May 9, 2019

Via Federal Express and e-mail (alan.mayberry@dot.gov)

Alan K. Mayberry
Associate Administrator
U.S. Department of Transportation
Pipeline and Hazardous Materials Safety Administration
1200 New Jersey Avenue, S.E.
Washington, D.C. 20590

RE: CPF No. 1-2016-1005: Petition for Reconsideration and Request for a Stay

Dear Mr. Mayberry:

Pursuant to 49 C.F.R. § 190.243(a), please find attached National Fuel Gas Supply Corporation’s (National Fuel) Petition for Reconsideration in regards to Item #s 2 and 3 in the above-referenced matter. National Fuel is also requesting a stay of paragraph 1 of the Compliance Order. Please do not hesitate to contact me if you have any questions.

Sincerely,

[Signature]

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Enclosure

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

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In the Matter of

National Fuel Gas Supply Corporation, CPF No. 1-2016-1005

Respondent.

PETITION FOR RECONSIDERATION AND REQUEST FOR A STAY
MAY 9, 2019
Pursuant to 49 C.F.R. § 190.243(a), National Fuel Gas Supply Corporation (National Fuel or the Company) respectfully seeks reconsideration of Items 2 and 3 in the Final Order.

I. Procedural Background


On April 18, 2019, PHMSA issued a Final Order finding that National Fuel violated sections 192.169(a), 192.169(b), and 192.617\(^1\) and committed a probable violation of § 192.605(a).\(^2\) PHMSA assessed civil penalties\(^3\) and issued a compliance order (the Compliance Order) requiring the Company to take certain actions.\(^4\)

In accordance with § 190.243(a), a petition for reconsideration of a Final Order must be “received no later than 20 days after receipt of the order by the respondent.”\(^5\) National Fuel received the Final Order on April 22, 2019. Therefore, this petition is timely.

\(^2\) Id. at 10.
\(^3\) Id. at 6-9.
\(^4\) Id. at 9.
II. The finding of violation and associated compliance terms for Item #2 are punitive and therefore are time-barred by the five-year statute of limitations.

In Item #2 of the Notice, PHMSA had alleged that National Fuel violated § 192.169(b) by failing to design the vent lines at the Beech Hill compressor station to discharge gas without hazard.\(^6\) PHMSA issued the allegation of violation thirty-six years after the Beech Hill station and vent lines were constructed. The Pipeline Safety Act does not prescribe a specific time limit for initiating an enforcement proceeding.\(^7\) Therefore, these proceedings are subject to the general five-year statute of limitations set forth in 28 U.S.C. § 2462.\(^8\) That statute provides that “…an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued…”\(^9\) The Supreme Court has determined that “a claim accrues as soon as the plaintiff can file suit and obtain relief.”\(^10\) In this matter, the claim accrued in 1980 when the station was designed and constructed. Therefore, the allegations in Item #2 are time-barred.

While acknowledging that the proposed civil penalty in Item # 2 is time-barred by 28 U.S.C. § 2462, the Agency took the unusual step to proceed with a finding of violation and a compliance order for this allegation. In the Final Order, PHMSA stated that “the agency is time-barred from imposing civil penalties against [National Fuel] for this particular violation.”\(^11\) However, PHMSA went on to state that “[b]ecause the violation also involved a proposed compliance order, which is a remedial action, not a penalty action, the proposed compliance terms

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\(^6\) Notice, at 2.
\(^7\) See, In the Matter of Aion USA, LP, CPF No. 5-2004-5021, Decision on Petition for Reconsideration (Oct. 22, 2009)(acknowledging that 28 U.S.C. § 2462 applies to PHMSA enforcement cases).
\(^8\) 28 U.S.C. § 2462.
\(^9\) Id. (emphasis added).
\(^11\) Final Order at 8.
for Item #2 are addressed below in the Compliance Order section.” PHMSA generally cited the 10th Circuit’s decision in United States v. Telluride in support of its position but did not offer any additional explanation. Nor did PHMSA discuss the United States Supreme Court’s recent decision in Kokesh v. Securities and Exchange Commission, where the court established a test for determining whether a sanction qualifies as a penalty for purposes of 28 U.S.C. § 2462.

A. PHMSA’s finding of violation and a compliance order for Item #2 are both punitive and therefore are time-barred by 28 U.S.C. § 2462.

