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.	)	

Pre-Hearing Brief[1]

I. Introduction

The events underlying this matter are an example of how operators should respond to emergency conditions under challenging circumstances. On the night of July 7, 2021, Kiantone Pipeline Corporation's ("Kiantone's") tank farm facility in Warren, Pennsylvania (the "Tank Farm Facility" or "Cobham Park Tank Farm"), lost commercial power due to a severe thunderstorm, and after exhausting its backup power, lost communications with its control center, preventing the control center from being able to remotely track and monitor the equipment at the Tank Farm Facility. Kiantone was therefore left to maintain operations, including unloading a scheduled crude oil delivery into one of its tanks ("Tank 651"), in the dark and without the aid of the facility's electrical equipment. Shortly before 9:30pm (EST), the facility briefly regained commercial power for all of 32 seconds—not enough time for its communications system to reboot, but just enough time for the motor-operated inlet valve for another one of the facility's tanks ("Tank 652") to partially open, unbeknownst to the control room operator. Due to this inadvertent opening, while crude oil was being unloaded into Tank 651, Tank 652 also began receiving product because the tanks share a manifold. With the Tank Farm Facility's communications system, as well as its monitoring and alarm systems, still without power, the control room operator could not detect this unplanned receipt.

Just after midnight on July 8th, one of the Tank Farm Facility's Pump House Operators returned to the facility, having briefly left to complete tasks at the nearby refinery. After he checked on another employee who was manning Tank 651 and gauging receipts, the Pump House Operator drove around the rest of the facility. Upon turning the corner around Tank 651, the Pump House Operator

[1] In accordance with 49 C.F.R. §§ 190.208(e), 190.343, Kiantone hereby notifies PHMSA of its confidential treatment of certain exhibits submitted alongside this Pre-Hearing Brief. Any exhibits marked as "Contains Confidential Commercial Information, Critical Energy Infrastructure Information, and Sensitive Security Information" contain confidential materials, including, but not limited to, those regarding proprietary information and procedures, sensitive internal investigations, emergency response procedures and measures, facility schematics, trade secrets, commercial practices, and privileged communications. None of these marked exhibits should be distributed to the public.

saw crude oil coming out of Tank 652's overfill vents. Seeing this, the Operator sprung into action to manually close both the dike drain valve for Tank 652's impoundment—which had earlier been opened to allow accumulated stormwater to drain—and the inadvertently opened inlet valve on Tank 652, preventing what could have become a much worse release. Despite the Operator's quick action, a relatively small amount of crude oil was released. But the released product was contained entirely on-site—the bulk captured within the impoundment around Tank 652, and a smaller amount draining from the impoundment into the facility's secondary containment system—and subsequently recovered by Kiantone. No oil traveled off-site or otherwise damaged the surrounding environment. In fact, a U.S. Environmental Protection Agency ("EPA") inspector who showed up later that morning expressed his satisfaction with Kiantone's systems and quick response. Simply put, Kiantone's containment system worked.

Kiantone nevertheless finds itself defending a massive penalty action from the Pipeline and Hazardous Materials Safety Administration ("PHMSA" or the "Agency") that alleges violations of Kiantone's Operations and Maintenance ("O&M") procedures in connection with the events of July 7th and 8th. The Agency's claims, though, all suffer from glaring flaws, from relying on the wrong O&M procedure, to trying to read requirements into other procedures that are simply not there. Moreover, the penalty that PHMSA demands glosses over these legal infirmities and mischaracterizes the facts, and remarkably would deny Kiantone any reductions for the successful application of its containment system and the quick actions of its employees. Although Kiantone acknowledges that this event certainly identified areas where Kiantone could improve its systems and its program—to be sure, no operator is perfect—Kiantone has made those improvements. Yet those strides are not reflected in PHMSA's penalty assessments. Even more troubling, the penalties being pursued here are comparable to those previously sought in matters associated with significant environmental impacts, including injuries to people and even fatalities. Seeking similarly high penalties here in the absence of comparable environmental or human health harms is textbook arbitrary and capricious. Finally, PHMSA has added a number of warnings for other events that it would treat as violations both here now and potentially in future enforcement actions, but which in fact present no compliance failure at all.

For these reasons, and those that follow, Kiantone requests that the Presiding Official dismiss the three civil penalty violations in PHMSA's Notice of Probable Violation ("NOPV") and the associated penalties. To the extent violations are found, any assessed penalties should be reduced for the reasons described herein. Kiantone also requests dismissal or withdrawal of the three warning items included in the NOPV. Recognizing that warning items present violations that are generally not subject to an adjudicative process, Kiantone nevertheless objects to the factual bases and legal theories supporting these warning violations. If not dismissed or withdrawn, Kiantone alternatively requests clear and justified statements of what the requirements are and what the company failed to do—more so than the brief and conclusory explanations provided in the NOPV—so that it can correct any past error and have fair warning on how to conform its conduct going forward.

II. Background

A. Factual Background

In the lead up to the events at issue, the facility experienced an intense and unexpected thunderstorm that dropped a lot of rain in a short time[2] and caused a loss of commercial power to the Tank Farm Facility at approximately 6:49pm on July 7th. The power loss initiated the facility's two-hour uninterruptible power supply ("UPS"), allowing the facility to maintain communications with the control center, while other electrical equipment, e.g., lights, pumps, and motor-operated valves, were without power. At approximately 8:36pm, the UPS was depleted, ceasing communications between the facility and the control center, preventing the control room operator from remotely tracking and monitoring the Tank Farm Facility's equipment.

Commercial power was very briefly restored at about 9:22pm for approximately 32 seconds. This fleeting restoration of power did not provide enough time for the control center to reestablish communications with the Tank Farm Facility—as its takes longer than 32 seconds for the facility's communications systems to boot back up after a complete loss of power. But it did cause the motor-operated inlet valve on just Tank 652 to partially open. The motor-operated inlet valves providing access to several other tanks that are also located on the manifold did not open. Because communications with the control center could not be reestablished before power was again lost after the 32 seconds, the partial and inadvertent valve opening was not detected by the facility's control center, and thus was unknown to those working at the Tank Farm Facility that night.

On that evening, Tank 651 was receiving a scheduled transfer of crude oil product using its procedures for receiving product during abnormal operations. At the facility, the product reaches Tank 651 through a manifold; from the manifold, the product reaches the tank through an inlet valve that is opened into the tank. At approximately 9:50pm, once Tank 651 was receiving product, a Kiantone employee began manually gauging how much product was being received into the tank.[3]

Separately, a Pump House Operator manually opened the dike drain valves for the dike impoundments surrounding Tank 651 and Tank 652. These dikes are designed to help capture and contain any uncontrolled releases from the facility's tanks—akin to surrounding each tank inside a very large bathtub. Because of the heavy rains the night of July 7th, these impoundment areas had accumulated a significant amount of rain water, which needed to be drained. Before opening the dike drain valves, the Pump House Operator confirmed that no crude oil product had accumulated in the stormwater. From there, the Pump House Operator drove to the nearby refinery (approximately 3 miles away) to complete other assigned tasks. He planned to record his opening

[2] *See* Exh. 1, Recorded Hourly Rainfall at Cobham Park Tank Farm, July 7, 2021 through July 9, 2021 (showing almost one inch of rainfall between 6:03pm and 8:03pm on July 7, 2021); Exh. 2, National Weather Service Climatological Data for Warren, Pennsylvania, for July 2021 (retrieved April 4, 2023) (showing that Warren, Pennsylvania, received over 40% (approximately 2.08 inches) of the expected average monthly rainfall for July between July 7, 2021, and July 9, 2021).

[3] *See* Exh. 3, Tank 651 Tank Level Gauge Readings (documenting the hourly tank level readings taken by the employee manning Tank 651 during receipt of product on the night of July 7 and 8, 2021).

of the dike drain valves in a facility logbook when he returned to the Tank Farm Facility shortly thereafter, well aware that the accumulated stormwater would not complete draining anytime soon.

Unfortunately, because the inlet valve for Tank 652, which shares a manifold with the active Tank 651, was partially opened as a result of the 32-second restoration of power, Tank 652 was receiving crude oil product as well. Because the power outage had disrupted the control room's ability to remotely monitor the Tank Farm, this unplanned transfer to Tank 652 went initially undetected.

The Pump House Operator returned from the refinery to the Tank Farm Facility at approximately 12:50am on July 8th. After checking on the employee manning Tank 651, the Operator continued to drive around the facility. Upon turning the corner around Tank 651, the Pump House Operator observed crude oil product spilling out of the overflow vents on Tank 652. This overflow was captured by the dike impoundment around Tank 652, thus operating as designed. The Pump House Operator promptly closed the dike drain valve for the Tank 652 impoundment. He subsequently closed the partially opened inlet valve on Tank 652, preventing further product from going into Tank 652 and stopping any further product from moving out of the tank via the overflow vents. After closing the valves, the Pump House Operator felt lightheaded and was subsequently taken to a nearby hospital as a precautionary measure; he was not admitted and was released shortly thereafter, returning for his next shift the following day. When he came back to work the next day, the Operator recorded his opening and closing of the dike drain valves the previous night with a written statement in the logs.[4]

Ultimately, all crude oil product released from Tank 652 was contained on-site, with most of the product being contained within the impoundment surrounding Tank 652 and a much smaller amount reaching the Tank Farm Facility's firewater retention pond. This firewater retention pond is itself designed to serve two purposes—providing a source of water as needed for firefighting operations, while also serving as a secondary containment system, as shown in Exhibits 3 through 5.[5] All of the product that reached the primary containment and the firewater pond was subsequently recovered. No crude oil got off-site and there were no impacts to areas outside of the Kiantone facility. Unsurprisingly, an EPA inspector who inspected the facility the following morning in response to Kiantone's notification to the National Response Center ("NRC") expressed his satisfaction with Kiantone's response. Thus, in spite of challenging circumstances, Kiantone's containment system worked as designed.

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[4] In order to prevent out-of-order entries and lessen any potential confusion, the facility manager decided to include additional documents as inserts to the log sheet to record the opening and closing of the Tank 652 dike drain valve. The first page of Exhibit 4 provides the drain valve opening time of "around 9:50pm" on July 7th, as well as an explanation as to why the Pump House Operator's dike drain entries are not included, as the Pump House Operator had been taken to the hospital on the morning of July 8th. *See* Exh. 4, Containment Area Drainage Log. The second page provides the testimony of the Pump House Operator, including testimony that he opened the dike drain valve at 9:55pm on July 7th and closed it at approximately 12:55am on July 8th. *Id.*

[5] *See* Exh. 5, SPCC Plan, Warren Emergency Containment (WEC): Cobham Park Tank Farm (last revised July 27, 2022); Exh. 6, Kiantone National Pollutant Discharge Elimination System Permit No. PA0005304, at 6 (May 24, 2011); Exh. 7, Cobham Park Tank Farm: Site Map/Site Drainage Map; *see infra* Section IV.B (explaining the firewater retention pond's role in the Tank Farm Facility's containment system).

