

**U.S. DEPARTMENT OF TRANSPORTATION
PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMINISTRATION
OFFICE OF PIPELINE SAFETY**

	)	
In the Matter of	)	
	)	
Dixie Pipeline Company, LLC,	)	CPF No. 4-2023-049-NOPV
	)	
Respondent.	)	
	)	

**POST-HEARING BRIEF OF DIXIE PIPELINE COMPANY, LLC
MAY 20, 2024**

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I. Introduction

Pursuant to 49 C.F.R. § 190.211(g), Dixie Pipeline Company, LLC (Dixie or the Company) respectfully submits this post-hearing brief regarding the Notice of Probable Violation and Proposed Civil Penalty (Notice) that the Office of Pipeline Safety (OPS) issued on August 14, 2023.¹ A hearing was held on April 18, 2024, at PHMSA’s Southwest Region office in Houston, Texas (Hearing). A transcript of the Hearing was prepared, and Dixie and OPS have jointly filed the Hearing transcript, including errata, for inclusion in the record.²

Pursuant to 49 U.S.C. § 60117(b)(1)(D), Dixie requests that the Pipeline and Hazardous Materials Safety Administration (PHMSA or the Agency) leave the record open beyond June 20, 2024, to allow the Company the opportunity to reply to the Southwest Region’s Post-Hearing Recommendation.

II. Summary

OPS has not met its burden of proof. Section 195.583(a) only requires an operator to inspect onshore pipelines that are “exposed to the atmosphere” at certain prescribed intervals. There is no evidence in the record demonstrating that the three pipeline segments in question were exposed to the atmosphere for longer than the prescribed interval without receiving an inspection. In fact, the only evidence in the record shows that the three segments were buried or submerged in water—and therefore not exposed to the atmosphere—in the years preceding the OPS inspection. OPS cannot meet its burden of proof if the unrebutted evidence disproves an essential element of the alleged violation.

¹ *In the Matter of Dixie Pipeline Co., LLC*, CPF No. 4-2023-049-NOPV, Notice (Aug. 14, 2023). The arguments in this Post-Hearing Brief supplement Dixie’s pre-hearing brief (Pre-Hearing Brief) filed on April 8, 2024. Dixie adopts and advances all arguments set forth in the Pre-Hearing Brief as though set forth fully herein.

² Hearing Transcript and Joint Errata (Apr. 18, 2024) (submitted on May 13, 2024).

Even if there was evidence in the record showing that the three segments were exposed to the atmosphere in the years preceding the inspection, OPS would still not be able to prove that Dixie violated Section 195.583(a). The un rebutted evidence demonstrates that Dixie developed and implemented a program that complied with both the external and atmospheric corrosion control requirements in Subpart H. Dixie’s actions were reasonable and consistent with the plain text of the regulations and OPS’s position in prior enforcement actions. The fair notice doctrine prohibits OPS from saying otherwise and imposing a civil penalty in this case.

Finally, even if OPS had a viable case on the merits—and to be clear it does not—the proposed civil penalty could not be sustained. The un rebutted evidence shows that Dixie acted in good faith, which would warrant a reduction of the proposed civil penalty to no more than \$2,606.80.

III. Discussion

A. OPS has not met its burden of proof.

OPS bears the burden of proof and must present sufficient evidence in an enforcement action to prove that the operator committed the alleged violation.³ To satisfy that burden in this case, OPS must show by a preponderance of the evidence that Section 195.583(a) applied to the three pipeline segments in question, and that Dixie failed to take the actions necessary to achieve compliance. Sweeping assertions about the applicability of Section 195.583(a)⁴ and speculation or conjecture about the underlying facts will not satisfy that evidentiary burden.⁵ OPS must point

³ See Dixie Pre-Hearing Brief at 9-10 (Apr. 8, 2024).

⁴ See OPS Pre-Hearing Brief at 2 (Apr. 8, 2024) (stating that “with no exceptions . . . pipelines exposed to the atmosphere must be inspected for atmospheric corrosion”).

