

**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,)

Respondent.)

CPF No. 1-2022-050-NOPV

Post-Hearing Brief

I. Introduction

Kiantone Pipeline Corporation (“Kiantone”) submits this Post-Hearing Brief to address the factual contentions and legal arguments advanced by the Pipeline and Hazardous Materials Safety Administration (“PHMSA” or “the Agency”) in its Pre-Hearing Brief for the above-captioned Notice of Probable Violation (“the NOPV”),¹ as well as during the April 20, 2023, hearing (“the Hearing”) held before Presiding Official Lawrence White (“the Presiding Official”). Kiantone appreciates the opportunity to present this post-hearing briefing, which is essential because PHMSA has so dramatically shifted its arguments over the course of this proceeding.

With the benefit of the Hearing, it has become clear that the allegations in PHMSA’s NOPV² regarding a release of crude oil product at Kiantone’s Cobham Park Tank Farm Facility on the night of July 7 and 8, 2021, (“the Release”) are without merit, and in no way support the statutory maximum penalties (totaling \$675,402) that the Agency has proposed. Further still, since issuing its NOPV on October 6, 2022, PHMSA has continually moved further afield from the violations and legal theories it initially alleged in the NOPV. In the end, PHMSA has chosen to center its case on a combination of irrelevant facts—such as when exactly Kiantone began manually gauging Tank 651, from which crude oil never escaped—and dubious legal theories—like conceding that Kiantone’s response to the June 30th abnormal operation was proper but nevertheless faulting the company for not taking PHMSA’s preferred response, which was first disclosed at the Hearing and would have ultimately been less safe than the preventive and mitigative measures that Kiantone chose. The sum total of PHMSA’s case, though, cannot support findings of violations, let alone statutory maximum penalties.

¹ See PHMSA Pre-Hr’g Submission, *In re Kiantone Pipeline Corp.*, CPF No. 1-2022-050-NOPV (Apr. 10, 2023) [hereinafter PHMSA Pre-Hearing Brief].

² See Notice of Probable Violation, *In re Kiantone Pipeline Corp.*, CPF No. 1-2022-050-NOPV (Oct. 6, 2022) [hereinafter NOPV].

Worse still, PHMSA's claims and exorbitant penalty demand cannot be reconciled with the bigger picture. As an example, consider PHMSA's claims that the alleged violations "rendered the secondary containment system ineffective."³ The evidence presented at the Hearing, however, showed that 100 percent of the crude-oil overflow was captured within the Tank Farm Facility's containment system and that 97 percent of the crude oil was contained in the dike basin around the overflowed tank.⁴ Thanks to Kiantone's compliance with PHMSA's regulatory program, the Release was contained within the Tank Farm Facility's containment system. In other words, PHMSA's regulatory program and Kiantone's adherence to its regulations avoided any environmental harm.

At the Hearing, PHMSA did not introduce any evidence to the contrary. And no environmental harm resulted precisely because Kiantone substantially followed its procedures, doing so in spite of the abnormal operating conditions posed by a prolonged power outage and communications failure with the Control Center. Yet despite the lack of any environmental harm, PHMSA has continued to treat this matter as warranting maximum penalties, entirely erasing the concept of proportionality inherent in its penalty policy. In its pursuit of these unwarranted, unfair and unconstitutional penalties, PHMSA has raised an ever-changing litany of spurious claims, as will be detailed *infra*.

In short, Kiantone reiterates that NOPV Items 1 through 3, and the associated proposed civil penalties, should be dismissed. Moreover, Kiantone respectfully requests that the Presiding Official not allow the various claims first asserted at the Hearing to proceed given the lack of any notice to Kiantone. If the Presiding Official believes any violations are warranted, Kiantone requests that the associated penalties be substantially lowered from what has been proposed by PHMSA to reflect the true facts and character of this case, which in no way justify statutory maximum penalties. Finally, Kiantone reiterates its request that the three warning items (NOPV Items 4 through 6) be withdrawn or dismissed for lack of merit.

II. NOPV Items 1 Through 3 Suffer from Significant Factual and Legal Infirmities and Should be Dismissed.

Rather than restate the arguments made in its Pre-Hearing Brief, Kiantone wishes to take this opportunity to emphasize and address a handful of key points regarding NOPV Items 1 through 3 that were raised by PHMSA in its Pre-Hearing Brief and at the Hearing.

A. Item 1: 49 C.F.R. § 195.402

According to the NOPV, Item 1 presented a claim that Kiantone failed to monitor Tank 652 while Tank 651, which shares a manifold with Tank 652, was receiving crude oil. Kiantone explained in its Response to the NOPV that PHMSA's claims under Operations and Maintenance ("O&M") Procedure 11.6.3 – Activities During Receipt of Crude Oil at Tank Farm ("O&M 11.6.3") invoked the wrong procedure. While O&M 11.6.3 called for the monitoring of all tanks on an active manifold, Kiantone followed Control Room Management ("CRM") Procedure 2.3.4 – Unplanned

³ *Id.* at 3.

⁴ Hr'g Tr. at 34:16-25, 106:6-22.

Communications Failure – Tank Farm (“CRM 2.3.4”), which was the applicable abnormal operations procedure and which (at the time) did not require such monitoring across a manifold.⁵

Based on these submissions, the relevant question in resolving Item 1, as alleged in the NOPV, is which procedure applied during the abnormal operation on the night of July 7 and 8, 2021: O&M 11.6.3 for normal operations, or CRM 2.3.4 for abnormal operations. In its Pre-Hearing Brief, though, PHMSA argued that even if CRM 2.3.4 applied, Kiantone did not satisfy that standard because Kiantone failed to meet some requirements with respect to Tank 651, which did not overflow and from which there was no release.⁶ Then, at the Hearing, PHMSA argued that both the normal and abnormal operations procedures apply at the same time and that Kiantone failed to satisfy either of them. Conversely, Kiantone has been consistent in pointing out (1) that the events on the night of the Release constitute abnormal operations triggering CRM 2.3.4, (2) Kiantone followed that procedure, and (3) any minor deviations from CRM 2.3.4 with respect to Tank 651, which did not overflow, do not warrant a maximum penalty for an overflow from Tank 652.

