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

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

PETITION FOR RECONSIDERATION

Pursuant to 49 C.F.R. § 190.243(a), Kiantone Pipeline Corporation ("Kiantone" or the "Company") respectfully seeks reconsideration of Items 1 and 2 and their associated penalties assessed in the Final Order (dated December 26, 2023) for the above-referenced matter.[1] Kiantone seeks reconsideration because the Final Order does not take full account of the facts and testimony presented by Kiantone in its filings and during the informal hearing, even though many of these went uncontested. As explained below, certain aspects of the Final Order, as currently drafted, would be found arbitrary and capricious upon judicial review.[2] This petition is not meant to be exhaustive, and Kiantone incorporates by reference its prior filings in this matter in support of its challenges to the determination regarding Items 1 and 2, and Item 3 to the extent that it is reasserted in any subsequent order.

I. Procedural Background

On October 6, 2022, the Pipeline and Hazardous Materials Safety Administration ("PHMSA" or the "Agency") issued a Notice of Probable Violation and Proposed Civil Penalty ("NOPV") to Kiantone in connection with the former's investigation of a release of crude oil product at Kiantone's Tank Farm facility located in Warren, Pennsylvania (the "Release"). The NOPV asserted three civil penalty items (Items 1 through 3) and three warning items (Items 4 through 6).[3] Kiantone filed its response and request for hearing on November 21, 2022 ("Response").[4] In advance of the hearing, Kiantone filed its pre-hearing submission on April 10, 2023 ("Kiantone Pre-Hearing Submission"), as did the Eastern Region ("Eastern Region Pre-

[1] *In re Kiantone Pipeline Corp.*, CPF No. 1-2022-050-NOPV, Final Order (Dec. 26, 2023) [hereinafter Final Order].

[2] *Cf. ExxonMobil v. U.S. Dep't of Transp.*, 867 F.3d 564, 571–84 (5th Cir. 2017) (reviewing and vacating civil penalty items and penalties under the arbitrary and capricious standard).

[3] *In re Kiantone Pipeline Corp.*, CPF No. 1-2022-050-NOPV, Notice of Probable Violation and Proposed Civil Penalty at 6 (Oct. 6, 2022) [hereinafter NOPV].

[4] *In re Kiantone Pipeline Corp.*, CPF No. 1-2022-050-NOPV, Request for Hearing and Response to NOPV (Nov. 21, 2022) [hereinafter Response].

Hearing Submission"). An in-person informal hearing (hereinafter the "Hearing") was held on April 20, 2023, in West Trenton, New Jersey, before a Presiding Official from PHMSA's Office of Chief Counsel. After the Hearing, Kiantone submitted its post-hearing submission on May 22, 2023 ("Kiantone Post-Hearing Brief"). The Eastern Region submitted its Recommendation on June 21, 2023 ("Eastern Region Recommendation").

On December 26, 2023, PHMSA issued its Final Order, which found two violations of 49 C.F.R. § 195.402(a) centered around Kiantone's alleged failure to follow its O&M Procedure 11.6.3 – Activities During Receipt of Crude Oil at Tank Farm ("O&M Procedure 11.6.3") (Item 1) and its O&M Procedure 5.7.10 – Tank Farm Dike Drain Operations ("O&M Procedure 5.7.10") (Item 2).[5] PHMSA assessed a total civil penalty of $450,268, which reflects the full penalty amounts for Items 1 and 2 that the Agency proposed in the NOPV.[6] PHMSA also withdrew Item 3 as duplicative of Item 1, and accordingly withdrew the recommended civil penalty.[7] PHMSA did not directly address Items 4 through 6, the warning items, but ostensibly upheld those items by noting that the items could form the basis for "future enforcement action" should PHMSA find a violation of the items in a subsequent inspection.[8]

PHMSA's regulations require that a petition for reconsideration of a final order must be "received no later than 20 days after receipt of the order by the respondent."[9] Kiantone received the Final Order on December 26, 2023, by e-mail. This petition for reconsideration is therefore timely.[10]

II. PHMSA Should Reconsider the Nature of Item 1 and Assess a Violation for Failure to Strictly Follow CRM 2.3.4 Regarding Tank 651, Resulting in a De Minimis Penalty.

As currently described, the violation found for Item 1 should be reconsidered as it is unsupported by the facts in the record and rests on a misreading of the relevant procedures. Upon reconsideration, the violation in Item 1 should consist of minor deviations from Control Room Management Procedure 2.3.4 – Unplanned Communications Failure – Tank Farm ("CRM 2.3.4") with respect to Tank 651 (the tank that did not overflow), resulting in a civil penalty well below the maximum penalty that has been imposed.

