

September 30, 2022

VIA ELECTRONIC MAIL TO: CommissionerMcClain-Hill@ladwp.com

Ms. Cynthia McClain-Hill
President of the Board of Water and Power Commissioners
Los Angeles Department of Water and Power
111 N. Hope Street
Los Angeles, CA 90012

Re: CPF No. 5-2022-037-NOPV

Dear Ms. McClain-Hill:

Enclosed please find the Final Order issued in the above-referenced case. It makes findings of violation, assesses a civil penalty of \$38,000, and specifies actions that need to be taken by the Los Angeles Department of Water and Power to comply with the pipeline safety regulations. The penalty payment terms are set forth in the Final Order. When the civil penalty has been paid and the terms of the compliance order completed, as determined by the Director, Western Region, this enforcement action will be closed. Service of the Final Order by e-mail is effective upon the date of transmission and acknowledgement of receipt as provided under 49 C.F.R. § 190.5.

Thank you for your cooperation in this matter.

Sincerely,

Alan K. Mayberry
Associate Administrator
for Pipeline Safety

Enclosure

cc: Mr. Dustin Hubbard, Director, Western Region, Office of Pipeline Safety, PHMSA
Mr. Martin Adams, General Manager, LADWP, martin.adams@ladwp.com
Ms. Susan Olenchuk, Counsel for LADWP, Van Ness Feldman, LLP, sam@vnf.com

CONFIRMATION OF RECEIPT REQUESTED

	)	
In the Matter of	)	
	)	
Los Angeles Department of	)	CPF No. 5-2022-037-NOPV
Water and Power,	)	
	)	
Respondent.	)	
	)	

From January 3, 2022, to March 10, 2022, pursuant to 49 U.S.C. § 60117, representatives of the Pipeline and Hazardous Materials Safety Administration (PHMSA), Office of Pipeline Safety (OPS), conducted a virtual inspection of the Los Angeles Department of Water and Power's (LADWP or Respondent) Drug and Alcohol (D&A) Program. LADWP is a municipally-owned utility that provides water and electricity services to over four million customers in Los Angeles, California. LADWP owns and operates the Harbor Generating Station, a gas-fired electricity generating facility that supplies electrical power to the LADWP system.

As a result of the inspection, the Director, Western Region, OPS (Director), issued to Respondent, by letter dated April 27, 2022, 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 LADWP had violated 49 C.F.R. part 199 and proposed assessing a civil penalty of \$38,000 for the alleged violations. The Notice also proposed ordering Respondent to take certain measures to correct the alleged violations.

LADWP responded to the Notice on May 9, 2022, requesting the exhibits associated with the case, the civil penalty calculation worksheet, and a 60-day extension of time to respond. PHMSA provided these documents and granted an extension of time on May 11, 2022. LADWP, by letter dated June 9, 2022, provided a written response to the allegations set forth in the Notice (Response). Respondent contested several of the allegations and requested that the Proposed Civil Penalty be reduced, but did not contest the Proposed Compliance Order. In response to the August 2, 2022 Recommendation of the Western Region Director, LADWP, on August 12, 2022, submitted additional arguments contesting the allegations raised in the Notice (Reply). Respondent did not request a hearing and therefore has waived its right to one.

FINDINGS OF VIOLATION

The Notice alleged that Respondent violated 49 C.F.R. Part 199, as follows:

Item 1: The Notice alleged that Respondent violated 49 C.F.R. § 199.101(a), which states:

§ 199.101 Anti-drug plan.

(a) Each operator shall maintain and follow a written anti-drug plan that conforms to the requirements of this part and the DOT Procedures. The plan must contain –

(1) Methods and procedures for compliance with all the requirements of this part, including the employee assistance program;

(2) The name and address of each laboratory that analyzes the specimens collected for drug testing;

(3) The name and address of the operator's Medical Review Officer, and Substance Abuse Professional; and

(4) Procedures for notifying employees of the coverage and provisions of the plan.

The Notice alleged that Respondent violated 49 C.F.R. § 199.101(a) by failing to maintain and follow a written anti-drug plan that conformed with the requirements of part 199 and DOT Procedures. Specifically, the Notice alleged that Respondent, when asked for its written anti-drug plan, provided documents that failed to contain the required methods and procedures necessary for compliance and did not contain the name and address of the Medical Review Officer (MRO) or the Substance Abuse Professional.

