

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

_____)	
In the Matter of)	
)	CPF No. 1-2024-003-NOPV
Kinder Morgan Liquid Terminals, LLC)	Notice of Probable Violation
)	
Respondent.)	
_____)	

Response to NOPV

I. Introduction

The Pipeline and Hazardous Materials Safety Administration (PHMSA or the Agency) issued a Notice of Probable Violation (NOPV), proposed civil penalty, and proposed compliance order (PCO) to Kinder Morgan Liquid Terminals, LLC (KMLT or the Company) on March 28, 2024. The NOPV alleged six (6) probable violations of the 49 C.F.R. Part 195 regulations. Of those six (6) allegations, three (3) were issued as warning items and three (3) were issued as probable violations which included a proposed civil penalty and one (1) of which included a PCO obligation. As provided by 49 C.F.R. § 190.208, KMLT's response to the allegations in the NOPV is due April 27, 2024. Therefore, this response is timely.

PHMSA issued the NOPV after a January 4, 2023 through April 6, 2023 investigation of KMLT's procedures and records from in regards to a pipeline failure that occurred at KMLT's Argo, Illinois facility on January 4, 2023. KMLT is committed to pipeline safety and integrity of its terminal facility. Toward this end, KMLT believes that certain allegations require clarification of the facts at issue, additional documentation, and the applicable law.

KMLT is, without admission and in the spirit of cooperation, electing not to contest two of the NOPV Items given the clarifications provided in this response. These Items are Warning Items 4 and 6.

To preserve its rights in the event the parties are unable to resolve this matter via an informal conference, however, KMLT is filing this response pursuant to 49 C.F.R. §§ 190.208 and 190.211 to request a hearing to address the factual and legal issues presented by the NOPV. Specifically, KMLT is contesting the remaining Warning Item (Warning Item 5), the three NOPV Items (NOPV Items 1, 2, and 3), the proposed civil penalties associated with NOPV Items 1, 2, and 3, and the associated PCO obligations with NOPV Items 1. In the event the parties proceed to a hearing, KMLT will be represented by in-house counsel as well as potentially outside counsel with Bracewell LLP.

Nevertheless, KMLT believes the remaining issues are capable of resolution without the need to proceed to a hearing and respectfully requests an informal settlement meeting with the Eastern Region. If the Eastern Region is amenable to an informal settlement conference, KMLT requests that the scheduling of a hearing be postponed to allow for settlement meetings.

II. Background

In relevant part, KMLT owns a complex terminal in Argo, Illinois. This facility is comprised of PHMSA jurisdictional and non-jurisdictional piping, tankage, and equipment. Given the mixed use and complexity of these facilities, different piping, tankage, and equipment may be subject to regulatory requirements imposed by PHMSA, the U.S. Environmental Protection Agency (EPA), the U.S. Coast Guard, and/or other agencies with jurisdiction, including related to emergency and facility response planning.

III. Uncontested NOPV and Warning Items

Without admission, KMLT is electing not to contest two of the NOPV Items given relevant clarifications outlined below. This includes the alleged NOPV warning items alleged under NOPV Items 4 and 6, which primarily consist of minor discrepancies with no impact on pipeline safety. After the inspection, KMLT completed actions, or actions are currently underway, to address these items as further detailed below.

A. NOPV Item 4 (Warning)

PHMSA Allegation

4. §199.105 Drug tests required.

(a) ...

(b) Post-accident testing

(1) ...

(2) If a test required by this section is not administered within the 32 hours following the accident, the operator must prepare and maintain its decision stating the reasons why the test was not promptly administered. If a test required by paragraph (b)(1) of this section is not administered within 32 hours following the accident, the operator must cease attempts to administer a drug test and must state in the record the reasons for not administering the test.

KMLT failed to prepare and maintain its decision stating the reasons why a post-accident drug test was not promptly administered in accordance with § 199 .105(b)(2).

Section V. of KMLT's Anti-Drug and Alcohol Misuse Prevention Plan, dated 01/01/23 (D&A), included provisions for KML T to decide not to perform post-accident drug testing if based on specific information demonstrating that employee performance played no role in the cause or severity of an accident. The D&A also required that these decisions supporting the determination be documented, and included an Appendix F form meant to capture this and other pertinent information about post-accident/incident drug and alcohol testing.

