U.S. Department
of Transportation
**Pipeline and Hazardous
Materials Safety
Administration**

1200 New Jersey Avenue, SE
Washington, DC 20590

June 3, 2024

VIA ELECTRONIC MAIL TO: dwortman@urc.com

Mr. Dave Wortman
Vice President, Supply and Transportation
Kiantone Pipeline Corporation
15 Bradley Street, P.O. Box 780
Warren, PA 16365

Re: CPF No. 1-2022-050-NOPV

Dear Mr. Wortman:

Enclosed please find the Decision on the Petition for Reconsideration issued in the above-referenced case. It denies your Petition for Reconsideration. Service of the Decision by certified mail is deemed effective upon the date of mailing, or as otherwise provided under 49 C.F.R. § 190.5.

Thank you for your cooperation in this matter.

Sincerely,

ALAN KRAMER MAYBERRY
Digitally signed by ALAN KRAMER MAYBERRY
Date: 2024.05.24 14:14:18 -04'00'

Alan K. Mayberry
Associate Administrator
for Pipeline Safety

Enclosure

cc: Mr. Robert Burrough, Director, Eastern Region, Office of Pipeline Safety, PHMSA
Mr. John Wagner, Vice President, General Counsel and Corporate Secretary, Kiantone Pipeline Corp., jwagner@urc.com
Mr. George C. Hopkins, Counsel for Kiantone Pipeline Corp., Vinson & Elkins, LLP, ghopkins@velaw.com

CONFIRMATION OF RECEIPT REQUESTED

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

In the Matter of	)	
Kiantone Pipeline Corporation,	)	**CPF No. 1-2022-050-NOPV**
Petitioner.	)	

DECISION ON PETITION FOR RECONSIDERATION

In a December 26, 2023 Final Order, I found that Kiantone Pipeline Corporation (Kiantone or Petitioner) had committed two violations of 49 C.F.R. Part 195 following an on-site pipeline safety inspection by the Office of Pipeline Safety (OPS) of Petitioner's facilities and records in connection with investigating a release of crude oil at a facility operated by Kiantone in Warren, Pennsylvania.[1]

In the Final Order, I assessed a civil penalty of $225,134 for Petitioner's violation of 49 C.F.R. § 195.402(a) for failing to follow Operations, Maintenance, and Emergency (OM&E) Procedure 11.6.3 – Activities During Receipt of Crude Oil at Tank Farm (Item 1). I also assessed a civil penalty of $225,134 for Petitioner's violation of 49 C.F.R. § 195.402(a) for failing to follow its OM&E Procedure Section 5.7.10 – Tank Farm Dike Drain Operations (Item 2). I withdrew one allegation of violation (Item 3) after being persuaded by Kiantone's argument that this allegation was duplicative of Item 1.[2]

On January 16, 2024, Kiantone submitted a Petition for Reconsideration (Petition) of the Final Order.[3] Specifically, the Petition seeks reconsideration of Items 1 and 2 in the Final Order and requests that these two findings of violation and the associated civil penalties be withdrawn.[4] Having considered the record and the arguments presented in the Petition, I am denying the Petition and affirming the Final Order without modification.

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[1] Kiantone Pipeline Corporation, Final Order, CPF No. 1-2022-050-NOPV (Dec. 26, 2023) (Final Order).

[2] OPS alleged a total of six violations including three warning items that required no further action, but warned Kiantone to correct the alleged probable violations or face possible future enforcement action (Items 4, 5, and 6).

[3] Petition for Reconsideration submitted by Mr. George C. Hopkins, Vinson & Elkins LLP, Counsel for Kiantone Pipeline Corporation, to Mr. Alan K. Mayberry, Associate Administrator for Pipeline Safety, PHMSA, dated January 16, 2024 (Petition).

[4] *Id*.