B. Procedural Posture

On October 6, 2022, following its investigation of the above-described events, PHMSA issued its NOPV.[6] The NOPV asserts three civil penalty violations, all premised upon alleged violations of 49 C.F.R. § 195.402 for failure to follow applicable O&M procedures ("Item 1" through "Item 3"). The NOPV also alleges three warning violations: one premised upon an alleged violation of 49 C.F.R. § 195.402 ("Item 4"), one upon an alleged violation § 195.52 ("Item 5"), and one upon an alleged violation of § 195.54 ("Item 6"). For Items 1 through 3, PHMSA has proposed a total civil penalty of $675,402. Kiantone timely responded to the NOPV on November 21, 2022, and requested a hearing pursuant to 49 C.F.R. §§ 190.208 and 190.211.[7]

The parties have engaged in settlement negotiations, including a settlement conference on January 19, 2023, to attempt to resolve the NOPV in lieu of a hearing, but an agreement could not be reached. Pursuant to the April 10, 2023 deadline for the submission of pre-hearing materials, Kiantone files this Pre-Hearing Brief and supporting exhibits, summarizing its challenges to the alleged violations and the amounts of the proposed civil penalties. Kiantone also notes its overall challenge to the constitutionality of particular aspects of this agency proceeding in light of recent judicial developments.

III. Argument Summary

Throughout the NOPV, PHMSA mischaracterizes or ignores the events of July 7th and 8th, as well as the substance of its own regulations and Kiantone's O&M procedures. In short, PHMSA broadly alleges in Items 1 through 3 that Kiantone (1) failed to monitor Tank 652 during the receipt of crude oil product by Tank 651; (2) failed to log and monitor the draining of Tank 652's dike impoundment and failed to close the dike drain valve "once draining was complete"; and (3) failed to review of abnormal operations during a prior prolonged power outage on June 30, 2021, which preceded the July 7th storm event by four business days.

The record, however, demonstrates quite the opposite. First, during the events at issue, Kiantone followed the relevant O&M procedure, Control Room Management ("CRM") Procedure 2.3.4 – Unplanned Communications Failure – Tank Farm ("CRM 2.3.4"), which governs the receipt of product during an unplanned communications failure, as occurred during the July 7th and 8th power outage. CRM 2.3.4 called for the monitoring of active tanks on a manifold, and the record demonstrates that while crude oil was being received by Tank 651, CRM 2.3.4 was followed: Tank 651 was continuously manned by a Kiantone employee who was taking the required hourly gauge readings, and several other Kiantone personnel, including the Pump House Operator and incoming and outgoing Shift Supervisors, were present at the Tank Farm Facility while Tank 651 was receiving product. For its part, PHMSA relies on an O&M procedure that applies to *normal* receipt operations, and which in fact refers employees to CRM 2.3.4 in the event of an unplanned communications failure.

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

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

Second, contrary to PHMSA's allegations, various Kiantone personnel were on-site at the Tank Farm Facility to monitor the draining of the Tank 652 dike impoundment—doing so periodically enough to detect the release of crude oil from the tank's overfill vents within 20 minutes and quickly respond accordingly. Further, the opening *and closing* of the dike drain valve were recorded in the logbook. Moreover, PHMSA's characterization of the events of July 7th and 8th and of the release itself ignores that the firewater retention pond, which captured the small portion of crude oil that drained beyond the Tank 652 impoundment, is part of the Tank Farm Facility's containment system. Rather than supporting a violation, this capture demonstrates the successful application of Kiantone's containment system.

Third, Kiantone in fact began its multi-step review of the prolonged power outage and abnormal operations that occurred on June 30, 2021, a process that could not reasonably have been completed within the four business days between that outage and the one on July 7th and 8th. The Agency nevertheless appears to fault Kiantone for failing to complete that review impossibly fast. It does so despite the fact that Kiantone's O&M procedures do not specify a particular deadline for completing the review, and despite the fact that the Agency's own regulation permits an operator a "reasonable time" to resolve non-integrity-related adverse conditions.

Next, the amounts of the proposed penalties are staggeringly high and entirely disproportionate to the actual events, as is evidenced by the fact that they are analogous in amount to penalties assessed by PHMSA for spills or releases of materials that have caused extensive personal injuries including fatalities and property damage claims. In preparing this assessment, PHMSA misapplied its penalty policy to the facts and utterly failed to recognize Kiantone's good faith efforts to create a containment system that worked, followed its procedures in responding to the event, and prevented the loss of any product outside the facility. The proposed penalties are arbitrary and capricious and should be set aside.

Alongside the three civil penalty items, PHMSA asserts three violations as warning items (Items 4 through 6), each of which is without factual or legal basis, as Kiantone has previously explained to no avail.[8] While the Agency's regulations apparently foreclose challenging these items as part of this hearing, these warnings, if left uncontested, are likely to impose indirect financial costs, increased enforcement risk, and reputational harms. The combination of these potential harms necessitates Kiantone's response to the warning items, as well as its request for dismissal or withdrawal of those items. In the alternative, Kiantone requests clearer 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.

Finally, PHMSA's decision to adjudicate the excessive penalty claims in its NOPV through an in-house administrative proceeding, rather than through a judicial court proceeding, raises a multitude of constitutional problems that conflict with the Seventh Amendment right to a jury trial as well as due-process and equal-protection principles. Kiantone raises these issues for the Agency's consideration, as well as to preserve such challenges for potential judicial review, if necessary.

[8] *See id.* at 6–7.

IV. NOPV Items 1 Through 3 Lack Factual and/or Legal Support and Should Be Dismissed.

In NOPV Items 1 through 3, PHMSA alleges various violations of 49 C.F.R. § 195.402(a), which requires an operator to "prepare and follow for each pipeline system a manual of written procedures for conducting normal operations and maintenance activities and handling abnormal operations and emergencies." Yet in asserting violations of Section 195.402(a), PHMSA relies on unsupported factual allegations, conclusory statements, and mistaken interpretations of Kiantone's then-applicable written procedures. Given these deficiencies, Kiantone requests that the Presiding Official dismiss Items 1 through 3 and the associated proposed penalties.

A. Item 1: 49 C.F.R. § 195.402

For Item 1, PHMSA applies the wrong section of Kiantone's O&M procedures, sidestepping the procedure that governs the receipt of product during an unplanned loss of communication capabilities (CRM 2.3.4), as occurred during the July 7th and 8th power outage. The record makes clear that Kiantone personnel followed the applicable procedure, meaning that the alleged violation of 49 C.F.R. § 195.402(a) is factually and legally unsupported.

PHMSA alleges that Kiantone violated Section 195.402(a) by failing to follow its O&M Procedure 11.6.3 – Activities During Receipt of Crude Oil at Tank Farm ("Procedure 11.6.3").[9] Specifically, PHMSA alleges that during the power outage, Kiantone failed to "verify that tanks, including Tank 652, which was not scheduled to receive product at Cobham Park Tank Farm, did not show an unexpected loss or gain of inventory" and to "obtain level gauge readings from each tank within the active manifold system according to its operating procedures."[10]

Procedure 11.6.3 applies during normal receipt operations.[11] The events of July 7th and 8th, however, involved a receipt due to an abnormal operation—an unplanned communications failure. The same Procedure 11.6.3 that PHMSA cites specifically says that during a communications failure, Kiantone personnel must instead follow CRM 2.3.4.[12] CRM 2.3.4 provides the "[a]ctions required" of various Kiantone personnel, including the Pump House Operator, in the event an active tank, i.e., the one receiving product, loses power, loses communication, or loses radar or laser—all three of which occurred during the July 7th and 8th outage.[13] Under those defined circumstances, the following alternative actions take effect:

1. The facility must be fully attended (i.e., personnel must remain on premises).

[9] NOPV at 2.

[10] *Id.*

[11] Exh. 8, O&M Procedure 11.6.3 – Activities During Receipt of Crude Oil at Tank Farm (last revised Mar. 7, 2022). For instance, Procedure 11.6.3 references "delivery" and "deliveries" of product, which necessarily implies a scheduled or planned receipt of product, as opposed to an unplanned receipt or receipt during abnormal operations. *Id.* at 1.

[12] *Id.* ("[S]ee Control Room Management Procedures CRM2.3.4, & CRM2.3.5 for communication failures.").

[13] Exh. 9, CRM Procedure 2.3.4 – Unplanned Communications Failure – Tank Farm, at 1–2 (last revised Dec. 14, 2018).

2. Attendance at the tank during the first and last hour of receipt.
3. Obtain readings from tank gauge at each hour during receipt.[14]

During the outage and unplanned communications failure on July 8th, Kiantone followed the requirements of CRM 2.3.4 then in effect. First, the facility was "fully attended" because Kiantone had as many as four personnel present at the Tank Farm Facility at various times while Tank 651 was receiving crude oil product: the Pump House Operator; the incoming and outgoing Shift Supervisors; and the Maintenance Laborer, who stayed on the premises all night and took readings of Tank 651 during the operations to move product to Tank 651. To Kiantone's knowledge at the time, Tank 651 was the only active tank, and thus the only tank subject to CRM 2.3.4's requirement to take manual readings every hour. The chart provided in Exhibit 6 shows the hourly tank level readings taken at Tank 651 during receipt, including the first and last hour.[15] The record thus demonstrates that Kiantone followed the applicable written procedure—i.e., CRM 2.3.4, not Procedure 11.6.3—and there is therefore no factual basis for PHMSA's alleged violation of 49 C.F.R. § 195.402(a) for failure to follow the relevant O&M procedure.[16]

In light of the above, Kiantone requests that Item 1 be dismissed. In the event a violation is found, Kiantone explains below how the proposed penalty amount is arbitrary and capricious and not in accordance with the facts or PHMSA's penalty policy.[17]

B. Item 2: 49 C.F.R. § 195.402

In Item 2, PHMSA alleges that Kiantone violated 49 C.F.R. § 195.402(a) by failing to properly monitor an opened dike drain, close the dike drain valve when drainage was complete, and log the

[14] *Id.* at 1.

