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June 12, 2017

Via Federal Express and e-mail (lawrence.white@dot.gov)

Lawrence White, Esq.
Presiding Official
U.S. Department of Transportation
Pipeline and Hazardous Materials Safety Administration
Office of the Chief Counsel
East Building, E26-310
1200 New Jersey Avenue, S.E.
Washington, D.C. 20590

RE: CPF No. 1-2016-1005: Post-hearing filings

Dear Mr. White:

Please find attached National Fuel Gas Supply Corporation's (National Fuel) post-hearing filings for the above-referenced matter. Pursuant to 49 C.F.R. §§ 190.209(b)(6) and 190.211(g), National Fuel submits this letter and all attachments for inclusion in the case file for this matter.

National Fuel's post-hearing filings include the following documents:

1. Post-Hearing Brief
2. Exhibits

Please note that National Fuel has asserted that certain information in the attached exhibits is subject to protection from release under the Freedom of Information Act, 5 U.S.C. § 552(b) and other authorities. National Fuel requests that PHMSA consult with National Fuel before making such materials available to the public.

Please do not hesitate to contact me if you have any questions.

Sincerely,

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Enclosure
cc: Mr. Forrest Pittman, Esq., Eastern Region Counsel, PHMSA
Mr. Rob Burrough, Acting Eastern Region Director, PHMSA

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

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

POST-HEARING BRIEF OF NATIONAL FUEL GAS SUPPLY CORPORATION
JUNE 12, 2017

Table of Contents

I. Introduction

Pursuant to 49 C.F.R. § 190.211(g), National Fuel Gas Supply Corporation (National Fuel or the Company) respectfully submits this post-hearing brief in the above-referenced matter. National Fuel reiterates its request that the Pipeline and Hazardous Materials Safety Administration (PHMSA or the Agency) withdraw the allegations, proposed civil penalties, and proposed compliance order set forth in the Notice of Probable Violation, Proposed Civil Penalty, and Proposed Compliance Order (Notice) issued on August 4, 2016.[1] A hearing was held on May 11, 2017, at PHMSA's Eastern Region office in West Trenton, New Jersey (Hearing). A transcript of the Hearing was prepared and a copy has been provided to PHMSA. National Fuel has attached a copy of the Hearing transcript, including errata, as Exhibit A for inclusion in the record.

The arguments in this Post-Hearing brief supplement National Fuel's Pre-Hearing brief filed on May 1, 2017. National Fuel adopts and advances all arguments set forth in the Pre-Hearing brief, as though set forth fully herein. *See* Exhibit B.

National Fuel requests that PHMSA leave the record open beyond June 12, 2017, to allow the Company the opportunity to reply to the Eastern Region's Post-Hearing Recommendation.

II. Statement of the Case

National Fuel is committed to public safety, protecting the environment, and operating its pipeline facilities safely. National Fuel takes PHMSA's allegations of violation very seriously. However, the Company believes that the allegations in this case are not supported by the facts or the regulations. The pressure relief device at the Beech Hill Compressor Station (the Station) had

[1] 49 C.F.R. § 190.211(g)(2016).

sufficient capacity as required by § 192.169(a). PHMSA has not demonstrated that the design of the vent stacks at the Station caused the fire and any allegation that National Fuel violated the design code in 1980 is now time-barred by the five-year statute of limitations. National Fuel had procedures for determining the cause of a failure and minimizing the possibility of a recurrence in accordance with § 192.617. PHMSA is estopped from alleging that National Fuel's failure investigation procedures violated the pipeline safety regulations. The Agency reviewed this exact procedure as part of a 2012 enforcement action and determined that "no further action [was] necessary."[2] Finally, National Fuel complied with its failure investigation procedures when it reported the events that occurred at the Station on March 5, 2015 (the Incident) to the National Response Center (NRC).

For these reasons, National Fuel respectfully requests that PHMSA withdraw Item # 1 in part, and Item #s 2, 3, and 4 completely. To the extent that the allegations are not withdrawn, National Fuel respectfully requests that the proposed civil penalties be reduced or eliminated, as described more fully below. National Fuel also requests that PHMSA withdraw the Proposed Compliance Order associated with Item #s 2 and 3.

III. Discussion and Argument

A. PHMSA must withdraw Item #2.

1. PHMSA is time-barred from asserting an allegation of a design violation thirty-six years after a facility was constructed.

PHMSA is bound by the general five-year statute of limitations (SOL) set forth in 28 U.S.C. § 2462 to commence a proceeding.[3] As acknowledged by the Agency in prior

[2] *In the Matter of National Fuel Gas Supply Corporation*, 1-2012-1023M, Closure letter (February 20, 2013).

[3] 28 U.S.C. § 2462.

enforcement decisions, "[t]he Pipeline Safety Laws[4] do not prescribe a specific time limit for initiating an enforcement proceeding. Therefore, those proceedings are subject to the default statute of limitations."[5] Section 2462 specifies 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**…"[6] The Supreme Court has determined that "a claim accrues as soon as the plaintiff can file suit and obtain relief."[7] In this matter, the claim first accrued in 1980 when the Station was designed and constructed. Section 2462, therefore, provides that PHMSA is time-barred from commencing an enforcement action concerning the design of the Station after 1985.

i. PHMSA has mischaracterized the function of a statute of limitations.

At the Hearing, PHMSA described 28 U.S.C. § 2462 as a restriction on how many years of civil penalties the Agency can assess for a given violation. The Agency stated, "PHMSA could not have charged further back than 5 years for the existence of this improperly designed vent stack."[8] PHMSA's position that a violation can run in perpetuity and 28 U.S.C. § 2462 only limits the duration of the penalty to 5 years is incorrect. Section 2462 restricts when PHMSA can *initiate* a legal proceeding. The title of the statute is "Time for Commencing Proceedings." The Agency

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[4] 49 U.S.C. §§ 60101-60137.

[5] *In the Matter of Alon USA, LP*, CPF No. 5-2004-5021, Decision on Petition for Reconsideration (October 22, 2009) (citing *U.S. v. Banks*, 115 F.3d 916 (11th Cir. 1997) and *U.S. v. C&R Trucking Company*, 537 F. Supp. 1080, 1083 (D. W.Va. 1982)).

[6] 28 U.S.C. § 2462 (emphasis added).

[7] *Heimeshoff v. Hartford Life & Accident Ins. Co.*, 134 S. Ct. 604, 610 (2013).