Background

From July 8, 2021 through July 9, 2021, pursuant to 49 U.S.C. § 60117, representatives of OPS conducted an on-site pipeline safety inspection of the facilities and records of Petitioner in connection with investigating a release of crude oil in Warren, Pennsylvania. Kiantone manages the 78-mile-long Kiantone Pipeline from West Seneca, New York to United Refining Company's facility in Warren, Pennsylvania including a tank farm for storage located on Cobham Park Road in Warren, Pennsylvania (Cobham Tank Farm).[5]

On July 8, 2021, at approximately 12:20 a.m. Eastern Daylight Time (EDT), Kiantone Pipeline experienced an overflow of Tank 652 at the Cobham Tank Farm. The overflow resulted in a release of 2,672 barrels (bbl) of crude oil into secondary containment, which exited an open dike drain valve and flowed downhill to a firewater retention pond. Following notification of the incident to the National Response Center (NRC), OPS deployed accident investigation personnel to the release site, along with the Pennsylvania Public Utility Commission.[6]

The material facts of the incident are not in dispute. A heavy storm caused a loss of power at the Cobham Tank farm on July 7, 2021, at approximately 6:49 p.m. EDT. The power loss initiated the uninterruptible power supply (UPS) to maintain communications with the facility's control center, but all other electrical equipment at the Cobham Tank Farm was inoperable, including lights, pumps, and motor-operated valves. Kiantone's UPS system, which powered the communications at the facility, operated for about two hours before being depleted at approximately 8:36 p.m. EDT. Commercial power was temporarily restored at approximately 9:22 p.m. EDT for 32 seconds. The restoration of power caused the remotely operated inlet valves to Tanks 650, 651, and 652 to begin to open, but the valve operation ceased when power was subsequently lost again. Tanks 650, 651, and 652 were all connected to the same manifold. Tank 651 was in the process of receiving product at this time. Because Tank 652 now had a partially opened inlet valve, Tank 652 also started to receive product. However, as the UPS was depleted and thus the facility had no communications, Kiantone's control center failed to detect Tank 652's valve operation. Therefore, the receiving of product by Tank 652 and its resulting overflow was not detected by Kiantone until approximately 12:50 a.m. EDT on July 8, 2021. The release was discovered when Kiantone's pump house blender visually noticed oil coming from the tank vents via illumination from his headlights as he drove within the facility after being notified of a heavy smell of petroleum in the air by other personnel at the facility.[7]

As a result of the inspection and investigation, the Director, Eastern Region, OPS (Director), issued to Petitioner, by letter dated October 6, 2022, a Notice of Probable Violation and Proposed Civil Penalty (Notice). In accordance with 49 C.F.R. § 190.207, the Notice proposed finding that Kiantone had committed three violations of 49 C.F.R. Part 195 and proposed

[5] Kiantone's parent company, United Refining Company, is an independent refiner and marketer of petroleum products in Pennsylvania and portions of New York and Ohio. United Refining Company website, Pipeline Operations, *available at* https://www.urc.com/pipelines (last accessed Nov. 5, 2023).

[6] *Failure Investigation Report – Kiantone Pipeline Corporation – Incorrect Operation Aboveground Storage Tank Overflow* (Dec. 21, 2021), Executive Summary.

[7] Recommendation, at 2-3.

assessing a total civil penalty of $675,402 for the alleged violations. The Notice also included an additional three warning items pursuant to 49 C.F.R. § 190.205, which warned the operator to correct these alleged probable violations or face possible future enforcement action.

Kiantone contested the allegations in the Notice and requested an informal hearing. A hearing was subsequently held on April 20, 2023, in West Trenton, New Jersey, before a Presiding Official from the Office of Chief Counsel, PHMSA. At the hearing, Petitioner was represented by counsel. On December 26, 2023, I issued a Final Order in this case.