1. CRM 2.3.4 Applied During the Unplanned Communications Failure on July 7 and 8, 2021

For Item 1, PHMSA reiterated its position that O&M 11.6.3 applies to receipt operations during abnormal operations, like an unplanned communications failure as occurred on the night of the Release.⁷ But as Kiantone explained its Pre-Hearing Brief, O&M 11.6.3 applies during normal operations. CRM 2.3.4, not O&M 11.6.3, applies during unplanned communications failures (which are abnormal operations).⁸ This is evident from reading O&M 11.6.3, which explicitly directs the reader to CRM 2.3.4 “for [unplanned] communications failures.”⁹ Even Darren Lemmerman, PHMSA’s investigator and main witness, initially read O&M 11.6.3 this way when questioned by PHMSA’s attorneys:

Q. So rewording the question, is there anything in operations, maintenance and emergency response procedures that says they’re supposed to follow a different procedure other than that procedure, in other words, instead of that procedure?

A. It says see control room management procedures CRM 2.3.4.

Q. For additional staffing requirements or ---?

A. For communication failures.

⁵ See Req. for Hr’g and Resp. to NOPV, *In re Kiantone Pipeline Corp.*, CPF No. 1-2022-050-NOPV (Nov. 21, 2022), at 4 [hereinafter NOPV Response].

⁶ See PHMSA Pre-Hearing Brief, *supra* n.1, at 4–5.

⁷ See PHMSA Pre-Hearing Brief, *supra* n.1, at 4.

⁸ See Kiantone Pre-Hr’g Brief, *In re Kiantone Pipeline Corp.*, CPF No. 1-2022-050-NOPV (Apr. 10, 2023), at 7–8 [hereinafter Kiantone Pre-Hearing Brief]. For the exhibits Kiantone included along with its Pre-Hearing Brief, Kiantone here refers to those as “Kiantone Exhibits” in order to differentiate from the exhibits PHMSA provided in conjunction with its Pre-Hearing Brief, which are referred to as “PHMSA Exhibits.”

⁹ See *id.* at 12 n.12; see also Kiantone Ex. 9, CRM Procedure 2.3.4 – Unplanned Communications Failure – Tank Farm (last revised Dec. 14, 2018).

Q. For additional staffing requirements or for all procedures?

A. I just --- I read what it says.¹⁰

Further, the remaining duties in O&M 11.6.3 fall under the responsibilities of the “Pipeline Control Center” as they relate to the Pump House Operator, and thus are geared to situations where the Control Center has power and can maintain communications with the rest of the Facility,¹¹ which was clearly not the case on the night of the Release. Senior Compliance Manager Jeremy Archer explained this during his testimony.¹² CRM 2.3.4 must apply during unplanned communications failures because the tasks in 11.6.3 that PHMSA says Kiantone should have done—such as “[m]onitor[ing] tank product levels in all crude tanks hourly” and “[v]erif[y]ing that tanks not scheduled to receive product do not show an unexpected loss or gain of inventory”—can only be performed when the Control Center has communications (i.e. during normal operations). Furthermore, it is contradictory for PHMSA to read O&M Procedure 5.7.10 – Tank Farm Dike Drain Operations (“O&M 5.7.10”) sequentially in the context of Item 2, but to refuse to do the same for O&M 11.6.3 in Item 1.

In its Pre-Hearing Brief, PHMSA argued that Kiantone had not consistently applied its abnormal operations requirements to abnormal events during the prior year.¹³ This assertion is wrong, though, as Kiantone’s abnormal operations reports (“AO reports”) for the 12 months preceding the release *all* cited to abnormal operations procedures, e.g., CRM 2.3.4, O&M Procedure 18.1.2 – Abnormal Operations at the Warren Tank Farm (“O&M 18.1.2”). In fact, the AO report for the June 30th power outage cited CRM 2.3.4, not O&M 11.6.3. At the Hearing, it became clear that PHMSA’s claim on this point was that some AO reports did not refer to CRM 2.3.4.¹⁴ Kiantone explained that CRM 2.3.4 did not apply to all abnormal operations—just unplanned communications failures—and that O&M 18.1.2 was another abnormal operations procedure that applied.¹⁵ The bigger point that PHMSA was missing is 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. Thus, not only is O&M 11.6.3 inapplicable during abnormal operations on its face, but also in practice. Moreover, the facts support that Kiantone understands which procedures apply to its operations and follows them as applicable.

2. PHMSA Did Not Allege a Deficiency in CRM 2.3.4

Next, PHMSA seemingly argues that if CRM 2.3.4 had conformed to API RP 2350—particularly the requirement to monitor all tanks on an active manifold during receipt operations—the inactive tank (Tank 652) would have been monitored, and the Release would likely have been prevented.¹⁶

¹⁰ Hr’g Tr. at 20:25–21:11.

¹¹ See Kiantone Ex. 8, O&M Procedure 11.6.3 – Activities During Receipt of Crude Oil at Tank Farm (last revised Mar. 7, 2022).

¹² See Hr’g Tr. at 30:21–31:13.

¹³ See PHMSA Pre-Hearing Br., *supra* n.1, at 5.

¹⁴ See Hr’g Tr. at 44:2–45:8.

¹⁵ *Id.*

¹⁶ See PHMSA Pre-Hearing Brief, *supra* n.1, at 5; *see also* Hr’g Tr. at 16:7–11, 23:4–21.

