177 FERC ¶ 61,182
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Richard Glick, Chairman;
James P. Danly, Allison Clements, and
Mark C. Christie.

Rover Pipeline, LLC, and
Energy Transfer Partners, L.P.

Docket No. IN17-4-000

ORDER TO SHOW CAUSE AND NOTICE OF PROPOSED PENALTY

(Issued December 16, 2021)

1. Pursuant to Rule 209(a)(2) of the Commission's Rules of Practice and Procedure,[1] the Commission's Revised Policy Statement on Enforcement,[2] and the Commission's Statement of Administrative Policy Regarding the Process for Assessing Civil Penalties,[3] the Commission directs Energy Transfer Partners, L.P. (Energy Transfer)[4] and its subsidiary Rover Pipeline, LLC (jointly, Respondent or Rover) to show cause why it should not be found to have violated Section 7(e) of the Natural Gas Act (NGA), 15 U.S.C. § 717f; the Commission's Regulations, 18 C.F.R. § 157.20 (2021); and the Commission's Order Issuing Certificates (Certificate Order),[5] by: (1) intentionally including diesel fuel and other toxic substances and unapproved additives in the drilling mud during its horizontal directional drilling (HDD) operations under the Tuscarawas River in Stark County, Ohio, (2) failing to adequately monitor the right-of-way at the site of the Tuscarawas River HDD operation, and (3) improperly disposing of inadvertently released drilling mud that was contaminated with diesel fuel and hydraulic oil. The Commission also directs Rover to show cause why it should not be assessed a civil penalty in the amount of $40,000,000.

[1] 18 C.F.R. § 385.209(a)(2) (2021).

[2] *Enforcement of Statutes, Regulations and Orders*, 123 FERC ¶ 61,156, at PP 35-36 (2008) (Revised Policy Statement on Enforcement).

[3] *Process for Assessing Civil Penalties*, 117 FERC ¶ 61,317, at P 6 (2006).

[4] Energy Transfer Partners, L.P. is now Energy Transfer L.P.

[5] *Rover Pipeline LLC,* 158 FERC ¶ 61,109 (2017), *order on clarification & reh'g*, 161 FERC ¶ 61,244 (2017), *Petition for Rev.*, *Rover Pipeline LLC v. FERC*, No. 18-1032 (D.C. Cir. Jan. 29, 2018) (Certificate or Certificate Order).

2. Respondent may seek a modification to the penalty amount as warranted.[6] Pursuant to Rule 213(a) of the Commission's Rules of Practice and Procedure,[7] the Commission directs Respondent to file an answer with the Commission within 30 days of the date of this order. Office of Enforcement staff (Enforcement Staff) may reply to Respondent's answer within 30 days of the filing of the answer. The Commission will consider these pleadings as part of its review of this proceeding.

3. This case presents allegations by Enforcement Staff that Respondent violated the NGA, Commission regulations, and the Certificate Order during construction of Rover's $6.7 billion Rover Pipeline Project (or Project), an approximately 711 mile long interstate natural gas pipeline designed to transport gas from the Marcellus and Utica shale supply areas through West Virginia, Pennsylvania, Ohio, and Michigan to outlets in the Midwest and elsewhere.[8] In April 2017, shortly after Rover began its HDD operation under the Tuscarawas River, a large inadvertent release (IR) of 2 million gallons of drilling mud reached the ground surface and flowed into a nearby protected wetland. Testing of the IR contents conducted by the Ohio Environmental Protection Agency revealed the presence of petroleum hydrocarbons consistent with diesel fuel. Enforcement Staff's allegations arise out of an investigation into the IR and are further described in the Enforcement Staff Report and Recommendation (Enforcement Staff Report).[9] Issuance of this order does not indicate Commission adoption or endorsement of the Enforcement Staff Report.

4. Enforcement Staff alleges that from April 2 through April 13, 2017, multiple HDD crew members employed by Rover's contractors intentionally added toxic diesel fuel, hydraulic oil, contaminated containment fluids, and non-toxic but unapproved lubricants to combat drilling difficulties and keep up with drilling progress demands. Witnesses testified that at least seven Rover contractor HDD crew members added diesel fuel to the

[6] *See* 18 C.F.R. § 385.209(b).

[7] 18 C.F.R § 385.213(a) (2021).

[8] Rover Pipeline LLC, Application of Rover Pipeline LLC for a Certificate of Public Convenience and Necessity, Docket No. CP15-93-000, at 1, 6, and 10 (filed Feb. 20, 2015) (Rover Application or Application).

[9] The Enforcement Staff Report is attached to this order as Appendix A. The Enforcement Staff Report describes the background of Enforcement Staff's investigation, findings and analysis, and recommended sanctions.

drilling mud[10] at the site of the Tuscarawas River HDD operation, and that this was done intentionally and routinely. Witnesses also testified that at least four Rover contractor HDD crew members added unapproved additives to lubricate the drill and speed up drilling progress, and that this was also done intentionally and routinely. Additionally, one witness admitted to adding hydraulic fluid to the drilling mud on at least one occasion, and contaminated water from containments on more than one occasion. Enforcement Staff further alleges that these violations were the product of a corporate culture that favored speed and construction progress over regulatory compliance, that Rover pressed upon its contractors, and that its contractors in turn imposed on its subcontractors and HDD crews.

5. Based on the allegations contained in the Enforcement Staff Report, the Commission directs Respondent to respond to this order as set forth above.[11] This order is also the notice of proposed penalty required by the NGA.[12] In the answer to this order, Respondent has the option to pay the proposed assessment or contest the order. If Respondent chooses to contest the order or the proposed assessment, the Commission will issue a further order.[13] If the record is sufficient, the Commission may assess a civil penalty. If a hearing is needed, the Commission will issue a hearing order and indicate whether the Commission will conduct a paper hearing or a hearing before an Administrative Law Judge (ALJ). If the Commission chooses to conduct a paper hearing, it will issue an order on the paper hearing record. If the matter is set for hearing before an ALJ, the ALJ will conduct a hearing under Part 385 of the Commission's regulations, and, unless otherwise directed in a hearing order, the ALJ will issue an Initial Decision

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[10] For the Rover Pipeline Project, drilling mud was defined as "a slurry of naturally occurring, non-toxic bentonite clay and water." *See* FERC, Final Environmental Impact Statement for Rover Pipeline, Docket No. CP15-93-000, at app G-1 at G1-6 (issued July 29, 2016) (Final EIS).

[11] Under 18 C.F.R. § 385.213(c), Respondent must file an answer that provides a clear and concise statement regarding any disputed factual issues and any law upon which it relies. Respondent must also, to the extent practicable, admit or deny, specifically and in detail, each material allegation contained in the Enforcement Staff Report and set forth every defense relied upon. Failure to answer an order to show cause will be treated as a general denial and may be a basis for summary disposition under Rule 217. 18 C.F.R. § 385.213(e)(2).

[12] 15 U.S.C. § 717t-1(b); *Process for Assessing Civil Penalties*, 117 FERC ¶ 61,317 at PP 6-7.

[13] *Process for Assessing Civil Penalties*, 117 FERC ¶ 61,317 at PP 6-7.

and determine whether a violation or violations occurred. The ALJ also will make factual findings on the statutory factors relevant to a civil penalty and on the factors set forth in the Commission's Revised Policy Statement on Enforcement.[14] The Commission will then consider the Initial Decision of the ALJ and any exceptions filed. If the Commission determines that there is a violation, the Commission will issue an order and may assess any appropriate penalty. In accordance with NGA Section 19(a) and Rule 713 of the Commission's Rules of Practice and Procedure,[15] Respondent may request a rehearing no later than 30 days after the issuance of the order assessing the penalty. Respondent can appeal a final Commission order to a United States Court of Appeals within the appropriate time for review of a Commission order. If the Commission finds a violation and assesses a penalty, if such penalty is not paid within 60 days of assessment, the Commission will institute a collection action in an appropriate United States District Court.[16]

6. The Commission authorizes Enforcement Staff to disclose information obtained during the course of the investigation as necessary to advance this matter.

The Commission orders:

(A) Within 30 days of the date of this order, Respondent must file an answer in accordance with Rule 213 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213, showing cause why Rover should not be found to have violated Section 7(e) of the NGA, 15 U.S.C. § 717f; the Commission's Regulations, 18 C.F.R. § 157.20; and the Commission's Certificate Order with respect to its conduct during construction of the Rover Pipeline Project.

(B) Within 30 days of the date of this order, Respondent must file an answer in accordance with Rule 213 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213, showing cause why the alleged violations should not warrant the assessment of a civil penalty in the amount of $40,000,000, or a modification to that amount as warranted.

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[14] *See* 15 U.S.C. § 717t-1(c); Revised Policy Statement on Enforcement, 123 FERC ¶ 61,156 at PP 55-71.

[15] *See* 15 U.S.C. § 717r; 18 C.F.R. § 385.713 (2021).

[16] *Process for Assessing Civil Penalties*, 117 FERC ¶ 61,317 at P 7.

(C) In the answer, Respondent should address any matter, legal, factual, or procedural, that it would urge the Commission to consider in this matter. To the extent that Respondent cites any material not cited in the Enforcement Staff Report, Respondent is directed to file non-publicly one copy of such material on CD-ROM or DVD in the captioned docket and to serve a copy of same on Enforcement Staff.

(D) Within 30 days of the filing of the answer by Respondent, Enforcement Staff may file a reply with the Commission.

By the Commission. Commissioner Phillips is not participating.

(S E A L)

Kimberly D. Bose,
Secretary.

APPENDIX A

FEDERAL ENERGY REGULATORY COMMISSION

Rover Pipeline, LLC
Energy Transfer Partners, L.P.

Docket No. IN17-4-000

Enforcement Staff Report and Recommendation

Tuscarawas River Investigation

Office of Enforcement

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The Office of Enforcement (Enforcement or Enforcement Staff) submits this report to the Federal Energy Regulatory Commission (Commission or FERC) setting forth its findings of fact and conclusions of law regarding the investigation of Energy Transfer Partners, L.P. (Energy Transfer)[1] and its subsidiary Rover Pipeline, LLC (jointly Rover). Enforcement's investigation relates to the presence of diesel fuel and petroleum hydrocarbons in the drilling mud[2] in Stark County, Ohio, at the site of the horizontal directional drilling (or HDD)[3] project described in Rover's Application for a Certificate of Public Convenience and Necessity and attendant filings.[4] Based upon the evidence obtained during its investigation, Enforcement has concluded that Rover violated: Section 7(e) of the Natural Gas Act (NGA), 15 U.S.C. § 717f (2018); the Commission's Regulations, 18 C.F.R. § 157.20; and the Commission's Order Issuing Certificates (Certificate Order),[5] by intentionally including diesel fuel and other toxic substances and unapproved additives in the drilling mud while drilling under the Tuscarawas River in Stark County, Ohio. In addition, Enforcement concluded that Rover failed to adequately monitor the right-of-way at the site of the Tuscarawas River HDD operation, and that it improperly disposed of inadvertently released drilling mud that was contaminated with diesel fuel and hydraulic oil.

I. Executive Summary

This matter involves Rover's project to construct the $6.7 billion[6] Rover Pipeline Project (or Project), an approximately 711 mile long interstate natural gas pipeline

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[1] Energy Transfer Partners, L.P. is now Energy Transfer L.P.

[2] For a discussion of what constitutes "drilling mud," *see infra* at Part II.C.

[3] HDD is a trenchless method of installing underground pipelines and is described more fully in Part II.A.

[4] Rover, Application of Rover Pipeline LLC for a Certificate of Public Convenience and Necessity, Docket No. CP15-93-000 (filed Feb. 20, 2015) (Rover Application or Application). The initial application filing Rover made was on February 20, 2015, with pertinent attendant documents filed in the subsequent days and months. Enforcement Staff refers to the documents collectively as the Application or Application filings.

[5] The Commission issued a Certificate Order to Rover on February 2, 2017, though it denied Rover's request for a blanket certificate under 18 C.F.R. § 157.203, in part because of the conduct at issue in another investigation related to this project. *Rover Pipeline LLC,* 158 FERC ¶ 61,109 (2017), *order on clarification & reh'g*, 161 FERC ¶ 61,244 (2017), Petition for Rev., *Rover Pipeline LLC v. FERC*, No. 18-1032 (D.C. Cir. Jan. 29, 2018) (Certificate or Certificate Order).

