failure to assemble an investigation team composed of cross functional employees, as required by OPER-PR-002, Paragraph 4.3.3. The Notice also alleges various failures to adequately evaluate the Project Work Plan.

At the hearing, the Respondent did not contend that it abided by OPER-PR-002. However, it stated that § 195.402(e)(9) and § 195.402(c)(5) required the same post-accident review and therefore Sunoco's collective failure to follow the procedure should constitute a single violation.

OPS argued that § 195.402(e)(9) and § 195.402(c)(5) required the completion of different analyses. Item 3 focused on Sunoco's failure to complete a Lessons Learned document that would have put Sunoco into compliance with the required post-accident review (§ 195.402(e)(9)) *when an emergency condition occurs* (emphasis added). Item 4, however, (§ 195.402(c)(5)) focuses on Sunoco's failure to analyze the cause of this accident pursuant to its manual for *maintenance and normal operations* (emphasis added). In OPS' view, Items 3 and 4 are therefore properly the basis of two separate violations of two separate procedures required by different parts of § 195.402.

Admittedly, Item 4 refers to Sunoco's failure to complete the Lessons Learned document (Item 3) and how this failure also violates § 195.402(c)(5). *Blockburger v. United States,* 284 U.S. 299, 304 (1932) requires a determination of whether there are two offenses or only one.[7] The relevant test is to determine whether the multiple alleged violations "each require proof of any additional fact or have their own 'evidentiary basis.'"[8] I find that there is a separate evidentiary basis for Item 4 – apart from the failure to complete the Lessons Learned document.

The Violation Report details multiple instances where Sunoco failed to follow its own procedural requirements. Simply because these actions are required by the same 11-page procedure that also required the "Lessons Learned" document does not mean that Sunoco's failure cannot form the basis of separate violations. In this case, there are two separate acts, including: (1) failure to provide complete and accurate photographs from the accident scene, as required by OPER-PR-002, Section 4.2; and (2) failure to assemble an investigation team composed of cross functional

[7] *Blockburger v. United States*, 284 U.S. 299, 304 (1932).

[8] *In re Colo. Interstate Gas*, Final Order, CPF No. 5-2008-1005, 2009 WL 5538649, at **11-13 (D.O.T Nov. 23, 2009).

employees, as required by OPER-PR-002, Paragraph 4.3.3. These acts are separate from the "act" of failing to complete the Lessons Learned document.

Accordingly, based upon a review of all of the evidence, I find that Respondent violated 49 C.F.R. § 195.402(c)(5) by failing to follow its own procedures for analyzing pipeline accidents to determine their causes.

Item 5: The Notice alleged that Respondent violated 49 C.F.R. § 195.402, which states in relevant part:

> **§ 195.402 Procedural manual for operations, maintenance and emergencies**
>
> (a) *General*. Each operator shall prepare and follow for each pipeline system a manual of written procedures for conducting normal operations and maintenance activities and handling abnormal operations and emergencies. This manual shall be reviewed at intervals not exceeding 15 months, but at least once each calendar year, and appropriate changes made as necessary to insure that the manual is effective. This manual shall be prepared before initial operations of a pipeline system commence, and appropriate parts shall be kept at locations where operations and maintenance activities are conducted.
>
> (c) *Maintenance and normal operations.* The manual required by paragraph (a) of this section must include procedures for the following to provide safety during maintenance and normal operations:
>
> (1) ….
>
> (6) Minimizing the potential for hazards identified under paragraph (c)(4) of this section and the possibility of recurrence of accidents analyzed under paragraph (c)(5) of this section.

The Notice alleged that Respondent violated 49 C.F.R. § 195.402(c)(6) by failing to prepare and follow its own procedure for minimizing the potential for hazards identified under paragraph (c)(4) and the possibility of recurrence of accidents analyzed under paragraph (c)(5). Specifically, the Notice alleged that Sunoco's procedure OPER-PR-002 (Paragraph 4.3.3), *Spill Reporting, Root Cause Analysis and Documentation*, required Sunoco to take prompt remedial action to minimize the possibility of accident recurrence. In 2009, Sunoco experienced an accident on the West Texas Gulf Pipeline in Colorado City. In the Violation Report, OPS stated that the circumstances of the 2009 Colorado City accident were similar in nature to the 2013 Wortham accident in the following ways: failure (1) to make required notice to the NRC; (2) to timely submit a Form 7000-1; (3) to take corrective actions where deficiencies were found in determining the effectiveness of procedures; (4) to perform annual audits of work processes; (5) to prevent ignition of vapors; (6) to properly isolate or make safe for welding, cutting, and associated hot work activities; and (7) to follow operating and maintenance procedures. On account of the 2009 Colorado City accident, a Final Order was issued to Sunoco on August 1, 2012.[9] It found that Sunoco, among other things, failed to follow its procedures and adequately

[9] See *In the Matter of Sunoco Logistics Partners, LP*, Final Order, CPF No. 4-2010-5010 (Aug. 1, 2012). Decision on Petition for Reconsideration (Dec. 31, 2012).

investigate the accident.

At the hearing, Sunoco stated that the Colorado City and Wortham accidents were different in nature and circumstance, despite the fact that both accidents involved a failure to follow procedures during hot work,[10] leading to a fire that caused injuries. Sunoco stated that the Wortham accident happened solely due to human error, or the fact that its contractor personnel failed to properly ground his equipment. In Colorado City, the explosion occurred when vapors passed through a mud plug during welding, allowing the explosion to occur. In its view, there was nothing in the 2009 Colorado City accident to learn from that would have prevented the 2013 Wortham accident because the contractor employee simply made a mistake in the latter accident. Given these differences, the Respondent argued that OPS did not meet its burden of proving that, even if Sunoco had identified the issues in Colorado City, that the Wortham accident would not have occurred.[11]

This regulation does not require OPS to prove that the failures in Colorado City and Wortham are identical, or even largely similar. It simply requires that, when an operator experiences a failure, it take steps to minimize the potential for hazards identified under paragraph (c)(4) of § 195.402 and the possibility of recurrence of accidents analyzed under (c)(5) of § 195.402. § 195.402 (c)(4) requires that an operator's manual for maintenance and normal operations include a procedure for "Determining which pipeline facilities are located in areas that would require an immediate response by the operator to prevent hazards to the public if the facilities failed or malfunctioned." Section 195.402 (c)(5) requires that an operator's manual for maintenance and normal operations include a procedure for "Analyzing pipeline accidents to determine their causes." Sunoco's procedure OPER-PR-002 (Paragraph 4.3.3), *Spill Reporting, Root Cause Analysis and Documentation* is the procedure that Sunoco implemented to fulfill the regulatory requirements of § 195.402 (c)(5).