But PHMSA never alleged in Item 1 that Kiantone’s O&M procedures were deficient. Instead, the Agency alleged that Kiantone failed to *follow* its procedures.¹⁷ Kiantone has acknowledged that at the time of the Release, CRM 2.3.4 was not in conformance with API RP 2350,¹⁸ although PHMSA had also failed to catch this discrepancy with respect to CRM 2.3.4 when it inspected Kiantone’s facility and O&M procedures in August 2019.¹⁹ And shortly after the Release, Kiantone revised CRM 2.3.4 to fully incorporate API RP 2350.²⁰ But the allegations in Item 1 do not put into issue whether CRM 2.3.4 was updated at the time of the Release. Rather, PHMSA’s allegations in Item 1, as established in the NOPV, turn on whether Kiantone followed its procedures. At the time, the applicable procedure did not call for the monitoring of all tanks on the manifold during an unplanned communications failure, just the active one (Tank 651). Kiantone followed that procedure.

3. Kiantone Materially Followed CRM 2.3.4

Finally, PHMSA has asserted probable violations of CRM 2.3.4 in its Pre-Hearing Brief, although the alleged violations relate not to Tank 652, but to Tank 651, which did not overflow. At the Hearing, PHMSA continued to raise issues about compliance with the requirements of CRM 2.3.4 as they related to a tank that did not overflow. These claims should not be allowed to proceed given the complete lack of notice provided to Kiantone.

In any event, as shown at the Hearing, Kiantone substantially followed CRM 2.3.4 in connection with Tank 651—which, to reiterate, did not overflow—as explained in its Pre-Hearing Brief, and any minor deviation from that procedure does not give rise to a statutory maximum penalty.²¹ PHMSA’s contrary assertions are without merit. First, PHMSA points to alleged time gaps when Tank 651 and the Facility were not “fully attended.”²² But the first alleged time gap (6:55 pm to 8:40 pm) occurred almost entirely while the Facility’s uninterruptible power supply (“UPS”) was powering the communications system, meaning that the Facility had not lost communications and therefore was not in a Category 1 status to trigger the full attendance requirement.²³ And the second gap (8:40 pm to 9:30 pm) occurred just after the Facility moved into a Category 1 status at approximately 8:36 pm on July 7th, and thus shows that the Facility was fully attended within an

¹⁷ See NOPV, *supra* n.2, at 2.

¹⁸ See Kiantone Pre-Hearing Brief, *supra* n.8, at 8 n.16; NOPV Response, *supra* n.5, at 4.

¹⁹ See Kiantone Pre-Hearing Brief, *supra* n.8, at 8 n.16; Kiantone Ex. 10, Notice of Amendment, CPF 1-2020-5008M (Apr. 30, 2020); Kiantone Ex. 11, Warning Letter, CPF 1-2020-5009W (Apr. 30, 2020); *see also* Hr’g Tr. at 33:10–12 (Jeremy Archer stating that PHMSA “had missed” that CRM 2.3.4, as written at the time of the Release, did not “require[] that all tanks on the manifold be monitored” during receipt of product by a tank on the manifold).

²⁰ See Kiantone Pre-Hearing Brief, *supra* n.8, at 8 n.16; Kiantone Ex. 12, CRM Procedure 2.3.4 – Unplanned Communications Failure – Tank Farm (last revised Dec. 16, 2021); *see also* Hr’g Tr. at 33:14–16.

²¹ See Kiantone Pre-Hearing Brief, *supra* n.8, at 8.

²² See PHMSA Pre-Hearing Brief, *supra* n.1, at 4.

²³ See Kiantone Ex. 9, CRM Procedure 2.3.4 – Unplanned Communications Failure – Tank Farm (last revised Dec. 14, 2018); Hr’g Tr. at 28:19–29:5 (Jeremy Archer explaining that the Facility moves into Category 1 abnormal operations “when you have a loss of power and you have a loss of communications or a loss of radar laser on your active tank, in which case the facility would need to be fully attended, have attendance at that tank during the first and last hour of receipt and obtain readings each hour during receipt”).

hour of moving into Category 1 status. While there is no established timeframe for when a Facility must be fully attended, even Mr. Lemmerman interpreted Kiantone's procedures as giving at least an hour to reach full attendance at the Facility.²⁴ Thus, these purported gaps in attendance at the Facility have little to no bearing on a violation of Kiantone's procedures.

Additionally, Kiantone personnel were manning and taking manual gauge readings from the active tank (Tank 651) during receipt operations, with the first reading at some time before 10:15 pm on July 7th.²⁵ PHMSA identifies 10:30 pm as the time of the first reading,²⁶ but this essentially cherry picks the most favorable time from one witness statement, while other, more detailed statements say the first reading was called in at 10:15 pm, indicating that the reading was taken some time before 10:15 pm.²⁷ And in any event, this claim concerns Tank 651, which was not the tank that overflowed. PHMSA spent a considerable amount of time at the Hearing trying to prove that Kiantone failed to follow CRM 2.3.4 with respect to Tank 651. 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 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.

B. Item 2: 49 C.F.R. § 195.402

1. Dike Valve Draining

For Item 2, PHMSA's principal contention is that Kiantone's monitoring of the Tank 652 dike drain was not sufficiently "periodic" to satisfy O&M 5.7.10.²⁸ Although Item 2 presents its claim as Kiantone having "failed to follow its manual of written procedure," PHMSA's entire claim is premised on reading a precise time limit into the term "periodically" so that it incorporates a set frequency for monitoring. PHMSA has offered no support either in the Kiantone manual itself or based on a legal or programmatic position that "periodic" requires a specific time period. The use of the term "periodically" means that Kiantone has the flexibility to determine what frequency is appropriate under a particular set of circumstances. Rather than pursuing a claim against Kiantone for having failed to comply with its manual of written procedure, PHMSA is trying to enforce a limitation that is not in Kiantone's manual. Moreover, PHMSA presented no evidence that the circumstances surrounding the amount of rainfall the Tank Farm Facility received on July 7th and 8th warranted a shorter timeframe for inspections.

²⁴ See Hr'g Tr. at 60:20–25 ("Q. Also, Darren, do you agree that there's an—that you have an hour when a facility must be fully attended, that an hour of no attendance is under that procedure? A. According to the Category 1 standard, they give themselves an hour to do that. That's their procedure."); see *id.* at 61:2–5 ("So if they gave themselves an hour, when would the earliest have been someone should have been on—on the facility and manually gauging the tank, if power—if they lost all communication at 8:36?" (emphasis added)).