[6] On May 2, 2019, Rover filed its Cost Comparison Statement, as required by 18 C.F.R. § 157.20(c), averring that Rover's final cost was then projected to be $6.7 billion. Rover, Cost Comparison Statement, Docket No. CP15-93-000 (filed May 2, 2019). Rover initially estimated the project would cost $4.22 billion in its Application filings. Application at 6.

designed to transport gas from the Marcellus and Utica shale supply areas through West Virginia, Pennsylvania, Ohio, and Michigan to outlets in the Midwest and elsewhere.[7] In April 2017, shortly after Rover began horizontal directional drilling under the Tuscarawas River in Stark County, Ohio, a large inadvertent release (IR) of 2 million gallons of drilling mud reached the ground surface and flowed into a nearby protected wetland. Testing of the IR contents conducted shortly thereafter by the Ohio Environmental Protection Agency (Ohio EPA) revealed the presence of petroleum hydrocarbons consistent with diesel fuel.

As described in this report, Enforcement Staff investigated Rover's conduct and the circumstances leading to the IR and found that Rover: (1) intentionally added diesel fuel and other toxic substances and unapproved additives to the drilling mud while drilling under the Tuscarawas River, (2) failed to adequately monitor the Project's right-of-way, and (3) improperly disposed of IR mud that was contaminated with diesel fuel and hydraulic oil. Enforcement Staff concluded that this conduct violated Section 7(e) of the NGA, the Commission's regulations, and the Commission's Certificate Order.

Contemporaneous evidence demonstrates that these violations were the product of a corporate culture—one that equally infected the executives managing the Tuscarawas River HDD and the onsite HDD crew—that favored speed and construction progress over regulatory compliance. This culture was fueled by Rover's execution of a $1.5 billion "time is of the essence" contract with a prime construction contractor—which constituted 35% of Rover's initial cost estimate for the Project.[8] It was also fueled by Rover's self-imposed four-month schedule to complete over 500 miles of the pipeline construction.[9] In addition to the contract requirements, Rover's Executive Vice President of Engineering and Construction, Yousif (Joey) Mahmoud, continually applied direct pressure on the Vice President of its prime contractor, Bobby Poteete, to speed up construction, which funneled down to its subcontractor and HDD crews onsite.[10] For instance, when drilling difficulties arose in the initial days of drilling at the Tuscarawas River and the Project began to experience delays, these delays and work stoppages by the crew due to safety and environmental issues were viewed by the head executive of Rover's subcontractor, Bill Colson, as a failure to understand the urgency of progressing with drilling.[11] It was in this strained work environment that HDD crew members began adding toxic diesel fuel and other toxic substances, as well as non-toxic but unapproved

[7] Application at 1, 6, and 10.
[8] *See infra* Part II.D.
[9] *See infra* Part II.F.
[10] *See infra* Part II.G.
[11] *Id.*

lubricants like "soap sticks" and "burritos,"[12] to the drilling mud to lubricate the drill and increase drilling speed. As detailed throughout this report, Rover HDD crew members have admitted under oath to doing so, and have provided numerous corroborating accounts of what occurred and how the conduct was openly discussed among onsite personnel.

Enforcement Staff recommends that the Commission issue an Order to Show Cause and Notice of Proposed Penalty to Rover, requiring it to show cause why (i) it did not violate Section 7(e) of the NGA, 15 U.S.C. § 717f; (ii) did not violate 18 C.F.R. § 157.20 of the Commission's regulations; (iii) did not violate the Commission's Certificate Order; and (iv) it should not pay a civil penalty of $40,000,000.

This Enforcement Staff report begins in Part II by relating the facts chronologically, primarily through citation to Rover's Application filings and related agreements, contemporaneous emails and documents gathered as part of this investigation, as well as to the testimony taken from witnesses during the investigation. The cited materials will be filed separately with the Commission as a non-public appendix, with a copy sent to counsel for Rover. Part III briefly outlines Enforcement's investigation. Part IV sets forth the legal framework established by the NGA and the Commission's Certificate Order. Part V details Enforcement Staff's analysis and findings, while Part VI addresses Rover's anticipated defense. Part VII articulates the relevant penalty considerations. Part VIII summarizes Enforcement's conclusions.

II. Factual Background

A. The Horizontal Directional Drilling Process

Horizontal directional drilling is a technique frequently used by natural gas pipelines to drill a horizontal hole beneath obstacles, and thereafter pull the pipe through the hole.[13] There are three main steps: drilling the pilot hole, reaming (enlarging the pilot hole to the full intended size), and pulling the pipe into and through the reamed hole.[14] To complete an HDD pipe installation, specialized construction contractors attach

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[12] "Soap sticks" and "burritos" refer to drilling industry standard lubricants that, had Rover gone through the required approval process with the Commission, would likely have been approved for Rover's use. *See, e.g.*, Testimony of Day Crew Foreman, Vol. I, at 128-29 (Aug. 15, 2017) (Day Crew Foreman Test. Vol. I); Testimony of Night Crew Mud Technician, at 76-77 (Nov. 1, 2017) (Night Crew Mud Technician Test.). However, these lubricants, while non-toxic, do not constitute drilling mud or form part of the drilling mud mixture approved by the Commission in its Certificate Order.

[13] *Pipelines: A Crucial Piece of Modern Infrastructure*, Am. Petroleum Inst. Energy, at 2 (last visited Oct. 4, 2021), https://www.api.org/-/media/APIWebsite/oil-and-natural-gas/primers/Horizontal%20Directional%20Drilling%20HDD%20Operations%20White%20Paper.pdf?la=en&hash=87ECB03D2D25B28DE401D6A23DA1C74D387339A7.

[14] *Id.* at 3.

steerable drill bits, reamers, tracking monitoring devices, and other tools to the end of a drill pipe string, then slowly drill a hole underneath an obstacle from one side to the other along a determined path.[15] Subsurface obstacles can be avoided by steering the drill bit horizontally and vertically while drilling the initial small-diameter pilot hole and reaching a precise exit point.[16] To help the drill bit cut through soil and rock, drilling fluid is pumped through the drill pipe string.[17] The drilling fluid exits the drill string through jet nozzles in the drill bit, lubricating and cooling the drill bit.[18] The drilling fluid also suspends and, under normal circumstances, carries the soil and rock cuttings from the hole back to the surface through the space between the drill pipe string and the wall of the hole (i.e., the annulus).[19] The pilot hole is enlarged by reaming it out with progressively larger diameter cutting tools.[20] During the reaming process, drilling fluid is again circulated through the hole.[21] Finally, the pipe is pulled into the enlarged hole.[22]

Normally, during the pilot hole and reaming stages of drilling, the drilling fluid that was added to the hole makes its way back to containment pits at the entry or exit points, where it then passes through a cleaning system to remove cuttings before being recirculated back into the hole.[23] In some instances, drilling fluid can escape the HDD hole and leak into the surrounding earth.[24] In extreme cases, drilling fluid can emerge at the ground surface or in any other undesired location such as wetlands or water bodies, which is known as an inadvertent release (or inadvertent return or IR).[25] IRs sometimes result from hydraulic fractures that occur when the drilling fluid pressure exceeds the strength of the surrounding material to contain it.[26] Irrespective of an IR's cause, an IR has the potential to release relatively large volumes of drilling fluid over a short period of time, particularly if high-pressure drilling fluid pumps are not immediately disengaged.[27]

The Commission requires natural gas companies to not only develop, but also comply with contingency and mitigation plans for the construction phase, including the

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[15] *Id.* at 2.
[16] *Id.*
[17] *Id.* at 3.
[18] *Id.*
[19] *Id.*
[20] *Id.* at 4, 5.
[21] *Id.* at 4.
[22] *Id.* at 5.
[23] *Id.* at 10.
[24] *Id.*
[25] *See id.* at 10-11.
[26] *Id.* at 10.
[27] *See id.* at 11.

measures to be taken in the event of an IR.[28] Due to the importance of limiting the potential effects of IRs, during construction, Rover personnel were required to periodically walk the HDD right-of-way to monitor for the release of drilling fluid to the surface.[29]

B. In February 2015, Rover Submits Its Initial Application Filings to Construct the Rover Pipeline

On February 20, 2015, Rover filed its Application for a Certificate of Public Convenience and Necessity to construct the Rover Pipeline Project. The Commission then conducted its standard analysis to determine whether the proposed project was required by the public convenience and necessity. Under this analysis, the Commission determines whether the public benefits of the project outweigh any adverse effects on specific and potentially affected economic interests.[30] If the Commission determines that the public benefits outweigh those adverse effects, the Commission then proceeds to its environmental analysis.[31] Specifically, the Commission takes a "hard look" at potential environmental impacts of the proposed action under the requirements of the National Environmental Policy Act or NEPA.[32] As part of the analysis, Commission staff in the Office of Energy Projects (OEP) completes an environmental assessment (EA) or an environmental impact statement (EIS).[33] If the Commission determines that the potential environmental impacts are unacceptable, it will deny authorization.[34] By contrast, if the Commission determines, based on the analyses conducted and comments submitted, that

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[28] *See, e.g.*, 15 U.S.C. § 717f(e) ("The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require."); 18 C.F.R. § 380.1 et seq. (2020) (regulations implementing the Commission's procedures under the National Environmental Policy Act of 1969 (NEPA)); Certificate Order, 158 FERC ¶ 61,109 at App. B (requiring Rover to follow the construction procedures and mitigation measures described in its application and supplements, including responses to staff data requests and as identified in the [environmental impact statement]"). *See also PennEast Pipeline Company, LLC*, Order Issuing Certificates, 162 FERC ¶ 61,053, at App. A (2018); *Tennessee Gas Pipeline Company, L.L.C.*, Order Issuing Certificate, 156 FERC ¶ 61,156, at App. B (2016).

[29] *See* FERC, Final Environmental Impact Statement for Rover Pipeline, Docket No. CP15-93-000, at App. G-1 at G1-6 (issued July 29, 2016) (Final EIS).

[30] FERC, Commission Statement of Policy on the Certification of New Interstate Natural Gas Pipeline Facilities, 88 FERC ¶ 61,227, at 61,745 (1999) (Certification Policy Statement).

[31] *Id.*

[32] Final EIS at 1-3.

[33] Certification Policy Statement, 88 FERC ¶ 61,227 at 61,745.