⁵ *U.S. Steel Mining Co. v. Director, Office of Workers’ Comp. Programs*, 187 F.3d 384, 389 (4th Cir. 1999); *Ward v. N.L.R.B.*, 462 F.2d 8, 13 (5th Cir. 1972) (citing *N.L.R.B. v. Mac Smith Garment Co.*, 203 F.2d 868, 871 (5th Cir. 1953)). In *U.S. Steel Mining Co. v. Director, Office of Workers’ Comp. Programs*, the Fourth Circuit explained that “to prove by a preponderance of the evidence each element of a claim before an administrative agency, the claimant must present reliable, probative, and substantial evidence of such sufficient quality and quantity that a reasonable

to “reliable, probative, and substantial” evidence in the record to establish that the alleged violation occurred.⁶ The absence of such evidence is fatal from a burden of proof perspective.

Section 195.583(a) only requires atmospheric corrosion inspections for pipelines that are “exposed to the atmosphere.”⁷ PHMSA’s Corrosion Control Enforcement Guidance defines a pipeline that is “exposed to the atmosphere” as a “pipeline that is not buried or submerged in an electrolyte such as soil or water.”⁸ This guidance is available on PHMSA’s website and has been in existence since at least June 22, 2016, if not earlier.⁹ Dixie has provided that guidance as Attachment 1 in accordance with the Presiding Official’s request at the Hearing.¹⁰ Under the definition referenced in PHMSA’s Corrosion Control Enforcement Guidance, a buried or submerged pipeline cannot be treated as “exposed to the atmosphere” for purposes of the requirements in Section 195.583(a).

The un rebutted testimony that Dixie offered at the Hearing confirm that understanding.¹¹ As Mr. Kyle Costlow explained at length, atmospheric corrosion only occurs if a pipeline is exposed to the atmosphere.¹² Mr. Costlow also explained that under the plain language of the

[administrative law judge] could conclude that the existence of the facts supporting the claim are more probable than their nonexistence.” U.S. Steel Mining Co., 187 F.3d at 389. By way of example, the Fourth Circuit further stated that

[i]f a claimant in an agency proceeding had the burden of establishing that a traffic light was green his way, he would not satisfy his burden of proving that fact with testimony that ‘it is possible that it could’ have been green his way. While it is possible it could have been green, it is also possible that it could have been red or yellow or even non-functioning. Because the testimony is entirely speculative, it does not advance the claimant’s case. More importantly, the statement that it is possible that the light could have been green does not exclude, to any degree, the opposite proposition. Therefore, it cannot establish more likely than not that the light was green.

Id. at 390-91.

⁶ U.S. Steel Mining Co., 187 F.3d at 389.

⁷ 49 C.F.R. § 195.583(a).

⁸ PHMSA Part 195 Corrosion Enforcement Guidance at 87 (June 22, 2016) (emphasis added) (Attachment 1).

⁹

⁹ See [https://www.phmsa.dot.gov/sites/phmsa.dot.gov/files/docs/Corrosion Enforcement Guidance Part195 6 22 2016.pdf](https://www.phmsa.dot.gov/sites/phmsa.dot.gov/files/docs/Corrosion%20Enforcement%20Guidance%20Part195%206%2022%202016.pdf).

¹⁰ Hearing Transcript at 53:15 - 55:8.

¹¹ *Id.* at 21:3-68:9.

¹² *Id.* at 25:19-25, 26:16-20, 27:23-28:2.

regulation and PHMSA’s guidance, a buried or submerged pipeline would not be treated as “exposed to the atmosphere” for purposes of Section 195.583(a).¹³

The evidence that OPS submitted prior to the Hearing demonstrates that all three of the pipeline segments at issue were submerged in water and silt in the years preceding the inspection.¹⁴ The atmospheric inspection records explicitly note that the locations were submerged in water when Dixie evaluated the locations at various points in time.¹⁵ The only evidence that OPS presented concerning atmosphere exposure were photographs of two of the pipeline segments taken on May 17, 2022.¹⁶ These photographs do not contradict the information provided in the atmospheric corrosion control records or establish that either of these segments were exposed to the atmosphere for the previous 3 years or any other length of time. Nor do the photographs provide any information about the status of the third segment, either on May 17, 2022, or at any other earlier point in time. As the Presiding Official correctly acknowledged in discussing the state of the evidence at the Hearing, “there’s nothing in the record to tell me that [the locations] couldn’t have been submerged for that entire seven years” prior to May 17, 2022.¹⁷

Further, Dixie entered multiple images of each location into the record showing them submerged in water and silt during times cited in the Notice.¹⁸ The record is clear that these locations were submerged in water and silt in the years preceding the OPS inspection, and that the

¹³ *Id.* at 50:13-54:3.

¹⁴ OPS Exhibits B-1-B-4.