[15] Exh. 3, Tank 651 Tank Level Gauge Readings.

[16] Related to Item 1, PHMSA may argue that CRM 2.3.4 should have called for the monitoring of inactive tanks within the same manifold as an active tank. This argument would falter for at least three reasons. First, an operator's supposed failure to incorporate certain provisions into its O&M procedures cannot constitute a violation for failure to "*follow* . . . a manual of written procedures," which is the basis for PHMSA's alleged violations in Item 1. *See* 49 C.F.R. § 195.402(a) (emphasis added). Second, PHMSA does not explicitly rely on, nor even allude to, this argument in the NOPV, meaning that any change in legal theory at this late juncture violates Kiantone's due process rights by limiting its ability to fairly defend itself against the alleged violations. *See FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) ("A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required."). Third, and finally, to the extent Kiantone may have failed to catch this supposed procedural deficiency, apparently so did PHMSA's inspectors. PHMSA previously inspected the Tank Farm Facility and reviewed Kiantone's O&M manual in August 2019; despite identifying areas for improvement with a handful of unrelated procedures, not a word was said about CRM 2.3.4. *See* Exh. 10, Notice of Amendment, CPF 1-2020-5008M (Apr. 30, 2020); Exh. 11, Warning Letter, CPF 1-2020-5009W (Apr. 30, 2020). PHMSA's tacit approval of the remainder of Kiantone's procedures suggests that Kiantone should not be retroactively penalized for failing to incorporate a certain provision into its procedures. And in any event, in the month following the incident, Kiantone promptly revised CRM 2.3.4 to require monitoring of all tanks on a manifold, even those that are inactive, and the revised version of CRM 2.3.4 is attached for reference. *See* Exh. 12, CRM Procedure 2.3.4 – Unplanned Communications Failure – Tank Farm (last revised Dec. 16, 2021). This revision incorporates the relevant American Petroleum Institute recommended practice. *See* Exh. 13, Excerpt from Overfill Protection for Storage Tanks in Petroleum Facilities, API Recommended Practice 2350, § 4.4.2 (3d ed. 2005).

[17] *See infra* Section V.

valve's opening and closing.[18] The Agency's claims, however, rely upon unsupported and/or incorrect factual allegations and mistaken readings of the applicable O&M procedure. Item 2 should therefore be dismissed.

Before proceeding further, Kiantone seeks to clarify a key point. In the NOPV, PHMSA characterizes the draining from the dike around Tank 652 into the nearby firewater retention pond as a "discharge."[19] "Discharge" is typically reserved for releases that leave the bounds of an operating facility.[20] In fact, as Exhibits 1 through 3 demonstrate, the firewater retention pond is part of the Tank Farm Facility's secondary containment system.[21] The Tank Farm Facility's spill prevention, control, and countermeasure ("SPCC") plan, an excerpt of which is attached as Exhibit 1, provides that the "Fire Pond" is part of the facility's emergency containment system, and describes a drainage path from the tanks to the firewater pond to a downstream outfall, labeled as "Outfall 014." Similarly, Exhibit 2, Kiantone's National Pollutant Discharge Elimination System ("NPDES") permit notes Outfall 14 as a permitted outfall, indicating those parts of the facility upstream from the outfall, including the firewater retention pond, are within the facility's containment system. The SPCC plan also contains a site map, attached as Exhibit 3, that provides a visual representation of this drainage path. And the events of July 7th and 8th illustrate this plan in action. As a result of the emergency drainage plan, all released crude oil product from Tank 652 that left containment was captured in the firewater pond and subsequently recovered by Kiantone. Thus, rather than receiving a "discharge," the firewater retention pond performed its function that night by preventing the accidental discharge of crude oil into the environment.[22]

As to the substance of Item 2, the alleged violations are premised upon violations of Kiantone's O&M Procedure 5.7.10 – Tank Farm Dike Drain Operations ("Procedure 5.7.10"). In relevant part, Procedure 5.7.10 requires that the Pump House Operator:

> 4. Log[] the valve open in the dike drain log and periodically monitor[] discharge. KPL/URC personnel must be present at the Tank Farm Facility while any dike drain is manually open for draining.

[18] NOPV at 3.

[19] *Id.*

[20] To illustrate, for regulations regarding oil spill response planning for onshore oil pipelines, PHMSA has characterized "discharges" as those that "could reasonably be expected to cause substantial harm to the environment if it were to discharge oil into navigable waters or adjoining shorelines." *See* Pipeline Safety: Response Plans for Onshore Transportation-Related Oil Pipelines, 70 Fed. Reg. 8,734, 8,734 (Feb. 23, 2005); *see also Discharge*, Merriam-Webster, https://www merriam-webster.com/dictionary/discharge (last visited Apr. 7, 2023) ("to release from *confinement*, custody, or care," or "to give *outlet* or vent to" (emphases added)).

[21] Exh. 5, SPCC Plan, Warren Emergency Containment (WEC): Cobham Park Tank Farm (last revised July 27, 2022); Exh. 6, Kiantone National Pollutant Discharge Elimination System Permit No. PA0005304, at 6 (May 24, 2011); Exh. 7, Cobham Park Tank Farm: Site Map/Site Drainage Map.

[22] Kiantone has since added an additional firewater retention pond with an estimated 2 million gallon capacity for containment and firefighting purposes.

5. Return valve to closed position when draining is complete and document in the dike drain log.[23]

During the events of July 7th and 8th, Kiantone met the requirements of Procedure 5.7.10. First, the Pump House Operator who opened the dike drain valve for the Tank 652 impoundment at approximately 9:55pm on July 7th and closed the valve at approximately 12:55am on July 8th logged both entries in the relevant logbook.[24] The Pump House Operator was not able to prepare these log entries until his next shift the following day because he had been taken to a nearby hospital (but not admitted) on the night of July 8th as a precautionary measure after feeling lightheaded while closing the dike drain and inlet valves.[25] He returned to work the following day and prepared a detailed written statement for the log.[26] Thus, the opening and closing of the valve were "log[ged]," as required by Procedure 5.7.10. To the extent PHMSA contends that the recordation should have been immediate—a requirement, it should be noted, that is entirely absent from Procedure 5.7.10—any brief delay was trivial and excusable, given the Pump House Operator's situation along with the abnormal operations posed by the power outage.

Second, while the Tank 652 dike drain valve was open to allow drainage, Kiantone had, at various times, four personnel present at the Tank Farm Facility to periodically monitor the drainage: the Pump House Operator, the incoming and outgoing Shift Supervisors, and the Maintenance Laborer. Although the NOPV seemingly misconstrues Procedure 5.7.10 as requiring the Pump House Operator be present at all times while a dike drain is manually open for draining,[27] the procedure actually states that "KPC/URC personnel must be present at the Tank Farm Facility."[28] Thus, the procedure itself, which simply references "personnel," plainly does not require the Pump House Operator in particular be present at all times while a dike drain is open.[29]

Nor can PHMSA seek to impose penalties on the theory that Kiantone's monitoring efforts were not sufficiently "periodic[]." Kiantone notes that Procedure 5.7.10 does not define what monitoring interval constitutes "periodic[]," and the NOPV is similarly silent as to what frequency Kiantone's monitoring events should have followed. Because the reason to open the dike drain valve is to allow stormwater to fully drain from the dike impoundment, the large volume of rainfall earlier in the day would not have led the Kiantone personnel on-site to believe it was necessary to repeatedly

[23] Exh. 14, O&M Procedure 5.7.10 – Tank Farm Dike Drain Operations (last revised Mar. 7, 2022). "KPC" refers to Kiantone Pipeline Company, while "URC" refers to United Refining Company, the parent company of Kiantone.

[24] Exh. 4, Containment Area Drainage Log (showing the recordation of the opening and closing of the Tank 652 dike drain valve).

[25] *Id.*

[26] *Id.*

[27] NOPV at 3.

[28] Exh. 14, O&M Procedure 5.7.10 – Tank Farm Dike Drain Operations (last revised Mar. 7, 2022).

[29] To the extent that PHMSA construes Procedure 5.7.10 as requiring the Pump House Operator to delegate the responsibility to be present at the Tank Farm Facility while a dike drain is open, this interpretation is similarly belied by the plain text of Procedure 5.7.10. A delegation theory assumes that the Pump House Operator had a duty to be present, and is thus simply a different way of claiming that the Pump House Operator was required to be present while a dike drain was open. As discussed, this theory is unsupported by the language of Procedure 5.7.10. Moreover, PHMSA did not assert any delegation theory in its NOPV.

check to determine whether the draining of the dikes was complete.[30] Moreover, Kiantone personnel monitored the draining of the dike impoundment around Tank 652 at least twice within a three-hour window; this monitoring proved frequent enough to detect that the materials exiting the dike area included crude oil within less than 20 minutes of when the Tank 652 overflow began.[31] If PHMSA contends that "periodic[]" must meet some certain specified frequency, such an assertion has no basis in Procedure 5.7.10, and PHMSA would need to point to a specific regulation that would give industry fair notice of such requirement,[32] which it did not do in the NOPV and has not done thus far. In short, PHMSA gives no indication as to why Kiantone's monitoring efforts during a continuous rain event that detected a release within 20 minutes were not sufficiently "periodic[]."

Third, and finally, PHMSA's allegation that Kiantone "failed to close the dike drain valve once draining was complete"[33] is wrong on the facts. For one thing, the closure of the Tank 652 dike drain valve was logged by the Pump House Operator.[34] The closure, in fact, is what prevented the accidental release from Tank 652 from exiting containment. For another, given the large volume of rain on July 7th, the notion that the dike would have fully drained within such a short amount of time is just wrong. In fact, when Kiantone detected crude oil in the draining material at 12:55am on July 8th, rainwater was still draining from the dike. Kiantone's records indicate that over 50,000 gallons of water was recovered from the dike impoundment—water that would have continued to drain had the valve remained open.[35] So PHMSA's insinuation that the dike drain valve was opened, all the water drained, and then the Operator neglected to close the valve, which caused or exacerbated the release, is unsupported.

In sum, the record demonstrates that Kiantone complied with Procedure 5.7.10, and PHMSA's contrary allegations are factually and legally unsupported.