[8] Transcript, at 35: 11-14.

recognized this concept in *the Matter of Alon USA, LP*. PHMSA cited the definition of a statute of limitation as:

> A law that bars claims after a specified period; specif[ically], a statute establishing a time limit for suing in a civil case, based on the date when the claim accrued…The purpose of such a statute is to require diligent prosecution of known claims, thereby providing finality and predictability in legal affairs and ensuring that claims will be resolved while evidence is reasonably available and fresh.[9]

Section 2462 applies from the time the violation first accrues. Any claim that National Fuel violated § 192.169(b) first accrued when PHMSA could have brought a case, *i.e.*, in 1980, when the vent stack was designed and constructed. PHMSA is time-barred from bringing an allegation of a design violation, now, 36 years after the facility was designed and constructed. PHMSA cannot avoid the limits of section 2462 by recharacterizing it as a penalty limitation.

ii. PHMSA's assertion that it does not need to evaluate the relevance of the tolling theories is not supported by the facts or the case law.

An agency can only assert violations beyond the applicable statute of limitations if the agency applies one of two tolling theories: repeated or continuing violations. At the Hearing, in response to an inquiry of whether it was PHMSA's position that § 192.169(b) was a continuing violation, PHMSA stated "No. Our position is that under PHMSA's statute, authorizing statute 60122, that we don't even need to get into the question of tolling the statute of limitations either through a continuing violation or through a recurrent violation. Our authorizing statute allows PHMSA to fine and to charge a new violation for every day that a particular facility is not compliant with pipeline safety laws, so we don't even need to get into the question of whether or

[9] *In the Matter of Alon USA LP*, CPF No. 5-2004-5021, Decision on Petition for Reconsideration, at 2 (October 22, 2009) (citing Black's Law Dictionary (8th ed. 2004)).

not this is a continuing violation."[10] This argument is not supported by the facts or the case law.

Although PHMSA has the authority to issue "a separate violation for each day the violation continues," in this case, the Agency appropriately chose to issue a single violation that lasted for one day.[11] The Violation Report and Proposed Civil Penalty Calculation specifically describes Item #2 as lasting for one day. These facts do not support the position that PHMSA was availing itself of its authority to issue a new violation for every day for 36 years.

If Congress intended for 49 U.S.C. § 60122 to override the statute of limitations, then 28 U.S.C. § 2462 would never apply to any PHMSA enforcement case. There would be no need to have a SOL for PHMSA matters. In addition, there are several federal agencies whose statutes include the authority to assert per diem violations and yet courts have applied 28 U.S.C. § 2462 in reviewing those agencies' enforcement decisions. For example, the Clean Air Act (CAA) and the Toxic Substances Control Act (TSCA) include the authority to issue civil penalties for each day the violation continues.[12] The per diem authority has not prevented courts from applying 28 U.S.C. § 2462 to enforcement cases brought under the CAA and TSCA.[13]

In *Sierra Club v. Oklahoma Gas and Elec. Co.*, the 10th Circuit reviewed the relevance of

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[10] Transcript, at 34: 5-14.

[11] 49 U.S.C. § 60122(a) (2016).

[12] In the Toxic Substances Control Act, "[a]ny person who violates a provision of section 2614 or 2689…shall be liable to the United States for a civil penalty in an amount not to exceed $37,500 for each such violation. Each day such a violation continues shall, for purposes of this subsection, constitute a separate violation of section 2614 or 2689 of this title." 15 U.S.C.A. § 2615(a)(2016)(emphasis added); In the Clean Air Act, "[t]he Administrator may issue an administrative order against any person assessing a civil administrative penalty of up to $25,000, per day of violation, whenever, on the basis of any available information, the Administrator finds that such person--(A) has violated or is violating any requirement or prohibition of an applicable implementation plan…" 42 U.S.C. § 7413(d)(emphasis added).

[13] *See Sierra Club v. Oklahoma Gas and Elec. Co.*, 816 F. 3d 666 (10th Cir. 2016); *3M Company (Minnesota Mining and Manufacturing) v. Browner*, 17 F. 3d. 1453 (D.C. Cir. 1994).

per diem penalty authority to the statute of limitations and determined that such authority does not allow the SOL to reset each day.[14] The court pointed to the "first accrued" language in 28 U.S.C. § 2462 and held that there is a difference between the availability of a penalty and the initial accrual of the violation giving rise to those penalties.[15]

The existence of per diem penalty authority in § 60122 does not permit PHMSA to disregard the statute of limitations. The SOL must be applied when the alleged violation first accrued. Any alleged violation first accrued when the Agency could have first obtained relief.[16] In this case, that time period is when the Station was constructed. Section 60122 does not allow PHMSA to ignore the "first accrued" language in the SOL and issue a violation 36 years after a facility was constructed.

iii. The only acceptable methods to extend the SOL beyond five years from the date of first accrual have not been argued by PHMSA in this case.

An agency can only assert violations beyond the applicable statute of limitations if the agency applies one of two tolling theories: repeated or continuing violations. PHMSA has not asserted either theory in this case.[17]

a. Section 192.169(b) is not a repeated violation.

As discussed in National Fuel's pre-hearing brief, the alleged violation of § 192.169(b) is not a repeated violation. A repeated violation is a new, discrete violation occurring on each day

[14] *Sierra Club*, 816 F. 3d at 671.

[15] *Id.* at 673.

[16] *Gabelli v. SEC*, 133 S. Ct. 1216, 1220 (2013).

[17] "…[W]e don't even need to get into the question of tolling the statute of limitations either through a continuing violation or through a recurrent violation." Transcript, at 34: 10-13.

of continued operation.[18] An alleged failure to meet a design requirement is not a new, discrete violation occurring on subsequent days of operation.[19] The allegation that National Fuel failed to design the vent stack properly is a pre-construction requirement and is not a repeated violation. There were no additional, discrete design violations occurring once construction was completed.

b. Section 192.169(b) is not a continuing violation.

A continuing violation tolls the statute of limitations when the violation that gave rise to the claim continues to occur within the limitations period.[20] The violation itself must continue, not the just the consequences.[21] As discussed in the Pre-Hearing brief, the failure to meet pre-construction requirements are not continuing violations. In *Sierra Club,* the Tenth Circuit unequivocally rejected the notion that the limitations period does not begin to run until after the final day of the violation pointing to the fact that Congress clearly specified in 28 U.S.C. § 2462 that the limitations period commences "when a claim *first* accrue[s]."[22] In *National Parks and Conservation Association, Inc. v. Tennessee Valley Authority*, the Eleventh Circuit emphasized that the permitting violations alleged in the case were based on laws originating in the preconstruction and construction subparts of the Clean Air Act and not in the operations subparts.[23]

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[18] *Sierra Club*, 816 F.3d at 671 (10th Cir. 2016).

