



U.S. Department
of Transportation

Pipeline and Hazardous Materials
Safety Administration

1200 New Jersey Avenue SE
Washington DC 20590

APR 18 2019

Mr. David Bauer
President
National Fuel Gas Supply Corporation
6363 Main Street
Williamsville, NY 14221

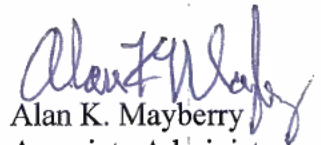
Re: CPF No. 1-2016-1005

Dear Mr. Bauer:

Enclosed please find the Final Order issued in the above-referenced case. It makes findings of violation, assesses a reduced civil penalty of \$53,200, and specifies actions that need to be taken by National Fuel Gas Supply Corp. to comply with the pipeline safety regulations. The penalty payment terms are set forth in the Final Order. When the civil penalty has been paid and the terms of the compliance order completed, as determined by the Director, Eastern Region, this enforcement action will be closed. Service of the Final Order by certified mail is effective upon the date of mailing as provided under 49 C.F.R. § 190.5.

Thank you for your cooperation in this matter.

Sincerely,


Alan K. Mayberry
Associate Administrator
for Pipeline Safety

Enclosure

cc: Mr. Robert Burroughs, Director, Eastern Region, Office of Pipeline Safety, PHMSA
Ms. Brianne K. Kurdock, Counsel, Babst Calland, 805 15th Street, N.W., 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,

Respondent.

CPF No. 1-2016-1005

FINAL ORDER

On March 6, 2015, pursuant to 49 U.S.C. § 60117, representatives of the New York State Department of Public Service, as agents for the Pipeline and Hazardous Materials Safety Administration (PHMSA), Office of Pipeline Safety (OPS), responded to and investigated an incident involving the release of natural gas which ignited at the National Fuel Gas Supply Corporation's (NFG or Respondent) Beech Hill Compressor Station located in the town of Wellsville, New York. NFG operates a 2,200-mile pipeline system, which includes 33 storage fields and 42 compressor stations, from the U.S.–Canadian border at the Niagara River in New York, into western New York and parts of Pennsylvania.¹

As a result of the investigation, the Director, Eastern Region, OPS (Director), issued to Respondent, by letter dated August 4, 2016, a Notice of Probable Violation, Proposed Civil Penalty, and Proposed Compliance Order (Notice), which also included a warning pursuant to 49 C.F.R. § 190.205. In accordance with 49 C.F.R. § 190.207, the Notice proposed finding that NFG had committed three violations of 49 C.F.R. Part 192 and proposed assessing a total civil penalty of \$202,900 for the alleged violations. The Notice also proposed ordering Respondent to take certain measures to correct two of the alleged violations. The warning item required no further action, but warned the operator to correct the probable violation or face possible future enforcement action.

Following a request for an extension of time to respond which was granted, NFG responded to the Notice by letter dated September 30, 2016 (Response). NFG contested the allegations and requested a hearing. NFG provided a pre-hearing submission by letter dated May 1, 2017, and a hearing was subsequently held on May 11, 2017, in West Trenton, New Jersey, before a PHMSA Presiding Official. At the hearing, which was transcribed, Respondent was represented by counsel. After the hearing, both parties provided a post-hearing submission on June 12, 2017 (NFG Closing and OPS Closing). The Director provided a recommendation dated August 10,

¹ Pipeline Safety Violation Report (Violation Report), (Aug. 4, 2016) (on file with PHMSA), at 1; <https://www.nationalfuelgas.com/supply/> (last accessed Nov. 9, 2018).

2017, and NFG provided a reply to the recommendation dated September 8, 2017.

FINDINGS OF VIOLATION

The Notice alleged that Respondent violated 49 C.F.R. Part 192, as follows:

Item 1: The Notice alleged that Respondent violated 49 C.F.R. § 192.169(a), which states:

§ 192.169 Compressor stations: Pressure limiting devices.