During the failure investigation, PHMSA requested from KMLT documentation stating why a post-accident drug test was not administered. KML T stated that this was a decision made by executive management and there are no records available. KML T did not provide any records to support why a drug test was not completed following the accident on January 4, 2023, pursuant to both§ 199.105(b)(2) and its D&A recordkeeping requirements.

Therefore, KML T failed to prepare and maintain its decision stating the reasons why the drug test was not promptly administered in accordance with § 199 .105(b)(2).

KMLT Response

Without admission, KMLT is not contesting NOPV Item 4. At the time of the incident, it was readily apparent a check valve utilized as a control measure failed and caused the release. KMLT Management determined the operators' actions were in no way a contributing factor and no post-accident drug test was performed or required. While a record was not available at the time of inspection, KMLT has completed the form documenting its decision, see Attachment 1.

B. NOPV Item 6 (Warning)

PHMSA Allegation

§ 199.225 Alcohol tests required.

(a) Post-accident.

(1) .. .

(2) .. .

(i) If a test required by this section is not administered within 2 hours following the accident, the operator shall prepare and maintain on file a record stating the reasons the test was not promptly administered. If a test required by paragraph (a) is not administered within 8 hours following the accident, the operator shall cease attempts to administer an alcohol test and shall state in the record the reasons for not administering the test.

KMLT failed to prepare and maintain its decision stating the reasons why a post-accident alcohol test was not promptly administered in accordance with § 199.225(a)(2)(i).

Section VI. of KML T's Anti-Drug and Alcohol Misuse Prevention Plan, dated 01/01/23 (D&A) included provisions for KMLT to decide not to perform post-accident alcohol testing if based on specific information demonstrating that employee performance played no role in the cause or severity of an accident. The D&A also required that these decisions supporting the determination be documented, and included an Appendix F form meant to capture this and other pertinent information about post-accident/incident drug and alcohol testing.

During the failure investigation, PHMSA requested from KML T documentation stating why a post-accident alcohol test was not administered. KMLT stated that this was a decision made by executive management and there are no records available. KML T did not provide any records to support why an alcohol test was not completed following the accident on January 4, 2023, pursuant to both § 199.225(a)(2)(i) and its D&A recordkeeping requirements.

Therefore, KML T failed to prepare and maintain its decision stating the reasons why a postaccident alcohol test was not promptly administered, in accordance with § 199.225(a)(2)(i).

KMLT Response

Without admission, KMLT is not contesting NOPV Item 6. At the time of the incident, it was readily apparent the check valve utilized as a control measure failed and caused the release. KMLT Management determined the operators' actions were in no way a contributing factor and no post-accident alcohol test was performed. While a record was not available at the time of inspection, KMLT has completed the form documenting its decision, see Attachment 1.

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IV. KMLT Response to Contested Items

KMLT is contesting Warning Item 5, NOPV Items 1, 2, and 3, the proposed civil penalties associated with NOPV Items 1, 2, and 3, as well as the PCO obligations associated with NOPV Item 1.

The Agency's own internal procedures and policies dictate that such issues should be addressed, if at all, in Warning Letters or Notices of Amendments (NOAs). As such, the Agency's allegations contradict its own Pipeline Safety Enforcement procedures by including minor data omissions or the failure to use a "proper" form which had no impact on pipeline safety or integrity as part of NOPV allegations. *PHMSA Pipeline Safety Enforcement Procedures, Sections 3.1.2, 3.1.3 (Jun. 29, 2017)* ("Warning Letter/Item is generally used for lower risk items;" "[a] Notice of Amendment is used to notify an operator that its plans or procedures...are 'inadequate'...").

PHMSA bears the burden of proof to establish all elements of a proposed violation in an enforcement proceeding. *See, e.g., In re ANR Pipeline Co, Final Order, CPF No. 3-2011-1011 (Dec. 31, 2012)*. If PHMSA "does not produce evidence supporting the allegation [which] outweighs the evidence and reasoning presented by Respondent in its defense," the allegation of violation must be withdrawn. *Id.* As set forth below and in the attached documentation, PHMSA has not met its burden in this NOPV to prove the allegations asserted in NOPV Items 1, 2, and 3 and these alleged violations should be withdrawn. In the event that these allegations are not withdrawn, KMLT requests that PHMSA significantly reduce the proposed civil penalty associated with NOPV Items 1, 2, and 3 and remove or modify the proposed compliance order requirements associated with NOPV Items 1.

