



June 2, 2023

VIA ELECTRONIC MAIL

Mr. Robert Burrough
Director, PHMSA Eastern Region
840 Bear Tavern Road, Suite 300
West Trenton, NJ 08628

**RE: CPF 1-2023-013-NOPV
Operator's Response
Request for Settlement Conference and Hearing**

Dear Mr. Burrough:

This letter is in response to the Notice of Probable Violation, Proposed Civil Penalty, and Proposed Compliance Order ("NOPV") received by Kiantone Pipeline Corporation ("Kiantone") dated May 5, 2023. For reasons explained below, Kiantone contests the Proposed Civil Penalty Items (1, 5, 8, and 9), Warning Items 4 and 6, and the scope of the Proposed Compliance Order as to Item 9. Kiantone does not contest Warning Items 2 and 7 or the Proposed Compliance Order as to Item 3, but provides further context and information below.

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 \$167,600.

In the event that the parties are unable to resolve the issues, and in order to preserve Kiantone's rights, Kiantone requests a hearing pursuant to 49 C.F.R. §§ 190.208 and 190.211. Kiantone intends to be represented by counsel at the hearing.

The items listed in the NOPV will be listed below in bold with the response directly below each item.

- 1. 49 C.F.R. § 194.7 Operating restrictions and interim operating authorization.**
 - (a) ...
 - (b) An operator must operate its onshore pipeline facilities in accordance with the applicable response plan.**

During the inspection, there was some confusion regarding what records were being requested. As a result of that confusion, Kiantone personnel responsible for maintaining the records incorrectly concluded that they did not have the requested documents, when in fact Kiantone did have the required documents. All of the required inspections of spill response equipment were in fact performed, and Kiantone has the requested records for 2020 and 2021. These records are provided as Attachment A to this response. Kiantone apologizes for the confusion and for not producing these records during the inspection. Because Kiantone in fact performed the inspections, and documentation does in fact exist, Kiantone requests that PHMSA either withdraw Item 1 and its associated penalty, or issue a Warning and not seek a penalty.

4893-7449-0472v.3

2. **49 C.F.R. § 195.402 Procedural manual for operations, maintenance, and emergencies.**
(a) **General.** Each operator shall 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. This manual shall be reviewed at intervals not exceeding 15 months, but at least once each calendar year, and appropriate changes made as necessary to ensure that the manual is effective. This manual shall be prepared before initial operations of a pipeline system commence, and appropriate parts shall be kept at locations where operations and maintenance activities are conducted.

Kiantone acknowledges this Warning Item and has re-enforced the requirement for all pipeline managers to attend all emergency response training drills.

3. **49 C.F.R. § 195.402 Procedural manual for operations, maintenance, and emergencies.**
(a) **General.** Each operator shall 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. This manual shall be reviewed at intervals not exceeding 15 months, but at least once each calendar year, and appropriate changes made as necessary to ensure that the manual is effective. This manual shall be prepared before initial operations of a pipeline system commence, and appropriate parts shall be kept at locations where operations and maintenance activities are conducted.

Kiantone disagrees with PHMSA's statement in the NOPV that "[t]he BOT CP procedure did not specify what form is to be utilized." The referenced procedure does in fact specify what form is to be utilized to record the required survey information and that form is included as an attachment to the procedure. Nonetheless, Kiantone does not contest Item 3 insofar as the specific forms that were provided to PHMSA contained some, but not all of the pertinent information. Since the inspection, Kiantone has developed a new procedure for conducting its breakout tank cathodic protection surveys and has also developed a new form for documenting this information. All locations now use this form, which captures all of the required information. The procedure and form are included in Attachment B to this response and they meet the requirements in Item A of the Proposed Compliance Order. Accordingly, Kiantone believes that it has satisfied the Proposed Compliance Order as to Item 3.

4. **49 C.F.R. § 195.402 Procedural manual for operations, maintenance, and emergencies.**
(a) **General.** Each operator shall 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. This manual shall be reviewed at intervals not exceeding 15 months, but at least once each calendar year, and appropriate changes made as necessary to ensure that the manual is effective. This manual shall be prepared before initial operations of a pipeline system commence, and appropriate parts shall be kept at locations where operations and maintenance activities are conducted.

PHMSA's allegation that Kiantone failed to conduct annual reviews of its Operations, Maintenance, & Emergency Response Procedures Manual ("OME") ignores the regulatory requirements and contradicts the documentation that Kiantone provided during the inspection. Kiantone provided documentation that clearly shows a complete record of Revision to the O&M Procedures Manual which corresponds to changes in the manual that occurred once each calendar year, at intervals not exceeding 15 months. Kiantone performs the OME review annually.