With respect to Item 1, I found that Petitioner violated 49 C.F.R. § 195.402(a) by failing to follow OM&E Procedure 11.6.3 – Activities During Receipt of Crude Oil at Tank Farm and assessed a civil penalty of $225,134. In assessing the civil penalty for this item, I applied the statutory civil penalty assessment factors including the nature, circumstances, gravity, and culpability of this violation.[8] I noted that properly monitoring oil storage tank levels connected to the same manifold during product delivery is a critical part of safe operations and must be accomplished locally in the event of power or communications failures. Accordingly, I found that the proposed civil penalty of $225,134 was supported by the record.

With respect to Item 2, I found that Petitioner violated 49 C.F.R. § 195.402(a) by failing to follow its OM&E Procedure Section 5.7.10 – Tank Farm Dike Drain Operations and assessed a civil penalty of $225,134. In assessing the civil penalty for this item, I applied the statutory civil penalty assessment factors including the nature, circumstances, gravity, and culpability of this violation. I noted that properly logging and monitoring a dike drain water discharge for oil after a drain valve is opened is a critical part of safe operations. Accordingly, I found that a civil penalty of $225,134 for the violation was supported by the record.

With respect to Item 3, I found that although Petitioner was required to identify and correct the deficiencies that caused a prior abnormal operation event on June 30, 2021, involving a power loss and had not done so by the time of the July 8, 2021 incident, its procedures did not specify a time deadline to do so and it was not reasonable for OPS to expect that the process of identifying and correcting the deficiencies that caused the June 30, 2021 incident to be resolved within this time period. Accordingly, I withdrew this allegation.

On January 16, 2024, Kiantone submitted a petition requesting reconsideration of Items 1 and 2 in the Final Order.

Standard of Review

Under 49 C.F.R. § 190.243, Kiantone has the right to petition the Associate Administrator for reconsideration of the Final Order. However, that right is not an appeal or an opportunity to seek a de novo review of the record.[9] It is a venue for presenting the Associate Administrator with information that was not previously available or requesting that any errors in the Final Order be corrected. Requests for consideration of additional facts or arguments must be supported by a

[8] 49 U.S.C. § 60122(b).

[9] 49 C.F.R. § 190.243(a)-(d).

statement of reasons as to why those facts or arguments were not presented prior to the issuance of the Final Order. Repetitious information or arguments will not be considered.

Item 1

Throughout this proceeding, and again in its Petition, Kiantone argues that OPS's allegation that it failed to follow Product Receipt Procedure 11.6.3 was flawed because it was based on the wrong OM&E procedure and as a result OPS was enforcing requirements that did not apply.[10] While Item 1 in the Notice was based on an alleged failure to follow Product Receipt Procedure 11.6.3, Petitioner contended that during an unplanned communications failure such as the power outage that occurred during the incident, its personnel were not required to follow the Product Receipt Procedure. Petitioner continues to argue that instead, its Control Room Management (CRM) Procedure 2.3.4 – Unplanned Communications Failure-Tank Farm (CRM 2.3.4) applied to the exclusion of Product Receipt Procedure 11.6.3.[11]

In evaluating Kiantone's argument, I noted in the Final Order that Product Receipt Procedure 11.6.3 includes a Table that defines a "Category 1" situation as occurring when power is lost, communications are lost, or radar/laser on an active tank is lost. The plain meaning of the word "or" in this procedure indicates that if any of those three conditions applied, that the hourly reading and tank monitoring and facility attendance requirements of this procedure applied. Thus, the existence of Category 1 in the Table of this procedure meant that Product Receipt Procedure 11.6.3 encompassed either a loss of power scenario or a loss of communication scenario such as occurred in this incident.