A. CRM 2.3.4 Applied During the Loss of Communications on July 7-8, 2021.

Before proceeding, Kiantone must point out that the Final Order appears to misunderstand the overlapping relationship between the two procedures that are implicated by the claims presented in Item 1. The Final Order reads as if the table in O&M Procedure 11.6.3 is somehow

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[5] Final Order at 5, 7.

[6] *Id.* at 10–11; *see* NOPV at 6.

[7] Final Order at 7–9. Kiantone agrees with the decision to withdraw Item 3 as duplicative of Item 1 and does not contest its withdrawal.

[8] *Id.* at 11–12.

[9] 49 C.F.R. § 190.243(a).

[10] Given that the twentieth day falls on Monday, January 15, 2024, a Federal holiday (Dr. Martin Luther King Jr. Day), Kiantone received an extension from the Presiding Official to file this petition on Tuesday, January 16th.

unique from the one in CRM 2.3.4.[11] The table at the end of O&M Procedure 11.6.3 *is* the table in CRM 2.3.4. The Eastern Region conceded this point at the Hearing: "Category 1 on both CRM 2.3.4 and OME 11.6.3. **Both of them have the same table.**"[12] The Associate Administrator's finding that Kiantone failed to follow O&M Procedure 11.6.3 because Kiantone failed to adhere to the Category 1 requirements "in the table in 11.6.3" should be reconsidered in light of the fact that the table comes from CRM 2.3.4.[13]

With that in mind, Kiantone has explained numerous times and in detail why the CRM 2.3.4 table—and not O&M Procedure 11.6.3 proper—applied during the loss of communications on July 7-8, 2021.[14] As a threshold matter, O&M Procedure 11.6.3 sets responsibilities during normal operations and CRM 2.3.4 sets the requirements for unplanned communications failures—i.e., abnormal operations. The reason why Kiantone has been so insistent that CRM 2.3.4 operates to the exclusion of O&M Procedure 11.6.3 during a loss of communications is because to read it any other way is to read a redundancy into the procedure.[15] O&M Procedure 11.6.3 requires the Pipeline Control Center Operator and Pump House Blender to, among other things, "[m]onitor[] tank product levels in ***all crude tanks*** hourly" and "[v]erif[y] that ***tanks*** not scheduled to receive product do not show an unexpected loss or gain of inventory."[16] This is not a hardship or difficulty during normal operations because the control room operator can refer to gauges in the control room to make these determinations.[17]

Whereas CRM 2.3.4, as it was then written, only required manual gauging at ***the active tank*** during a Category 1 situation, which is an emergency situation, where the capability of monitoring levels remotely as occurs during normal operations has been lost.[18] If the obligation to monitor tank product levels in all crude tanks hourly occurred during both normal operations and abnormal operations (i.e. loss of communications), the language in CRM 2.3.4 requiring hourly readings at only the active tank would be redundant. The Eastern Region recognized this problem, but referred to it as an inconsistency in the procedures.[19] The more natural reading—that only one of the two procedures can be in effect during an unplanned communications failure—avoids this

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[11] *See* Final Order at 4 ("Procedure 11.6.3 includes a Table that defines a 'Category 1' situation" . . . "Procedure 11.6.3 and its included table"); *id.* at 5 ("per the 'current Facility Category' listed in the table in 11.6.3."). The Eastern Region's Recommendation also refers to it as "the table in 11.6.3" despite the Region's previous acknowledgment in the Region's Pre-Hearing Submission that the table comes from CRM 2.3.4. *Compare* Eastern Region Recommendation at 5, 7, *with* Eastern Region Pre-Hearing Submission at 4.

[12] Hr'g Tr. at 54:17–18 (emphasis added); *see also* Eastern Region Pre-Hearing Submission at 4.

[13] Final Order at 5.

[14] *See* Kiantone Pre-Hearing Submission at 7–8; Kiantone Post-Hearing Brief at 3–4.

[15] *See* Kiantone Post-Hearing Brief at 4.

[16] Kiantone Ex. 8 (emphasis added).

[17] *See* Hr'g Tr. at 30:21–31:13 (explaining that requirements in Procedure 11.6.3 cannot be completed if the control center loses communications).

[18] Kiantone Ex. 9 (emphasis added); *see also* Final Order at 3 n.5.