Kiantone provided Section 1.5 in the OME (O&M Procedures Manual Review Process & Frequency) and Procedure 1.5.1 (Annual Review of O&M Procedures Manual), which outline the review process, frequency, responsible person, update process, documentation process, distribution to personnel, and notification/training for revisions. Kiantone also provided Appendix G (Revision Record), which clearly shows the version, review and revision date, and a list of every section, procedure, form, and appendix that was revised. Per the procedure that was provided, the dates in the revision log indicate the dates of the required review and revisions. As was explained to PHMSA during the inspection, the O&M manual is reviewed annually (every 12 to 15 months) as required. So it is incorrect for PHMSA to allege that Kiantone utterly “failed to conduct” such a review at appropriate intervals. Indeed, the OME shows revisions, which demonstrates that the review plainly occurred.

Rather, PHMSA seems to take issue with the manner in which Kiantone’s records portray the revisions: “However, the revision logs failed to indicate that an annual review was conducted, who conducted the annual review, the dates of the annual review, who signed off/approved the annual review and why changes were made.” NOPV at 4. But neither the applicable procedures nor PHMSA’s regulation require such particulars. The regulation only requires that the operator review the manual at intervals not exceeding 15 months, but at least once each calendar year, and make appropriate changes as necessary to ensure that the manual is effective. 49 C.F.R. § 195.402(a). The regulation does not require the signature of the person who approved the review, nor an explanation of why changes were made. These additional requirements that PHMSA is trying to read into the procedures cannot be the basis for enforcement. The regulation simply requires that Kiantone conduct the review and make changes as necessary to ensure that the manual is effective. Kiantone has done that in accordance with its procedures and provided records demonstrating its compliance to PHMSA. Therefore, Kiantone requests that PHMSA withdraw this Warning Item.

5. 49 C.F.R. § 195.403 Emergency Response Training.

(a) ...

(c) Each operator shall require and verify that its supervisors maintain a thorough knowledge of that portion of the emergency response procedures established under 195.402 for which they are responsible to ensure compliance.

Kiantone utilizes its Operator Qualification program to verify that its supervisors maintain a thorough knowledge of the portions of the emergency response procedures for which they are responsible for ensuring compliance. Specifically, pipeline supervisors are required to maintain qualifications for OQ task 638OP “Control Room: Emergency Response”. In order to pass the exam and qualify for this task, each supervisor must demonstrate knowledge of company-approved emergency response procedures, notification requirements, and contact numbers, and they must also demonstrate the ability to utilize the company supplied emergency response manual. Supervisors are required to re-qualify for this task at three-year intervals. Records for these qualifications are maintained within the Veriforce OQ program database, to which access is limited to only authorized personnel. The OQ records for the pipeline supervisors to satisfy this requirement are included as Attachment C to this response. Kiantone therefore does meet the requirement, and the alleged violation and civil penalty for this Item should be reduced to a Warning Item only since the records were not readily available during the inspection.

6. 49 C.F.R. § 195.406 Maximum operating pressure.

(a) Except for surge pressures and other variations from normal operations, no operator may operate a pipeline at a pressure that exceeds any of the following:

(1) The internal design pressure of the pipe determined in accordance with § 195.106. However, for steel pipe in pipelines being converted under § 195.5, if one or more

factors of the design formula (§ 195.106) are unknown, one of the following pressures is to be used as design pressure:

- (i) Eighty percent of the first test pressure that produces yield under section N5.0 of appendix N of ASME/ANSI B31.8 (incorporated by reference, see § 195.3), reduced by the appropriate factors in § 195.106 (a) and (e); or
 - (ii) If the pipe is 12 ¼ inch (324 mm) or less outside diameter and is not tested to yield under this paragraph, 200 p.s.i. (1379 kPa) gage.
- (2) The design pressure of any other component of the pipeline.
 - (3) Eighty percent of the test pressure for any part of the pipeline which has been pressure tested under subpart E of this part.
 - (4) Eighty percent of the factory test pressure or of the prototype test pressure for any individually installed component which is excepted from testing under § 195.305.
 - (5) For pipelines under § 195.302(b)(1) and (b)(2)(i) that have not been pressure tested under subpart E of this part, 80 percent of the test pressure or highest operating pressure to which the pipeline was subjected for 4 or more continuous hours that can be demonstrated by recording charts or logs made at the time the test or operations were conducted.

