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November 21, 2022

By Electronic Mail

Robert Burrough
Director, Eastern Region, Office of Pipeline Safety
Pipeline and Hazardous Materials Safety Administration
840 Bear Tavern Road, Suite 300
West Trenton, NJ 08628

**Re: Kiantone Pipeline Corporation
Notice of Probable Violation and Proposed Civil Penalty
CPF 1-2022-050-NOPV
Request for Settlement Conference and Hearing**

Dear Mr. Burrough:

Kiantone Pipeline Corporation (“Kiantone”) acknowledges receipt of the Pipeline and Hazardous Materials Safety Administration’s (“PHMSA”) Notice of Probable Violation (“NOPV”) and Proposed Civil Penalty which was dated October 6, 2022 and overnighted to Kiantone on October 7.

As you know, PHMSA investigated and inspected Kiantone’s facilities and records following the July 8, 2021 event and issued the above referenced NOPV and Proposed Civil Penalty to Kiantone on October 6, 2022. The NOPV alleges six (6) separate violations of the Part 195 regulations under 49 C.F.R., and includes a proposed total civil penalty of \$675,402 for Items 1, 2, and 3, and warnings for Items 4, 5, and 6.

With this letter and pursuant to the Pipeline Safety Act, 49 U.S.C. § 60117(b)(1)(B), Kiantone respectfully requests the opportunity to convene an informal settlement meeting with PHMSA to discuss the issues of fact and law raised by the NOPV, as well as the proposed civil penalty of \$675,402.

In the event that the parties are unable to resolve the issues, and in order to preserve Kiantone’s rights, Kiantone is timely filing the attached request for a hearing and statement of issues for all items in the NOPV, including the associated proposed civil penalty pursuant to 49 C.F.R. §§ 190.208 and 190.211. Kiantone respectfully requests that PHMSA refrain from scheduling a hearing in order to provide the parties with sufficient time to attempt to resolve these issues.

Thank you for your consideration of this request for an informal settlement meeting and request for hearing. If you have any questions, please do not hesitate to contact me.

Sincerely,

A handwritten signature in blue ink that reads "George C. Hopkins". The signature is written in a cursive style and is positioned above a light blue rectangular stamp.

Vinson & Elkins, LLP
George C. Hopkins
2200 Pennsylvania Ave. NW
Washington DC 20037
Counsel for Kiantone Pipeline Corporation

**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
)	Notice of Probable Violation
Respondent.)	
)	

Request for Hearing and Response to NOPV

I. Introduction and Request for Hearing

Kiantone Pipeline Corporation (“Kiantone”) hereby responds to the Notice of Probable Violation (NOPV) and Proposed Civil Penalty issued by the Pipeline and Hazardous Materials Safety Administration (PHMSA) relative to the Pipeline Safety Regulations, Title 49, Code of Federal Regulations (“C.F.R.”). Kiantone hereby requests a hearing pursuant to 49 C.F.R. § 190.208.

II. Response to NOPV

Response to NOPV No. 1

Kiantone disputes alleged violation number 1. The Notice alleges Kiantone failed to follow its Operations, Maintenance & Emergency Response Procedures Manual (“O&M Manual”) Procedure 11.6.3 – Activities During Receipt of Crude Oil at Tank Farm. During normal operations, Kiantone follows Procedure 11.6.3. PHMSA’s NOPV references this section of Kiantone’s O&M Manual incorrectly, however, because during an unplanned communications failure such as the power outage that occurred on July 8, 2021, Kiantone follows Control Room Management (“CRM”) Procedure 2.3.4 – Unplanned Communications Failure-Tank Farm. This emergency procedure complies with the requirements of API RP 2350, section 4.6.1 because it provides clearly written procedures for handling emergencies. Under CRM 2.3.4, as it was then written, if the active tank loses power, loses communications, or loses radar/laser (all three of which occurred during the power outage on July 8), it called for the following:

1. Facility must be fully attended (i.e. must remain on premises)
2. Attendance at tank during first and last hour of receipt
3. Obtain readings from tank gauge each hour during receipt

Kiantone did follow CRM 2.3.4, which at that time, only allowed for taking readings at the active tank, which to Kiantone's knowledge, was Tank 651. Kiantone did follow its procedures as written as the attached chart shows hourly tank level readings. Later in July 2021, however, Kiantone amended its procedures in O&M 11.6.3 and CRM 2.3.4 to require the taking of readings at all tanks within a manifold to detect any similar events in the future.