(a) Each compressor station must have pressure relief or other suitable protective devices of sufficient capacity and sensitivity to ensure that the maximum allowable operating pressure of the station piping and equipment is not exceeded by more than 10 percent.

The Notice alleged that Respondent 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. Specifically, the Notice alleged that the MAOP of a gas line at the station (300 psig) reached 341 psig on March 5, 2015, exceeding the maximum by more than 10 percent.

In its Response and at the hearing, NFG did not contest the fact that the pressure relief device in question did not have adequate sensitivity to ensure that the MAOP was not exceeded by more than 10 percent.² However, Respondent argued that the regulation should be read as two separate requirements, one for sensitivity and one for capacity, and that OPS must meet the burden of proof for each.³ NFG further argued that OPS failed to do so with respect to the capacity requirement and contended that, as a result, this portion of the alleged violation should be withdrawn and the proposed civil penalty be reduced accordingly.⁴ OPS disagreed, stating that the regulation required the device to have both sufficient capacity and sensitivity and the failure to meet either one of these constituted a violation of the regulation.⁵

In general, a regulation such as § 192.169(a), which consists of a single sentence, should be read in its entirety. With respect to NFG's argument that the alleged violation must be bifurcated and both lack of capacity and lack of sensitivity must be proven, Respondent cited prior PHMSA enforcement cases that did not limit PHMSA from issuing multiple citations for violations of different parts of a regulation.⁶ In addition to involving very different regulations, however, the

² Hearing Transcript at 99.

³ NFG Closing at 28.

⁴ NFG Closing at 29.

⁵ Hearing Transcript at 99-100.

⁶ NFG Closing at 28.

cases cited by Respondent do not establish the proposition that a regulation having multiple conjunctive requirements requires proof that the operator failed to meet every aspect of them. To the contrary, they are examples of cases where an operator was cited more than once under the same code section for violating multiple requirements.

The purpose of the regulation at issue is to prevent significant overpressure events which can damage the pipe and risk failure. As OPS correctly noted, "A device with sufficient capacity but insufficient sensitivity cannot prevent an initial pressure increase above 110 percent MAOP, while a device with sufficient sensitivity but insufficient capacity cannot adequately relieve overpressure after the device is triggered."⁷ NFG acknowledged that the MAOP was exceeded by more than 10 percent and did not contest the fact that the pressure relief device in question did not have adequate sensitivity to ensure that the MAOP was not exceeded by more than 10 percent. Accordingly, after considering all of the evidence and the legal issues presented, I find that Respondent 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 MAOP of the station piping and equipment was not exceeded by more than 10 percent. To the extent that Respondent's argument is relevant to the assessment of a civil penalty, it will be addressed in the Assessment of Penalty section below.

Item 2: The Notice alleged that Respondent violated 49 C.F.R. § 192.169(b), which states:

§ 192.169 Compressor stations: Pressure limiting devices.

(a)...

(b) Each vent line that exhausts gas from the pressure relief valves of a compressor station must extend to a location where the gas may be discharged without hazard.

The Notice alleged that Respondent 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. Specifically, the Notice alleged that the vent line that exhausts gas at the Beech Hill Compressor Station discharged gas up the side of the M&R building into the eaves located approximately ten feet above the top of the vent piping, and that gas was discharged with a force that peeled back the steel flashing on the building and that the gas subsequently ignited.

In its Response and at the hearing, NFG stated that there was no regulatory requirement that all such vent stacks must clear the roof line and any finding that § 192.169(b) involves a height requirement would be arbitrary and capricious.⁸ NFG stated that the stack had been in place for 36 years and no prior inspections including one only eight months prior to the incident had identified a concern with the stack.⁹ NFG stated that the stack was not near a walkway, the

⁷ OPS Closing at 3.

⁸ NFG Pre-hearing Submittal at 20.

