

**Before the
U.S. Department of Transportation
Pipeline and Hazardous Materials Safety Administration
Office of Pipeline Safety
Washington, D.C.**

In the Matter of	)	
	)	
Kinder Morgan Liquid Terminals, LLC	)	CPF No. 1-2022-038-NOPV
	)	Notice of Probable Violation
Respondent.	)	
	)	

Request for Hearing, Statement of Issues, and Response to NOPV

I. Introduction

The Pipeline and Hazardous Materials Safety Administration (PHMSA or the Agency) issued a Notice of Probable Violation (NOPV), proposed civil penalty, and proposed compliance order (PCO) to Kinder Morgan Liquid Terminals, LLC (KMLT or the Company) on July 1, 2022. The NOPV alleged sixteen (16) probable violations of the 49 C.F.R. Parts 194 and 195 regulations. Of those sixteen (16) allegations, seven (7) were issued as warning items and nine (9) were issued as probable violations, six (6) of which included a proposed civil penalty and three (3) of which included a PCO obligation. As provided by 49 C.F.R. § 190.208 and through an extension granted by the Eastern Region on July 21, 2022, KMLT's response to the allegations in the NOPV is due September 1, 2022. Therefore, this response is timely.

PHMSA issued the NOPV after an inspection of KMLT's procedures, records, and facilities in Cincinnati and Dayton, Ohio, Indianapolis, Indiana, and O'Hare, Argo, and Wood River, Illinois that occurred from June 21, 2021 through September 15, 2021. KMLT is committed to pipeline safety and integrity of its terminal facilities. Toward this end, KMLT believes that certain allegations require clarification of the facts at issue, existing documentation, and the applicable law. In particular, many of the NOPV allegations relate to minor recordkeeping discrepancies and subjective procedural preferences, with little to no impact on safety and some of which appear to be based on an unwarranted expansion of the regulations not previously articulated in prior PHMSA enforcement or guidance.

KMLT is, without admission and in the spirit of cooperation, electing not to contest four (4) of the NOPV Items given the clarifications provided in this response. These Items are Warning Items 3-4, 6, and 13. At this time, KMLT believes the remaining issues are capable of resolution without the need to proceed to a hearing and respectfully requests an informal settlement meeting with the Eastern Region.

To preserve its rights in the event the parties are unable to resolve this matter via an informal conference, however, KMLT is filing this response pursuant to 49 C.F.R. §§ 190.208 and 190.211

to request a hearing to address the factual and legal issues presented by the NOPV. Specifically, KMLT is contesting the remaining twelve (12) NOPV Items (NOPV Items 2, 5, 7, 8, 9, 10, 11, 12, and 15 and Warning Items 1, 14 and 16), (2) the proposed civil penalties associated with NOPV Items 2, 5, 8, 9, 12, and 15, and (3) the associated PCO obligations with NOPV Items 7, 10, and 11. In the event the parties proceed to a hearing, KMLT will be represented by in-house counsel as well as outside counsel with Bracewell LLP.

If the Eastern Region is amenable to an informal settlement conference, KMLT requests that the scheduling of a hearing be postponed to allow for settlement meetings.

II. Background

In relevant part, KMLT owns seven (7) complex terminals in the MidWest region, including terminals in Cincinnati and Dayton, Ohio, Indianapolis, Indiana, and O'Hare, Argo, and Wood River, Illinois. These facilities are each comprised of PHMSA jurisdictional and non-jurisdictional piping, tankage, and equipment. Given the mixed use and complexity of these facilities, different piping, tankage, and equipment may be subject to regulatory requirements imposed by PHMSA, the U.S. Environmental Protection Agency (EPA), the U.S. Coast Guard, and/or other agencies with jurisdiction, including related to emergency and facility response planning.

KMLT purchased six (6) of the seven (7) terminals in 2016 and conducted a review of those assets at that time. The seven (7) terminals range in complexity and include: four (4) smaller truck rack facilities and three (3) large facilities that include truck, rail, pipelines, and marine services. The number of tanks, including both jurisdictional and non-jurisdictional tanks, at each facility includes:

- Argo, Illinois – 218 tanks ranging in size from 50,000 gallons to 95,000 barrels.
- Argo Harlem, Illinois – 15 tanks ranging in size from 10,000 to 80,000 barrels.
- Cincinnati, Ohio – 18 tanks ranging in size from 9,901 gallons to 24,674 barrels.
- Dayton, Ohio – 9 tanks ranging in size from 10,000 to 79,7000 barrels.
- Indianapolis, Indiana – 9 tanks ranging in size from 11,992 to 69,562 barrels.
- O'Hare, Illinois (referred to by PHMSA as Chicago O'Hare) – 11 tanks ranging in size from 300 gallons to 111,900 barrels.
- Wood River, Illinois – 21 tanks ranging in size from 48,577 to 204,584 barrels.

Over time, the service of any piece of equipment or tank at any of these facilities may have changed, impacting the jurisdiction and regulatory requirements applicable to the equipment. All seven (7) facilities were audited by PHMSA Central Region in 2017, which resulted in a Warning Letter containing three (3) items, CPF 3-2021-5006W. KMLT addressed all of PHMSA's identified concerns following the inspection.

III. Uncontested NOPV and Warning Items

Without admission, KMLT is electing not to contest four (4) of the NOPV Items given relevant clarifications outlined below. This includes the alleged NOPV warning items alleged under NOPV Items 3-4, 6, and 13, which primarily consist of minor recordkeeping discrepancies with little to no impact on pipeline safety. After the inspection, KMLT completed actions, or actions are currently underway, to address these items as further detailed below.

A. NOPV Item 3 (Warning)

PHMSA Allegation

§ 195.55 Reporting safety-related conditions.

(b) Except as provided in paragraph (b) of this section, each operator shall report in accordance with § 195.56 the existence of any of the following safety-related conditions involving pipelines in service:

(3) Any material defect or physical damage that impairs the serviceability of a pipeline.

KMLT failed to report a safety-related condition for an extreme weather event that impaired the serviceability of a pipeline. Specifically, KMLT failed to report a safety-related condition for a May 27, 2019 tornado which occurred at its Dayton, Ohio facility in accordance with § 195.55(a)(3).

During the inspection PHMSA requested records related to extreme weather or natural disaster events. KMLT mentioned the May 27, 2019 tornado which occurred at its Dayton, Ohio facility that caused extensive property damage to the facility and associated breakout tanks, and activated the emergency response system as well as resulted in a shutdown of the facility for approximately nine months. KMLT provided *Emergency Tornado Drill Record, dated 05/27/19* and *Pictures from Tornado, dated 05/27/19*. The records confirmed that the tornado impacted the Dayton, Ohio facility on May 27, 2019.

When PHMSA asked KMLT if it filed a safety-related condition report, KMLT asserted that a report was not necessary and that it did not file one. However, KMLT records indicated that material defects and physical damage to the facility impaired the serviceability of the pipeline (breakout tanks), thus requiring a safety-related report to be filed with PHMSA.

Therefore, KMLT failed to report a safety-related condition for a tornado that impaired the serviceability of a pipeline in accordance with § 195.55(a)(3).

KMLT Response

KMLT is, without admission, electing not to contest NOPV Item 3. On May 27, 2019, a tornado occurred at KMLT's Dayton, Ohio facility that damaged portions of the facility and associated tanks, although it did not impact line pipe. During the event, KMLT was in contact with all appropriate emergency response personnel and federal, state, and local agencies, including PHMSA. At the time of the event, KMLT did not believe that the event triggered PHMSA safety-related condition (SRC) reporting under 49 C.F.R. § 195.55(a)(3) given that there was no impact to the serviceability of the line pipe at the facility and KMLT was already coordinating with PHMSA and others regarding the event. The regulation requires SRCs be reported for conditions involving "pipelines in service" and in relevant part those conditions which involve damage that "impairs the serviceability of the pipeline." KMLT reasonably interpreted this to limit SRC reporting to exclude

the applicable damage to the breakout storage tanks at issue. KMLT has updated its procedure to include breakout storage tanks and the documentation is available upon request.

B. NOPV Item 4 (Warning)

PHMSA Allegation

§ 195.264 Impoundment, protection against entry, normal/emergency venting or pressure/vacuum relief for aboveground breakout tanks.

(e) For normal/emergency relief venting and pressure/vacuum- relieving devices installed on aboveground breakout tanks after October 2, 2000, compliance with paragraph (d) of this section requires the following for the tanks specified:

(1) normal/emergency relief venting installed on atmospheric pressure tanks (such as those built to API Std 650 or its predecessor Standard 12C) must be in accordance with API Std 2000 (incorporated by reference, see § 195.3).