The five-year statute of limitation in § 2462 applies to “any civil fine, penalty, or forfeiture, pecuniary or otherwise.” Federal courts, including the 10th Circuit in Telluride, have determined that the word “penalty” is not limited to civil penalties, but also includes non-monetary penalties. In 2017, the Supreme Court announced a test to determine whether a sanction is a “penalty” for the purposes of 28 U.S.C. § 2462. The Court stated that a sanction is penal if it is (1) a consequence for violating a public law, (2) sought only for the purpose of punishment and to deter others from offending in a similar manner (not to compensate an individual victim), and (3) intended to punish and label defendants as wrongdoers.

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12 Id. (emphasis added).
13 Id. n.24 (citing United States v. Telluride Co., 146 F.3d. 1241, 1248-1249 (10th 1998)). PHMSA cited pages 1248-1249 of the Telluride decision but did not offer further explanation. Therefore, National Fuel has focused its arguments in this Petition on pages 1248-1249 of the Telluride decision.
14 Id. n.24. National Fuel raised the statute of limitations defense in its pre-hearing and post-hearing filings. After the close of the record, in the Final Order, the Agency, for the first time, articulated a distinction between the civil penalty and the compliance order for statute of limitations purposes. Therefore, this is National Fuel’s first opportunity to respond to this argument.
15 28 U.S.C. § 2462. The statute provides that “Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued....” Telluride, 146 F.3d at 1245 (“[W]e construe § 2462 as applying to non-monetary penalties.”). See also, SEC v. Bartek, 484 Fed. Appx. 949, 956-957 (5th Cir. 2012); Johnson v SEC, 87 F.3d 484, 487-488 (D.C. 1996).
17 Id.
18 Id.
All three elements of the Supreme Court’s test are satisfied in this case. The predicate that PHMSA uses to impose the Compliance Order is an alleged violation of the pipeline safety regulations. Issued pursuant to the authority provided in the Pipeline Safety Act, the pipeline safety regulations are clearly public laws. PHMSA has confirmed in its Pipeline Safety Enforcement Procedures that its compliance orders are intended to have a deterrent effect. The Agency specifically states that a compliance order is necessary to “ensure that a similar non-compliance will not recur.” Finally, compliance orders are intended to punish and label the respondent in an enforcement action as a wrongdoer. PHMSA’s findings of violations are posted publicly on PHMSA’s website. Violations of the pipeline safety regulations are included in an operator’s prior history for five years after issuance and are considered as an aggravating factor that increases the amount of the proposed civil penalty in subsequent enforcement cases.

PHMSA stated in the Final Order that the Compliance Order is “a remedial action not a penalty action.” Compliance orders may have some remedial characteristics but as the Kokesh Court acknowledged “sanctions frequently can serve more than one purpose.” “A civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term.” In Kokesh, the Court analyzed whether a disgorgement order was a penalty or a remedial action. The Court ultimately concluded that although disgorgement orders can be

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19 Pipeline Safety Enforcement Procedures, Section 3, Paragraph 3.1.1.4 (Apr. 27, 2018).
20 Id.
22 49 C.F.R. § 190.225(a)(3)(an operator’s history of prior offenses is included in determining the amount of a civil penalty).
23 Final Order, at 8.
24 Kokesh, 137 S.Ct. at 1645 (quoting Austin v. United States, 509 U.S. 602, 610 (1993)).
25 Id. (quoting Austin, 509 U.S. at 621).
remedial, they “go beyond compensation, are intended to punish, and label defendants wrongdoers” and therefore are penalties subject to 28 U.S.C. § 2462. Although a PHMSA compliance order may have some remedial characteristics, it is a “penalty” under 28 U.S.C. § 2462 since it is intended to punish and label a company as a wrongdoer. Therefore, the five-year statute of limitations prohibits PHMSA from imposing the Compliance Order in this enforcement action.

If both the civil penalty and Compliance Order are time-barred, PHMSA cannot issue a finding of violation for Item #2. Furthermore, a finding of violation in of itself also meets the Kokesh test for a penalty and is time barred in this case. PHMSA issues findings of violation to deter both the respondent and all other operators from similar conduct. A finding of violation labels the operator subject to the order as a wrongdoer and is not intended to compensate an individual victim. The 11th Circuit’s decision in SEC v. Graham is instructive on this point. In that case, the SEC requested that the district court declare that the defendants had violated federal securities laws. There, both the district court and the 11th Circuit stated that such declaratory relief is “backward-looking and thus would operate as a penalty under § 2462.” The court clarified that “[a] public declaration that the defendants violated the law does little other than label the defendants as wrongdoers.” A PHMSA enforcement action serves the same purpose even if a civil penalty is not imposed for a finding of violation. A finding of violation is based entirely