¹⁵ See OPS Exhibits B-1-B-3. In some instances, Dixie could not determine whether the locations were exposed due to high vegetation. When this occurred, Dixie corrosion techs conducted follow up evaluations until it could be confirmed that the locations were submerged; Hearing Transcript at 32:2-18.

¹⁶ OPS Exhibit B-4 does not include any images of Location 133.0786. Dixie further notes that two of the images dated May 17, 2022, show the pipeline crossing a ditch with the bottom half submerged in water, which corroborates the other evidence in the record showing that the line was submerged prior to that time.

¹⁷ Hearing Transcript at 76:18-77:3.

¹⁸ See Dixie Pre-Hearing Brief, Attachment 5; Hearing Transcript at 36:18-25; See also, Hearing Transcript at 40:1-5.

lines were submerged when Dixie attempted to inspect the locations for atmospheric corrosion.¹⁹ Apart from May 17, 2022, for two of the locations, OPS has not provided any evidence that the locations were exposed to the atmosphere. OPS has clearly failed to meet its burden that the locations were subject to Section 195.583(a) during the period cited in the Notice and the allegation must be withdrawn.

Nor did OPS challenge any of the extensive evidence presented by Dixie at the Hearing. Dixie introduced multiple documents and provided additional witness testimony to show that the locations were submerged and not subject to Section 195.583(a). OPS did not dispute or attempt to rebut any of that evidence.²⁰ PHMSA has withdrawn allegations of violation in the past where OPS failed to rebut the evidence provided in response to an enforcement case. In the *Matter of Rocky Mountain Pipeline System*, for example, PHMSA noted that “OPS did not present any evidence contradicting Respondent’s assertions. Therefore, this allegation of violation is withdrawn and this case is closed.”²¹ In the *Matter of ExxonMobil Pipeline Co.*, PHMSA also acknowledged that OPS had not provided any supporting evidence to establish that the operator did not have adequate cathodic protection.²² The Agency stated that “[c]ontrary to the Regional Recommendation, the Respondent is not required to ‘rule out as being possible that the area influenced by the rectifier did not meet the required criteria of -850mV.’ The burden of proof is on OPS to establish there was not adequate cathodic protection.”²³ As a result, PHMSA withdrew the alleged violation determining that OPS had not met its burden of proof.

¹⁹ See Dixie Pre-Hearing Brief, Attachment 2; Hearing Transcript at 30:8-25; See also, Hearing Transcript at 36:1-16.

²⁰ Hearing Transcript at 72:15-23.

²¹ *In the Matter of Rocky Mountain Pipeline System*, CPF No. 5-2003-5015 at 3 (Dec. 23, 2004).

²² *In the Matter of ExxonMobil Pipeline Co.*, CPF No. 4-2017-5027 (Apr. 3, 2019).

²³ *Id.* at 6-7,

The same result is warranted in this case. OPS bears the burden of establishing that the pipeline segments were exposed to the atmosphere during the time periods cited in the Notice, and that Dixie failed to inspect the segments for atmospheric corrosion at the prescribed intervals. OPS clearly failed to meet that evidentiary burden here. The allegation of violation must be withdrawn.

B. Dixie did not have fair notice.

As discussed in the Pre-Hearing Brief, section 195.583(a) does not provide operators with notice of any standard for performing inspections of pipelines that transition between being submerged or buried and exposed to the atmosphere.²⁴ Section 195.583(a) does not address submerged pipelines at all, instructing only that pipelines exposed to the atmosphere must be inspected for atmospheric corrosion.²⁵ In PHMSA's only two enforcement cases that discussed submerged lines that may become exposed to the atmosphere, PHMSA issued warnings informing the operators that they should include these pipelines in their atmospheric corrosion program.²⁶ This is exactly what Dixie did at the locations identified in the Notice. OPS has not pointed to any other material that instructs operators how to conduct atmospheric corrosion inspections when lines are submerged and are not subject to Section 195.583(a) or how to develop a schedule for atmospheric corrosion inspections on submerged lines that may become exposed. Based on a reasonable reading of Section 195.583(a), Dixie did not have fair notice and could not identify with "ascertainable certainty" the standards OPS expected Dixie to satisfy.²⁷ Therefore, the allegation of violation and proposed civil penalty should be withdrawn.

²⁴ See Dixie Pre-Hearing Brief at 12-14.