For the reasons more fully set forth above, Kiantone requests that PHMSA either withdraw Violation number 1, or issue a warning letter and not seek a penalty.

Response to NOPV No. 2

Kiantone disputes alleged violation number 2 because it alleges a series of factual claims that are incorrect. First, it misstates the Kiantone plan as requiring the "Pump House Operator" to be present at the Tank Farm Facility "while any drain dike is manually open." In fact, Kiantone's O&M Procedure 5.7.10 states that "KPC/URC personnel must be present at the Tank Farm Facility" while this is happening. It is a responsibility of the Pump House Operator to ensure this requirement is met but the procedure plainly does not require the Pump House Operator in particular to be present. What is more, Kiantone actually had three personnel present at the Tank Farm Facility while the drain dike was open. These personnel included, at various times, the Pump House Operator, the incoming and outgoing Shift Supervisors, and the Maintenance Laborer assigned to take the tank readings.

Second, the NOPV alleges that Kiantone failed to periodically monitor the discharge from the dike. Again, this is inaccurate. Kiantone employees were present at the Tank Farm Facility and were monitoring the draining. The term "periodic" is not defined and the NOPV notably fails to state what frequency these monitoring events should have followed. This claim is indeed surprising as Kiantone detected the fact that the materials exiting the dike area included petroleum within less than 20 minutes of when the Tank 652 overflow began according to our calculations.

The NOPV also makes a counterfactual claim that Kiantone "failed to close the dike drain valve once draining was complete." Even when Kiantone discovered that there were petroleum liquids in these materials at 12:55 a.m., there was still rainwater draining. This claim likewise lacks any factual basis.

Finally, it is not accurate to describe the draining from the tank dikes into the firewater retention pond as a "discharge." In fact, the firewater retention pond is part of the facility's secondary containment system. All of this material was recaptured by Kiantone and there were no impacts on the environment. In short, despite the emergency events triggered by the unprecedented loss of power, Kiantone's secondary containment system prevented the accidentally discharged materials from escaping into the environment.

For the reasons more fully set forth above, Kiantone requests that PHMSA either withdraw Violation number 2, or issue a warning letter and not seek a penalty.

Response to NOPV No. 3

Kiantone disputes alleged violation number 3. When the events of July 8 occurred, a total of four business days had elapsed since the events of June 30, 2021. During that time, Kiantone in fact had commenced a proper review of the events in question and was in the process of developing a comprehensive response. There is no basis in the regulations or in Kiantone's procedures to suggest that four business days was a deadline for completing this review.

PHMSA's decision to assert a claim of a violation consisting of failure to repair a defect under 49 C.F.R. § 195.402(a) is quite telling. The federal pipeline safety regulations specifically outline how an operator must respond to non-integrity related adverse conditions in 49 C.F.R. § 195.401(b)(1), which provides, in pertinent part, as follows:

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.

49 C.F.R. § 195.401(b)(1). The operative concept in this regulation is conveniently avoided by PHMSA in citing Section 402(a): what is a "reasonable time" to repair such a condition? PHMSA plainly chose to avoid alleging a violation under Section 195.401(b)(1), which specifically relates to failing to make timely repairs that are non-integrity related, because it knew that the "reasonable time" requirement would be an obstacle to prevailing on that claim.

A resolution to the issues encountered on June 30 required more than four business days to resolve. Kiantone had to first understand what caused the issue of valves opening after a power shutdown failure. That effort alone was quite substantial. As PHMSA certainly appreciates, Kiantone needed to follow a rigorous engineering process to simulate an event that led to an unexpected condition with its equipment. The steps included 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, and ensuring adequate staffing. Next, Kiantone had to troubleshoot the failure. Finally, Kiantone had to go through the process of updating its procedures to address that issue should it ever arise again. Kiantone had identified appropriate changes to make, began to pursue them, and documented those efforts. But it is entirely unreasonable to assert that Kiantone should have corrected such an adverse condition by completing that entire review process within four business days.

For the reasons more fully set forth above, Kiantone requests that PHMSA either withdraw Violation number 3, or issue a warning letter and not seek a penalty.