C. Item 3: 49 C.F.R. § 195.402

In Item 3, PHMSA alleges that Kiantone violated 49 C.F.R. § 195.402(a) by failing to conduct a "proper review" of a different, earlier outage on June 30, 2021, pursuant to O&M Procedure 18.1 – Abnormal Operations ("Procedure 18.1"), and failing to "correct a previously discovered

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[30] *See* Exh. 1, Recorded Hourly Rainfall at Cobham Park Tank Farm, July 7, 2021 through July 9, 2021; Exh. 2, National Weather Service Climatological Data for Warren, Pennsylvania, for July 2021 (retrieved April 4, 2023); *see also supra* n.2.

[31] Exh. 15, Kiantone Calculation for Approximate Time that Tank Started to Overflow (calculating that the overflow began at approximately 12:36am before being discovered at 12:55am).

[32] *See Fox Television*, 567 U.S. at 253; *see also Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155–56 (2012) (observing that agencies cannot adopt an interpretation that "does not reflect the agency's fair and considered judgment on the matter in question," or that represents "a convenient litigating position" or "a *post hoc* rationalization advanced by an agency seeking to defend past agency action against attack" (alterations, internal quotation marks, and citations omitted)).

[33] NOPV at 3.

[34] Exh. 4, Containment Area Drainage Log.

[35] Exh. 16, FRAC Tank Volumes Recovered from Tank Farm (showing the recovery of 52,221 gallons of water from the Tank 652 impoundment).

equipment malfunction."[36] But Kiantone had in fact commenced a review of the events of June 30th, and only four business days had elapsed between the outages on June 30th and July 7th and 8th. PHMSA gives no reason to conclude, whether by virtue of its regulations or Kiantone's procedures, that Kiantone was required to complete its review and resolve all potential issues related to the June 30th outage within four business days. Thus, Item 3 has no basis in fact or law.

As relevant here, Kiantone's Procedure 18.1 states:

> Once abnormal operations have ended, operators at the Pipeline Control Center and/or the Pipeline Manager will monitor pipeline operations to be sure the abnormal condition has been corrected and the pipeline is operating safely.
>
> The Pipeline Manager is responsible to review the actions of personnel who responded to an abnormal operation to determine:
>
> - Whether the response was timely and appropriate, to ensure protection of persons and property.
> - Whether employee actions followed company-approved procedures.
> - Whether any deficiencies exist in Kiantone O&M procedures, safety equipment, or pipeline monitoring and/or control systems.[37]

On the morning of June 30, 2021, the Tank Farm Facility lost commercial power, prompting the UPS to take over. Once the UPS was depleted about two hours later, communications between the facility and the control center were lost. When power was fully restored shortly thereafter, communications were reestablished with the tanks. At that point, the valve for only Tank 651 was supposed to be open, but the control center observed that the inlet valves for Tanks 650 and 652 had been inadvertently opened. At the same time, the high-level alarm for Tank 651 was triggered—despite the fact that the high-level point had not been reached—prompting the pipeline to shut down. The control center remotely closed the inlet valve for Tank 652, but the valve for Tank 650 had to be manually closed. These events were unprecedented and had not previously occurred during an outage and restoration of power, and the facility initiated the process set out in Procedure 18.1 to determine the cause and to develop a permanent solution.

Kiantone promptly recorded these abnormal operations of June 30th on that same day, and the Tank Farm Manager requested the next day a revision of procedures to address the abnormal operation.[38] From the time of this request, Kiantone began the required review process to identify and isolate what exactly caused the inadvertent opening of the inlet valves for Tanks 650 and 652, and whether any deficiencies in its equipment or procedures needed to be addressed. This rigorous review

[36] NOPV at 4.

[37] Exh. 17, O&M Procedure 18.1 – Abnormal Operations, at p. 18.1.1 (last revised Mar. 7, 2022).

[38] *See* Exh. 18, Form #18.1.1, Documentation of Abnormal Operation (July 1, 2021); Exh. 19, Form #1.5.2, O&M Procedure Request for Revision (June 30, 2021).

process, as explained in Exhibit 14, entailed a thorough staff review of the O&M procedures, as well as a simulation of the events that led to the abnormal operations.[39] Such a simulation is no small task, as it requires preparing the equipment, designing the parameters of the simulation, bench scale testing of certain equipment in order to facilitate the analysis during the simulated event, ensuring adequate staffing to monitor all inlet and outlet valves, and shutting down the pipeline. Kiantone then needed to analyze the results of the simulation to identify any deficiencies and troubleshoot potential causes of the abnormal operation. Finally, Kiantone had to go through the process of updating its procedures to address the identified issues, should they ever arise again.

In short, Kiantone had documented the abnormal operations on June 30th and had begun the process of reviewing the events to identify and correct possible causes or deficiencies.

Thus, PHMSA's principal objection is not that Kiantone failed to initiate the required review, but rather that it did not complete the review quickly enough to PHMSA's liking. But it is here where PHMSA's legal theory is most puzzling. First, the procedure that it claims Kiantone violated does not set a timeline for completing the analysis, let alone a deadline of four business days. PHMSA's claims in Item 3 thus seek to enforce a timing mandate in Procedure 18.1 that does not exist.

Even more surprisingly, PHMSA's attempt to insert a four-business-day or shorter time frame for completing this analysis contradicts its own regulation concerning how an operator must respond to a non-integrity-related adverse condition, found at 49 C.F.R. § 195.401(b)(1). This section states in relevant part, with emphasis added:

> (b) An operator must make repairs on its pipeline system according to the following requirements: (1) Non Integrity management repairs. 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*. However, if the condition is of such a nature that it presents an immediate hazard to persons or property, the operator may not operate the affected part of the system until it has corrected the unsafe condition.

Thus, in responding to and resolving a non-integrity-related adverse condition that does not pose an immediate hazard to persons or property—and PHMSA does not (and cannot) allege that the events of June 30th posed such an immediate hazard—operators are given "a reasonable time" to do so. In matters concerning Section 195.401(b)(1), the Agency has measured violations of the "reasonable time" requirement in terms of months or years or inspection cycles.[40] Here, only four business days had elapsed between the June 30th power outage and the outage on July 7th and 8th—a much shorter amount of time than the Agency typically permits to resolve non-integrity-related

[39] *See* Exh. 20, Excerpt of Asset Performance Group, 442-TK652 Overfill Event: Final Investigation Report (Aug. 27, 2021) (providing summary of steps in the review process).

[40] *See, e.g.*, *In re Sunoco Pipeline, LP*, CPF No. 1-2014-5005, 2016 WL 770393, at *3 (D.O.T. Jan. 13, 2016) (finding violation for failing to correct a non-integrity-related adverse condition within "15 months—the maximum time allowed between annual cathodic protection surveys"); *In re Sunoco Logistics Partners, LP*, CPF No. 3-2010-5012, 2012 WL 4846329, at *1–*2 (D.O.T. Aug. 30, 2012) (failing to correct within three years); *In re Holly Energy Partners, LP*, CPF No. 4-2010-5005, 2011 WL 2040234, at *4 (D.O.T. Mar. 30, 2011) (within one year or before the next inspection cycle, based on operator procedures).

issues. Kiantone could not have reasonably been expected to effectively and thoroughly complete all the steps of its review process, as described above, within four business days.[41] Indeed, Kiantone completed its analysis and determined the measures needed to addressed these events in late July 2021 and updated all of its pertinent operating procedures shortly thereafter.

PHMSA, however, apparently seeks to avoid the concept of "reasonable time" in its regulations by instead citing 49 C.F.R. § 195.402(a), and pointing to Kiantone's Procedure 18.1, to reach the ultimate conclusion that Kiantone should have resolved its review of the June 30th outage within four business days. Yet Procedure 18.1, excerpted above, does not supply any deadline for resolving non-integrity-related issues, much less one so strict as four business days.[42] Thus, there is no violation of the procedure. And while the regulation requires action within a "reasonable time," that term is not defined, and it begs credulity that it can be applied to mean four business days, particularly given the steps required to conduct the analysis to understand what caused the problem, and thus what corrective action could be undertaken. Finally, even if a "reasonable time" might be limited to four business days in this specific case—a contention Kiantone rejects—the term itself is so malleable and imprecise that enforcement under such a theory would violate requirements of fair notice due to operators.[43]

In the absence of a superseding O&M procedure, PHMSA's alleged violation of 195.402(a) has no basis in fact. Furthermore, the Agency's explicit provision of a "reasonable time" deadline in 49 C.F.R. § 195.401(b)(1) provides a legal bar to PHMSA's theory that Kiantone should have completed its review of a non-integrity-related adverse condition within four business days.

PHMSA cannot say that Kiantone failed to follow its procedures for reviewing an abnormal operation, and PHMSA cannot prevail on the properly characterized claim that Kiantone failed to act within a reasonable time. So PHMSA seems to be 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. If PHMSA's complaint is not with Kiantone's response to the issue under its manual, but with its alleged failure to monitor, then this claim is already covered by Item 1. An operator cannot be penalized twice for the same conduct under the guise of "separate" violations; to do so would circumvent the maximum penalty limit, resulting in an unfair total fine.[44] To this end, PHMSA hearing officials employ the *Blockburger* test from criminal law

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[41] Furthermore, PHMSA cannot arbitrarily interpret the phrase "reasonable time" as imposing a four-day deadline simply because it provides "a convenient litigating position" or "a post hoc rationalization . . . to defend past agency action against attack." *Christopher*, 567 U.S. at 155–56 (second and third quotations) (alterations, internal quotation marks, and citations omitted); *see also NLRB v. Bell Aerospace Co. Div. of Textron*, 416 U.S. 267, 269 (1974) (observing that an agency should not alter an interpretation in an adjudicative setting where doing so would impose "new liability . . . on individuals for past actions which were taken in good-faith reliance on [agency] pronouncements" or in cases involving "fines or damages").

[42] Exh. 17, O&M Procedure 18.1 – Abnormal Operations (last revised Mar. 7, 2022).

[43] *See supra* n.41 and associated text; *cf. United States v. Saybolt*, 577 F.3d 195, 205 (3d Cir. 2009) (An indictment should "identify[] the law that is alleged to have been violated and including factual allegations that sufficiently apprise the defendant of the offending conduct." (citation omitted)).

[44] *See, e.g.*, *In re Williams Gas Pipeline Co.*, CPF No. 5-2009-1003, 2010 WL 6539190, at *7 (D.O.T. Oct. 14, 2010) ("[C]ertain violations . . . may be so related that they constitute a single offense for which the agency should not assess combined penalties exceeding the applicable cap.").

and "evaluate all Notice Items to determine whether each can stand alone and has its own evidentiary basis, or whether any two or more are so closely related (i.e., same evidentiary basis) that they are not separate and should be considered one violation for purposes of applying the [statutory] cap."[45] Thus, if PHMSA's theory for Item 3 is premised upon a failure to monitor, then Items 1 and 3 share the same evidentiary basis and are thus so closely related that they should be considered one violation for purposes of the penalty analysis. If that is the case, one or the other should be struck.