[19] *Id.* at 672. The 10th Circuit held that modifying a boiler plant without a pre-construction permit is not a repeated violation since no discrete violations occurred on subsequent days of operation.

[20] *Havens Realty Corp. v. Coleman,* 455 U.S. 363, 380 (1982); *See also, Sierra Club,* 816 F.3d. 666 at 671.

[21] *National Parks and Conservation Ass'n Inc. v. Tennessee Valley Auth.*, 502 F.3d 1316, 1322 (11th Cir. 2007) (citing *Ross v. Buckeye Cellulose Corp,* 980 F. 2d 648, 658 (11th Cir. 1993)(emphasis added)). The 11th Circuit stated that "It is important to distinguish between the 'present consequences of a one-time violation,' which do not extend the limitations period, and 'a continuation of a violation into the present,' which does."

[22] *Sierra Club,* 816 F.3d at 673.

[23] *National Parks*, at 1322 (citing *New York v. Niagara Mohawk Power Corp.*, 263 F. Supp.2d 650, 651 (W.D. N.Y. 2003)).

The "preconstruction requirements cannot reasonably be construed to mean that building or altering a machine without a permit is a violation that continues as long as the machine exists or is operated….[a] violation of the Clean Air Act's preconstruction permit requirements . . . occurs at the time of the construction or modification and is not continuing in nature."[24] The court concluded that any permitting violations occurred at the time of construction, and did not continue on an ongoing basis in perpetuity.[25] Finally, the Western District of New York did not accept the argument that every day a facility is operated without a pre-construction permit, the SOL resets. The court stated that this approach would create "a *de facto* elimination of any statute of limitation, for the limitation period would never begin to accrue as long as the facility remained in operation."[26]

Any alleged failure to design the vent stacks properly is a pre-construction violation and is not a continuing violation. Allowing the statute of limitations to reset every day that the facility is in operation would eliminate the application of 28 U.S.C. § 2462 to PHMSA enforcement cases. The language of the statute and the case law do not recognize such an exception.

c. PHMSA's attempt to distinguish these cases lack support.

At the Hearing, PHMSA stated that the cases cited in National Fuel's Pre-Hearing brief were distinguishable because "…Congress has not given the relevant agencies in those cases a different statute of limitations or a means by which they can charge a new violation for each day that a violation continues."[27] National Fuel cited *Niagara Mohawk Power, Sierra Club,* and

[24] *Id.* (citing *United States v. Ill. Power Co.,* 245 F. Supp. 2d 951, 957 (S.D. Ill. 2003).

[25] *Id*.

[26] *New York v. Niagara Mohawk Power Corp.*, 263 F. Supp.2d 650, 651 (W.D. N.Y. 2003).

[27] Transcript, at 28: 16-20.

National Parks in support of its argument that 28 U.S.C. § 2462 cannot be tolled when applied to an alleged design violation. All three of these cases reviewed the application of 28 U.S.C. § 2462, the same statute of limitations applicable to PHMSA enforcement cases.[28] All three cases examined the ability to cite an operator for a pre-construction violation after construction is complete. Finally, all three cases involved the CAA, which similar to the Pipeline Safety Act, has a provision allowing new violations for each day that a violation occurs.[29] PHMSA's attempt to distinguish these cases is without merit.

PHMSA also attempted to distinguish these cases by stating that an operator has an ongoing obligation to review its design decisions regularly. This is simply incorrect. Once design and construction are complete, the other sections of the pipeline safety regulations such as operations, maintenance, and operator qualification regulations, *etc.*, apply on an ongoing basis. These sections of the pipeline safety regulations provide a broadly applicable framework that requires operators to identify and rectify safety problems. Operators routinely review their facilities through continuing surveillance activities and the fulfillment of other operations and maintenance requirements. If an operator discovers a safety issue with design, it would certainly address the problem. However, operators are not required to review historical design decisions on a reoccurring basis. An operator is not required under PHMSA regulations to review its prior design and construction decisions continuously, or in this case, decades later. Nothing in the statute, regulations, prior enforcement decisions, or guidance impose such an obligation. At the Hearing,

[28] *New York v. Niagara Mohawk Power Corp.*, 263 F. Supp.2d 650, 651 (W.D. N.Y. 2003); *Sierra Club v. Oklahoma Gas and Electric Company*, 816 F.3d 666, 673 (10th Cir 2016); *National Parks and Conservation Ass'n Inc. v. Tennessee Valley Authority*, 502 F.3d 1316, 1322 (11th Cir. 2007).

[29] 42 U.S.C. § 7413(d) and (e) (1990).

PHMSA could not point to any document supporting the Agency's argument that operators must re-review its design decisions on a regular basis.[30]

d. The PHMSA *Equitable* enforcement decision is distinguishable from this case.

During the Hearing, the Agency stated that *Equitable* presented similar circumstances to the Beech Hill matter.[31] The allegations raised in *Equitable* involved an operations violation and are fully distinguishable from this matter. In *Equitable*, PHMSA concluded that an operator had an ongoing duty to comply with § 195.401 in reference to the repair of anomalous conditions.[32] PHMSA decided that the continuous failure by Equitable to correct the conditions constituted a series of daily violations that continued through the limitations period.[33] PHMSA relied on the repeated violation theory to toll the SOL. Here, PHMSA alleged a violation of a design requirement, not an operations requirement, and the Agency failed to assert any tolling theory to extend the SOL.

In addition, the *Equitable* decision was issued prior to the 2013 Supreme Court decisions of *Heimeshoff* and *Gabelli.* In *Equitable*, PHMSA cited to *Newell Recycling Co. v. EPA*[34] and *Interamericas Investments, Ltd. v. Board of Governors of the Federal Reserve System*.[35] The 10th Circuit distinguished *Newell* finding it inconsistent with the Supreme Court decisions

[30] Transcript, at 53; 58: 7-8.

[31] Transcript, at 27: 11-12; *See In the Matter of Equitable Production Company, a Division of EQT Corporation, et al.*, CPF No. 2-2006-5001 (February 17, 2011).