I found that OPS met its burden of establishing that the facility was in a "Category 1" situation on the night of the incident and the tank monitoring and reading procedures set forth in the Product Receipt Procedure 11.6.3 and its included table clearly applied. When the back-up power failed at approximately 8:36 p.m. EDT, the facility was then without communications. Thus, the tank monitoring and hourly readings and manning requirements described in 11.6.3 applied, to include the "Facility Category" table requirement in a "Category 1" situation. Under the procedure, these readings may be taken remotely under 11.6.3 (when a facility has power and the control center systems are working properly), or "locally" per the "current Facility Category" listed in the table in 11.6.3. Per that table, during a "Category 1" situation, the facility must be fully attended and the tanks at the facility must be monitored to ensure they do not show unexpected loss or gain of inventory, and hourly tank readings must be taken. Based on the manner in which Product Receipt Procedure 11.6.3 and the included table expressly apply to either a loss of power scenario or a loss of communications scenario, Kiantone's argument that its procedures called for following CRM 2.3.4 to the exclusion of the Product Receipt Procedure 11.6.3 is flatly contradicted by the plain language of its written procedures.

[10] Pre-hearing submission, at 2.

[11] Under CRM 2.3.4, as it was written then, that procedure required that if the active tank lost power, communications, or radar/ laser, that the facility must be fully attended, that the tank must be attended during first and last hour of receipt, and that readings must be obtained from the tank gauge each hour during receipt.

Petitioner questioned whether I understood that both of these procedures used the same table and continued to insist that CRM 2.3.4 operates to the exclusion of Product Receipt Procedure 11.6.3, arguing in its Petition that applying both procedures could be redundant.[12] I continue to find Kiantone's argument unpersuasive. Section 11.6.3 as it existed at the time of the Accident references CRM 2.3.4, and instructs that the pump house blender must "[f]ollow additional manning requirements as listed in the table below for situations where the facility or tank may change from Category 3 to a Category 1 or 2 (see Control Room Management procedures CRM 2.3.4, & CRM 2.3.5 for communications failures)". Not only do the procedures omit any instruction that Product Receipt Procedure 11.6.3 may be disregarded when communications are lost, in fact, the procedures instruct the opposite, that "**additional** manning requirements" are to be followed in situations where the facility or tank farm may change to a Category 1 situation.[13]

Petitioner stated that in its past practice, it had only applied CRM 2.3.4 during unplanned communications failures and questioned whether I failed to consider a statement by a company employee during the hearing to this effect.[14] That is incorrect. In determining the preponderance of the evidence, I weighed this statement against the evidence in its totality including the plain black letter language of Petitioner's written OM&E procedures. OM&E procedures are put in writing for a reason. The procedures in effect at the time of the incident must be followed by personnel in the field. Otherwise ad hoc practices that deviate from the procedures could result in further risks to safety. An attempt to justify a failure to follow written procedures by expressing someone's opinion after the fact that the procedures mean something other than what they actually say does not overcome the facts and the record in this case. Petitioner went on to argue that although it deviated from CRM 2.3.4 in this instance, the deviation occurred with respect to Tank 651 and had no impact on the release from Tank 652.[15] However, OPS did not allege a failure to follow CRM 2.3.4 or that Product Receipt Procedure 11.6.3 applied exclusively. There is no suggestion that even if CRM 2.3.4 had been followed with or without any deviation, it would have been impossible for Kiantone to follow Product Receipt Procedure 11.6.3. Written procedures often interact with and contain internal references to other procedures. It is not uncommon that more than one procedure may apply during an incident and even if some of the same actions would be triggered, there is nothing unlawful about OPS making the choice about which procedure it would cite to bring the allegation as long as it meets its burden of proof with respect to cited procedure. Having fully reconsidered all information in the record, I find that nothing in the Petition warrants any change in the findings made in Item 1 of the Final Order.

Having considered Petitioner's arguments, the preponderance of the evidence in this proceeding supports the finding in the Final Order that Petitioner violated 49 C.F.R. § 195.402(a) by failing to follow OM&E Procedure 11.6.3 – Activities During Receipt of Crude Oil at Tank Farm.

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[12] Petition, at 3.

[13] Recommendation, at 7. It should also be noted that even if Petitioner had taken actions fully consistent with CRM 2.3.4, doing so would not have made following Product Receipt Procedure 11.6.3 an impossibility.

[14] Petition, at 4.

[15] Petition, at 5.

