



January 18, 2012

UPS NEXT DAY AIR 1Z 3AF 434 13 9660 4527

Mr. Jeffrey D. Weise, Associate Administrator  
Office of Pipeline Safety, PHMSA  
1200 New Jersey Avenue SE  
East Building, 2<sup>nd</sup> Floor  
Washington, D.C. 20590

**JAN 19 2012**

RE: CPF 3-2011-5005

Dear Mr. Weise:

Please accept the attached Petition for Reconsideration submitted to you in accordance with 49 CFR §190.215. This Petition is sent in response to a Final Order, received January 4, 2012, in regards to the matter of CPF 3-2011-5005.

NuStar respectfully requests you exercise your discretion in consideration of granting our Petition.

Sincerely,

Todd Denton, P.E.  
Vice President, Terminal and Pipeline Operations

Cc: Office of Chief Counsel, PHMSA  
UPS NEXT DAY AIR 1Z 3AF 434 13 9913 7330

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

In the Matter of ) NuStar Pipeline Operating Partnership L.P. ) Petitioner. )	CPF No. 3-2011-5005  <b>JAN 19 2012</b>
---	---

**PETITION FOR RECONSIDERATION**

NuStar Pipeline Operating Partnership L.P. (NuStar) respectfully submits this Petition for Reconsideration regarding CPF No. 3-2011-5005.

1. BACKGROUND. NuStar was issued a Notice of Probable Violation (NOPV) on April 21, 2011 with a \$112,000 total penalty and compliance order (Exhibit A). On May 20, 2011, NuStar submitted a written response (Exhibit B) to NOPV Items 1, 3 and 4. We specifically request the NOPV response is considered as part of this Petition for Reconsideration. On December 29, 2011, a Final Order was issued denying NuStar's request in part (Exhibit C). This Petition incorporates the factual background in the Order's first, second and third paragraphs and respectfully requests you:

- a. Dismiss the second and third incidents alleged in Item 1 and reduce Item 1's penalty to \$21,367 (1/3<sup>rd</sup> of \$64,100 proposed penalty). We are not requesting you dismiss the first incident in Item 1.
- b. Reduce Item 3's penalty to \$17,220 (3/5<sup>th</sup> of \$28,700 proposed penalty). We are not requesting any additional dismissals or reduction under Item 3.
- c. Based on a and b, reduce the total penalty to \$47,787.

2. The NOPV, Response, Order and NuStar's Petition is summarized in the below table.

ITEM	ALLEGED VIOLATION SUMMARY	PROPOSED PENALTY	RESPONSE REQUEST	ORDER	PETITION REQUEST
1	NuStar allegedly violated § 195.50 by not reporting 3 releases of more than 5 gallons, but less than 5 barrels	\$64,100	Dismissal of all 3 releases  No penalty	Denied  \$64,100	Dismissal of 2 of 3 releases  \$21,367 (1/3 <sup>rd</sup> of \$64,100)
2	NuStar allegedly violated § 195.412 by conducting 25 instead of 26 pipeline right of way patrols	Warning	NA	NA	NA
3	NuStar allegedly violated § 195.573 by not conducting corrosion control monitoring tests at 5 locations	\$28,700	Dismissal of 2 of 5 locations  Unspecified reduction	Dismissal of 2 of 5 locations  \$27,900 (\$800 reduction)	NA  \$17,220 (3/5 <sup>th</sup> of \$28,700)
4	NuStar allegedly violated § 195.404 by not maintaining overpressure safety device inspection records	\$19,200	Dismissal  No Penalty	Denied  \$9,200 (\$10,000 reduction)	NA  NA, \$9,200
	TOTAL PENALTY	\$112,000	Unspecified reduction	\$101,200	\$47,787

3. ANALYSIS. NuStar respectfully requests you dismiss the second and third incidents listed in Item 1 after considering the below analysis and our NOPV response.

a. The Order's analysis of the phrase "resulting from a pipeline maintenance activity", especially its analysis that the releases must be "planned or expected" or "intended" and "during maintenance or normal activities" must be overturned for several reasons. This interpretation of the regulatory phrase "resulting from a pipeline maintenance activity" is unreasonable<sup>1</sup> because it:

(1) revises 49 CFR § 195.50 without following the procedures required under the Administrative Procedures Act and agency regulations. If the agency wants to define "resulting from a pipeline maintenance activity" as requiring that releases are "planned or

---

<sup>1</sup> See infra footnote 5.

expected” or “intended” and “during maintenance or normal activities”, the agency should undergo the rulemaking notice and comment procedures required by the Act. Agencies should not define terms and essentially make regulations through regulatory opinions.<sup>2</sup>

(2) inappropriately places too much reliance on information that is not entitled to deference, including a response to a rulemaking comment and the instructions to a form. This is especially troubling when the agency has specifically told operators in other opinions that forms “are not interpretations of the regulations and the instructions are simply provided to assist operators in filling out the forms properly.”<sup>3</sup> Further, the form, instructions, and the response to a rulemaking comment cited in the Order certainly cannot be interpreted as creating a binding exhaustive listing of when a release can be “resulting from a pipeline maintenance activity”.

(3) would require operators to actually “plan” to have “intentional” releases of hazardous materials into the environment.

(4) is inconsistent with previous agency interpretations of a rule that has been in place for over a decade. Past agency opinions related to § 195.50 have not mentioned, much less applied, these “planned or expected” or “intended” and “during a maintenance or normal activities” requirements. This violates the long standing administrative law principle that agency standards must be “generally known so as to assure that it is being applied

---

<sup>2</sup> “Interpretations such as those in opinion letters -- like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law -- do not warrant Chevron-style deference.” See, *Christensen v. Harris County*, 529 US 576, 587 (2000). “Instead, interpretations contained in formats such as opinion letters are ‘entitled to respect’ under our decision in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 89 L. Ed. 124, 65 S. Ct. 161 (1944), but only to the extent that those interpretations have the “power to persuade.” *Id.* This weak deference, often called Skidmore deference, “will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.” 323 US at 140.

<sup>3</sup> See e.g., *Explorer Pipeline*, Final Order, p. 5 (available at [http://primis.phmsa.dot.gov/comm/reports/enforce/CaseDetail\\_cpf\\_320095018.html?nocache=2994# TP\\_1\\_tab\\_2](http://primis.phmsa.dot.gov/comm/reports/enforce/CaseDetail_cpf_320095018.html?nocache=2994# TP_1_tab_2)).

consistently and so as to avoid both the reality and the appearance of [being] arbitrar[il]y” applied.<sup>4</sup>

b. Instead, the agency should apply the plain and clear meaning of the phrase “resulting from a pipeline maintenance activity”.<sup>5</sup> In the Final Rule on § 195.50, the agency did not further define or interpret “resulting from a pipeline maintenance activity” because the phrase is clear and unambiguous.

The agency provided:

We have chosen to exclude from the reporting requirement hazardous liquid releases under 5 barrels that result from maintenance operations. Our information is that such spills occur regularly upon the opening of pipelines for insertion of spheres, smart pigs, or for routine inspections. The spills are usually caught in a berm or other containment device; are cleaned up immediately; and have little or no impact on the environment. We believe information on such releases would not be helpful in accident trending analysis. Maintenance spills must be promptly cleaned up to avoid the reporting requirement. Any nonmaintenance spill of 5 gallons or more must be reported.

\*\*\*

[A commenter asked whether the] proposed criteria for the nonreporting of releases of 5 gallons or more but less than 5 barrels may need to be better defined in the preamble to the final rule. Would a release occurring during the hydrostatic testing of a pipeline during maintenance activities that has a petroleum liquid as the test medium fall under this criteria? ... [In response, the agency] pointed out that releases meeting the requirements of the normal maintenance operations exception in the final rule need not be reported.<sup>6</sup>

c. The plain meaning of the phrase “resulting from a pipeline maintenance activity” is not a timing issue as provided for in the Order. Common sense and our knowledge of the ways of the world tell us that a result of an action can happen long after that action has taken place. Therefore, the Order’s analysis that the release would have to happen “during maintenance or normal activities” is fundamentally flawed.