[32] *Id.* at 9.

[33] *See In the Matter of Equitable Production Company, a Division of EQT Corporation, et al.*, Decision on Petition for Reconsideration at 2.

[34] *Newell Recycling Co. v. EPA*, 231 F.3d 204, 206 (5th Cir. 2000).

[35] *Interamericas Investments, Ltd. v. Bd. of Governors of the Federal Reserve System*, 111 F.3d 376 (5th Cir. 1997).

issued in *Heimeshoff* and *Gabelli*.[36] The 10th Circuit also stated that the *Newell* court did not address the use of the word "first" in 28 U.S.C. § 2462. The court held that "[i]f the limitations period under § 2462 reset each day, the statutory term "first" would have no operative force."[37]

Although PHMSA has statutory authority to issue per diem civil penalties, the holding in the *Interamericas* case is inapplicable because the case involved reporting violations that impose a continuous duty on the regulated entity. The design section of the pipeline safety regulations does not confer a continuous duty to reevaluate the decisions made during construction.

The SOL runs when the violation first accrues. This timeframe, as determined by the Supreme Court, is when the Agency could have first brought an action (i.e., in 1980). Without a tolling theory, any claims asserted after 1985 are time-barred.

iv. The Agency's argument that the discovery rule should apply to PHMSA enforcement cases is contrary to Supreme Court precedent.

During the Hearing, the Agency stated that because "…pipelines often run underground, you're under no obligation to notify PHMSA when changes are made in many cases, so for PHMSA to be unable to charge a violation of the pipeline safety laws after five years of that particular design being installed…would be untenable."[38] First, pipeline operators <u>are</u> required by the pipeline safety regulations to notify PHMSA of changes to its facility. Second, the Supreme Court has unequivocally determined that there are no "textual, historical, or equitable reasons to graft a discovery rule on the statute of limitations of § 2462."[39]

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[36] *Heimeshoff v. Hartford Life & Accident Ins. Co.*, 134 S. Ct. 604, 610 (2013); *Gabelli v. SEC*, 133 S. Ct. 1216, 1220 (2013).

[37] *Sierra Club*, at 674.

[38] Transcript, at 36: 7-14.

[39] *Gabelli*, 133 S.Ct. at 1224.

Finally, in *3M*, the D.C. Circuit stated that "[a]n agency's failure to detect violations, for whatever reasons, does not avoid the problems of faded memories, lost witnesses and discarded documents in penalty actions brought decades after alleged violations are finally discovered. Most important, nothing in the language of § 2462 even arguably makes the running of the limitations period turn on the degree of difficulty an agency experiences in detecting violations."[40] PHMSA cannot apply the discovery rule to extend the statute of limitations in this case.

v. There is a distinct separation between design and operation requirements in the pipeline safety regulations.

At the Hearing, PHMSA disputed the distinction between design and operation violations and stated that there is no separation in the pipeline safety regulations between these requirements.[41] National Fuel disagrees. There has always been a separation between the design and operations requirements in the pipeline safety regulations. First, from a structural approach, design is in a separate subpart from the operations requirements. Design requirements are addressed in subparts C and D while operation requirements are listed in subpart L. Once design and construction are complete, the other sections of the pipeline safety regulations such as operations, maintenance, and operator qualification regulations, *etc.*, apply on an ongoing basis.

Second, Congress has always treated pipeline design differently from operational requirements. This separation dates back to the Pipeline Safety Act of 1968 and the creation of the first federal pipeline safety regulations.[42] Operation requirements can be applied retroactively

[40] *3M*, 17 F.3d at 1461.

[41] Transcript, at 29: 24-25.

[42] Natural Gas Pipeline Safety Act of 1968, Pub. L. No. 90-481, 82 Stat. 720, 727 (1968).

while design requirements cannot.[43] Congress specifically prohibited PHMSA from applying the design requirements retroactively.[44] Section 60104(b) of the Pipeline Safety Act states that "[a] design, installation, construction, initial inspection, or initial testing standard does not apply to a pipeline facility existing when the standard is adopted."[45]

PHMSA also argued 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."[46] This characterization is fundamentally incorrect. Pipeline infrastructure is subject to numerous requirements to ensure safe operations.

PHMSA's statement at the Hearing that a design violation can never run afoul of the statute of limitations flies in the face of Supreme Court precedent that recognizes that "[i]t 'would be utterly repugnant to the genius of our laws,' if actions for penalties could 'be brought at any distance of time.'" [47] PHMSA must withdraw Item #2.

2. PHMSA has not met its burden of proof demonstrating that an issue with the design of the vent stacks caused the gas to ignite.

PHMSA has the burden of proof in a pipeline safety enforcement proceeding to demonstrate that a violation occurred. In order to meet this obligation, PHMSA must demonstrate

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[43] *Id*; *See In the Matter of Belle Fourche Pipeline Company,* CPF No. 5-2004-5010 (December 11, 2008); *See also,* 49 U.S.C. § 60104(b).

[44] 49 U.S.C. § 60104(b).

[45] *Id.*

[46] Transcript, at 57: 23-25; 58:1.

[47] Transcript, at 35: 21-25; 36: 1-5; *Gabelli*, 133 S. Ct. at 1221 (quoting *Adams v. Woods*, 2 Cranch 336, 342 (1805)).

that National Fuel inappropriately designed the vent stacks. PHMSA has not demonstrated in the Notice, Violation Report, or at the Hearing that an issue with the design of the vent stack caused the gas to ignite. Although PHMSA asserts in the Violation Report that the height of the vent stack led to the ignition of gas, the Agency acknowledged at the Hearing that there is no roofline requirement for vent stacks.[48] In the Pre-Hearing brief and at the Hearing, National Fuel discussed the engineering decision process to determine if there was a flaw in the vent stack design.[49] None of the areas of concern applied to the design of the Beech Hill vent stack.

Section 192.169(b) is a performance-based design regulation requiring an engineering decision process dependent on the location of the Station and proximity to buildings, overhead power lines, and other sources of ignition. National Fuel designed the Beech Hill vent stack so that gas could be discharged by an adequately sized and mechanically sound and supported vent stack. The vent stack was unobstructed and offset from the Station wall. The area was well-ventilated and there was an unobstructed pathway to vent gas to the atmosphere. There were no overhangs or structures that could cause venting gas to accumulate.[50] The nearby building was made of steel, a non-combustible material. The vent stack was not located near an electrical source. National Fuel's design of the vent stack was reasonably calculated to avoid a hazard to people, the public, or property.

