

**JUNE 14, 2012**

Mr. Michael Truby  
Vice President, Pipeline Operations  
NuStar Pipeline Operating Partnership, L.P.  
2330 N. Loop 1604 West  
San Antonio, TX 78248

**Re: CPF No. 3-2011-5005**

Dear Mr. Truby:

Enclosed please find the Decision on Reconsideration issued in the above-referenced case. It denies your Petition for Reconsideration. Service of the Decision by certified mail is deemed effective upon the date of mailing, or as otherwise provided under 49 C.F.R. § 190.5.

Thank you for your cooperation in this matter.

Sincerely,

Jeffrey D. Wiese  
Associate Administrator  
for Pipeline Safety

Enclosure

cc: Mr. David Barrett, Director, Central Region, OPS  
Mr. Alan Mayberry, Deputy Associate Administrator for Field Operations, OPS

**CERTIFIED MAIL – RETURN RECEIPT REQUESTED**

**U.S. DEPARTMENT OF TRANSPORTATION  
PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMINISTRATION  
OFFICE OF PIPELINE SAFETY  
WASHINGTON, D.C. 20590**

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| _____                            | ) |                            |
| <b>In the Matter of</b>          | ) |                            |
|                                  | ) |                            |
| <b>NuStar Pipeline Operating</b> | ) | <b>CPF No. 3-2011-5005</b> |
| <b>Partnership, L.P.,</b>        | ) |                            |
|                                  | ) |                            |
| <b>Petitioner.</b>               | ) |                            |
| _____                            | ) |                            |

**DECISION ON RECONSIDERATION**

On December 29, 2011, the Pipeline and Hazardous Materials Safety Administration (PHMSA), Office of Pipeline Safety (OPS), issued a Final Order in this matter to NuStar Pipeline Operating Partnership, L.P. (NuStar or Petitioner), finding that NuStar had committed several violations of the hazardous liquid pipeline safety regulations. I assessed Petitioner a civil penalty of \$101,200 and ordered the company to complete certain corrective actions.

On January 18, 2012, NuStar submitted a timely Petition for Reconsideration (Petition) seeking review of Items 1 and 3 of the Final Order and the associated civil penalties and compliance items. First, NuStar argues that I erred in finding that the company violated 49 C.F.R. § 195.50 (Item #1) by failing to report three releases of more than five gallons of product. Second, NuStar asserts that the civil penalty assessed for Item #3 of the Final Order should be reduced.

Standard of Review

A respondent may petition the Associate Administrator for reconsideration of a final order. Reconsideration is not a right to appeal or seek a de novo review of the record.<sup>1</sup> It is an opportunity to present the Associate Administrator with previously unavailable information or to request that any errors in the Final Order be corrected. Requests for consideration of new facts or arguments must be supported by a statement of reasons as to why those facts or arguments were not presented prior to the issuance of the Final Order. Repetitious information or arguments will not be considered.

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<sup>1</sup> 49 C.F.R. § 190.215(a)-(e).

## Analysis

### *Item 1*

In its Petition, NuStar argues that the finding made in Item #1 of the Final Order should be dismissed for two of the three releases. Specifically, NuStar argues that the second and third releases met the maintenance exception to the reporting requirement and therefore were not violations. NuStar does not request dismissal of the first release, a spill of 50 gallons at its Geneva station, which occurred after the operator failed to close the block and bleed valve prior to start up. NuStar admitted in its Response that this spill occurred during normal operational activities.<sup>2</sup>

In its Petition, NuStar argues that the second release resulted from a maintenance activity because the valve that was left partially open occurred during normal maintenance inspections of the equipment.<sup>3</sup> This release occurred at the Elm Creek Pump station in which a sump overflowed releasing 89 gallons of fuel oil. NuStar argues that the third release also resulted from a maintenance activity since Respondent was testing newly installed equipment at the time of the release.<sup>4</sup> This release occurred at the El Dorado Station during the start up of the mainline pump, resulting in a release of 50 gallons.

I have reviewed NuStar's arguments in its Petition and I do not find them compelling. In the Final Order, I made a finding that all three spills cited in the Notice, including the two referenced above, did not meet the maintenance exception and should have been reported.<sup>5</sup> I do not find that any information provided by NuStar in its Petition supports a reversal of my decision in the Final Order.