²⁵ See Kiantone Pre-Hearing Brief, *supra* n.8, at 8.

²⁶ See PHMSA Pre-Hearing Brief, *supra* n.1, at 4 (citing PHMSA Ex. 21-217159 G-1, at 5).

²⁷ See Hr'g Tr. at 79:17–83:4; see also *id.* 81:1–11 (Darren Lemmerman acknowledging that "people are always recollecting timeframes, and it's hard to recognize where it is, but we have two timeframes that are close. Carl Anderson arrived at 10:20, according to his. And according to Richard's, it was 10:10. I say that's pretty close, fair.").

²⁸ See PHMSA Pre-Hearing Brief, *supra* n.1, at 7.

More specifically, PHMSA makes much out of the fact that three hours elapsed between when the Tank 652 dike drain valve was opened (approximately 9:50 pm on July 7, 2021) and when Ted Snyder, the Pump House Operator, returned to the Facility from the nearby refinery to inspect the dike drains and impoundments (approximately 12:50 am on July 8, 2021).²⁹

Kiantone has explained why the three-hour time period satisfies O&M 5.7.10 and was reasonable under the circumstances. As Jeremy Archer explained during the Hearing, “periodically” in O&M 5.7.10 “is dependent upon how much water is in the dike at the time of the draining,” meaning if there has been “a significant rain event,” on-site personnel “wouldn’t have to check as often.”³⁰ This policy makes sense. In the same way that a babysitter has to check on a ten-year-old less periodically than a four-year-old, an operator has to check on a vast amount of water draining less periodically than on a small body of water that might complete draining sooner.

Prior to the Release, there had been a significant amount of rainfall in a short period of time, as evidenced by the over 52,000 gallons of water still in the Tank 652 dike impoundment after draining had taken place for three hours.³¹ Given this amount of water in the impoundment, draining was assuredly not complete when the dike drain valve was closed (shortly after the release was detected), and there would have been no reason for the Kiantone personnel at the Facility (or any reasonable observer, for that matter) to conclude that the Tank 652 impoundment would have completely drained within three hours. In its NOPV and Pre-Hearing Brief, PHMSA very strikingly suggested that the draining had been “completed” before the Tank 652 overflow occurred.³² At the Hearing, PHMSA again changed course, instead asserting that “52,000 gallons” is “an insignificant number . . . within that dike containment,”³³ PHMSA has again provided no legal support for this assertion. Kiantone stands by its position that volumes of that magnitude present a safety concern and thus necessitate draining.

Neither has PHMSA provided an alternative interpretation of “periodically” for purposes of O&M 5.7.10, let alone one that is more reasonable than the one provided by Kiantone. As Mr. Archer explained, around 12:55 am Mr. Snyder spotted the overflow from Tank 652 while driving his natural inspection route around the Tank Farm Facility—exactly the kind of monitoring for which O&M 5.7.10 calls.³⁴ For argument’s sake, even if Mr. Snyder had returned to the Tank Farm to monitor the draining say, once an hour starting at 9:50 pm when he opened the drain, nothing would have changed. The tank did not begin overflowing until 12:36 am.³⁵ Prior to that, at 10:50 pm and 11:50 pm, he would have just seen water draining. 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

²⁹ See *id.*; Hr’g Tr. at 87:21–88:11.

³⁰ Hr’g Tr. at 95:1-16.

³¹ See Kiantone Pre-Hearing Brief, *supra* n.8, at 11; Hr’g Tr. at 99:24–100:23; Kiantone Ex. 16, FRAC Tank Volumes Recovered from Tank Farm.

³² See NOPV, *supra* n.2, at 3; PHMSA Pre-Hearing Brief, *supra* n.1, at 2, 6.

³³ Hr’g Tr. at 119:17-20.

³⁴ See *id.* at 97:1–24.

³⁵ See Ex. 15, Kiantone Calculation for Approximate Time that Tank Started to Overflow; Hr’g Tr. at 113:3-7.

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.

2. Logging the Dike Drain Valve Open

For Item 2, PHMSA also insisted that Kiantone violated O&M 5.7.10 by not immediately logging the dike drain valves open. Kiantone has repeatedly explained the slight delay in logging and why that had no impact on the release. 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.

3. Firewater Retention Pond

With respect to the firewater retention pond, Kiantone has demonstrated that the pond was considered part of the Tank Farm Facility’s emergency containment system before the Release, as a means of preventing any released product from escaping beyond the confines of the facility. Documents describing Kiantone’s containment system that predate the Release have been provided here and were previously reviewed by PHMSA inspectors prior to the Release without comment from the Agency.³⁶ This is not a convenient position that Kiantone has taken in this litigation; PHMSA has previously reviewed Kiantone’s plans and procedures which showed that the firewater retention pond is part of the emergency containment system. Additionally, the Tank Farm Facility has sufficient measures in place to maintain firefighting capabilities in the event released crude oil reaches the firewater retention pond—e.g., the drawing of water from the bottom of the pond, while oil floats to the top; a boom on top of the pond to trap crude oil product; the installation of a second firewater retention pond disconnected from the first.³⁷ PHMSA has thus far not disputed Kiantone’s factual assertions concerning the pond’s integration within the Tank Farm Facility’s drainage and containment system, nor did the Agency present any evidence that product escaped the pond.

As to one final point, PHMSA raised at the Hearing an extraneous and irrelevant argument regarding the status of the Tank Farm Facility’s National Pollutant Discharge Elimination System (“NPDES”) permit for the outfall after the firewater retention pond.³⁸ Kiantone appreciates the Presiding Official’s decision to disregard this irrelevant line of questioning as not “hav[ing] any relevanc[y] to . . . the allegations” in the NOPV.³⁹ Kiantone simply wishes to use the Agency’s

³⁶ See Kiantone Pre-Hearing Brief, *supra* n.8, at 9 & n.21; NOPV Response, *supra* n.18, at 4; see also Hr’g Tr. at 103:17–24 (Jeremy Archer testifying that the firewater retention pond “helps . . . any contamination from leaving the permitted outfall”).