In sum, PHMSA's allegations in Item 3 lack factual basis because Kiantone did follow its manual, and PHMSA is nevertheless legally barred by Kiantone's compliance with 49 C.F.R. § 195.401(b)(1). If PHMSA's theory for Item 3 is actually premised upon a failure to monitor, then the penalty should be dismissed as duplicative of Item 1, or vice versa, and the claims treated as one violation.

V. The Proposed Civil Penalties for Items 1 Through 3 Should Be Reduced.

To the extent violations are found for any of Items 1 through 3, Kiantone requests that any assessed penalties be substantially reduced from the levels proposed by PHMSA in the NOPV. PHMSA's regulations call for the amount of a penalty to be evaluated in light of the following factors:

> (1) The nature, circumstances and gravity of the violation, including adverse impact on the environment;
> (2) The degree of the respondent's culpability;
> (3) The respondent's history of prior offenses;
> (4) Any good faith by the respondent in attempting to achieve compliance;
> (5) The effect on the respondent's ability to continue in business[.][46]

In addition, PHMSA "may consider" "[t]he economic benefit gained from the violation, if readily ascertainable, without any reduction because of subsequent damages" and "[s]uch other matters as justice may require."[47] In weighing these various considerations, PHMSA has adopted and regularly applies a penalty matrix.[48] Importantly, like any agency action, the penalty assessed must not be arbitrary or capricious, meaning that PHMSA must "examine the relevant data and articulate a satisfactory explanation for its action."[49]

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[45] *In re Colorado Interstate Gas Co.*, CPF No. 5-2008-1005, 2009 WL 5538649, at *10 (D.O.T. Nov. 23, 2009) (Wiese, Associate Administrator, presiding) (citing *Blockburger v. United States*, 284 U.S. 299, 304 (1932)); see *In re Kinder Morgan Liquids Terminals LLC*, CPF No. 1-2011-5001, 2012 WL 6184429, at *11 (D.O.T. Oct. 17, 2012) ("PHMSA has found the rationale in *Blockburger* to be relevant to determining whether multiple violations of the pipeline safety regulations are 'a related series of violations' subject to the statutory limit.").

[46] 49 C.F.R. § 190.225(a); *see* 49 U.S.C. § 60122(b)(1).

[47] 49 C.F.R. § 190.225(b); *see* 49 U.S.C. § 60122(b)(2).

[48] *See* PHMSA, *Civil Penalty Summary* (last updated Feb. 25, 2019), https://tinyurl.com/mtd5up96 [hereinafter PHMSA Penalty Matrix].

[49] *FCC v. Fox Television Stations, Inc*., 556 U.S. 502, 513 (2009) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)); *see also State Farm*, 463 U.S. at 43 (stating that an agency decision is

As an initial matter, PHMSA has proposed for each of Items 1 through 3 the statutorily maximum penalty.[50] In doing so, PHMSA appears to disregard both its regulation and its penalty worksheet, which call on PHMSA to consider whether the incident resulted in adverse impacts on the environment.[51] The Agency's penalty calculation shows that did not take into account the fact that the release did not result in any damage to the environment or any injury to human health. No crude oil actually left the confines of the Tank Farm Facility's containment systems and all released materials were recovered, meaning there were no "adverse impact[s] on the environment."[52] The lack of an actual release of crude oil beyond the confines of the containment system and into the environment goes right to the penalty consideration of "gravity," as the Agency's penalty matrix weighs "the severity of an accident/incident" and whether there was a hazardous liquid release as part of the gravity analysis.[53]

The Agency has recognized that situations not involving a release typically do not warrant a maximum penalty.[54] This makes sense, as maximum penalties should be reserved for much more serious violations, i.e., those with significant adverse impacts on the environment. As some examples, PHMSA has penalty amounts in this case that are comparable to violations that involved the destruction or damaging of buildings and burns to third parties,[55] widespread evacuations of homes and businesses,[56] and fires and explosions resulting in hospitalizations and fatalities.[57] Yet PHMSA has thus far provided no explanation why it arbitrarily decided to impose maximum amounts of penalties in this case that are the same as cases involving significant environmental damage.

Moving to each item individually, in the event a violation is found and penalty assessed for Item 1, the penalty amount should be significantly lower than that proposed by PHMSA in the NOPV. Looking at PHMSA's proposed civil penalty worksheet for this matter, given that Kiantone

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arbitrary and capricious if the agency's "explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise").

[50] NOPV at 6. From May 3, 2021, to March 21, 2022, the maximum civil penalty allowed under 49 U.S.C. § 60122(a)(1) was $225,134. *Compare* DOT, Civil Penalty Amounts, 86 Fed. Reg. 23,241, 23,246 (May 3, 2021), *with* DOT, Revisions to Civil Penalty Amounts, 87 Fed. Reg. 15,839, 15,859 (Mar. 21, 2022).

[51] 49 C.F.R. § 190.225(a)(1); Exh. 21, PHMSA Proposed Civil Penalty Worksheet, CPF No. 1-2022-050-NOPV (July 22, 2022) ("Consideration will be given to using a lower multiplier if mitigating factors are identified, such as little or no known environment damage.").

[52] 49 C.F.R. § 190.225(a)(1).

[53] *See* PHMSA Penalty Matrix, *supra* n.48, at 2.

[54] *See In re Sunoco, Inc.*, CPF No. 3-2009-5016, 2012 WL 7177131, at *3 (D.O.T. Dec. 31, 2012) ("Respondent is correct that fortunately no product releases resulted from the event, but this was taken into consideration when the proposed penalty amount" of $32,500 "was determined and *would have been higher had a release been involved*." (emphasis added)).

[55] *See* 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).

[56] *See* Notice of Probable Violation and Proposed Civil Penalty, *In re Fla. Gas Transmission Co.*, CPF No. 4-2022-032-NOPV (July 22, 2022).

[57] *See* Notice of Probable Violation, Proposed Civil Penalty, and Proposed Compliance Order, *In re Tex. E. Transmission, LP*, CPF No. 1-2021-045-NOPV (Dec. 21, 2021).

followed its procedures, the alleged violation cannot be said to be the "causal factor of a reportable accident/incident," which represents a maximum gravity assessment, the primary driver for the penalty calculation here.[58] Rather, the gravity constituent of the penalty calculation should be reduced to correspond with the point level for "the violation occurred NOT within a HCA," a substantial reduction from what is proposed now.[59] Moreover, the penalty amount should reflect Kiantone's good faith efforts in subsequently revising CRM 2.3.4, in light of the events at issue, to require personnel to monitor all tanks, active or inactive, in a manifold.[60] The combination of these considerations, along with the absence of any adverse effects on the environment, should warrant a penalty significantly lower than the statutory maximum, somewhere in the range of $15,500 to $32,800.

For Item 2, in the event a violation is found and penalty assessed, Kiantone believes that the only *potentially* violative conduct was the brief delay (i.e., one day) in logging the opening and closing of the dike drain valve—but does not accept that such a delay is a violation. The personnel on the ground do not actually use the log to communicate valve openings to each other; they do so through verbal communications. So the delay in logging did not cause any alleged failure to monitor. Such a minor recordkeeping infraction should warrant at most a warning item, not a maximum civil penalty. To the extent civil penalties are assessed, Kiantone believes those penalties should reflect (1) the absence of any release adversely affecting the environment; (2) the fact that any potentially violative conduct relates to recordkeeping, not any failure to follow O&M procedures; and (3) Kiantone's good faith efforts to comply with Procedure 5.7.10 despite difficult abnormal conditions posed by the July 7th and 8th power outage. Such a properly calculated penalty should be in the range of $1,700 to $19,000.

Finally, for Item 3, any assessed penalty should be substantially lower than the statutory maximum because (1) any supposed failure to complete the review of the June 30th outage within four business days in no way caused the release on July 8th and (2) Kiantone was conducting its rigorous review in good faith to comply with its responsibilities under its O&M procedures and, more importantly, ensure that it effectively addressed any and all potential deficiencies in its systems or procedures. By our calculations, such a penalty should be $15,500. Further, Kiantone reiterates its argument that if PHMSA's theory is premised upon a failure to monitor, then the penalty for Item 3 should be dismissed as duplicative of Item 1, or vice versa.

VI. The NOPV's Warning Items Create a False History of Non-Compliance that Could Adversely Impact Kiantone in the Future.

Kiantone acknowledges that warning items are typically not subject to adjudication.[61] But the failure to correct conduct subject to a warning may invite follow-up enforcement action, as the NOPV makes clear.[62] Moreover, an operator's "history of prior offenses" is one of PHMSA's

[58] Exh. 21, PHMSA Proposed Civil Penalty Worksheet, CPF No. 1-2022-050-NOPV, at 1 (July 22, 2022).

[59] *Id.*

[60] Exh. 12, CRM Procedure 2.3.4 – Unplanned Communications Failure – Tank Farm (last revised Dec. 16, 2021).

[61] 49 C.F.R. § 190.205.

[62] NOPV at 6–7 ("We advise you to promptly correct [Items 4, 5, and 6]. Failure to do so may result in additional enforcement action.").

stated penalty considerations, meaning that a warning letter may impact future penalty assessments.[63] PHMSA's decisions have made it clear that it will use prior warning items as a factor in subsequent violation findings and/or penalty calculations.[64] Relatedly, PHMSA maintains an "Enforcement Transparency" webpage that tracks "Warning Letter Cases" the same way that it tracks NOPVs and "Corrective Order Action[s]."[65] Thus, PHMSA represents to interested members of the public that the Agency equates warnings with violations that are asserted in an NOPV. It is therefore critical that an operator have the opportunity to contest warning items that are ill-founded for any reason.

Of equal concern to Kiantone is that the company is committed to complying with PHSMA's requirements as set out in properly promulgated regulations. Warnings that stray in material ways from what the governing statute and regulations require create substantial uncertainty about Kiantone's regulatory obligations. In addition, compliance often requires committing substantial resources. Kiantone therefore needs certainty about how exactly it should modify its conduct or procedures to ensure future compliance. To that end, and given its continued objections to the allegations made in Items 4 through 6 of the NOPV,[66] Kiantone requests dismissal or withdrawal of those three items. 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.