Although the gas that discharged from the vent stacks at the Station ultimately ignited, PHMSA has not established that the design was the causal factor of the fire. The gas could have

[48] In the Violation Report, PHMSA alleged that "…the location of the vent stacks below the roof line of the M&R building allowed the discharged gas… to ignite." Violation Report, at 18; *See also*,. Transcript, 31: 17-19 ("And in this particular case PHMSA has not said you must have vent stacks that go above the roofline").

[49] *See* Transcript, at 23: 4-25; 24: 1-21.

[50] *See* Transcript, at 17:22-25; 18: 1-25; 19:1-4.

ignited for reasons other than issues with the design of the vent stack. Given that National Fuel operated the vent stack for 36 years without an incident, it is questionable that the design was to blame for the ignition of gas on March 5, 2015. National Fuel vented gas using the stack in question over the course of a month of troubleshooting at the Station. As discussed at the Hearing, National Fuel was trying to determine why the rupture disk on the starting gas line burst in the weeks leading up to the Incident. Ultimately, the Company determined that there were gas hydrates in the regulator. However, when the rupture disk burst during this troubleshooting period, National Fuel personnel were present and observed gas vent up the stack and not ignite.[51] These facts support the position that it was not the design of the stacks that led to the fire.

Neither PHMSA nor the NYDPS objected to the height of the vent stack, despite previous inspections that specifically reviewed the vent stack design.[52] During the 2014 audit at the Beech Hill facility, the inspector observed the placement of a combustible gas indicator in a vent stack at the Station immediately adjacent to the vent stack at issue in this case. The height of the vent stack for the starting gas line would have been apparent during that inspection and yet NYDPS staff did not raise any concerns.[53] At no time, did either agency inform National Fuel that the vent stacks were too low.

PHMSA does not have the statutory authority to characterize § 192.169(b) as a strict liability violation. The fact that the gas ignited does not prove a design flaw. Without a demonstration of a flaw in the design of the vent stack, PHMSA must withdraw Item #2.

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[51] Transcript, at 17: 6-12.

[52] *See* Exhibit J of Pre-Hearing brief (2014 Inspection Checklist).

[53] *Id.* at 4; *See also*, Transcript, at 19:17-25; 20: 1-25; 21: 1-9; 44:13:25.

3. The proposed civil penalty for Item #2 must either be withdrawn or reduced.

Because National Fuel did not violate § 192.169(b), the proposed civil penalty associated with Item 2 must be withdrawn. To the extent that PHMSA makes a finding of violation, the proposed civil penalty must be reduced.

i. Gravity: Use of the Multiplier

At the Hearing, PHMSA acknowledged that the design of the vent stack was not a causal factor in the Incident and agreed to reduce the proposed civil penalty accordingly. Since the cause of the Incident was a failed regulator, and not the design of the vent stack, National Fuel agrees and appreciates PHMSA's willingness to modify its proposed civil penalty calculation. However, National Fuel would also like PHMSA to review its use of the multiplier for this item.

PHMSA used a multiplier in its penalty calculation for Item #2 effectively doubling the proposed civil penalty. The agency stated in its Proposed Civil Penalty Worksheet that it can use a multiplier *if* the gravity factor is 25 or greater.[54] Per the Proposed Civil Penalty Worksheet, a score of 25 for gravity indicates that the "violation increased the severity of the incident."[55] As stated in the Pre-Hearing brief and acknowledged by PHMSA at the Hearing, the cause of the Incident was a failed regulator. PHMSA established no defect in the design of the vent stacks and did not establish a link between the design of the vent stacks and the Incident. The use of a gravity score of 25 lacks support and would be arbitrary and capricious. PHMSA must remove the multiplier. The Agency must also reduce the points associated with gravity from 25 to 5

[54] *See* Exhibit M of Pre-Hearing brief.

[55] *See* Exhibit B of Pre-Hearing brief.

acknowledging that the release of gas occurred in a rural area, not in a high consequence area (HCA).

ii. Culpability

In the Proposed Civil Penalty Worksheet, PHMSA stated that National Fuel "…failed to take appropriate action to comply with a requirement that was clearly applicable."[56] PHMSA must recognize that National Fuel took significant steps to comply. As acknowledged at the Hearing, § 192.169(b) is a performance-based regulation and "…the operator has the discretion to design the vent stack in whatever way suits their facility."[57] The Company acted reasonably in designing the Station including the vent stacks. At a minimum, PHMSA should apply an eight point credit to the civil penalty calculation for Item #2 noting that National Fuel "…took significant steps to comply with a requirement but failed to achieve compliance for reasons such as unforeseeable events/conditions that were partly or wholly outside its control."[58]

iii. Good Faith

In the Violation Report, PHMSA stated that National Fuel did not have a credible justification for its actions.[59] As set forth above, PHMSA has never specified a height for vent stacks in § 192.169(b) or elsewhere in the regulations. No guidance existed prior to the Incident recommending that operators extend the vent stacks above nearby buildings. Nine months after

[56] Exhibit M of Pre-Hearing brief.

[57] Transcript, at 32:1-3.

[58] Exhibit M of Pre-Hearing brief.

[59] Violation Report, at 20-39.

the Incident, PHMSA changed its guidance to reflect a roofline requirement.[60] Then at the Hearing, PHMSA stated that there is no roofline requirement and that it was not responsible for the agency's conflicting guidance creating further confusion as to the Agency's expectations for vent stack design.[61]

National Fuel acted reasonably in designing the vent stacks in accordance with the text of § 192.169(b). PHMSA has not presented any evidence that the regulations required National Fuel to design its vent stacks differently. National Fuel's good faith efforts warrant a 10 point good faith credit for its reasonable interpretation of § 192.169(b).

4. PHMSA must withdraw the proposed compliance order.

National Fuel did not violate § 192.169(b) and therefore, PHMSA must withdraw the proposed compliance order.

B. National Fuel did not violate § 192.617 as alleged in Item #3 of the Notice.

1. PHMSA has not satisfied its burden of proof that National Fuel violated § 192.617.

PHMSA has the burden of proof in a pipeline safety enforcement proceeding to demonstrate that a violation occurred.[62] Where PHMSA does not produce such evidence, the

[60] Exhibit K of Pre-Hearing brief.

[61] Transcript, at 61:10-11.