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26 Id. (quoting Gabelli v. SEC, 568 U.S. 442, 451-452 (2013)).
27 SEC v. Graham, 823 F.3d 1357, 1362 (11th Cir. 2016).
28 Id. at 1360-1362. The court stated that an equitable remedy is forward looking and since it is used to forbid future conduct, is not subject to the statute of limitations set forth in 28 U.S.C. § 2462. Id. at 1360. However, a penalty addresses past violations and is imposed in a punitive way and therefore is subject to the time limitations in 28 U.S.C. § 2462.
29 Id. at 1362.
30 The existence of a pipeline safety violation will also increase the amount of a future civil penalty should National Fuel receive one. Violations of the pipeline safety regulations are included in an operator’s prior history for five years after issuance. See 49 C.F.R. § 190.225(a)(3) (an operator’s history of prior offenses is included in determining the amount of a civil penalty).
on past conduct and is a "penalty" under 28 U.S.C. § 2462. Therefore, the finding of violation in this case cannot be issued more than five years after the claim accrued.\(^{31}\)

The Agency has other enforcement tools to address alleged safety issues such as a Notice of Proposed Safety Order or a Corrective Action Order. Since a finding of violation addresses conduct in the past, it is a "penalty" under 28 U.S.C. § 2462 and therefore cannot be used more than five years after the claim accrued.\(^{32}\)

**B. The Telluride case is inconsistent with Supreme Court precedent and therefore cannot be the basis for PHMSA’s Final Order.**

PHMSA bases its decision in the Final Order that the Compliance Order is not time-barred on the 10\(^{th}\) Circuit’s *Telluride* decision. In that case, the court stated that an injunction to restore wetlands to their prior condition before the violations took place was a remedial action because “other equitable remedies, such as disgorgement, which sanction past conduct, are remedial.”\(^{33}\) However, the U.S. Supreme Court recently held that disgorgement orders are a penalty and are not solely remedial.\(^{34}\) The Court recognized that “[b]ecause disgorgement orders ‘go beyond compensation, are intended to punish and label defendants wrongdoers’ as a consequence of violating public laws, ... they represent a penalty and thus fall within the 5-year statute of limitations of § 2462.”\(^{35}\) To the extent that the *Telluride* decision offered any support for PHMSA’s views at the outset of this enforcement action, the *Kokesh* decision now calls that precedent into question, a fact that the D.C. Circuit acknowledged in a recent case.\(^{36}\) The Final

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\(^{31}\) 28 U.S.C. § 2462; *See also, 3M Co. v. Browner*, 17 F.3d. at 1456.

\(^{32}\) 28 U.S.C. § 2462; *See also, 3M Co.,* 17 F.3d. at 1456.

\(^{33}\) *Telluride*, 146 F.3d. at 1247 (citing *SEC v. Bilzerian*, 29 F.3d. 689, 696 (D.C. Cir. 1994)).

\(^{34}\) *Kokesh*, 137 S.Ct. at 1645.

\(^{35}\) *Id.* (quoting *Gabelli*, 568 U.S. at 451-452).

\(^{36}\) A few months after the *Kokesh* opinion was issued, the D.C. Circuit remanded a case to the Securities and Exchange Commission to determine if *Kokesh* was relevant to the appellant’s argument that a lifetime securities ban was punitive. *See Saad v. SEC*, 873 F. 3d 297, 304 (2017). In the concurring opinion, then-Judge Kavanaugh stated
Order did not address this precedent and PHMSA did not explain its position that the Compliance Order is remedial.

C. PHMSA has other enforcement tools available should the Agency identify safety concerns with the design of a facility after the statute of limitations has run.

PHMSA raised concerns at the Hearing that if design violations are time-barred after five years, “... then a sizeable and, quite frankly, enormous portion of the gas transmission infrastructure across the country would be essentially beyond regulation.” As discussed in the Post-Hearing brief, this is simply not true. Nothing precludes PHMSA from issuing a Notice of Proposed Safety Order (NOPSO) or a Corrective Action Order (CAO) if the design of a facility presents a current safety issue (assuming the Agency can meet the required standard for those specific enforcement proceedings).