[34] *See id.* at ¶ 61,750; Final EIS at 1-3.

the proposed project can be constructed and operated in an environmentally acceptable manner, the Commission moves to the final step—issuance of a certificate order.[35] The certificate order that is subsequently issued "will contain the environmental conditions the Commission deems necessary and appropriate to ensure acceptable mitigation of potential environmental harms."[36]

C. In July 2016, the Office of Energy Projects Issues Its Final Environmental Impact Statement for the Proposed Rover Pipeline

During its review of Rover's Application, OEP staff issued a Final EIS in July 2016, which assessed the potential environmental effects of the construction and operation of the pipeline in accordance with NEPA.[37] One area of focus was the various HDD crossings that were planned by Rover, which were intended to minimize risks to sensitive resources such as wetlands and river crossings.[38] OEP Staff concluded that approval of the Project "would have some adverse and significant environmental impacts; however, these impacts would be reduced to acceptable levels with the implementation of *Rover's, . . . proposed mitigation and the additional measures recommended by staff in the final EIS*."[39]

To that end, and relevant here, the Final EIS contained explicit descriptions of the non-hazardous substances to be used in the HDD process. Specifically, in describing trenchless crossing methods to be permitted, the Final EIS stated that "throughout the drilling process, a slurry of *naturally occurring, non-toxic bentonite clay and water* would be pressurized and pumped through the drilling head to lubricate the drill bit, remove drill cuttings, and hold the hole open."[40] Similarly, in describing the water mixture allowed for lubricating the HDDs, the Final EIS stated "[t]hroughout the process of drilling and enlarging the hole, a slurry made of *non-toxic/non-hazardous bentonite clay and water*, referred to as drilling mud, would be circulated through the drilling tools to lubricate the drill bit, remove drill cuttings, and hold the hole open."[41]

In addition, the Final EIS contained an HDD Contingency Plan that required Rover to "closely and continually" monitor HDD activities and to conduct, as feasible, "visual and pedestrian field inspection along the drill path," "including monitoring the

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[35] *See* Certification Policy Statement, 88 FERC ¶ 61,227 at 61,746; Final EIS at 1-3 and 1-4.
[36] Final EIS at 1-3.
[37] *Id.* at 1.
[38] Application at 38.
[39] Final EIS at 1 (emphasis added).
[40] *Id.* at 2-31 (emphasis added).
[41] *Id.* at 4-88 (emphasis added).

wetlands and waterbodies for evidence of a release."[42] Rover was also required to properly dispose of any drilling mud released from an IR.[43]

D. In August 2016, Rover States that Its Project is Operating Under a "Necessity to Race to Market," and Three Months Later Executes a $1.5 Billion Contract with a Prime Contractor

After issuance of the Final EIS in July 2016, while its Application was still pending with the Commission, Rover began to take steps in anticipation of a certificate order. In August of 2016, Rover anticipated that the Commission would issue a certificate order in September or October of 2016, and that a notice to proceed with construction would subsequently be issued in October or November of 2016.[44] At that time in August of 2016, Yousif (Joey) Mahmoud, ETP and Rover's Executive Vice President of Engineering and Construction, referred to the Rover Pipeline Project as operating under a "necessity to race to market"[45] when speaking to prospective customers about the difficult environment Rover faced in terms of the time and expense for getting certain initial legal approvals that would be necessary in order to construct the pipeline.[46] Three months later, on November 28, 2016, and still without the certificate order that it anticipated receiving in September or October of 2016 , Rover executed a $1.5 billion contract with Precision Pipeline LLC (Precision), a drilling company, to construct the Rover pipeline.[47]

Rover staffed its Project with contract staff and third-party contractors. Precision, Rover's prime contractor, was the largest contractor on the Project[48] and was responsible for installing much of the pipeline by open trench installation and through HDDs under highways, railroads, and natural resources.[49] Precision is a subsidiary of MasTec, Inc., an

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[42] *Id.* at App. G-1 at G1-6.
[43] *See, e.g.*, *id.* at G1-7.
[44] Rover Pipeline Customer Meeting, at 5 (2016) Rover-00070525.
[45] *Id.* at 16.
[46] *Id.* (discussing the "Difficult Right-of-Way Environment"). A pipeline right-of-way is a piece of land, granted to a pipeline company, on top of and on either side of a natural gas pipeline. Also referred to as an easement, it provides certain interests and restrictions to the land that allow the pipeline company to install and maintain the pipeline. *See* Ohio State University, *A Landowner's Guide to Understanding Recommended Pipeline Standards and Construction Specifications* (May 23, 2016). https://ohioline.osu.edu/factsheet/anr-29.
[47] Master Construction Agreement between Rover Pipeline and Precision Pipeline (Nov. 28, 2016) MASTEC0051598 (MCA).
[48] Testimony of Yousif Mahmoud, at 47 (Oct. 5, 2017) (Mahmoud Test.).
[49] *Id.*; MCA at Ex. A, Scope of Work.

infrastructure engineering and construction company.[50] Precision was managed by Steve Rooney, its President, and Bobby Poteete, its Vice President.

The Master Construction Agreement (MCA) between Rover and Precision set forth a seven-month schedule for getting "Phase 1" of the pipeline in-service (i.e., by June 16, 2017), and an 11-month schedule for getting "Phase II" of the Project in-service (i.e. by November 1, 2017), "with time being of the essence at all times" for both phases.[51] The MCA specified a stringent feet-per-day progression rate and further stated that there would be "no additional time . . . for any slippage in such delivery dates" unless Rover conceded, in writing, that additional time was necessary and specified the extent of this additional time allowance.[52] The MCA also contained a Target Price Incentive "for timely completing the Work"[53] In addition, the MCA provided that any subcontractor used by Precision for the Project must first be approved in writing by Rover.[54] The MCA also provided that the contractor, Precision, does not "assume any obligations or commitments in the name of" Rover. [55]

Precision, in turn, executed an Intracompany Work Order with Pretec Directional Drilling, LLC (Pretec), an HDD company, to perform work as a subcontractor on the Rover pipeline. Formed by Precision in 2016, Pretec is majority-owned by MasTec, Inc., the parent company of Precision. Pretec was managed by Bill Colson, Pretec's General Manager, who executed the Intracompany Work Order on behalf of Pretec. Per the terms of the Intracompany Work Order, Pretec was hired to provide all manpower and equipment for the Rover Pipeline Project, and to operate on a six-day, twelve-hour per day shift that would include Sundays as necessary to meet a previously agreed upon schedule.[56] Pretec would supply a day shift crew and a night shift crew that collectively provided 24-hour, around-the-clock manpower for construction of the pipeline.[57] The day shift crew would be overseen by Pretec's Day Crew Foreman for the Tuscarawas River HDD, while the night shift crew would be overseen by Pretec's Night Crew

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[50] *See* MasTec Website, https://www.mastec.com/.
[51] MCA at 2; *id.* at Ex. A, Scope of Work, § 2.3.2. Phase I refers to the in-service date for Spread A, Line A, while Phase II refers to the in-service date for Spread A, Line B. *See id.* Line A covered over 500 miles. *See* Mahmoud Test. at 29.
[52] MCA at 2.
[53] *Id.* at 9.
[54] *Id.* at 22.
[55] *Id.* at 21.
[56] Precision and Pretec, Intracompany Work Order, at 1 (executed Mar. 10, 2017) MASTEC0051574-81; *id.* at Attachment 1, ¶ 10. The Intracompany Work Order was executed in March 2017, following the Commission's issuance of the Certificate Order in February 2017.
[57] *Id.*

Foreman for the Tuscarawas River HDD. Many crew members, including foremen and drillers, were eligible for bonuses from Pretec based, in part, on performance.[58]

E. Commission Issues a Certificate Order in February 2017, and the Order is Subject to Rover's Compliance with Express Environmental Conditions

On February 2, 2017, four months later than Rover had previously projected, the Commission issued the Certificate Order, granting approval of the Rover Pipeline Project subject to forty-five environmental conditions set forth in Appendix B.[59]

Environmental Condition # 1 of the Certificate Order required Rover to "follow the construction procedures and mitigation measures described in its application . . . and as identified in the EIS."[60] Rover has not disputed that this condition required it to use the non-toxic/non-hazardous drilling mud, described above, in the HDD process. Environmental Condition # 1 further stated that any modification to an environmental condition must be requested in a filing to the Commission, include a justification as well as an explanation for how the modification "provides an equal or greater level of environmental protection than the original measure," and be approved in writing by the OEP Director "**before using that modification**."[61]

Environmental Condition # 3 of the Certificate Order stated that prior to commencing any construction, each applicant must file an "affirmative statement" with the Commission, "certified by a senior company official, that all company personnel, environmental inspectors (EI), and contractor personnel will be informed of the EI's authority and have been or will be trained on the implementation of the environmental mitigation measures appropriate to their jobs **before** becoming involved with construction and restoration activities."[62]

Environmental Condition # 6 of the Certificate Order required Rover to file an "Implementation Plan for review and written approval by the Director of OEP," that

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[58] Testimony of Robert M. Poteete, at 32 (Oct. 24, 2018) (Poteete Test.); Testimony of Steve Rooney, at 133-34 (Oct. 5, 2018) (Rooney Test.); MasTec, Field Bonus Spreadsheet (2016) MASTEC0059060; MasTec, Field Bonus Spreadsheet (2017) MASTEC0059061. Bill Colson, the General Manager of Pretec, valued speed with respect to the performance of Pretec's crew at the Tuscarawas River. Colson, with the approval of Bobby Poteete, Vice President of Precision, determined the bonuses for the field employees based on the employee's performance rating. The bonuses were taken from a "block of money" set aside for bonuses by the Chief Financial Officer of MasTec. Poteete Test. at 34-41.

[59] *See* Certificate Order, 158 FERC ¶ 61,109 at PP 6, 281.

[60] *Id.* at App. B.

[61] *Id.*

[62] *Id.*

identified, among other things, "the company personnel (if known) and specific portion of the applicant's organization having responsibility for compliance."[63]

Environmental Condition # 7 of the Certificate Order required Rover to employ at least one EI per construction spread[64] who was required to be:

> a. responsible for monitoring and ensuring compliance with all mitigation measures required by the order and other grants, permits, certificates, or other authorizing documents;
>
> b. responsible for evaluating the construction contractor's implementation of the environmental mitigation measures required in the contract (see condition 6 above) and any other authorizing document;
>
> c. empowered to order correction of acts that violate the environmental conditions of the order, and any other authorizing document;
>
> d. a full-time position, separate from all other activity inspectors;
>
> e. responsible for documenting compliance with the environmental conditions of the order, as well as any environmental conditions/permit requirements imposed by other federal, state, or local agencies; and
>
> f. responsible for maintaining status reports.[65]

Environmental Condition # 10 of the Certificate Order required written authorization from the Director of OEP before Rover could place its Project into service, and further provided that "[s]uch authorization will only be granted following a determination that rehabilitation and restoration of areas affected by the Project are proceeding satisfactorily."[66]

On February 3, 2017, the day after the Commission issued its Certificate Order, and as required by 18 C.F.R. § 157.20(a), Rover filed its "affirmative statement" accepting the terms of the Certificate Order.[67] At that time, Rover projected the Rover

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[63] *Id.*

[64] Pipeline construction for projects like Rover are typically broken into manageable lengths called "spreads," with multiple spreads under construction simultaneously. *See* Rover Pipeline Facts, Construction, (last visited Oct. 4, 2021), https://www.roverpipelinefacts.com/construction.html. Each spread is composed of various crews that each have their own responsibilities.

[65] Certificate Order, 158 FERC ¶ 61,109 at App. B.

[66] *Id.*

[67] Rover, Acceptance of Commission Order, Docket No. CP15-93-000 (filed Feb. 3, 2017) (Rover Acceptance of Commission Order).

pipeline being in-service for Phase 1 by July 2017, and for Phase 2 by November 2017.[68] Thus, by comparison to its contract deadlines, Rover pushed back the in-service date for Phase 1 by less than a month, and made no changes to the in-service date for Phase 2. In addition, that day Rover also filed an Implementation Plan that identified Rover's Executive Vice President, Joey Mahmoud, several Rover managers, and Rover's Lead EIs as "Key Rover personnel having responsibility for environmental compliance."[69]

F. The Commission Issues a Notice to Proceed with Construction in March 2017, at Which Time Rover Plans to Construct Over 500 Miles of Pipeline in Approximately Four Months

On March 3, 2017, four months later than Rover had previously projected, the Commission issued Rover a notice to proceed with construction (Notice to Proceed or NTP) for the Rover Pipeline Project.[70] That issuance date left Rover's contractors with what Rover described as a "doable but aggressive" construction window of approximately four months to build over 500 miles of pipeline for Phase 1, which included clearing the right-of-way, stringing the pipe, welding the pipe, inspecting the pipe, including HDD drills at crossings, and restoring the right-of-way.[71] Even within that timeframe, Rover had certain earlier regulatory deadlines to meet, like completion of clearing the right-of-way, imposed by the U.S. Fish and Wildlife Service's clearing restrictions for migratory birds.[72] To keep up with the short timetable, Rover hired what it described as a "small army" of 12,000 construction workers—five times the number of workers that Rover claimed it would have had working simultaneously over a project of this size had such self-imposed time constraints not been present—and asked unions to train and certify new workers.[73]

Around March 2017, Rover also retained various staffing contractors, including Project Consulting Services, Inc. (PCS), Cleveland Integrity Services (CIS), and Kestrel Engineering Group (Kestrel), to provide temporary employees to Rover. Specifically, Rover hired an HDD Chief from PCS, a Day Utility Inspector and a Night Utility Inspector from CIS, and a Lead Environmental Inspector from Kestrel for Spread A, the portion of the overall construction where the IR at issue occurred.