KMLT failed to maintain records of the installation and inspection of pressure vacuum relieving devices on its breakout tanks. Specifically, KMLT failed to maintain records of pressure vacuum relieving device installation on breakout tanks S1, S2 and 63-1 at its Argo, Illinois facility in accordance with § 195.264(e)(2). During the inspection PHMSA requested records related to § 195.264 for breakout tanks S1, S2 and 63-1. KMLT confirmed that these three breakout tanks had pressure vacuum relieving devices but it did not have any associated installation or inspection records for these tanks.

After the inspection KMLT provided *S1 and S2 Sizing Reports, dated 05/02/2016* (Sizing Reports). The Sizing Reports, however, were not installation records of pressure vacuum relieving devices on breakout tanks S1, S2 or 63-1. After the inspection via email correspondence on September 2, 2021, KMLT stated that it did not have installation records for Tank 63-1, but did provide new analysis on 63-1, as well as updated analysis for S-1 and S-2.

Therefore, KMLT failed to maintain records of the installation and inspection of pressure vacuum relieving devices on breakout tanks S1, S2 and 63-1 at its Argo, Illinois facility in accordance with § 195.264(e)(2).

KMLT Response

Without admission, KMLT is electing not to contest NOPV Item 4. As noted by PHMSA, KMLT already provided PHMSA with (1) an updated analysis, including pressure vacuum relieving device installation records, for breakout tanks S1 and S2 and (2) additional analysis associated with the pressure vacuum relieving device installation records for breakout tank 63-1.

C. NOPV Item 6 (Warning)

PHMSA Allegation

§ 195.402 Procedural manual for operations, maintenance, and emergencies.

(a) General. Each operator must prepare and follow for each pipeline system a manual of written procedures for conducting normal operations and maintenance activities and handling abnormal operations and emergencies. This manual shall be reviewed at intervals not exceeding 15 months, but at least once each calendar year, and appropriate changes made as necessary to ensure that the manual is effective. This manual shall be prepared before initial operations of a pipeline system commence, and appropriate parts shall be kept at locations where operations and maintenance activities are conducted.

KMLT failed to follow its manual of written procedures. Specifically, KMLT failed to follow its *T-O&M 003 Procedure Review, dated 09/12/18* and *T-O&M 003 Procedure Review, dated 04/10/19* (Procedure Reviews) in accordance with § 195.402(a).

The Procedure Reviews stated that “Directors and Managers will coordinate the procedure review assignments within their own regions and systems. Assignments will be documented on T- OM000-03, Procedure Review Form.” The Procedures Reviews also stated that “Subject Matter Experts (SME) shall review the manual for appropriate current operations/maintenance/inspection practices, tools and equipment. The review shall be documented on T-OM 000-03, Procedure Review Form.”

During the inspection PHMSA requested the annual review records for the emergency manuals for calendar years 2019 and 2020. KMLT provided the *Emergency Manual Excel Spreadsheet, dated 12/15/20* (ERP Spreadsheet) and the *Facility Response Plans* (FRPs). KMLT stated that the revision logs in the FRPs and the ERP Spreadsheet contained the annual review records. However, these documents failed to follow the Procedure Reviews for documenting annual reviews during calendar years 2019 and 2020 on the proper T-OM 000-03 Procedure Review Form.

When PHMSA inquired further about the emergency manual annual reviews being documented in accordance with its Procedure Review, KMLT did not provide a response. After the inspection KMLT provided *MOC Summary 26290 - 1900 Annual Review, dated 07/11/19* and *MOC Summary 26290 - 1900 Annual Review, dated 04/30/20* (MOC Records). However, these documents were also not completed on the proper T-OM 000-03 Procedure Review Form.

KMLT Response

Without admission, KMLT is electing not to contest NOPV Item 6. In the allegation, PHMSA acknowledges that KMLT performed and documented the required annual reviews. The allegation is limited to the assertion that KMLT recorded relevant information on the “improper form.” As such, there was no impact to pipeline safety. As reflected in documentation provided to PHMSA, KMLT performed and documented relevant annual FRP and emergency response plan (ERP) reviews required under its procedure, *T-O&M 003 Procedure Review*. After the inspection, KMLT clarified applicable documentation and forms associated with these reviews as set forth in an updated version of its procedure, *T-O&M 003 Procedure Review*, and the documentation can be available to PHMSA upon request.

D. NOPV Item 13 (Warning)

PHMSA Allegation

§ 195.428 Overpressure safety devices and overfill protection systems.

(d) Except as provided in paragraph (b) of this section, each operator shall, at intervals not exceeding 15 months, but at least once each calendar year, or in the case of pipelines used to carry highly volatile liquids, at intervals not to exceed 7 1/2 months, but at least twice each calendar year, inspect and test each pressure limiting device, relief valve, pressure regulator, or other item of pressure control equipment to determine that it is functioning properly, is in good mechanical condition, and is adequate from the standpoint of capacity and reliability of operation for the service in which it is used.

KMLT failed to inspect and test its overfill protection devices. Specifically, KMLT failed to inspect and test the overfill protection devices on breakout tank 13 at its Chicago O'Hare facility for calendar years 2019 and 2020 in accordance with § 195.428(a).

During the inspection PHMSA requested the records for inspection and testing of overfill protection devices on breakout tank 13. KMLT stated that it did not have a record and did not provide further information. After the inspection via email, *KMLT-PHMSA Email Correspondence, dated 09022021* KMLT stated it could not locate Tank 13 overfill protection device records for 2019 and 2020.

Therefore, KMLT failed to inspect and test its overfill protection devices on breakout tank 13 at its Chicago O'Hare facility for calendar years 2019 and 2020 in accordance with § 195.428(a).

KMLT Response

Without admission, KMLT is electing not to contest NOPV Item 13. KMLT performed overfill protection inspections of breakout Tank 13 although it was unable to locate the records for the 2019 and 2020 inspections at the time of the PHMSA inspection. KMLT takes exception to PHMSA's implication that KMLT "failed to inspect" the breakout tank at issue since KMLT maintains records for the overfill protection inspections for the other tanks at the O'Hare facility and maintains records for the 2021 and 2022 inspections of breakout Tank 13 consistent with 49 C.F.R. § 195.428(a).

IV. KMLT Response to Contested Items

KMLT is contesting NOPV Items 1, 2, 5, 7-12, 14, 15 and 16, the proposed civil penalties associated with NOPV Items 2, 5, 8, 9, 12, and 15, and the PCO obligations associated with NOPV Items 7, 10, and 11. PHMSA based several of its allegations on missing data that was in fact made available or already provided to the Agency. Further, a majority of these items allege non-substantive recordkeeping or documentation deficiencies that go beyond the regulatory requirements and the processes set forth in KMLT procedures, with little to no impact to pipeline safety. Almost half of the alleged violations which KMLT is contesting are based on the same regulation at 49 C.F.R. § 192.402 and three (3) take issue with how the completion of certain reviews are recorded in KMLT's incident investigation database (IMPACT), rather than with the absence of the reviews.

The Agency's own internal procedures and policies dictate that such issues should be addressed, if at all, in Warning Letters or Notices of Amendments (NOAs). As such, the majority of the Agency's allegations contradict its own Pipeline Safety Enforcement procedures by including minor data omissions or the failure to use a "proper" form which had no impact on pipeline safety or integrity as part of NOPV allegations. *PHMSA Pipeline Safety Enforcement Procedures, Sections 3.1.2, 3.1.3 (Jun. 29, 2017)* ("Warning Letter/Item is generally used for lower risk items;" "[a] Notice of Amendment is used to notify an operator that its plans or procedures...are 'inadequate'..."). While three (3) of the NOPV items were issued as Warning items, Items 1, 14 and 16, these items do not constitute alleged violations for the reasons set forth below and should be withdrawn.

PHMSA bears the burden of proof to establish all elements of a proposed violation in an enforcement proceeding. *See, e.g., In re ANR Pipeline Co, Final Order, CPF No. 3-2011-1011 (Dec. 31, 2012)*. If PHMSA "does not produce evidence supporting the allegation [which] outweighs the evidence and reasoning presented by Respondent in its defense," the allegation of

violation must be withdrawn. *Id.* As set forth below and in the attached documentation, PHMSA has not met its burden in this NOPV to prove the allegations asserted in NOPV Items 1, 2, 5, 7-12, 14, 15 and 16 and these alleged violations should be withdrawn. In the event that these allegations are not withdrawn, KMLT requests that PHMSA significantly reduce the proposed civil penalty associated with NOPV Items 2, 5, 8, 9, 12, and 15 and remove or modify the proposed compliance order requirements associated with NOPV Items 7, 10, and 11.

A. NOPV Item 1 (Warning)

PHMSA Allegation

§ 194.105 Worst case discharge.

(b) The worst case discharge is the largest volume, in barrels (cubic meters), of the following: (3) If the response zone contains one or more breakout tanks, the capacity of the single largest tank or battery of tanks within a single secondary containment system, adjusted for the capacity or size of the secondary containment system, expressed in barrels (cubic meters).

