



U.S. Department
of Transportation
**Pipeline and Hazardous
Materials Safety
Administration**

1200 New Jersey Ave., S.E.
Washington, DC 20590

MAR 3 1 2008

VIA CERTIFIED MAIL – RETURN RECEIPT REQUESTED

Mr. Richard Hatchett
Vice President
West Texas Gas, Inc.
211 North Colorado
Midland, TX 79701-4607

Re: CPF No. 4-2005-1015

Dear Mr. Hatchett:

Enclosed is the Final Order issued in the above-referenced case. It makes findings of violation and assesses a civil penalty of \$13,500. The penalty payment terms are set forth in the Final Order. This enforcement action closes automatically upon payment. Your receipt of the Final Order constitutes service under 49 C.F.R. § 190.5.

Thank you for your cooperation in this matter.

Sincerely,

for

Jeffrey D. Wiese
Associate Administrator
for Pipeline Safety

Enclosure

cc: Sterling H. Smith, Esq.
2900 Stratford Dr.
Austin, TX 78746-4629

**U.S. DEPARTMENT OF TRANSPORTATION
PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMINISTRATION
OFFICE OF PIPELINE SAFETY
WASHINGTON, D.C. 20590**

_____)
In the Matter of)

West Texas Gas, Inc.,)

Respondent)
_____)

CPF No. 4-2005-1015

FINAL ORDER

On August 25 and 26, 2004, pursuant to 49 U.S.C. § 60117, representatives of the Pipeline and Hazardous Materials Safety Administration, Office of Pipeline Safety (OPS), conducted an on-site pipeline safety inspection of West Texas Gas, Inc.'s (Respondent's) operator qualification (OQ) program and records in Amarillo, Texas. Respondent operates natural gas pipelines, including gathering, transmission, and distribution lines in Texas, New Mexico and Oklahoma. As a result of the inspection, the Director, Southwest Region, OPS, issued to Respondent, by letter dated September 12, 2005, a Notice of Probable Violation and Proposed Civil Penalty (Notice).¹ In accordance with 49 C.F.R. § 190.207, the Notice proposed finding that Respondent had committed violations of 49 C.F.R. § 192.805 and proposed a civil penalty of \$13,500 for the alleged violations.

Respondent responded to the Notice by letter dated October 14, 2005 (Response). Respondent contested the allegations and requested a hearing. In accordance with 49 C.F.R. § 190.211, a hearing was held in Houston, Texas on May 25, 2006, with an attorney from the Office of Chief Counsel presiding. Respondent submitted a post-hearing brief (Brief) by letter dated June 23, 2006.

FINDINGS OF VIOLATION

Item 1: The Notice alleged that Respondent violated 49 C.F.R. § 192.805(b), which states:

§ 192.805 – Qualification program.

Each operator shall have and follow a written qualification program. The program shall include provisions to . . .

(b) Ensure through evaluation that individuals performing covered tasks are qualified . . .

¹ The Notice erroneously reported the dates of the inspection as August 25 and 26, 2003.

§ 192.801 – Scope.

(a)

(b) For the purpose of this subpart, a covered task is an activity, identified by the operator, that:

- (1) Is performed on a pipeline facility;
- (2) Is an operations or maintenance task;
- (3) Is performed as a requirement of this part; and
- (4) Affects the operation or integrity of the pipeline.

§ 192.803 – Definitions.

Abnormal operating condition means a condition identified by the operator that may indicate a malfunction of a component or deviation from normal operations

Evaluation means a process, established and documented by the operator, to determine an individual’s ability to perform a covered task

Qualified means that an individual has been evaluated and can:

- (a) Perform assigned covered tasks; and
- (b) Recognize and react to abnormal operating conditions.

As a general matter, Respondent contended in its Brief that OPS inspected the wrong OQ program. Respondent stated that seven months prior to the August 2004 inspection, Respondent implemented a new OQ program, but that OPS inspected Respondent’s prior program. Respondent did not present this argument in its initial Response or at the hearing, but raised it for the first time in its Brief. Respondent did not provide any documentation to substantiate its contention that a new program had been fully implemented at the time of the inspection in August 2004. To the contrary, OPS inspectors noted during the inspection that Respondent had purchased a new “off-the-shelf” plan in late 2003 but had not completed efforts to adapt that program to Respondent’s own procedures and practices. Since the new program was still under development at the time of the inspection, I find OPS inspected the correct program that governed Respondent’s OQ efforts at that time.