⁹ Hearing Transcript at 19-21.

building was not combustible, there was no overhang, and no prior inspection had identified a concern.¹⁰ NFG further argued that PHMSA did not prove that the vent stack design caused the fire. Finally, Respondent argued that even if the stack design was inconsistent with the regulation, the applicable five-year statute of limitations had long since run and it could not be penalized for the violation.¹¹

With respect to NFG's argument that there was no prescriptive code requirement that all vent stacks must clear the roof line, it does not necessarily follow that no violation occurred. The regulation at issue is a performance-based regulation. In this case, in light of all the factors that go into vent stack design, the designers may have proceeded on the assumption that a discharge from this vent stack would not cause a hazard.¹² There is no question, however, that the discharge in this instance through this stack did cause a hazard. If a design used by an operator fails to meet a performance standard, yet that operator could not be cited, it would render the standard virtually meaningless. Therefore, I cannot accept NFG's argument that the failure to achieve the performance deemed to be acceptable under § 192.169(b) does not equate to failure to meet the regulatory requirement. As for Respondent's argument that under § 192.169(b) PHMSA was required to prove that the vent stack design caused the ignition, I disagree. The failure to adequately vent gas away from a gas facility such as a compressor station presents a hazard regardless of the source of the ignition when an incident involves ignition.

With respect to NFG's argument that the stack had been in place for many years and no prior inspection had resulted in a citation does not negate the non-compliance.¹³ It is well established that the absence of a citation in a prior inspection does not guarantee that a future inspection or accident investigation might allege a violation.¹⁴

Accordingly, after considering all of the evidence and the legal issues presented, I find that Respondent 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. Respondent's argument concerning whether it could be penalized for this violation given the applicable statute of limitations is addressed in the Assessment of Penalty section below.

Item 3: The Notice alleged that Respondent violated 49 C.F.R. § 192.617, which states:

§ 192.617 Investigation of failures.

Each operator shall establish procedures for analyzing

¹⁰ Hearing Transcript at 23-25.

¹¹ NFG Closing at 2-3.

¹² Hearing Transcript at 23-24.

¹³ In some circumstances, this argument may be relevant to mitigating a civil penalty assessment if one were involved.

¹⁴ See *ConocoPhillips Pipeline Co.*, Final Order, CPF No. 3-2005-5015, 2010 WL 6531628, at 2 (Sept. 13, 2010).

accidents and failures, including the selection of samples of the failed facility or equipment for laboratory examination, where appropriate, for the purpose of determining the causes of the failure and minimizing the possibility of a recurrence.

The Notice alleged that Respondent 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. Specifically, the Notice alleged that NFG's Procedure Section 11.5.4, Investigation of Failures, stated in relevant part that "All necessary precautions shall be taken to eliminate a recurrence or similar failure." but the procedures did not function to ensure the root cause of the incident was identified and the possibility of recurrence was minimized.

In its Response and at the hearing, NFG explained that its personnel had completed a "Gas System Reliability Report" (SRR) pursuant to Procedure Section 5.1.1 which involved producing a description of the failure and the remedial steps subsequently taken before returning the line to service including replacing the failed regulator.¹⁵ OPS noted that Section 11.5.4 did not contain a cross-reference to Section 5.1.1.¹⁶

While Section 11.5.4 did briefly mention reviewing the operating conditions at the time of a failure and the possible use of lab analysis to determine the cause of failure for "blowouts," OPS is correct that basic failure analysis implementation steps were absent and Section 11.5.4 did not cross-reference the SRR report provision. Moreover, while NFG stated that it later evaluated its other compressor stations for venting hazards, there was nothing in Section 11.5.4 to ensure responsibility for documenting this process by a qualified individual having responsibility for approving any decisions made or actions taken.¹⁷ It appears that no documentation of NFG's evaluation of its other compressor stations for the possible presence of the root cause of the Beech Hill incident—which was not identified before that line was placed back into service—was provided, illustrating the importance of having such procedures to meet the requirement of ensuring the possibility of recurrence is minimized.

