

PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMINISTRATION  
WASHINGTON, DC 20590

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In the Matter of:	§	
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Panhandle Eastern Pipeline Company,	§	CPF No. 4-2023-011-NOPV
	§	
Respondent	§	
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**STATEMENT OF ISSUES  
OF  
PANHANDLE EASTERN PIPELINE COMPANY  
TO  
NOTICE OF PROBABLE VIOLATION  
PROPOSED CIVIL PENALTY  
AND  
PROPOSED COMPLIANCE ORDER**

Panhandle Eastern Pipeline Company (“Respondent”) submits this Statement of Issues pursuant to 49 C.F.R. § 190.211(b) in connection with its request for a hearing pursuant to 49 C.F.R. § 190.208(a)(4).

By letter dated June 15, 2023, the Pipeline and Hazardous Materials Safety Administration (“PHMSA”) issued to Respondent a Notice of Probable Violation, Proposed Civil Penalty and Proposed Compliance Order (collectively, the “NOPV”). By letter dated June 27, 2023, Respondent requested an extension of 30 days to respond to the NOPV. By letter dated June 28, 2023, Director, Southwest Region, Bryan Lethcoe, granted an extension of time to respond until August 14, 2023. Subsequently, given that as of August 8, 2023, Respondent had not received the entire case file, by letter dated August 9, 2023, Respondent requested an extension of time to respond of an additional 14 days. By letter dated August 10, 2023, the Director granted an extension until August 28, 2023. By letter of even date herewith, Respondent has requested a hearing in this matter, and this Statement of Issues is served therewith.

**BACKGROUND**

The subject NOPV relates to an investigation following an incident which occurred on March 26, 2020, at Respondent’s Borchers Station near Meade, Kansas.

In the NOPV, PHMSA alleges three violations of the pipeline safety regulations promulgated at 49 C.F.R. Part 192, proposes to assess civil penalties in connection with the three alleged violations, and proposes to issue a compliance order in connection with two of the alleged violations, all pursuant to the procedural and enforcement regulations promulgated at 49 C.F.R.

Part 190, Subparts A and B. As to the alleged violations, proposed civil penalties and proposed compliance order, Respondent herein states its issues.

## THE ALLEGED VIOLATIONS

Respondent states below its factual, regulatory and/or legal issues that relate to the alleged violations of the NOPV. The numbered paragraphs below correspond with the numbered Items of the NOPV. Each numbered paragraph begins with a citation to the subject regulation and a summary of the agency's allegations.

### 1. **49 C.F.R. § 192.605 Procedural manual for operations, maintenance, and emergencies.**

#### (a) *General.*

PHMSA alleges that Respondent failed to “follow its manual of written procedures for conducting operations and maintenance activities and for emergency response in four areas in accordance with § 192.605(a).” PHMSA specifically alleges that Respondent:

- (1) Failed to follow *Safety Procedure S-230, Hazardous Energy Control (Lockout Tagout) (Effective 08/01/2017)* “which requires the operator [to] de-energize the pipe prior to performance of scheduled activities.”
- (2) Failed to follow *Safety Procedure S-370, Work Permits (Effective 8/1/2017)* “which requires that a ‘General Work Permit’ be obtained for potentially hazardous work.”
- (3) Failed to follow two provisions in *Standard Operating Procedures, Pigging and Pig Trap Operation, Procedure: I.13 (Effective 5/1/2015)*.
  - a. Section 7.2 which states that “personnel cannot ‘stand in front of the launcher or receiver door in the project [sic] path of the line-cleaning tool while opening.’”
  - b. Section 7.5 which states that personnel “must ‘[v]erify the trap is depressured and that SOP B.06 Hazardous Energy Control and Safety Procedure S-230 Lockout Tag out are followed before opening the closure.’”
- (4) Failed to follow *Best Practice Clearing Freezes BP I.17 (Effective 6/1/2013)* “which requires, in Section 7.2 that personnel ‘[n]otify the operations manager of the freeze and discuss the procedures to [sic] handling freezes’” and, requires in Section 7.3, that “personnel must ‘[b]lowdown slowly in [sic] either side of the freeze using the smallest valve available [ and m]aintain a differential of 50 psi or less across the freeze.’”