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[68] Energy Transfer Press Release, Energy Transfer Announces Receipt of FERC Certificate for Construction of Rover Pipeline, Rover Pipeline (Feb. 3, 2017), https://www.roverpipelinefacts.com/documents/02172017/ETP_Press_Release-Rover_FERC_Certificate_Receipt_2-3-2017_Final.pdf (ETP Press Release).

[69] Rover, Implementation Plan, Docket No. CP15-93-000, at 30 (filed Feb. 3, 2017) (Rover Implementation Plan).

[70] FERC, Notice to Proceed with Construction, Docket No. CP15-93-000 (issued Mar. 3, 2017) (Delegated Order).

[71] *See* Mahmoud Test. at 29, 30.

[72] *See id.* at 29.

[73] *See id.* at 30-32, 37.

G. Rover HDD Crews Are Pressed to Begin Drilling, and the Pressure Continues Even as They Encounter Delays Due to Environmental Compliance Issues

HDD crews were slated to begin drilling at the Tuscarawas River on March 18, 2017.[74] Contemporaneous communications from that morning show that Bill Colson, Pretec's General Manager, was getting heavy pressure from Rover via Precision to get the HDD at the Tuscarawas River started. At around 8:30 AM that morning, Colson had the following text exchange with his Project Manager for the Rover Pipeline Project:[75]

> March 18, 2017, 8:36 AM
>
> Colson: Push hard, I know you do, but extra hard! I want all drills ready turn today/tomorrow!!!! Let me know as soon as they are ready so I can push on etc
>
> How long till [the Day Crew Foreman] is ready
>
> How long before we are good to turn on Indian fork and Tusc?
>
> Project Manager: [The Day Crew Foreman] should be going by noon or close to it, [the Indian Fork HDD Day Crew Foreman] will be this afternoon.
>
> Colson: I don't care what we have to do... [the Indian Fork HDD Day Crew Foreman] needs to be asap as well... I know everything takes time, but I am getting g my ass tore up

Other contemporaneous communications demonstrate that this pressure appears to have originated from the top of Rover's management. On that same day and within the same timeframe of Colson's text exchange with his Project Manager, Rover's Joey Mahmoud, as well as executives of Precision and Pretec, were directly communicating about drilling progress—or lack thereof, and details about the construction work.

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[74] J.D. Hair & Associates, Inc., Third-Party Review of Design and Construction Activities Rover Pipeline Project: 42-inch Tuscarawas River Crossing by Horizontal Directional Drilling, Docket No. CP15-93-000, at JDHAIR0010 (filed July 31, 2017) (J.D. Hair Report).

[75] MASTECTEXT00791-94; MASTECTEXT000796-97.

Specifically, less than two hours after Colson and Carter's text exchange, Precision's Vice President, Bobby Poteete, emailed Colson at 10:07 AM to press him about drilling progress: "Drop me a text as soon as we start turning on any crossing. Also, have [the Project Manager] continue to update the spreadsheet daily on each crossing until it strays [*sic*] turning."[76] Poteete then went on to discuss the reason why he was pressing Colson about the timing, explaining that the source of the pressure was Rover: "I need to document our challenges as joey [Mahmoud] will be all over me. We received the NTP [Notice to Proceed] on the 3rd and not able to turn the first crossing until the 18th. [H]e will blow a gasket at some point. That's him. . . ."[77]

Just over an hour later, at 11:27 AM, Bill Colson checked in with his Superintendent about drilling progress, and then checked in again at 12:50 PM and 2:25 PM. At that point, the sense of urgency coming from management was clearly evident to crew on the ground, as Colson merely texted the Superintendent a series of questions marks. As shown below, the Superintendent knew exactly what Colson was referring to. Significantly, when the Superintendent explained that there were delays due to the crew's focus on "button[ing] up" some safety and environmental issues that arose, Colson took this to mean that the HDD crew did not "understand the urgency here":[78]

March 18, 2017, 11:27 AM

Colson: Drilling yet

Superintendent: [The Day Crew Foreman] says he be turning shortly.

Colson: Giddy Up, let's go

March 18, 2017, 12:50 PM

Colson: [The Day Crew Foreman] in the ground?

Superintendent: I really wish I could tell you yes, but not as of 20 minutes ago. Should be getting close they were hooking up pump.

Colson: Drill, buddy, drill!!!!

[76] Email from Bobby Poteete to Bill Colson (Mar. 18, 2017) MASTEC010222.
[77] *Id.*
[78] MASTECTEXT00781-84; MASTECTEXT00786-90.

March 18, 2017, 2:25 PM

Colson: ??

Superintendent: Got dig pit and button up some safety and environmental issues, shouldn't take long.

Colson: Do they not understand or what? Do we need to kick it over to [the Second Day Crew Foreman] to fix... I'm about to fucking lose it here. [The Day Crew Foreman] was supposed to be ready to drill along one ago, I don't think they understand the urgency here... [The Indian Fork HDD Day Crew Foreman] says tonight....

Once drilling did begin, the pressure continued. That same day, crews lost returns of drilling mud and they were never regained.[79] The lost returns only exacerbated matters in this already time-sensitive environment. Two days later, on March 20, 2017, Precision's Vice President, Bobby Poteete, sent a text to Steve Rooney, Precision's President, relaying what a "nightmare" it was onsite that day due to lost returns and demonstrating just how plugged in high-level executives were to the most specific details of what was happening onsite, like the exact footage drilled. Poteete wrote:[80]

[79] In order to succeed with trenchless drilling, drills rely on a constant circulation of mud through the drill to the bit and back out of the hole to lubricate the drill stem and allow forward progress. Losing returns means that mud is pumping down into the hole but is not circulating back out and thus, is "lost" down the hole. The fundamentals of HDD operations are set forth above in Part II.A.

[80] MASTECEXT02003.

> March 20, 2017, 7:16 AM
>
> It's been a nightmare today.
>
> Tuscarawas - 625 ft out with pilot, drilling on...pat returns on joint 6 and have not got them back. Hauling a lot of water and mixing a lot o mud.

As a consequence of losing returns, new drilling mud had to be mixed via a mud system onsite, and then pumped into the hole, instead of being constantly recirculated. The Day Crew Foreman testified that when there were returns of drilling mud, the mud system "darn near runs itself."[81] However, when there were no returns, mixing and replacing the mud was a labor-intensive process. Workers had to cut 50-pound bags to mix clay with water all day and night. One crew member testified that he mixed 12 to 14 pallets, at 60 bags a pallet, of 50 pound bags in one shift.[82] This became a serious personnel issue, requiring other laborers to step in to perform the task, because of the enormously difficult nature of the work.[83] In addition, drilling often had to shut down to catch up on mud by bringing more water onsite or mixing more clay.[84]

Mud Machine

Bentonite Clay Bags[85]

[81] Day Crew Foreman Test., Vol. I at 49.
[82] Testimony of Night Crew Laborer # 2, at 34, 39 (Oct. 24, 2017) (Night Crew Laborer # 2 Test.).
[83] *See, e.g.*, Testimony of Night Crew Driller, at 59-60, 62-63 (Oct. 25, 2017) (Night Crew Driller Test.); Testimony of Day Crew Laborer # 2, at 31 (Sept. 12, 2017) (Day Crew Laborer # 2 Test.).
[84] *See* Night Crew Driller Test. at 43-44.
[85] OE Staff Photos, Mud Machine (June 2, 2017) IMG_20170602_124153303; OE Staff Photos, Bentonite Clay Bags (June 2, 2017) IMG_ 20170602_124008816.

On March 23, 2017, a few days into drilling at the Tuscarawas River, a small potential IR was discovered before the much larger IR that occurred in April. The response to this small IR further demonstrates that at the site of the Tuscarawas River HDD operation, regulatory compliance was viewed as a nuisance to construction progress. In a text exchange with his Project Manager that morning, Pretec's General Manager, Bill Colson, expressed his annoyance with having to temporarily suspend construction while the IR was being investigated, and relayed that he had notified Precision's Vice President, Bobby Poteete:[86]

> March 23, 2017, 8:36 AM
>
> Project Manager: Where they able to prove that it is actually and IR?
>
> Colson: No.... but we are still shot down
>
> I notified BP
>
> Hope it turns out not to be, so I can shove down their throats
>
> Project Manager: I hope so too.
>
> 2 miles from entry and 3 miles from the bit.

From April 2 to April 13, 2017, crews continued to face drilling difficulties and immense time pressures from Rover. Drilling issues were partially documented in contemporaneous drill logs, which show that the crews at the Tuscarawas River believed the reamer to be "balled up" or caked with mud.[87] Below are images of a clean and balled up reamer from the site of the Project:[88]

[86] MASTECTEXT00708-11.

[87] J.D. Hair Report at JDHAIR0214 and JDHAIR0228.

[88] OE Staff Photo, Clean Reamer (Jun. 2, 2017) (IMG_20170602_123855271); CIS Photo, Balled Up Reamer (April 3, 2017) (CIS0002218). This picture of the balled-up reamer onsite was taken ten days before the IR.

Clean Reamer

Balled Up Reamer
April 3, 2017

H. Rover HDD Crews Begin Using Toxic Diesel Fuel and Other Unlawful Substances and Unapproved Additives to Speed Up Drilling Progress

It was when the Rover HDD crews continued experiencing drilling difficulties on April 2, 2017, that they began using unlawful measures to lubricate the drill in order to keep up with job progress demands.[89] As described below, multiple Rover HDD crew members admitted to, and provided corroborating accounts of, intentionally adding toxic diesel fuel and other toxic substances and unapproved additives to the drilling mud during this period. Rover's Lead EI for Spread A, testified that Rover had a 2,000-gallon tank of diesel fuel onsite, as well as a smaller tank, and estimated that there were "2500 gallons or so" in total of diesel fuel stored onsite.[90]

1. Night Crew Foreman

The Night Crew Foreman was the first to admit to adding diesel fuel to the drilling mud, and provided the following testimony regarding the origin of the idea:

> Q: Did you add diesel fuel to the drilling mud at the HDD of the Tuscarawas River?
>
> A: Yes.
>
> Q: Okay. Did you ask other people to do it?
>
> A: I don't believe I did, but it was -- once I did it, I believe that they thought it was okay to do it.

---

[89] Testimony of Night Crew Foreman, at 19 (Oct. 11, 2017) (Night Crew Foreman Test.) (Night crew used diesel to combat reamer difficulties); Testimony of Night Crew Laborer # 1, at 27 (Oct. 24, 2017) (Night Crew Laborer # 1 Test.) (pinpoints diesel use between his start date and the IR).

[90] Testimony of Lead Environmental Inspector for Spread A, at 66 (July 21, 2017) (Lead EI Spread A Test.).

***

Q: Was it kind of everybody on your crew was doing it or just a few?

A: [The Night Crew Mud Technician] is the only one that I remember. I've heard there was other ones doing it, and I honestly never really seen them.

***

Q: Is it fair to say that you did it because you thought it would help the drill?

A: Yes.

Q: Okay. How so?

A: The reamer was getting stuck, and it acts as a lubricant.

Q: Okay. The diesel fuel act as a lubricant?

A: It did.

***

Q: What made you think to use it?

A: From the daytime driller.

Q: Okay. Who is that?

A: [The Day Crew Driller].

Q: Okay. And was he using it?

A: He told me he did.[91]

The Night Crew Foreman also admitted to using "burritos," a non-toxic but unapproved lubricant, on multiple occasions to lubricate the drill, and admitted that he did not record his use of it "[b]ecause we weren't supposed to use it."[92]

2. Night Crew Mud Technician

Subsequently, the Night Crew Mud Technician admitted to adding diesel fuel and unapproved additives to the drilling mud, and that he did so at the instruction of the Night Crew Foreman, in order to speed up drilling progress:

Q: Were you ever told to put diesel in the hole?

A: Yes, I was.

Q: And who -- who told you to do that?

A: My foreman.

---

[91] Night Crew Foreman Test. at 18-20.
[92] *Id.* at 107-109.

Q: [The Night Crew Foreman]?

A: Yep.

Q: Was this after you had been using soap sticks?

A: Uh-huh; yeah.