NFG's argument that it completed the SRR and replaced the regulator does not negate the failure to meet the requirements of § 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. Accordingly, after considering all of the evidence and the legal issues presented, I find that Respondent 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.

These findings of violation will be considered prior offenses in any subsequent enforcement

¹⁵ NFG Closing at 19.

¹⁶ Hearing Transcript at 75.

¹⁷ NFG Closing at 20.

action taken against Respondent.

ASSESSMENT OF PENALTY

Under 49 U.S.C. § 60122, Respondent is subject to an administrative civil penalty not to exceed \$200,000 per violation for each day of the violation, up to a maximum of \$2,000,000 for any related series of violations.¹⁸

In determining the amount of a civil penalty under 49 U.S.C. § 60122 and 49 C.F.R. § 190.225, I must consider the following criteria: the nature, circumstances, and gravity of the violation, including adverse impact on the environment; the degree of Respondent's culpability; the history of Respondent's prior offenses; any effect that the penalty may have on its ability to continue doing business; and the good faith of Respondent in attempting to comply with the pipeline safety regulations. In addition, I may consider the economic benefit gained from the violation without any reduction because of subsequent damages, and such other matters as justice may require. The Notice proposed a total civil penalty of \$202,900 for the violations cited above.

Item 1: The Notice proposed a civil penalty of \$31,600 for Respondent's violation of 49 C.F.R. § 192.169(a), for 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 MAOP of the station piping and equipment was not exceeded by more than 10 percent. Respondent disagreed with the amount of the proposed civil penalty and questioned whether it was supported by the penalty consideration factors in the Pipeline Safety Act and § 190.225 regulations.

With respect to the nature and circumstances of NFG's violation of § 192.169(b), ensuring that MAOP is not exceeded by more than 10 percent is a basic code requirement. With respect to the gravity of the offense, ensuring that MAOP is not exceeded by more than 10 percent is 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 pipe. In this instance, a release of gas and ignition were involved. Notably, however, the gravity factor for this violation was not assigned at a high level that would correspond to being a causal factor in an accident, but rather at a medium-to-lower level.¹⁹ With respect to culpability, there were no circumstances beyond Respondent's control that prevented it from complying with the regulation and action was not taken to achieve compliance until after the violation was discovered by OPS. As discussed above, I did not agree with Respondent's argument that the violation must be bifurcated and lack of capacity and lack of sensitivity read as two separate requirements for purposes of finding a violation. For the same reasons, I see no justification for a reduction in the civil penalty amount proposed in the Notice for this violation. I further find that the record supports the points assigned for prior offenses and good faith.

Respondent has presented no information or arguments that would warrant a reduction in the

¹⁸ These amounts are adjusted annually for inflation. *See, e.g.*, Pipeline Safety: Inflation Adjustment of Maximum Civil Penalties, 82 Fed. Reg. 19325 (April 27, 2017).

¹⁹ Violation Report at 10.

civil penalty amount proposed in the Notice for this violation. Accordingly, having reviewed the record and considered the assessment criteria, I assess Respondent a civil penalty of \$31,600 for violation of 49 C.F.R. § 192.169(a).

Item 2: The Notice proposed a civil penalty of \$149,700 for Respondent's violation of 49 C.F.R. § 192.169(b), for 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.

In its response and at the hearing, NFG argued that under 28 U.S.C. § 2462, PHMSA was time-barred from pursuing "...an action, suit, or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise...unless commenced within five years from the date when the claim first accrued...".²⁰ NFG contended that the claim first accrued when the vent stack and the rest of the station were designed and constructed in 1980.²¹ OPS disagreed and argued that under 49 U.S.C. § 60122, a new violation occurred every day that the Beech Hill facility was not in compliance. OPS' argument amounts to the proposition that a violation of a design requirement such as § 192.169(a) can be penalized even decades later.