[62] *See In re Air Products and Chemicals, Inc.*, Final Order, CPF No. 4-2013-1001, 2015 WL 6758819, at *3 (D.O.T. Aug. 10, 2015) (PHMSA did not meet its burden of proving a violation when it did not produce "any evidence to support its position"); *In re ExxonMobil Pipeline Co.*, Final Order, CPF No. 5-2013-5007, 2015 WL 780721, at *12 (D.O.T. Jan. 23, 2015) (PHMSA failed to meet burden of proving that certain measures were required under regulations); *In re So. Star Central Gas Pipeline, Inc.*, Final Order, CPF No. 3-2008-1005, 2011 WL 7006614, at *4 (D.O.T. Oct. 21, 2011) (finding the evidence insufficient to sustain the allegation); *In re Golden Pass Pipeline, LLC*, CPF No. 4-2008-1017, 2011 WL 1919517, at *5 (D.O.T. Mar. 22, 2011) (PHMSA did not meet its burden of proving that its interpretation of regulatory language was correct); *In re Butte Pipeline Co.*, CPF No. 5-2007-5008, 2009 WL 3190794, at *1 (D.O.T. Aug. 17, 2009) ("PHMSA carries the burden of proving the allegations set forth in the Notice,

allegation of violation must be withdrawn.[63] PHMSA alleged that National Fuel violated § 192.617 because its "procedures for analyzing accidents and failures failed to include details on how to determine the causes of the failure, and how to minimize the possibility of recurrence."[64] As discussed in the Pre-Hearing brief and at the Hearing, National Fuel had failure investigation procedures for the purpose of determining the cause of the failure and minimizing the possibility of recurrence. Section 11.5.4 of National Fuel's O&M manual, entitled "Investigation of Failures", sets out the actions that various personnel must take in response to an incident.[65] Pursuant to section 5.1.1 of National Fuel's O&M procedures, the Operations, Engineering, and Gas Control teams are responsible for completing a "Gas System Reliability Report" (SRR) for operational problems on transmission piping, storage piping, compressor stations, and M&R stations.[66] Personnel must identify the operational problem, date of occurrence, initial field corrections and long-term recommendations and memorialize this data on a SRR for each operational problem. The SRRs are numbered and entered into a database that is maintained by the Engineering team. Personnel are required to meet and review all open SRRs on an annual basis to determine if additional work is required.

As part of its investigation of the Beech Hill Incident, National Fuel personnel completed

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meaning that a violation may be found only if the evidence supporting the allegation outweighs the evidence and reasoning presented by Respondent in its defense.").

[63] *In re ANR Pipeline Co.*, Final Order, CPF No. 3-2011-1011, 2012 WL 7177134, at *3 (D.O.T. Dec. 31, 2012); *see also In re CITGO Pipeline Co.*, Decision on Petition for Reconsideration, CPF No. 4-2007-5010, 2011 WL 7517716, at *5 (D.O.T. Dec. 29, 2011).

[64] Notice, at 3.

[65] *See* Exhibit O of Pre-Hearing brief (Section 11.5.4 of National Fuel's O&M manual); *See also*, Violation Report, Exhibit A-07.

[66] *See* Exhibit P of Pre-Hearing brief (Section 5.1.1 of National Fuel's O&M procedure).

a SRR analyzing the events that transpired at Beech Hill.[67] National Fuel personnel provided a detailed account of the Incident, including specific pressure readings and the times of significant points during the Incident. Personnel identified the failed regulator as the cause of the Incident and discussed short-term and long-term corrections.

National Fuel replaced the regulator and relief devices at the Station, and tested them prior to operation.[68] The NYDPS was onsite for the testing and did not object to recommencement of service. National Fuel also installed an in-line heater to prevent the formation of hydrates that caused the regulator to fail.[69] The Company reviewed its vent stacks at Beech Hill and its other stations in New York. It ultimately raised the vent stacks at Beech Hill at the urging of NYDPS. The Company evaluated its other compressor stations in New York to identify the use of rupture disks.[70] Ultimately, National Fuel discontinued the use of a rupture disk at Beech Hill and replaced it with a new pilot-operated relief valve.

PHMSA has not demonstrated that National Fuel's failure investigation procedures lacked provisions for determining the cause of a failure. In implementing the procedures, Company personnel determined that the cause of the Incident was a failed regulator. National Fuel personnel took the steps outlined above to minimize a recurrence of a failed regulator in the future. Having not met its burden of proof, PHMSA must withdraw Item #3.

2. Section 192.617 does not require a formal root cause analysis.

[67] *See* Exhibit Q of Pre-Hearing brief (System Reliability Report).

[68] *Id*.

[69] Exhibit R of Pre-Hearing brief (photo of in-line heater).

[70] This review occurred between March 6-13, 2015.

In the Notice, PHMSA contended that National Fuel's procedures "[did] not provide direction for determining the root cause of the failure…"[71] In addition, PHMSA asserted that National Fuel should have considered eight specific topics in its failure investigation procedures.[72] However, § 192.617 does not include a requirement to conduct a formal root cause analysis as alleged in the Notice or an obligation to consider the eight topics listed in the Notice. Section 192.617 provides that "[e]ach operator shall establish procedures for analyzing 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."[73] It is up to the operator to calibrate the level of investigation depending on the nature of the incident. Federal courts have made clear that an agency cannot advance a position for the first time for purposes of litigation or to support a claim for a regulatory violation.[74] A finding by PHMSA that § 192.617 requires a formal root cause analysis or consideration of the eight topics listed in the Notice would be arbitrary, capricious, and an abuse of discretion. Item # 3 must be withdrawn.

[71] Notice at 3.

[72] PHMSA stated that National Fuel should have considered the following: 1. What is the process for performing the root cause analysis? 2. What is the process for minimizing the possibility of a recurrence? 3. What i[s] the make-up of the investigation team (individual)? 4. What are the qualifications of the personnel on the team? 5. What is the extent of the investigation / how is it determined? 6. What documentation is required? 7. Who is responsible for approving conclusions reached by the investigation team? 8. How are lessons learned applied to other similar facilities.

[73] 49 C.F.R. § 192.617.

[74] *See Gose v. United States Postal Service*, 451 F.3d 831, 838 (Fed. Cir. 2006); *Bowen v. Georgetown Univ. Hospital*, 109 S. Ct. 468, 474 (1988).