³⁷ See Hr’g Tr. at 37:18–38:6.

³⁸ See *id.* at 66:1–67:24.

³⁹ See *id.* at 83:15–19; *id.* at 67:10–12. And generally speaking, when an NPDES permit holder applies for a renewal of its permit, the permit holder can avail itself of a “permit shield” until the state permitting agency acts upon the renewal application, meaning that the holder is shielded from agency enforcement and citizen suit so long as it complies with the terms of the initially issued permit. See 33 U.S.C. § 1342(k); *Piney Run Pres. Ass’n v. Cnty. Comm’rs of Carroll Cnty., Md.*, 268 F.3d 255, 259 (4th Cir. 2001) (outlining seminal test for applicability of permit shield); see also Hr’g Tr. at 84:1–15 (Jeremy Archer noting that Kiantone has applied for a renewal of the NPDES permit and that State of Pennsylvania has not acted upon that application yet).

raising of an NPDES argument, which relates to a statute (the Clean Water Act) that PHMSA does not administer, as an illustration of the difficulties in defending an enforcement action with ever-changing factual and legal contentions and having to do so in an agency-run forum lacking the traditional procedural safeguards meant to filter out unpreserved, irrelevant, and/or unfounded allegations.

C. *Item 3: 49 C.F.R. § 195.402*

Nowhere has the goalpost been moved further than in Item 3. To summarize, the NOPV alleged that Kiantone failed to follow its procedure for reviewing abnormal operations with respect to the June 30, 2021, power outage and that Kiantone violated its procedures and PHMSA regulations by failing to “correct” this condition by July 7th. In its NOPV Response, Kiantone explained how it followed its procedures by undertaking an arduous review process, how it is incorrect to assume that such a review could have been completed in four business days, and how it is improper for PHMSA to base a violation on a procedure that does not prescribe a deadline when § 195.401(b)(1) allows an operator a “reasonable time” to correct such conditions.⁴⁰

Kiantone provided more support and context for these arguments in its Pre-Hearing Brief and discerned that, if PHMSA is “relying on some abstract notion that Kiantone was on notice that the valve might inadvertently open, and therefore should have monitored Tank 652 on the night of the incident,” then Item 3 should be struck as duplicative of Item 1.⁴¹ PHMSA’s Pre-Hearing Brief unequivocally triggered that trap—Item 3 is entirely duplicative of Item 1. In its Pre-Hearing Brief (exchanged the same day), PHMSA argued, “eight days after a power loss, when the Accident occurred, Kiantone was still not monitoring all tanks connected to the same manifold during the Power Loss.”⁴²

In its Pre-Hearing Brief, PHMSA mentioned nothing about preventive and mitigative measures (“PMMs”) in the context of Item 3, and mentioned nowhere the idea of closing the valve to Tank 652 as of June 30th. Yet at the Hearing, PHMSA claimed that Kiantone should have implemented PMMs by closing the valve to Tank 652 on June 30th and not operating that tank until the June 30th malfunction was fully understood. In the process, PHMSA essentially disavowed its claim that Kiantone failed to “correct” the underlying conditions of the June 30th outage. Had PHMSA provided even a glimmer of a hint that Item 3 would morph from a claim that Kiantone should have “corrected” the condition detected on June 30th to a claim that Kiantone should have implemented a particular PMM to address that condition should it ever occur again, Kiantone would have been prepared to address it at the Hearing. In any event, Kiantone can now put Item 3 to rest; the very solution that PHMSA proposed at the Hearing would have been less safe than what Kiantone actually did.

⁴⁰ See NOPV Response, *supra* n.5, at 5; see also 49 C.F.R. § 195.401(b)(1) (“Whenever an operator discovers any condition that could adversely affect the safe operation of its pipeline system, it must correct the condition *within a reasonable time.*” (emphasis added)).

⁴¹ Kiantone’s Pre-Hearing Brief, *supra* n.8, at 14.

⁴² PHMSA’s Pre-Hearing Brief, *supra* n.1, at 9.

1. Item 3 as Alleged in the NOPV

In the NOPV, PHMSA alleged that Kiantone failed to follow O&M Procedure 18.1.1 – Abnormal Operations (“O&M 18.1.1”) by failing to complete its review of a June 30, 2021, power outage, which resulted in an inadvertent opening of the Tank 652 inlet valves, and conduct any necessary repairs prior to the Release.⁴³ As with the claims in Item 2, PHMSA’s claims in Item 3 also rest upon the notion that Kiantone’s procedures imposed a time limit on the review that Kiantone failed to meet. Yet even PHMSA’s representative acknowledged at the Hearing that the referenced procedure does not specify that timeline.⁴⁴ In addition, the NOPV does not discuss prior abnormal operational incidents besides the June 30th outage, nor does it discuss PMMs.

In its Response to the NOPV and in its Pre-Hearing Brief, Kiantone explained that after the June 30th outage, it started the comprehensive review process required under O&M 18.1.1, which could not possibly have been completed within the timeframe between the June 30th outage and the Release.⁴⁵ Kiantone also noted that 49 C.F.R. § 195.401(b)(1), which PHMSA did not cite or reference in its NOPV, permits an operator a “reasonable time” to repair non-integrity-related adverse pipeline conditions. Finally, Kiantone argued that if PHMSA’s legal theory was premised upon Kiantone being on notice that it needed to monitor Tank 652 during power restorations, such a “failure to monitor” is already covered under NOPV Item 1, rendering the two duplicative of each other.⁴⁶

2. Item 3 as Alleged in PHMSA’s Pre-Hearing Brief

In its Pre-Hearing Brief, PHMSA took a different tack, premising Item 3 on the theory that Kiantone was on notice after the June 30th outage that it needed to monitor Tank 652 during power restorations and that Kiantone failed to do so on the night of the Release.⁴⁷ Likewise, PHMSA asserted that Kiantone had not “fully attended” the Facility and had not monitored the discharge from Tank 652. These assertions are precisely the kind of duplicity that Kiantone cautioned against in its Pre-Hearing Brief. In the process of making its new argument, PHMSA shed any pretense of arguing that Kiantone’s review of the June 30th was insufficient under O&M 18.1.1, or that Kiantone failed to correct any discovered issue with the tank inlet valves. PHMSA also relied on a series of prior abnormal operations reports to assert that Kiantone was aware of the possibility

⁴³ See NOPV, *supra* n.2, at 4 (“After the previous malfunction, Kiantone did not conduct a proper review of the abnormal operation to determine all the deficiencies in procedures, safety equipment, and monitoring or control systems. Kiantone did not correct a previously discovered equipment malfunction prior to the [Release], as required by O&M Section 18.1, resulting in recurrence of the malfunctions and the release of product.”).