[19] *See* Eastern Region Pre-Hearing Submission at 5 ("Eastern Region notes that Kiantone's OME manual and CRM procedures were not consistent with one another (*e.g.*, monitoring and verification of all tanks in Procedure 11.6.3 versus only tanks schedule to receive product in the event of a power outage in CRM 2.3.4).").

interpretative problem.[20] Yet the Final Order adopts the Region's interpretation of O&M Procedure 11.6.3.[21] That decision should be reconsidered in light of the evidence presented at the Hearing.

B. The Final Order Fails to Consider Evidence from the Hearing that Shows CRM 2.3.4 Applies in Practice.

Additionally, the Final Order fails to consider evidence that was presented at the Hearing that demonstrated that only CRM 2.3.4 applies during an unplanned communications failure in the Company's pattern and practice. Kiantone's representative testified to that fact,[22] but his testimony was apparently not considered in the decision. The Final Order nowhere mentions this testimony nor grapples with the fact that PHMSA's interpretation of the Company's procedures runs counter to the Company's real-world implementation of them. Neither did the Final Order address the fact that the Eastern Region's own witness, PHMSA's Senior Accident Investigator, initially read the two Procedures the same way Kiantone does.[23]

The determination that O&M Procedure 11.6.3 was the operative provision also overlooks the testimony and references in the post-hearing briefing about the significance of the prior abnormal operations ("AO") reports that are in the record.[24] Kiantone explained that "none of the AO reports from the prior 12 months cited to O&M 11.6.3 as the procedure that was followed during the abnormal operation," and the AO report from the prior event that PHMSA claims should have put Kiantone on notice of these risks did actually cite to CRM 2.3.4.[25] Those AO reports provide confirmation of the testimony that Kiantone did not in practice apply O&M Procedure 11.6.3 during abnormal operations, and followed a demonstrated practice of applying CRM 2.3.4 during unplanned communications failures. The significance of these reports on the real-world application of Kiantone's procedures should be considered in any decision.

[20] *See* Kiantone Ex. 9 ("This procedure is for unplanned communications failures only. . . . During normal operations, the active (inbound) pipeline tanks are considered Category 3.").

[21] *See* Final Order at 4.

[22] *See* Hr'g Tr. at 30:5–32:3 ("The way we wrote this procedure and the way we teach this procedure is . . . if you're in a Category 1 for an unplanned communication failure you immediately go to CRM 2.3.4 and follow that. . . . In an unplanned communication failure they follow 2.3.4.").

[23] *See id.* at 20:25–21:11. After the Senior Accident Investigator provided his answer, the Region began to ask another one of its witnesses (Operations Supervisor Catherine Washabaugh) to look at the same procedure to see what answer she would provide. *See id.* at 21:12–14. The court reporter briefly went off the record to clarify who each individual speaking was. *See id.* at 21:15–22:3. Once back on the record, the Senior Accident Investigator changed his answer. *See id.* at 22:5–12.

[24] *See* Abnormal Operations Reports (contained in case file); *see also* Hr'g Tr. at 41:11–42:2 (Eastern Region confirming the AO reports are in the case file).

[25] Kiantone Post-Hearing Brief at 4. "In fact, the AO report for the June 30th power outage cited CRM 2.3.4, not O&M 11.6.3." *Id.*

C. Item 1 Should Be Assessed as a Violation for Failure to Follow CRM 2.3.4 Regarding Tank 651, Resulting in a Much Lower Penalty.

That brings Kiantone to the question of compliance with CRM 2.3.4. Curiously, the Final Order states the following:

> Finally, while there was some discussion at the hearing concerning the extent to which Respondent's actions were consistent with CRM 2.3.4 when the subject was raised by Kiantone in its defense, **OPS did not take a position on whether Respondent complied with CRM 2.3.4 or ever allege that it failed to do so**.[26]

In the Recommendation, the Region claimed that "PHMSA has not taken a position on whether Kiantone also failed to comply with CRM 2.3.4."[27] The record reflects otherwise. In the Region's Pre-Hearing Submission, the Region argued numerous times that Kiantone failed to comply with CRM 2.3.4.[28] At the Hearing, the Region presented such arguments in the summary of its claims and also presented evidence about the delay in taking manual readings at Tank 651.[29]

To be clear, Kiantone has acknowledged minor deviations from CRM 2.3.4.[30] During a Category 1 situation, such as the Tank Farm found itself in on the night of July 8, 2021, CRM 2.3.4 required Kiantone personnel to "[o]btain readings from tank gauge [of the active tank] each hour during receipt."[31] The record shows that the UPS was depleted at 8:36pm and the first manual tank gauging of what Kiantone thought to be the only active tank (Tank 651) did not take place until either 10:15pm or 10:30pm—more than an hour after the facility entered Category 1.[32] But that deviation had no impact on the release from Tank 652 because it occurred at Tank 651, the tank that did not overflow. A reconsidered Final Order that reflects a violation for Item 1 on those limited grounds would be supported by the record and would result in a significant reduction of the penalty.[33]

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[26] Final Order at 5 (emphasis added).