The application of the statute of limitations in regulatory proceedings such as this is governed by *3M Company v. Browner*, 17 F.3d 1453, a major D.C. Circuit Court of Appeals case holding that the statute of limitations for regulatory violations generally begins running at the time a violation occurs, not the time it was discovered by the government which is often much later. The court explains that the purpose of the statute of limitations, disallowing stale cases where the accused can no longer properly defend itself, would be frustrated if regulated entities remained exposed to penalties for decades after a discrete violation occurs.²²

As applied to most typical pipeline enforcement matters involving ongoing, periodic operating and maintenance requirements, OPS would be correct that § 60122 means a new violation occurs each day the noncompliance is present and as a result are generally not time barred as long as the noncompliance cited does not extend back more than five years from the commencement of the case.²³ This provision, however, only applies if the violation actually repeats itself periodically. The particular violation in this case involves a design and construction requirement. As NFG correctly pointed out, design requirements have a very different nature than ongoing operating and maintenance requirements and a design decision is a discrete event that occurred at one time in the past (although it should be noted that even design and construction requirement violations can be subject to time of discovery if the noncompliance is latent or undiscoverable by the government). This instance, however, presents the relatively rare circumstance where the violation both involved a design requirement and was discoverable by the government. In these narrow circumstances, NFG is correct that failing to apply the five-year period from the time a

²⁰ NFG Closing at 3.

²¹ *Id.*

²² See *Sierra Club v. Oklahoma Gas and Electric Company*, 816 F.3d 666 (10th Cir. 2016).

²³ For purposes of applying 28 U.S.C. § 2462, commencement of the case means issuance of the Notice.

discoverable design requirement was violated when a facility is built would conflict with the fundamental purpose of the statute of limitations and would be inconsistent with the D.C. Circuit's holding in the 3M case. Accordingly, OPS' argument on this point fails and the agency is time-barred from imposing civil penalties against NFG for this particular violation.

Based on the foregoing, I withdraw the proposed penalty for violation of 49 C.F.R. § 192.169(b). Because the violation also involved a proposed compliance order, which is a remedial action not a penalty action, the proposed compliance terms for Item 2 are addressed below in the Compliance Order section.²⁴

Item 3: The Notice proposed a civil penalty of \$21,600 for Respondent's violation of 49 C.F.R. § 192.617, for 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. Respondent disagreed with the amount of the proposed civil penalty and questioned whether it was supported by the penalty consideration factors in the Pipeline Safety Act and § 190.225 regulations.

With respect to the nature and circumstances of NFG's violation of § 192.617, having 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 is a key part of safety and the non-compliance was discovered by the OPS inspector. With respect to the gravity of the offense, the gravity factor for this violation was assigned at a medium-to-lower level commensurate with the offense.²⁵ With 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.²⁶ I further find that the record supports the points assigned for prior offenses and good faith.

Accordingly, having reviewed the record and considered the assessment criteria, I assess Respondent a civil penalty of \$21,600 for violation of 49 C.F.R. § 192.617.

In summary, having reviewed the record and considered the assessment criteria for each of the Items cited above, I assess Respondent a total civil penalty of **\$53,200**.

Payment of the civil penalty must be made within 20 days of service. Federal regulations (49 C.F.R. § 89.21(b)(3)) require such payment to be made by wire transfer through the Federal Reserve Communications System (Fedwire), to the account of the U.S. Treasury. Detailed instructions are contained in the enclosure. Questions concerning wire transfers should be directed to: Financial Operations Division (AMK-325), Federal Aviation Administration, Mike Monroney Aeronautical Center, 6500 S MacArthur Blvd, Oklahoma City, Oklahoma 79169. The Financial Operations Division telephone number is (405) 954-8845.

²⁴ See *United States v. Telluride*, 146 F.3d at 1248-49.

²⁵ Violation Report at 26.