⁴⁴ Hr’g Tr. 139:16-18, 152:5-10.

⁴⁵ See Kiantone Pre-Hearing Brief, *supra* n.8, at 12–15; NOPV Response, *supra* n.18, at 5; *see also* Hr’g Tr. at 126:16–19 (Catherine Washabaugh confirming that PHMSA did not expect Kiantone “to have done the full report and full analysis of what has had occurred within eight days”).

⁴⁶ See Kiantone Pre-Hearing Brief, *supra* n.8, at 12–15; NOPV Response, *supra* n.18, at 5.

⁴⁷ See PHMSA Pre-Hearing Brief, *supra* n.1, at 8–11.

of power outages, ignoring the fact that the valve malfunction only occurs when the UPS is depleted and power is restored, not simply when power goes out.⁴⁸

3. Item 3 as Alleged at the Hearing

At the Hearing, Kiantone addressed the arguments PHMSA made in its Pre-Hearing Brief, despite their deviations from the NOPV, and showed that its review of the June 30th power outage followed its procedures and that Kiantone updated its response procedures to reflect its then-present understanding of the abnormal condition. Jeremy Archer testified to Kiantone's extensive review process for the June 30th outage, and PHMSA's witness agreed that O&M 18.1.1 does not set a timeframe for completing that review.⁴⁹ And Catherine Washabaugh, a PHMSA witness, confirmed that Kiantone could not have been expected to complete the review called for by its procedures within 8 days.⁵⁰ Kiantone submits that this evidence alone warrants the dismissal of Item 3, as PHMSA has conceded that Kiantone could not have corrected the underlying conditions of the June 30th outage by July 7th and that it did not otherwise fail to follow its review procedure.

Mr. Archer also described the changes that Kiantone subsequently implemented on a short- and long-term basis.⁵¹ The testimony shows that on July 7, 2021, the Pump House Blender turned the Tank 652's inlet valve to "OFF" sometime shortly after 9:30 pm.⁵² He was directed to do that in response to the June 30 event.⁵³ Jeremy Archer explained:

I think we need to note an important distinction between the two events. June 30 when power was fully restored and those three inlet valves opened we also had fully restored comms. So he could see those valves open, we got the alarm the pipeline shutdown. We were not on notice at that point or had no reason to believe that the power flickered or a brief power restoration affected anything. This only happened with a full power restoration. So that procedure change to put those valves in off during a power failure would correct that based on the knowledge we had at the time.⁵⁴

...

Q. Okay. And so, by turning it to off while the power was out, what did that do?

A. That rendered those valves incapable of moving.

⁴⁸ *Id.* at 8 (citing PHMSA Ex. 21-217159 G-1, at 3).

⁴⁹ Hr'g Tr. 152:5-10.

⁵⁰ *See id.* at 127:7-10 ("Q. In fact did PHMSA expect somebody to have done the full report and full analysis of what has had occurred within eight days? A. No, absolutely not.").

⁵¹ *See id.* at 132:4-137:17.

⁵² *See id.* at 47:17-48:19.

⁵³ *Id.* at 132:4-11.

⁵⁴ *Id.* at 144:24-145:10.

Q. Once power is restored?

A. Correct.⁵⁵

On the night of the incident, Kiantone implemented a solution that would have theoretically obviated any need to monitor Tank 652 given what Kiantone knew at the time. PHMSA's witness even conceded that such a solution was a "correct effort."⁵⁶ But according to the witness, that was not "the proper response."⁵⁷ More specifically, Ms. Washabaugh testified that Kiantone should have closed the Tank 652 inlet valve to the "OFF" position immediately after the June 30th power outage and ceased operating that tank until the issue was fully resolved.⁵⁸ "[T]hey had to take preventive and mitigative measures to make sure that you would not have another incident like that. And the best way to do that would be to have that valve in the off position at that time on June 30."⁵⁹

Again, and it bears repeating, nowhere in the NOPV does PHMSA allege that Kiantone violated O&M 18.1.1—and by extension, 49 C.F.R. § 195.402(a)—by failing to institute PMMs, let alone the specific measure of effectively shutting off and shutting down Tank 652 until the exact problem could be identified and corrected. The first time Kiantone heard anything about PMMs in the context of Item 3 was at the Hearing.⁶⁰ That is troubling. Even more troubling is the fact that PHMSA's witness conceded that Kiantone's attempted solution was a correct one, but not the one PHMSA thinks was "proper" in hindsight. Kiantone again asks that the Presiding Official not allow this theory to proceed because of the lack of notice afforded Kiantone.