[27] Eastern Region Recommendation at 7.

[28] Eastern Region Pre-Hearing Submission at 4 ("[E]ven if Kiantone was permitted to follow its CRM procedures rather than its OME manual during the Accident, Kiantone still violated the regulations by failing to follow the requirements in those procedures. Indeed, Kiantone failed to follow CRM 2.4.3[.] . . . Thus, Kiantone failed to follow the procedures within CRM 2.3.4. . . . [E]ven if its CRM procedures were controlling at the time of the Accident, Kiantone still violated the regulations by failing to follow the CRM procedures as well."); *id.* at 5 ("[N]either the CRM nor OME was actually followed the night of the Accident.").

[29] Hr'g Tr. at 15:22–16:16 ("but not to stray from that [Control Room Management] procedure"), 60:11-61:11 (implying that the CRM 2.3.4 table was not followed because the hourly reading required at 9:36pm was not taken).

[30] *See* Kiantone Post-Hearing Brief at 3, 5; Hr'g Tr. at 158:9–15.

[31] Kiantone Ex. 9.

[32] Hr'g Tr. at 26:11–15, 61:1–8, 76:2–5, 80:13–18; Richard Sullivan Statement (contained in case file).

[33] *See* Kiantone Post-Hearing Brief at 6 ("If the violation in Item 1 is really that Kiantone missed one hourly reading, in the dark, on a tank that did not overflow, such conduct constitutes a mere recordkeeping violation that in no way

III. PHMSA Should Withdraw Item 2 or Substantially Reduce the Associated Penalty.

For Item 2, the Final Order determined that Kiantone violated 49 C.F.R. § 195.402(a) by failing to follow O&M Procedure 5.7.10, specifically the requirements to log the opening and closing of the dike drain valve for Tank 652 and to "periodically" monitor discharges of water from the Tank 652 dike drain.[34] Yet, like with Item 1, this determination appears premised on conclusions not supported by the record and without any regard for contrary evidence. Kiantone thus requests a more fulsome account of the record, which supports a withdrawal of Item 2 for lack of a violation of 49 C.F.R. § 195.402(a), or a substantial reduction of the penalty to account for a minor recordkeeping violation.

A. The Final Order Misconstrues Kiantone's Argument.

With respect to the monitoring requirement, the Final Order characterizes Kiantone's argument as being that "***the observation*** of oil escaping from Tank 652 by the Pump House Operator on his drive through the facility approximately three hours after the dike drain was opened constituted the periodic monitoring required by the procedure."[35] According to the Final Order, Kiantone asserted that the "happenstance . . . discovery of the ongoing oil spill via car headlights hitting Tank 652 constituted 'periodic' monitoring."[36] These characterizations are not correct. Kiantone did not assert that the identification of the crude oil overflow from Tank 652 "constituted an attempt to periodically monitor the dike drain discharge for Tank 652."[37] Rather, the identification of the overflow was *the result* of Kiantone's periodic monitoring efforts, and the layout of the facility necessarily led the Pump House Operator to identify the crude oil overflow before he could reach the dike drain for Tank 652.

B. The Finding that Kiantone Did Not Monitor Pursuant to Procedure 5.7.10 Is Factually Unsupported.

1. Kiantone Presented Evidence Regarding the Pump House Operator's Route Through the Tank Farm to Monitor the Tank 652 Dike Drain.

Kiantone presented several pieces of evidence establishing a timeline and explaining the Pump House Operator's route with reference to a map of the Tank Farm.[38] First, Kiantone presented evidence that the significant rainfall during the day had resulted in a large volume of water in the containment area and that Kiantone's procedures called for this to be drained.[39]

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contributed to the release and in no way justifies PHMSA's proposed maximum penalty of $225,134. By our calculations, such a penalty would be worth less than 10 percent of the proposed penalty.").

[34] Final Order at 5–7; Kiantone Ex. 14.

[35] Final Order at 6 (emphasis added).

[36] *Id.* at 7.

[37] *Id.*

[38] Hr'g Tr. at 97:9–98:14; Kiantone Ex. 31 (aerial map of Tank Farm).