KMLT failed to adequately conduct its worst case discharge calculations. Specifically, KMLT failed to adequately conduct the worst case discharge calculations for its breakout tanks at the Cincinnati, Ohio and Chicago O'Hare, Illinois facilities in accordance with § 194.105(b)(3). During the inspection PHMSA requested records for the worst case discharge calculations for the Cincinnati, Ohio and Chicago O'Hare, Illinois facilities. KMLT provided its *Cincinnati North Terminal FRP-EPA-PHMSA*, dated 07/02/21 (Cincinnati FRP) and *O'Hare FRP-EPA PHMSA*, dated 06/09/21 (O'Hare FRP).

The O'Hare FRP indicated the worst case discharge calculation for its breakout tanks was based on a non-jurisdictional breakout tank (Tank 3). The Cincinnati FRP indicated the worst case discharge calculation for its breakout tanks was based on a non-jurisdictional breakout tank (Tank 14). During the inspection PHMSA asked KMLT about the worst case discharge calculations. KMLT stated that incorrect breakout tanks and tank capacities were used in the worst case discharge calculations for these two terminals. Therefore, KMLT failed to adequately conduct its worst case discharge calculations in accordance with § 194.105(b)(3).

KMLT Response

KMLT is contesting NOPV Item 1, which was issued as a warning item by PHMSA. As provided by 49 C.F.R. § 194.105(b)(3), the worst case discharge is the capacity of the single largest tank or battery of tanks within a single secondary containment system, including where the response zone contains one or more breakout tanks. A battery of tanks can contain a mix of PHMSA jurisdictional tanks and non-PHMSA jurisdictional tanks. Regulated entities with complex facilities subject to the jurisdiction of multiple agencies are encouraged in guidance to develop facility response plans or integrated contingency plans (ICP) that serve to address the overlapping regulatory requirements to “eliminate confusion for facility first responders” and “improve coordination between facility response personnel and local, state, and federal emergency response personnel.” *The National Response Team’s Integrated Contingency Response Plan Guidance*, 61 Fed. Reg. 28642 (Jun. 4, 1996) (Integrated Contingency Plan Guidance).¹ Based on this guidance, it is appropriate for worst

¹ Published by the U.S. EPA as chair of the National Response Team, which consists of a host of federal agencies including PHMSA, the U.S. Coast Guard, the Department of Interior’s Bureau of Safety and Environmental Enforcement, and the Department of Labor’s Occupational Safety and Health Administration.

case discharge planning purposes to use the capacity of the largest tank, even if it is non-jurisdictional to PHMSA.

Tank 3 and Tank 14 are the largest tanks at their respective facilities. Tank 3 shares containment with PHMSA Tank 13. Tank 14 shares containment with PHMSA Tank 4. As noted above, these facilities are complex facilities subject to the jurisdiction of multiple federal and state agencies, including the EPA. As such, these facilities maintain a facility response plan that cross references the regulatory requirements applicable to each jurisdictional agency, which allows facilities to consolidate multiple facility response plans into one functional plan. As such, the worst case discharge determination is prepared on a facility-wide basis, not for each separate agency.

In light of the above-referenced guidance, KMLT seeks clarification from PHMSA regarding its worst case discharge calculations in the relevant FRPs, which serve to satisfy both PHMSA and EPA requirements. Application of PHMSA's interpretation in this enforcement action would require different worst case discharges for PHMSA as compared to EPA, which is contrary to the intent of the ICP and associated guidance. Relevant documentation can be made available to PHMSA upon request.

B. NOPV Item 2

PHMSA Allegation

§ 194.107 General Response Plan Requirements.

(c) Each response plan must include: (1) A core plan consisting of (viii) Equipment testing

KMLT failed to follow its facility response plan regarding equipment testing. Specifically, KMLT failed to inspect and test all KMLT owned response equipment at the specified inspection intervals for calendar years 2019 and 2020 in accordance with § 194.107(c)(1)(viii).

During the inspection PHMSA requested 2019 and 2020 facility response plan equipment inspection and test records for the Argo, Illinois terminal. KMLT provided its Argo facility response plan, *Argo Terminal FRP, dated 04/01/2020* (Argo FRP).

The Argo FRP Figure 4.2 listed each type of KMLT owned response equipment. The Argo FRP Figure 4.3 identified a general inspection frequency of quarterly. When PHMSA re-requested the 2019 and 2020 response equipment records, KMLT stated that it did not have any records to provide. After the inspection KMLT provided *Kinder Morgan Argo Boat PM Maximo Work Order, dated 06/01/21* (Boat Work Order) and *Monthly Spill Response Boat PM, dated 06/29/20* (Boat Record). However, the Boat Work Order and Boat Record failed to indicate an adequate inspection and test for all KMLT owned response equipment at the required inspection intervals.

Therefore, KMLT failed to follow its facility response plan regarding equipment testing for calendar years 2019 and 2020 in accordance with § 194.107(c)(1)(viii).

KMLT Response

KMLT contests NOPV Item 2 and the associated proposed civil penalty of \$36,600. As reflected in documentation provided, KMLT performed inspections and testing of all listed emergency response equipment necessary to respond to incidents associated with PHMSA jurisdictional

facilities at the requisite intervals for 2019 and 2020. By email dated August 13, 2021, PHMSA stated: “Regarding the FRP response plan equipment, please confirm there are no other 2019 or 2020 response plan equipment testing records (other than Argo, IL. boat equipment)?”

In response to PHMSA’s request, KMLT made available for PHMSA’s review records of the relevant inspections for response equipment in addition to the boat through a SharePoint site on September 2, 2021. The assertion that KMLT did not provide or did not have any records to provide is thus inaccurate, and the records made available to PHMSA document that KMLT did, in fact, follow its FRP regarding equipment testing for calendar years 2019 and 2020 in accordance with 49 C.F.R. § 194.107(c)(1)(viii).

Below are screenshots of the SharePoint site, which confirms documents provided to PHMSA and the date that those documents were uploaded for PHMSA’s review. The first screenshot provides an overview of the Sharepoint site and the second and third screenshots provide specific examples of inspection records relevant to different types of equipment. These records were uploaded in response to PHMSA’s August 2021 documentation request. This information remains available to PHMSA on the SharePoint site.



KML PORTAL Codes & Standards 210816 Requested Items › Item 4 - Argo FRP Response Equipment Testing (not the boat) ⓘ

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Name	Modified	Modified By
Extinguishers	September 2, 2021	Stephens, Danielle
Fire Truck	September 2, 2021	Stephens, Danielle
Fire Water System	September 2, 2021	Stephens, Danielle
Foam	September 2, 2021	Stephens, Danielle
Hydrants	September 2, 2021	Stephens, Danielle

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KML PORTAL Codes & Standards Item 4 - Argo FRP Response Equipment Testing (not the boat) › Fire Truck ⓘ

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Name	Modified	Modified By
2019 Foam 3 pump test	September 2, 2021	Stephens, Danielle
Fire Truck 2019 and 2020 Preventive Maintenance	September 2, 2021	Stephens, Danielle
Foam 3 ck sheets	September 2, 2021	Stephens, Danielle

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Since the inspections were conducted and the records were provided as requested by PHMSA, this NOPV Item 2 should be withdrawn.

Further, this enforcement action is inconsistent with PHMSA’s prior enforcement under 49 C.F.R. § 194.107(c)(1)(viii). Typically, PHMSA issues Warning Letters and NOAs for alleged violations of this provision. *See, e.g., In re Holly Energy Partners*, Warning Letter, CPF 5-2017-5021W (Sep. 15, 2017) (alleging that there were no records to demonstrate that testing was completed); *In re NuStar Energy, L.P.*, Warning Letter, CPF 5-2017-6004W (Feb. 10, 2017) (alleging that there was no evidence of testing of equipment maintained by contractor); *In re IMTT-Pipeline*, Notice of Amendment, CPF 1-2022-015-NOA (Mar. 15, 2022) (finding that an operator’s facility response plan “failed to contain any details on what these inspections entail and any requirements for documenting these inspections” and requesting amendment of the procedures). Lastly, PHMSA has never issued a civil penalty for a violation of 49 C.F.R. § 194.107(c)(1)(viii), and KMLT does not believe one is warranted here.

C. NOPV Item 5

PHMSA Allegation

§ 195.310 Records.

(a) A record must be made of each pressure test required by this subpart, and the record of the latest test must be retained as long as the facility tested is in use.

