November 15, 2019

Mr. David Bauer
President and Chief Executive Officer
National Fuel Gas Supply Corporation
6363 Main Street
Williamsville, New York 14221

Re: CPF No. 1-2016-1005

Dear Mr. Bauer:

Enclosed please find the Decision on the Petition for Reconsideration filed by National Fuel Gas Supply Corporation in the above-referenced case. For the reasons explained therein, the Decision denies your Petition for Reconsideration. This Decision constitutes the final administrative action in this preceding. 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,

Alan K. Mayberry
Associate Administrator
Pipeline Safety

Enclosure

cc: Mr. Robert Burrough, Director, Eastern Region, Office of Pipeline Safety, PHMSA
Ms. Sarah J. Mugel, General Counsel, National Fuel Gas Supply Corporation
Ms. Brianne K. Kurdock, Counsel, Babst Calland, 805 15th Street, NW, Suite 601, Washington, DC 20005

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

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

In the Matter of	)	
National Fuel Gas Supply Corporation,	)	**CPF No. 1-2016-1005**
Petitioner.	)	

DECISION ON PETITION FOR RECONSIDERATION

In an April 18, 2019 Final Order, I found that National Fuel Gas Supply Corporation (NFG or Petitioner) had committed three separate violations of 49 C.F.R. Part 192 following an investigation of an incident involving the release of natural gas which ignited at a gas compressor station operated by Petitioner in Wellsville, New York.[1] I assessed a civil penalty of $31,600 for violation of 49 C.F.R. § 192.169(a) (Item 1). I withdrew the proposed civil penalty of $149,700 for violation of 49 C.F.R. § 192.169(b) on the grounds that the penalty was time barred; however, I required that NFG take certain measures to remedy the non-compliance with this regulation (Item 2). Finally, I assessed a civil penalty of $21,600 for violation of 49 C.F.R. § 192.617 and required that NFG to take certain measures to remedy the non-compliance with this regulation (Item 3).

On May 9, 2019, NFG submitted a Petition for Reconsideration (Petition) of the Final Order.[2] The Petition seeks reconsideration of Items 2 and 3 in the Final Order and requests that these items be withdrawn.[3] Having considered the full record and the legal arguments presented in the Petition, I am denying the Petition and affirming the Final Order without modification.

Background

On March 5, 2015, a release of natural gas occurred at the Beech Hill Compressor Station operated by Petitioner in Wellsville, New York. The release was caused by a component failure that resulted in an over-pressurization event. The escaping gas ignited and resulted in a flash fire on the exterior of the compressor station facility. In accordance with the Pipeline Safety Act (49 U.S.C. 60101 et. seq.) and the regulations issued thereunder, representatives of the New York State Department of Public Service, as agents for the Pipeline and Hazardous Materials Safety

[1] *National Fuel Gas Supply Corporation*, Final Order, CPF No. 1-2016-1005 (April 18, 2019) (Final Order).

[2] Letter from Ms. Brianne K. Kurdock, Counsel for National Fuel Gas Supply Corp., to Mr. Alan K. Mayberry, Associate Administrator for Pipeline Safety, PHMSA, dated May 9, 2019 (Petition).

[3] *Id*.

Administration (PHMSA), Office of Pipeline Safety (OPS), responded to and investigated the incident.

As a result of the investigation, on August 4, 2016, the Director, Eastern Region, OPS (Director) issued a Notice of Probable Violation, Proposed Civil Penalty, and Proposed Compliance Order (Notice) to Petitioner.[4] In accordance with 49 C.F.R. § 190.207, the Notice proposed finding that NFG had committed three separate violations of 49 C.F.R. Part 192, proposed that a total civil penalty of $202,900 be assessed for the alleged violations, and proposed requiring NFG to take certain measures to remedy two of the alleged violations.[5]

