

By Email Only

June 9, 2022

Mr. Dustin Hubbard
Director, Western Region
Office of Pipeline Safety
Pipeline and Hazardous Materials Safety Administration
12300 West Dakota Avenue
Suite 110, Lakewood, CO 80228

**Re: Written Response of the Los Angeles Department of Water and Power
CPF No. 5-2022-037-NOPV**

Dear Mr. Hubbard:

Pursuant to 49 C.F.R. § 190.208, the Los Angeles Department of Water and Power respectfully submits its Written Response to the Notice of Probable Violation, Proposed Civil Penalty, and Proposed Compliance Order (Notice) regarding LADWP's compliance with Part 199 of the Pipeline and Hazardous Materials Safety Administration (PHMSA)¹ and procedures of the Department of Transportation (DOT) with respect to the natural gas pipeline serving LADWP's Harbor Generating Station.² On May 11, 2022, PHMSA approved by emails an extension of time until June 27, 2022, to respond to the Notice.³ Therefore, this response is timely.

LADWP requests that it be provided with all documents or communications from OPS pertaining to the case or the case file. This includes "all agency records pertinent to the matters of fact and law asserted,"⁴ including, but not limited to inspector notes or other materials the region intends to rely on to support the NOPV, and Region Director's "written evaluation of response material submitted by the respondent and recommendation for final action, if one is prepared." 49 C.F.R. § 190.209(b)(7). Please consider this a standing request. LADWP reserves the right to supplement its Written Response in the event that PHMSA provides any additional materials to the case file.

¹ 49 C.F.R. Part 199 (2020).

² 49 C.F.R. Part 40.

³ The initial extension established a deadline of June 8, 2022, to submit this Response. That date was revised to reflect the deadline of June 27, 2022.

⁴ 49 U.S.C. § 60117(b)(1)(C).

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LADWP is committed to public safety and operating its pipeline in accordance with PHMSA's regulations and takes PHMSA's allegations of violation seriously. While LADWP does not contest Item 2 of the Notice, LADWP contests the allegations in Item 1 and Item 3 that LADWP did not "follow" Part 199 requirements and DOT procedures. LADWP requests that PHMSA withdraw these portions of the allegations. LADWP does not contest the proposed compliance order for Item 1 and Item 3 but requests that PHMSA reduce the proposed civil penalty consistent with the request to withdraw portions of the allegations in those items.

LADWP looks forward to working with you and your staff to resolve the issues raised in the Notice. Please do not hesitate to contact the undersigned if you have any questions.

Thank you for your attention on this matter.

Sincerely,



Martin L. Adams
General Manager and Chief Engineer

c: Mr. Wayne T. Lemoi, Drug and Alcohol Program Manager, OPS
Mr. Erin D. Hendrixson, Senior Attorney Advisor, PHMSA
Ms. Julie C. Riley, Assistant City Attorney, LADWP
Ms. Susan A. Olenchuk, Van Ness Feldman, LLP
Mr. Brian J. Wilbur, Senior Assistant General Manager – Power System
Construction, Maintenance, and Operations, LADWP
Mr. Robert P. Gonzalez, Director of Power Construction and Maintenance, LADWP
Mr. Andrew C. Kendall, Senior Assistant General Manager – Corporate Services,
LADWP
Mr. Thomas Simonovski, Director of Employee Health Plans and Services, LADWP
Mr. Donald Treinen, Manager of Steam Generation, LADWP

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

Pursuant to 49 C.F.R. § 190.208, the Los Angeles Department of Water and Power (LADWP) submits a Written Response (Response) to the Notice of Probable Violation, Proposed Civil Penalty, and Proposed Compliance Order (Notice) issued on April 27, 2022. The Notice was issued following an inspection by the Office of Pipeline Safety (OPS) regarding LADWP's compliance with Part 199 of the Pipeline and Hazardous Materials Safety Administration (PHMSA)¹ and the drug and alcohol testing procedures of the Department of Transportation (DOT)² with respect to the natural gas pipeline that serves LADWP's Harbor Generating Station (HGS). On May 11, 2022, PHMSA approved by emails an extension of time until June 27, 2022, to respond to the Notice.³ Therefore, this response is timely.

The Notice alleges violations of three provisions of 49 C.F.R. Part 199, PHMSA's regulations requiring that a pipeline operator have a written anti-drug plan and a written alcohol misuse plan. LADWP is committed to public safety and operating its pipeline facilities in accordance with the PHMSA's regulations and takes PHMSA's allegations of violation seriously.

LADWP does not contest Item 2 of the Notice or the proposed civil penalty for Item 2. LADWP does, however, contest the allegations in Item 1 and Item 3 that LADWP did not “follow” Part 199 requirements and DOT procedures. LADWP requests that PHMSA withdraw this aspect of these allegations because they are not supported by the evidence in the case file and OPS has not met its burden of proof. LADWP does not contest the proposed compliance orders for Item 1 and Item 3, but requests that PHMSA reduce the proposed civil penalty for Item 1.