III. PHMSA must withdraw Item #3 on account of its prior enforcement case involving the same procedure.

An operator should be able to rely on PHMSA’s prior enforcement decisions involving the same entity and the same procedure. As discussed during the Hearing, and in the Post-Hearing

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that “the Supreme Court’s decision in Kokesh overturned a line of cases from this Court that had concluded that disgorgement was remedial and not punitive. ... As I see it, the Kokesh analysis matters here. The Supreme Court’s reasoning in Kokesh was not limited to the specific statute at issue there.” Id. at 305 (Kavanaugh B., concurring).


38 The Associate Administrator may issue a NOPSO proposing that the operator take action where PHMSA determines that a “particular pipeline facility has a condition or conditions that pose a pipeline integrity risk to public safety, property, or the environment.” 49 C.F.R. § 190.239(a).

39 PHMSA may issue a CAO if it determines that a “particular pipeline facility is or would be hazardous to life, property or the environment.” 49 C.F.R. § 190.233(a). A CAO requires the operator to take corrective action, which may include suspension or restricted use of the facility, physical inspection, testing, repair, replacement, or other appropriate action. PHMSA explains in its Pipeline Safety Enforcement Procedures that a CAO can also be used “to notify an operator that its facility, or a component of the facility, is or would be constructed or operated with equipment, material, or a technique that is hazardous to life, property, or the environment. Pipeline Safety Enforcement Procedures: Selection of Administrative Enforcement Actions § 3.2.1.1.

40 At the Hearing, PHMSA counsel stated that “I don’t think we can tell whether or not [the prior enforcement action] included procedures concerning accident investigation.” Transcript, at 124:25-125:1. However, it is clear from the record that PHMSA did indeed review National Fuel’s section 11.5.4 procedure during the 2012 enforcement proceeding. In fact, PHMSA sought revisions to paragraph 4 of section 11.5.4 in that matter. See also, Post-Hearing Brief at 2, 22, n.76.
Brief and Reply, National Fuel raised concern that in 2012, PHMSA had stated that “no further action is necessary” with regard to changes to National Fuel’s Failure Investigation Procedure (Section 11.5.4). Guided by PHMSA’s letter, National Fuel did not make any further modifications to section 11.5.4. Yet three years later, PHMSA issued a new enforcement action under the same regulation alleging deficiencies with the same procedure that was previously deemed acceptable. National Fuel questioned in the Post-Hearing Brief how it could be liable for civil penalties and a compliance order for a procedure that the Agency previously determined was acceptable. PHMSA did not address this argument in the Final Order.

PHMSA is estopped from assessing a civil penalty and compliance order for alleged defects with the same procedure the Agency previously deemed acceptable. In addition, it would not be fair for an agency to cite prior enforcement decisions as precedent against the industry and specific operators individually (to calculate prior history) yet prohibit an operator from also relying on those cases. On this basis, National Fuel requests that PHMSA reconsider its decision in Item #3 of the Final Order and withdraw this item.

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41 Post-Hearing Brief at 22.
42 Reply at 8-9.
43 See In the Matter of National Fuel Gas Supply Corp., CPF No. 1-2012-1023M, Notice of Amendment (Nov. 7, 2012). On February 20, 2013, PHMSA closed the Notice of Amendment determining that “the inadequacies outlined in [the] Notice of Amendment have been corrected” and “no further action is necessary.” In the Matter of National Fuel Gas Supply Corp., CPF No. 1-2012-1023M, Closure Letter (Feb. 20, 2013). In its Post-Hearing Region Recommendation, PHMSA stated that “at no point did PHMSA state [in the closure letter] that ‘National Fuel did not need to make any further changes to § 11.5.4.’” Region Recommendation, Post-Hearing at 3, CPF No. 1-2016-1005 (Aug. 10, 2017). The 2012 enforcement case alleged inadequacies with National Fuel’s Failure Investigation Procedure. National Fuel corrected the inadequacies and in response, PHMSA stated that “no further action is necessary.” It is reasonable to conclude that National Fuel did not need to make any further changes to the procedures subject to the enforcement proceeding which included the Company’s Failure Investigation Procedure.
45 Post-Hearing, at 22.
46 Id., n. 75 (citing Allen v. McCurry, 449 U.S. 90 (1980)).
47 In 2006, PHMSA acknowledged that prior agency decisions are public records and “an agency may consider its past actions sua sponte.” In the Matter of ExxonMobil Pipeline Co., CPF No. 4-2005-5017H, Post-Hearing Decision at 4 (Feb. 16, 2006).
National Fuel also stated in the record that should PHMSA choose not to withdraw Item #3, at a minimum, the Agency should account for the Company’s reliance on the prior enforcement case in the culpability factor of the civil penalty calculation. PHMSA did not address this argument in the Final Order. Instead, PHMSA stated that “[w]ith respect to culpability, there were no circumstances beyond Respondent’s control that prevented it from complying with the regulation and NFG was given credit for making some effort to have these procedures, albeit not enough to achieve compliance.” PHMSA has to account for the fact that it previously agreed that National Fuel’s procedures were adequate. The Agency must either rescind Item #3 or reduce the civil penalty.

