

April 8, 2024

Mr. Lawrence White
Presiding Official
U.S. Department of Transportation
Pipeline and Hazardous Materials Safety Administration
1200 New Jersey Avenue, S.E.
Washington, D.C. 20590

Re: Dixie Pipeline Company, LLC
CPF No. 4-2023-049-NOPV

Dear Mr. White:

Pursuant to your communication dated March 1, 2024, Dixie Pipeline Company, LLC (Dixie) provides its pre-hearing submission in the above-referenced case. By copy of this letter, Dixie is also providing these materials to Southwest Region counsel.

Dixie intends to have the following individuals attend the hearing:

1. Jeffrey C. Morton, Senior Director, Transportation Compliance, Dixie
2. Kyle L. Costlow, Director, Corrosion Prevention, Dixie
3. Zachary Craft, Counsel, Dixie
4. Court Reporter (a specific name will be provided closer to the date of the hearing)

In addition to its pre-hearing brief, Dixie also submits the following materials for inclusion in the record:

1. Curriculum vitae for Jeffrey C. Morton and Kyle L. Costlow (Attachment 1)
2. 2015, 2018, 2021, and 2022 Atmospheric Inspection Reports of Locations 124.7008, 125.0193, and 133.0786 (Attachment 2)
3. 2018-2022 Annual Cathodic Protection Monitoring Data from Dixie MPs 122-135 (Attachment 3)
4. 2016 and 2021 Sulphur to Bayou Des Cannes Hydrostatic Test Records (Attachment 4)
5. Satellite Images of Locations 124.7008, 125.0193, and 133.0786 (Attachment 5)
6. Dixie's Response to PHMSA's Post-Inspection Written Preliminary Findings (Attachment 6)

These materials may be accessed through ShareFile.

Dixie will be represented at the hearing by the undersigned. Dixie reserves the right pursuant to 49 C.F.R. § 190.211(g) to submit further material after the hearing for inclusion in the record and to respond to the region's recommendation pursuant to 40 C.F.R. § 190.209(b)(7).

Sincerely,

A handwritten signature in blue ink, appearing to read 'K. Coyle', with a stylized flourish at the end.

Keith J. Coyle

cc: Bryan Lethcoe (PHMSA)
Ian Curry, Esq. (PHMSA)
Kelsey Gagnon, Esq. (PHMSA)
Zachary Craft, Esq. (Dixie)

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

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

**PRE-HEARING BRIEF OF DIXIE PIPELINE COMPANY, LLC
APRIL 8, 2024**

Table of Contents

I.	Introduction	2
II.	Background	2
A.	Summary of OPS Allegation	2
B.	Summary Response and Request for Relief	2
III.	Procedural History	5
IV.	Discussion and Argument	5
A.	Dixie did not violate § 195.583(a).	6
1.	Dixie's corrosion control program complies with Subpart H.	6
2.	OPS has not met its burden of proof.	9
3.	The fair notice doctrine prohibits a civil penalty.	12
B.	Dixie's actions were reasonable.	14
C.	OPS's proposed civil penalty is unreasonable in any event.	15
V.	Right to Supplement	16
VI.	Conclusion	16

I. Introduction

Pursuant to 49 C.F.R. § 190.211(d), Dixie Pipeline Company, LLC (Dixie or the Respondent) respectfully submits this pre-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 The Notice arose from an OPS inspection that occurred between February 7, 2022, and January 30, 2023, at Dixie’s facilities in Apex, North Carolina, Milner, Georgia, and Mont Belvieu, Texas.²

II. Background

A. Summary of OPS Allegation

OPS has alleged that Dixie violated section 195.583(a) by “fail[ing] to inspect portions of its pipeline system that are exposed to the atmosphere for evidence of atmospheric corrosion at least once every 3 calendar years, but with intervals not exceeding 39 months...” (Item #1).³ OPS has proposed that Dixie pay a \$21,200 civil penalty for committing that alleged violation.⁴

B. Summary Response and Request for Relief

OPS has alleged that Dixie violated section 195.583(a) by failing to perform timely atmospheric corrosion inspections of three onshore pipeline segments.⁵ To meet its burden of proof, OPS must show that section 195.583(a) applies to the three pipeline segments identified in the Notice, and that Dixie failed to perform atmospheric corrosion control inspections at the prescribed intervals. OPS cannot make either showing in this case.