³ The initial extension established a deadline of June 8, 2022, to submit this Response. That date was revised to reflect the deadline of June 27, 2022.

I. Overview of the LADWP Harbor Generating Station Pipeline

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 HGS, one of the gas-fired electricity generating facilities that supplies electrical power to the LADWP system. The HGS is located in Wilmington, California and operates seven gas combustion turbines and one steam turbine.

The HGS receives natural gas supply through a 1.19-mile, 20"-diameter gas transmission pipeline (HGS Pipeline) that is owned and operated by LADWP. The HGS is the only gas-fired electric generating station in LADWP's generation fleet where the natural gas pipeline serving the generating station is owned by LADWP, and the HGS Pipeline is the only pipeline owned and operated by LADWP. Because the HGS Pipeline is municipally-owned, California law precludes regulation by the California Public Utilities Commission. Consequently, the HGS Pipeline is regulated for pipeline safety purposes by PHMSA.

II. Response of LADWP

The Notice alleges violations of three provisions of Part 199 of PHMSA's regulations requiring that a pipeline operator have and follow a written anti-drug plan and a written alcohol misuse plan.⁴ LADWP does not contest Item 2 or the proposed civil penalty related to Item 2. LADWP, however, partially contests the allegations in Item 1 and Item 3.

Item 1 of the Notice alleges that LADWP "did not maintain and follow a written anti-drug plan that conformed to the requirements of Part 199 and the DOT Procedures" in violation of § 199.101(a) of PHMSA's regulations.⁵ The Notice states that documents provided by LADWP during the inspection did not meet "the requirements for a written PHMSA anti-drug plan," and "did not contain the required methods and procedures necessary for compliance with all the requirements of Parts 199 and 40 and did not contain the name and address of the Medical Review Officer (MRO) or the Substance Abuse Professional (SAP)."⁶ The Notice proposes to assess a civil penalty of \$19,000 and proposes a compliance order that would require that LADWP "develop a written anti-drug plan that contains the specific methods and procedures it will use to comply with all of the requirements of part 199 and part 40 and . . . submit the plan to PHMSA for review within 90 days of receipt of the Final Order."⁷

Item 3 of the Notice alleges that LADWP did not "maintain and follow a written alcohol misuse plan that conformed to the requirements of Part 199 and the DOT procedures concerning alcohol testing programs" in violation of § 199.202.⁸ The Notice states that "[n]one of the documents met the requirements for a written PHMSA alcohol misuse plan as required by the

⁴ 49 C.F.R. Part 199.

⁵ Notice at 2. 49 C.F.R. § 199.101(a).

⁶ Notice at 2.

⁷ *Id.* at 6.

⁸ *Id.* at 3. 49 C.F.R. § 199.202.

regulations . . . [and] did not contain the required methods and procedures necessary for compliance with all the requirements of Parts 199 and 40.”⁹ The Notice does not propose to assess a civil penalty for Item 3, but proposes a compliance order that would require that LADWP “develop a alcohol misuse plan that contains the specific methods and procedures it will use to comply with all of the requirements of part 199 and part 40 and . . . submit the plan to PHMSA for review within 90 days of receipt of the Final Order.”¹⁰

PHMSA has the burden of proving that LADWP violated the pipeline safety regulations.¹¹ PHMSA has the “burden of production,” *i.e.*, . . . 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.”¹² PHMSA “bears the burden of proof as to all elements of the proposed violation.”¹³ Where PHMSA does not produce such evidence, the allegation of violation must be withdrawn.¹⁴

LADWP contests Item 1 and Item 3 because evidence contained in the Notice and Violation Report does not demonstrate that LADWP failed to “follow” PHMSA’s Part 199 requirements or DOT’s procedures.

The Notice and the Violation Report describe several provisions in LADWP’s procedures that OPS states support the allegation that the procedures do not conform to PHMSA’s Part 199 requirements for anti-drug plans and alcohol misuse plans and DOT procedures.¹⁵ The examples fall into three categories:

1. Allegations that LADWP’s documents conflate company policy and regulatory provisions.¹⁶

⁹ Notice at 3.

¹⁰ *Id.* at 6. Alternatively, LADWP may develop a combined anti-drug and alcohol misuse plan.