Item 1A in the Notice alleged that Respondent violated 49 C.F.R. § 192.805(b), as quoted above, by failing to have and follow a written qualification program that complied with the regulation. Specifically, the Notice alleged that Respondent’s qualification program did not include provisions to ensure through evaluation that individuals performing covered tasks could recognize and react to all abnormal operating conditions (AOCs) associated with those tasks. The Notice further alleged that Respondent’s qualification program only identified “generic” AOCs, or those that might be encountered during the performance of a covered task generally, but the program did not identify “task-specific” AOCs, i.e., abnormal conditions that are associated with specific covered tasks.

At the hearing, Respondent acknowledged that it had not correlated each covered task with a set of task-specific AOCs. Respondent contended at the hearing and in its Brief, however, that the regulation does not require the correlation of each covered task with a set of task-specific AOCs.

Respondent cited OPS guidance FAQ 4.3 in support of its contention that identification of task-specific AOCs is optional.²

Read in its entirety, however, FAQ 4.3 explains that “[o]perators are expected to develop a thorough listing of AOCs, *both task-specific and generic*” (emphasis added). The guidance further clarifies that the “regulatory requirement [to evaluate an individual’s ability to recognize and react to AOCs] applies to *both task-specific and generic AOCs . . .*” (emphasis added). The requirement for operators to identify both task-specific and generic AOCs is consistent with the text of the regulation and its stated purpose to ensure that individuals performing covered tasks can recognize and react to all AOCs that might reasonably be expected to be encountered during the performance of a covered task.³

The evidence in the record shows that Respondent’s written qualification program identified generic AOCs, but did not include provisions that identified task-specific AOCs for each covered task.⁴ In addition, the list of covered tasks in Respondent’s qualification program did not reference AOCs that were associated with those tasks.⁵ Accordingly, I find that Respondent violated § 192.805(b) by failing to have and follow a written qualification program that included provisions to ensure that individuals performing covered tasks could recognize and react to the full range of AOCs associated with those tasks.

Item 1B in the Notice alleged that Respondent violated 49 C.F.R. § 192.805(b), as quoted above, by failing to have and follow a written qualification program that included provisions to ensure through evaluation that individuals performing covered tasks were qualified. More specifically, the Notice alleged that Respondent’s qualification program did not include a process, established and documented by the operator, to determine whether an individual was able to recognize and react to AOCs. The Notice alleged that Respondent qualified approximately 135 individuals based on an evaluation of each individual’s ability to perform covered tasks during on-the-job training, but without evaluating their ability to recognize and react to AOCs. The Notice also alleged that Respondent conceded during the August 2004 inspection that it did not use evaluation processes such as examinations or training to determine whether individuals were able to recognize and react to AOCs.

² OPS provides operators with guidance information concerning the OQ regulations through public meetings, an extensive OQ website, answers to frequently asked questions (FAQs), and inspection protocols used by OPS in conducting OQ compliance inspections. These guidance materials do not constitute rules themselves but simply provide informal information to the regulated community about how to implement their OQ programs in accordance with the applicable requirements of the pipeline safety regulations. FAQs are located on the OQ website at <http://primis.phmsa.dot.gov/oq>.

³ See also In the Matter of Georgia-Pacific Crossett Paper Operations, Final Order, CPF No. 2-2005-1007 (Sept. 1, 2005) (finding the pipeline operator had violated § 192.805(b) when it conducted evaluations that did not address AOCs generically or by task).

⁴ Respondent’s Brief, Exhibit B, June 23, 2006.

⁵ Respondent’s Brief, Exhibit A.

In its Response and Brief, Respondent categorized Item 1B as a citation for failing to provide training. However, the allegation in the Notice was that Respondent violated § 192.805(b) by failing to have and follow an established and documented *evaluation process* to determine if an individual performing a covered task was able to recognize and react to AOCs. Although the Notice did reference Respondent's failure to provide AOC-specific training and examinations, that was merely to document that Respondent did not utilize methods commonly used by other operators to comply with § 192.805(b).

At the hearing and in its written submissions, Respondent contended that it did evaluate each individual's ability to recognize and react to AOCs. Respondent submitted an affidavit by its Director of Regulatory Compliance, dated October 12, 2005, attesting that each qualified individual "was capable of performing the covered task and could recognize and react to abnormal operating conditions expected to be encountered." The Director stated that a manager would make this determination based on a review of the individual's work performance history. At the hearing, Respondent also explained that an assessment would be made based on an evaluator's personal experience with the individual during on-the-job training. By signing a qualification form, the evaluator would certify that the individual was able to recognize and react to AOCs.