¹ *In the Matter of Dixie Pipeline Co., LLC*, CPF No. 4-2023-049-NOPV, Notice (Aug. 14, 2023).

² *Id.*

³ Notice, at 2.

⁴ *Id.*

⁵ 49 C.F.R. § 195.583.

Section 195.583(a) only applies to a pipeline “that is exposed to the atmosphere.”⁶ The evidence demonstrates that the three pipeline segments identified in the Notice have been intermittently submerged in water or buried in silt at various points since 2015. There is no evidence demonstrating that any of the segments were continuously exposed to the atmosphere during any 3-year-calendar-year period, not to exceed 39 months. OPS cannot prove that Dixie violated section 195.583(a) without presenting such evidence.

Nor does section 195.583(a) speak directly to pipelines that transition between being submerged or buried and exposed. Section 195.583(a) states that an inspection is required if a “pipeline . . . *is exposed to the atmosphere.*” Section 195.581, which is cross-referenced in section 195.583(c), similarly states that an operator must “clean and coat each pipeline or portion of pipeline that *is exposed to the atmosphere.*”⁷ In other words, the requirements in section 195.583 for conducting an atmospheric corrosion control inspection, and the requirements in section 195.581 for protecting against atmospheric corrosion, both make clear that compliance is only required if the pipeline “*is exposed to the atmosphere*”. OPS has never said otherwise and cannot enforce a position that is at odds with the plain language of the regulation.⁸

Moreover, even if there was a genuine ambiguity as to whether section 195.583(a) applies to a pipeline that is *not* exposed to the atmosphere, OPS has only ever said that an operator should consider including pipelines that may be subject to intermittent exposure in its atmospheric corrosion control program. Dixie followed that guidance in developing and implementing a program that complies with the external *and* atmospheric corrosion control requirements in

⁶ *Id.*

⁷ *Id.* at (c).

⁸ See *Newman v. Federal Energy Regulatory Commission*, 27 F.4th 690, 696 (D.C. Cir. 2022); *University of Texas M.D. Anderson Center v. United States Department of Health and Human Services*, 985 F.3d 472, 476 (5th Cir. 2021).

Subpart H. As part of that program, Dixie provides cathodic protection in accordance with sections 195.563-575 to segments that are buried or submerged.⁹ To account for the possibility of exposure, Dixie also includes the segments in its atmospheric corrosion program and attempts to perform inspections at the intervals prescribed in section 195.583(a). Dixie's program accounts for real-world conditions is consistent with basic engineering and corrosion control principles, and balances the competing requirements in Subpart H. Dixie's program is entirely reasonable and achieves compliance with the applicable requirements.

And even if OPS disagrees with Dixie's approach, the prior notice doctrine prohibits a civil penalty in this case. The text of sections 195.583(a) and 195.581(a) both make clear that the inspection requirements only apply to a pipeline "that is exposed to the atmosphere". No one reading these regulations would think otherwise and OPS has never said as much. OPS has only said that operators should consider including pipelines that may be subject to intermittent exposure in their atmospheric corrosion control program. Dixie followed that guidance—and the plain language of the regulation—and cannot be subject to a civil penalty.

OPS cannot meet its burden of proof. The evidence does not show that Dixie failed to perform an atmospheric corrosion control inspection of the three segments identified in the Notice within the interval prescribed in section 195.583(a), that Dixie acted unreasonably in implementing its program for complying with the requirements in Subpart H, or that Dixie can be subject to a civil penalty under the fair notice doctrine. For these reasons, Item # 1 of the Notice and the associated proposed civil penalty must be withdrawn.

⁹ 49 C.F.R. §§ 195.563-195.575.

III. Procedural History

On August 14, 2023, the Southwest Region issued the Notice alleging one violation of 49 C.F.R. § 195.583(a). On September 13, 2023, Dixie filed its Response, Request for Hearing, and Preliminary Statement of Issues. On September 27, 2023, the Pipeline and Hazardous Materials Safety Administration's (PHMSA) Presiding Official scheduled a hearing on this matter. On February 28, 2024, OPS and Dixie jointly requested an extension of the hearing date. On February 29, 2024, the Presiding Official rescheduled the hearing for April 18, 2024.