OPS argued that Sunoco's failure to perform a root cause analysis following the 2009 accident allowed the Wortham accident to occur because Sunoco failed to complete its Serious Incident Investigation or its Lessons Learned document in order to properly minimize the potential for future hazards, as required by § 195.402(c)(6). I agree. It is enough that OPS establish that Sunoco failed to take any action, as required by OPER-PR-002, to produce a complete root cause failure analysis following the Colorado City accident. If Sunoco had completed this analysis, it could have argued that it fulfilled its obligation to minimize the potential for a future incident. It is evident that Sunoco failed to take any action following the Colorado City accident to minimize the potential for hazards identified under paragraph (c)(4) or the possibility of recurrence of accidents analyzed under paragraph (c)(5).

Accordingly, based upon a review of all of the evidence, I find that Respondent violated 49 C.F.R. § 195.402(c)(6) by failing to prepare and follow its own procedure for minimizing the

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[10] Hot work is any work that involves burning, welding, using fire- or spark-producing tools, or that produces a source of ignition. *See* https://www.osha.gov/SLTC/etools/oilandgas/general_safety/hot_work_welding.html (last accessed October 1, 2019).

[11] Mr. Nordozzi (Senior Manager, DOT Compliance): "There wasn't a failure of the mud plug itself like we saw in Colorado City where the vapors passed by vapor barrier. So I think that's the distinction between the two that we are trying to illustrate." (Transcript, at 74).

potential for hazards identified under paragraph (c)(4) and the possibility of recurrence of accidents analyzed under paragraph (c)(5).

Item 6: The Notice alleged that Respondent violated 49 C.F.R. § 195.505(b), which states:

> **§ 195.505 Qualification program.**
> Each operator shall have and follow a written qualification program. The program shall include provisions to:
> (a) ….
> (b) Ensure through evaluation that individuals performing covered tasks are qualified;

The Notice alleged that Respondent violated 49 C.F.R. § 195.505(b) by failing to have and follow a written qualification program with provisions to ensure through evaluation that individuals performing covered tasks are qualified. Specifically, the Notice alleged that two welders directly involved in the Wortham accident did not have proper qualifications.

At the hearing, Sunoco stated that its welders were properly qualified to weld despite the fact that their ISNetworld records showed that their qualifications were expired. Sunoco's written Operator Qualification procedures, Section 5.3, detail requalification frequency and afford a three-month grace period (beyond the standard 36 months). It is undisputed that both welders were within the three-month grace period. OPS argued that ISNetworld, the record keeper for Sunoco's OQ records, does not permit a three-month grace period, and therefore both welders were unqualified at the time of the accident.

Despite the contradiction between the procedures and the ISNetworld records, the Respondent was not out of compliance, per its own procedures. Both welders were within the three-month grace period. Based upon the foregoing, I hereby order that Item 6 be withdrawn.

Item 7: The Notice alleged that Respondent violated 49 C.F.R. § 195.505(d):

> **§ 195.505 Qualification program.**
> Each operator shall have and follow a written qualification program. The program shall include provisions to:
> (a) ….
> (d) Evaluate an individual if the operator has reason to believe that the individual's performance of a covered task contributed to an accident as defined in Part 195;

The Notice alleged that Respondent violated 49 C.F.R. § 195.505(d) by failing to have and follow a written qualification program with provisions to evaluate an individual if the operator has reason to believe that the individual's performance of a covered task contributed to an accident, as defined in Part 195. Specifically, the Notice alleged that Sunoco allowed Mr. Vern Tolbert, Mr. Waymen Casey, and Mr. Danny Tant, all of whom were involved in the February 19 accident, to complete tie-in welds on February 20, 2013 (the day after the accident), without conducting the requisite evaluation into their performance.

At the hearing, Sunoco argued that this violation is duplicative of Item 6, relies on the same regulatory provision, and involves the same qualification issues. As stated above, I withdrew Item 6, rendering the duplication issue moot.

Accordingly, based upon a review of all of the evidence, I find that Respondent violated 49 C.F.R. § 195.505(d) by failing to have and follow a written qualification program with provisions to evaluate an individual if the operator has reason to believe that the individual's performance of a covered task contributed to an accident, as defined in Part 195.

Item 8: 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 must drug test each surviving covered employee whose performance of a covered function 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 specific information that the covered employee's performance had no role in the cause(s) or severity of the accident.

The Notice alleged that Respondent violated 49 C.F.R. § 199.105(b) by failing to conduct post-accident drug testing for each surviving covered employee whose performance of a covered function either contributed to the accident or cannot be completely discounted as a contributing factor to the accident. Specifically, the Notice alleged that Sunoco reported on PHMSA Form 7000-1 that it did not conduct any testing on employees or contractors following the Wortham accident. Sunoco also did not justify its decision not to test based on specific information that the covered employee's performance had no role in the cause or severity of the Wortham accident.

Respondent did not contest this allegation of violation.

Accordingly, based upon a review of the evidence, I find that Respondent violated 49 C.F.R. § 199.105(b) by failing to conduct post-accident drug testing for each surviving covered employee whose performance of a covered function either contributed to the accident or cannot be completely discounted as a contributing factor to the accident.

Item 9: The Notice alleged that Respondent violated 49 C.F.R. § 199.225, which states in relevant part:

> **§ 199.225 Alcohol tests required.**
> Each operator must 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 must 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 must be based on specific information that the covered employee's performance had no role in the cause(s) or severity of the accident.