Finally, but perhaps most importantly, if Kiantone had, as PHMSA suggested at the Hearing, turned the inlet valves to Tank 650 and Tank 652 to the "OFF" position after the June 30th power outage and kept them there until Kiantone could fully resolve the problem, such a solution would actually have rendered Kiantone's system *less* safe, not more so. The Tank Farm Facility's Overfill Protection System relies on the inlet valves on a manifold having power and being in the "REMOTE" position. As a result, if a tank on a manifold begins to overfill, triggering the Hi-Hi alarm, the Overfill Protection System can shut down the pipeline and remotely open other inlet valves on the manifold to divert product to other tanks, thereby preventing an overflow. If the inlet valves on a manifold are placed in the "OFF" position, however, the Overfill Protection System would not be able to communicate with those valves, rendering the system inoperable, thereby increasing the risk of an overflow. Thus, PHMSA effectively faults Kiantone for not adopting a solution that is actually less safe than the one Kiantone ultimately chose (to temporarily close the Tank 652 inlet valve shortly after the UPS was depleted on July 7). On this point, Kiantone attaches the Overfill Protection Procedures, appended to the end of this brief as an Attachment. We regret that we have to attach evidence to a Post-Hearing Brief, but we have no choice but to do so when

⁵⁵ *Id.* at 48:6-11.

⁵⁶ *See id.* at 141:1-6; *see also* 142:15-16 ("Q. Was it the wrong approach? A. No, I just think . . .").

⁵⁷ *Id.* at 153:19-20.

⁵⁸ *See id.* at 124:3-12, 141:4-15.

⁵⁹ *Id.* at 124:24-125:3.

⁶⁰ *See id.* at 124:2-125:17, 126:23-127:2, 138:17-20.

PHMSA raises arguments for the first time at a Hearing, particularly when the solution PHMSA proposed would have rendered operations unsafe.

In short, PHMSA has shifted its theory for Item 3 throughout this proceeding. But in the process, the Agency has landed on a particular theory—that Kiantone should have adopted a particular PMM—that is nowhere in the NOPV, penalizes Kiantone based entirely on hindsight bias, and would have ultimately required Kiantone to adopt a riskier pipeline practice. Kiantone again submits that PHMSA’s PMM theory should be rejected because it was not presented in the NOPV or the Agency’s Pre-Hearing Brief. In any event, even if the Presiding Official agrees to consider the argument, PHMSA’s latest theory should be rejected for lack of merit, and Item 3 should be dismissed.

III. The Proposed Civil Penalties for NOPV Items 1 Through 3 Should Be Substantially Reduced from the Proposed Levels, if Any Violations Are Found.

PHMSA seeks three separate statutory maximum penalties (each worth \$225,134) for an overflow that was contained entirely within the Tank Farm Facility and did not cause environmental damage. This penalty position is untenable and would set a dangerous precedent for future proceedings, where every release could be subject to statutory maximum penalties, even where there were no environmental impacts. Kiantone thus re-raises its arguments that the penalties PHMSA seeks—which are on par with those the Agency has sought for releases resulting in major environmental damages and/or personal injuries, including fatalities—are grossly disproportionate to the Agency’s factual claims.⁶¹ PHMSA has misapplied its penalty policy and failed to recognize Kiantone’s good faith efforts to create a containment system that worked, follow its procedures in responding to challenging circumstances, and prevent the loss of any product outside the facility.

While Kiantone presented hearing testimony regarding the lack of any environmental damage resulting from the Release,⁶² PHMSA presented no contradictory evidence, and in fact never inquired into the issue. PHMSA instead simply asserts that “[t]he civil penalties reflect that this accident where over 2,000 barrels of oil touched the ground was entirely preventable if the procedures had been followed.”⁶³ 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 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. Moreover, the imposition of statutory

⁶¹ See Kiantone Pre-Hearing Brief, *supra* n.8, at 16–17 & nn.54–57.

⁶² See Hr’g Tr. at 84:16–25 (Jeremy Archer testifying that the U.S. Environmental Protection Agency inspected the Tank Farm Facility 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 (Jeremy Archer testifying that representatives of the Pennsylvania Department of Environmental Protection and the Pennsylvania Fish & Boat Commission inspecting the Tank Farm Facility after the Release and finding neither “dead animals as a result of the events” nor “any evidence of contamination off of the property”).

⁶³ *Id.* at 159:3–6.

maximum penalties in the absence of evidence of environmental damage conflicts with the Agency’s mandate to exercise its penalty authority to protect the environment.⁶⁴

Given that Items 1 through 3 are without merit, as described above, Kiantone reiterates that the proposed civil penalties for those items should be dismissed. In the event that civil penalties are found to be warranted, the penalty amounts proposed by PHMSA are arbitrary and capricious and do not accurately reflect the facts relevant to PHMSA’s claims or the relevant penalty factors. To that end, Kiantone has already proposed and explained reduced penalty amounts that more fairly reflect PHMSA’s penalty policies, explaining why PHMSA’s alleged violations cannot be said to be “the causal factor of a reportable incident” (or represent minor recordkeeping violations) and why any consideration of gravity should be informed by the lack of any environmental damage.⁶⁵ The proposed penalties for any of PHMSA’s alleged violations should be a mere fraction (10 percent or less) of those the Agency has proposed.

IV. PHMSA Continues to Evade Kiantone’s Arguments Regarding the NOPV’s Warning Items (Items 4 through 6) and the Potential Harms Stemming from Uncontestable Warning Items.

Kiantone also reasserts its objections to the ostensibly unchallengeable warning items in the NOPV. As explained in the Pre-Hearing Brief, Kiantone believes the three warning items that PHMSA has included in the NOPV, if left uncontested, are likely to impose some combination of financial harms, reputational harms, and increased risk of enforcement action.⁶⁶ For example, PHMSA publicizes warning items on its website alongside civil penalty and corrective action items.⁶⁷ The publication of warning items that imply a violation or poor operational practice—without any corresponding opportunity for an operator to respond or contest—may decrease the trust between an operator and its various stakeholders, from those in the communities in which it operates, to financial creditors and lenders, to insurers. This is especially true for an uncontestable warning item premised upon an alleged failure to report (such as Items 5 and 6 here), as community stakeholders may gain the misplaced impression that an operator is not attentive to the potential risks of its operations to that community. Similarly, despite PHMSA’s contrary assertions at the Hearing,⁶⁸ the Agency has in fact previously considered warning items as some sort of factor in subsequent violation findings and/or penalty calculations.⁶⁹

⁶⁴ See 49 U.S.C. § 60122(b)(1)(A) (“In determining the amount of a civil penalty under this section the Secretary [of Transportation] shall consider the nature, circumstances, and gravity of the violation, including *adverse impact on the environment*.” (emphasis added)); see also *id.* § 60102(b)(1)(B)(ii), (b)(5) (listing “protecting the environment” and “environmental benefits” as statutory considerations for regulation under the Pipeline Safety Act).