Item 2

Throughout this proceeding, and again in its Petition, Kiantone argues that it met the requirements of its procedures to periodically monitor the dike drain discharge for Tank 652 when the Pump House Operator drove through the facility at approximately 12:50 a.m. EDT. Petitioner argues that the finding of violation in the Final Order for this item was erroneous because it was based on an inference that when Petitioner's Pump House Operator drove through the facility and observed Tank 652 to be overflowing from the tank vents, the purpose of the drive through the facility was not to investigate a heavy odor of petroleum that has been reported and therefore satisfied the requirement for periodic monitoring of the dike drain discharge.

Specifically, the Petition stated:

> The Final Order contends that "the pump house blender's drive through the facility occurred approximately 20 minutes after a call to him from the personnel 'sitting at 651 tank' indicating there was a strong smell in the air" and that from that point in time the Pump House Operator "[w]ent back to the Farm around 12:50 AM to check on [ ] sitting at 651 tank."[48] In other words, the Final Order presumes that the Pump House Operator was not at the Tank Farm to monitor draining water, but rather to investigate the smell of odor, a potential sign of release. This contention, however, is belied by the signed witness statements.
>
> In his witness statement, the Tank Gauger stated that at "12:30AM" he "gauged 651 tank and called West Seneca. Shortly after this the light flickered twice. I let Carl Anderson and Ted know that this happened. I also let Ted know there was a heavy smell." The next time entry in the statement is not until "1:30AM" because the entries are mostly hourly.[49] The Final Order appears to infer that all of the events listed by the Tank Gauger for 12:30am occurred at or around that time (as opposed to anywhere between 12:30am and 1:30am), including the gauging of Tank 651, the call to West Seneca, the flickering of the lights, and the communication of the smell of crude oil to the Pump House Operator. But this disregards the clear sequencing of multiple events over the span of an hour and the use of a phrase like "[s]hortly after this" to indicate a lapse in time. Furthermore, it conflates the forms of communication. The Tank Gauger "called" the control room at West Seneca, [50] whereas he "*let* Ted know there was a heavy smell."[51] The Final Order presumes the Tank Gauger "let" the Pump House Operator know about the smell via phone call, but other witness statements would contradict that inference. For

> instance, the Pump House Operator's witness statement nowhere says that the Tank Gauger called him to alert him to the smell of oil, particularly not between 12:30am and 12:50am. Rather, the witness statements from both the Pump House Operator and the incoming Operations Shift Supervisor show that they arrived at the Tank Farm at approximately 12:50am. These statements show that it was after their arrival when they had a brief conversation with the Tank Gauger at Tank 651 regarding the smell of crude oil.[52] This finding thus rests on a single inference from one of three statements and is not a firm basis to suggest that the Pump House Operator's return to the Tank Farm (or subsequent monitoring of Tank 651 dike) was directly prompted by a phone call from the Tank Gauger about the smell of oil. That is a premise that is unsupported by a careful consideration of the record. In other words, they did not come to the Tank Farm *because* of the reported odor of oil, but learned of it when they arrived as part of their monitoring.[16]

Petitioner argued that the Final Order inaccurately inferred that the Tank Gauger reported the heavy crude oil smell and that the statement prepared by its employee for the informal hearing proved that the Pump House Operator's drive through the facility at 12:50 a.m. EDT was not done for the purpose of investigating the crude oil smell. Kiantone stated that the path of the vehicle happened to result in the Pump House Operator's observation of the crude oil overflow from Tank 652 before he could reach the dike drain valve.[17]

While this employee statement appears to be somewhat at odds with the contemporaneous evidence that a strong odor of petroleum had been reported and was being investigated, even conceding that the purpose of the drive through the facility was for purposes other than investigating the odor, the evidence in the record shows that Kiantone still failed to complete documented periodic monitoring of the dike drain valve discharge. First, there is no dispute that the dike drain valve was not logged open (nor later logged closed) as required under Kiantone's Dike Drain Procedure.[18] The evidence shows those logs being updated days after the incident (July 9, 2021) rather than when those actions were conducted as required by Kiantone's procedures.[19] Second, while Kiantone may not have defined "periodically" in its procedures, Petitioner never refuted the allegation that monitoring of the type required by the procedure (i.e., at the drain discharge) was not conducted at all. Petitioner's argument is, at best, an attempt at explaining why its employee did not perform the monitoring, even at 12:50 a.m. EDT.