For Item 4, PHMSA alleges that Kiantone violated 49 C.F.R. § 195.402(a) by failing to correctly fill out its form documenting the events during the June 30, 2021, outage as required by Procedure 18.1 and AO Conditions Form #18.1.1, regarding the reporting of abnormal operations.[67] Specifically, PHMSA alleges that Kiantone did not "document the unintentional valves opening in its 'Description of Abnormal Operation'" portion of the form, "nor did Kiantone generate a different" form "to describe that occurrence."[68]

Yet on page 2 of Form #18.1.1, in the "Follow-up Actions taken" section, there is a precise summary of the key events.[69] That description specifically mentions the fact that "650/651/652

[63] 49 C.F.R. § 190.225(a)(3).

[64] *See In re El Paso Nat. Gas Co., LLC*, CPF No. 5-2013-1012, 2015 WL 3545213, at *1, *4 (Apr. 3, 2015) (noting that the NOPV included reference to a previously issued warning and finding "factual differences between the two cases" to "confirm[] the prior warning was not considered a 'prior offense' for purposes of determining whether a violation occurred in this case, or for purposes of calculating an appropriate civil penalty"); *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.").

[65] *See Summary of Enforcement Actions: Nationwide*, PHMSA, https://tinyurl.com/7pykt72e (last visited Apr. 5, 2023) (documenting warning letter cases initiated between 2002 and 2023) [hereinafter Enforcement Transparency].

[66] *See also* NOPV Response, *supra* n.7, at 6–7 (explaining Kiantone's objections to Items 4 through 6).

[67] NOPV at 4–5.

[68] *Id.*

[69] Exh. 18, Form #18.1.1, Documentation of Abnormal Operation (dated June 30, 2021, and July 1, 2021).

inlet [motor-operated valves] were open,"[70] which PHMSA thought was missing.[71] On page 1, in the "Action taken" section, which sits just below the "Description of Abnormal Operation" section, one of the actions taken was to "shut inlet valves of 650, 651." Again, that implies that the inlet valves to the tanks on that manifold were open. Furthermore, the request for revision form mentioned on the second page went into further detail about the failure. A form containing all of the material information about an event cannot be the basis of a violation simply because PHMSA believes that certain pieces of information should have been in one section versus another. Moreover, the Form #18.1.1 identified a series of measures to be taken to minimize a risk of any reoccurrence. But as noted above, only four business days passed between the events of June 30th and July 8th, and Kiantone cannot have been reasonably expected to identify and implement the necessary changes within that short timeframe.

Additionally, PHMSA's assertion that Kiantone should have documented the opening of the valves on a separate Form 18.1.1 is misplaced. As Procedure 18.1 clearly states, "*All* abnormal operations should be documented on Form 18.1.1."[72] Nothing in the instructions to Form 18.1.1 indicate that multiple forms should be used to document related incidents. Further, doing so would not make sense from the operator's standpoint. In order to fully understand and evaluate the abnormal operation, the operator would want to document all related events in one Form 18.1.1, which is what Kiantone did. Thus, it remains unclear what precise course of conduct or failure PHMSA is requesting Kiantone correct.

For Item 5, PHMSA alleges that Kiantone violated 49 C.F.R. § 195.52 by failing to timely report to the NRC a release of hazardous liquid associated with a September 15, 2018, tank fire that occurred while cleaning Tank 648.[73] This reporting requirement, though, is only triggered "following discovery[] of a *release* of [] hazardous liquid or carbon dioxide resulting in" a fire.[74] In the case of the Tank 648 fire, the tank was out of service for cleaning and virtually empty at the time of the fire. Thus, there was no release that *resulted in* a fire to trigger the NRC reporting requirement. Indeed, Kiantone informed PHMSA of these facts in response to the Agency's September 30, 2019, request for an accident report for the fire.[75] PHMSA never responded to Kiantone's email, even three years later. Nor did PHMSA raise any objection—much less issue an NOPV—after thoroughly exploring the issue as part of its July 2019 audit. In light of these facts, PHMSA can only find a violation based on a misreading of the regulation: that a fire requires reporting whether or not it is the result of a release of hazardous liquid.[76] That is not what the regulation says. A plain reading of the regulation shows that Kiantone had no reporting obligation.

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[70] *Id.*

[71] NOPV at 5 ("Kiantone did not correctly investigate and document the unintentional valves opening . . .").

[72] Exh. 17, O&M Procedure 18.1 – Abnormal Operations (last revised Mar. 7, 2022) (emphasis added).

[73] NOPV at 5.

[74] 49 C.F.R. § 195.52(a).

[75] Exh. 22, September 2019 Email Exchange Between Kiantone and PHMSA Regarding the Tank 648 Fire (Sep. 7, 2019, to Sep. 30, 2019).

[76] NOPV at 5 ("This unintentional tank fire to Tank 648 released hazardous liquid and therefore was a reportable event under the criteria established in § 195.50(a).").

These facts cannot sustain a claim that Kiantone violated the regulations by failing to make this report.

Finally, for Item 6, PHMSA alleges that Kiantone violated 49 C.F.R. § 195.54 for failing to file a DOT Form 7000-1 accident report for the September 15, 2018, tank fire.[77] But like with Item 5, an accident report only applies to "accident[s]" under 49 C.F.R. § 195.50, which is only triggered by "a release of [a] hazardous liquid or carbon dioxide transported resulting in explosion or fire not intentionally set by the operator."[78] As noted above, Tank 648 was empty when it was being cleaned; there was no release that resulted in a fire. And as further noted, PHMSA had been aware of the tank fire, and Kiantone's position that an accident report was not warranted, for three years.[79] Thus, Item 6, like Items 4 and 5, lacks factual or legal support.

* * *

While Kiantone primarily raises its concerns with Items 4 through 6 in order to clarify its obligations under the Agency's regulations, Kiantone also takes issue with its inability to formally challenge the warning items as part of an adjudicative hearing.[80] Even though warning items do not impose direct monetary penalties on operators, they nevertheless inflict harmful consequences on operators. For one thing, PHMSA uses an operator's "prior history of offenses" as an explicit penalty consideration,[81] meaning that while a violation presented in a warning item may not impose an immediate financial cost, it may lead to greater civil penalties in the future if a later violation occurs. For another, warning items, like civil penalty items, are made public on PHMSA's website,[82] and thus may reflect negatively on an operator's operational and/or safety record—a consequence that may invite reputational harms among stakeholders in the communities in which an operator operates, or financial harms in the form of greater credit or insurance risk. This is especially true for publicly available warning items premised on alleged failures to report, like Items 5 and 6 here, as such items, if left uncontested, may diminish the trust between an operator and its local stakeholders. As yet another, the Agency may view a history of warning items as reason to conduct more frequent or rigorous inspections of an operator's facility, as compared to an operator without such a history, even if there is little factual or legal basis for the warning items resulting in the disparate treatment.[83] In light of these potential harms, it is unreasonable, and violates due process, for PHMSA to impose uncontestable warning items on operators.

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[77] *Id.* at 6.

[78] 49 C.F.R. § 195.50(a).

[79] Exh. 22, September 2019 Email Exchange Between Kiantone and PHMSA Regarding the Tank 648 Fire (Sep. 7, 2019, to Sep. 30, 2019).

[80] 49 C.F.R. § 190.205.

[81] 40 C.F.R. § 190.225(a)(3); *see Kaneb Pipe Line*, 1998 WL 35166428, at *6 ("In assessing the penalty amount, it is proper to consider a previous warning that Respondent received regarding its O&M Manual.").

[82] *See* Enforcement Transparency, *supra* n.65.

[83] *See El Paso Nat. Gas*, 2015 WL 3545213, at *1, *4.

VII. PHMSA's Proceedings Raise Significant Constitutional Issues.

Beyond concerns with the merits of PHMSA's NOPV and proposed penalties, PHMSA's statutory scheme and statutory authority for conducting these proceedings conflicts with critical constitutional principles. Kiantone raises these issues for the Presiding Official's consideration, as well as to preserve them for possible judicial review.

A. The Seventh Amendment Right to a Jury Trial and Article III

Shunting challenges to PHMSA's NOPV to the Agency first and courts later inflicts constitutional harm on Kiantone by allowing PHMSA to pursue *and* adjudicate claims for civil penalties in excess of $675,000 that should be adjudicated in Article III courts and subject to a jury determination of liability, as provided by the Seventh Amendment.

The Seventh Amendment guarantees defendants the right to a jury trial on the merits for those actions that "are analogous to '[s]uits at common law[,]'" like civil enforcement actions.[84] Trial by jury is a "fundamental" bulwark against "governmental arbitrariness,"[85] so much so that "any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care."[86] In *Tull v. United States*, the seminal case establishing the right to a jury trial in civil enforcement actions, the Supreme Court held that a defendant has a "constitutional right to a jury trial to determine [their] liability on the legal claims," even if the defendant is not entitled to a jury determination of the amount of a civil penalty. [87] Accordingly, courts have observed that the right to a jury determination of liability for civil penalties generally attaches to agency enforcement actions brought in Article III courts.[88]

Yet PHMSA wields the unilateral power to choose the forum for its civil enforcement actions, a decision that necessarily grants or deprives an operator of a jury trial.[89] PHMSA is permitted to impose civil penalties after written notice and an opportunity for an in-house hearing,[90] or it may request the Department of Justice, a fellow Executive Branch agency, pursue a civil action in

[84] *Tull v. United States*, 481 U.S. 412, 417 (1987); *see also* U.S. Const. amend. VII.

[85] *Reid v. Covert*, 354 U.S. 1, 9–10 (1957).

[86] *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935).

[87] *Tull*, 481 U.S. at 425. The Court was unanimous on this point. *See id.*; *id.* at 427 (Scalia, J., concurring in part and dissenting in part). And *Tull's* holding on this point was subsequently confirmed in *Feltner v. Columbia Pictures Television, Inc.*, where the Court observed that "[i]n *Tull*, we held that the Seventh Amendment grants a right to a jury trial on all issues relating to liability for civil penalties." 523 U.S. 340, 354 (1998).

[88] *See, e.g.*, *SEC v. Life Partners Holdings*, 854 F.3d 765, 781–82 (5th Cir. 2017); *United States v. Allegheny Ludlum Corp.*, 366 F.3d 164, 170–71 (3d Cir. 2004); *SEC v. Lipson*, 278 F.3d 656, 662 (7th Cir. 2002).