As stated in the Final Rule for § 195.50, the maintenance exception is intended to apply to "...spills [that] occur regularly upon the opening of the pipelines for insertion of spheres, smart pigs, or for routine inspections."<sup>6</sup> "Any non-maintenance spill of five gallons or more must be reported."<sup>7</sup> The second release occurred when a sump overflowed and not during a maintenance activity. In fact, NuStar acknowledged in its Response that the second release occurred "*after* the completion of the maintenance inspections and restart of the pipeline".<sup>8</sup> This exception was not intended to cover accidental valve closures that occur after a maintenance activity has concluded. Failing to shut a valve at the conclusion of maintenance is not a maintenance activity

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<sup>2</sup> Response, Exhibit A, page 2.

<sup>3</sup> Petition, at 5.

<sup>4</sup> *Id.*

<sup>5</sup> Final Order, at 4.

<sup>6</sup> *Pipeline Safety: Hazardous Liquid Pipeline Accident Reporting Revisions*, 67 Fed. Reg. 831 (January 8, 2002).

<sup>7</sup> *Id.*

<sup>8</sup> Response, Exhibit A, page 3 (emphasis added).

but rather an error on the part of the company and is the proximate cause of the release. Therefore, this spill should have been reported and the finding of violation issued in the Final Order stands.

As for the third spill, the 50 gallon spill at the El Dorado Station occurred when NuStar personnel were repairing the motor to the #2 mainline pumping unit. According to NuStar, the unit was started up to test for proper installation and alignment.<sup>9</sup> During this test, the release occurred. In its Petition, NuStar maintains that this release occurred as result of maintenance because if the test for proper installation and alignment had not occurred, there would not have been a release. However, as noted in the Final Order, NuStar personnel confirmed during the OPS inspection that this release occurred due to the failure of unit #2, specifically the settings of the relief valve and case pressure during startup operations.<sup>10</sup>

The OPS Central Region has established that this particular release met the requirements of § 195.50 in that it was a release of hazardous liquid of five gallons or more. Certainly, the restart of a line can be related to maintenance in certain circumstances but NuStar has not provided enough information to support its argument that the maintenance exception applies in this specific situation.

NuStar makes several other arguments in support of its position including the reasonableness of the agency's interpretation, reliance on guidance material, and use of the word 'intentional'. First, NuStar's asserts that a Federal agency cannot issue interpretations within an enforcement decision. To the contrary, an agency is "not precluded from announcing new principles in an adjudicative proceeding."<sup>11</sup> PHMSA can and does develop such interpretations in its enforcement decisions.<sup>12</sup> Federal courts have held that an order issued in an adjudicatory proceeding is not subject to the notice and comment procedures of the Administrative Procedure Act.<sup>13</sup>

Second, NuStar states in its Petition, that "[p]ast agency opinions related to § 195.50 have not mentioned, much less applied, these "planned or expected" or "intended" and "during a maintenance or normal activities" requirements." However, NuStar failed to cite to any specific pipeline interpretation to support this statement.<sup>14</sup>

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<sup>9</sup> Petition, at 5.

<sup>10</sup> Violation Report, at 3.

<sup>11</sup> *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 292-94 (1974).

<sup>12</sup> See *In the Matter of ANR Pipeline Company*, Final Order, CPF No. 3-2007-1006)(available at [www.phmsa.dot.gov/pipeline/enforcement](http://www.phmsa.dot.gov/pipeline/enforcement)).

<sup>13</sup> *RT 182, LLC v. FAA*, 519 F.3d 307, 310 (6<sup>th</sup> Cir. 2008) (emphasis added).

<sup>14</sup> PHMSA's interpretations are located at <http://www.dot.gov/phmsa>.