KMLT failed to maintain adequate pressure test records on its aboveground breakout tanks. Specifically, KMLT failed to maintain adequate pressure tests for three breakout tanks at its Argo, Illinois facility (Tank S1, Tank S2, and Tank 63-1) in accordance with § 195.310(a).²

During the inspection PHMSA requested hydrostatic test records for KMLT's breakout tanks constructed after October 2, 2000. KMLT provided the *S1-S2 and 63-1 Hydrotest Records, dated 10/31/02* (Hydrostatic Test Records). The Hydrostatic Test Records for Tank 63-1 did not record any of the following required data: pressure recording charts, test instrument calibration data, the name of the person responsible for making the test, the name of the company used, the minimum test pressure, an explanation of any pressure discontinuities, including test failures, that appear on the pressure recording chart, temperature of the test medium, sign-off or approval of the hydrotest. The Hydrostatic Test Records for Tanks S1 and S2 did not record any of the following required data: pressure recording charts, test instrument calibration data, the minimum test pressure, an explanation of any pressure discontinuities, including test failures that appear on the pressure.

This violation is a repeat of violations found in CPF No. 1-2018-5004, Item No. 1.

KMLT Response

KMLT contests NOPV Item 5 and the associated proposed civil penalty of \$141,300. Subpart E of 49 C.F.R. Part 195 establishes requirements for pressure testing of certain pipelines, pipeline components, and breakout tanks. The requirements for conducting a pressure test differ depending on whether the item tested is a pipeline, a component, or a tank. Section 195.310(b) requires operators to maintain relevant records of the various pressure tests. This regulation does not, however, mandate what pressure tests are required. The requirements for pressure testing aboveground breakout tanks are set forth in 49 C.F.R. § 195.307 and these requirements depend on when a tank was constructed and the API standard to which a tank is constructed. Some tanks do not require pressure testing such as external floating roof tanks. Some tanks were constructed prior to specified construction dates. If a tank is not subject to pressure testing pursuant to 49 C.F.R. § 195.307, then the record keeping requirements of C.F.R. § 195.310 do not apply.

Tank 63-1 is a fixed cone roof atmospheric tank constructed in 2002. At the time of construction, Tank 63-1 was not intended to be, nor was it constructed as a PHMSA jurisdictional breakout tank. As such, the PHMSA recordkeeping requirements for construction do not apply to it. Further, at the time of construction of Tank 63-1, PHMSA rules incorporated the 9th Edition of API Standard 650, which did not include an express hydrostatic testing requirement for tanks. This standard only included testing of the shell, excluding tanks constructed pursuant to Appendix F. *See Pipeline Safety: Adoption of Consensus Standards for Breakout Tanks, 64 Fed. Reg. 15926 (Apr. 2, 1999); API 650 9th ed., Section 5.3.5.* Tank 63-1 was not constructed to Appendix F. This tank was bought into PHMSA jurisdiction in 2005.

Tanks S1 and S2 are also fixed cone roof atmospheric tanks constructed in 2012 as PHMSA jurisdictional breakout tanks. At the time of construction these two breakout tanks, PHMSA rules incorporated the 11th Edition of API Standard 650, which is currently incorporated by reference to the rules (and has been since August 11, 2010). These two tanks were constructed to Appendix F.

Although not expressly stated in the rule, certain records noted in 49 C.F.R. § 195.310(b) are not created for tank pressure testing as required by 49 C.F.R. § 195.307(c). When 49 C.F.R. § 195.310 was originally promulgated in 1981, pressure testing of breakout tanks was not contemplated. *46 Fed. Reg. 38357 (July 27, 1981)*. The final rule promulgating the tank testing requirements at 49 C.F.R. § 195.307 was not issued for nearly two decades, in 1999. PHMSA has yet to formally clarify that many of the test records specified in 49 C.F.R. § 195.310 are inapplicable to tank testing. *64 Fed. Reg. 15926 (Apr. 2, 1999)*. The pressure test record requirements at 49 C.F.R. § 195.310 are not applicable to aboveground atmospheric storage breakout tanks constructed to API Standard 650. The NOPV cites 49 C.F.R. § 195.310(a), which at subsection (b) enumerates the records required to be maintained for hydrostatic testing.

The majority of these record requirements are not applicable to testing aboveground breakout tanks constructed to API Standard 650. In particular, 49 C.F.R. § 195.310(b)(1) (pressure recording chart), (2) (test instrument calibration data), (5) (minimum test pressure), (8) (explanation of discontinuities in pressure recording charts), and (9) (elevation profile differences) are not applicable to aboveground breakout tanks. Recent PHMSA enforcement has acknowledged that the all of the pressure records set forth in 49 C.F.R. § 195.310(b)(1) may not be required for atmospheric pressure tanks tested per API 650. *See Consent Agreement and Order, In re: Tallgrass Pony Express Pipeline, CPF 3-2021-0946NOPV (May 10, 2022)* (withdrawing a warning item based in part on explanation that pressure measurements are not required for an atmospheric pressure tank hydrostatically tested with water fill at atmospheric pressure under API 650).

The applicable paragraph for testing aboveground breakout tanks is 49 C.F.R. § 195.307(c), which specifies that “For aboveground breakout tanks built to API Standard 650 (incorporated by reference, see §195.3) and first placed in service after October 2, 2000, testing must be in accordance with sections 7.3.5 and 7.3.6 of API Standard 650 (incorporated by reference, see §195.3).” A hydrotest of an aboveground breakout tank has a twofold purpose: (1) to stress test the shell, and (2) to stress test the foundation. Further, the regulations provide at 49 C.F.R. § 195.1,

[b]reakout tanks subject to this part must comply with requirements that apply specifically to breakout tanks and, to the extent applicable, with requirements that apply to pipeline systems and pipeline facilities. If a conflict exists between a requirement that applies specifically to breakout tanks and a requirement that applies to pipeline systems or pipeline facilities, the requirement that applies specifically to breakout tanks prevails.

NOPV Item 5 and the associated proposed civil penalty should be withdrawn because the records alleged to be missing were not required to be created or maintained by any applicable regulation. In the alternative, KMLT contends that NOPV Item 5 should be reduced because tank 63-1 is not subject to either the testing or the recordkeeping requirements cited.

D. NOPV Item 7

PHMSA Allegation

§ 195.402 Procedural manual for operations, maintenance, and emergencies.

(b) General. Each operator must prepare and follow for each pipeline system a manual of written procedures for conducting normal operations and maintenance activities and handling abnormal operations and emergencies. This manual shall be reviewed at intervals not exceeding 15 months, but at least once each calendar year, and appropriate changes made as necessary to ensure that the manual is effective. This manual shall be prepared before initial operations of a pipeline system commence, and appropriate parts shall be kept at locations where operations and maintenance activities are conducted.

KMLT failed to follow its manual of written procedures. Specifically, KMLT failed to follow its *T-O&M 1101-Response to Notice of Emergency or Abnormal Operations, dated 03/11/2020* (AO Procedure) and *T-O&M 179-Incident Investigation, dated 11/12/2020* (Incident Procedure) for its abnormal operating records in accordance with § 195.402(a).

During the inspection PHMSA requested KMLT's procedures and 2019 - 2020 calendar year records related to § 195.402(d)(1).³ KMLT provided its AO Procedure, Incident Procedure, its *Abnormal Operating Condition Data Gathering Report, dated 07/14/2019* and its *Abnormal Operating Condition Data Gathering Report, dated 02/12/2020* (AOC Records).

The AO Procedure Section 3.4.1 stated in part:

Each emergency and abnormal operating condition will be responded to and investigated to determine the cause and appropriate corrective action. T-O&M Procedure 179, Incident Investigation Section 3.9 Failure Investigation shall be followed to determine the extent of the investigation, and Table 3 of the same procedure provides guidance on who should be on the investigative team.

The Incident Procedure Section 2 stated in part:

This procedure establishes the minimum requirements for the investigation of all incidents (accidents and near misses). This includes but is not limited to accidents and/or near misses involving employees, contractors, visitors, or assets of the Kinder Morgan Terminals

For the AOC Records provided, KMLT's managers failed to validate the successful closure of all corrective actions prior to the incident being closed. Specifically, the AOC Records failed to include a manager's approval signature indicating the successful closure of all identified corrective actions. PHMSA requested additional information regarding how KMLT followed its AO Procedure and Incident Procedure. KMLT stated that the reports were closed, but that there is no further documentation.

In addition to failing to follow its manual of written procedures, KMLT's existing written procedures were inadequate to ensure safe operation of a pipeline facility. Specifically, the Incident Procedure did not include or reference abnormal operating conditions in its scope, nor did it include details for responding to, investigating, and correcting the cause of the abnormal operating conditions. Neither Section 3.9 Failure Investigation nor Table 3, referenced in the AO Procedure, were present in the Incident Procedure.

Therefore, KMLT failed to follow its manual of written procedures in accordance with § 195.402(a).

KMLT Response

KMLT is contesting NOPV Item 7 and the associated PCO obligation. KMLT complied with its manual of written procedures with regard to the applicable Abnormal Operating Condition (AOC) reviews and recordkeeping consistent with 49 C.F.R. § 195.402(a). Specifically, KMLT adhered to *T-O&M 1101-Response to Notice of Emergency or Abnormal Operations, dated 03/11/2020* (AO Procedure) and *T-O&M 179-Incident Investigation, dated 11/12/2020* (Incident Procedure). The procedures quoted by PHMSA in the NOPV do not expressly specify that a manager's approval signature is required. Identified corrective actions are reviewed by subject matter experts (SMEs), implemented, and managers are responsible for validating the successful closure of corrective actions prior to closure of the event in KMLT's incident investigation database, IMPACT.