Response to NOPV No. 4

Kiantone disputes alleged violation number 4. This violation asserts that Kiantone failed to correctly fill out its form for the events of June 30, 2021, because it did not “document the unintentional valves opening in its ‘Description of Abnormal Operation’ portion of the relevant form, “nor did Kiantone generate a different” form “to describe that occurrence.” First, PHMSA cannot assert a violation on the basis that information should have been in one part of a form versus another. Second, nothing in the Abnormal Operations Procedures requires the operator to fill out separate forms for the same incident, nor would that be efficient where the two events were so closely related.

On page 2 of Form 18.1.1, in the “Follow-up Actions taken” section, there is a precise summary of the key events. 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.” 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. Kiantone submits that a form containing all of the material information about an event cannot be the basis of a violation 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 only four business days passed between the events of June 30 and July 8. Kiantone submits that it had not had the reasonable time required to implement the changes that it had identified.

Additionally, PHMSA’s assertion that Kiantone should have documented the opening of the valves on a separate form 18.1.1 is misplaced. O&M Procedure 18.1 – Abnormal Operations clearly states, “All abnormal operations should be documented on Form 18.1.1.” Nothing in the instructions to Form 18.1.1 indicates 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.

It is arbitrary and capricious for PHMSA to seek to assess a violation against Kiantone on the sole basis that certain information called for by the report should have been provided in a different section of a document, or in a separate and duplicative document. This form contained the relevant information, which was accessible to all who needed the information.

For the reasons more fully set forth above, Kiantone requests that PHMSA withdraw Violation number 4.

Response to NOPV No. 5

Kiantone disputes alleged violation number 5. The Notice alleges that Kiantone violated 49 C.F.R. § 195.52(a)(2) by failing to report to the National Response Center (“NRC”) a “failure” that resulted in a tank fire while cleaning Tank 648 on September 15, 2018. But the requirement to report to the NRC only applies “following discovery of a *release* of [] hazardous liquid or carbon dioxide.” In this instance, there was no release.

There was not a release of any hazardous liquid associated with the Tank 648 fire. Rather, the tank was out of service for cleaning, and was virtually empty. A contractor was cleaning residue off the tank floor when the fire started. Because no release of any hazardous liquid or carbon dioxide occurred during or after the fire, § 195.52(a) does not apply, and therefore Kiantone had no obligation to report the September 2018 tank fire to the NRC. Accordingly, Item 5 and its accompanying warning should be withdrawn.

Indeed, PHMSA is well aware of these facts as it previously wrote to Kiantone on September 30, 2019, requesting that it prepare an “accident report” for this event. In response, Kiantone replied later that same day explaining that the notice requirement in § 195.52 does not apply under the plain text of the regulation because there was no release of hazardous substances. PHMSA never responded to that email since receiving it over three years ago. Nor did PHMSA issue a notice of probable violation (until now) after thoroughly exploring this issue in its July 2019 audit.

For the reasons more fully set forth above, Kiantone requests that PHMSA withdraw Violation number 5.

Response to NOPV No. 6

Similarly, Kiantone disputes alleged violation number 6. The Notice alleges that Kiantone violated 49 C.F.R. § 195.54(a) by failing to file an accident report for the same tank fire that occurred while cleaning Tank 648 on September 15, 2018. But the requirement to file an accident report only applies to “accident[s]” under § 195.50. Under § 195.50(a), “An accident report is required for each failure in a pipeline system . . . in which there is a *release* of the hazardous liquid or carbon dioxide transported resulting in explosion or fire not intentionally set by the operator.” The tank fire did not involve a release.

As set forth above, PHMSA has been aware for three years that there was not a release of any hazardous liquid associated with the Tank 648 fire. Rather, the tank was out of service for cleaning, and was virtually empty. A contractor was cleaning residue off the tank floor when the fire started. Because no release of any hazardous liquid or carbon dioxide occurred, a reportable accident under § 195.50 did not occur, and therefore Kiantone had no obligation under § 195.54 to file an accident report for the September 2018 tank fire. Accordingly, Item 6 and its accompanying warning should be withdrawn.

For the reasons more fully set forth above, Kiantone requests that PHMSA withdraw Violation number 6.