Q: Was this because the soap sticks and burritos weren't doing the job?

A: That's exactly why.

***

A: And I think he told [Night Crew Laborer # 2] to one time. Otherwise, he did it a few times himself.

***

Q: Do you remember how many times -- did you ever see [Night Crew Laborer # 2] do it?

***

A: Once.

Q: Did you ever see [the Night Crew Foreman] do it?

A: Yep.

Q: And how many times?

A: Not for certain. Two or three.

Q: And how many times did he tell you to do it?

A: I'm not certain on that either.

Q: You can estimate.

A: Yeah, I'd say four or five times.[93]

The Night Crew Mud Technician also testified that the Night Crew Foreman later told him, after they had already used the soap sticks and burritos, that "none of these were FERC-approved additives and we are not allowed to use them."[94]

The Night Crew Mud Technician further testified about the mechanics of the Rover HDD crew members adding diesel fuel to the drilling mud, explaining that they were similar to pumping gas into a car at a gas station:[95]

[93] Night Crew Mud Technician Test. at 80-81.
[94] *Id.* at 76-77.
[95] *Id.* at 83.

Q: And when you did it, when you put the -- so was it just like when you're filling up a car, it's that kind of handle?

A: Yeah, that's exactly it, except just a little bit bigger.

Q: So you put that into the pipe. Did you have to actually squeeze and hold it, or like at the gas station, can you just like click it?

A: Yeah, it had a clicker, and because we weren't getting returns and there was nothing in the pipe, it never clicked off.[96]

3. Night Crew Laborer # 1

Night Crew Laborer # 1, similarly testified that prior to the April IR, he saw the Night Crew Foreman putting diesel fuel into the drilling mud on one occasion.[97] When asked how long he observed the Night Crew Foreman was doing this for, he testified: "I would say that it seemed like at least 10 minutes."[98]

4. Night Crew Driller

A Night Crew Driller admitted that the Day Utility Inspector and Night Utility Inspector openly discussed adding diesel fuel to the drilling mud in his presence while they were in the drill cab transitioning between the day and night shifts.[99] The inspectors, who were retained by and reported directly to Rover, expressed no concern for the conduct. The Night Crew Driller testified that the two inspectors said at the time: "oh, yeah, what's it going to hurt. Pump some diesel down there. We got no returns. Who is ever going to know. What's it going to hurt."[100]

5. Night Crew Laborer # 2

Night Crew Laborer # 2 testified that he heard the Night Crew Mud Technician and Night Crew Foreman discussing a couple of times over the radio adding "ruby red" or diesel fuel to the drilling mud.[101] He further testified that the Night Crew Mud Technician directed him to add an unapproved additive, "burritos," to the drilling mud and demonstrated for him how to do it.[102] Night Crew Laborer # 2 explained that this instruction to add "burritos" to the drilling mud came from the Night Crew Foreman.[103]

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[96] *Id.*
[97] Night Crew Laborer # 1 Test. at 27.
[98] *Id.*
[99] Night Crew Driller Test. at 95-100.
[100] *Id.* at 100.
[101] Night Crew Laborer # 2 Test. at 42-43. Night Crew Laborer # 2 and other HDD crew members testified that "ruby red" refers to diesel fuel. *See, e.g.*, *id.*; Night Crew Mud Technician Test. at 82-83.
[102] Night Crew Laborer # 2 Test. at 29.
[103] *Id.*

He further testified that he added burritos to the drilling mud "quite a few" times, and estimated the frequency to be "five or six a shift."[104]

6. Night Crew Operator

A Night Crew Operator testified that Day Crew Laborer # 1 referenced below, told her that he saw Day Crew Laborer # 2 and the Day Crew Mud Technician add diesel fuel to the drilling mud.[105] The Night Crew Operator further testified that she herself was told by the Night Crew Foreman to "dump" hydraulic oil into the mud system, and told by a vacuum truck driver to dump the equipment grease and water that puddled into onsite containments into the mud system, and that she did so.[106] While directing the Night Crew Operator to add hydraulic oil to the drilling mud, the Night Crew Foreman displayed the same lack of concern about adding hydraulic oil to the drilling mud, as the Rover Day Utility Inspector and Night Utility Inspector did about adding diesel fuel, responding: "It won't hurt anything."[107] The Night Crew Operator provided the following testimony:

> A: The hydraulic oil that we took out of the drill rig power unit, I was told to dump it into the mud system, and I did.
>
> Q: That is the --
>
> A: The 5-gallon bucket.
>
> Q: The 5-gallon bucket that we talked about -- about the leak from the power unit?
>
> A: Yes.
>
> Q: Okay. Do you know when approximately that was?
>
> A: It was still in the pilot hole, because the mud system was still on rig side. So it was in -- within the first week or so.
>
> Q: Who told you to do that?
>
> A: [The Night Crew Foreman].
>
> Q: Do you know why he told you to do that?
>
> A: He said it wouldn't hurt anything. I said, It's hydraulic oil. He said, It won't hurt anything. It's probably the easiest way to get rid of it.
>
> Q: Do you know anything about any other fluids going into the mud that shouldn't have been?

---

[104] *Id.* at 27.
[105] Testimony of Night Crew Operator, at 77-80 (Nov. 13, 2017) (Night Crew Operator Test.).
[106] *Id.* at 115-17.
[107] *Id.* at 116.

A: No, I don't. Oh, wait. Sometimes we would suck out the containments, which is the -- the containments that held the power -- the power unit, the containment that held the light plants, the containment that held the fuel cans. And we would suck those out with the vac truck, and they would put that down the hole. I don't know. I mean, sometimes they would haul it away, and sometimes they would put it down the hole. So --

Q: What was it that you were sucking out?

A: It was like, you know, if it rained and the water would be in the containment, but yet there was a slight bit of, say, fuel or oil off the can, or maybe the light plant leaked or something, you know. If it had any kind of grease or anything, that would have been in that.

Q: Who told you -- or who, in fact, put that back in the hole?

A: The vac truck driver . . . .

***

A: Yeah. And that was direct order from someone else. I mean, he wouldn't have done it on his own. If that's what we were told to do, just suck those out and put it down the hole.[108]

7. Day Crew Laborer # 1

Day Crew Laborer # 1 testified that prior to the April IR he saw the Day Crew Mud Technician add diesel fuel to the drilling mud,[109] and on multiple occasions he heard the Day Crew Foreman instruct the crew over the radio to add "ruby red" into "the mud system so it could get mixed up."[110]

8. Vacuum Truck Driver

A Vacuum Truck Driver testified that Day Crew Laborer # 2 admitted to him that he added diesel fuel to the drilling mud, and "was almost boasting about it," stating to the Vacuum Truck Driver: "'of course, there's diesel fuel in there, I dumped it in there. . . . [The Day Crew Foreman] told me to do it. I dumped 2,500 gallons.'"[111] Notably, as described above, Rover's Lead EI for Spread A, corroborated that Rover had "2500 gallons or so" of diesel fuel stored onsite.[112]

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[108] *Id.* at 115-16.
[109] Testimony of Day Crew Laborer # 1, at 81 (Mar. 9, 2018) (Day Crew Laborer # 1 Test.).
[110] *Id.* at 81, 118-22.
[111] Testimony of Vacuum Truck Driver, at 68-69 (Aug. 23, 2017) (Vacuum Truck Driver Test.).
[112] Lead EI Spread A Test. at 66.

9. Day Crew Driller

A Day Crew Driller whom one witness testified was the source of the idea of adding diesel fuel to the drilling mud, admitted that he suggested using diesel fuel to Night Crew Driller and Night Crew Foreman, but that he was only "joking."[113] The Day Crew Driller further testified that Rover's Day Utility Inspector contemporaneously showed him an image of what the Day Crew Driller believed was the Day Crew Foreman putting diesel fuel in the drilling mud.[114]

10. Day Crew Foreman

Initially, the Day Crew Foreman categorically denied adding diesel fuel to the drilling mud and instructing others to do so.[115] However, his statements are directly contradicted by multiple other crew members, including crew members that he supervised. The Day Crew Foreman did, however, admit to adding an unapproved additive ("soap sticks") to the drilling mud, but claimed that it was an "accident."[116] The Day Crew Foreman admitted that at the time he used the "soap sticks," he knew that they had not been approved by the Commission for Rover's use.[117] When the Day Crew Foreman was questioned by Enforcement a second time, subsequent to other HDD crew members admitting to adding diesel fuel, hydraulic oil, contaminated containment fluid, and non-toxic but unproved additives to the drilling mud, the Day Crew Foreman refused to answer any questions and instead asserted his Fifth Amendment privilege against self-incrimination.[118]

I. Large Inadvertent Release and Discovery of Diesel Fuel in Drilling Mud

On April 13, 2017, a large IR, later determined to be of nearly 2 million gallons of drilling mud, was discovered on the west/exit side of the Tuscarawas River.[119] Rover's Day Utility Inspector, who ultimately discovered the IR, confirmed that prior to the IR, the right-of-way was not being regularly monitored:

> If you're not getting returns in that pit, you need to have somebody walking all the time, 24 hours a day with a flashlight, and [the IR] would have never happened . . . . We may have had a little bit of mud come up, but that should have

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[113] *See, e.g.*, Testimony of Day Crew Driller, at 125-28 (Feb. 5, 2018) (Day Crew Driller Test.).
[114] *Id.* at 145-48.
[115] *See* Day Crew Foreman Test., Vol. I at 135-37, 146, 149.
[116] *See id.* at 128.
[117] *See id.* at 128-29.
[118] Testimony of Day Crew Foreman, Vol. II, at 196-97 (Apr. 25, 2018) (Day Crew Foreman Test., Vol. II).
[119] J.D. Hair Report at JDHAIR0005-06.

> been -- when I'm drilling and I don't have flow, you automatically -- that is a person's job, get him out there walking. If you need two people out there because it's not safe, get two people walking. I mean, it's a multimillion-dollar [*sic*] project . . . I'm pretty much the only one that was walking, you know. *And if I had put the waders on a week before, you know, maybe it wouldn't have been so bad.*[120]

After the large IR, as a further testament to the hyper-focus on drilling progress, Pretec's General Manager, Bill Colson, and the Day Crew Foreman were nonetheless making plans to move the drill stem in order to prevent a hole collapse while Rover awaited permission from the Commission to recommence drilling on April 22, 2017. On April 21, 2017, Colson told his Day Crew Foreman that he could "pump a little mud" and "trip a few joints back and forth to try to ease everything, but they'd prefer it be done at night."[121] The Day Crew Foreman responded "10 4. I will do it first thing in the morning. No one will be the wiser."[122]

From April 13 to August 6, 2017, Precision estimates that it spent approximately $6,477,613.07 cleaning the IR,[123] including disposal of the drilling mud released in the IR at a local sand and gravel disposal pit and a local quarry.[124] On or about May 12, 2017, the Ohio EPA informed Rover of hotline tips alleging that diesel fuel was contained in the drilling mud at Tuscarawas River.[125] On May 26, 2017, the Ohio EPA advised Commission staff and Rover that Ohio EPA's sampling of the mud at the IR revealed the presence of petroleum hydrocarbons consistent with diesel fuel.[126]

III. Enforcement's Investigation

On June 1, 2017, OEP publicly referred this matter to Enforcement for investigation, and urged Rover to cooperate.[127] Enforcement's investigation sought to

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[120] Testimony of Day Utility Inspector, at 111-12 (Nov. 29, 2017) (Day Utility Inspector Test.) (emphasis added).
[121] MASTECTEXT00484-86.
[122] *Id.*
[123] Tuscarawas IR Cleanup Summary (Oct. 15, 2017) MASTEC0058126.
[124] *See* OEP, Letter re: Mitigation Measures Necessary for In-Service Authorization, Docket No. CP15-93-000, at 1 (issued July 12, 2017) (OEP Mitigation Measures Letter); Tuscarawas IR Cleanup Summary.
[125] Mahmoud Test. at 147-50; Testimony of Buffy Thomason, at 114-18 (Sept. 15, 2017) (Thomason Test.).
[126] Email from Ed Gortner to Joey Mahmoud (May 26, 2017, 2:57 PM) THDD-00015687 (EPA informs Rover of test results).
[127] FERC, Letter to Rover, Docket No. CP15-93-000, at 2 (issued June 1, 2017) (regarding the drilling fluid composition found in samples from various locations near the Tuscarawas River HDD).