¹¹ 49 U.S.C. § 60117(b)(1)(F) (2018), as amended by the Protecting our Infrastructure of Pipelines and Enhancing Safety Act of 2020, Pub. L. No. 116-260, div. R, title I, § 108(a)(2), 134 Stat. 2221, 2223 (Dec. 27, 2020). *See* 49 C.F.R. § 190.213(a)(1) (2020). *See, e.g., In re ExxonMobil Pipeline Co.*, Final Order, CPF No. 4-2017-5027, 2019 WL 3734516, **4, 5 (Apr. 3, 2019) (withdrawing allegation because PHMSA’s evidence did not establish a violation); *In re Air Prods. & Chems., Inc.*, Final Order, CPF No. 4-2013-1001, 2015 WL 6758819, *3 (Aug. 10, 2015) (withdrawing alleged violation because PHMSA did not produce “any evidence to support its position” and thereby did not meet its burden of proof).

¹² *Schaffer v. Weast*, 546 U.S. 49, 56 (2005) (quoting *Dir., Office of Workers’ Comp. Programs, Dep’t of Labor v. Greenwich Collieries*, 512 U.S. 267, 272 (1994)); *see also In re Butte Pipeline Co.*, Final Order, CPF No. 5-2007-5008, 2009 WL 3190794, *1 (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.”) (internal citation omitted).

¹³ *In re ANR Pipeline Co.*, Final Order, CPF No. 3-2011-1011, 2012 WL 7177134, *3 (Dec. 31, 2012) (finding that evidence in violation report was insufficient); *In re CITGO Pipeline Co.*, Decision on Reconsideration, CPF No. 4-2007-5010, 2011 WL 7517716, *5 (Dec. 29, 2011) (finding lack of evidence demonstrating all elements of the alleged violation).

¹⁴ *ExxonMobil*, 2019 WL 3734516 at **4, 5; *Air Prods. & Chems.* 2015 WL 6758819 at *3.

¹⁵ Notice at 2, 3; Pipeline Safety Violation Report, CPF No. 5-2022-037-NOPV at 5-7 (Apr. 27, 2022) (Violation Report).

¹⁶ Notice at 2 (stating that LADWP’s Administrative Manuals reflect an LADWP “policy statement” and LADWP “health policy and guidelines,” and that LADWP’s DOT Employee Handbook and DOT Supervisor’s Guide

2. Allegations that statements in LADWP's documents conflate the regulatory requirements of PHMSA, DOT, and the Federal Motor Carrier Safety Administration.¹⁷
3. Allegations that statements do not accurately describe Part 199 requirements or DOT procedures.¹⁸

All of these examples address provisions in LADWP's procedures. None of them identify an instance where LADWP's drug and alcohol testing practices failed to follow regulatory requirements. For example, the Notice and Violation Report do not establish that LADWP (1) randomly drug tested less than 50% of covered employees; (2) tested for incorrect drugs; (3) failed to comply with return to duty regulations; (4) applied the regulations of a different agency; or (5) failed to administer a required drug or alcohol test or followed incorrect testing procedures.

OPS has failed to meet its burden of proving that LADWP did not "follow" Part 199 requirements and DOT procedures. LADWP respectfully requests that these allegations in Item 1 and Item 3 be withdrawn as unsupported by evidence in the case file.¹⁹ LADWP also requests that PHMSA reduce the amount of the civil penalty to reflect the withdrawn allegations. LADWP does not contest the proposed compliance orders for Item 1 and Item 3.

III. CONCLUSION

LADWP requests that PHMSA withdraw the allegations in Item 1 and Item 3 that LADWP did not "follow" Part 199 of PHMSA regulations pertaining to anti-drug plans and alcohol misuse programs and related DOT procedures. LADWP also requests that PHMSA reduce the amount of the proposed civil penalty for Item 1, consistent with the request to withdraw portions of the allegations in Item 1 and Item 3.

Respectfully submitted,



Martin L. Adams

General Manager and Chief Engineer

June 9, 2022

"conflated company policies with PHMSA regulations"); *see also* Violation Report at 6 (describing the following provisions as company policy: prohibition on use of controlled substances "except as prescribed by a physician;" a provision disqualifying an applicant who tests positive from employment eligibility; and a discipline policy).

¹⁷ Notice at 2-3 (describing the DOT Employee Handbook and DOT Supervisor's Guide); *see also* Violation Report at 5-7.

¹⁸ Notice at 2-3 (describing the DOT Employee Handbook and DOT Supervisor's Guide). *See also* Violation Report at 5 (referring to use of the term "controlled substances;" references to opiates, instead of opioids; statements suggesting that employees are covered only when on duty; reference to an accident on a hazardous liquid pipeline; incorrectly stated random drug test rate; statement regarding required return-to-duty evaluations; description of who an MRO must notify of test results; outdated information that did not reflect current regulations; reference to 1991 statute; statements suggesting that someone other than the MRO can discuss test results with an employee; characterization of refusal to sign drug testing form; reference to the term "actual knowledge").

¹⁹ *ExxonMobil*, 2019 WL 3734516 at **4, 5; *Air Prods. & Chems.* 2015 WL 6758819 at *3.