The Notice alleged that Respondent violated 49 C.F.R. § 199.225(a)(1) by failing to conduct post-accident alcohol testing for 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. Specifically, the Notice alleged that Sunoco did not perform any post-accident alcohol testing following the Wortham accident or justify the decision not to conduct testing.

Respondent did not contest this allegation of violation.

Accordingly, based upon a review of all of the evidence, I find that Respondent violated 49 C.F.R. § 199.225(a)(1) by failing to conduct post-accident alcohol testing for 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.

Item 10: The Notice alleged that Respondent violated 49 C.F.R. § 195.402, which states in relevant part:

> **§ 195.402 Procedural manual for operations, maintenance and emergencies**
>
> (a) *General*. Each operator shall prepare and follow for each pipeline system a manual of written procedures for conducting normal operations and maintenance activities and handling abnormal operations and emergencies. This manual shall be reviewed at intervals not exceeding 15 months, but at least once each calendar year, and appropriate changes made as necessary to insure that the manual is effective. This manual shall be prepared before initial operations of a pipeline system commence, and appropriate parts shall be kept at locations where operations and maintenance activities are conducted.
>
> (c) *Maintenance and normal operations*. The manual required by paragraph (a) of this section must include procedures for the following to provide safety during maintenance and normal operations:
>
> (1) ….
>
> (3) Operating, maintaining, and repairing the pipeline system in accordance with each of the requirements of this subpart and subpart H of this part.

The Notice alleged that Respondent violated 49 C.F.R. § 195.402(c)(3) by failing to include procedures for operating, maintaining, and repairing the pipeline system in accordance with each of the requirements of Subpart F (Operation and Maintenance) and Subpart H (Corrosion

Control). Specifically, the Notice alleged that Sunoco did not have a procedure for the installation and operation of bentonite mud plugs that were installed on this Project.

At the hearing, Sunoco presented a recommended practice (RP)[12] that it contended met the regulatory requirement for two reasons. First, Sunoco asserted that the RP was compulsory, as it was included in its contract with the subcontractor performing the work and the contractor treated the RP as a procedure. In addition, the Respondent pointed to deposition testimony in which the subcontractor discussed the RP and verified that it was followed.

OPS declined to treat the RP as a procedure and maintains that Item 10 should be upheld as a violation. During the hearing, I questioned Respondent's counsel about whether and how an RP constitutes a procedure. I am not convinced that, simply because the RP was presented to the contractor as compulsory for this project, Respondent achieved regulatory compliance. Sunoco must have a procedure (not an RP) that is prepared and followed for its pipeline system. Even if I accept that the RP was compulsory for this project, that does not meet the regulatory requirement, which requires that there be a procedure for Sunoco's pipeline system as a whole.

In its Post-Hearing brief, Sunoco also argues that it was not required to have a procedure for the installation of mud plugs. I disagree. At the hearing, both parties agreed that operators must have a procedure to isolate hot zones from potential vapors and that mud plugs are one way to achieve such isolation. During the hearing, the Regional Director stated: "[E]very operator, I would think – feel free to contradict me – would have a way of isolating work areas from the product. That's a common thing. Mr. Dresh (Sunoco, Director of Integrity Projects): I agree a hundred percent with that statement…"[13] It is not necessary for every operator to have a procedure for the installation of mud plugs. However, once Sunoco determined that it would use mud plugs as an isolation device, it was required to have a procedure. Since I find that the RP was not a procedure for the purposes of determining compliance with § 195.402(c)(3), I find that Respondent did not achieve regulatory compliance.

Accordingly, based upon a review of all of the evidence, I find that Respondent violated 49 C.F.R. § 195.402(c)(3) by failing to include procedures for operating, maintaining, and repairing the pipeline system in accordance with each of the requirements of Subpart F (Operation and Maintenance) and Subpart H (Corrosion Control).

Item 11: The Notice alleged that Respondent violated 49 C.F.R. § 195.402, which states in relevant part:

> **§ 195.402 Procedural manual for operations, maintenance and emergencies**
>
> (a) *General.* Each operator shall prepare and follow for each pipeline system a manual of written procedures for conducting normal operations and maintenance activities and handling abnormal operations and emergencies. This manual shall be reviewed at intervals not exceeding 15

[12] Fire Clay mudpack RP dated 5/30/08.

[13] Transcript, at 133.

> months, but at least once each calendar year, and appropriate changes made as necessary to insure that the manual is effective. This manual shall be prepared before initial operations of a pipeline system commence, and appropriate parts shall be kept at locations where operations and maintenance activities are conducted.
>
> (c) *Maintenance and normal operations.* The manual required by paragraph (a) of this section must include procedures for the following to provide safety during maintenance and normal operations:
>
> (1) ….
>
> (3) Operating, maintaining, and repairing the pipeline system in accordance with each of the requirements of this subpart and subpart H of this part.

The Notice alleged that Respondent violated 49 C.F.R. § 195.402(c)(3) by failing to follow procedures for operating, maintaining, and repairing the pipeline system in accordance with each of the requirements of Subpart F (Operation and Maintenance) and Subpart H (Corrosion Control). Specifically, the Notice alleged that Sunoco failed to follow seven items in its Hot Work Procedure HS-P-009 during the work performed at Wortham from 2012-2013 (Items 11(a)-(g)). These items alleged that the Respondent:

(a) Did not ensure that Hot Work permits were issued for all time frames and applicable activities related to cutting, removing and replacing a 50-foot section of pipe between February 18 and February 20, 2013, at the SPLP operated Wortham facility as required by Section 3.0;
(b) Delegated the responsibility to issue Hot Work permits to the Contract Inspector who was not trained or qualified in evaluating the hazards, air monitoring, fire prevention, and monitoring, or issuing Hot Work Permits in accordance with the SPLP Hot Work procedure;
(c) Failed to coordinate corrective measures with Health, Environment, and Safety (HES) personnel to address the deficiencies in the Work Permit system;
(d) Did not provide a copy of the HS-P-009 procedure to its contractor or contractor personnel or ensure they were familiar with or trained on the requirements of the procedure to enable them to adhere to the SPLP Hot Work Permit Procedures;
(e) Failed to ensure that continuous atmospheric monitoring, or monitoring frequently enough to detect hazardous vapors was occurring in the area where the Hot Work was being performed on the removal and replacement of the 50-foot section of pipe between February 18 and February 20, 2013, at the SPLP operated Wortham facility;
(f) Failed to ensure that a trained fire watch was assigned during all times that Hot Work was being performed on the removal and replacement of the 50-foot section of pipe between February 18 and February 20, 2013, at the SPLP operated Wortham facility; and
(g) Failed to perform an adequate evaluation of the Hot Work/Work Permit procedures or observation of active tasks to identify that failures of its processes were occurring.