IV. Discussion and Argument

Section 195.583(a) provides that an operator must “inspect each pipeline or portion of pipeline that is exposed to the atmosphere for evidence of atmospheric corrosion . . . at least once every 3 calendar years, but with intervals not exceeding 39 months.”¹⁰ The Notice alleges that Dixie did not conduct atmospheric corrosion inspections of three onshore pipeline segments (locations 124.7008, 125.0193, and 133.0786) within the interval prescribed in section 195.583(a). Specifically, OPS alleges the following:

- Location 124.7008: Dixie did not conduct an atmospheric corrosion inspection between April 7, 2015, and May 17, 2022.
- Location 125.0193: Dixie did not complete an atmospheric corrosion inspection between June 25, 2018, and May 17, 2022.
- Location 133.0786: Dixie had not completed an atmospheric corrosion inspection between May 6, 2015, and May 17, 2022.¹¹

OPS did not acknowledge in the Notice that the identified locations are often submerged in water and silt, making an atmospheric corrosion inspection both unnecessary and impractical.

¹⁰ 49 C.F.R. § 195.583(a).

¹¹ NOPV, p. 2.

OPS also did not acknowledge that Dixie attempted to inspect each of these pipeline segments on multiple occasions during the specified time periods. The Violation Report only briefly noted that a “second attempt to inspect the exposures [was] unsuccessful as the line was either submerged in water or had high vegetation on the dates attempts were made...”¹²

The record shows that Dixie attempted to inspect Location 124.7008 several times, including on June 25, 2018, July 26, 2021, September 27, 2021, and October 6, 2021. Dixie took the same approach with Location 125.0193, conducting an inspection of a portion of the segment that was exposed on June 25, 2018, and attempting to inspect the segment on July 26, 2021, September 27, 2021, and October 6, 2021. Dixie attempted to inspect Location 133.0786 on June 25, 2018, August 17, 2021, May 11, 2022, October 3, 2022, and October 26, 2022. Dixie provided OPS with information documenting these efforts in responding to the Post-Inspection Written Preliminary Findings.¹³

A. Dixie did not violate § 195.583(a).

1. Dixie’s corrosion control program complies with Subpart H.

OPS did not provide a complete picture of Dixie’s corrosion control practices at the three locations referenced in the Notice. Dixie monitors for both atmospheric corrosion and external corrosion depending on the status of the pipeline segment at each location. Dixie applies its atmospheric corrosion program to these locations when the pipeline is exposed and its external corrosion control program when the pipeline is submerged or buried. Dixie’s treatment of these pipeline segments is consistent with basic principles of corrosion engineering and the requirements

¹² Violation Report, p. 5.

¹³ Enterprise Response to PHMSA Post-Inspection Written Preliminary Findings (Mar. 9, 2023).

in Subpart H. Pipelines that are exposed to the atmosphere are susceptible to atmospheric corrosion. Pipelines that are buried or submerged are not.¹⁴

As a prudent operator, Dixie includes these locations on its 3-year schedule for conducting atmospheric corrosion inspections to facilitate compliance with 195.583(a). Dixie evaluates if the location is buried or submerged or exposed to the atmosphere at the prescribed interval and, if the segment is exposed, conducts an inspection for evidence of atmospheric corrosion. Dixie also documents its findings and actions. For the timeframes cited in the Notice, Dixie's atmospheric corrosion records for the three locations indicated the following:

Inspection Cycle Year	MP. 124.7008	MP. 125.0193	MP. 133.0786	Observations
2015	Exposed	Exposed	Exposed	All locations are inspected when exposed.
2018	Submerged	Exposed	Submerged	All locations are inspected when exposed.
2021	Obstructed	Obstructed	Submerged	All observable locations are not exposed.
2021	Submerged	Submerged		Locations that could not be observed are verified to not be exposed.
2022	Exposed	Exposed	Submerged	All exposed locations are inspected.

15

In addition to implementing a program that addresses the potential for atmospheric exposure and corrosion, Dixie monitors the adequacy of the cathodic protection for each of the

¹⁴ When the pipeline segments are submerged or buried, the water and mud or silt covering the pipe acts as an electrolyte, which allows the segment to receive cathodic protection as required by 49 C.F.R. § 195.563(a).