PHMSA asserts that Respondent’s “failure to follow its written procedures was a causal factor in the incident that occurred on March 26, 2020.” PHMSA finally concludes that Respondent “failed to follow its manual of written procedures for conducting operations and maintenance activities and for emergency response in four areas in accordance with § 192.605(a).”

Respondent disputes and objects to the allegations stated in the NOPV on the following grounds:

- a. PHMSA has failed to meet its burden of proof that a violation occurred.

- b. The alleged violation is not supported by the evidence in the case file.
- c. The alleged violation is not supported by the relevant facts.
- d. The NOPV fails to adequately make factual findings or to explain, discuss, or analyze the conclusion that Respondent is in violation of the subject regulation in the manner alleged; as such, to find a violation upon such grounds would constitute arbitrary and capricious agency action.
- e. The content of the PHMSA case file provided to Respondent fails to comply with 49 U.S.C. 60117(b)(1)(C); as a result, Respondent is precluded from access to all relevant facts in the agency's possession, is denied a right granted by Congress, and thus is denied a full and fair opportunity to respond to the agency's allegations; as such, to find Respondent is in violation of the subject regulation would constitute a violation of the Pipeline Safety Act and a violation of Respondent's right of due process.

**2. 49 C.F.R. § 192.605 Procedural manual for operations, maintenance, and emergencies.**

**(b) Maintenance and normal operations.**

- (8) Periodically reviewing the work done by operator personnel to determine the effectiveness, and adequacy of the procedures used in normal operation and maintenance and modifying the procedures when deficiencies are found.

PHMSA alleges that Respondent “failed to follow its manual of written procedures for conducting operations and maintenance activities and for emergency response in accordance with § 192.605(a).”

PHMSA specifically alleges that Respondent failed to “periodically review the work done by operator personnel to determine the effectiveness, and adequacy of the procedures used in normal operation and maintenance and modify the procedures when deficiencies are found in accordance with” (1) § 192.605(b)(8), (2) *Standard Operating Procedures, Management of Change: A.03 (Effective 8-1-2017)*, Section 4.0 Frequency, and (3) *Standard Operating Procedures, Guiding Principles: A.02 (Effective 5/1/2015)*, Section 4 Frequency, Section 7.1 Rules, and Section 7.2 Developing an SOP. Additionally, PHMSA alleges that Respondent “failed to review the work performed under its *Standard Operating Procedures, Pigging and Pig Trap Operation, Procedure: I.13, 1.0 Procedure Description (Effective 5-1-2015)*.”

PHMSA alleges that, as a result of the above allegations, Respondent “failed to determine the procedures were deficient and failed to modify the procedures to provide guidance to employees for safely addressing ice accumulation during pigging and pig trap operation.”

Further, PHMSA alleges that Respondent's procedures “failed to include instructions for employees encountering ice build-up when launching and receiving pigs” and that Respondent “failed to conduct effectiveness reviews” in accordance with § 192.605(b)(8). PHMSA asserts that “[s]upervisors at the Borchers' [sic] Storage Facility did not have knowledge of any

effectiveness reviews or documentation for clearing freezes” and further asserts that employees who were interviewed by PHMSA “noted that the line would ‘freeze up often’ and that ‘ice is a problem.’”

PHMSA asserts that Respondent’s failure “to follow its written procedures increased the severity of the incident that occurred on March 26, 2020.” PHMSA finally concludes that Respondent “failed to follow its manual of written procedures for conducting operations and maintenance activities and for emergency response in accordance with § 192.605(a).”