NFG responded to the Notice by letter dated September 30, 2016. NFG contested the allegations and requested an administrative hearing. A hearing was subsequently held on May 11, 2017, in West Trenton, New Jersey before a PHMSA Presiding Official. On April 18, 2019, I issued a Final Order in this case. With respect to Item 1, I determined that Petitioner violated 49 C.F.R. § 192.169(a) by failing to ensure that the Beech Hill Compressor Station had pressure relief or other suitable protective devices of sufficient capacity and sensitivity to ensure that the maximum allowable operating pressure (MAOP) of the station piping and equipment was not exceeded by more than 10 percent. In assessing the civil penalty for this item, I applied the statutory civil penalty assessment factors including the nature, circumstances, gravity, and culpability of this violation.[6] I noted that ensuring that the MAOP is not exceeded by more than 10 percent is a basic code requirement and a key part of safety. If overpressure events occur, they can compromise the integrity of piping and accelerate the failure of any defects in steel pipes. In this instance, a release of gas and ignition were involved. Accordingly, I found that the proposed civil penalty of $31,600 was supported by the record.

With respect to Item 2, Petitioner violated 49 C.F.R. § 192.169(b) by failing to ensure that each vent line that exhausts gas from the pressure relief valves of a compressor station extended to a location where the gas may be discharged without hazard. Although the Notice had proposed a civil penalty of $149,700 for this item, I did not assess a penalty because the cited regulation specified a design requirement and the Beech Hill facility had been designed and constructed in 1980, well over five years prior to the commencement of this case. Accordingly, I found that under 28 U.S.C. § 2462, PHMSA was time-barred from penalizing NFG for this violation. The requirement for NFG to take certain measures to remedy the noncompliance was maintained as proposed in the Notice.

With respect to Item 3, Petitioner violated 49 C.F.R. § 192.617 by failing to have procedures for analyzing accidents and failures that included details on how to determine the causes of the failure and minimizing the possibility of a recurrence. In assessing the civil penalty for this item, I applied the civil penalty assessment factors including the nature, circumstances, gravity, and culpability of this violation. I noted that having procedures for analyzing accidents and failures that include details on how to determine the causes of the failure and minimizing the possibility of a recurrence is a key part of safety and found that the proposed civil penalty amount in the

[4] Notice of Probable Violation, Proposed Civil Penalty, and Proposed Compliance Order, CPF No. 1-2016-1005 (August 4, 2016).

[5] The proposed civil penalty amounts for the three violations were $31,600, $149,700, and $21,600 respectively. The Notice also alleged non-compliance with a fourth regulation which was reduced to a warning item.

[6] 49 U.S.C. § 60122(b).

Notice had already given NFG credit for making some effort to have these procedures, albeit not enough to achieve compliance. Accordingly, I found that the proposed civil penalty of $21,600 was supported by the record. The requirement for NFG to take certain measures to remedy the noncompliance was maintained as proposed in the Notice.

On May 9, 2019, NFG submitted a petition requesting reconsideration of the remedial requirement for Item 2, and the civil penalty of $21,600 for Item 3.

Standard of Review

Under 49 C.F.R. § 190.243, a respondent is afforded the right to petition the Associate Administrator for reconsideration of a Final Order. However, that right is not an appeal or an opportunity to seek a de novo review of the record.[7] It is a venue for presenting the Associate Administrator with information that was not previously available or requesting that any errors in the Final Order be corrected. Requests for consideration of additional 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.

Analysis

With respect to Item 2, the Notice proposed a civil penalty of $149,700 be assessed for having a vent line that did not extend to a location where the gas may be discharged without hazard. As explained above, however, I completely withdrew this proposed civil penalty at the Final Order stage because I agreed with NFG's argument at the hearing that under 28 U.S.C. § 2462, PHMSA was time-barred from penalizing NFG for this violation.[8]

In its Petition, however, NFG argues that in addition to the civil penalty being time barred, the compliance order requiring NFG to take certain measures to remedy the noncompliance is also time barred. Petitioner cites a U.S. Supreme Court case, *Kokesh v. Security and Exchange Commission*, in which the court found that a claim by the Securities and Exchange Commission (SEC) for the disgorgement of $34.9 million by Mr. Kokesh, an investment advisor who fraudulently misappropriated funds and violated securities laws, constituted a penalty for purposes of 28 U.S.C. § 2462.[9] The court found that depriving a violator of a public law of his ill-gotten gains was done by the SEC for the primary purpose of deterrence and therefore constituted a penalty. The Kokesh case establishes that disgorgement is punitive.