Third, in the Final Order, I reviewed the regulatory history of § 195.50 and referred to guidance materials including the instructions for the Accident Report to support the agency's position.<sup>15</sup> NuStar argued in its Petition that this reference to the Accident Report instructions was improper and cited the *Explorer Pipeline Company* (CPF No. 3-2009-5018) case to discount this information.<sup>16</sup> Specifically, NuStar cited to a statement in *Explorer* that the forms "are not interpretations of the regulations and the instructions are simply provided to assist operators in filling out the forms properly."<sup>17</sup> This quote is from the summary of the OPS Central Region's argument and not my finding. The exact quote is that "PHMSA also contended that its annual reporting forms are not interpretations of the regulations and the instructions are simply provided to assist operators in filling out the form properly."<sup>18</sup> I stated in *Explorer* that "I find that instructions to complete forms are guidance, not binding regulation."<sup>19</sup> The instructions to any of the OPS forms are guidance and not binding regulation. My reference to them in the Final Order was consistent with this approach.

Finally, NuStar objects to my use of the word "intentional" in the Final Order to describe the type of spills that would be included under the maintenance exception. Specifically, I stated –

Certainly, the agency's intention was to exclude planned or expected maintenance spills that occurred from opening the line. The instructions for the Accident Report (PHMSA Form 7000-1) explicitly state that "hazardous liquid releases *during* maintenance or other routine activities need not be reported if the spill was less than 5 barrels, not otherwise reportable under 49 C.F.R. § 195.50, and did not result in water pollution as described by 49 C.F.R. § 195.52(a)(4)."<sup>20</sup>

NuStar's three spills were certainly not planned and did not occur during maintenance activities. Rather, the spills occurred during a start up of the pipe and occurred as a result of personnel error after the maintenance activity had concluded.... As stated above, the exception is intended to capture only those spills that are planned or intended during maintenance. If the Section 195.50(b) exception were intended to include *all* spills that were in any way related to maintenance, then numerous spills would go unreported.<sup>21</sup>

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<sup>15</sup> Final Order, at 3-4.

<sup>16</sup> *In the Matter of Explorer Pipeline*, CPF No. 3-2009-5018 (July 22, 2011).

<sup>17</sup> Petition, at 3 (citing *In the Matter of Explorer Pipeline*, CPF No. 3-2009-5018, at 5).

<sup>18</sup> CPF No. 3-2009-5018, at 5.

<sup>19</sup> *Id.*

<sup>20</sup> Instructions for Form PHMSA F 7000-1 (1-2001) (emphasis added) located at <http://www.phmsa.dot.gov>.

<sup>21</sup> Final Order, at 4.

The intent of the exception is to capture small spills that “occur upon the opening of the pipeline”. These spills occur regularly during maintenance activities. Obviously, the agency is not condoning intentional spills that do not fit this description.

Having reviewed the evidence provided in the Notice of Probable Violation, Violation Report, Response and Petition, I find that the violation stands. NuStar’s petition for Item #1 is denied.

*Item 3*

NuStar also argues in its Petition that the \$27,900 civil penalty assessed in Item #3 should be reduced to 3/5 of the proposed civil penalty or \$17,220. NuStar states that two of the five test stations were previously dismissed; therefore, the civil penalty should be reduced to 3/5 of the original amount. As explained in the Final Order, the proposed civil penalty was reduced to account for the removal of these test stations. Specifically, I stated that “the civil penalty amount is reduced to reflect that only three test stations were missed instead of the proposed five.”<sup>22</sup> In addition, I stated that “...the foundation of the penalty amount is based on the gravity of the violation, the circumstances surrounding the violation including the duration of the missed tests, and the prior history of the operator.”<sup>23</sup> NuStar’s failure to inspect these three test stations for several consecutive years was factored into the civil penalty amount.<sup>24</sup> Since the civil penalty amount was already reduced to reflect the removal of these two test stations from the finding of violation, and NuStar has not presented any new information in its Petition to support its argument for a further reduction, the assessed civil penalty amount stands. NuStar’s petition on this Item is denied.

**PETITION DENIED**

Based on a review of the relevant portions of the record, and for the reasons stated above, I am denying NuStar’s petition. The Final Order is affirmed without modification.

This Decision is the final administrative action in this proceeding.

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Jeffrey D. Wiese  
Associate Administrator  
for Pipeline Safety

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Date Issued

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<sup>22</sup> Final Order, at 6.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*