Respondent disputes and objects to the allegations stated in the NOPV on the following grounds:

- a. PHMSA has failed to meet its burden of proof that a violation occurred.
- b. The alleged violation is not supported by the evidence in the case file.
- c. PHMSA misinterprets Respondent’s procedures and/or misapplies Respondent’s procedures to the facts in evidence.
- d. The NOPV fails to adequately make factual findings or to explain, discuss, or analyze the conclusion that Respondent is in violation of the subject regulation in the manner alleged; as such, to find a violation upon such grounds would constitute arbitrary and capricious agency action.
- e. PHMSA’s allegations are attended with vagueness and ambiguity such that the allegations cannot support a finding of violation, and, as such, to find a violation would constitute arbitrary and capricious agency action.
- f. PHMSA has failed to establish, or indeed to suggest, a rational connection between the facts found and the conclusions reached, and, as such, to find a violation would constitute arbitrary and capricious agency action.
- g. The content of the PHMSA case file provided to Respondent fails to comply with 49 U.S.C. 60117(b)(1)(C); as a result, Respondent is precluded from access to all relevant facts in the agency’s possession, is denied a right granted by Congress, and thus is denied a full and fair opportunity to respond to the agency’s allegations; as such, to find Respondent is in violation of the subject regulation would constitute a violation of the Pipeline Safety Act and a violation of Respondent’s right of due process.

### **3. 49 C.F.R. § 192.805 Qualification program.**

#### **(a) Identify covered tasks;**

PHMSA alleges that Respondent “failed to have and follow a written Operator Qualification (OQ) Program that identified all covered tasks in accordance with § 192.805(a).” Specifically, PHMSA alleges that Respondent’s *Standard Operating Procedures, Operator Qualification Plan (Effective 5/1/2018)* “failed to include the operation and maintenance task of launching and receiving pigs as a covered task in its plan.”

PHMSA finally concludes that Respondent failed to comply with § 192.805(a).

Respondent disputes and objects to the allegations stated in the NOPV on the following grounds:

- a. PHMSA has failed to plead and prove all elements of the claim.
- b. PHMSA misinterprets and/or misapplies the applicable regulatory standard, and, therefore, its allegations are technically incorrect and unfounded.
- c. PHMSA has failed to meet its burden of proof that a violation occurred.
- d. The alleged violation is not supported by the evidence in the case file.
- e. The NOPV fails to adequately make factual findings or to explain, discuss, or analyze the conclusion that Respondent is in violation of the subject regulation in the manner alleged.
- f. PHMSA has failed to establish, or indeed to suggest, a rational connection between the facts found and the conclusions reached, and, as such, to find a violation would constitute arbitrary and capricious agency action.
- g. The content of the PHMSA case file provided to Respondent fails to comply with 49 U.S.C. 60117(b)(1)(C); as a result, Respondent is precluded from access to all relevant facts in the agency's possession, is denied a right granted by Congress, and thus is denied a full and fair opportunity to respond to the agency's allegations; as such, to find Respondent is in violation of the subject regulation would constitute a violation of the Pipeline Safety Act and a violation of Respondent's right of due process.

### **THE PROPOSED CIVIL PENALTIES**

PHMSA proposes a total of \$2,473,912 in civil penalties in connection with alleged violation Item 1, Item 2, and Item 3, as to each of which Respondent states the following issues:

1. PHMSA has failed to make available to the public, as required by the Administrative Procedure Act, the methods or procedures by which PHMSA determines the amount of proposed civil penalties and the amounts eventually assessed, a denial of Respondent's right of due process, and thus, Respondent is unable to understand the calculation of the civil penalties under the penalty assessment factors and is unable to discern any potential errors in the calculations; as such, the proposed civil penalties should be withdrawn in their entirety.
2. The NOPV and the underlying Pipeline Safety Violation Report fail to establish a sufficient evidentiary basis for, or adequate discussion, explanation or analysis of, the penalty assessment considerations of 49 C.F.R. § 190.225 in support of the proposed civil penalties, and, thus, Respondent has no reasonable opportunity to prepare an adequate defense to contest any of the proposed civil penalties.
3. To the extent that an alleged violation is not supported by substantial evidence, a rational connection between facts found and conclusions drawn, regulation, or law, such proposed civil penalty may not be imposed and must be withdrawn in its entirety.

4. As to the proposed civil penalty for Item 1 and Item 2, Respondent objects to the magnitude of the proposed penalties as: unreasonable; disproportional to any of the penalty assessment considerations of 49 C.F.R. § 190.225; unsupported by sufficient evidence, or any analysis, that applies the penalty assessment considerations; arbitrary, capricious or otherwise not in accordance with law; in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; and an abuse of discretion. On those grounds the proposed civil penalties should be withdrawn in their entirety.