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[16] Petition, at 8-9.

[17] Petition, at 7.

[18] *See*, *e.g.*, Tr. at 96-104 and Kiantone Post-Hearing Brief, at 8.

[19] Tr. at 109: 23-35; 110 1-10. *See also* Exhibit 21-217159 B-2 and Kiantone Exhibit No. 4 (labeled in Kiantone's Pre-Hearing Brief electronic exhibits as ((#24) 652 Dike Drain Log).

Petitioner's argument that the required monitoring did not even need to begin until over three hours had elapsed since the dike drain began discharging is also inconsistent with the purpose of the monitoring required by the procedure which is to monitor the water discharge from the dike drain for Tank 652 for oil. The purpose of monitoring a dike drain is to identify the escape of crude oil into the containment area if and when it begins to take place. In other words, if the operator doesn't identify the escape of crude oil until it can be seen heavily flowing out of the tank vents that happen to be visible from a passing vehicle's headlamps at night, the operator is not periodically monitoring the dike drain in an effective manner that has any possibility of achieving the purpose of dike drain water monitoring down in the containment area. Kiantone's argument that its requirement to perform periodic monitoring of the water flowing from a dike drain valve down in the containment area was met when a passing vehicle could see oil flowing out of the tank vents lacks any merit even if it were true that the Pump House Operator was not investigating the reported heavy crude oil smell as the purpose of his drive through the facility. The failure to complete a written log of the valve opening/closure which would have been done if the procedure were being followed is further evidence of this violation. Having fully reconsidered all information in the record, I find that nothing in the Petition warrants any change in the findings made in Item 2 of the Final Order.

Having considered Petitioner's arguments, the preponderance of the evidence in this proceeding supports the finding in the Final Order that Petitioner violated 49 C.F.R. § 195.402(a) by failing to follow its OM&E Procedure Section 5.7.10 – Tank Farm Dike Drain Operations.

Assessment of Penalty

With respect to Item 1, Petitioner contends that rather than being assessed a civil penalty for failure to follow OM&E Procedure 11.6.3 with respect to Tank 652, it should have been assessed a de minimis penalty for failing to follow CRM 2.3.4 with respect to Tank 651.[20] With respect to Item 2, Petitioner contends that rather than being assessed a civil penalty for failure to follow OM&E Procedure 5.7.10, it should receive a significantly reduced penalty for "a short delay in filling out the logbook."[21] With respect to both items, Petitioner contends that the civil penalties assessed in the Final Order were arbitrary and had misapplied the gravity factor because it had engaged in cleanup and recovery efforts of the crude oil that was released and the Final Order erred in considering any environmental impact in assessing the penalty.

With respect to Item 1, I have discussed at length above why Kiantone's argument that rather than being assessed a civil penalty for failure to follow OM&E Procedure 11.6.3 with respect to Tank 652, it should have been assessed a de minimis penalty for failing to follow CRM 2.3.4 with respect to Tank 651 is unpersuasive. With respect to Item 2, I have also discussed above why Petitioner's failure to follow OM&E Procedure 5.7.10 is much more than a mere recordkeeping violation.

[20] Petition, at 2.

[21] Petition, at 10.