¹⁵ In 2021, Locations 124.7008 and 125.0193 on two occasions were obstructed by high vegetation, and Dixie's technicians could not determine whether the locations were exposed or not. Dixie technicians returned to these locations in subsequent, short intervals until both locations were confirmed as submerged.

segments as required by the external corrosion control requirements in section 195.573.¹⁶ Dixie's records indicate that cathodic protection at the identified locations complied with the regulations:

Inspection Cycle Year	MP 124.7008		MP 125.0193		MP 133.0786	
	Upstream CP Test point	Downstream CP Test point	Upstream CP Test point	Downstream CP Test point	Upstream CP Test point	Downstream CP Test point
2015	All Location Are Exposed to Atmosphere, Not Subject to Cathodic Protection					
2018	Meets Criteria	Meets Criteria	Exposed to Atmosphere		Meets Criteria	Meets Criteria
2021	Meets Criteria	Meets Criteria	Meets Criteria	Meets Criteria	Meets Criteria	Meets Criteria
2022	Exposed to Atmosphere		Exposed to Atmosphere		Meets Criteria	Meets Criteria

In summary, Dixie applied a comprehensive corrosion control program to the pipeline segments at each location, following the atmospheric corrosion control requirements or external corrosion control requirements in Subpart H depending on whether the segment is submerged or buried or exposed to the atmosphere.

¹⁶ 49 C.F.R. § 195.573(a).

2. OPS has not met its burden of proof.

OPS has the burden of proof, presentation, and persuasion in a pipeline safety enforcement proceeding to demonstrate that a violation occurred.¹⁷ OPS must satisfy that obligation with respect to each element of an alleged violation.¹⁸

To satisfy its burden of production, OPS must present sufficient evidence to sustain an allegation of violation.¹⁹ To meet its burden of persuasion, OPS must demonstrate that “the evidence supporting the allegation outweighs the evidence and reasoning presented by Respondent.”²⁰ A respondent will prevail under this standard where its rebuttal evidence is more persuasive than the evidence provided by OPS.²¹ A respondent will also prevail if OPS fails to

¹⁷ 49 U.S.C. § 60117(1)(F) (“requir[ing] that the agency have the burden of proof, presentation, and persuasion in any enforcement matter”); see *Schaffer v. Weast*, 546 U.S. 49, 56 (2005) (explaining that the burden of proof has “historically . . . encompassed two distinct burdens: the burden of production,’ i.e., which party bears the obligation to come forward with the evidence at different points in the proceeding and the ‘burden of persuasion,’ i.e., which party loses if the evidence is closely balanced”) (citing *Dir., Office of Workers' Comp. Programs, Dep't of Labor v. Greenwich Collieries*, 512 U.S. 267, 272 (1994)); See also, *In re Bridger Pipeline Co.*, Final Order, CPF No. 5-2007-5003, 2009 WL 7796887, at *1 (D.O.T. Apr. 2, 2009); *In re Air Products and Chemicals, Inc.*, Final Order, CPF No. 4-2013-1001, 2015 WL 6758819, at *3 (D.O.T. Aug. 10, 2015) (PHMSA did not meet its burden of proving a violation when it did not produce “any evidence to support its position”); *In re ExxonMobil Pipeline Co.*, Final Order, CPF No. 5-2013-5007, 2015 WL 780721, at *12 (D.O.T. Jan. 23, 2015) (PHMSA failed to meet burden of proving that certain measures were required under regulations); *In re So. Star Central Gas Pipeline, Inc.*, Final Order, CPF No. 3-2008-1005, 2011 WL 7006614, at *4 (D.O.T. Oct. 21, 2011) (finding the evidence insufficient to sustain the allegation); *In re Golden Pass Pipeline, LLC*, CPF No. 4-2008-1017, 2011 WL 1919517, at *5 (D.O.T. Mar. 22, 2011) (PHMSA did not meet its burden of proving that its interpretation of regulatory language was correct); *In re Butte Pipeline Co.*, CPF No. 5-2007-5008, 2009 WL 3190794, at *1 (D.O.T. Aug. 17, 2009) (“PHMSA carries the burden of proving the allegations set forth in the Notice, meaning that a violation may be found only if the evidence supporting the allegation outweighs the evidence and reasoning presented by Respondent in its defense.”).