A. NOPV Item 1

PHMSA Allegation

§ 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 insure 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.

KML T failed to follow its written procedures for conducting maintenance activities. Specifically, KMLT failed to follow its Hazardous Energy Control Program - T-O&M 152, dated 09/26/22 (Energy Procedure), regarding developing, documenting, and utilizing site-specific energy control procedures.

Section 6.2 of the Energy Procedure included requirements for KMLT to develop, document and utilize site-specific energy control procedures (lockout/tagout) for maintenance activities, and included a minimum list of the types of equipment required to have such procedures.

During the failure investigation, PHMSA asked KMLT if its list of equipment contained in the Energy Procedure included the filter vessel or sump pump involved in the accident on January 4, 2023. KMLT stated that the filter vessel would be included, that they are developing a site-specific procedure for this equipment, and that a procedure did not exist prior to the accident. Pumps are specifically listed in Section 6.2 as equipment for which site-specific energy control procedures at this terminal must be developed and documented.

Therefore, KMLT failed to follow its Energy Procedure regarding developing, documenting, and utilizing site-specific energy control procedures to include procedures covering the filter vessel, in accordance with § 195.402(a). shutdown tests for calendar years 2020 and 2021, in accordance with § 195.402(a).

KMLT Response

KMLT contests NOPV Item 1 and the associated proposed civil penalty of \$68,800. On the day of the release, Operations was performing a filter change on Jet Filter Vessel #3 (the vessel). The work process for this task requires the vessel to be first drained of product, and then locked out and tagged out following an approved Energy Control Procedure. The draining of the vessel must occur prior to applying the lockout/tagout; otherwise, the vessel would not be able to drain. The Operators had just completed draining the vessel prior to the release when they were called away for another task. At this point in the workflow, KMLT's procedure does not require an Energy Control Procedure to be in place. There literally was no work occurring on the drained tank. At this point, KMLT could have elected to abort the filter change and returned the tank into full service without ever requiring an Energy Control Procedure.

The next step in the work flow, before any work on filter could occur, would have been to apply the Lockout/Tagout per KMLT's Hazardous Energy Control Program T-O&M 152, dated 09/26/22. Under this program, the Written Energy Control Procedure can be developed simultaneously as the Lockout/Tagout Checklist. In fact, Terminal O&M Form No. 152-01 – Lockout/Tagout Checklist can be utilized as both the Energy Control Procedure and checklist, such that once the checklist is completed, it can be retained in local files and used as a site-specific procedure on future jobs. However, since the Operators were reassigned to another task prior to applying the Lockout/Tagout, a Written Energy Control Procedure was not implanted and did not need to be implemented. If the Lockout/Tagout had been applied, then the previous T-O&M Form No. 152.01 – Lockout/Tagout checklist, completed on 10/12/2021 (see Attachment 2), would have been utilized as the Energy Control Procedure. This alleged violation is not valid, since an Energy Control Procedure would have been developed prior to applying the Lockout/Tagout, or the previous Lockout/Tagout Checklist would have been utilized as an Energy Control Procedure. At the time of incident, no Energy Control Procedure was required.

Regarding the PCO associated with NOPV item 1, KMLT's procedure allows for the development of Energy Control Procedures simultaneously with the Lockout/Tagout Checklist. Further, the Lockout/Tagout Checklist can be utilized as both the Energy Control Procedure and Checklist, such that once the checklist is completed, it can be retained in local

files and used as a site-specific procedure on future jobs. For the filter change out on Jet Filer Vessel #3, KMLT possesses completed Terminal O&M Form NO 152-01 – Lockout/Tagout Checklist, completed on DATE, which can be utilized as an Energy Control Procedure. As such, there is no corrective action for KMLT to take regarding this PCO.

B. NOPV Item 2

PHMSA Allegation

§ 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 insure 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.

KML T failed to follow its written procedures for conducting maintenance activities. Specifically, KMLT failed to follow its T-O&M 103 - Safety Permits, dated 10/08/20 (Safety Procedure) regarding safe work permits.

Section 5.7 of the Safety Procedure included requirements for a general safe work permit for any tasks performed where a standard maintenance procedure or site-specific procedure does not exist.