Kiantone has records to support the design pressure of all valves currently installed in the pipeline system, including the eleven mainline valves installed in 1971. These records include Engineering documents, as-built drawings, and the original hydrotest documents (provided during the inspection) for the pipeline which were used to support MOP determinations. The purchase order provided during the inspection states the rating of the valves purchased in 1971 and the hydrotest used the valve rating as the limiting factor in the hydrotest performed in 1971. The valve ratings and the test data are consistent.

It is unclear to Kiantone if PHMSA does not believe that the original mainline valves installed in 1971 are still present in the system, or if PHMSA is simply looking for additional supporting records that show what valves/ratings are in the system. Based on the regulation itself and the fact that design pressure data in fact exists, there is no factual basis for a Warning.

7. 49 C.F.R. § 195.410 Line Markers.

- (a) Except as provided in paragraph (b) of this section, each operator shall place and maintain line markers over each buried pipeline in accordance with the following:
 - (1) Markers must be located at each public road crossing, and in sufficient number along the remainder of each buried line so that its location is accurately known.

Contrary to PHMSA's assertion in the NOPV, Kiantone did have line markers at the public road crossing near mainline valve eight, but Kiantone acknowledges that some line markers within the ROW in the north and south directions from mainline valve eight had not yet been replaced at the time of the inspection. These markers had been knocked down/destroyed during the required ROW clearing/maintenance project. The markers in question have since been replaced.

8. 49 C.F.R. § 195.402 Procedural manual for operations, maintenance, and emergencies.

- (a) *General.* Each operator shall 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. This manual shall be reviewed at intervals not exceeding 15 months, but at least once each calendar year, and appropriate changes made as necessary to ensure that the manual is effective. This manual shall be prepared before initial operations of a pipeline

system commence, and appropriate parts shall be kept at locations where operations and maintenance activities are conducted.

During the inspection, Kiantone provided an informational document from the Flow Meter manufacturer (Emerson). First, PHMSA misreads this document. Second, this document shows that Kiantone followed its procedures regarding the calibration of flow meters.

In the NOPV, PHMSA incorrectly refers to this document as a calibration procedure, which it is not. Additionally, PHMSA selectively highlights specific language from this document while ignoring language that supports Kiantone's practices. For example, PHMSA cites to a 3-year calibration interval in a part of the manufacturer's document that references equipment with Smart Meter Verification. But the meters in question do not have Smart Meter Verification capability. And more importantly, that 3-year recommended interval is "[f]or customers that have not otherwise established a company policy, and have no industry guidelines." PHMSA ignores the more applicable language that provides Kiantone discretion as to calibration intervals.

The manufacturer's document states, "It has been our experience, and that of our customers, that when appropriate materials are selected Coriolis meters do not drift or lose their calibration during the life of the meter. – The question of how often any flow meter should be verified or calibrated...is something typically left to the discretion of the end user." Based on the manufacturer's written guidance and historical meter performance, Kiantone has determined that recalibration of these flow meters has been unnecessary (up to this point). That is a determination that Kiantone is allowed to make because OME 6.4 simply requires calibration "according to manufacturer's recommendations," and the manufacturer provides the end user discretion because the flow meters may "not . . . lose their calibration during the life of the meter."

The specific language from API RP 1130 that PHMSA references in the NOPV requires that each CPM must comply with API RP 1130, but when the word "should" is used in a standard, it denotes a recommendation or that which is advised but not required to conform to the standard. The word "shall" (denoting something that is mandatory) is only used once in the standard, in section 6.2.3, and does not pertain to a requirement. As a result, Kiantone is in compliance with the regulation, and this Item and its associated penalty should be dismissed.

9. 49 C.F.R. § 195.452 Pipeline integrity management in high consequence areas.

(a) ...

(l) **What records must an operator keep to demonstrate compliance?**

(1) **An operator must maintain, for the useful life of the pipeline, records that demonstrate compliance with the requirements of this subpart. At a minimum, an operator must maintain the following records for review during an inspection:**

195.452(i)(3) Leak Detection. An operator must have a means to detect leaks on its pipeline system. An operator must evaluate the capability of its leak detection means and modify, as necessary, to protect the high consequence area. An operator's evaluation must, at least, consider, the following factors – length and size of the pipeline, type of product carried, the pipeline's proximity to the high consequence area, the swiftness of the leak detection, location of nearest response personnel, leak history, and risk assessment results.