¹⁸ *In re ANR Pipeline Co.*, Final Order, CPF No. 3-2011-1011, 2012 WL 7177134, at *3 (D.O.T. Dec. 31, 2012); see also *In re CITGO Pipeline Co.*, Decision on Petition for Reconsideration, CPF No. 4-2007-5010, 2011 WL 7517716, at *5 (D.O.T. Dec. 29, 2011).

¹⁹ See e.g., *In re EQT Corp.*, Final Order, CPF No. 1-2006-1006, 2010 WL 2228558, at **6-7 (D.O.T. May 13, 2010); *In re Plains Pipeline, L.P.*, Final Order, CPF No. 4-2009-5009, 2011 WL 1919520, at **4-5 (D.O.T. Mar. 15, 2011); *In re Bridger Pipeline Co.*, Decision on Petition for Reconsideration, CPF No. 5-2007-5003 2009, WL 2336991, at *5-6 (D.O.T. June 16, 2009).

²⁰ *In re Butte Pipeline Co.*, 2009 WL 3190794, at * 1.

²¹ *In re ANR Pipeline Co.*, 2012 WL 717134, at *3. In *ANR Pipeline*, PHMSA found that ANR’s “plausible” explanation regarding the discovery of a reportable condition on its pipeline was sufficient to warrant withdrawal of the allegation of violation because the “Violation Report contain[ed] no evidence which would rebut ANR’s argument.”

provide evidence of an element of the alleged violation, or if the evidence presented is in equipoise or equally balanced.²²

Section 195.583(a) states that an operator must “inspect each [onshore] pipeline or portion of [an onshore] pipeline that is exposed to the atmosphere for evidence of atmospheric corrosion . . . [a]t least once every 3 calendar years, but with intervals not exceeding 39 months.” PHMSA’s Part 195 Corrosion Control Enforcement Guidance describes a “pipeline exposed to the atmosphere” as “a pipeline that *is not buried or submerged in an electrolyte such as soil or water.*”²³

As a threshold matter, OPS has not presented any evidence demonstrating that the pipeline segments identified in the Notice were exposed to the atmosphere for the duration of the inspection interval prescribed in section 195.583(a). The evidence presented shows the opposite, *i.e.*, that the segments were buried or submerged—and thus not exposed to the atmosphere—at various points in time. OPS cannot show that Dixie failed to comply with section 195.583(a) if the regulation did not apply or ceased to apply within the prescribed interval.

Section 195.583(a) states that an operator “must inspect each pipeline or portion of pipeline *that is exposed to the atmosphere* for evidence of atmospheric corrosion.” 49 C.F.R. § 195.583(a) (emphasis added). Section 195.583(c) also cross-references another regulation, 49 C.F.R. § 195.581, which similarly states that an operator must “clean and coat each pipeline or portion of pipeline that *is exposed to the atmosphere.*” *Id.* at (c). In other words, the requirements in section 195.583 for conducting an atmospheric corrosion control inspection, and the requirements in

²² *In re Alyeska Pipeline Serv. Co.*, 2009 WL 5538655 at * 3, (quoting *Schaeffer*, 546 U.S. at 56). *Cf. In re Buckeye Partners, LP*, CPF No. 1-2009-5002, 2012 WL 3144486, at *7 (D.O.T. May 30, 2012) (where neither party “present[s] sufficient proof to prove its position,” the violation must be withdrawn because PHMSA bears the burden).

²³ Pipeline and Hazardous Materials Administration, Part 195 Corrosion Enforcement Guidance, p. 87 (June 22, 2016) (emphasis added); see also “The definition of ‘buried’ reflects the common corrosion control practice of treating any portion of pipe in contact with the soil as if that portion were buried.”

section 195.581 for protecting against atmospheric corrosion, both make clear that compliance is only required if the pipeline “*is exposed to the atmosphere*”. As there is no evidence showing that the pipeline segments were exposed to the atmosphere for the duration of the prescribed interval, OPS cannot meet its burden of demonstrating that a violation occurred.²⁴

More importantly, the evidence in the record demonstrates that Dixie complied with section 195.583(a) in any event. As OPS acknowledged in the Violation Report,²⁵ the pipeline segments in question were either submerged in water or silt throughout the period identified in the Notice, including at the times when Dixie attempted to perform the atmospheric corrosion inspections. Nothing in section 195.583(a) requires an operator to intentionally expose a submerged or buried pipeline solely for purposes of performing an atmospheric corrosion control inspection. That interpretation of section 195.583(a) would produce absurd results, *i.e.*, an operator would be required to expose a pipeline segment to the atmosphere, creating the condition that is the alleged basis for performing the inspection. Having exposed the pipeline segment to the atmosphere, an operator would be required to do the same thing again within the prescribed inspection interval to comply with section 195.583(a).