With regard to whether the Final Order erred in considering any environmental impact in assessing the penalty and misapplied the gravity factor because Kiantone had engaged in cleanup and recovery efforts, I find Petitioner's arguments unpersuasive. Under PHMSA's statutory civil penalty framework, the gravity of a violation, which includes its consequences, is required to be considered by PHMSA. In assessing the civil penalties, the Final Order found that Kiantone's failure to follow OM&E Procedure 11.6.3 – Activities During Receipt of Crude Oil at Tank Farm (Item 1) was a causal factor in the crude oil spill and the failure to periodically monitor the dike drain discharge for Tank 652 on the night of the incident (Item 2) increased the severity (i.e., the volume) of the spill.

With respect to Item 1, the civil penalty and the gravity factor in particular reflect the fact that this accident was preventable. If Petitioner had followed the applicable procedure and not allowed Tank 652 to receive the unplanned delivery of oil, the spill would not have occurred. With respect to Item 2, the civil penalty and the gravity factor in particular reflect the fact that the amount of oil spilled was more severe than it otherwise would have been. If Petitioner had properly monitored the dike drain discharge for Tank 652, it would likely have detected and been able to stop the overflow after a few hundred or even a few thousand gallons of oil had spilled. Instead, approximately 112,000 gallons of oil were spilled. With respect to Petitioner's argument that the fact a spill occurred should have been irrelevant to the gravity factor because the oil was cleaned up before it could spread beyond the firewater pond, the fact that Kiantone had to clean up its own spill after it occurred is not a mitigating factor. Nothing in the history of PHMSA's civil penalty assessments requires that a spill must spread to further environmental areas such as wildlife areas, or other property owners' land before it can be considered as part of the gravity factor. Moreover, there is nothing unlawful about PHMSA considering the sheer size or volume of a given spill in assessing a civil penalty because even if oil-soaked soil is removed and taken elsewhere, for example, some environmental impact is involved.

Having considered Petitioner's arguments and the record in this case, I find that the civil penalty assessments in this matter, in both the amounts and the factors to be considered in formulating such, comply with the governing statute at 49 U.S.C. § 60122 and 49 C.F.R. § 190.223. Accordingly, I find that nothing in the Petition warrants a reduction in the civil penalties assessed in the Final Order for these violations.

Warning Items

The Final Order included three items, Items 4, 5 and 6, that were identified as warning items pursuant to § 190.205. The warnings were for Petitioner's alleged failure to follow its Abnormal Operation Procedure 18.1.2 and associated form for reporting of abnormal operations; Petitioner's alleged failure to give notice of a September 15, 2018 tank fire to the National Response Center; and Petitioner's alleged failure to file an accident report on DOT Form 7000-1 after discovery of the September 15, 2018 tank fire.

In its response to the Notice and again in its Petition, Kiantone took issue with the OPS practice of issuing warnings. Petitioner argued that the three warning items were unjustified because they created the impression of non-compliance without the opportunity for any objection by the pipeline operator.

The authority for OPS to issue warnings comes from 49 C.F.R. § 190.205 which states:

> **§ 190.205 Warnings.**
>
> Upon determining that a probable violation of 49 U.S.C. 60101 et seq., 33 U.S.C. 1321(j), or any regulation or order issued thereunder has occurred, the Associate Administrator or a Regional Director may issue a written warning notifying the operator of the probable violation and advising the operator to correct it or be subject to potential enforcement action in the future. The operator may submit a response to a warning, but is not required to. An adjudication under this subpart to determine whether a violation occurred is not conducted for warnings.

OPS has issued warnings to pipeline operators under this authority for decades. The Final Order stated that if OPS finds a violation of any of these warning items in a subsequent inspection, "Respondent may be subject to future enforcement action." Thus, a warning item is not a finding of violation, is not a prior offense, and involves no penalty. It is perplexing that Petitioner took issue with these three items because if they were not mere warnings, the case may have ended up involving three additional violations and associated civil penalties. To the extent Petitioner is concerned that warnings allege noncompliance without any adjudication, it should be noted that the phrase "Respondent may be subject to future enforcement action" does not mean that the evidence of the past conduct referenced in the Notice will be the basis for another Notice. Again, it is not a prior offense. The allegations in a future enforcement action, if any, would have to be based on new evidence that the issue remained present after the Final Order is issued and the operator would have a full opportunity to contest such allegations. In short, unless 49 C.F.R. § 190.205 is repealed, there is nothing stopping OPS from issuing warnings where appropriate.

