

October 28, 2022

By Electronic Mail

Mr. Bryan Lethcoe
Director, Southwest Region, Office of Pipeline Safety
U.S. Department of Transportation, Pipeline and Hazardous Materials Safety Administration

Re: Denbury Onshore, LLC
Notice of Probable Violation and Proposed Civil Penalty, CFP 4-2022-048-NOPV

Dear: Mr. Lethcoe

Denbury Onshore, LLC (“Denbury”) acknowledges receipt of the Pipeline and Hazardous Materials Safety Administration’s (“PHMSA”) Notice of Probable Violation and Proposed Civil Penalty dated September 14, 2022 (the “NOPV”). The NOPV alleges that Denbury has committed a probable violation of 49 C.F.R. § 195.64(c)(1)(ii), which provides that an “operator must notify PHMSA of . . . [c]onstruction of 10 or more miles of a new or replacement hazardous liquid or carbon dioxide pipeline” no “later than 60 days before the event occurs.” Please accept this letter as a written response pursuant to 49 C.F.R. § 190.208(a)(3) in answer to the allegations of a violation.

Response to Notice of Proposed Violation

Denbury notified PHMSA on May 14, 2021 of its construction of the Cedar Creek Anticline project. Denbury reported the anticipated start date of construction as July 13, 2021. The NOPV states that the basis for the alleged violation is that PHMSA “observed pipes being transported by trucks” on July 7, 2021, and that certain “project documents regarding construction activities” were dated before the anticipated start date of July 13, 2021. PHMSA alleges that, based “on the construction activity observed on July 7, 2021, [Denbury’s] notification should have been made no later than May 8, 2021”—i.e., 6 days earlier than it was submitted to PHMSA.

In submitting the original notice of construction of the Cedar Creek Anticline project, Denbury based the anticipated start date on the date when it expected to begin actual excavation activities at the construction site which was officially initiated on July 13, 2021. Due to the ambiguity of 49 C.F.R. 195.64(c)(1) and without waiver of its right to object in the future to any attempt by PHMSA to apply the September 2014 Advisory Bulletin (the “Advisory Bulletin”), Denbury is willing to accept that it failed to provide the 60-day notice before moving construction materials to the construction site on July 7 as referenced in the NOPV. Denbury, however, cannot agree to PHMSA’s interpretation of “construction” as stated in the NOPV.

As support for its contention that the observed activities constitute “construction” for purposes of 49 C.F.R. § 195.64(c)(1)(ii), PHMSA relies exclusively on the Advisory Bulletin, which the NOPV characterizes as having “clarified the types of activities that constitute the start of construction.”¹ In the Advisory Bulletin, PHMSA interpreted the phrase “construction” as used in 49 C.F.R. § 195.64(c)(1)(ii) to refer to “construction-related events,” and then noted that PHMSA was “encourag[ing] operators to provide the required construction-related notification(s) not later than 60 days prior to whichever of the following activities occurs first: Material purchasing and manufacturing; right-of-way acquisition; construction equipment move-in activities; onsite or offsite fabrications; or right-of-way clearing, grading and ditching.”²

Denbury has several concerns about the NOPV’s reliance on the Advisory Bulletin.

First, the NOPV does not acknowledge that the Advisory Bulletin states that the examples of “construction-related activities” it lists “may not necessarily represent the commencement of construction for purposes of triggering the minimum 60-day notice period.”³ In addition, the Advisory Bulletin merely “encourages” notification before the listed “construction-related events,” but does not purport to require such notification. Likewise, the Advisory Bulletin itself disclaims the notion that its guidance is binding (or even that PHMSA will apply that guidance in all circumstances). While several of the cited activities referenced in the Advisory Bulletin are in the category of “construction related events” the Advisory Bulletin groups them with other activities not typically associated with pipeline construction and then leaves it to the reader to decide which activity complies with the PHMSA requirement in 49 C.F.R. Part 195.64(c)(1). Moreover, prior efforts by PHMSA to establish violations by relying on the Advisory Bulletin have been questioned by the Associate Administrator for Pipeline Safety. *In re Shell Pipeline Co., LP* is instructive, as the Associate Administrator noted there that “the Advisory Bulletin is merely guidance.”⁴

Additionally, PHMSA’s regulation states that notice is required 60 days prior to “construction,”⁵ but the Advisory Bulletin suggests that notice is required 60 days prior to what it calls “construction-related events,”⁶ a term not used in the regulation. This is concerning to Denbury because the terms “construction” and “construction-related events” are not analogous. Although “construction” is not

¹ NOPV at 2 & n.1 (citing *Pipeline Safety: Construction Notification*, 79 Fed. Reg. 54,777 (Sept. 12, 2014)).

² Advisory Bulletin, 79 Fed. Reg. at 54,777.

³ *Id.* at 54,778.

⁴ CFP No. 4-2016-5023, 2018 WL 1365573 (PHMSA Jan. 18, 2018).

⁵ 49 C.F.R. § 195.64(c)(1)(ii).

⁶ Advisory Bulletin, 79 Fed. Reg. at 54,778.

defined in PHMSA's regulations, as used in the industry, the term "construction" refers to actively building or assembling something. By contrast, the term "construction-related events" seems substantially broader, and could reasonably be interpreted to include preparatory work that, while not itself "construction," is the type of activity that might naturally be expected to precede construction. If PHMSA wishes to require parties to provide 60-days' notice prior to "construction-related events," it must amend its existing regulations through notice-and-comment rulemaking to impose that requirement.

Denbury respectfully submits that the findings of violation are ambiguous, arbitrary and unlawful to the extent that they seek to apply the Advisory Bulletin to PHMSA's regulation which states that notice is required 60 days prior to "construction."

Response to Proposed Civil Penalty

Denbury is prepared to pay the proposed civil penalty for failing to provide 60-days' notice prior to moving construction materials to the construction site. Denbury opposes any relief whatsoever or any finding of violation for the many items listed in the NOPV that do not involve construction but instead seek to use "construction-related activities" as the trigger for the 60-day notice. Denbury submits that any attempt to enforce the "guidance" in the Advisory Bulletin in this case is barred for the reasons more plainly set forth above.

Thank you for your consideration of this written response. If you have any questions, please do not hesitate to contact me.

Sincerely,



George C. Hopkins