KMLT strongly disagrees with the assertion that its existing written procedures were inadequate to ensure safe operation of a pipeline facility. KMLT's T-O&M 179-Incident Investigation procedure does not expressly reference abnormal operations, but it does not need to. The entire incident investigation procedure applies to investigating an abnormal operation condition because KMLT procedure T-O&M 1101-Response to Notice of Emergency or Abnormal Operations expressly states in 3.4.1:

Each emergency and abnormal operating condition will be responded to and investigated to determine the cause and appropriate corrective action. T-O&M Procedure 179, Incident Investigation Section 3.9 Failure Investigation shall be followed to determine the extent of the investigation, and Table 3 of the same procedure provides guidance on who should be on the investigative team.

As such, KMLT's procedures are adequate to ensure the safe operation of a pipeline facility. Moreover, to the extent that PHMSA believes a signature should be required by KMLT procedures as confirmation of the manager's validation of closure of corrective actions, PHMSA should more appropriately have issued this NOPV item as an NOA, consistent with PHMSA's Enforcement Procedures manual. *PHMSA Enforcement Procedures, Section 3.1.3.1 (Sep. 15, 2020)*. Those procedures clarify that a NOA is "used to notify an operator that its plans or procedures required under 49 [C.F.R.] Parts 192, 193, 195, and 199 are 'inadequate' to assure safe operation of a pipeline facility." *Id.*

E. NOPV Item 8

PHMSA Allegation

§ 195.402 Procedural manual for operations, maintenance, and emergencies.

(c) *Maintenance and normal operations.* The manual required by paragraph (a) of this section must include procedures for the following to provide safety during maintenance and normal operations:

(13) Periodically reviewing the work done by operator personnel to determine the effectiveness of the procedures used in normal operation and maintenance and taking corrective action where deficiencies are found.

KMLT failed to conduct periodic reviews of the work done by operator personnel to determine the effectiveness of the procedures used in normal operation and maintenance and taking corrective action where deficiencies are found as required by § 195.402(c)(13).

During the inspection the PHMSA inspector requested records related to § 195.402(c)(13) for calendar years 2019 and 2020. KMLT provided *ADC Annual Review of T-O&M Procedures, dated 12/17/19* (ADC Records). The ADC Records indicated an annual review of the T-O&M procedures, not an effectiveness review pursuant to § 195.402(c)(13). The ADC Records failed to indicate what reviews were conducted of the work done, what procedure was reviewed by operator personnel in normal operation and maintenance tasks, and what corrective actions were taken if any deficiencies were found.

Therefore, KMLT failed to conduct periodic reviews of the work done by operator personnel to determine the effectiveness of the procedures used in normal operation and maintenance and taking corrective action where deficiencies are found in calendar years 2019 and 2020 in accordance with § 195.402(c)(13).

KMLT Response

KMLT contests NOPV Item 8 and the associated proposed civil penalty of \$36,600. KMLT performed periodic (i.e., annual) effectiveness reviews of its procedures consistent with 49 C.F.R. § 195.402(c)(13). Documentation of the reviews were provided to PHMSA during the inspection. It appears that PHMSA's concern with the annual reviews is that they do not specifically include the word "effectiveness," which is not an express regulatory requirement. KMLT's Annual Review procedure Section 3.2 makes clear that the very purpose of the review is an "Effectiveness Review," however:

3.2. Effectiveness Review

Supervisors/Managers/Directors are to review the work performed by their personnel within their organization to determine the procedures' effectiveness; i.e., following up that the procedures produced the desired outcome.

3.2.1. Supervisors/Managers shall document effectiveness review on T-OM 000-11, ADC Letter to Supervisors and Managers

3.2.2. Upon receipt of completed ADC Letter to Supervisor and Manager, Directors shall document effectiveness review on T-OM 000-10, ADC Letter to Director

(emphasis added). In the documentation of the review at issue, pursuant to KMLT's Annual Review procedure Section 3.2, the Supervisors certified that the procedures were "adequate":

This is to certify that each T-O&M procedure used within my area has been reviewed this period by those who use or are directly affected by the procedure, and are consistent with and relevant for the current operations, practices and equipment. In addition, I have reviewed abnormal operations, releases, and emergency response in my operating area and determined the T-O&M procedures to be **adequate**. [emphasis added]

There is no meaningful difference between the use of the word "effective" or "adequate." Certainly, this is not a difference which impacts the safety of the pipeline and, in any event, KMLT procedures clarify that the purpose of the review is to review the effectiveness of the procedures.

To the extent that PHMSA believes that KMLT procedures warranted even more clarification with respect to the specificity of the documentation of such reviews, PHMSA should more appropriately have issued this NOPV item as an NOA, consistent with its Enforcement Procedures manual. *PHMSA Enforcement Procedures, Section 3.1.3.1 (Sep. 15, 2020)* (clarifying that a NOA is “used to notify an operator that its plans or procedures required under 49 [C.F.R.] Parts 192, 193, 195, and 199 are ‘inadequate’ to assure safe operation of a pipeline facility”).

In response to the issue raised by PHMSA in the inspection and without admission, KMLT nevertheless updated its process to more clearly memorialize the existing practice where the annual “effectiveness” review is documented on the annual review form. These documents can be made available for review.

F. NOPV Item 9

PHMSA Allegation

§ 195.402 Procedural manual for operations, maintenance, and emergencies.

(d) *Abnormal operation.* The manual required by paragraph (a) of this section must include procedures for the following to provide safety when operating design limits have been exceeded:

(5) Periodically reviewing the response of operator personnel to determine the effectiveness of the procedures controlling abnormal operation and taking corrective action where deficiencies are found.

KMLT failed to conduct post-event reviews of actions taken by operator personnel to determine the effectiveness of the abnormal operation procedures and whether corrective actions were taken when deficiencies were found as required by § 195.402(d)(5).

During the inspection PHMSA requested records related to § 195.402(d)(5) for calendar years 2019 and 2020. KMLT was unable to provide any post-event effectiveness review records. KMLT stated that it has no further information related to post-event effectiveness review records.

Therefore, KMLT failed to conduct post-event reviews during calendar years 2019 and 2020 of actions taken by operator personnel to determine the effectiveness of the abnormal operation procedures and whether corrective actions were taken when deficiencies were found in accordance with § 195.402(d)(5).

KMLT Response

KMLT contests NOPV Item 9 and the associated proposed civil penalty of \$36,600. KMLT performed periodic (annual) effectiveness reviews of its procedures consistent with 49 C.F.R. § 195.402(c)(13), as summarized above. KMLT takes exception to PHMSA’s allegation that (1) the Company failed to conduct post-event reviews of actions taken to determine the effectiveness of abnormal operation procedures and (2) KMLT was unable to provide any post-event effectiveness review records for 2019 and 2020. This allegation is the same as Item 8, except it pertains to abnormal operations instead of normal operations.

The regulations do not prescribe how such documentation must be maintained. KMLT conducted these reviews and, as confirmed in PHMSA’s NOPV Item 8 allegation, at the time of the inspection KMLT documented performance of the 2019 and 2020 effectiveness review by affirmatively

marking “Yes” in its incident investigation database, IMPACT. KMLT’s IMPACT database is the document of record which memorializes that the reviews were conducted.

In the spirit of cooperation and without admission, KMLT is in the process of updating its procedures to clarify relevant documentation and detail regarding the effectiveness reviews (e.g., procedures reviewed, etc.).

G. NOPV Item 10

PHMSA Allegation

§ 195.402 Procedural manual for operations, maintenance, and emergencies.

(e) *Emergencies.* The manual required by paragraph (a) of this section must include procedures for the following to provide safety when an emergency condition occurs: (9) Providing for a post accident review of employee activities to determine whether the procedures were effective in each emergency and taking corrective action where deficiencies are found.

KMLT’s written procedures were inadequate to ensure safe operation of a pipeline facility. Specifically, KMLT failed to include procedures that provide for a post accident review of employee activities to determine whether the procedures were effective in each emergency and taking corrective action where deficiencies are found in accordance with § 195.402(e)(9).

During the inspection PHMSA requested records for § 195.402(e)(9) for calendar years 2019 and 2020. KMLT provided its *IMPACT incident reports, dated 10/12/19* (IMPACT Records) for the four incidents which took place during 2019 and 2020 at KMLT affected facilities. Additionally, KMLT provided the *ERL Alert- KMLT Email Correspondence, dated 11/18/19* (ERL Emails) and *ERL Report for Business Segments, dated 01/01/19* (ERL Report).