[39] *See* Hr'g Tr. at 91:25–93:22; *see also* Kiantone Ex. 1 (recorded rainfall between July 7, 2021, and July 9, 2021), Ex. 2 (National Weather Service climatological data for July 2021), and Ex. 16 (calculation of water recovered from containment system).

Kiantone also established that draining these amounts of water would not be a short process and that the need for monitoring the outfall should reflect those considerations.[40] Nowhere does this evidence get addressed in the Order.

Instead, the Order entirely misapprehends the events relating to the monitoring of the valve. For instance, the Pump House Operator on duty returned to the Tank Farm at approximately 12:50am on July 8th (approximately three hours after opening the drains) and drove around the facility for the purpose of, among other things, monitoring the dike drains.[41] This is reflected in the Pump House Operator's written statement, where he noted that he "[w]ent back to the Farm around 12:50am to check on" the personnel manning Tank 651 ("Tank Gauger") and "proceeded to check the rest of the area."[42] Kiantone's representative testified that the route the Pump House Operator would had to have taken around the Tank Farm necessarily led him first to Tank 651, then to Tank 652, where he observed the crude oil overflow from Tank 652 before he could reach the dike drain valve to monitor discharges:

> A: So when he came back to the tank farm around 12:50, he entered at the entry point gate marked on the map, drove down by 651 Tank to check on Tanner, who was the manual gauger. From there, he left to inspect the rest of the facility. So he would drive around. So that top, middle gray tank, that's a new tank. That's 654.
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> As you drive around that tank, you have to drive up that incline to exit that main dike area. He was going to drive down to inspect the—to look at the dike drain valve that's marked there at 652. However, when you exit that dike, you're driving up the incline. That's when his headlights hit 652 Tank and immediately saw it overflowing. That's—that is the only reason when you say he—he observed the tank overflowing before inspecting the dike, coming back to monitor the dike drain valve, the only reason is because of the route you have to take to exit that dike, that he just—he saw that first before he got to the dike drain valve. And as soon as he saw it, his first move was to go close that dike drain valve.
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> **Q: So if instead of going to check on [Tank Gauger] in the monitoring of the tank that was receiving crude, if he had driven the other direction, he might have come up on it and encountered the leak at the drain valve as opposed to seeing it coming out of the top?**

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[40] Hr'g Tr. at 95:1–16.

[41] *See* Kiantone Pre-Hearing Submission at 4, 10–11; Kiantone Post-Hearing Brief at 6–8.

[42] Signed Statements from Workers at 1 (statement of Ted Snyder) (contained in case file).

> A: He could have. However, the entry point marked there is the only keycard access at the tank farm, so—[43]

Kiantone has presented evidence that the Pump House Operator was monitoring the dike drains, and the reason he encountered the spill before reaching Tank 652 dike drain (but after monitoring the Tank 651 dike) is because of the route he had to take around the Tank Farm. Kiantone explored this thoroughly at the Hearing, but the Final Order fails to consider the key pieces of evidence bolstering this argument.

2. The Final Order Does Not Account for the Evidence and Testimony Kiantone Presented Regarding the Pump House Operator's Monitoring of Draining Water.

For example, the Final Order disregards the testimony of Kiantone's witness, relegating to a footnote its reasoning that Kiantone's representative must have been speculating about the Pump House Operator's motivations.[44] The record demonstrates that it was not speculation. The witness referred to a map of the Tank Farm, relied on his personal knowledge of the route one is allowed to take at the facility, and cited to the Pump House Operator's witness statement.[45] The Final Order even quotes a sentence from that witness statement,[46] but overlooks its importance:

> ***While driving out of 651 dike*** I saw that the vents on 652 were flowing oil.[47]

What was the Pump House Operator doing at the Tank 651 drain dike if not monitoring the draining of water? The Final Order has but one answer—he was investigating the report of the smell of oil—and it is based on an inference that does not hold up when all the witness statements in the record are considered.

3. The Final Order's Conclusions Regarding the Reason for the Pump House Operator's Return to the Tank Farm Fails to Account for all Relevant Witness Statements.

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

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[43] Hr'g Tr. at 97:9–98:14; *see also* Kiantone Ex. 31.

[44] *See* Final Order at 7 n.15.

[45] Hr'g Tr. at 96:25–99:5.

[46] Final Order at 7.

[47] Signed Statements from Workers at 1 (statement of Ted Snyder) (emphasis added).

[48] Final Order at 7.

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.