determine whether and why diesel fuel was used in the drilling mud at the Tuscarawas River HDD operation. Enforcement Staff immediately served its first set of data requests on Rover.[128] On June 2, Enforcement Staff visited the site of the Tuscarawas River HDD and the IR. Over the next two weeks, Enforcement Staff requested testimony from key Rover witnesses. On June 23, Rover claimed to "fully cooperate" with the investigation, but could not produce key witnesses because it did not want to "disrupt or negatively impact Rover's ongoing activities."[129] Rover produced its first documents on June 26.[130] Rover did not produce its first witness until August 18, when the first and least relevant Rover witness appeared for testimony.[131]

On July 12, 2017, after learning of the presence of diesel fuel in the IR mud, OEP sent Rover a letter, which OEP also submitted to the public FERC docket, requiring that Rover, pursuant to Environmental Condition # 10 in the Certificate Order, remove "all drilling mud and drill cuttings with the presence of petroleum hydrocarbons from the Oster Sand and Gravel Disposal Pit and the Beach City Quarry to an Ohio Environmental Protection Agency approved solid waste disposal site."[132] The letter also required that going forward, Rover must remove and dispose of any remaining contaminated IR mud to an Ohio EPA approved solid waste disposal site.[133] In the letter, OEP further explained that "[p]rior to authorizing future HDDs, Commission staff also anticipates the development of a set of protocols to prevent future drilling mud contamination."[134] OEP admonished that "it is important that Commission staff gain at least a preliminary understanding of the underlying causes for the presence of petroleum hydrocarbons in the drilling fluid at the HDD of the Tuscarawas River," and expressed "concern[ ] that the lack of availability of Rover's personnel and its contractors' personnel is delaying our ability to determine the relevant facts."[135]

On July 31, 2017, third-party analyst J.D. Hair released a report prepared at the request of the Commission, regarding the circumstances that led to the IR. J.D. Hair reviewed "[Pretec] and Rover's documentation of daily HDD construction operations and daily IR monitoring," and found that their documentation of these activities "was very limited."[136] Based on the information available from that documentation, J.D. Hair concluded that the steps Pretec took to restore drilling fluid circulation after returns were

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[128] OE Data Requests to Rover (June 1, 2017).
[129] Email from Rover to OE (June 23, 2017, 5:05 pm).
[130] Rover Letter to OE re production for June 1, 2017 Data Request (June 26, 2017).
[131] Testimony of Stacey Boultinghouse (Aug. 18, 2017) (Boultinghouse Test.).
[132] OEP Mitigation Measures Letter at 1.
[133] *Id.* at 2.
[134] *Id.*
[135] *Id.*
[136] J.D. Hair Report at JDHAIR0005.

lost, "did fall short of common HDD industry practices."[137] J.D. Hair also expressed its opinion that the IR "was due to a combination of weak overburden soil beneath the wetland and annular pressure increases that resulted from [Pretec's] remedial actions" taken when drilling difficulties emerged at the Tuscarawas River.[138]

J.D. Hair also disputed Pretec reports suggesting that the IR occurred over a 24-hour period, immediately after the right-of-way had been inspected. J.D. Hair's analysis found that in order for 2 million gallons of drilling mud to have accumulated, "the IR likely occurred 3 to 4 days prior to being discovered."[139] Rover's Day Utility Inspector confirmed in testimony that the right-of-way was not being regularly monitored.[140] Based on its review, J.D. Hair recommended, among other technical drilling changes, that Rover "[u]se third party inspectors for independent monitoring and documenting HDD operations, as well as full-time inspectors to check for inadvertent releases of drilling fluid."[141]

On August 4, 2017, Rover responded to the J.D. Hair Report in a docketed letter, and theorized that "diesel concentrations could have been caused by an inadvertent and unreported spill or leak from equipment operating during the clean-up of the IR, or it could have been the deliberate or malicious act of individuals opposed to the project. Given the extensive inspection and oversite [*sic*] at this and other sites along the project, it is difficult to imagine that this occurred from an unreported spill or leak."[142] Rover has not changed, in any docketed on-the-record statement to the Commission, its narrative about the source of the diesel fuel in the IR mud.

On August 21, 2017, the Commission authorized Enforcement to conduct a non-public, formal investigation.[143] On August 28, Enforcement issued subpoenas for documents (re-issuing the previous data requests under subpoena) with return dates of September 13 and September 27.[144]

On August 29, 2017, in a letter to Enforcement, Rover repeatedly denied the use of diesel fuel, arguing that the positive petroleum hydrocarbon test results did not necessarily indicate the presence of diesel fuel, and posited that the testing could be

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[137] *Id.* at JDHAIR0006.
[138] *See id.*
[139] *See id.* at JDHAIR0007, JDHAIR0061.
[140] Day Utility Inspector Test. at 111-12.
[141] J.D. Hair Report at JDHAIR0008.
[142] Rover, Letter re: J.D. Hair Report and FERC Letter Orders, Docket No. CP15-93-000, at 4-5 (filed Aug. 4, 2017).
[143] FERC, Order of Non-Public, Formal Investigation, Docket No. IN17-04 (issued Aug. 21, 2017).
[144] Enforcement subpoena to Rover for Document Production of Documents (Aug. 28, 2017) (Second Data Request).

explained by way of sabotage or accident.[145] Rover stated that there was "a dearth of evidence to support" Enforcement's allegations, that "'Diesel Range Organics' are not the same thing as diesel fuel,"[146] and that "Rover is not aware of any testing that shows diesel fuel contamination of the drilling mud at the HDD site *in contravention of the Commission Order.*"[147]

On October 3, 2017, Rover's Executive Vice President of Engineering and Construction, Joey Mahmoud, submitted an affidavit to Enforcement Staff regarding his failure to preserve data despite preservation notices issued by OEP and Enforcement Staff.[148] Specifically, Mahmoud stated that after getting locked out of his phone, he reset it and thus deleted all of the data stored on it, and then restored the phone to whatever the "the most recently available iCloud backup" was at the time.[149] While Mahmoud stated that it is his "understanding that the Company has taken steps to retrieve any information that may not have been restored to the phone," he later acknowledged in testimony that Rover had identified gaps in his phone records.[150]

Enforcement issued an additional subpoena on November 8, 2017, with a return date of December 7, 2017.[151] Rover's production was purportedly complete on March 27, 2018.[152] However, on May 21, 2018, Rover produced more than 4,000 documents that were previously withheld or redacted, and that were not included in their privilege claims.[153] Rover's production was complete nearly a year from the original data request (June 1, 2017) and eight months from the first subpoena deadlines (September 13 and September 27, 2017). From June 27, 2017 to present, Enforcement reviewed more than 25,000 documents produced by Rover and third parties. From July 18, 2017 to October 26, 2018, Enforcement took the testimony of 24 witnesses.

On May 10, 2019, Enforcement Staff issued preliminary findings to Rover.[154] On January 19, 2021, Enforcement Staff issued a letter providing notice pursuant to 18 C.F.R. § 1b.19 that Enforcement would be recommending that the Commission issue an

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[145] Letter from Rover to Enforcement (Aug. 29, 2017).
[146] *Id.*
[147] *Id.* at 1-2 (emphasis in original).
[148] *See* Affidavit of Joey Mahmoud (Oct. 3, 2017) (Mahmoud Aff.).
[149] *Id.* P 7.
[150] *Id.* P 8; Mahmoud Test. at 219-21.
[151] Enforcement Subpoena to Rover for Document Production of Documents (Nov. 8, 2017) (Third Set of Data Request).
[152] Rover Letter to Enforcement (Mar. 27, 2018). At the time, Rover made no indication that it would produce additional documents in May 2018. To the contrary, Rover indicated a privilege log was forthcoming and insisted it would not produce a privilege log until its production was complete.
[153] Rover Letter to OE re Production Responsive to Data Requests (May 21, 2018).
[154] Enforcement Staff Preliminary Findings Letter to Rover (May 10, 2019).

Order to Show Cause why Rover should not be made the subject of a public enforcement proceeding and pay a civil penalty.[155] To-date, Rover has not provided a substantive response to Enforcement's preliminary findings or Enforcement's § 1b.19 notice.

IV. Legal Framework

A. Natural Gas Act

Interstate natural gas pipeline construction is governed by NGA Section 7, which provides:

> No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations.[156]

Pursuant to Section 7, in order to begin construction on an interstate natural gas pipeline, a company must receive approval from Commission in the form of a certificate of public convenience and necessity.[157] The Commission will issue a certificate only if "it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of [the Act] and the requirements, rules, and regulations of the Commission thereunder" and if construction and operation of the pipeline "is or will be required by the present or future public convenience and necessity."[158]

As described above, Rover filed its requisite Application on February 20, 2015, and the Commission issued the Certificate Order on February 2, 2017.

1. Natural Gas Act Section 22(a)

Section 22(a) of the NGA gives the Commission authority to impose a civil penalty for a violation of Commission orders, including certificates of public convenience

[155] Enforcement Staff 1b.19 Letter to Rover (Jan. 19, 2021).
[156] 15 U.S.C. § 717f(c)(1)(A).
[157] *See Texas E. Transmission Corp.*, 90 FERC ¶ 61,278, at 61,921 (2000).
[158] 15 U.S.C. § 717(f)(e).

and necessity, of $1 million per day per violation for as long as the violation continues, as adjusted for inflation.[159]

2. Natural Gas Act Section 7(e)

NGA Section 7 also provides the Commission with the authority to attach to a certificate of public convenience and necessity "such reasonable terms and conditions as the public convenience and necessity may require."[160] In other words, the Commission may require certificate holders, such as Rover, to meet certain conditions—such as environmental conditions—in connection with their construction and operation of interstate natural gas pipelines.[161]

B. Commission Regulations, 18 C.F.R. § 157.20

Section 157.20 of the Commission's regulations, which addresses general conditions applicable to certificates, similarly provides that the "terms and conditions" that the Commission finds are "required by the public convenience and necessity, shall attach to the issuance of each certificate and to the exercise of the rights granted thereunder."[162]

C. Commission's Certificate Order

Environmental Condition # 1 of the Certificate Order required Rover to follow the construction procedures and mitigation measures described in its application and as identified in the Final EIS.

Rover was therefore required under NGA Section 7 to comply with the conditions contained in the Commission's Certificate Order, including Environmental Condition # 1, which mandated that Rover "follow the construction procedures and mitigation measures described in its application . . . and as identified in the EIS [Environmental Impact Statement]."[163]

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[159] 15 U.S.C. § 717t-1; *Civil Monetary Penalty Inflation Adjustments*, 158 FERC ¶ 61,017, at P 8 (2017). *See also Algonquin Gas Transmission*, *LLC*, 154 FERC ¶ 61,048, at P 14 n.19 (2016) ("Pipeline companies that violate certificate conditions are subject to general and civil penalties.").

[160] 15 U.S.C. § 717f(e).

[161] *See, e.g.*, *Algonquin*, 154 FERC ¶ 61,048 at P 14 n.19 ("Pipelines cannot begin construction before receiving authorization from the Director of the Commission's Office of Energy Projects pursuant to a certificate order's conditions."); *Iroquois Gas Transmission Sys., L.P.*, 52 FERC ¶ 61,091, at 61,402 n.195 (1990) ("The Commission has a longstanding practice of issuing certificates conditioned on the completion of environmental work or the adherence by the applicants to environmental conditions.").

[162] 18 C.F.R. § 157.20.

[163] Certificate Order, 158 FERC ¶ 61,109 at App. B.