⁶⁵ See Kiantone Pre-Hearing Brief, *supra* n.8, at 17–18.

⁶⁶ See *id.* at 18–21.

⁶⁷ See *Summary of Enforcement Actions: Nationwide*, PHMSA, <https://tinyurl.com/7pykt72e> (last visited May 15, 2023) (documenting warning letter cases initiated between 2002 and 2023).

⁶⁸ See Hr’g Tr. at 160:10-161:1.

⁶⁹ See, e.g., *In re El Paso Nat. Gas Co., LLC*, CPF No. 5-2013-1012, 2015 WL 3545213, at *1, *4 (Apr. 3, 2015); *In re Kaneb Pipe Line Operating Partnership, LP*, CPF No. 53509, 1998 WL 35166428, at *6 (Feb. 26, 1998) (“In assessing the penalty amount, it is proper to consider a previous warning that Respondent received regarding its O&M Manual.”).

And while Kiantone has attempted to point out the problems with the warning items and work with PHMSA to determine how best to conform its conduct to the Agency's regulations, PHMSA has virtually refused to engage with Kiantone on the warning items, let alone defend their substance. Perhaps most tellingly, PHMSA, in its Pre-Hearing Brief, did not address or respond to Kiantone's objections to the warning items, instead hiding behind its regulation precluding adjudication of warning items.⁷⁰

Thus, Kiantone asserts that the three warning items (Items 4 through 6) should be withdrawn or dismissed. In the alternative, Kiantone requests more clear and justified explanations of how its conduct deviated from regulatory obligations, as compared to the brief and conclusory explanations provided in the NOPV, so that it may correct prior actions and conform its conduct going forward.

V. PHMSA's Procedures for Adjudicating an NOPV Continue to Raise Significant Constitutional Concerns.

Finally, Kiantone re-raises and reasserts its constitutional objections to the use of an agency-run proceeding to adjudicate an NOPV such as the one here, where PHMSA's claims are without merit and the proposed monetary penalties are unconscionably disproportionate to the alleged violations.⁷¹ PHMSA's decision to adjudicate the NOPV through an in-house administrative proceeding rather than in a judicial forum—a decision PHMSA apparently has the sole, unfettered discretion to make—conflicts with the Seventh Amendment right to a jury trial, the Due Process Clause, and the Equal Protection Clause. While Kiantone appreciates the opportunity to present its case at a hearing, and thanks the Presiding Official for his time and attention to the matter, Kiantone nevertheless believes that an agency proceeding is not an adequate substitute for a formal judicial proceeding.

Kiantone's constitutional concerns are especially manifest given PHMSA's apparent view that it can continually deviate from the legal theories initially proposed in the NOPV—to the point of introducing entirely new and previously undiscussed theories for the first time at the Hearing. The lack of procedural guardrails provided by an agency-run hearing (as opposed to a judicial forum) have only served to incentivize PHMSA to take the loose and unrestrained approach to pleading and enforcement that it has taken in this proceeding. In Item 1, for example, PHMSA shifted its focus entirely to Kiantone's procedures as they related to the loading of Tank 651, even though these new claims were never presented in the NOPV and are entirely irrelevant to the overflow of Tank 652. Similarly, for Item 2, PHMSA initially claimed that Kiantone failed to timely close the Tank 652 dike drain valve after draining was "complete," despite the fact that over 52,000 gallons of water remained in the dike impoundment, but has since characterized that amount of water as "insignificant"—a brand-new factual assertion that PHMSA has not even attempted to substantiate. Finally, PHMSA has completely disregard the concept of notice by drastically revising its claim in Item 3, at the Hearing no less, from one centered on whether Kiantone had "corrected" an abnormal condition to whether Kiantone implemented a specific PMM—one that would have ultimately been less safe than the one Kiantone actually adopted.

⁷⁰ See PHMSA Pre-Hearing Brief, *supra* n.1, at 9–10; *see also* 49 C.F.R. § 190.205.

⁷¹ See Kiantone Pre-Hearing Brief, *supra* n.8, at 21–27.

In a judicial proceeding, PHMSA's newly crafted arguments would have been struck, forcing the Agency to rely on the claims actually asserted in the NOPV, i.e, those claims of which Kiantone had sufficient notice to defend. Likewise, an obligation to verify factual assertions would have dramatically changed the claims in Item 2 that Kiantone allowed the Tank 652 dike drain valve to remain open when it should have been closed. Instead, Kiantone has had to parry newly raised arguments and assertions at every stage of this proceeding, including during the Hearing itself. Kiantone therefore requests that the Presiding Official reject PHMSA's newly crafted arguments and require the Agency to stick to the NOPV. But in any event, Kiantone reiterates its continuing objection to PHMSA's use of an informal, agency-run proceeding that has at every stage failed to provide constitutionally required notice of the claims and alleged violations levied against Kiantone so that it may field an appropriate defense.

VI. Conclusion and Request for Relief

For all the reasons Kiantone has stated above and prior, Kiantone respectfully requests that the Presiding Official not consider the arguments raised by PHMSA for the first time in its Pre-Hearing Brief or at the Hearing, and dismiss Items 1 through 3 for the reasons set forth in Kiantone's Pre-Hearing Brief and those herein. In the event violations are found and penalties levied, Kiantone avers that such penalties should be substantially reduced from the levels proposed by PHMSA for the reasons previously described and described herein. Additionally, if PHMSA does not withdraw the Warning Items, Kiantone requests that the Presiding Official dismiss Items 4 through 6, or alternatively direct PHMSA to provide clearer and more justified explanations than are contained in the NOPV, so that Kiantone may properly and effectively adjust its conduct moving forward.

Respectfully submitted,



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