Objections to Penalty Amount

Kiantone objects to the proposed civil penalties for Items 1, 2, and 3. Quite simply, Kiantone fails to understand how a release of only 2,672 barrels of crude oil, which did not escape the secondary containment system, and had no serious impacts on the surrounding environment or community, could result in a proposed civil penalty that meets the statutory limits for each violation—amounting to \$675,402. Kiantone objects to the proposed penalties as inconsistent with the assessment considerations in 49 C.F.R. § 190.225.

First, Kiantone believes that PHMSA should withdraw all of the alleged violations, along with the accompanying penalties and warnings. For the reasons set forth above, Kiantone believes that the alleged violations are predicated on factual inaccuracies. Should PHMSA continue to pursue these alleged violations, however, Kiantone objects that the penalties should be greatly reduced to reflect the true circumstances and lack of environmental impacts present in this case.

With respect to Item 1, Kiantone has explained how it followed its appropriate procedures. Those procedures have since been updated to allow for the taking of readings at all tanks within an active manifold. To the extent Kiantone's procedures might have been deficient in any way, PHMSA did not allege such a violation. Rather, PHMSA alleged that Kiantone failed to follow its O&M procedures as written. That is incorrect. Since Kiantone followed its appropriate procedures, it cannot be said that the alleged violation was a causal factor in a reportable incident, and thus the gravity of the violation should be significantly reduced.

Regarding Item 2, Kiantone has explained how operations personnel were present at the Tank Farm to periodically monitor the dike draining, and how the release did not escape the facility. With no significant external impacts, PHMSA's proposed civil penalty of \$225,134 for Item 2 is out of proportion to the alleged violation.

With respect to Item 3, Kiantone has explained how it was indeed following its O&M Procedure to document and correct an adverse correction that occurred only four business days before the July 8 incident. PHMSA's allegation that Kiantone failed to comply with its abnormal operations procedures by failing to conduct such a review in only four business days is unjustified. Given that it was impossible to perform such a review in that time frame, it cannot be true that the alleged violation was a causal factor in the reportable incident, under the gravity consideration.

Statement of Issues

1. Is PHMSA's penalty assessment arbitrary and capricious where it fails to consider the emergency circumstances confronting the company as a result of an unprecedented loss of power?
2. Can PHMSA use a general requirement of its regulations under 49 C.F.R. § 195.402(a) regarding implementing an O&M manual that requires repairs of conditions to avoid

- providing Operator the reasonable time to repair non-integrity problems that 49 C.F.R. § 195.401(b)(1) provide?
3. Does the use of a form prescribed by Operator's procedures violate these procedures because factually accurate information is set out in a different part of the form than where PHMSA thinks it should be?
 4. Can an Operator be found to have violated notification and report preparation requirements applicable to a release of hazardous materials in connection with an event that did not involve a release of hazardous materials?
 5. Can PHMSA impose violations on an Operator for violating its O&M procedures where PHMSA ignores the precise language of these procedures?
 6. Can PHMSA increase penalties on the grounds that the release has impacted the environment where the release of petroleum materials remained within the facility's containment system and was completely recovered?
 7. Is it arbitrary and capricious for PHMSA to impose penalties on an Operator that far exceed any historic penalties it has assessed or collected for larger spills of petroleum products that impacted off-site areas, harmed the environment, and damaged property?
 8. Are four (4) business days sufficient for an Operator to conduct a proper review of an abnormal operation to determine and correct all the potential deficiencies in procedures, operational equipment, and safety equipment?
 9. Can PHMSA seek to impose a penalty of this magnitude without affording the Operator a right to a jury trial?
 10. Does PHMSA's enforcement scheme violate an Operator's Seventh Amendment right to a jury trial where it allows the Secretary of Transportation to decide whether or not to bring an enforcement action and seek civil penalties within the agency or in federal court before a jury?
 11. Is PHMSA's enforcement scheme unconstitutional because the statutes provide the Secretary of Transportation unfettered discretion—no intelligible principle—to decide whether to bring enforcement actions against Operators within the agency or in district court?
 12. Is PHMSA's enforcement scheme constitutional where it allows PHMSA to pursue claims for massive penalties without affording to defendant a right to jury trial?

Kiantone intends to be represented by counsel at the hearing.

Sincerely,

A handwritten signature in blue ink that reads "George C. Hopkins". The signature is written in a cursive style with a clear, legible font.

Vinson & Elkins, LLP
George C. Hopkins
2200 Pennsylvania Ave. NW
Washington DC 20037
Counsel for Kiantone Pipeline Corporation