The Final EIS stated that "throughout the drilling process, a slurry of *naturally occurring, non-toxic bentonite clay and water* would be pressurized and pumped through the drilling head to lubricate the drill bit, remove drill cuttings, and hold the hole open."[164] Further, in describing the water mixture to be used for lubricating the HDDs, the Final EIS stated "[t]hroughout the process of drilling and enlarging the hole, a slurry made of *non-toxic/non-hazardous bentonite clay and water*, referred to as drilling mud, would be circulated through the drilling tools to lubricate the drill bit, remove drill cuttings, and hold the hole open."[165]

The Final EIS explicitly enumerated the only substances (non-toxic bentonite clay and water) Rover was permitted to use in the HDD process.[166] The Final EIS also required Rover to "closely and continually" monitor HDD activities and to conduct, as feasible, "[v]isual and pedestrian field inspection along the drill path," "including monitoring the wetlands and waterbodies for evidence of release."[167] Additionally, the Final EIS required Rover to properly dispose of any drilling mud released from an IR.[168]

V. Analysis and Findings

A. Rover Violated the NGA, the Commission's Regulations, and the Commission's Certificate Order

1. Rover HDD Crews Intentionally Used Diesel Fuel and Other Toxic Substances and Unapproved Additives in the Drilling Mud

As further described below, Enforcement found that from April 2 through April 13, 2017, multiple HDD crew members employed by Rover's contractors intentionally added toxic diesel fuel, hydraulic oil, contaminated containment fluids, and unapproved lubricants such as "soap sticks" and "burritos" to combat drilling difficulties and keep up with drilling progress demands.

Witnesses testified that at least the following seven Rover HDD crew members added diesel fuel to drilling mud at the Tuscarawas River HDD: Night Crew Foreman, Night Crew Mud Technician, Day Crew Foreman, Day Crew Mud Technician, Night Crew Laborer # 2, Day Crew Laborer # 2, and Day Crew Driller.[169] The Night Crew Foreman and Night Crew Mud Technician admitted in testimony to engaging in this conduct.[170] Their testimony further shows that diesel fuel was routinely added to the

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[164] Final EIS at 2-31 (emphasis added).
[165] *Id.* at 4-88 (emphasis added).
[166] *Id.*
[167] *Id.*at App. G-1 at G1-6.
[168] *See, e.g.*, *id.* at G1-7.
[169] *See supra* Part II.H (describing testimony of Night Crew Foreman, Night Crew Mud Technician, Night Crew Laborer # 1, Day Crew Laborer # 1, and Vacuum Truck Driver.
[170] *Id.*

drilling mud.[171] The Night Crew Mud Technician testified to adding diesel fuel to the drilling mud five times, and testified to seeing the Night Crew Foreman adding diesel fuel three times.

Witnesses also testified that at least the following four Rover HDD crew members added unapproved additives, like "soap sticks" or "burritos" to lubricate the drill and speed up drilling progress: Night Crew Foreman, Night Crew Mud Technician, Night Crew Laborer # 2, and Day Crew Foreman.[172] Additionally, one witness admitted to adding hydraulic oil to the drilling mud on at least one occasion, and contaminated water from containments on more than one occasion.[173]

Rover's use of diesel fuel, hydraulic oil, contaminated containment fluids, and unapproved additives to lubricate the drill, constituted clear violations of Section 7(e) of the NGA, the Commission's implementing regulation at 18 C.F.R. § 157.20, and the Commission's Certificate Order. Environmental Condition # 1 of the Certificate Order imposed the condition, pursuant to Section 7(e) of the NGA, that Rover "follow the construction procedures and mitigation measures described in its application . . . and as identified in the EIS,"[174] and to request any modification to an environmental condition in a filing to the Commission "before using that modification."[175] The EIS permitted Rover to use *only* non-toxic bentonite clay and water in its drilling fluid.

2. Rover HDD Crews Failed to Monitor the Right-of-Way

Enforcement also found that Rover HDD crews at the Tuscarawas River failed to monitor the right-of-way. As demonstrated above, potential IRs slowed progress. Rover's Lead EI for Spread A believed right-of-way monitoring to be the job of Pretec alone. However, he was listed in Rover's Application as an individual responsible for environmental compliance,[176] and Environmental Condition # 7 required Lead EIs to be responsible for evaluating the construction contractor's implementation of environmental mitigation measures, and for documenting compliance with the environmental conditions of the Certificate Order.[177] Further, third-party reviewer J.D. Hair concluded that there was no documentation of monitoring the IR, and that due to the volume of drilling fluid it understood to be found in the wetland, "the IR likely was occurring 3 to 4 days prior to being discovered."[178] That time period equates to approximately seven shifts of HDD crew members and inspectors who failed to monitor the right-of-way and discover the

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[171] *Id.*
[172] *See supra* Part II.H (describing testimony of Night Crew Foreman, Night Crew Mud Technician, Night Crew Laborer # 2, and Day Crew Foreman.
[173] *See* Night Crew Operator Test. at 116.
[174] Certificate Order, 158 FERC ¶ 61,109 at App. B.
[175] *Id.*
[176] Rover Implementation Plan at 30.
[177] Certificate Order, 158 FERC ¶ 61,109 at App. B.
[178] J.D. Hair Report at JDHAIR0007, JDHAIR0088.

IR.[179] The Day Utility Inspector who ultimately discovered the IR, confirmed that crews were not monitoring the right-of-way as required.[180]

Enforcement concluded that this failure to monitor the right-of-way constituted a clear violation of Section 7(e) of the NGA, the Commission's implementing regulation at 18 C.F.R. § 157.20, and the Commission's Certificate Order. Environmental Condition # 1 of the Certificate Order imposed the condition, pursuant to Section 7(e) of the NGA, that Rover "follow the construction procedures and mitigation measures described in its application . . . and as identified in the EIS."[181] The HDD Contingency Plan contained in the Final EIS, required Rover to "closely and continually" monitor HDD activities and to conduct, as feasible, "[v]isual and pedestrian field inspection along the drill path," "including monitoring the wetlands and waterbodies for evidence of a release."[182]

3. Rover HDD Crews Failed to Properly Dispose of IR Mud Contaminated with Diesel Fuel and Hydraulic Oil

Additionally, Enforcement found that Rover improperly disposed of the drilling mud released during the IR that was contaminated with toxic diesel fuel and hydraulic oil. Instead of removing the IR mud at a site appropriate for disposing of the contaminated mud, such as an Ohio EPA-approved solid waste disposal site, Rover disposed of the IR mud at the Oster Sand and Gravel Disposal Pit and the Beach City Quarry.[183] Per a July 12, 2017 request from OEP, Rover was required to remove and dispose of the IR mud from those two locations and transfer it to an Ohio EPA-approved solid waste disposal site.[184] Further, Rover was required to remove and dispose of any remaining IR mud at an Ohio EPA-approved solid waste disposal site.[185]

Enforcement concluded that Rover's initial disposal of the contaminated drilling mud from the IR at a local sand and gravel pit and a local quarry constituted a clear violation of Section 7(e) of the NGA, the Commission's implementing regulation at 18 C.F.R. § 157.20, and the Commission's Certificate Order. Environmental Condition # 1 of Certificate Order imposed the condition, pursuant to Section 7(e) of the NGA, that Rover "follow the construction procedures and mitigation measures described in its application. . . and as identified in the EIS."[186] The HDD Contingency Plan contained in the Final EIS, required Rover to properly dispose of drilling mud released from any IR.[187]

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[179] *See id.* at JDHAIR0061.
[180] Day Utility Inspector Test. at 111-12 (emphasis added).
[181] Certificate Order,158 FERC ¶ 61,109 at App. B.
[182] Final EIS at App. G-1 at G1-6.
[183] OEP Mitigation Measures Letter at 1.
[184] *Id.*
[185] *Id.* at 2.
[186] Certificate Order,158 FERC ¶ 61,109 at App. B.
[187] *See, e.g.*, Final EIS at App. G-1 at G1-7.

B. Rover's Weak Environmental Compliance Program and Focus on Construction Speed Created an Environment Ripe for the Violations

In addition to the foregoing violations, Enforcement found that Rover's environmental compliance program was ineffective and superficial. Rover failed to make the requirements for environmental compliance clear. Precision's then-Director of Environmental Compliance stated in testimony that "it seemed like each spread might have had their own interpretation [of the environmental rules.]"[188] Individuals with responsibility for environmental compliance, such as the Lead Environmental Inspector for Spread A, had no specific environmental training.[189] Enforcement also found that Rover failed to define the roles and responsibilities of its inspectors. While Rover hired two individuals nominally as day and night "utility inspectors," Rover provided no job description and no guidance as to their roles or responsibilities until *after* the IR.[190] In addition, the inspectors were not contemporaneously empowered with the authority to address environmental noncompliance. For example, the Day Utility Inspector related that he told the Day Crew Foreman to take care of an inadequate containment. In return, he got a call from his boss telling him that his job "was to observe and report and not give any direction toward what they should and shouldn't do."[191]

The inspectors also lacked a meaningful presence on the job site itself. One operator testified that he never met or spoke with the inspector on his shift.[192] Another driller stated that the inspector's job was to "[s]leep in the trucks, make sure that we're doing everything accordingly . . . They just want to know how much footage you made at the end of the day so they can put it on their report."[193] The inspector's reports confirm that they were mainly concerned with progress and not compliance, as they superficially reported "everything went as planned" while the crews were faced with some of the drilling difficulties described above.[194] The J.D. Hair Report similarly observed that "Pretec Directional Drilling's (PDD) and Rover's documentation of daily

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[188] Testimony of Precision's Director of Environmental Compliance, at 49-50, 53 (July 18, 2017) (Director of Environmental Compliance Test.).
[189] Lead EI Spread A Test. at 20.
[190] *Compare* Email from HDD Chief re Inspector Roles and Responsibilities (Mar. 19, 2017) (CIS0001816), *with* Email from HDD Chief re Inspector Roles and Responsibilities (Aug. 18, 2017) (CIS0000982), *and* Utility Inspector Definition and Responsibilities (CIS0003520).
[191] Day Utility Inspector Test. at 56.
[192] Night Crew Laborer # 1 Test. at 26.
[193] Night Crew Driller Test. at 25-26 . This highlights that Rover's environmental inspectors were, at least in part, concentrated on monitoring and reporting to Rover management the speed of work progress.
[194] J.D. Hair Report at JDHAIR0294; Day Utility Inspector Test. at 109 ; Testimony of Night Utility Inspector, at 18 (Nov. 19, 2017) (Night Utility Inspector Test.).

HDD construction operations and daily IR monitoring was very limited," and consequently "it was not possible for JDH&A to accurately assess or verify conformance with many of the applicable project requirements." [195]

Not only did Rover facilitate an atmosphere in which environmental compliance was treated in practice, as an afterthought, Rover placed direct pressure on its contractor to maintain its "aggressive" construction schedule.[196] Rover sought to have Phase 1 of the project in-service only four months after the Commission issued the Certificate Order.[197] As described above, in order to meet this "aggressive" schedule for this multi-billion dollar Project, Rover hired a "small army" of 12,000 workers, five times the amount of workers that would be optimal in the absence of such pressing deadlines, and asked unions to train and certify new workers.[198] Any delays – including environmental compliance delays – would be costly to Rover and its subcontractors.[199] That pressure from Rover was transferred directly down from executives at its contractor Precision, to the Rover HDD crews onsite who resorted to any means necessary to keep up with job progress demands.

VI. Rover's Anticipated Defense Is Unavailing

While Rover has not yet responded to the substance of Enforcement's allegations,[200] Enforcement Staff anticipates that Rover will argue that the subcontractor Pretec is solely liable for the addition of diesel fuel and other contaminants to the drilling mud. Rover is likely to cite the fact that Pretec crew members are known to have physically placed the contaminants in the drilling fluid and further contend that those crew members acted contrary to Rover's policies and instructions. For the reasons discussed below, any attempt by Rover to shirk responsibility for the actions of its own

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[195] J.D. Hair Report at JDHAIR0005.
[196] *See supra* Part II.G.
[197] ETP Press Release.
[198] Mahmoud Test. at 30-32, 37.
[199] Rover estimated that the additional compliance measures it was required to take after the IR, which may have prevented the violations found here had they been in place at the outset of construction, cost Rover approximately $93 million. *See* Ohio Dep't. of Tax'n., re: Assessment No. 1901142/Public Utility Personal Property Tax (July 10, 2020), https://tax.ohio.gov/static/legal/final-determinations/roverpipelinellcfinaldetermination.pdf (including table that Rover submitted as cost reductions in support of its effort to decrease the taxable value of its property by approximately $1.6 billion).
[200] *See supra* Part III.

contractors on the Project, for which the NGA makes Rover solely responsible,[201] cannot succeed.