The IMPACT Records, ERL Emails and ERL Report failed to document any post accident review of employee activities to determine whether the procedures were effective. During the inspection KMLT stated that the post accident effectiveness reviews were documented by the “yes or no” data field on the IMPACT Records, which asked whether the procedures were effective based on a review of personnel activities. In further discussions however, KMLT was unable to identify any supporting information which justified its response, such as who the employee was, what procedures were used, how effectiveness was determined, as well as a documented process for conducting the effectiveness review.

Furthermore, KMLT’s *T-O&M 179 Incident Investigation, dated 11/12/20* (Incident Procedure) failed to include procedures to provide a post-accident review of employee activities to determine whether the procedures were effective in each emergency and taking corrective actions where deficiencies are found. During the inspection, PHMSA requested KMLT’s procedures regarding the § 195.402(e)(9) requirements. KMLT described a process in its IMPACT internal database system where “yes and no” demonstrate whether a review was conducted. However, the Incident Procedure did not mention a post-accident review of employees’ activities, nor did it include details to determine whether the procedures were effective in each emergency.

Therefore, KMLT failed to include procedures that provide for a post accident review of employee activities to determine whether the procedures were effective in each emergency and taking corrective action where deficiencies are found in accordance with § 195.402(e)(9).

KMLT Response

KMLT contests NOPV Item 10 and the associated PCO obligation. For clarification, KMLT's T-O&M 179 Incident Investigation states:

All incidents must be entered into IMPACT, which is the primary means of maintaining information related to the incident as well as the documentation of the incident reporting process used to notify all of the stakeholders as required by Kinder Morgan and regulatory agencies.

All Informal investigations must be documented using IMPACT and require an Immediate Cause and Corrective Action to be complete.

This procedure further states:

An informal investigation may be as simple as one person providing a description of what occurred, and only requires Immediate Cause(s) and Corrective Action(s) whereas a formal investigation using the SCAT methodology to arrive at Root Causes and Corrective Actions may require convening a multi-member, cross-functional team to address complex incidents.

As explained during the inspection and in response to NOPV Items 7 and 8 above, KMLT post-accident effectiveness reviews are documented by the "yes or no" data field on the IMPACT records, which includes an express question to confirm whether the procedures were effective based on a review of personnel activities. In all instances where a formal investigation is required, KMLT procedures require a full SCAT analysis which includes analysis of Section 2.4.1.16 Failure to Follow Procedure/Policy/Practice. The SCAT procedure includes instances where approved procedures, policies, or practices were not reviewed before beginning the task. The omission of steps, changing of the order of procedural steps, or the disregard of provisions of the approved procedure or practice are also included. The procedure also requires:

Develop corrective actions for each cause and/or contributing factor by establishing individual responsibilities and completion dates for each recommendation.

All of the four (4) incidents referenced in the NOPV necessitated formal investigation and all four (4) included SCAT analysis. In each of these incidents, "Failure to Follow Procedure/Policy/Practice" was not considered to be a root cause or a contributory cause. Consequently, there were no deficiencies to correct. Contrary to PHMSA's allegations, the IMPACT records include the names of employees responsible for any corrective actions as well as the name of the employee responsible for the Investigation, which includes completion of the SCAT analysis.

There is no regulatory requirement or KMLT procedure that requires the level of specificity identified in the NOPV allegation, such as the name of employee, what procedures were used, how effectiveness was determined, or a documented process for conducting the effectiveness review. Further, PHMSA's allegation on its face expressly relates to sufficiency of KMLT's

procedures, “KMLT’s written procedures were inadequate. . .” Under these circumstances, PHMSA enforcement guidance manual instructs the agency that an NOA is the appropriate enforcement mechanism. *PHMSA Enforcement Procedures, Section 3.1.3.1 (Sep. 15, 2020)* (clarifying that a NOA is “used to notify an operator that its plans or procedures required under 49 [C.F.R.] Parts 192, 193, 195, and 199 are ‘inadequate’ to assure safe operation of a pipeline facility.”).

H. NOPV Item 11

PHMSA Allegation

§ 195.403 Emergency response training.

(c) Each operator shall require and verify that its supervisors maintain a thorough knowledge of that portion of the emergency response procedures established under 195.402 for which they are responsible to ensure compliance.

KMLT failed to require and verify that its supervisors maintain a thorough knowledge of that portion of the emergency response procedures established under § 195.402 for which they are responsible for ensuring compliance. Specifically, KMLT failed to provide adequate records demonstrating compliance with § 195.403(c).

During the inspection PHMSA requested emergency response supervisor training records for calendar years 2019 and 2020. KMLT provided its *Egress & Emergency Action Plan Sign-In- Sheets, dated 01/01/2018* (Egress Records) and *Excel Spreadsheet-Emergency Evacuation - Getting Out Alive Training, dated 01/01/19* (Emergency Evacuation Records). PHMSA subsequently requested additional information on how supervisors maintain knowledge of the emergency response procedures for which they are responsible for ensuring compliance. KMLT stated that all KMLT personnel in emergency response take the same training, and there is no specific training or requirements for emergency response supervisors. KMT stated that there is a test system given to employees but that it is not documented in it written procedures. Furthermore, KMLT stated that the Egress Records and Emergency Evacuation Records were trainings related to supervisors reviewing the procedures. The Egress Records and the Emergency Evacuation Records did not demonstrate that KMLT verified that its supervisors maintain a thorough knowledge of that portion of the emergency response procedures established under § 195.402 for which they are responsible to ensure compliance.

Furthermore, KMLT's *T-O&M 1900 Abnormal Operating Conditions and Emergency Response Plan, dated 03/09/18* (ERP Procedure) and its *T-O&M 7101 Terminals Training Program, dated 10/16/20* (Training Program) failed to include an adequate process for requiring and verifying that supervisors be knowledgeable of emergency response procedures for which they are responsible for as required by § 195.403(c).

During the inspection PHMSA requested KMLT's procedures regarding emergency response supervisor training. KMLT provided the ERP Procedure Section 4 which stated in part:

Supervisors rare required to maintain a thorough knowledge of the portion of the emergency response procedures for which they are responsible to ensure compliance. A review of the Emergency Response procedures (refer to T-O&M Procedure 003, Procedure Review) and participation in Hazwoper training will service to verify continued knowledge.

The ERP Procedure and the Training Program did not mention any specific details regarding how KMLT requires and verifies that its supervisors are knowledgeable of the emergency response procedures for which they are responsible for, as well as how and where these requirements are documented.

Therefore, KMLT failed to require and verify that its supervisors maintain a thorough knowledge of that portion of the emergency response procedures established under § 195.402 for which they are responsible for ensuring compliance during calendar years 2019 and 2020 in accordance with § 195.403(c).

KMLT Response

KMLT contests NOPV Item 11 and the associated PCO obligation. KMLT maintains a robust terminals training program, including in particular emergency response training, under which it both requires and verifies that its supervisors “maintain a thorough knowledge of that portion of the emergency response procedures established under § 195.402 for which they are responsible for ensuring compliance in accordance with § 195.403(c).”

As PHMSA acknowledges, KMLT procedure states:

Supervisors are required to maintain a thorough knowledge of the portion of the emergency response procedures for which they are responsible to ensure compliance. A review of the Emergency Response procedures (refer to T-O&M Procedure 003, Procedure Review) and participation in Hazwoper training will serve to verify continued knowledge.

As such, KMLT did not fail to “require” its supervisors to maintain a thorough knowledge of the procedures. To the contrary, given its importance, all KMLT emergency response personnel, including supervisors, are trained to the same high standard to ensure that they uniformly maintain a thorough knowledge of the applicable procedures. KMLT does not maintain a separate training program for its supervisors nor do the regulations require separate programs. As a policy matter, PHMSA should not penalize KMLT for training its operators to the same high level as its supervisors.

With respect to verifying the supervisor’s knowledge, KMLT's T-O&M 1900 Abnormal Operating Conditions and Emergency Response Plan, dated 03/09/18 requires:

Supervisors and managers will schedule annual area/facility training reviews and/or drills to determine effectiveness of the ERP and associated procedures. Reviews and drills will be defined in the site-specific ERP. [emphasis added]

Participation of supervisors in the annual drills is verification of the supervisor’s knowledge and documentation of these drills and the sign in sheets documenting the participation by the supervisors are available for PHMSA review.

Further, the underlying regulation, 49 C.F.R. § 195.403(c), is a performance-based standard and PHMSA has previously accepted broadly worded procedures to demonstrate compliance with the regulation. PHMSA has also acknowledged that operators can use a variety of ways to demonstrate compliance with this requirement (noting that operators can comply with this requirement through

the submission of written documentation, test records, or other verification, including official meeting notes or personnel evaluations). In a recent Final Order, PHMSA explained,

[O]perators have the flexibility to prove compliance with § 195.403(c) by any appropriate method. Compliance can be shown through submission of written documentation, test records, or other verification, including official meeting notes or personnel evaluations. Therefore, PHMSA properly alleged a violation of § 195.403(c) based on CBDI's failure to show, through documentation or any other appropriate method, that it had verified supervisor's knowledge of those emergency response procedures established under § 195.402 for which they are responsible to ensure compliance.