The Respondent presented evidence that contradicted the specific allegations set forth in the Notice, or 11(b) - (g). The majority of Respondent's supporting evidence is deposition testimony from the Talbot litigation between Sunoco and an injured third-party contractor. This litigation

produced deposition testimony[14] that the Respondent is using here for the purposes of rebutting this (and other) allegations. I will note here that this accident occurred in 2013, the Talbot litigation was initiated in March 2014, and OPS began its investigation in March 2015. The Violation Report states that OPS interviewed Mr. Thomas Bushong (former Sunoco employee and initial on-site Incident Commander) and Mr. Danny Tant (Sprint welder involved in the accident). Both stated that there was no fire watch at the site or continuous monitoring for vapors at the time of the accident.[15] The Respondent states that the deposition testimony is sufficient to rebut these allegations. However, I am affording higher evidentiary value to the specific statements of the individuals who were present at the time of the accident and were interviewed by OPS. There was no reason for Mr. Bushong or Mr. Tant to dissemble during OPS' investigation – and I find this testimony more credible than the deposition testimony relied upon by the Respondent, which was given during civil litigation where the Respondent was defending itself against claims of negligence.

There was no specific rebuttal of the allegation included in 11(a), that Hot Work permits were not issued *for all time frames and for all* applicable activities. Therefore, I find that Respondent violated 11(a). As for 11(b), that the Respondent delegated the responsibility to issue Hot Work permits to Mr. Tolbert, who was not trained or qualified, I found in Item 1 that Mr. Tolbert was not properly qualified. Therefore, the Respondent did delegate this responsibility to an unqualified person. 11(c) alleged that the Respondent failed to coordinate corrective measures with HES. In its Post-Hearing Brief, Respondent alludes to the fact that "if there were deficiencies to address it would have been evaluated and addressed as part of that process (the 566 inspections Sunoco conducted in year 2012). This is insufficient to rebut the specific allegation found in 11(c) regarding the coordination with HES. 11(d) alleges that Sunoco did not provide a copy of the HS-P-009 procedure to its contractor or contractor personnel or ensure they were familiar with or trained on the requirements of the procedure to enable them to adhere to the SPLP Hot Work Permit Procedures. The Respondent rebuts this allegation by referring to deposition testimony that states that all procedures were provided to the contractors pursuant to their onboarding. As I have discussed above, I find that the testimony and evidence in the Violation Report is more persuasive since it was obtained from the contractor personnel directly involved in this accident. I also find that the Respondent failed to ensure that continuous atmospheric monitoring, or monitoring frequently enough to detect hazardous vapors was occurring in the area where the Hot Work was being performed on the removal and replacement of the 50-foot section of pipe between February 18 and February 20, 2013, at the SPLP operated Wortham facility (11(e)). I find that the Respondent failed to ensure that trained fire watch was assigned during all times that Hot Work was being performed on the removal and replacement of the 50-foot section of pipe between February 18 and February 20, 2013, at the SPLP operated Wortham facility (11(f)). Lastly, notwithstanding the Respondent's submittal, I find that there is no direct evidence that it performed an adequate evaluation of the Hot Work and Work Permit

[14] Mr. Gust (Mustang corporate representative) stated that "Mustang affirmatively marketed to Sunoco . . . that Mustang is familiar with all applicable federal, state, and local permit requirements, project specifications and applicable codes." Transcript, at 44. Mr. Waymond Casey (Superintendent, Sprint Pipeline) stated that "Sprint went through and physically inspected the locations of the events. We know that there was monitoring going on and that they had, at least preliminarily, tests for any vapors that were passing around the mud plug." Transcript, at 85.

[15] Violation Report, at 80.

procedures or observed active tasks to identify that failures of its processes were occurring. The Violation Report includes persuasive testimony from both employees and contractors that were present at the time of the accident that the foregoing procedures actions were not taken.

The Respondent also argued that, because of the overlap between the requirements of the work permit and the hot work permit, that Items 11 and 12 should constitute one violation.[16] After reviewing both permits, I acknowledge that the work permit and the hot work permit are one document, albeit with different requirements. Nonetheless, as pointed out by OPS in its written evaluation, "they are two distinct procedures with a variety of procedural differences between them."[17] Below, I address this argument in greater detail.

Accordingly, based upon a review of all of the evidence, I find that Respondent violated 49 C.F.R. § 195.402(c)(3) by failing to follow its Hot Work Procedure.

Item 12: The Notice alleged that Respondent violated 49 C.F.R. § 195.402, which states in relevant part:

> **§ 195.402 Procedural manual for operations, maintenance and emergencies**
>
> (a) *General*. Each operator shall prepare and follow for each pipeline system a manual of written procedures for conducting normal operations and maintenance activities and handling abnormal operations and emergencies. This manual shall be reviewed at intervals not exceeding 15 months, but at least once each calendar year, and appropriate changes made as necessary to insure that the manual is effective. This manual shall be prepared before initial operations of a pipeline system commence, and appropriate parts shall be kept at locations where operations and maintenance activities are conducted.
>
> (c) *Maintenance and normal operations.* The manual required by paragraph (a) of this section must include procedures for the following to provide safety during maintenance and normal operations:
>
> (1) ….
>
> (3) Operating, maintaining, and repairing the pipeline system in accordance with each of the requirements of this subpart and subpart H of this part.