[89] PHMSA is permitted to impose civil penalties after written notice and an opportunity for a hearing, *see* 49 U.S.C. § 60120(a)(1); 49 C.F.R. §§ 190.207–190.213, 190.221, or it may request the Department of Justice, a fellow Executive Branch agency, pursue a civil action in court, *see* 49 U.S.C. § 60122; 49 C.F.R. § 190.235.

[90] *See* 49 U.S.C. § 60120(a)(1); 49 C.F.R. §§ 190.207–190.213, 190.221.

court.[91] No such choice, however, is available to those operators who face the imposition of civil penalties. This deprivation of a right to a jury trial cannot be squared with precedent.

The right to a jury trial attaches to "[s]uits at common law," which the Supreme Court has interpreted to refer to "suits in which *legal* rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered."[92] The Seventh Amendment thus "applies to actions brought to enforce statutory rights that are analogous to common-law causes of action ordinarily decided in English law courts in the late 18th century, as opposed to those customarily heard by courts of equity or admiralty."[93] The inquiry as to whether the right attaches requires looking at both the nature of the action and the remedy sought, with the latter consideration "more important than the first."[94]

Against this legal backdrop, the Supreme Court in *Tull* held that the Seventh Amendment guarantees a jury trial for a Clean Water Act ("CWA") action pursued by the federal government seeking civil penalties meant to "punish culpable individuals, as opposed to those intended simply to extract compensation or restore the status quo," finding such actions analogous to common law actions in debt typically handled by courts of law.[95] In reaching that conclusion, the Court rejected arguments that the CWA action at issue resembled public nuisance actions that were traditionally handled by courts of equity, emphasizing that such equitable actions typically sought injunctive relief to abate the nuisance, not punitive relief meant to punish past conduct.[96]

Like in *Tull*, PHMSA here is seeking civil penalties, amounting to over $675,000, intended to punish Kiantone for alleged violations of the Agency's regulations and Kiantone's O&M procedures—exactly the type of action in debt that *Tull* holds should be adjudicated by a jury, not an agency. And it is of no consequence that one may characterize the subject matter of PHMSA's action (pipeline safety) as akin to a public nuisance action; *Tull* makes clear that the key focus is the remedy being sought.[97] It is similarly of no consequence that PHMSA's action also includes equitable-like claims (the warning items), as the Court has held that the Seventh Amendment right to a jury applies to proceedings that involve a mix of legal and equitable claims.[98]

To be sure, there is a Seventh Amendment exception by which Congress can reserve for agencies adjudication of a narrow category of rights referred to as "public rights," or those "matters arising

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[91] *See* 49 U.S.C. § 60122; 49 C.F.R. § 190.235.

[92] *Parsons v. Bedford*, 28 U.S. 433, 447 (1830) (emphasis added); *see Hatco Corp. v. W.R. Grace & Co. Conn.*, 59 F.3d 400, 411 (3d Cir. 1995) ("As a general rule, the right to a jury trial is protected by the Seventh Amendment when the claim is a legal one, but not if it is equitable.").

[93] *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 41–42 (1989) (quoting *Curtis v. Loether*, 415 U.S. 189, 193 (1974)).

[94] *Id.* at 42.

[95] *Tull*, 481 U.S. at 420, 422; *see also Jarkesy v. SEC*, 34 F.4th 446, 453–55 (5th Cir. 2022) (similarly concluding that actions for civil penalties are analogous to actions in debt); *cf. Hatco Corp.*, 59 F.3d at 412–414 (implicitly contrasting actions in debt with actions for restitution or contribution, finding the latter to be actions in equity).

[96] *Tull*, 481 U.S. at 420–22.

[97] In an event, as explained below, PHMSA's claims are more akin to a traditional tort claim, than one for public nuisance, making it more appropriate for a court of law, rather than equity.

[98] *See Ross v. Bernhard*, 396 U.S. 531, 537–38 (1970).

between the government and others, which from their nature do not require judicial determination."[99] But, "in general, Congress may not withdraw from judicial cognizance" the adjudication of *private* rights, including "any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty."[100] And Congress cannot eliminate a party's Seventh Amendment right to a jury "merely by relabeling the cause of action to which it attaches and placing exclusive jurisdiction in an administrative agency or a specialized court of equity."[101] In determining whether a particular right is public or private, two considerations are key: (1) whether "Congress 'creat[ed] a new cause action, and remedies therefor, unknown to the common law' because traditional rights and remedies were inadequate to cope with a manifest public problem," and (2) whether jury trials would "go far to dismantle the statutory scheme" or "impede swift resolution" of the claims created by statute.[102]

Here, although PHMSA's civil enforcement authority is statutory in nature, its claims are largely premised on tort and traditional notions of negligence, reasonable care, and duties owed. This is evident from a plethora of PHMSA regulations referencing those tort-like principles.[103] Thus, although the claims arise from a modern pipeline safety statute, the underlying standards of conduct and associated alleged violations are analogous to common law standards and claims traditionally subject to judicial, not agency, adjudication.[104] Further, there can be little argument that jury trials would dismantle the statutory scheme or impede swift resolution of statutory claims because the statute itself permits civil actions pursued in Article III courts.[105] If Congress truly thought that PHMSA alone possessed special competence to adjudicate claims brought pursuant to its regulations, it would have mandated that *all* actions be adjudicated in that manner—as it has in other situations the Supreme Court has addressed.[106]

Setting legal doctrine aside, the threshold decision of whether an operator will be afforded a jury trial in an Article III court, rather than resigned to an internal agency adjudication, carries significant practical consequences. In federal court, the Federal Rules of Evidence and Civil

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[99] *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 138 S. Ct. 1365, 1373 (2018) (internal quotation marks omitted); *see Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm'n*, 430 U.S. 442, 455 (1977).

[100] *See Stern v. Marshall*, 564 U.S. 462, 484 (2011) (quoting *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 284 (1856)).

[101] *Granfinanciera*, 492 U.S. at 61.

[102] *Id.* at 60–63 (quoting *Atlas Roofing*, 430 U.S. at 454 n.11, 461 (first and second quotations)).

[103] *See* 49 C.F.R. § 195.401(a) ("No operator may operate or maintain its pipeline systems *at a level of safety* lower than that required by this subpart and the procedures it is required to establish . . . ." (emphasis added)); *id.* § 195.401(b) (operator duty to repair conditions that could adversely affect a pipeline); *id.* § 195.402(b) (allowing the agency to require an operator "to amend its plans and procedures as necessary to provide a *reasonable* level of safety" (emphasis added)).

[104] *See Atlas Roofing*, 564 U.S. at 458 (contrasting public rights from common law "private *tort*, contract, and property cases" (emphasis added)); *see also Stern*, 564 U.S. at 2601 (rejecting premise that non-Article III courts can adjudicate state law tort claims).

[105] *See* 49 U.S.C. § 60122; 49 C.F.R. § 190.235.

[106] *See Atlas Roofing*, 430 U.S. at 450 ("Congress has often created new statutory obligations, provided for civil penalties for their violation, and committed *exclusively* to an administrative agency the function of deciding whether a violation has in fact occurred." (emphasis added)).

Procedure apply; private parties enjoy full cross-examination rights; Article III judges develop the record that will govern that proceeding and those down the line; and courts of appeals review findings of law *de novo* and those of fact for clear error.

PHMSA proceedings, in contrast, are a starkly different experience. At the outset, the Agency issues an NOPV, which can propose civil penalties for hundreds of thousands of dollars, like here, without the same sort of certification requirements as a formal civil complaint.[107] This lack of rigor eliminates an essential backstop to protect defendants and respondents. If the operator seeks a hearing, a Presiding Official—who is an Agency attorney, not an administrative law judge—presides over hearings that need not comply with the Federal Rules of Evidence or Civil Procedure.[108] The Presiding Official makes initial factual and legal findings in a recommended decision forwarded along to the Associate Administrator for adoption in a final order.[109] If an aggrieved operator petitions for reconsideration, the matter goes back to the Associate Administrator, who then reviews their own final order, and may do so without taking additional evidence or arguments.[110] It is only after this point that a federal court may review PHMSA's decision, under standards provided through the Administrative Procedure Act.[111]

It is true that ever since *Crowell v. Benson* in 1932, the Supreme Court has endorsed the federal government's constitutional authority, in at least *some* instances, to adjudicate its enforcement

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[107] *See* Fed. R. Civ. P. 11(b)(2), (3); *see also Garr v. U.S. Healthcare, Inc.*, 22 F.3d 1274, 1278 (3d Cir. 1994) ("The signer's signature on a pleading, motion, or other paper certifies the signer has done three things: (1) read the pleading, motion, or paper; (2) made a reasonable inquiry into the contents of the pleading, motion, or other paper and concluded that it is well grounded in fact and warranted in law; and (3) has not acted in bad faith in signing the document." (citation omitted)).

[108] 49 C.F.R. § 190.212; *see* PHMSA, *Pipeline Safety Enforcement Procedures, Section 4: Administrative Enforcement Processes,* at 43 (last updated Oct. 18, 2022), https://tinyurl.com/35f2mmax ("All PHMSA hearings are considered 'informal adjudications,' meaning that they do not adhere to the formal procedures used by courts or strict rules of evidence.").

[109] 49 C.F.R. § 190.212. On this point, Kiantone raises a constitutional objection related to the use of Presiding Officials: while a Presiding Official exercises "significant authority" in its adjudication of PHMSA administrative matters, much like an administrative law judge ("ALJ"), they do not appear to be appointed to their position by the President, "Courts of Law," or "Heads of Departments," as required of "Officers" under the Appointments Clause of Article II of the U.S. Constitution. *See Lucia v. SEC*, 138 S. Ct. 2044, 2051–52 (2018); *see also* U.S. Const. art. II, § 2, cl. 2. The position of "Presiding Official" is "created by [a] statute" that describes its means of appointment and duties. *See* Pub. L. No. 112-90, § 20, 125 Stat. 1916, 1916–17 (2011); *see also Lucia*, 138 S. Ct. at 2053. And much like ALJs, Presiding Officials receive and inquire into evidence, require the submission of documents, prepare recommended decisions, and generally control the conduct and course of an adjudicatory proceeding. *See* 49 C.F.R. § 190.212(c) (describing powers and duties of Presiding Official); *see also Lucia*, 138 S. Ct. at 2053. Finally, it is of little consequence that Presiding Officials issue recommended decisions, rather than final decisions like ALJs, as the Supreme Court has previously found that "special trial judges" who prepared proposed findings and an opinion subject to a Tax Court Judge's adoption were nevertheless "Officers" for purposes of Article II. *See Freytag v. Comm'r*, 501 U.S. 868, 873 (1991). In light of this constitutional issue, Kiantone requests that PHMSA re-consider its use of Presiding Officials that have not been properly appointed pursuant to Article II to adjudicate matters such as this enforcement matter here.