3. PHMSA is estopped from assessing a civil penalty and compliance order for alleged defects with the same procedure it previously deemed acceptable.

The doctrine of collateral estoppel prevents PHMSA from alleging a defect in the same procedure that it specifically reviewed and deemed acceptable during a prior administrative enforcement case. Collateral estoppel precludes relitigation of an issue decided previously in an administrative proceeding provided the party against whom the prior decision was asserted enjoyed a full and fair opportunity to litigate that issue in an earlier proceeding.[75] Here, PHMSA reviewed the same procedure, section 11.5.4, in a 2012 enforcement proceeding.[76] On February 20, 2013, PHMSA closed this enforcement proceeding.[77] As of that February date, PHMSA stated that National Fuel did not need to make any further changes to section 11.5.4. Guided by PHMSA's letter, National Fuel did not make any further modifications to section 11.5.4. However, in August 2016, PHMSA issued a new enforcement action alleging that National Fuel's procedure now violated the pipeline safety regulations. National Fuel questions how it could be liable for civil penalties and a compliance order for a procedure that the Agency previously determined was acceptable.

4. The proposed § 192.617 civil penalty must be withdrawn or reduced.

Because National Fuel did not violate § 192.617, PHMSA must withdraw the proposed civil penalty associated with Item #3. If PHMSA finds a violation, then the civil penalty should

[75] *See Allen v. McCurry*, 449 U.S. 90, 96, 101 S.Ct. 411, 415, 66 L.Ed.2d 308 (1980).

[76] At the Hearing, PHMSA counsel stated that the "…I don't think we can tell whether or not [the prior enforcement action] included procedures concerning accident investigation." However, it is clear from the record that PHMSA did indeed review section 11.5.4 during the 2012 enforcement proceeding. In fact, PHMSA sought revisions to paragraph 4 of section 11.5.4 in that matter.

[77] *See* CPF No. 1-2012-1023M (Closure letter dated February 20, 2013).

be reduced.

i. Duration

In the Violation Report and the civil penalty calculation, PHMSA indicates that the probable violation of § 192.617 lasted 763 days. The duration was calculated by adding the number of days between National Fuel's last O&M manual revision in 2013 (approximately January 31, 2013) and the date of the Incident (March 5, 2015).[78] PHMSA cannot assert that it had concerns with this procedure starting on January 31, 2013, when as late as February 20, 2013, the Agency stated that no further edits to that procedure were needed. The Agency must reduce the duration and correct its Proposed Civil Penalty Worksheet to ensure that the record is accurate.

ii. Gravity

PHMSA indicates that pipeline safety was significantly compromised by National Fuel's alleged failure to have procedures determining the cause and preventing the recurrence of an incident.[79] While National Fuel takes this incident seriously, pipeline safety was not *significantly* compromised because of an alleged deficiency in a post-incident procedure. PHMSA has failed to prove that the alleged violation significantly compromised pipeline safety or compromised it at all. National Fuel had procedures to investigate a failure and implemented them appropriately. PHMSA must decrease the points in the civil penalty calculation associated with the gravity factor from ten to zero.

iii. Culpability

If PHMSA proceeds with a civil penalty for this item, the agency must account for the fact that it deemed National Fuel's failure investigation procedure satisfactory prior to the Incident.

[78] Exhibit M of Pre-Hearing brief.

[79] Violation Report, at 26.

This fact must be included in the Agency's assessment of culpability. PHMSA should apply a credit to account for the fact that even the Agency thought National Fuel's Failure Investigation procedure was in compliance prior to the Incident.

iv. Good Faith

In the good faith portion of the proposed civil penalty calculation, PHMSA indicates that the regulation was clear and that National Fuel did not have a credible justification for its actions.[80] National Fuel's O&M manual was drafted based upon the language of § 192.617. Nowhere in the regulation or guidance does it require the level of detail alleged in the Notice. Prior to the Incident, PHMSA confirmed that this particular procedure was satisfactory. Therefore, it is striking that the Agency now states that "National Fuel did not have a credible justification for its actions."[81] PHMSA must apply the 10-point credit to reflect the actions the company took to address failures and minimize the possibility of recurrence and the fact that even PHMSA thought the failure investigation procedure was in compliance with the regulations.

5. PHMSA must also withdraw the proposed compliance order.

National Fuel did not violate § 192.617. Therefore, PHMSA must withdraw the proposed compliance order associated with Item #3.

C. PHMSA must rescind its warning of a probable violation of § 192.605(a) as alleged in Item #4 of the Notice.

PHMSA has not met its burden of proof to support a probable violation of § 192.605(a). Section 192.605(a) provides that "[e]ach operator shall prepare and follow for each pipeline, a

[80] Violation Report, at 28.

[81] *Id.*

manual of written procedures for conducting operations and maintenance activities and for emergency response."[82] PHMSA contends that National Fuel failed to notify the NRC of the Incident within the required time period specified in National Fuel's Section 11.5 procedure.[83] This is incorrect. Section 11.5 sets out specific deadlines for reporting an incident and National Fuel met these requirements when reporting the events of March 5, 2015 to the NRC.

National Fuel's procedures require that the Station Manager alert the Superintendent within 1-hour of discovery and the superintendent report the incident to the NRC within 1-hour of confirmed discovery.[84] As evidenced by National Fuel's Incident Contact log, the Station Manager arrived at the site at 5:20 a.m. on March 6, 2015.[85] By 5:44 a.m., only 24 minutes later and well within the 1-hour time period listed in National Fuel's procedures, the Station Manager called the superintendent.[86] By 8:28 a.m., the superintendent confirmed that the gas loss would exceed the three million cubic feet threshold and thus would meet the definition of a reportable incident.[87] At approximately 9:11 a.m., the superintendent called the NRC.[88] National Fuel made the notification to the NRC forty-three minutes after confirming that the release of gas was a reportable incident. This timeline complied with National Fuel's procedures.

At the Hearing, PHMSA stated that the Agency requires operators to report within 1-2 hours of discovery of the incident itself and not from when the operator determined that the

[82] 49 C.F.R. § 192.605.

[83] Notice at 3.

[84] Exhibit T of Pre-Hearing brief (Section 11.5 of National Fuel's O&M procedures).

[85] Exhibit F of Pre-Hearing brief (Incident log).

[86] *Id*.

[87] *Id*.