The Notice alleged that Respondent violated 49 C.F.R. § 195.402(c)(3) by failing to follow procedures for operating, maintaining, and repairing the pipeline system in accordance with each of the requirements of Subpart F (Operation and Maintenance) and Subpart H (Corrosion Control). Specifically, the Notice alleged that Sunoco failed to follow nine separate items (12 (a) – (i)) in its work permit issuance procedure, *HS-G-012*. These items alleged that the

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[16] "To the extent that the allegations for Alleged Violation 11 are the same as Alleged Violation …and are not withdrawn as requested due to PHMSA's failure to meet its burden of proof, then, consistent with *Blockburger* and *Colorado Interstate Gas Company*, they should be withdrawn from Alleged Violation 11 because they allege facts duplicative of those already found in Alleged Violations 1, 2, or 12." Operator Post Hearing Brief, at 22.

[17] Regional Recommendation, at 9.

Respondent:

(a) Did not ensure Work Permits were issued for all time frames and applicable activities related to cutting, removing and replacing a 50-foot section of pipe between February 18 and February 20, 2013, at the SPLP operated Wortham facility as required by Section 3.0 General Requirements;
(b) Failed to designate a Qualified Person to issue and monitor the Work Permit as required by Section 5.0 Procedure/Process;
(c) Failed to coordinate corrective measures with HES to address the deficiencies in the Work Permit system identified after the 2010 accident;
(d) Did not provide a copy of the HS-G-012 procedure to its contractor or contractor personnel or ensure they were familiar with or trained on the requirements of the procedure to enable them to adhere to the SPLP Hot Work Permit Procedures;
(e) Did not ensure that the Work Permits described and authorized the specific work planned by employees or contractors. The description of the work, "Shut Down Work Continue-Cold Cut, Welding, Bolting Up" was so general in nature it did not allow a proper hazard evaluation or identify all of the tasks to be performed for the timeframe in which the accident occurred;
(f) Failed to ensure that the Work Permit addressed the LOTO Program HS-P-005, and did not provide a copy of the procedure to the personnel performing the work at the time of the accident;
(g) Failed to ensure that the Work Permit, as issued, correctly identified the hazards. The Work Permit 418311 issued on February 19, 2013, clearly indicated that the Equipment Status was "Drained, Depressured, Safe to Open, Contains Oil, LO/TO" by the checked boxes. There was no indication of the actual condition of the piping;
(h) Failed to perform an adequate evaluation of the Work Permit procedures of observation of active tasks to identify that these failure of its processes were occurring; and
(i) Failed to maintain the Work Permit records in accordance with its procedure.

Sunoco contested 12 (a), (b), (c), (d), (h) and (i), largely through deposition testimony from the Talbot litigation. It is difficult to ascertain OPS' position on the specific factual evidence presented at the hearing because it is not explicitly addressed in the Region Recommendation. In addition, the specific factual allegations involved in this Item are repeated in Item 11, casting significant doubt on whether there are two offenses or only one.[18] The Respondent has proffered enough evidence in support of its contention that the same acts and omissions are involved. Therefore, I find that Items 11 and 12 have the same evidentiary bases. Accordingly, both Items should constitute one violation.

Accordingly, based upon a review of all of the evidence, I withdraw this allegation of violation.

Item 13: The Notice alleged that Respondent violated 49 C.F.R. § 195.402, which states in relevant part:

§ 195.402 Procedural manual for operations, maintenance and

[18] See, *In the matter of Colorado Interstate Gas Co.*, 2009 WL 5538649, CPF No. 5-2008-1005 (Nov. 23, 2009).

emergencies

(a) *General.* Each operator shall prepare and follow for each pipeline system a manual of written procedures for conducting normal operations and maintenance activities and handling abnormal operations and emergencies. This manual shall be reviewed at intervals not exceeding 15 months, but at least once each calendar year, and appropriate changes made as necessary to insure that the manual is effective. This manual shall be prepared before initial operations of a pipeline system commence, and appropriate parts shall be kept at locations where operations and maintenance activities are conducted.

(c) *Maintenance and normal operations.* The manual required by paragraph (a) of this section must include procedures for the following to provide safety during maintenance and normal operations:

(1) ….

(3) Operating, maintaining, and repairing the pipeline system in accordance with each of the requirements of this subpart and subpart H of this part.

The Notice alleged that Respondent violated 49 C.F.R. § 195.402(c)(3) by failing to follow its procedure for operating, maintaining, and repairing the pipeline system in accordance with each of the requirements of this Subpart and Subpart H of this part. Specifically, the Notice alleged that Sunoco failed to follow twelve provisions in its procedure, *Lockout/Tagout Program HS-P-005.* These items alleged that the Respondent:

(a) Failed to perform an annual audit or compliance verification after an accident that involved a failure of the LOTO Program at the Wortham facility;
(b) Failed to identify and control the energy source that resulted in serious injury to a welder during the project activities;
(c) Failed to provide a copy of the HS-P-005 procedure to its contractor or contractor personnel or ensure they were familiar with or trained on the requirements of the procedure to enable them to adhere to the LOTO Program procedures;
(d) Failed to identify the specific steps for shutting down, isolating, blocking, and securing the system(s) or the specific requirements for testing the system(s) to assure that all energy sources had been completely controlled;
(e) Failed to establish a clear understanding of the LOTO boundaries of the facility, leading to confusion on how to ensure flow was maintained during the facility shutdown;
(f) Failed to ensure that the ECP matched the Work Plan, as detailed in the Stand Alone WP;
(g) Failed to enter the LOTO Form Number on the Work Permit in the blank space next to the LO/TO checkbox as required by the LOTO Procedure, for the Work Permit issued for 2-19-2013;
(h) Failed to maintain the LOTO records in accordance with its procedure;
(i) Failed to demonstrate verification of LOTO was performed over multiple shifts between February 17, 2013, and February 22, 2013, by failing to document the transfer of ownership, or complete the Verification of Equipment Isolation on the ECP;
(j) Failed to ensure that the contractors understood and complied with the restrictions of the company's ECP, as required by the LOTO procedure. The SPLP supervisor of the department overseeing the work (Engineering – Capital Projects) was tasked with this duty;

(k) Failed to insert a blank or blind in the line if working on a pressurized system where valve leaks may re-pressurize the line. SPLP allowed the use of mud plugs for which it did not have a formal procedure; and
(l) Failed to inform all "affected employees, and all other employees working in or entering the work area, that LOTO is to be performed."