As OPS acknowledged in the Violation Report, “evidence of atmospheric corrosion . . . was not significant” when the pipeline segments became exposed and Dixie could perform the inspection.²⁶ These results confirm that Dixie’s corrosion control program is adequate and reinforce the (entirely uncontroverted) principle that intermittent exposure creates less risk of atmospheric corrosion, particularly if a pipeline segment is subject to cathodic protection for

²⁴ *In the Matter of ExxonMobil Pipeline Co.*, CPF No. 4-2017-5027, Final Order (Apr. 3, 2019) at 7 (“Contrary 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”).

²⁵ Violation Report, at 5.

²⁶ *Id.*, at 8.

external corrosion when the segment is buried or submerged. This shows that Dixie implemented a program that successfully protected these segments from atmospheric and external corrosion. Dixie should be commended for that effort, not subject to an enforcement action.

OPS has failed to meet its burden of proof. The evidence presented does not show that Dixie failed to comply with section 195.583(a). Therefore, the probable violation and proposed civil penalty must be withdrawn.

3. The fair notice doctrine prohibits a civil penalty.

The Due Process Clause of the Constitution requires that “regulations which allow monetary penalties against those who violate them must give a regulated party fair warning of the conduct they prohibit or require.”²⁷ Fair notice requires the agency to have “state[d] with ascertainable certainty what is meant by the standards [it] has promulgated [, . . .] must give [a party] fair warning of the conduct it prohibits or requires, and it must provide a reasonably clear standard of culpability to circumscribe the discretion of the enforcement authority and its agents.”²⁸ The question, in other words, is “whether the regulated party received, or should have received, notice of the agency’s interpretation in the most obvious way of all: by reading the regulations. If, by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with ‘ascertainable certainty,’ the standards with which the agency expects parties to conform, then the agency has fairly notified a petitioner of the agency’s interpretation.”²⁹

Section 195.583(a) does not provide operators with notice of any standard for performing

²⁷ *Employer Solutions Staffing Group II, LLC v. Office of Chief Administrative Officer*, 833 F.3d 480, 487-488 (5th Cir. 2016)(internal punctuation omitted).

²⁸ *ExxonMobil Pipeline Co. v. U.S. Dep’t of Transp.*, 867 F.3d 564, 578 (5th Cir. 2017) (citing *Diamond Roofing Co, Inc. v. OSHRC*, 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).

²⁹ *General Elec. v. U.S. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995).

inspections of pipelines that transition between being submerged or buried and exposed to the atmosphere. Section 195.583(a) simply states that an operator of an onshore pipeline segment that *is* exposed to the atmosphere must be inspected for evidence of atmospheric corrosion at certain prescribed intervals. The regulation does not address the applicability of the inspection requirements to pipeline segments that are intermittently submerged or buried, and therefore not exposed to the atmosphere. Nor does section 195.583(a) require an operator to expose a pipeline segment to the atmosphere solely for the purpose of performing an inspection, even if the segment was exposed to the atmosphere at some point during the preceding 3-calendar-year interval, not to exceed 39 months. The regulation simply states that an inspection must be performed if the pipeline *is* exposed to the atmosphere, not that the operator must expose the pipeline to the atmosphere solely for the purpose of performing the inspection.

Section 195.583(a) cannot be reasonably interpreted to require an operator to inspect pipelines that are only subject to intermittent exposure more frequently than pipelines that are subject to continuous exposure. That defies reason and basic principles of engineering and corrosion control. OPS has not presented any evidence to support the notion that pipelines that are exposed to the atmosphere less frequently are at a greater risk of atmospheric corrosion than pipelines that are exposed to the atmosphere more frequently. Nor does the language of section 195.583(a) suggest that an operator must invest more time, energy, and resources into performing an inspection of a pipeline that is less susceptible to the condition that the inspection itself is designed to detect. To the extent there is any genuine ambiguity at all, a far more reasonable interpretation of section 195.583(a) is that the 3-year inspection interval is suspended, either permanently or temporarily, when a pipeline segment becomes buried or submerged.