During the failure investigation, PHMSA requested from KML T documentation related to safe work permits for the maintenance work being performed on the day of the accident, January 4, 2023. KMLT provided Work Order No. 34403, dated 01/05/23 (Work Order). KMLT stated that the only permit created was for the cleanup activities and that the original work did not require a permit, so therefore one was not created. KML T also confirmed that a site-specific procedure was not in place for the work performed on the filter vessel, in violation of the Section 5.7 requirement for a safe work permit when any task is performed "that does not have a Standard Maintenance Procedure (SMP) OR Site Specific Procedure (SSP)." KMLT failed to provide a work order or any safe work permits related to the work being done which led to the accident on January 4, 2023.

Therefore, KML T failed to follow its Safety Procedure to document a safe work permit for the filter vessel tasks performed, in accordance with § 195.402(a).

KMLT Response

KMLT contests NOPV Item 2 and the associated proposed civil penalty of \$68,800. KMLT did have a Standard Maintenance Procedure (SMP) that was being utilized to replace the filters on Jet Filter Vessel #3. The SMP is contained within Work Order No. 10122, dated 1/4/2023 issued for the filter change out. See Attachment 3. As noted, T-O&M 103 – Safety Permits does not require a safe work permit for tasks that has a SMP. Therefore, this allegation is unfounded.

It should be noted that there was an error in the SMP contained within Work Order NO 10122. Step 2 of the WO stated: “supervisor to L/O filter vessel”. Step 3 of SMP stated: “Drain the vessel using

the sump separator, if product is clean pump back to tank 55-8 if not use vac truck to remove dirty product, open 1” valve on top of vessel to let in air”. Step 2 and Step 3 are out of order; Step 3 was performed prior to Step 2. The vessel must be drained prior to applying the Lockout/Tagout. It would be impossible to drain the vessel with the Lockout/Tagout in place. This error was recognized by the Operators and the steps were physically performed in the correct order. The Operators had just completed draining the vessel when they were called to another task. The order of the steps has been corrected for future Work Orders. Notwithstanding this error, there was an applicable work order associated with the filter change out.

C. NOPV Item 3

PHMSA Allegation

§ 199.105 Drug tests required.

Each operator shall conduct the following drug tests for the presence of a prohibited drug:

(a) . . .

(b) Post-accident testing.

(1) As soon as possible but no later than 32 hours after an accident, an operator must drug test each surviving covered employee whose performance of a covered function either contributed to the accident or cannot be completely discounted as a contributing factor to the accident. An operator may decide not to test under this paragraph but such a decision must be based on specific information that the covered employee's performance had no role in the cause(s) or severity of the accident..

KML T failed to conduct post-accident drug tests on each employee, whose performance of a covered function either contributed to the accident or cannot be completely discounted as a contributing factor to the accident., Specifically, KML T failed to conduct drug testing of the three KML T Terminal Operators who were assigned to the filter element changeout task on the day of the accident, January 4, 2023.

During the failure investigation, PHMSA requested records related to post-accident drug testing and KML T stated that a drug test was not completed, and not required to be conducted. KML T stated it did not conduct post-accident drug test of the three involved Terminal Operators. Further, KML T did not provide any information demonstrating if and how it had decided that the three employees' performance was not a contributing factor, or could be completely discounted as a contributing factor, to the accident during the required testing timeframe.

Therefore, KML T failed to conduct post-accident drug tests on three employees for the presence of a prohibited drug as soon as possible but no later than 32 hours after an accident, in accordance with §199.105(b).

KMLT Response

KMLT contests NOPV Item 3 and the associated proposed civil penalty of \$39,800. At the time of the incident, it was readily apparent the check valve utilized as a control measure failed and caused the release. The Operators were not performing any work on the check valve and they did not cause the check valve to fail. The check valve was working as intended during the drain down activities and there was no indication the check valve would fail in the short time the Operators stepped away for another task. For this reason, KMLT Management determined the Operators' performance

played no role in the cause or severity of the accident and no post-accident drug test was performed. While a record was not available at the time of inspection, KMLT has completed the form documenting its decision, see Attachment 1. However, a delay in recordkeeping does not equate to a failure to conduct drug testing as alleged. The regulation expressly allows an Operator to decide not to test as occurred in this incident.

D. NOPV Item 5 (Warning)

PHMSA Allegation

§ 199.225 Alcohol tests required.