In re Caliber Midstream Partners, LP, Final Order. CPF 3-2021-037-NOPV (Jan. 12, 2022). In other enforcement, PHMSA has indicated that training could meet this regulatory requirement where it contained an annual knowledge or performance review of emergency response supervisors. *In re Fore River Energy Center*, Notice of Probable Violation, CPF 1-2021-065 (Dec. 10, 2021).

KMLT's training and associated documentation meet the requirements of 49 C.F.R. § 195.403(c), as clarified by PHMSA enforcement. Further, the allegations in NOPV Item 11 are targeted to the sufficiency of KMLT's procedures, for which a NOA would have been the appropriate vehicle for enforcement, consistent with PHMSA's Enforcement Procedures manual as referenced above.

I. NOPV Item 12

PHMSA Allegation

§ 195.430 Firefighting equipment.

Each operator shall maintain adequate firefighting equipment at each pump station and breakout tank area. The equipment must be in proper operating condition at all times.

KMLT failed to maintain adequate firefighting equipment in proper operating condition at all times. Specifically, KMLT failed to conduct various firefighting protection equipment inspections for calendar years 2019 and 2020 at its Chicago O'Hare, Illinois, Dayton, Ohio, Indianapolis, Indiana and Wood River, Illinois facilities in accordance with § 195.430(a).

During the inspection PHMSA requested fire protection equipment records related to § 195.430 for KMLT's four facilities. KMLT failed to provide any records related to firefighting equipment inspection and maintenance. After the inspection KMLT provided its *Fire Extinguisher Records, dated 2019 and 2020* (Fire Records). Based on a review of the Fire Records, KMLT failed to conduct its firefighting protection equipment inspections for the following:

- Wood River, Illinois annual fire extinguisher records for calendar years 2019 and 2020
- Indianapolis, Indiana monthly fire extinguisher records for calendar year 2019
- Indianapolis, Indiana annual fire extinguisher records for calendar years 2019 and 2020
- Chicago O'Hare, Illinois monthly fire extinguisher records for calendar years 2019 and 2020
- Dayton, Ohio annual fire extinguisher records for calendar years 2019 and 2020

- Dayton, Ohio monthly fire extinguisher records for calendar years 2019 and 2020

Therefore, KMLT to maintain adequate firefighting equipment in proper operating condition at all times in accordance with § 195.430(a).

KMLT Response

KMLT contests NOPV Item 12 and the associated proposed civil penalty of \$122,600. KMLT objects to the assertion that KMLT failed to provide any records related to firefighting equipment inspection and maintenance. KMLT performed the relevant annual and monthly firefighting equipment inspections in 2019 and 2020 and the Company maintains documentation of the inspections.

KMLT retains a third party inspector to conduct its fire extinguisher inspections. Further, not every fire extinguisher located at these terminals is PHMSA jurisdictional equipment. For example, fire extinguishers in buildings would not be jurisdictional since they would not be appropriate for use to address a fire involving petroleum equipment. Relevant inspections are available for review, as follows:

- Wood River, Illinois annual fire extinguisher records for calendar years 2019 and 2020: These records are maintained by KMLT but were inadvertently not included in the submissions to PHMSA at the time of the inspection. These records can be made available to PHMSA.
- O'Hare, Illinois monthly fire extinguisher records for calendar years 2019 and 2020: These records are maintained by KMLT but were inadvertently not included in the submissions to PHMSA at the time of the inspection. They can be made available for PHMSA review.
- Dayton, Ohio annual fire extinguisher records for calendar years 2019 and 2020: KMLT provided PHMSA with copies of invoices from the third party vendor documenting that the annual inspections were conducted.
- Dayton, Ohio monthly fire extinguisher records for calendar years 2019 and 2020: KMLT provided PHMSA with copies of the work orders for the monthly inspections documenting that these inspections were conducted for both years.

The regulation at issue, 49 C.F.R. § 195.430, requires that operators maintain “adequate firefighting equipment” at each breakout tank area that is in “proper operating condition at all times.” Under NOPV Item 12, PHMSA appears to be requiring a “Master List” of the equipment and the inspections that KMLT performs to ensure that applicable equipment is in proper operating condition. The plain language of the 49 C.F.R. § 195.430 does not require this level of detail.

KMLT further believes that the proposed civil penalty associated with NOPV Item 12 should be withdrawn or significantly reduced because it relates to records of inspections that were in fact timely completed with no impact to pipeline safety.

J. NOPV Item 14 (Warning)

PHMSA Allegation

§ 195.573 What must I do to monitor external corrosion control?

(d) Breakout tanks. You must inspect each cathodic protection system used to control corrosion on the bottom of an aboveground breakout tank to ensure that operation and maintenance of the system are in accordance with API RP 651 (incorporated by reference, see § 195.3). However, this inspection is not required if you note in the corrosion control procedures established under § 195.402(c)(3) why complying with all or certain operation and maintenance provisions of API RP 651 is not necessary for the safety of the tank.

KMLT failed to inspect each cathodic protection system used to control corrosion on the bottom of aboveground breakout tanks. Specifically, KMLT failed to inspect the cathodic protection systems on breakout tanks 12 and 13 during calendar year 2020 at its Chicago O'Hare, Illinois facility in accordance with § 195.573(d).

During the inspection PHMSA requested records related to § 195.573(d) for breakout tanks 12 and 13 at the Chicago O'Hare, Illinois facility. KMLT provided its *O'Hare CPDM Survey Report, dated 10/02/19* (2019 CPDM). KMLT failed to provide a 2020 CPDM report. KMLT stated that prior to 2021 the cathodic protection system could be inspected, but it chose not to inspect or test the system as it monitored the corrosion growth rate analysis of the tanks. KMLT stated that in 2021 readings will be taken to monitor the impressed current system. KMLT provided its *O'Hare DOT Tank CP Plan, dated 03/10/21* (CP Plan).

When PHMSA re-requested the missing 2020 CPDM report, KMLT also stated that cathodic protection readings on the installed tank systems were not meeting KMLT criteria, therefore it is using a corrosion growth rate analysis. KMLT failed to specify how the inspection of each cathodic protection system on breakout tanks 12 and 13 were not required based upon its corrosion growth analysis conducted in 2020, in the CP Plan.

Further, KMLT failed to justify in its corrosion control procedures why complying with all or certain operation and maintenance provisions of API RP 651 is not necessary for the safety of the tank. *T-O&M903 External Corrosion Control for Buried or Submerged Pipelines, dated 01/13/21* (Corrosion Manual) Section 3.5.2.4 stated in part:

Annual structure-to-soil potential surveys should be performed and rectifiers should be checked for proper operation every two months, in accordance with ANSI/API RP 651. However, due to unexpected delays and to allow flexibility in scheduling, annual surveys may extend to 15 months (but at least once each calendar year) and rectifier inspections may extend to 2 ½ month (but at least 6 times per year). This is consistent with the reasoning of Amendment 195-24, which extended all periodic inspection intervals.

Therefore, KMLT failed to inspect each cathodic protection system on breakout tank 12 and 13 during calendar year 2020 at its Chicago O'Hare, Illinois facility and failed to note in its corrosion control procedures established under § 195.402(c)(3) why complying with all or certain operation and maintenance provisions of API RP 651 is not necessary for the safety of the tank in accordance with § 195.573(d).

KMLT Response

KMLT contests NOPV Item 14 which was issued as a warning item. As set forth in 49 C.F.R. § 195.573(d), operators may elect not to inspect cathodic protection (CP) systems where they note in their corrosion control procedures established under § 195.402(c)(3) why complying with all or certain operation and maintenance provisions of API RP 651 is not necessary for the safety of the tank.

Consistent with this allowance and for purposes of clarification, KMLT monitored the effectiveness of the corrosion control measures for breakout tanks 12 and 13 at its O'Hare, Illinois facility during calendar year 2020 using electrical resistance (ER) probes. KMLT believes that this type of monitoring is more effective than the annual cathodic protection potential measurements because ER probes confirm the integrity of the tank by determining the cumulative effectiveness of corrosion control measures over the inspection period. In contrast, annual cathodic protection potential measurements provide only a snapshot.

According to NACE RP0193, which is referenced in API RP 651 (incorporated by reference at § 195.3):

4.5.2 Coupons and electrical resistance probes may be useful in evaluating the effectiveness of the cathodic protection system.

For breakout tanks 12 and 13, KMLT performed more frequent inspections of the ER probes (twice per year, not to exceed 7½ months) than the recommended frequency for cathodic protection systems (which is annual per API RP 651 § 11.3.2). The inspections confirmed that corrosion control measures were sufficient for the safety of each tank.