At the hearing, Sunoco presented testimony in support of its compliance with Items 13(b), (d) – (j), and (l). It also introduced a diagram to show that the failure to lock out or tag out valves did not cause this accident. In addition, the Respondent argued that 13(a), (c), and (k) were duplicative of other allegations of violation.

After reviewing the evidence, I am withdrawing 13(a) – (l) because the Recommendation does not address the Respondent's arguments. I find that there is insufficient evidence to support the allegations contained in this Item.

Item 14: The Notice alleged that Respondent violated 49 C.F.R. § 195.505, which in relevant part:

> **§ 195.505 Qualification program.**
> Each operator shall have and follow a written qualification program.

The Notice alleged that Respondent violated 49 C.F.R. § 195.505 by failing to have and follow a written qualification program. Specifically, the Notice alleged that Sunoco failed to follow eight separate provisions of its written Operator Qualification plan. Those provisions are failure to ensure that:

(a) Its' contractors were aware of what tasks were covered tasks and that covered tasks may only be performed by persons qualified under the program;
(b) Its' construction project manager was aware of the requirements for covered tasks on the Wortham Project;
(c) A copy of the HS-P-005 procedure was provided to its contractor or contractor personnel to ensure that they were familiar with or trained on the requirements of the procedure to enable them to adhere to the Operator Qualification Program procedures;
(d) Records were kept for employees performing covered tasks on the Wortham project, specifically the welder injured and the contractor inspector;
(e) Records were entered into ISNetworld by its contractors having employees performing covered tasks on the Wortham project, specifically for the welder that was injured and the contractor inspector;
(f) Qualifications of personnel involved in the accident were suspended, even though this was identified as an action in the Serious Incident Investigation to be completed;
(g) Section 16.0 of its OQ Program to evaluate individuals performing covered tasks and maintain compliance records was followed; and
(h) Section 17.0 of its OQ Program was followed by failing to review and modify the OQ Program, as necessary after the 2009 accident, and again after the 2013 accident to ensure compliance with the Program.

At the hearing, Sunoco stated that it objected to the fact that this violation relied on the "exact

same facts … that should be considered duplicative. … [and that] 14 is essentially a summary of the previous items."[19] Each of the preceding eight failures constitute separate violations of the *operator qualification* regulations. However, I do agree that 14(c) is duplicative and therefore withdraw it. In its Post Hearing Brief, the Respondent did not refute the factual allegations contained in this Item but reiterated its argument that these allegations are duplicative of previous Items. However, I have withdrawn Items 6, 12, and 13, which moots the Respondent's arguments regarding duplication. Therefore, I find that, with the exception of 14(c), I find that Respondent failed to follow the remaining seven provisions, all required by its written Operator Qualification plan.

Accordingly, based upon a review of all of the evidence, I find that Respondent violated 49 C.F.R. § 195.505 by failing to have and follow a written qualification program.

Item 15: The Notice alleged that Respondent violated 49 C.F.R. § 195.505, which in relevant part:

> **§ 195.505 Qualification program.**
>
> Each operator shall have and follow a written qualification program. The program shall include provisions to:
>
> (a) Identify covered tasks;

The Notice alleged that Respondent violated 49 C.F.R. § 195.505(a) by failing to have and follow a written qualification program, including a provision to identify covered tasks. Specifically, the Notice alleged that Sunoco failed to include the installation and operation of bentonite mud plugs as a covered task in its written OQ plan.

At the hearing, Sunoco objected to this item as duplicative of Item 6 (failure to ensure through evaluation that individuals performing covered tasks are qualified; § 195.505(b)), Item 7 (failure to evaluate an individual if an operator has reason to believe that an individual's performance of a covered task contributed to an accident; § 195.505(d)), and Item 14 (failure to have and follow its written Operator Qualification Program; § 195.505). There is no validity to this argument. Item 6[20] alleged that Sunoco failed to qualify individuals performing covered tasks; Item 7 alleged that Sunoco failed, after the accident, to evaluate an individual performing covered tasks; and Item 14 alleged eight separate violations of Sunoco's written qualification program. This Item alleges that Sunoco failed, pursuant to § 195.505(a), to identify the isolation of vapors using mud plugs as a covered task, in its written Operator Qualification Plan, during 2012-2013. As I discussed in Item 10, Sunoco was required to include a procedure for the installation of mud plugs once it determined that it would use mud plugs as an isolation device.

Accordingly, based upon a review of all of the evidence, I find that Respondent violated 49 C.F.R. § 195.505(a) by failing to have and follow a written qualification program, including a provision to identify covered tasks.

These findings of violation will be considered prior offenses in any subsequent enforcement

[19] Transcript, at 171 (2-10).

[20] Item 6 has been withdrawn.

action taken against Respondent.

ASSESSMENT OF PENALTY

Under 49 U.S.C. § 60122, Respondent is subject to an administrative civil penalty not to exceed $200,000 per violation for each day of the violation, up to a maximum of $2,000,000 for any related series of violations.[21] 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, 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; 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 $1,539,800 for the violations cited above.