There are only two PHMSA enforcement cases that discuss intermittently submerged

pipelines and neither indicate that Dixie should have acted differently. In both *BP Oil Pipeline* and *Marathon Pipe Line, LLC*, PHMSA issued warnings informing the operators that they should include potentially exposed pipelines in their atmospheric corrosion program.³⁰ This is precisely what Dixie did. Dixie then made a good faith effort to comply with the regulation, by evaluating the locations on the interval provided in section 195.583(a), and inspecting the locations, when exposed. OPS cannot seek to penalize Dixie by now raising a previously unknown inspection frequency without first alerting Dixie and other operators.

Section 195.583(a) requires an operator to perform an inspection of a “pipeline that is exposed to the atmosphere”. OPS’s position in this case is that an operator needs to perform an inspection of a pipeline that is *not* exposed to the atmosphere. Prior notice does not exist if the language of section 195.583(a) needs to be rewritten for OPS to prevail in an enforcement proceeding. And even if that position did not contravene the express language of the regulation, OPS has never advised pipeline operators that they need to expose a pipeline that is buried or submerged to the atmosphere to comply with section 195.583(a). OPS has only said that operators need to consider including pipelines that may be intermittently exposed in their atmospheric corrosion control program, and Dixie followed that guidance here. For these reasons, the allegation of violation and civil penalty must be withdrawn.

B. Dixie’s actions were reasonable.

Dixie developed and implemented a program to comply with the external and atmospheric corrosion control requirements in Subpart H. An intermittently submerged or buried pipeline necessarily moves between these regulations depending on its status. Dixie took a reasonable approach of including the pipeline segments in its atmospheric corrosion control program and

³⁰ *In the Matter of BP Pipelines (North America) Inc.*, CPF No. 3-2009-5009, NOPV at 3 (July 16, 2009); *In the Matter of Marathon Pipe Line, LLC*, CPF No. 3-2007-5024, NOPV at 4 (Sep. 5, 2007).

attempting to inspect these locations at the prescribed intervals.

OPS implies that an operator should return to a location *more frequently* than the prescribed interval if a pipeline is exposed to the atmosphere *for less time*. There is no support for that position in the text of section 195.583(a) for the reasons previously discussed. Nor is the position consistent with basic principles of engineering and corrosion control. A pipeline that is subject to intermittent exposure faces less risk of atmospheric corrosion than a pipeline that is continuously and permanently exposed. A three-year inspection interval is sufficient to monitor for atmospheric corrosion on the latter pipelines. The notion that operators should inspect pipelines that are subject to intermittent exposure more frequently does not make sense from a legal, technical, or practical perspective.

OPS's position is simply not workable. Dixie's actions were entirely reasonable, and the allegation of violation and proposed civil penalty should be withdrawn.

C. OPS's proposed civil penalty is unreasonable in any event.

Even if OPS could meet its burden of proof and the fair notice doctrine did not apply, a proposed civil penalty in this case would be unreasonable. PHMSA is required to consider an operator's "good faith in attempting to comply" in determining the amount of a civil penalty, 49 U.S.C. § 60122(b)(1)(C), 49 C.F.R. § 190.225(a)(4), and the evidence shows that Dixie clearly made a good faith effort to comply with section 195.583(a). Consistent with prior OPS guidance, Dixie included the three segments in its atmospheric corrosion program and attempted, on multiple occasions, to inspect each segment on a 3-calendar year interval.³¹ Dixie went even further and included each segment in its external corrosion control program. And, as OPS acknowledged in

³¹ PHMSA notes in its Violation Reports that a good faith credit is appropriate when "an operator failed to achieve compliance for reasons such as unforeseeable events/conditions that were partly or wholly outside its control." Violation Report, at 10.

the Violation Report, “evidence of atmospheric corrosion . . . was not significant” when the pipeline segments became exposed and Dixie could perform the inspections.³²

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 and the safety and integrity of each. 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 (if OPS could meet its burden of proof and the fair notice doctrine did not apply).

V. Right to Supplement

Dixie reserves the right to supplement its positions based on any arguments discussed at the hearing or provided by OPS in this case.

VI. Conclusion

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

Respectfully submitted this 8th day of April 2024.



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³² *Id.*, at 8.