²⁶ Violation Report at 27.

Failure to pay the \$53,200 civil penalty will result in accrual of interest at the current annual rate in accordance with 31 U.S.C. § 3717, 31 C.F.R. § 901.9 and 49 C.F.R. § 89.23. Pursuant to those same authorities, a late penalty charge of six percent (6%) per annum will be charged if payment is not made within 110 days of service. Furthermore, failure to pay the civil penalty may result in referral of the matter to the Attorney General for appropriate action in a district court of the United States.

COMPLIANCE ORDER

The Notice proposed a compliance order with respect to Items 2 and 3 in the Notice for violations of 49 C.F.R. §§ 192.169(b), and 192.617, respectively. Under 49 U.S.C. § 60118(a), each person who engages in the transportation of gas or who owns or operates a pipeline facility is required to comply with the applicable safety standards established under chapter 601.

Pursuant to the authority of 49 U.S.C. § 60118(b) and 49 C.F.R. § 190.217, Respondent is ordered to take the following actions to ensure compliance with the pipeline safety regulations applicable to its operations:

1. With respect to the violation of § 192.169(b) (**Item 2**), within 180 days following receipt of this order, Respondent must submit documentation 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.
2. With respect to the violation of § 192.617 (**Item 3**), within 90 days following receipt of this order, Respondent must submit documentation to the Director showing that it has revised its procedures for analyzing accidents and failures to set forth the process steps for how to determine the causes of the failure including analyzing the root cause and minimizing the possibility of a recurrence.

The Director may grant an extension of time to comply with any of the required items upon a written request timely submitted by the Respondent and demonstrating good cause for an extension.

It is requested (not mandated) that Respondent maintain documentation of the safety improvement costs associated with fulfilling this Compliance Order and submit the total to the Director. It is requested that these costs be reported in two categories: (1) total cost associated with preparation/revision of plans, procedures, studies and analyses; and (2) total cost associated with replacements, additions and other changes to pipeline infrastructure.

Failure to comply with this Order may result in the administrative assessment of civil penalties not to exceed \$200,000, as adjusted for inflation (49 C.F.R. § 190.223), for each violation for each day the violation continues or in referral to the Attorney General for appropriate relief in a district court of the United States.

WARNING ITEM

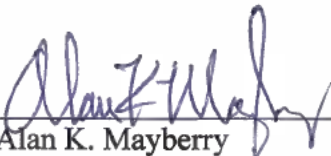
With respect to Item 4, the Notice alleged a probable violation of Part 192 but did not propose a civil penalty or compliance order for this item. Therefore, this is considered to be a warning item. The warning was for:

49 C.F.R. § 192.605(a) **(Item 4)** — Respondent's alleged failure to follow its procedure for telephonic reporting the release to the National Response Center at the earliest practicable moment but not later than one hour following discovery.

NFG presented information in its Response showing that it had taken certain actions to address the cited item. If OPS finds a violation of this provision in a subsequent inspection, Respondent may be subject to future enforcement action.

Under 49 C.F.R. § 190.243, Respondent may submit a petition for reconsideration of this Final Order to the Associate Administrator, Office of Pipeline Safety, PHMSA, 1200 New Jersey Avenue, SE, East Building, 2nd Floor, Washington, DC 20590, with a copy sent to the Office of Chief Counsel, PHMSA, at the same address, no later than 20 days after receipt of service of this Final Order by Respondent. Should Respondent elect to do so, the petition must contain a statement of the issue(s) and meet all other requirements of 49 C.F.R. § 190.243. The filing of a petition automatically stays the payment of any civil penalty assessed. The other terms of the order, including corrective action, remain in effect unless the Associate Administrator, upon request, grants a stay.

The terms and conditions of this Final Order are effective upon service in accordance with 49 C.F.R. § 190.5.



Alan K. Mayberry
Associate Administrator
for Pipeline Safety

APR 18 2019

Date Issued