The record shows Respondent's written OQ program documented the use of work performance history reviews and on-the-job training but not any method or standard for assessing an individual's ability to recognize and react to AOCs.⁶ The process by which Respondent evaluated an individual's ability to recognize and react to AOCs involved certifications by an evaluator based solely on the evaluator's experience with the individual during on-the-job training but without any documented standard by which the assessment was made. Respondent's evaluation process also lacked established acceptance criteria to ensure consistent qualifications by evaluators. The qualification of individuals based solely on the impression of an evaluator, without any assessment standards or acceptance criteria, fails to comply with § 192.805(b) because the regulation requires an established and documented evaluation process to determine whether an individual performing a covered task is able to recognize and react to AOCs.

Respondent's qualification program did not include provisions to ensure that each qualified individual was able to recognize and react to AOCs. Accordingly, I find Respondent violated § 192.805(b) by failing to have and follow a written qualification program with provisions to ensure through evaluation that individuals performing covered tasks were qualified.

These findings of violation will be considered prior offenses in any subsequent enforcement action taken against Respondent.

⁶ Violation Report, Exhibit 1, Sept. 12, 2005. Pages 3-4 of Respondent's OQ plan describe the use of work performance history review evaluations and on-the-job training, but do not include any standard for assessing someone's ability to recognize and react to AOCs.

ASSESSMENT OF PENALTY

Under 49 U.S.C. § 60122, Respondent is subject to a civil penalty not to exceed \$100,000 per violation for each day of the violation up to a maximum of \$1,000,000 for any related series of violations. The Notice proposed a total civil penalty of \$13,500 for the violations of § 192.805(b).

49 U.S.C. § 60122 and 49 C.F.R. § 190.225 require that, in determining the amount of the civil penalty, I consider the following criteria: nature, circumstances, and gravity of the violation, including adverse impact on the environment; degree of Respondent's culpability; history of Respondent's prior violations; Respondent's ability to pay the penalty, and any effect on Respondent's ability to continue doing business; and good faith of Respondent in attempting to achieve compliance. I may also consider the economic benefits gained from the violation(s) without any reduction because of subsequent damages, and such other matters as justice may require.

The Federal pipeline safety OQ regulations are designed to ensure a qualified work force and reduce the probability and consequences of pipeline incidents caused by human error. Respondent permitted approximately 135 individuals to perform covered tasks that could affect the safe operation and integrity of Respondent's pipeline system without properly evaluating their ability to recognize and react to AOCs. Respondent also failed to identify task-specific AOCs that might reasonably be expected to be encountered during the performance of a given covered task. Respondent's violations of § 192.805(b) constituted a significant safety risk to the safe operation and integrity of Respondent's pipeline, for which Respondent is culpable. Although Respondent contested the allegations of violation, the company did not present any information that would warrant mitigation of the proposed civil penalty under the assessment criteria.

Accordingly, having reviewed the record and considered the assessment criteria, I assess Respondent a total civil penalty of **\$13,500** for violations of § 192.805(b).

Payment of the civil penalty must be made within 20 days of service. Federal regulations (49 C.F.R. § 89.21(b)(3)) require this payment be made by wire transfer, through the Federal Reserve Communications System (Fedwire), to the account of the U.S. Treasury. Detailed instructions are contained in the enclosure. Questions concerning wire transfers should be directed to: Financial Operations Division (AMZ-341), Federal Aviation Administration, Mike Monroney Aeronautical Center, P.O. Box 25082, Oklahoma City, OK 73125; (405) 954-8893.

Failure to pay the \$13,500 civil penalty will result in accrual of interest at the current annual rate in accordance with 31 U.S.C. § 3717, 31 C.F.R. § 901.9, and 49 C.F.R. § 89.23. Pursuant to those same authorities, a late penalty charge of six percent (6%) per annum will be charged if payment is not made within 110 days of service. Furthermore, failure to pay the civil penalty may result in referral of the matter to the Attorney General for appropriate action in a United States District Court.

Under 49 C.F.R. § 190.215, Respondent has a right to submit a Petition for Reconsideration of this Final Order. The petition must be received within 20 days of Respondent's receipt of this Final Order and must contain a brief statement of the issue(s). The filing of the petition automatically stays the payment of any civil penalty assessed. However, if Respondent submits payment for the civil penalty, the Final Order becomes the final administrative action and the right to petition for reconsideration is waived.

The terms and conditions of this Final Order shall be effective upon receipt.

William H. Gault
for

Jeffrey D. Wiese
Associate Administrator
for Pipeline Safety

MAR 3 1 2008

Date Issued