A. Rover is Solely Responsible for Ensuring Compliance with the Certificate Order

Rover alone accepted the terms of the Commission's Certificate Order for the Rover Pipeline Project.[202] Rover affirmed under oath that "all company personnel involved with construction and restoration, environmental inspectors, and contractor personnel will be informed of the Environmental Inspector's authority and will be trained on the implementation of the environmental mitigation measures appropriate to their jobs before becoming involved with construction and restoration activities."[203] In addition, certificates issued to applicants are not transferrable.[204] As a result, it was Rover, not its contractors, that was solely responsible for ensuring compliance with the Certificate Order.

B. Rover Cannot Sever Its Regulatory Obligations By Pointing the Finger at the Contractors It Hired

Rover, as the certificate holder, is responsible for any violations of the Certificate Order. It is well-established that a company can be held liable for the actions of its agents, including contractors and their employees, and thus Rover cannot escape liability by pointing to Pretec (or Precision) as the wrongdoers. The Commission itself has stated that a company "is responsible for actions taken by its agents and its agents' employees,"[205] and explained its rationale for that position in *Trafalgar Power, Inc.*:

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[201] *See, e.g.*, *infra* note 220; 15 U.S.C. § 717f(e) (providing that "a certificate shall be issued to any qualified *applicant* therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that *the applicant* is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder . . . .") (emphasis added).

[202] *See* Rover Acceptance of Commission Order.

[203] *Id.*

[204] *See* 18 C.F.R. § 157.20(e) ("The certificate issued to applicant is not transferable in any manner and shall be effective only so long as applicant continues the operations authorized by the order issuing such certificate and in accordance with the provisions of the Natural Gas Act, as well as applicable rules, regulations, and orders of the Commission.").

[205] *Berkshire Power Co. LLC et al.*, 154 FERC ¶ 61,259, at P 22 (2016); *see also City of Dover, New Hampshire*, 19 FERC ¶ 61,231, at 61,452 (1982) ("Parties are responsible for their agents' acts as well as their own.").

> Corporations act through their employees or contractors and are responsible for the actions and inaction of those workers . . . . Placing blame for the license violations on [the contractor in this case, a project engineer] does not relieve the licensee of its responsibility . . . The licensee is ultimately responsible for ensuring that the requirements of its license are met. Licensees can frequently claim that they relied on their project engineers and argue that the Commission should distinguish between knowing failures to comply and situations where licensees relied on their agents and assumed that all license requirements were met. If readily accepted, such arguments could undercut the Commission's ability to ensure compliance with the law.[206]

Consequently, the Commission found that the actions of Trafalgar's contractor "were the actions of Trafalgar," and rejected Trafalgar's argument that it was not notified of potential violations as "unfounded."[207] Any such argument from Rover that it is not responsible for the actions of its contractors or for the violations of the Certificate Order should similarly be rejected by the Commission.

VII. Recommended Remedies and Sanctions

Enforcement Staff recommends a civil penalty of $40,000,000. Pursuant to NGA Section 22(a), the Commission may assess a civil penalty of up to $1 million per day, per violation against any person who violates the NGA or any rule, regulation, or order under the statute.[208] In determining the appropriate penalty amount, NGA Section 22(c) requires the Commission to consider "the seriousness of the violation and the efforts to remedy the violation."[209] The Commission regularly applies its Penalty Guidelines to perform this penalty analysis for violations by companies, such as Rover. However, the Commission also can depart from the Penalty Guidelines in appropriate cases.[210] Specifically, when adopting the Penalty Guidelines the Commission recognized that they are not "tailored to fit every conceivable circumstance of a case," and the "departure mechanism allows [the Commission] to account for unique or exceptional factors that

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[206] *Trafalgar Power, Inc.*, 49 FERC ¶ 61,140, at 61,597 (1989).
[207] *Id.*
[208] 15 U.S.C. § 717t-1(a). Based on inflation adjustments, this penalty authority at the time of Rover's violations increased to $1,213,503 per day per violation. *Civil Monetary Penalty Inflation Adjustments*, 158 FERC ¶ 61,017, at P 8.
[209] 15 U.S.C. § 717t-1(c).
[210] FERC Penalty Guidelines § 1A1.1(1) ("The Commission reserves the right to depart from these Guidelines where it deems appropriate.").

might arise in a case."[211] For the reasons described below, Enforcement Staff believes that a departure is justified here.

The section of the Penalty Guidelines applicable to Rover's violations, Section 2B1.1, focuses largely on the pecuniary market harm caused by the violations, or the resulting pecuniary gain to the violator.[212] Rover's violations are more appropriately viewed in terms of the environmental, safety, and regulatory harms they caused, and these elements are not specifically considered by the Penalty Guidelines.

Therefore, Enforcement Staff believes it would be more appropriate to depart from the Penalty Guidelines in this case and proposes a civil penalty of $40,000,000, based on the various factors the Commission takes into consideration under the NGA and its Revised Policy Statement on Enforcement.[213] As described above, in determining the amount of a proposed penalty under Section 22 of the NGA, the Commission is required to take into consideration "the nature and seriousness of the violation and the efforts to remedy the violation."[214] The Commission has identified five factors that the Commission may consider in determining the amount of any civil penalty: (1) seriousness of the offense, (2) commitment to compliance, (3) self-reporting, (4) cooperation, and (5) reliance on staff guidance.[215]

First, the Commission bases the seriousness of a violation on, among other things, the scope of the violation and the circumstances giving rise to it.[216] The Commission examines the specific harm caused by the violation, and whether the actions were

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[211] *Enforcement of Statutes, Orders, Rules, and Regulations*, 130 FERC ¶ 61,220, at P 32 (2010).
[212] *See* FERC Penalty Guidelines § 2B1.1; Application Note 2.
[213] *See Enforcement of Statutes, Regulations, and Orders*, 123 FERC ¶ 61,156, at PP 55-71 (2008) (Revised Policy Statement on Enforcement). The Commission has approved departures in other cases where the circumstances warrant them. *See, e.g.*, *Vitol Inc.*, 169 FERC ¶ 61,070, at P 226 (2019) ("[A] strict application of the Penalty Guidelines to Vitol's conduct would not adequately account for Corteggiano's role in this matter, and thus we find that it is appropriate to depart from the Penalty Guidelines in this case."); *National Energy & Trade, L.P.*, 156 FERC ¶ 61,154, at P 26 (2016) (approving downward departure "[a]fter considering all of the circumstances of this matter, including the fact that National Energy is no longer a going concern"); *In re Xcel Energy Inc.*, 138 FERC ¶ 61,026, at P 13 (2012) ("[W]e determined that a downward departure from the Penalty Guidelines penalty range is appropriate here, given the unique facts and circumstances surrounding the merger of PSCo and SPS and the construction of the Lamar Tie.").
[214] 15 U.S.C. § 717t-1(c).
[215] *See* Revised Policy Statement on Enforcement, 123 FERC ¶ 61,156 at PP 55-71.
[216] *See id.* P 55.

"willful," "reckless," or "deliberately indifferent to the results."[217] In addition, the Commission looks at whether the "wrongdoer act[ed] in concert with others."[218] The Commission also examines whether the actions were "the result of pressure placed on employees by senior management to achieve specific results.[219] The Commission also considers "[w]hat penalty amount best discourages improper conduct, while not excessively discouraging beneficial" market activities.[220] Here, Enforcement believes a significant fine is necessary given the seriousness of the violation. As set forth above, several Rover HDD crew members admitted to adding diesel fuel, hydraulic oil, containment fluids, and other unapproved additives into the drilling mud, and/or seeing others do it, and that this happened repeatedly and was openly discussed onsite.[221] Enforcement Staff determined that Rover used diesel fuel and other unapproved substances routinely over at least 12 days leading up to the IR, from April 2 through April 13, 2017. The evidence also shows that the IR was occurring for approximately four days before it was discovered, evidencing a failure to adequately monitor the right-of-way.[222] This failure to adequately monitor the right-of-way allowed for 2 million gallons of drilling mud contaminated with toxic diesel fuel and hydraulic oil to continuously flow into a protected wetland near the site of the Tuscarawas River HDD operation.

Second, the Commission considers the company's demonstrated commitment to compliance at the time of the violations.[223] Relevant compliance measures include: "(i) systems and protocols for monitoring, identifying, and correcting possible violations, (ii) a management culture that encourages compliance among company personnel, and (iii) tools and training sufficient to enable employees to comply with Commission requirements."[224] As described in Part V.B above, Enforcement Staff found that Rover's compliance program for the Rover Pipeline Project was ineffective and superficial. Further, as detailed in Part II.G above, Enforcement Staff found that executives at Rover fueled a culture among its contractors and at the Project site that favored speed and construction progress over regulatory compliance.

Third, the Commission considers whether the company self-reported the violations.[225] Here, Rover did not self-report the violations to the Commission, and the

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[217] *Id.*
[218] *Id.*
[219] *Id.*
[220] *Id.* P 57.
[221] *See supra* Part II.H.
[222] *See id.* at JDHAIR0007, JDHAIR0061.
[223] Revised Policy Statement on Enforcement, 123 FERC ¶ 61,156 at P 57.
[224] *Id.*
[225] *Id.* PP 61-64.

Commission did not learn of the presence of diesel fuel in the IR mud until it was notified by the Ohio EPA on May 26, 2017.

Fourth, the Commission considers whether the company demonstrated "exemplary cooperation," during Enforcement's investigation.[226] Examples of uncooperative conduct include "untimely or incomplete responses, unresponsiveness to information requests, misrepresentation, or any other conduct that obstructs a Commission investigation, audit or inquiry."[227] Further, "[o]bstructionist conduct in an investigation can include, among other things: misrepresentation, persistent delays in responding to information requests, or frivolous objections to information requests."[228] As discussed in Part III above, Rover withheld or redacted unprivileged and relevant subpoenaed documents for nearly a year, and failed to preserve data subject to OEP and Enforcement Staff's preservation notices. Based on the foregoing, Enforcement Staff concluded that Rover engaged in obstructionist conduct during the investigation.

Fifth, the Commission considers whether the company reasonably relied, "in good faith, on staff guidance in pursuing the conduct that is ultimately found to be in violation of a Commission requirement." Rover did not rely, and does not claim to have relied, on staff guidance in pursuing the violative conduct described herein.

Staff's proposed $40,000,000 penalty is appropriate under the foregoing analysis and falls below the penalty allowed under the statutory maximum.[229]

VIII. Conclusion

For the reasons discussed above, Enforcement recommends that the Commission direct Rover to show cause why it did not violate Section 7(e) of the NGA, 15 U.S.C. § 717f, the Commission's Regulations, 18 C.F.R. § 157.20, and the Commission's Certificate Order, by: (i) intentionally including diesel fuel and other toxic substances and unapproved additives in the drilling mud while drilling under the Tuscarawas River in Stark County, Ohio; (ii) failing to adequately monitor the right-of-way for the

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[226] *Id.* P 65.
[227] *Id.* P 68.
[228] *Id.*
[229] The Commission's statutory maximum at the time of the violations was $1,213,503 per day per violation. *Civil Monetary Penalty Inflation Adjustments*, 158 FERC ¶ 61,017, at P 8. For the violations described herein, Enforcement Staff calculated a statutory maximum of *at least* $52,180,629 based upon the evidence. This includes, but is not limited to, the evidence discussed above in Part II.H. This calculation reflects a conservative view taken by Staff of the number of times each of the following violations occurred: (1) adding toxic and other unapproved additives to the drilling mud, including (i) diesel fuel, (ii) hydraulic oil, (iii) containment fluids, and (iv) non-toxic, but unapproved lubricants; (2) failure to adequately monitor the right-of-way; and (3) failure to properly dispose of the contaminated IR mud.

Tuscarawas River HDD; and (iii) improperly disposing of IR mud that was contaminated with diesel fuel and hydraulic oil. Enforcement further recommends that the Commission direct Rover to show cause why it should not pay a civil penalty of $40,000,000.