After the inspection and without admission, KMLT has further clarified its O'Hare DOT Tank CP Plan to demonstrate why complying with all or certain operation and maintenance provisions of API RP 651 (i.e., monitoring cathodic protection levels as recommended by RP 651 § 11.3.2) is not necessary for the safety of relevant tanks. Documentation is available upon request.

K. NOPV Item 15

PHMSA Allegation

§ 195.573 What must I do to monitor external corrosion control?

(e) *Corrective action.* You must correct any identified deficiency in corrosion control as required by § 195.401(b). However, if the deficiency involves a pipeline in an integrity management program under § 195.452, you must correct the deficiency as required by § 195.452(h).

KMLT failed to correct identified deficiencies in corrosion control. Specifically, KMLT failed to correct the below criteria cathodic protection readings on four breakout tanks at its Argo, Illinois, Chicago O'Hare, Illinois and Indianapolis, Indiana facilities in accordance with § 195.573(e).

During the inspection PHMSA requested breakout tank cathodic protection records. KMLT provided *Argo CPDM Survey Report, dated 06/26/19 (Argo CPDM), Indianapolis CPDM Survey Report, dated*

04/09/19 (Indy CPDM), and *O'Hare CPDM Survey Report, dated 10/02/19* (O'Hare CPDM). The CPDM records indicated the following tanks had below criteria cathodic protection readings: Argo tank 63-1 (2019 and 2020), Indianapolis tank 2, and O'Hare tank 12 and 13 (2019, 2020 no record). When PHMSA requested records related to correction of the low cathodic protection readings on the breakout tanks, KMLT was unable to provide any records. KMLT stated that it had taken readings on these tanks but was unable to meet criteria and had not made any repairs, and therefore it was now monitoring these tanks based upon the corrosion growth rate analysis. Using the corrosion growth rate analysis does not correct identified deficiencies on these four breakout tanks. Further, KMLT failed to make any repairs on these breakout tank cathodic protection systems to bring them into compliance.

Therefore, KMLT failed to correct the below criteria cathodic protection readings on four breakout tanks at its Argo, Illinois, Chicago O'Hare, Illinois and Indianapolis, Indiana facilities in accordance with § 195.573(e).

KMLT Response

KMLT contests NOPV Item 15 and the associated proposed civil penalty of \$81,500. KMLT monitored the effectiveness of the corrosion control measures for the four breakout tanks at its Argo, Illinois, O'Hare, Illinois, and Indianapolis, Indiana facilities during calendar years 2019 and 2020 using ER probes. The results of the corrosion rate monitoring showed that corrosion control methods were effective at mitigating corrosion with the CP levels below the criteria in API RP 651 (incorporated by reference at 49 C.F.R. § 195.3).

As explained during the inspection, KMLT's CP Plan for the various terminal facilities clearly explains that these tanks are monitored by ER probes and thus are not subject to minimum CP criteria. The same language appears in each of the plans applicable to the O'Hare Tanks 12 and 13, Argo Tank 63-1, and the Indianapolis Tank 2:

Per 49 CFR 195.565, KMLT does not need to comply with ANSI/API RP 651 when installing any tank for which we note in the corrosion control procedures established under § 195.402(c)(3) why complying with all or certain provisions of ANSI/API RP 651 is not necessary for the safety of the tank. T-O&M 903, External Corrosion Control for Buried or Submerged Pipelines Section 3.5.2.3 provides the limitations of installing CP on tanks per ANSI/API 651 (latest referenced edition). However, some tanks were either constructed prior to the October 2, 2000 date when CP was required by regulation to be installed, or readings from CP systems installed are not meeting criteria. In these instances KMLT uses the corrosion growth rate (CGR) from the previous Out of Service (OOS) API 653 inspections to determine the remaining life of the tank floor without effective cathodic protection.

KMLT has nevertheless and without admission further clarified the language in the applicable CP Plans to demonstrate why complying with all or certain operation and maintenance provisions of API RP 651 (i.e., maintaining cathodic protection levels at API RP 651 criteria) is not necessary for the safety of the tank.

L. NOPV Item 16 (Warning)

PHMSA Allegation

§ 195.579 What must I do to mitigate internal corrosion?

(d) Breakout tanks. After October 2, 2000, when you install a tank bottom lining in an aboveground breakout tank built to API Spec 12F (incorporated by reference, see § 195.3), API Std 620 (incorporated by reference, see § 195.3), API Std 650 (incorporated by reference, see § 195.3), or API Std 650's predecessor, Standard 12C, you must install the lining in accordance with API RP 652 (incorporated by reference, see § 195.3). However, you don't need to comply with API RP 652 when installing any tank for which you note in the corrosion control procedures established under § 195.402(c)(3) why compliance with all or certain provisions of API RP 652 is not necessary for the safety of the tank.

KMLT failed to maintain breakout tank lining installation records for breakout tank 63-1 at the Argo, Illinois facility as required by API RP 652 in accordance with § 195.579(d).

During the inspection PHMSA requested records related to § 195.579(d). KMLT stated that breakout tank 63-1 had a lining installed. KMLT was unable to provide any records which demonstrated compliance. After the inspection KMLT provided *Breakout Tank Purchase Order Records, dated 11/01/02* (Purchase Order Records). Purchase Order Records failed to indicate any installation of a lining on breakout tank 63-1. Further, the Records failed to indicate the lining was installed in accordance with API RP 652 or any analysis done demonstrating why compliance with API RP 652 was not necessary for the safety of the tank.

Therefore, KMLT failed to maintain breakout tank lining installation records for breakout tank 63- 1 at the Argo, Illinois facility in accordance with § 195.579(d).

KMLT Response

KMLT is contesting NOPV Item 16. When the tank was constructed in 2002, KMLT specified that it would include a tank bottom lining which would be installed. As set forth above, this tank was not constructed or installed as a PHMSA jurisdictional breakout tank. As such, it is not subject to the lining installation record keeping requirements of 49 C.F.R. § 195.579(d). PHMSA cannot reasonably require retroactive recordkeeping for a tank prior to becoming jurisdictional. See 49 U.S.C. 60104(b) (“A design, installation, construction, initial inspection, or initial testing standard does not to a pipeline facility existing when the standard is adopted”).

V. Proposed Civil Penalty

The NOPV proposes civil penalties associated with six (6) of the underlying allegations, including NOPV Items 2, 5, 8, 9, 12, and 15. As detailed above, KMLT is contesting the proposed civil penalties associated with these items. PHMSA has failed to meet its burden of proof to establish the underlying violations. Additionally, the proposed penalties do not properly reflect statutory and regulatory civil penalty factors of (1) nature, (2) gravity, (3) culpability, and/or (4) other matters as justice may require. KMLT requests that these civil penalties be withdrawn or significantly reduced.

VI. Statement of Issues

- A. Whether based on the facts and applicable law, PHMSA has met its burden to prove by a preponderance of the evidence that KMLT did not comply with 49 C.F.R. § 195 requirements for NOPV Items 1, 2, 5, 7 - 12, 14, 15, and 16.
- B. Whether PHMSA provided due process and fair notice, as required by the U.S. Constitution and the Administrative Procedure Act, in issuing alleged violations for NOPV Items 1, 2, 5, 7 - 12, 14, 15 and 16 based on the facts and the applicable law.
- C. Whether PHMSA's allegations of noncompliance under NOPV Items 1, 2, 5, 7 - 12, 14, 15, and 16 are arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2).
- D. Whether the proposed civil penalties associated with NOPV Items 2, 5, 8, 9, 12, and 15 should be withdrawn or reduced to accurately reflect the statutory and regulatory penalty assessment criteria required under 49 U.S.C. § 60122(b) and 49 C.F.R. § 190.225 and to align with penalties issued in prior relevant PHMSA enforcement.
- E. Whether NOPV Items 1, 2, 5, 7 - 12, 14, 15 and 16, proposed civil penalties associated with Items 2, 5, 8, 9, 12, and 15, and the PCO obligations contradict PHMSA's Pipeline Safety Enforcement Procedures and prior enforcement precedent.

VII. Summary and Request for Relief

For all of the reasons identified above, and in consideration of other matters as justice may require, KMLT respectfully requests that NOPV Items 1, 2, 5, 7 - 12, 14, 15 and 16 be withdrawn in their entirety, including the proposed civil penalties associated with NOPV Items 2, 5, 8, 9, 12, and 15, and the PCO obligations associated with NOPV Items 7, 10, and 11. In advance of the requested hearing and settlement meeting, and pursuant to 49 C.F.R. § 190.209, KMLT requests a copy of the complete case file in this matter, beyond the Pipeline Safety Violation Report and its exhibits which have already been provided. As noted above, KMLT believes these issues are capable of resolution without the need to proceed to a hearing and respectfully requests an informal settlement meeting with the Eastern Region.

Respectfully submitted,



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