In its Response, LADWP argued that PHMSA did not meet its burden of proof to show that LADWP failed to follow regulatory requirements and DOT procedures. In its August 12, 2022 Reply, LADWP argued that failure to maintain a compliant written anti-drug plan does not mean it cannot and did not comply with part 199 and DOT procedures. This argument, even if true, does not absolve the operator of the violation of the regulation because Respondent did not maintain a written drug plan. Respondent did not argue that it maintained a compliant anti-drug plan in its Response or in its Reply. The regulatory text clearly requires operators to both maintain and to follow a written plan. The evidence in the case file shows that when asked for its anti-drug plan by PHMSA inspectors, Respondent was unable to produce a written plan that contained the required elements in § 199.101(a)(1)-(4) and conformed to part 199 as well as DOT Procedures. Instead, Respondent returned four different administrative manuals, employee handbooks, and supervisor guides. This evidence clearly demonstrates that LADWP did not maintain a written anti-drug plan compliant with part 199 and DOT Procedures. The operator is, therefore, in violation of the regulations.

Accordingly, after considering all of the evidence and the legal issues presented, I find that Respondent violated 49 C.F.R. § 199.101(a) by failing to maintain and follow a written anti-drug plan that conformed with the requirements of part 199 and DOT Procedures.

Item 2: The Notice alleged that Respondent violated 49 C.F.R. § 199.109(d), which states:

§ 199.109 Review of drug testing results.

(a)

(d) *MRO reports.* The MRO must report all drug test results to the operator in accordance with DOT Procedures.

The Notice alleged that Respondent violated 49 C.F.R. § 199.109(d) because the MRO did not report all drug test results to the operator in accordance with DOT Procedures. Specifically, the Notice alleged the MRO who received laboratory results of a positive random DOT drug test conducted on an LADWP covered employee on February 23, 2020, did not report the drug test results to LADWP in accordance with DOT Procedures.

In its Response and its Reply, LADWP did not contest this allegation of violation. Accordingly, after considering all of the evidence, I find that Respondent violated 49 C.F.R. § 199.109(d) where the MRO did not report all drug test results to LADWP in accordance with DOT Procedures.

Item 3: The Notice alleged that Respondent violated 49 C.F.R. § 199.202, which states:

§ 199.202 Alcohol misuse plan.

Each operator must maintain and follow a written alcohol misuse plan that conforms to the requirements of this part and DOT Procedures concerning alcohol testing programs. The plan shall contain methods and procedures for compliance with all the requirements of this subpart, including required testing, recordkeeping, reporting, education and training elements.

The Notice alleged that Respondent violated 49 C.F.R. § 199.202 by failing to maintain and follow a written alcohol misuse plan that conformed to the requirements of part 199 and the DOT Procedures concerning alcohol testing programs. Specifically, the Notice alleged that Respondent, when asked for its written alcohol misuse plan, failed to provide a plan that included the required methods and procedures necessary for compliance with the regulations. When PHMSA inspectors requested documentation of Respondent's alcohol misuse plan, LADWP submitted the same four documents it submitted for its written anti-drug plan.

In its Response, LADWP argued that PHMSA did not meet its burden of proof to show that LADWP failed to follow regulatory requirements and DOT procedures for alcohol testing. In its Response and its Reply, LADWP argued that failure to maintain a compliant written alcohol misuse plan does not mean LADWP cannot and did not comply with part 199 and DOT procedures. As discussed in Item 1 above, this argument, even if true, does not absolve the operator of the violation of the regulation because Respondent did not maintain a written alcohol misuse plan. The regulatory text requires operators to both maintain and to follow a written alcohol misuse plan. Respondent did not argue that it maintained a compliant alcohol misuse plan in its Response or its Reply. The evidence in the case file shows that when asked for its alcohol misuse plan by PHMSA inspectors, Respondent was unable to produce a written plan

that reflected the requirements contained in Part 199, subpart C. Instead, Respondent returned portions of four different administrative manuals, employee handbooks, and supervisor guides, the same documents submitted when asked for its anti-drug plan. Because Respondent was unable to produce a written alcohol misuse plan that contained methods and procedures for compliance with all the requirements of Part 199, subpart C, LADWP did not meet the requirements of § 199.202.

Accordingly, after considering all of the evidence and the legal issues presented, I find that Respondent violated 49 C.F.R. § 199.202 by not maintaining and following a written alcohol misuse plan that conformed to the requirements of part 199 and the DOT Procedures concerning alcohol testing programs.