---

<sup>4</sup> Morton v. Ruiz, 415 US 199, 292 (1974).

<sup>5</sup> See generally, Chevron, USA v. Natural Resource Defense Council, 467 US 867 (1984) (holding that the first step in interpreting a statute or regulation is to determine whether the regulation is “clear”). If the language is clear, the analysis ends there. Only if the language is ambiguous, do you need to go to the second step – the reasonableness of the agency interpretation. *Id.* Further, in this case, the agency’s interpretation is not entitled to “Chevron” deference. See *supra*, footnote 2.

<sup>6</sup> 67 Fed. Reg. 831, 832 and 834 (January 8, 2002).

d. The plain meaning of the phrase “resulting from a pipeline maintenance activity” is not an issue of whether the result was intentional or unintentional. Common sense and our knowledge of the ways of the world tell us that an action can create intentional and unintentional results. Therefore, the Order’s analysis that the release would have to be “planned or expected” or “intended” is fundamentally flawed.<sup>7</sup> Notably, in addition, the Order’s interpretation would require operators to admit they knowingly, willfully and intentionally released a hazardous material into the environment. This obviously is an unworkable standard that could give rise to liabilities under other statutes, regulations and legal authorities.

e. The plain meaning of the phrase “resulting from a pipeline maintenance activity” is that the result was, in some way, caused by the action. It is a “but for” causation analysis. In this case, the releases described in Item 1 would not have occurred but for the maintenance activities. NuStar is specifically challenging the second and third incidents. For the second incident, the operator turning the valve that was left partially open occurred during normal maintenance inspections of this equipment. If this activity had not occurred, there would not have been a release. Therefore, the release resulted from a maintenance activity. For the third incident, the test for proper installation and alignment occurred as part of the maintenance activity. Testing of newly installed equipment is an integral part of this maintenance activity. If this activity had not occurred, there would not have been a release. Therefore, the release resulted from a maintenance activity.

4. Next, NuStar respectfully requests you use the discretion provided under 49 CFR § 190.225 to reassess the penalty in this case. After dismissing 2 of the 3 incidents under Item 1, we request you reduce the Item 1 penalty to 1/3<sup>rd</sup> of the initial proposed penalty. In addition, we request you reduce the Item 3 penalty to 3/5<sup>th</sup> of the initial proposed penalty because 2 of the 5 incidents were previously dismissed.

---

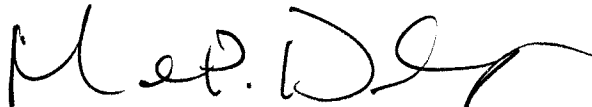
<sup>7</sup> In addition, intentionally releasing liquid from a pipeline for maintenance purposes (i.e. draining a pig trap) would not need reporting exemption because it does not constitute a “failure in a pipeline system”. 49 CFR § 195.50.

5. CONCLUSION. After considering the above and our response to the NOPV, NuStar respectfully requests you:

- a. Dismiss the second and third incidents alleged in Item 1 and reduce Item 1's penalty to \$21,367 (1/3<sup>rd</sup> of \$64,100 proposed penalty). We are not requesting you dismiss the first incident in Item 1.
- b. Reduce Item 3's penalty to \$17,220 (3/5<sup>th</sup> of \$28,700 proposed penalty). We are not requesting any additional dismissals or reduction under Item 3.
- c. Based on a and b, reduce the total penalty to \$47,787.

Dated this 17<sup>th</sup> day of January, 2012.

Respectfully submitted,



Michael P. Dillinger  
Counsel for Petitioner  
NuStar Pipeline Operating Partnership L.P.  
2330 North Loop 1604 West  
San Antonio, Texas 78248  
Direct Line (210) 918-2091  
Blackberry (210) 560-5243  
FAX (210) 918-7191  
[Mike.Dillinger@NuStarEnergy.com](mailto:Mike.Dillinger@NuStarEnergy.com)