Kiantone disagrees with PHMSA's allegation in the NOPV that "Kiantone failed to produce any records . . . o[f] evaluation on the leak detection system." Kiantone did evaluate its leak detection system as part of its annual risk review process, and Kiantone has provided records demonstrating that review was performed. However, Kiantone acknowledges that two of the regulatory factors—"the swiftness of the leak detection, location of nearest response personnel"—were not specifically analyzed and documented as part of that review. Moving forward, Kiantone will

incorporate those factors into its leak detection evaluation and document that analysis. Accordingly, the proposed penalty for Item 9 should be reduced to reflect the fact that a leak detection evaluation incorporating most of the regulatory factors was performed. Further, Kiantone will produce documentation to satisfy Item B of the Proposed Compliance Order.

To explain, Kiantone annually updates its pipeline risk model to include any new risk data (i.e., ILI data, repair data, new HCA data, PMM's, CP, land use changes, leak history, etc.). Once the updated risk results are available, Kiantone holds an annual risk review meeting with all pertinent subject matter experts ("SMEs") to discuss the results and determine the locations that have the most significant risks of failure. The group also discusses ways to improve the pipeline system and mitigate risks, completed and/or new PMMs, pipeline assessment schedule, and overall program effectiveness. Included in this discussion is an evaluation of the leak detection system, which captures all of the factors called for by the regulation with the exception of "the swiftness of the leak detection" and "the location of nearest response personnel." For example, within the effectiveness metrics, Kiantone reviews "general release response," for which our specific indicator has been determined to be "percent of line miles with leak detection not monitored by KPC".

Kiantone is currently developing a plan to complete a leak detection evaluation that includes those two factors within the 90 days proposed by the compliance order. However, Kiantone believes that a reduction in the proposed civil penalty is warranted, considering most of the required leak detection evaluation criteria have been and are routinely analyzed, reviewed, discussed, and documented during the risk review process and SME meeting. Alternatively, Item 9 should be reduced to a Warning Item given Kiantone's good faith attempt to comply with the regulation.

STATEMENT OF ISSUES

1. Is PHMSA's proposed civil penalty excessive, arbitrary or capricious?
2. Is PHMSA's Proposed Compliance Order moot where the Operator has already taken appropriate compliance measures?
3. Can PHMSA maintain a violation for failure to produce records of an activity when the Operator provides those records to PHMSA?
4. Can PHMSA maintain a violation for failure to produce records of an activity when PHMSA did not request such records, or did not request such records clearly or properly?
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 impose violations on an Operator for violating its O&M procedures where PHMSA reads into those procedures requirements that are not in the procedures or PHMSA's regulations?
7. 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? Or because PHMSA believes that information which is not required by the regulations or the Operator's procedures to be in the form should be in the form?
8. Has PHMSA assessed Warning Items that are not supported by the facts, the regulations, or the Operator's procedures?
9. Do PHMSA's regulations prohibiting the contesting and adjudication of Warning Items violate an Operator's constitutional rights?
10. Does PHMSA's civil penalty worksheet violate the Administrative Procedure Act for failure to go through public notice and comment rulemaking?

11. Has PHMSA violated the Administrative Procedure Act by revising its civil penalty worksheet (in a way that will lead to higher proposed penalties) without going through public notice and comment rulemaking?
12. Is PHMSA's informal hearing process unconstitutional where the Presiding Official is not properly appointed pursuant to the Appointments Clause of the Constitution?
13. Is PHMSA's informal hearing process unconstitutional where the Presiding Official is not a properly appointed Administrative Law judge?
14. Can PHMSA seek to impose a penalty of this magnitude without affording the Operator a right to a jury trial?
15. Does PHMSA's enforcement scheme violate an Operator's Seventh Amendment right to a jury trial where PHMSA does not have to produce discovery to the Operator?
16. 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?
17. 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?

CONCLUSION

In sum, Items 1, 4, 5, 6, 8, and 9 should be dismissed, or at most treated as Warning Items. If any violations are found, Kiantone asserts that the penalties associated with Items 1, 5, 8, and 9 should be reduced. The updated cathodic protection procedure required to satisfy Item A of the Proposed Compliance Order is included as Attachment B to this response. Additionally, Kiantone will produce the records necessary to satisfy Item B of the Proposed Compliance Order within 90 days of receipt of the Final Order. Kiantone looks forward to an informal settlement meeting and has herein preserved its rights to a hearing in the event that the parties are unable to resolve the issues.

If you have any questions or comments, feel free to contact me directly at the above number.

Sincerely,

UNITED REFINING COMPANY



William J. Roy
Assistant Vice President, Environmental Compliance Officer

Attachments

cc. David Wortman, V.P. Supply & Transportation
George C. Hopkins, Partner, Vinson & Elkins LLP