## **THE PROPOSED COMPLIANCE ORDER**

PHMSA proposes to order that Respondent perform the following corrective actions, as to each of which Respondent states the issues below.

1. Regarding alleged violation Item 2 of the NOPV, PHMSA proposed the following actions:
  - (1) Within 60 days of issuance of the Final Order, Respondent must “conduct an effectiveness review of its procedures for Pigging and Pig Trap Operations and Clearing Freezes Best Practice by reviewing employees’ experiences at each of the PEPL facilities and identifying the facilities where employees may encounter ice in the PEPL system.”
  - (2) Respondent must “[i]dentify specific locations on the pipeline at each facility where icing may occur.”
  - (3) Within 240 days of issuance of the Final Order, Respondent must “[c]reate and implement new procedures for each specific location and detailed guidelines for employees encountering ice build-up when launching and receiving pigs” and submit same to the Director, Southwest Region.
  - (4) Within 365 days of issuance of the Final Order, Respondent must “[t]rain all PEPL employees responsible for following the site-specific procedures.”

As to the corrective actions proposed in connection with alleged violation Item 2 of the NOPV, Respondent states the following issues:

- a. To the extent PHMSA is unable to establish a rational connection between any facts found and the conclusions reached to ultimately prove a violation, the proposed compliance order cannot be imposed and, therefore, must be withdrawn.
- b. PHMSA has not provided any analysis or discussion which explains the manner in which the proposed corrective actions would place Respondent in compliance with the subject regulation; as such, to impose such corrective actions would constitute arbitrary and capricious agency action.
- c. PHMSA has neither proffered any evidence, nor made any factual finding, nor provided any explanation, discussion or analysis of the manner in which the alleged violation or the public interest warrant the issuance of the proposed compliance order; see 49 C.F.R. § 190.217. On those grounds, the proposed

compliance order must be withdrawn in its entirety.

2. Regarding alleged violation Item 3 of the NOPV, PHMSA proposed the following actions:

- (1) Respondent must “[a]mend its written operator qualification program to include launching and receiving pigs as a covered task.”
- (2) Respondent must “[i]dentify and qualify all PEPL employees responsible for performing the new covered task.”
- (3) Within 210 days of issuance of the Final Order, Respondent must “submit the amended Operation Qualification Plan and qualification records” to the Director, Southwest Region.

As to the corrective actions proposed in connection with alleged violation Item 3 of the NOPV, Respondent states the following issues:

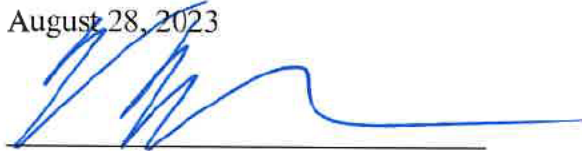
- a. To the extent PHMSA is unable to establish a rational connection between any facts found and the conclusions reached to ultimately prove a violation, the proposed compliance order cannot be imposed and, therefore, must be withdrawn.
- b. PHMSA has not provided any analysis or discussion which explains the manner in which the proposed corrective actions would place Respondent in compliance with the subject regulation; as such, to impose such corrective actions would constitute arbitrary and capricious agency action.
- c. PHMSA has neither proffered any evidence, nor made any factual finding, nor provided any explanation, discussion or analysis of the manner in which the alleged violation or the public interest warrant the issuance of the proposed compliance order; see 49 C.F.R. § 190.217. On those grounds, the proposed compliance order must be withdrawn in its entirety.

## CONCLUSION

At the hearing in this matter, Respondent intends to bring forth evidence in the form of documents and/or witness testimony, as well as to examine the evidence in the PHMSA case file and any PHMSA witnesses. Respondent also will present its arguments in support of the issues stated heretofore. Respondent reserves the right to amend and supplement this Statement of Issues at or before the hearing.

## COUNSEL FOR RESPONDENT PANHANDLE EASTERN PIPELINE COMPANY

August 28, 2023



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