[88] *Id*.

incident was reportable. In support, PHMSA cited § 191.5 cases. These cases are not relevant to the Beech Hill matter because PHMSA did not cite National Fuel for a § 191.5 probable violation. Instead, PHMSA alleged that National Fuel failed to follow its procedures (§ 192.605).

The requirements of National Fuel's procedures and the facts leading up to the NRC notification were explained in the Pre-Hearing brief, at the Hearing, and in this section of the Post-Hearing brief. There is no evidence that a probable violation occurred. PHMSA has not proven that a probable violation occurred and must rescind this warning item.

Although Item #4 is a warning item and therefore is characterized only as a probable violation, the Agency has the authority to rescind warning items when the allegations are not supported by the evidence. PHMSA has withdrawn warning items on numerous occasions including *In the Matter of Kinder Morgan, Inc.* and *In the Matter of Union Oil Company of California*.[89] Here, PHMSA has not demonstrated that National Fuel violated its procedures and therefore this item must be withdrawn.

D. National Fuel did not violate the requirement to have sufficient capacity for its relief device, as alleged in Item #1 of the Notice.

1. PHMSA has not met its burden of proof demonstrating that National Fuel failed to ensure that the relief device in use at the Station lacked capacity.

PHMSA has failed to provide any evidence that the relief device at the Station lacked capacity. At the Hearing, PHMSA stated that because National Fuel chose not to contest the sensitivity requirement listed in § 192.169(a), the agency did not have to prove its case as to the remaining allegation: whether the relief device had sufficient capacity. PHMSA stated that "[i]n

[89] *In the Matter of Kinder Morgan, Inc.* CPF No. 5-2007-1008 * 10-11 (September 1, 2009); *In the Matter of Union Oil Company of California,* CPF No. 5-2008-2002 *4 (March 16, 2011).

order to be successful in demonstrating that this particular regulation has been violated[,] PHMSA only needed to show that the device didn't have one of these [sensitivity or capacity] because it says "and".[90] PHMSA also stated that "…it's not necessary to support…to show that the device had one or the other in order for there to be a violation."[91]

This position is not consistent with PHMSA's prior enforcement decisions in which the Agency acknowledged that a single paragraph can comprise two separate requirements.[92] As early as 2004, PHMSA has recognized that an operator must comply with each individual obligation of a multi-requirement paragraph.[93] Section 192.169(a) is styled similarly to many other regulations in Parts 192, 193, and 195. Section 192.169(a) provides that compressor stations must have pressure relief or other suitable devices of sufficient capacity ***and*** sensitivity.[94] This regulation involves two requirements: sufficient sensitivity and sufficient capacity. In *the Matter of Kinder Morgan Liquids Terminals LLC,* the agency stated that "…a single paragraph may actually constitute multiple requirements for which the operator is responsible for compliance…"[95] In that case, the Agency referenced § 195.402(c)(3) as an example of a single paragraph that includes multiple requirements.[96] Section 195.402(c)(3) provides that an operator must have procedures

[90] Transcript, at 106: 18-22.

[91] Transcript, at 105: 15-17.

[92] *See In the Matter of Alyeska Pipeline Service Company*, CPF No. 54516 (October 18, 2004); *In the Matter of Kinder Morgan Liquids Terminals LLC*, CPF No. 1-2011-5001 (October 17, 2012).

[93] *Id.*

[94] 49 C.F.R. § 192.169(a)(emphasis added).

[95] *In the Matter of Kinder Morgan Liquids Terminals LLC*, CPF No. 1-2011-5001 (October 17, 2012).

[96] *Id.*

for "*operating, maintaining, and repairing* the pipeline system…"[97] An operator not only has an obligation to have procedures for operating the pipeline, but it must also have them for maintaining and repairing the pipeline. In *the Matter of Alyeska Pipeline Service Company*, the agency acknowledged that "[a]lthough § 195.406(b) is a single paragraph, it comprises two separate requirements."[98] In order to comply with section 195.406(b), an operator must prevent pipeline pressure from exceeding 110 percent of maximum operating pressure and have adequate controls and protective equipment. PHMSA stated that "[w]here the evidence indicates that Respondent violated both parts of § 195.406(b), Respondent may be cited for both violations."[99] PHMSA has stated that "[i]t would be contrary to the intent of the regulations for PHMSA to limit enforcement to only one requirement of [a multi-requirement citation]."[100]

PHMSA may limit an enforcement action to one of the multiple requirements listed in a single code citation. In this matter, however, PHMSA cited National Fuel for failure to ensure that the relief device lacked sensitivity *and* capacity. The Agency did not limit Item #1 to sensitivity only. Therefore, PHMSA was initially required to meet its burden of proof for both requirements.[101]

The facts and type of evidence that support each allegation listed in § 192.169(a) are different. In order to demonstrate the lack of capacity of a relief device, PHMSA would need to introduce different evidence than the documentation supporting a lack of sensitivity for the same

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[97] *Id.*

[98] *In the Matter of Alyeska Pipeline Service Company*, CPF No. 54516 (October 18, 2004).

[99] *Id.*

[100] *In the Matter of Kinder Morgan Liquids Terminals LLC*, CPF No. 1-2011-5001 (October 17, 2012).

[101] National Fuel later elected not to contest the sensitivity allegation.

relief device. The evidence that PHMSA listed in the Violation Report does not support a violation of the § 192.169(a) capacity requirement. PHMSA attached a copy of the manufacturer's instructions for the relief device, the SCADA logs, and the incident report. As discussed at the Hearing, none of these documents support PHMSA's allegation that the relief device lacked capacity.

PHMSA did not introduce any additional evidence supporting the capacity allegation and instead stated at the Hearing that it was not contesting the capacity requirement.[102] Since PHMSA failed to provide any evidence supporting a lack of capacity for this relief device, did not refute any of the arguments presented in the Pre-Hearing brief or at the Hearing, and ultimately stated that it was not alleging a lack of capacity, this portion of the §192.169(a) allegation must be withdrawn. PHMSA must reduce the proposed civil penalty for Item #1 accordingly.

IV. Conclusion

Based on the foregoing, National Fuel respectfully requests that PHMSA withdraw Item # 1 in part, and Item #s 2, 3, and 4 completely. If PHMSA determines that violations occurred, the Agency must reduce the civil penalties in accordance with the arguments discussed in this brief. National Fuel also requests that PHMSA withdraw the Proposed Compliance Order.

[102] *See* Transcript, at 105: 6-7.

Respectfully submitted this 12th day of June, 2017

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