C. Periodic Monitoring Occurred.

Given that Kiantone has proven that monitoring occurred, the remaining question is whether it was periodic enough to satisfy O&M Procedure 5.7.10. Since the Final Order found that no monitoring had occurred, it did not address this question. Kiantone, however, presented evidence at the Hearing about the sheer volume of water that was still present in the dike three

[49] Signed Statements from Workers at 2 (statement of Tanner Kays) (contained in case file).

[50] Hr'g Tr. at 25:19–20, 26:20–21, 50:14.

[51] Signed Statements from Workers at 2 (statement of Tanner Kays) (emphasis added).

[52] *See* Signed Statements from Workers (statement of Ted Snyder) ("Went back to the Farm around 12:50 AM to check on [the Tank Gauger] sitting at Tank 651. After a brief conversation I proceeded to check the rest of the area."); Carl Anderson Statement (contained in case file) ("~12:50AM July 8, 2021: Entered upper Tank Farm gate. Drove to 651 location where [T]anner [K]ays was monitoring the level of 651 Tank. . . . Upon arrival, Ted Snyder (Pump House Blender) was on site, also checking on Tanner Kays to see how things were going, etc. Ted and I both [c]ommented on the strong [h]ydrocarbon smell as we had driven up Cobham Park Road.").

hours into draining.[53] Kiantone has thoroughly explained why returning to monitor within three hours is sufficiently periodic given that volume of water and ongoing rainfall, and how PHMSA would be hard pressed to say it is not given the flexibility of that term and the short timeframe between when the release began and when it was detected (no more than 20 minutes).[54]

D. Failure to Immediately Log the Drain Opening and Closing Constitutes a Recordkeeping Violation Worth a Significantly Reduced Penalty.

Finally, with respect to the recordkeeping requirement in Procedure 5.7.10, Kiantone has explained at length why the opening and closing of the Tank 651 dike drain valve was not immediately logged,[55] namely the Pump House Operator's focus on closing the Tank 652 dike drain valve and his subsequent precautionary visit to the hospital.[56] A reconsidered recordkeeping violation for the Pump House Operator's short delay in filling out the logbook would warrant a significantly reduced penalty.[57]

IV. The Civil Penalties for Items 1 and 2, if Not Withdrawn, Should Be Substantially Reduced.

The penalty analysis in the Final Order, which concludes in an assessment of statutory maximum penalties for Items 1 and 2, is arbitrary and capricious for several reasons. First, the Final Order fails to consider the lack of environmental impacts present in this case despite Congress's directive to do so. Second, the gravity factor is misapplied under PHMSA's penalty framework. Third, Kiantone's argument that the proposed, and now assessed, penalty amount is inconsistent with penalties assessed in similar PHMSA enforcement actions was not considered.

A. The Penalty Analysis Must Consider the Lack of Environmental Impacts from the Release.

Ironically, the only time the word "environment" or the like appears in the Final Order is when the statutory (and regulatory) requirement for PHMSA to consider "adverse impact on the

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[53] *See* Hr'g Tr. at 99:24–100:23; *see also* Kiantone Ex. 1 (recorded rainfall between July 7, 2021, and July 9, 2021), Ex. 2 (National Weather Service climatological data for July 2021), and Ex. 16 (calculation of water recovered from containment system).

[54] *See* Kiantone Post-Hearing Brief at 7–8 ("The only situation in which Mr. Snyder monitors draining earlier and spots the release sooner is if he returns to the Tank Farm within 2 hours and 45 minutes as opposed to 3 hours. Not only would it be arbitrary for PHMSA to assert 'periodically' means 15 minutes less than what Kiantone did, but it is splitting hairs to the point where Kiantone is perplexed as to how such a violation could justify a maximum penalty."); *see also* Hr'g Tr. at 114:6–8 (affirming that Kiantone discovered the overflow within 19 minutes).

[55] Final Order at 6–7 ("The evidence shows that those logs being updated in days following the Accident (July 9, 2021) rather than when those actions were conducted as required by Kiantone's procedures.").

[56] *See* Kiantone Pre-Hearing Submission at 10; Kiantone Post-Hearing Brief at 8; *see also* Hr'g Tr. at 99:21–23, 103:25–104:5.