IV. Request to Stay Paragraph 1 of the Compliance Order

Pursuant to 49 C.F.R. § 190.243(c), the filing of a petition for reconsideration automatically stays the payment of the civil penalty but not the terms of the compliance order. In paragraph 1 of the Compliance Order, PHMSA directed National Fuel to confirm that all vent lines at compressor stations in the State of New York extend to a location where the gas may be discharged without hazard within 180 days of the Final Order. The Company respectfully requests that PHMSA stay these specific terms of the Compliance Order to allow the Agency time to issue a decision on this Petition. Without a stay, National Fuel would be forced to make potentially permanent modifications to its facilities while the Petition is pending.

In order to determine if a stay of a compliance order is appropriate, PHMSA must evaluate the four-part test for a preliminary injunction. The “standard for a stay at the agency level is the

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48 Final Order at 8. Pursuant to the Proposed Civil Penalty Worksheet, the credit was for having a 192.617 procedure and was unrelated to the reliance on CPF No. 1-2012-1023M.
49 49 C.F.R. § 190.243(c).
50 Final Order, at 9.
same as the standard for a stay at the judicial level: each is governed by the four-part preliminary injunction test." The "four part test" consists of the following elements: (1) the likelihood that the moving party will prevail on the merits; (2) the prospect of irreparable injury to the moving party if the stay is withheld; (3) the possibility of substantial harm to other parties if the stay is granted; and (4) the public interest in granting the stay.\footnote{Id.}

In this case, National Fuel’s petition for reconsideration of Item #2 is grounded in Supreme Court precedent. Because National Fuel can demonstrate that the compliance order for Item #2 meets the \textit{Kokesh} test for a “penalty”, the Company is likely to prevail on the merits. National Fuel will suffer irreparable harm absent a stay of the Compliance Order. PHMSA has directed National Fuel to submit documentation demonstrating that “all vent lines that exhaust gas from the pressure relief valves at all compressor stations located in the State of New York extend to a location where the gas may be discharged without a hazard.”\footnote{Wash. Met. Area Transit Comm’n v. Holiday Tours, Inc., 559 F. 2d 841, 843 (D.C. Cir. 1977) (citing Virginia Petroleum Jobbers Ass’n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958)); Cuomo v. U.S. Nuclear Regulatory Comm’n, 772 F.2d 972, 978 (D.C. Cir. 1985).} Such a review could require potentially permanent modifications to the Company’s vent lines. The Supreme Court has held that “complying with a regulation later held invalid almost always produces the irreparable harm of nonrecoverable compliance costs.”\footnote{Final Order, at 9.} Given that National Fuel’s Petition specifically seeks relief from this particular provision in the Compliance Order, the Company respectfully requests that PHMSA stay these terms of the Compliance Order. A stay would allow the Agency time to issue a decision instead of directing National Fuel to make permanent modifications to its facilities.
while the Petition is pending. In the interim, National Fuel agrees to review its vent stacks at its compressor stations in New York and address any issues that are identified.

The final two factors of the four-part test, the possibility of substantial harm to other parties if the stay is granted and the public interest in granting the stay, are merged together when relief is sought in a case involving the government.\textsuperscript{56} A stay of the Compliance Order until the Agency issues a decision on the Petition will not adversely impact the Agency’s interests. National Fuel has agreed to review its vent lines at its compressor stations in New York. PHMSA also retains its authority to issue a NOPSO or a CAO should it become concerned with a safety issue involving National Fuel’s vent stacks during the pendency of the Agency’s review of this Petition.

\textbf{V. Conclusion}

Based on the foregoing, National Fuel respectfully requests that PHMSA reconsider its decision in the Final Order and withdraw Items 2 and 3 including the associated civil penalty and Compliance Order. National Fuel also requests that the Agency grant a stay of paragraph 1 of the Compliance Order while the Agency is reviewing this Petition.

Respectfully submitted this 9th day of May, 2019

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