The issue presented in this case is whether a safety-related regulatory compliance order is punitive. The remedial requirement that Petitioner argues should constitute a penalty in this case reads, in its entirety:

> With respect to the violation of § 192.169(b) (**Item 2**), within 180 days following receipt of this order, Respondent must submit documentation

[7] 49 C.F.R. § 190.243(a)-(d).

[8] Final Order, at 7-8.

[9] *Kokesh v. SEC*, 137 S.Ct. 1635 (2017).

> to the Director showing 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 hazard.

Petitioner argues that PHMSA's remedial requirement seeking documentation showing that vent stack compliance is being achieved at its other vented compressor stations to ensure that a hazard is not present should be treated as a "penalty" in the same manner as a $34.9 million disgorgement action under the securities laws.

While Petitioner is certainly correct that the word "penalty" in 28 U.S.C. § 2462 is not limited to monetary penalties, the question is whether the remedial requirement in this particular case meets the Supreme Court's test for determining what constitutes a penalty for purposes of 28 U.S.C. § 2462. First, we must recognize that the *Kokesh* disgorgement proceeding involved an entirely different remedial scheme and materially different statutory authorities. Disgorgement is an equitable remedy and often exceeds the profits gained leaving the defendant worse off which is a major factor in determining that disgorgement constitutes a penalty.

Unlike the SEC, however, PHMSA is a public safety agency. Its mission is to protect people, property, and the environment from the risks posed by the transportation of flammable and hazardous products by pipelines and pipeline facilities.[10] Ensuring compliance with safety requirements, whether issued by a state fire marshal or a federal agency such as PHMSA, is very different from SEC disgorgement actions involving the collection of and recoupment of ill-gotten monetary gains from persons who defraud investors and commit securities violations.

PHMSA's statutory authority to issue a compliance order is found at 49 U.S.C. § 60118(b) and reads:

> The Secretary of Transportation may issue orders directing compliance with this chapter, an order under section 60126, or a regulation prescribed under this chapter. An order shall state clearly the action a person must take to comply.

Therefore, Congress expressly authorized the Secretary to issue compliance orders when determined to be appropriate by the Secretary. While PHMSA also has statutory authority to assess administrative civil penalties (which I agreed were time barred in this case), this civil penalty authority is found in 49 U.S.C. 60122(a), a completely separate section of title 49. Notably, the civil penalty authority in 49 U.S.C. § 60122 includes a tool for depriving violators of ill-gotten gains known as the "economic benefit" calculation option in connection with a civil penalty proceeding.[11] That authority was never used in this case, not even in the proposed civil penalty in the Notice which was eliminated.

PHMSA's order in this case seeks to ensure that any identified deviations from federal safety standards are rectified in order to protect the public's safety. Petitioner contended that the

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[10] 49 U.S.C. § 60102(a).

[11] The economic benefit authority is found at 49 U.S.C. § 60122(b)(2)(A).

remedial requirement was done for the purpose of deterrence and cited section 3, paragraph 3.1.1.4 of PHMSA's Enforcement Manual which outlines PHMSA's compliance order authority.[12] However, the word "deterrence" does not actually appear in this provision, nor does it appear in 49 U.S.C. § 60118(b) or anywhere else in the federal pipeline safety laws or regulations.[13] Petitioner also asserted its belief that a compliance order is intended to punish the Respondent. Petitioner, however, could not be more wrong on this point. As the Associate Administrator for Pipeline Safety, I can attest to the fact that correcting a current lack of compliance to achieve safety and protect the public is the sole reason for issuing a compliance order. [14]

Petitioner also argues that an operator in its position cannot be cited for a regulatory violation at all because it would stigmatize the pipeline company by labeling it as a wrongdoer.[15] This argument may be material in the case of an individual person who loses a securities license for non-compliance with an applicable regulation because a finding of violation itself could be seen as stigmatizing that person. It could potentially harm their future employment prospects to an extent that no regulatory relief of any type could be sought without the implication of punishment. Such a rationale, however, is not material in the case of a large oil and gas pipeline company that operates hundreds or thousands of miles of pipelines. Due to the inherent risks associated with the transportation of large volumes of flammable, toxic, and otherwise hazardous substances, operators are subject to a complex and multilayered regulatory regime involving regular inspections and compliance proceedings. It would not be realistic for a large pipeline operator such as NFG to expect that it will have zero history of citations, and one citation more-or-less does not significantly alter the company's business prospects. Within this context, the company's perceived reputation is simply irrelevant.