[110] 49 C.F.R. §§ 190.213, 190.243.

[111] *See* 49 U.S.C. § 60119; 49 C.F.R. § 190.243(g), (h); *see also* 5 U.S.C. § 706 (permitting courts to set aside agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or "unsupported by substantial evidence"); *cf.* Gary Lawson, *The Rise and Rise of the Administrative State*, 107 Harv. L. Rev. 1231, 1247 (1994) (noting that the "deferential review" afforded agencies "arguably fails to satisfy Article III").

actions before administrative tribunals rather than Article III courts.[112] But this endorsement assumes that the administrative adjudicative process will operate with efficiency and, more importantly, fairness to all parties involved, especially those facing significant liabilities; PHMSA's in-house review regime, as described above, does not accord with that premise.[113]

B. Due Process and Equal Protection

The fundamental structural flaw that works to deprive an operator of its constitutional jury right is compounded by a PHMSA adjudicatory process that conflicts with due-process and equal-protection values central to the Constitution. For example, PHMSA alone possesses the discretion to choose which cases will benefit from jury trials in Article III courts and which are shunted to in-house Agency proceedings. Yet the Agency has no apparent procedures or regulations, at least not any made available to the public, governing *how* this decision is made, as its regulations simply cite the discretion it enjoys to make that threshold decision.[114] This flouts basic equal-protection principles, which require the government to have a rational basis for ensuring that parties that "are similarly situated for all relevant purposes" are similarly treated.[115]

In truth, there is *no* intelligible principle to guide PHMSA's decision in choosing whether to bring an enforcement action in an Article III court or within the Agency. While Congress may possess the power to provide agencies discretion in how to pursue enforcement actions,[116] it can only do so if that delegation is accompanied by an "intelligible principle by which to exercise that power."[117] Here, PHMSA cannot gainsay that its governing statute, which simply states that PHMSA "may request the Attorney General to bring a civil action . . . to collect a civil penalty,"[118] restrains its discretion in any meaningful way. "Intelligible principle" necessarily requires *some*

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[112] 285 U.S. 22.

[113] *See Lorenzo v. SEC*, 872 F.3d 578, 602 (D.C. Cir. 2017) (Kavanaugh, J., dissenting) (The "agency-centric process is in some tension with Article III of the Constitution, the Due Process Clause of the Fifth Amendment, and the Seventh Amendment right to a jury trial in civil cases." (citation omitted)); *see also United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1993 (2021) (Gorsuch, J., concurring in part, dissenting in part) ("Any suggestion that the neutrality and independence the framers guaranteed for courts could be replicated within the Executive Branch was never more than wishful thinking.").

[114] 49 C.F.R. § 190.235 ("[T]he Administrator, or the person to whom the authority has been delegated, *may* request the Attorney General to bring an action in the appropriate U.S. District Court for such relief as is necessary or appropriate, ..." (emphasis added)). PHMSA does not even give cursory acknowledgement that some unspecified decision-relevant factors may in fact exist, as with the U.S. Securities and Exchange Commission. *See* SEC, *How Investigations Work* (last updated Jan. 27, 2017), https://tinyurl.com/2ztnajez ("Whether the Commission decides to bring a case in federal court or within the SEC before an administrative law judge may depend upon various factors.").

[115] *See Williams v. Vermont*, 472 U.S. 14, 23 (1985); *Schweiker v. Wilson*, 450 U.S. 221, 235 (1981) (A classificatory scheme must "rationally advance[] a reasonable and *identifiable* governmental objective." (emphasis added)).

[116] *See Atlas Roofing*, 430 U.S. at 455; *see also Crowell*, 285 at 50 (1932) (observing that "the mode of determining" which cases are assigned to administrative tribunals "is completely within congressional control" (quoting *Ex parte Bakelite Corp.*, 279 U.S. 438, 451 (1929))).

[117] *Jarkesy*, 34 F.4th at 462; *cf. Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 472–73 (2001).

[118] 49 U.S.C. § 60122(c)(1); *see also id.* § 60120(a)(1) ("At the request of the Secretary of Transportation, the Attorney General may bring a civil action in an appropriate district court of the United States . . . .").

standard, and the absence of one that guides what matters are handled before the Agency and what are put before an Article III court raises grave constitutional concerns.[119]

Moreover, PHMSA's adjudicative process within a proceeding poses grave due-process concerns. When PHMSA hales an operator before the Agency, its procedures (or, quite often, lack thereof) inflict constitutional harms. The Fifth Amendment Due Process Clause requires that an adjudication not only be void of actual bias, but just as importantly, it must also "satisfy the appearance of justice."[120] "[A] fair trial in a fair tribunal is a basic requirement of due process."[121] Yet, at PHMSA, the playing field is tilted in its favor from the outset. PHMSA serves as investigator, prosecutor, judge, and jury. Agency staff investigate potential violations,[122] and commence proceedings by issuing notices of "probable" violation—implying the operator's guilt even before proceedings have begun.[123] PHMSA officials adjudicate the NOPV in an "adversarial" proceeding between PHMSA prosecutors and the operator.[124] PHMSA then circles back to act as final judge of whether the operator violated the Agency's regulations.[125]

Administrative proceedings also allow PHMSA to shift the law in its favor for the next go-round. By passing regulations under the auspices of broad congressional mandates,[126] and subsequently making decisions regarding violations of those regulations internally—again, with limited procedural protections afforded operators—PHMSA can seek to use *Chevron* deference to uphold its decisions and vindicate its interpretations of its governing statutes. In doing so, PHMSA expands its variety of roles to include legislator and appellate judge. Such administrative fiat further loads the dice against operators.

PHMSA's enforcement regime thus allows it to usurp substantial power—investigating, adjudicating, and otherwise operating in unconstitutional ways. Yet, most parties haled before the Agency have no meaningful prospect of judicial review. Faced with the threat of serious sanctions and odds loaded in PHMSA's favor, few parties persevere through administrative proceedings in hope of vindicating their rights in court in the distant future. The few that do often end up back in front of the same agency, facing further unconstitutional proceedings. Such a reality cannot be reconciled with both constitutionally mandated separation of powers or the due process protections mandated by the Constitution.

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[119] *Cf. Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (plurality opinion) (Kagan, J.) (reasoning that "we would face a nondelegation question" if the statutory provision had "grant[ed] the Attorney General plenary power to determine SORNA's applicability to pre-Act offenders—to require them to register, or not, as she sees fit, and to change her policy for any reason and at any time").

[120] *See In re Murchison*, 349 U.S. 133, 136 (1955) (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)).

[121] *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009) (citation omitted).

[122] 49 C.F.R. § 190.203.

[123] *Id.* § 190.207.

[124] *Id.* §§ 190.211, 190.212.

[125] *Id.* § 190.213.

[126] *See, e.g.*, 49 U.S.C. §§ 60102, 60108, 60109.

VIII. Conclusion and Request for Relief

For all the reasons identified above, and in consideration of other matters as justice may require, Kiantone respectfully requests that the Presiding Official dismiss NOPV Items 1 through 3. In the event violations are found and penalties levied against Kiantone, Kiantone requests that such penalties be substantially reduced from the levels proposed by PHMSA for the reasons stated above. In addition, Kiantone requests that PHMSA dismiss or withdraw Items 4 through 6, or alternatively provide clearer and more justified explanations than are contained in the NOPV, so that Kiantone may properly and effectively adjust its conduct going forward.

Respectfully submitted,

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Date: April 10, 2023

Pre-Hearing Brief Exhibit List

In accordance with 49 C.F.R. §§ 190.208(e), 190.343, Kiantone hereby notifies PHMSA of its confidential treatment of certain exhibits in this Exhibit List. Any exhibits marked as "Contains Confidential Commercial Information, Critical Energy Infrastructure Information, and Sensitive Security Information" contain confidential materials, including, but not limited to, those regarding proprietary information and procedures, sensitive internal investigations, emergency response procedures and measures, facility schematics, trade secrets, commercial practices, and privileged communications. None of these marked exhibits should be distributed to the public.

Exhibit No.	Document
1	Recorded Hourly Rainfall at Cobham Park Tank Farm, July 7, 2021 through July 9, 2021
2	National Weather Service Climatological Data for Warren, Pennsylvania, for July 2021 (retrieved April 4, 2023)
3	Tank 651 Tank Level Gauge Readings
4	Containment Area Drainage Log
5	SPCC Plan, Warren Emergency Containment (WEC): Cobham Park Tank Farm (last revised July 27, 2022)
6	Kiantone National Pollutant Discharge Elimination System Permit No. PA0005304 (May 24, 2011)
7	Cobham Park Tank Farm: Site Map/Site Drainage Map
8	O&M Procedure 11.6.3 – Activities During Receipt of Crude Oil at Tank Farm (last revised Mar. 7, 2022)
9	CRM Procedure 2.3.4 – Unplanned Communications Failure – Tank Farm (last revised Dec. 14, 2018)
10	Notice of Amendment, United Refining Co., CPF 1-2020-5008M (Apr. 30, 2020)
11	Warning Letter, United Refining Co., CPF 1-2020-5009W (Apr. 30, 2020)
12	CRM Procedure 2.3.4 – Unplanned Communications Failure – Tank Farm (last revised Dec. 16, 2021)
13	Excerpt from Overfill Protection for Storage Tanks in Petroleum Facilities, API Recommended Practice 2350 (3d ed. 2005)
14	O&M Procedure 5.7.10 – Tank Farm Dike Drain Operations (last revised Mar. 7, 2022)
15	Kiantone Calculation for Approximate Time that Tank Started to Overflow
16	FRAC Tank Volumes Recovered from Tank Farm
17	O&M Procedure 18.1 – Abnormal Operations (last revised Mar. 7, 2022)
18	Form #18.1.1, Documentation of Abnormal Operation (June 30, 2021, and July 1, 2021)
19	Form #1.5.2, O&M Procedure Request for Revision (June 30, 2021)
20	Asset Performance Group, 442-TK652 Overfill Event: Final Investigation Report (Aug. 27, 2021)
21	PHMSA Proposed Civil Penalty Worksheet, CPF No. 1-2022-050-NOPV (July 22, 2022)

22	September 2019 Email Exchange Between Kiantone and PHMSA Regarding the Tank 648 Fire (Sep. 7, 2019, to Sep. 30, 2019)