[57] Kiantone Post-Hearing Brief at 8 ("If the violation in Item 2 is really that the Pump House Operator did not complete a log entry until the next day, that is a minor recordkeeping violation worth nowhere near the proposed fine.").

environment" is recited.[58] The penalty analysis then fails to consider that criterion in violation of Congress's statutory command to consider environmental impacts (or lack thereof).[59]

Kiantone proclaimed in each of its filings that the release resulted in no environmental impacts because of the prompt and effective response, cleanup, and recovery efforts by Kiantone personnel.[60] At the Hearing, Kiantone proved that fact with evidence about the robust response and cleanup efforts that resulted in a lack of environmental impacts caused by the spill, and about how other state and federal environmental protection agencies investigated the spill and were satisfied with Kiantone's response.[61] This evidence was not impeached by the Region. That is why Kiantone was surprised to see the following statement appear not once, but twice in the Final Order: "Respondent presented no information that would warrant a reduction in the civil penalty proposed in the Notice."[62] To the contrary, Kiantone explained at every stage of this proceeding why the penalties should be reduced—chiefly, that the release did not adversely impact the environment or human health.[63] It is not that Kiantone failed to present such information, it is that the Final Order failed to consider it.

B. The Penalty Analysis Should Be Reconsidered to Properly Apply the Gravity Factor.

Next, the Final Order incorrectly applies the gravity consideration in the penalty analysis. In determining the penalties for Items 1 and 2, the Final Order states in each instance, "With respect to the gravity of this violation, 2,672 bbl of crude oil were in fact spilled from the tank requiring clean-up operations."[64] That statement is reminiscent of the Region's argument at the Hearing that the civil penalty amount was justified considering "over 2,000 barrels of oil touched the ground."[65] But Kiantone has explained that the mere fact that product was released from the tank and therefore had to be cleaned up, even though it did not exit containment,[66] is not grounds for a statutory maximum penalty given that the same will be true for every release, no matter how great the amount spilled or how minor the environmental impacts.[67]

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[58] *See* Final Order at 10 (citing 49 U.S.C. § 60122; 49 C.F.R. § 190.225).

[59] *See* 49 U.S.C. § 60122(b)(1)(A).

[60] *See* Response at 4, 8, 9; Kiantone Pre-Hearing Submission at 2, 16, 17; Kiantone Post-Hearing Brief at 2, 13–14.

[61] Hr'g Tr. at 84:16–25 (Kiantone representative testifying that the U.S. Environmental Protection Agency inspected the Tank Farm on July 8, 2021, and that the inspector "said everything was contained, the cleanup was going very well" and that "they had no issues"); *id.* at 102:10–103:7 (Kiantone representative testifying that representatives of the Pennsylvania Department of Environmental Protection and the Pennsylvania Fish & Boat Commission inspected the Tank Farm after the Release and found neither "dead animals as a result of the events" nor "any evidence of contamination off of the property").

[62] Final Order at 10, 11.

[63] *See supra* n.60.

[64] Final Order at 10, 11.

[65] Hr'g Tr. at 159:3–6.

[66] *Id.* at 34:6–25, 106:6–18.

[67] *See* Kiantone Post-Hearing Brief at 13 ("But the fact that product 'touched the ground' is a prerequisite for almost any release, meaning that such a consideration cannot, by itself, support statutory maximum penalties. Doing so would

Furthermore, the Final Order did not adhere to PHMSA's civil penalty worksheet, which establishes parameters for gravity. On PHMSA's civil penalty worksheet, the numerical score for gravity is determined based on whether the operator caused or increased the severity of an incident, whether it occurred within an HCA, or whether pipeline safety was minimally affected.[68] Strictly speaking, nowhere in that list is a consideration of the amount of product released. Rather, the number of barrels released is relevant to the consequence multiplier further down on the worksheet. That consequence multiplier only applies if the gravity score is high enough to trigger the multiplier. In other words, the Final Order errs in that it skips a step; it uses the number of barrels as the gravity finding when the Agency's worksheet requires that the violation be found to have caused or increased the severity of a reportable incident before considering the amount released. The Final Order would have to make a finding that Kiantone caused or increased the severity of the incident—a finding that would be unsupported by the facts—before considering the number of barrels released from Tank 652.

C. The Final Order Failed to Consider Kiantone's Argument that the Penalty Here is Inconsistent with Penalties Assessed in Similar Cases, or Cases with Even Worse Environmental Impacts.

Nor did PHMSA address Kiantone's argument that the circumstances here, i.e., a contained release with neither environmental damage nor harm to third parties or property,[69] do not typically warrant a statutory maximum penalty.[70] PHMSA has typically reserved statutory maximum penalties for matters involving significantly more harm or damage than the situation at issue here.[71] PHMSA's decision to impose maximum penalties here, and thereby diminishing the notion that penalties are scaled according to the circumstances of the matter at hand, is arbitrary and capricious by itself.