²⁵ 49 C.F.R. § 195.583(a).

²⁶ *In the Matter of BP Pipelines (North America) Inc.*, CPF No. 3-2009-5009, NOPV at 6 (July 16, 2009); *In the Matter of Marathon Pipe Line, LLC*, CPF No. 3-2007-5024, NOPV at 3-4 (Sep. 5, 2007).

²⁷ *ExxonMobil Pipeline Co. v. U.S. Dep't of Transp.*, 867 F.3d 564, 578 (5th Cir. 2017) (citing *Diamond Roofing Co, Inc. v. Occupational Health & Safety Review Comm'n*, 528 F.2d 645, 649 (5th Cir. 1976)); See also, *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012); *Upton v. S.E.C.*, 75 F.3d 92, 97-98 (1996); *General Elec. v. U.S. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995); see also, Dixie Pre-Hearing Brief at 12-14.

OPS's suggested interpretation of Section 195.583(a) would lead to absurd results and not provide any additional safety benefits. Dixie assumes it would need to either return to the locations on a daily basis until they are finally exposed and can be inspected, or Dixie would need to expose the locations to inspect for atmospheric corrosion. Either result would be absurd. As Dixie outlined at the Hearing, atmospheric corrosion on exposed pipelines and external corrosion on submerged pipelines are two distinct threats, which are caused by different factors and require operators to adopt different preventative measures.²⁸ Operators protect against atmospheric corrosion primarily through the use of pipeline coating.²⁹ Protection against external corrosion on submerged lines is provided, in part, by cathodic protection.³⁰ Critically, pipelines not exposed to the atmosphere are not susceptible to atmospheric corrosion.³¹ Therefore, OPS's position would require Dixie to inspect locations less at risk to atmospheric corrosion more frequently than lines permanently exposed to the atmosphere, or require Dixie to expose the locations to the very threat that Section 195.583 is attempting to guard against. Neither of these approaches would enhance safety and would instead add burdensome and unnecessary compliance costs that divert resources from other pipeline safety programs.

As highlighted in its Pre-Hearing Brief and at the Hearing,³² Dixie protects against atmospheric and external corrosion at the locations by including them in both its atmospheric and external corrosion control programs. When submerged, the locations receive cathodic protection to protect against external corrosion and Dixie's records demonstrate that the locations receive adequate cathodic protection as required by Subpart H.³³ Concurrently, Dixie's corrosion

²⁸ Hearing Transcript at 26:10-27:17.

²⁹ *Id.* at 26:7-9.

³⁰ *Id.* at 27:11-17.

³¹ *Id.* at 27:19-28:2.

³² See Dixie Pre-Hearing Brief at 6-8; See also, Dixie Pre-Hearing Attachments 3 and 4.

³³ See Dixie Pre-Hearing Attachment 3; Hearing Transcript at 44:11-45:17.

technicians continue to monitor the locations to determine if they are exposed to the atmosphere and should be evaluated for atmospheric corrosion.³⁴ This is a reasonable approach to protect intermittently submerged pipelines from both atmospheric and external corrosion, which aligns with the corrosion control requirements in Subpart H.³⁵

C. OPS's proposed civil penalty is unreasonable.

Though the evidence is clear that Dixie did not violate Section 195.583(a), if PHMSA does find that a violation occurred, the civil penalty proposed in this case is unreasonable. As Dixie presented in its Pre-Hearing Brief and at the Hearing,³⁶ the Company developed a corrosion control program that sought to address PHMSA's requirements related to both atmospheric and external corrosion control for the same pipeline segments. The evidence shows that Dixie went above and beyond in seeking to achieve compliance. Dixie applied the provisions in two separate (and mutually exclusive) corrosion control programs to the segments. A good faith credit is clearly warranted. Accordingly, any civil penalty in this case would need to be reduced by 10 points to \$2,606.80 (assuming, of course, that OPS could meet its burden of proof, and that the fair notice doctrine did not apply).

³⁴ See Dixie Pre-Hearing Attachment 2; Hearing Transcript at 52:18-21.

³⁵ See Dixie Pre-Hearing Brief at 8.

³⁶ See Dixie Pre-Hearing Brief at 15-16; Hearing Transcript at 65:9-66:6.

IV. Conclusion

Based on the foregoing, Dixie respectfully requests that PHMSA withdraw the alleged violation and proposed civil penalty.

Respectfully submitted this 20th day of May 2024.



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