Each operator shall conduct the following types of alcohol tests for the presence of alcohol:

(a) Post-accident.

(1) As soon as practicable following an accident, each operator must test each surviving covered employee for alcohol if that employee's performance of a covered function either contributed to the accident or cannot be completely discounted as a contributing factor to the accident. The decision not to administer a test under this section must be based on specific information that the covered employee's performance had no role in the cause(s) or severity of the accident.

KML T failed to test, as soon as practicable following an accident, each surviving covered employee for alcohol if that employee's performance of a covered function either contributed to the accident or cannot be completely discounted as a contributing factor to the accident. Specifically, KMLT failed to test the three KMLT Terminal Operators, who were performing a covered function during the accident on January 4, 2023, for alcohol.

During the failure investigation, PHMSA requested records related to post-accident alcohol testing. KML T stated that an alcohol test was not performed, nor was it required to be conducted. However, KML T did not provide any specific information demonstrating if and how it had decided that the three employees' performance had no role in the cause or severity of the accident during the required testing timeframe.

Therefore, KML T failed to conduct post-accident alcohol tests on three employees for the presence of alcohol as soon as practicable following an accident, in accordance with § 199.225(a)(1).

KMLT Response

KMLT is contesting NOPV Item 5. At the time of the incident, it was readily apparent the check valve utilized as a control measure failed and caused the release. The operators were not performing any work on the check valve and they did not cause the check valve to fail. The check valve was working as intended during the drain down activities and there was no indication the check valve would fail in the short time the operators stepped away for another task. For this reason, KMLT Management determined the operators' performance played no role in the cause or severity of the accident and no post-accident alcohol test was performed. While a record was not available at the time of inspection, KMLT has completed the form documenting its decision, see Attachment 1.

However, a lapse in recordkeeping does not equate to a failure to conduct alcohol testing as alleged. The regulation expressly allows an Operator to decide not to test as occurred in this incident.

V. Proposed Civil Penalty

The NOPV proposes civil penalties associated with three (3) of the underlying allegations, including NOPV Items 1, 2, and 3. As detailed above, KMLT is contesting the proposed civil penalties associated with these items. PHMSA has failed to meet its burden of proof to establish the underlying violations. Additionally, the proposed penalties do not properly reflect statutory and regulatory civil penalty factors of (1) nature, (2) gravity, (3) culpability, and/or (4) other matters as justice may require. KMLT requests that these civil penalties be withdrawn or significantly reduced.

VI. Statement of Issues

- A. Whether based on the facts and applicable law, PHMSA has met its burden to prove by a preponderance of the evidence that KMLT did not comply with 49 C.F.R. § 195 requirements for NOPV Items 1,2,3, and 5.
- B. Whether PHMSA provided due process and fair notice, as required by the U.S. Constitution and the Administrative Procedure Act, in issuing alleged violations for NOPV 1,2,3, and 5 based on the facts and the applicable law.
- C. Whether PHMSA's allegations of noncompliance under NOPV Items 1,2,3, and 5 are arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2).
- D. Whether the proposed civil penalties associated with NOPV Items 1,2, and 3 should be withdrawn or reduced to accurately reflect the statutory and regulatory penalty assessment criteria required under 49 U.S.C. § 60122(b) and 49 C.F.R. § 190.225 and to align with penalties issued in prior relevant PHMSA enforcement.
- E. Whether NOPV Items 1,2,3, and 5, proposed civil penalties associated with Items 1,2, and 3, and the PCO obligations contradict PHMSA's Pipeline Safety Enforcement Procedures and prior enforcement precedent.

VII. Summary and Request for Relief

For all of the reasons identified above, and in consideration of other matters as justice may require, KMLT respectfully requests that NOPV Items 1,2,3, and 5 be withdrawn in their entirety, including the proposed civil penalties associated with NOPV Items 1,2, and 3, and the PCO obligations associated with NOPV Items 1. In advance of the requested hearing and settlement meeting, and pursuant to 49 C.F.R. § 190.209, KMLT requests a copy of the complete case file in this matter, beyond the Pipeline Safety Violation Report and its exhibits which have already been provided. As noted above, KMLT believes these issues are capable of resolution without the need to proceed to a hearing and respectfully requests an informal settlement meeting with the Eastern Region.

Respectfully submitted,

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Date: April 25, 2023