Item 1: The Notice proposed a civil penalty of $43,200 for Respondent's violation of 49 C.F.R. § 195.204, for failing to ensure that any operator personnel used to perform an inspection be trained and qualified in the phase of construction to be inspected. In its Post-Hearing Brief[22], Sunoco argued that the civil penalty should be withdrawn or, in the alternative, reduced. In support of its argument for a reduction, the Respondent contended that the nature and gravity designations should be changed to reflect that this was solely a recordkeeping issue. Also, the culpability section should be changed to reflect that significant steps were taken to achieve compliance. I do not agree with either argument. First, this was not simply a recordkeeping issue. Sunoco remains unsure of what process Mustang or Sprint used to qualify Mr. Tolbert. At the hearing, it hypothesized what might have happened, but was unable to produce any solid evidence that this inspector was qualified according to established procedures. Second, I do not see that significant steps were taken towards compliance. While Sunoco located Mr. Tolbert's resume, that is not evidence that it took significant steps to achieve compliance prior to Mr. Tolbert's participation in the inspection process. Accordingly, having reviewed the record and considered the assessment criteria, I assess Respondent a civil penalty of $43,200 for violation of 49 C.F.R. § 195.204.

Item 2: The Notice proposed a civil penalty of $43,200 for Respondent's violation of 49 C.F.R. § 195.402(c)(13), for failing to follow its own procedures for periodically reviewing its work and determining the effectiveness of the procedures used in normal operation and maintenance, and taking corrective action where deficiencies are found. Sunoco argued that the civil penalty should be withdrawn or, in the alternative, reduced. In support of its argument for a reduction, Sunoco argued that the culpability designation should be reduced due to the operator's significant steps toward compliance. I have reviewed the records[23] and do not feel that these

[21] These amounts are adjusted annually for inflation. *See* 49 C.F.R. § 190.223; Revisions to Civil Penalty Amounts, 83 Fed. Reg. 60732, 60744 (Nov. 27, 2018).

[22] Post-Hearing Brief, at 24.

[23] Exhibit 1 includes assorted Work Permits. Exhibit 2 includes copies of an Inspection Checklists for LOTO.

records indicate that significant steps were taken. Accordingly, having reviewed the record and considered the assessment criteria, I assess Respondent a civil penalty of $43,200 for violation of 49 C.F.R. § 195.402(c)(13).

Item 3: The Notice proposed a civil penalty of $72,000 for Respondent's violation of 49 C.F.R. § 195.402(e)(9), for failing to follow its own procedures to provide a post-accident review of employee activities to determine whether its procedures were effective and taking corrective action where deficiencies were found. Sunoco argued that the civil penalty should be withdrawn or, in the alternative reduced. In its Post-Hearing Brief, Sunoco states that this alleged violation is duplicative of Item 4. However, as I discuss above, Item 3 solely addresses Respondent's failure to complete a "Lessons Learned" Document, in violation of its own procedure. Accordingly, having reviewed the record and considered the assessment criteria, I assess Respondent a civil penalty of $72,000 for violation of 49 C.F.R. § 195.402(e)(9).

Item 4: The Notice proposed a civil penalty of $200,000 for Respondent's violation of 49 C.F.R. § 195.402(c)(5), for failing to follow its own procedures for analyzing pipeline accidents to determine their causes. Sunoco argued that the civil penalty should be withdrawn or, in the alternative reduced. In support of its argument for a reduction, Sunoco states that the culpability assignment on the civil penalty worksheet should be changed from "failed to take appropriate action to comply with a requirement that was clearly applicable" to "took significant steps to comply with a requirement but did not achieve compliance."[24] Given that Sunoco failed to comply with its own procedure in multiple respects, I fail to see how "significant steps" were taken towards compliance. It is therefore appropriate that the culpability assignment remain unchanged. Accordingly, having reviewed the record and considered the assessment criteria, I assess Respondent a civil penalty of $200,000 for violation of 49 C.F.R. § 195.402(c)(5).

Item 5: The Notice proposed a civil penalty of $368,600 for Respondent's violation of 49 C.F.R. § 195.402(c)(6), for failing to prepare and follow its own procedure for minimizing the potential for hazards identified under paragraph (c)(4) and the possibility of recurrence of accidents analyzed under paragraph (c)(5). Sunoco argued that both the Item and associated civil penalty should be withdrawn. In the alternative, Respondent contended that the gravity value for "Number of Instances of Violation" should be changed from "3" to "1" because there was only one instance of review rather than the three reflected in the Violation Report and Civil Penalty Worksheet. The Regional Director's written evaluation did not address this argument. In addition, Respondent argues that this violation was not a casual factor in the accident, but rather "minimally affected" pipeline safety. First, I cannot find evidence in the record supporting three instances of violation. Therefore, I will reduce this number to one. As for the argument that violation of Item 5 minimally affected pipeline safety, I find that there is sufficient evidence to support the finding that Sunoco's failure to follow its own procedure was casual to this accident. Sunoco argues that the Wortham accident was unforeseeable and solely attributable to human error. However, had Sunoco followed its procedure by completing its Lessons Learned document, it could have identified and corrected the consistent failure to follow procedures that led to both the 2009 and 2013 accidents. While these accidents are different in many respects, the common thread is Sunoco's failure to adequately complete the requisite analyses and lessons

[24] OPS Civil Penalty Worksheet, at 1.

learned. Accordingly, having reviewed the record and considered the assessment criteria, I assess Respondent a reduced civil penalty of $345,600 for violation of 49 C.F.R. § 195.402(c)(6).

Item 6: The Notice proposed a civil penalty of $257,000 for Respondent's violation of 49 C.F.R. § 195.505(b), for failing to have and follow a written qualification program with provisions to ensure through evaluation that individuals performing covered tasks are qualified. As stated above, despite the contradiction in the OQ records and Sunoco's own procedures, the welders were within the 3 month grace period identified in the Respondent's procedure. Therefore, there was no violation of 49 C.F.R. § 195.505(b). Based upon the foregoing, I withdraw the proposed penalty for violation of 49 C.F.R. § 195.505(b).

Item 7: The Notice proposed a civil penalty of $43,900 for Respondent's violation of 49 C.F.R. § 195.505(d) by failing to have and follow a written qualification program with provisions to evaluate an individual if the operator has reason to believe that the individual's performance of a covered task contributed to an accident, as defined in Part 195. In its Post-Hearing Brief, Sunoco did not request mitigation of the proposed civil penalty. Accordingly, having reviewed the record and considered the assessment criteria, I assess Respondent a civil penalty of $43,900 for violation of 49 C.F.R. § 195.505(d).