The record in this case does not provide a basis to conclude that the remedial requirement regarding the gas compressor station vents was either ordered as a punishment or for deterrence. Rather the compliance order was intended to ensure that any known safety hazards to the public are eliminated. Accordingly, the remedial requirement is not time barred by 28 U.S.C. § 2462. It should be emphasized that the purpose of the compliance order in this case is to ensure that Petitioner's gas vent stacks are compliant with applicable regulations and that any documented deviations are rectified. Such agency action was not done for the purpose of deterrence, does not constitute a penalty, and the Petitioner earns no right to operate a pipeline system in violation of existing safety regulations in perpetuity merely because the safety deficiency has existed for more than five years.

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[12] Petition, at 4.

[13] It is not disputed that a monetary civil penalty under 49 U.S.C. § 60122(a) is intended at least in part to have a deterrent effect.

[14] While a failure to satisfy a compliance order may entail consequences in a future inspection, such a directive falls outside of the scope of the Supreme Court's "punitive" definition in Kokesh.

[15] Petition, at 6. Petitioner inaccurately characterized PHMSA case as merely seeking declaratory relief and suggested that PHMSA could utilize a Corrective Action Order or a Safety Order because these actions are based on a finding that an operator's facility is hazardous as opposed to being out of compliance. The hypothetical reputational damage Petitioner purports would be associated with non-compliance would be no less so if PHMSA had utilized a Corrective Action Orders or Safety Order and labeled its facility as "a hazardous facility."

Item 3

With respect to Item 3, Petitioner contends that the $21,600 civil penalty assessed for its violation of 49 C.F.R. § 192.617 by lacking detailed written procedures for analyzing accidents and failures should be reduced or eliminated because its written procedures had been reviewed in previous inspections and proceedings and it had not been penalized previously. In its Petition, NFG asserted that in a 2012 enforcement case CPF 1-2012-1023M, PHMSA reviewed and deemed acceptable the same procedure at issue in Item 3. NFG contended that this 2012 proceeding estopped PHMSA from any future finding of non-compliance with its procedures in this area.

While PHMSA's February 20, 2013 Closure Letter in case CPF 1-2012-1023M did state that NFG had corrected the inadequacies outlined in PHMSA's Notice of Amendment, PHMSA did not state that Petitioner did not need to make any further changes to § 11.5.4. In that case, PHMSA reviewed NFG's procedures, alleged a specific failure to provide adequate guidance in § 11.5.4 concerning sample collection processes, and later accepted NFG's revised sample-collection procedures as a correction to the specified inadequacy. PHMSA's statements in that closure letter did not constitute a blanket approval of all NFG's procedures, nor did it absolve NFG of any future violations concerning the procedures that were inspected. Different inspections tend to focus on different aspects of the pipeline operation and the manner in which the procedures are carried out. It is well established in prior PHMSA enforcement actions that the absence of a finding of non-compliance in one inspection does not preclude a future enforcement action if non-compliance is later identified.[16]

RELIEF DENIED

Based on the information provided in the Petition, a review of the record, and for the reasons stated above, I am affirming the Final Order without modification. The Request to Stay Paragraph 1 of the Compliance Order on pages 9-11 of the Petition is dismissed as moot.

This Decision is the final administrative action in this proceeding.

November 15, 2019

Alan K. Mayberry
Associate Administrator
for Pipeline Safety

Date Issued

[16] *See ConocoPhillips Pipeline Co*., Final Order, CPF No. 3-2005-5015, 2010 WL 6531628, at *2 (PHMSA Sept. 13, 2010) ("review of procedures during an inspection [does not] constitute approval of procedures by [the Office of Pipeline Safety]").