Due Process Arguments

Throughout this proceeding, Kiantone has contended that OPS continually deviated from the legal theories initially proposed in the Notice, argued that OPS' claims were entirely without merit, and questioned whether it could receive fair treatment in an administrative agency adjudication as opposed to a judicial proceeding.[22] I disagree with these arguments. First, OPS has held to the original allegations in the Notice. Nothing about the allegations in the Notice, or the evidentiary basis put forward by OPS at the time the Notice was issued changed during the course of this proceeding. The purpose of this proceeding was simply to apply the facts to the enforceable requirements, nothing more, nothing less. Petitioner had ample opportunities to present its arguments for all three items at every stage of this proceeding including: (1) in response to the Notice; (2) during the hearing; (3) following the hearing; and (4) in its Petition. Petitioner had a full and fair opportunity to present its arguments. While Items 1 and 2 were not withdrawn as Item 3 was, the reason is that OPS met its burden of proving these two allegations, not any lack of fairness in the process.

[22] Post-hearing submission, at 15.

Petitioner is correct that the Part 190 administrative adjudication process, which has been in place for decades, does not have all of the same procedures as a jury trial. However, the Part 190 administrative adjudication process is consistent with basic constitutional due process including the right to notice of the proceeding, the right to appear and contest the evidence, the right to counsel, and the opportunity for judicial review. With respect to Petitioner's arguments regarding the constitutionality of PHMSA's governing statutes and underlying enforcement regulations, the pipeline safety standards were mandated by Congress and do not arise from common law predating the relevant statutes at 49 U.S.C. Chapter 601, nor are they predicated on torts.[23] Moreover, the Part 190 administrative process and the agency's authority to assess civil penalties for non-compliance was mandated by Congress and is codified at 49 U.S.C. 60122. Notably, the U.S. Court of Appeals for the Sixth Circuit recently issued a decision on June 2, 2023, denying a pipeline operator's petition for review of a PHMSA pipeline safety enforcement civil penalty matter.[24] In that case, the Court upheld PHMSA's assessment of civil penalties in a contested pipeline safety enforcement case, in which an administrative hearing was also held, under the same procedural statutes and regulations which governed here.[25]

PHMSA takes its enforcement responsibilities very seriously and recognizes that its administrative authority must be used judiciously and in a fair manner. At the same time, the transportation of large volumes of flammable and toxic hazardous products by pipeline through populated and environmentally sensitive areas has inherent risks and pipeline operators, including large, sophisticated companies like Petitioner, are aware that they have chosen to engage in a regulated industry that calls for prompt and efficient safety and compliance proceedings.

RELIEF DENIED

Based on the information provided in the Petition, a review of the record, and for the reasons stated above, I am affirming the Final Order without modification.

This Decision is the final administrative action in this proceeding.

ALAN KRAMER MAYBERRY
Digitally signed by ALAN KRAMER MAYBERRY
Date: 2024.05.24 14:12:41 -04'00'

Alan K. Mayberry
Associate Administrator
for Pipeline Safety

June 3, 2024
Date Issued

[23] *See Jarkesy* v. *Sec. & Exch. Comm'n*, 34 F.4th 446, 453 (5th Cir. 2022) (citing *Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm'n*, 430 U.S. 442, 458 (1977)). *See also American Power & Light Co.* v. *SEC*, 329 U.S. 90 (1946).

[24] *See Wolverine Pipe Line Company v. DOT, PHMSA*, Case No. 21-3405 (6th Cir., June 2, 2023); *available online at*: https://www.govinfo.gov/content/pkg/USCOURTS-ca6-21-03405/pdf/USCOURTS-ca6-21-03405-0.pdf.

[25] *Id.*