These findings of violation will be considered prior offenses in any subsequent enforcement 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.¹

Item 1: The Notice proposed a civil penalty of \$19,000 for Respondent's violation of 49 C.F.R. § 199.101(a), for failing to maintain and follow a written anti-drug plan that conformed with the requirements of part 199 and DOT Procedures. In its Response and its Reply, Respondent requested that PHMSA withdraw the allegation that it did not "follow" part 199 requirements and DOT Procedures, and "reduce the amount of the civil penalty to reflect the withdrawn allegation." Respondent did not present argument for a reduction of the civil penalty absent a withdrawal of the underlying allegation of violation. For the reasons stated in the Findings of Violation section above, I find there is no basis to withdraw the underlying allegation of violation. Accordingly, having reviewed the record and considered the assessment criteria, I assess Respondent a civil penalty of \$19,000 for violation of 49 C.F.R. § 199.101(a).

Item 2: The Notice proposed a civil penalty of \$19,000 for Respondent's violation of 49 C.F.R. § 199.109(d) where the MRO who received the laboratory results of a positive random DOT drug test conducted on an LADWP covered employee on February 23, 2020, did not report the drug test results to LADWP in accordance with DOT Procedures. In its Response and its Reply, Respondent did not contest the proposed civil penalty for this Item. Accordingly, having reviewed the record and considered the assessment criteria, I assess Respondent a civil penalty of \$19,000 for violation of 49 C.F.R. § 199.109(d).

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 **\$38,000**.

Payment of the civil penalty must be made within 20 days after receipt of this Final Order.

¹ These amounts are adjusted annually for inflation. See 49 C.F.R. § 190.223.

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 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 \$38,000 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

The Notice proposed a compliance order with respect to Items 1 and 3 in the Notice for violations of 49 C.F.R. §§ 199.101(a) and § 199.202, respectively. In its Response and its Reply, Respondent did not contest the Proposed Compliance Order for these Items. Under 49 U.S.C. § 60118(a), each person who engages in the transportation of gas or who owns or operates a pipeline facility is required to comply with the applicable safety standards established under chapter 601. Pursuant to the authority of 49 U.S.C. § 60118(b) and 49 C.F.R. § 190.217, Respondent is ordered to take the following actions to ensure compliance with the pipeline safety regulations applicable to its operations:

- A. With respect to the violation of § 199.101(a) (**Item 1**), Respondent must develop a written anti-drug plan that contains the specific methods and procedures it will use to comply with all the requirements of 49 C.F.R. part 199 and part 40 and must submit the plan to PHMSA for review within 90 days of receipt of the Final Order.
- B. With respect to the violation of § 199.202 (**Item 3**), Respondent must develop an alcohol misuse plan that contains the specific methods and procedures it will use to comply with all the requirements of 49 C.F.R. part 199 and part 40 and must submit the plan to PHMSA for review within 90 days of receipt of the Final Order.
- C. In lieu of A and B above, Respondent may develop a combined anti-drug and alcohol misuse plan that contains the specific methods and procedures it will use to comply with all the requirements of 49 C.F.R. part 199 and the DOT Procedures in 49 C.F.R. part 40, and must submit the plan to PHMSA for review within 90 days of receipt of the Final Order.

The Director may grant an extension of time to comply with any of the required items upon a written request timely submitted by the Respondent and demonstrating good cause for an extension.

PHMSA requests that Respondent maintain documentation of the safety improvement costs

associated with fulfilling this Compliance Order and submit the total to the Director. It is requested that these costs be reported in two categories: (1) total cost associated with preparation/revision of plans, procedures, studies and analyses; and (2) total cost associated with replacements, additions and other changes to pipeline infrastructure.

Failure to comply with this Order may result in the administrative assessment of civil penalties not to exceed \$200,000, as adjusted for inflation (*see* 49 C.F.R. § 190.223), for each violation for each day the violation continues or in referral to the Attorney General for appropriate relief in a district court of the United States.

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. The written petition must be received no later than 20 days after receipt of the Final Order by Respondent. Any petition submitted must contain a 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 corrective action, remain in effect unless the Associate Administrator, upon request, grants a stay.

The terms and conditions of this Final Order are effective upon service in accordance with 49 C.F.R. § 190.5.

September 30, 2022

Alan K. Mayberry
Associate Administrator
for Pipeline Safety

Date Issued