Item 8: The Notice proposed a civil penalty of $37,800 for Respondent's violation of 49 C.F.R. § 199.105(b) for failing to conduct post-accident drug testing for each surviving covered employee whose performance of a covered function either contributed to the accident or cannot be completely discounted as a contributing factor to the accident. Sunoco neither contested the allegation nor presented any evidence or argument justifying elimination of the proposed penalty. Accordingly, having reviewed the record and considered the assessment criteria, I assess Respondent a civil penalty of $37,800 for violation of 49 C.F.R. § 199.105(b).

Item 9: The Notice proposed a civil penalty of $37,800 for Respondent's violation of 49 C.F.R. § 199.225(a)(1), for failing to conduct post-accident alcohol testing for 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. Sunoco neither contested the allegation nor presented any evidence or argument justifying elimination of the proposed penalty. Accordingly, having reviewed the record and considered the assessment criteria, I assess Respondent a civil penalty of $37,800 for violation of 49 C.F.R. § 199.225(a)(1).

Item 10: The Notice proposed a civil penalty of $200,000 for Respondent's violation of 49 C.F.R. § 195.402(c)(3), for failing to include procedures for operating, maintaining, and repairing the pipeline system in accordance with each of the requirements of Subpart F (Operation and Maintenance) and Subpart H (Corrosion Control). As I stated above, Sunoco committed this violation by not having a written procedure for the isolation of vapors. Nonetheless, there was an RP that, if incorporated into the Respondent's procedures, would have been sufficient. After reviewing the deposition testimony, it is clear that this RP was included in the work contract and followed by the subcontractor. OPS did not address the Respondent's penalty argument in the written evaluation. Therefore, I am reducing the gravity assignment to a records only violation. Based upon the foregoing, I assess Respondent a reduced civil penalty of

$76,300 for violation of 49 C.F.R. § 195.402(c)(3).

Item 11: The Notice proposed a civil penalty of $38,100 for Respondent's violation of 49 C.F.R. § 195.402(c)(3), for failing to follow its Hot Work procedure. In its Post-Hearing brief, the Respondent argues that the number of instances found in the gravity section should be reduced to 2 because this Item is duplicative of Item 12. Based on the withdrawal of Item 12, this argument has been rendered moot. Accordingly, having reviewed the record and considered the assessment criteria, I assess Respondent a civil penalty of $38,100 for violation of 49 C.F.R. § 195.402(c)(3).

Item 12: The Notice proposed a civil penalty of $38,800 for Respondent's violation of 49 C.F.R. § 195.402(c)(3), for failing to follow its Work Permit Procedure. As stated above, I am withdrawing this Item. Accordingly, having reviewed the record and considered the assessment criteria, I withdraw the civil penalty of $38,800 for violation of 49 C.F.R. § 195.402(c)(3).

Item 13: The Notice proposed a civil penalty of $77,700 for Respondent's violation of 49 C.F.R. § 195.402(c)(3), for failing to follow procedures for operating, maintaining, and repairing the pipeline system in accordance with each of the requirements of Subpart F (Operation and Maintenance) and Subpart H (Corrosion Control). As stated above, I withdraw this Item. Accordingly, I withdraw the civil penalty of $77,700 for violation of 49 C.F.R. § 195.402(c)(3).

Item 14: The Notice proposed a civil penalty of $38,500 for Respondent's violation of 49 C.F.R. § 195.505, for failing to have and follow a written qualification program, specifically OQ procedures. Sunoco argues that Item 14 is duplicative of previous Items and should be withdrawn. However, I read this allegation as a violation of a failure to follow procedures, and not a duplication of the earlier items that were based on a failure to qualify personnel with the exception of Item 14(c). Accordingly, having reviewed the record and considered the assessment criteria, I assess Respondent a reduced civil penalty of $38,100 for violation of 49 C.F.R. § 195.505.

Item 15: The Notice proposed a civil penalty of $43,200 for Respondent's violation of 49 C.F.R. 195.505(a) for failing to have and follow a written qualification program, including a provision to identify covered tasks. In its Post-Hearing brief, the Respondent argues that it was not required to have a formal practice for installation and operation of vapor barriers. However, as further explicated above in the discussion of this Item, having a procedure for the isolation of vapors is standard for the industry. Furthermore, prior case precedent found this to be a covered task.[25] Accordingly, having reviewed the record and considered the assessment criteria, I assess Respondent a civil penalty of $43,200 for violation of 49 C.F.R. § 195.505(a).

In summary, having reviewed the record and considered the assessment criteria for each of the Items cited above, I assess Respondent a total civil penalty of **$1,019,200**.

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

[25] In re Marathon Pipe Line, LLC, PHMSA CPF No. 4-2010-5013 (Sept. 7, 2012).

instructions are contained in the enclosure. Questions concerning wire transfers should be directed to: Financial Operations Division (AMK-325), Federal Aviation Administration, Mike Monroney Aeronautical Center, 6500 S MacArthur Blvd, Oklahoma City, Oklahoma 79169. The Financial Operations Division telephone number is (405) 954-8845.

Failure to pay the $1,019,200 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.

COMPLIANCE ORDER

I am withdrawing the Compliance Order in its entirety. The Regional Director's Recommendation states that a Consent Agreement is in effect that addresses the compliance items sought in this Order.

Under 49 C.F.R. § 190.243, Respondent may submit a Petition for Reconsideration of this Final Order to the 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, no later than 20 days after receipt of service of the Final Order by Respondent. Any petition submitted must contain a brief statement of the issue(s) and meet all other requirements of 49 C.F.R. § 190.243. The filing of a petition automatically stays the payment of any civil penalty assessed. The other terms of the order, including any corrective action, remain in effect unless the Associate Administrator, upon request, grants a stay. 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.

November 8, 2019

Alan K. Mayberry
Associate Administrator
for Pipeline Safety

Date Issued