V. PHMSA Should Withdraw Warning Items 4 through 6.

Kiantone renews its previously raised objections to warning items 4 through 6 in the NOPV.[72] Kiantone has repeatedly attempted to identify and resolve factual and legal problems underlying the three warning items. Kiantone has also pointed out how the ostensibly

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render the concepts of penalty ranges, penalty factors, and maximum penalties virtually meaningless, as any release that 'touch[es] the ground' (i.e., all releases) would automatically warrant a maximum penalty.").

[68] *See, e.g.*, PHMSA Proposed Civil Penalty Worksheet, CPF No. 1-2022-050-NOPV (July 22, 2022).

[69] *See supra* n.60; Hr'g Tr. at 103:5–7.

[70] *See* Kiantone Pre-Hearing Submission at 15–16 & nn.55–57; Hr'g Tr. at 157:22–158:8; Kiantone Post-Hearing Brief at 14.

[71] *Id.*; *see, e.g.*, Notice of Probable Violation and Proposed Civil Penalty, *In re Fla. Gas Transmission Co.*, CPF No. 4-2022-032-NOPV (July 22, 2022) (evacuations of homes and businesses; $834,000 civil penalty recommended); Notice of Probable Violation, Proposed Civil Penalty, and Proposed Compliance Order, *In re Columbia Gas Transmission, LLC*, CPF No. 1-2021-045-NOPV (Dec. 22, 2021) (destruction or damaging of homes and business and burn injuries to third parties; $1,064,400 civil penalty assessed); Notice of Probable Violation, Proposed Civil Penalty, and Proposed Compliance Order, *In re Tex. E. Transmission, LP*, CPF No. 4-2021-034-NOPV (Dec. 21, 2021) (fire and explosion resulting in fatality and hospitalizations; $640,300 civil penalty assessed).

[72] *See* Kiantone Pre-Hearing Submission at 17–20; Kiantone Post-Hearing Brief at 14–15.

uncontestable nature of warning items[73] can invite financial harms, reputational harms, and increased enforcement risk by creating the impression that an operator has violated applicable pipeline safety requirements or has poor or unsafe operational practices, without a corresponding opportunity for the operator to contest a warning item. Throughout these proceedings, Kiantone was hopeful that the warning items would be withdrawn or, at the very least, that Kiantone would be provided a more fulsome explanation of how its conduct deviated from regulatory obligations and how to conform its conduct to applicable requirements going forward. But the Final Order does not engage with Kiantone's reasoned objections, let alone justify the warning items.

Kiantone again requests that the three warning items be withdrawn, for the reasons the Company has previously identified.[74]

VI. PHMSA's In-House Procedures for Adjudicating Enforcement Actions Raise Significant Constitutional Concerns.

Like with the warning items, Kiantone renews its constitutional objections to PHMSA's use of an in-house agency proceeding to adjudicate the NOPV and assess a civil penalty now in excess of $450,000.[75] PHMSA's unilateral and seemingly unfettered authority to place a respondent in an administrative proceeding, rather than a judicial forum, runs afoul of the Seventh Amendment, the Due Process Clause, and the Equal Protection Clause, and otherwise deprives Kiantone of the protections typically afforded a litigant in federal court, such as fair notice of the allegations against it and an independent adjudicator (i.e., a jury or judge) making factual and credibility determinations. As identified above, Kiantone presented ample factual evidence and testimony countering PHMSA's claims as to Items 1 and 2, yet the Associate Administrator has seemingly accepted PHMSA's claims without either acknowledging contrary evidence or weighing the credibility of competing factual assertions.

Kiantone recognizes that PHMSA is unlikely to "rule" on the constitutionality of its own enforcement and hearing procedures, and Kiantone appreciates the time and attention that the Associate Administrator, the Presiding Official, and PHMSA counsel have afforded this matter. Kiantone nevertheless believes that this proceeding, including this Final Order, demonstrates that an agency proceeding is not an adequate substitute for a formal judicial proceeding and principally seeks at this juncture to renew and preserve its constitutional objections, in the event judicial review is sought.

VII. Conclusion

Based on the foregoing, Kiantone respectfully requests that PHMSA reconsider its decisions in the Final Order regarding the violations and civil penalties assessed under Items 1 and 2.

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[73] *See* 49 C.F.R. § 190.205 ("An adjudication under this subpart to determine whether a violation occurred is not conducted for warnings.").

[74] *See* Kiantone Pre-Hearing Submission at 17–20; Kiantone Post-Hearing Brief at 14–15.

[75] *See* Kiantone Pre-Hearing Submission at 21–26; Kiantone Post-Hearing Brief at 15–16; *see also* Response at 9; Hr'g Tr. at 159:11–160:1.

Respectfully submitted,

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