

OQ Rule – Preamble Language vs. Enforcement Criteria (Conflict Resolution)

Question: My company's OQ Plan was structured to conform with the letter and intent of the OQ Rule¹. Where some gray areas appeared to be subject to interpretation, we followed the guidelines and examples provided in the preamble to the Rule. Nevertheless, when our program was inspected by OPS, we learned that some of the preamble's guidance was in error, and we were required to make changes to our OQ Plan to conform with the advice given by the inspectors. The costs of making the required changes is not insignificant; the fact that they had to be made at all has caused those of us who developed the OQ Plan look less competent in the eyes of our senior management. OPS and state enforcement agencies haven't hesitated to use preamble language to interpret the "intent" of rules in the past, so why is this rule different?

Answer: To fully address your question, it is necessary to outline how we got from publication of the OQ Rule to the inspection process that you experienced.

Summary of the Development of the OQ Plan Inspection Process

As noted in the rule's preamble, the OQ Rule was the result of a negotiated rulemaking process between RSPA (OPS) and industry entered into in 1996. RSPA believed that a rule developed through consensus would better address the needs of both the public and the regulated community. That process was chosen following industry's objections to RSPA's rulemaking initially proposed in 1994² as being "too prescriptive" to fit the needs of all operators. The intent of that proposed rulemaking was to craft a rule requiring pipeline operators to provide specific training, testing and periodic refresher training to pipeline workers to ensure they were qualified to perform regulated operations, maintenance and emergency response work³.

A broad spectrum of organizations (serving both the public interest and the industry) was invited to serve on the development committee to ensure a positive outcome. That committee met eight times between May 1997 and February 1999, at which time final consensus was reached on a non-prescriptive, performance based regulation which would allow each operator's program to be tailored to its unique operation and maintenance practices⁴. The final OQ Rule was published on August 27, 1999 (with an effective date of October 26, 1999) and required that all individuals performing "covered tasks" were to be qualified within three years of the rule's effective date (or 38 months following publication; that is, by October 28, 2002).

The National Transportation Safety Board (NTSB), however, announced that the OQ Rule *as issued* was insufficient to support satisfactory closure of OQ-related recommendations it had issued earlier; the issue was closed as "unsatisfactory response". The Associate Administrator

¹ Amendments 192-86 and 195-67, published on August 27, 1999 at 64FR46853, effective October 26, 1999; later corrected on August 20, 2001 at 66FR43523, effective that same day.

² Published on August 13, 1994 at 59 FR 39506.

³ The Pipeline Safety Act of 1992 (PSA) had required that workers be tested for qualifications and certified to operate and maintain pipeline facilities.

⁴ The 1992 Act was amended by The Accountable Pipeline Safety and Partnership Act of 1996 (APSPA) to require (instead of testing and certification) that: (a) All individuals who operate and maintain pipeline facilities shall be qualified to operate and maintain the pipeline facilities. (b) The qualifications applicable to an individual who operates and maintains a pipeline facility shall address the ability to recognize and react appropriately to abnormal operating conditions that may indicate a dangerous situation or a condition exceeding design limits. (c) The operator of a pipeline facility shall ensure that employees who operate and maintain the facility are qualified to operate and maintain the pipeline facilities.

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for Pipeline Safety, Stacey Gerard, obtained agreement from the NTSB to reopen their OQ recommendations, based on the relative satisfaction of the NTSB, as expressed in the Bellingham accident report, with the approach taken by OPS to the inspection process for Integrity Management Programs (IMP) of liquid operators. The use of a standardized inspection process employing inspection protocols similar to those used for IMP inspections was initiated in July 2002; this process was referred to as “IMPing OQ”, or “OQ-2”.

From August to October of 2002, an OQ work group⁵ formulated a set of sixteen Inspection Protocols (based on eight program elements), developed a list of Frequently Asked Questions (FAQs), developed a process flow chart describing the elements of inspection implied by the OQ Rule, and established communications with industry (including setting up a informational “OQ website”, <http://primis.rspa.dot.gov/oq/index.htm>). Thirteen preliminary fact-finding inspections were conducted by the work group (now known as the “Federal OQ Inspection Team”, which included one designee from each OPS region⁶) in 2002. These “quick hit” inspections spanned large and small liquid and gas operators and were designed to see how industry had interpreted and implemented the OQ Rule.

Meanwhile, congress was working on a pipeline safety reauthorization bill. This bill was enacted into law on December 17, 2002⁷. Section 13, “Pipeline Qualification Programs”, placed certain performance vs. time constraints on both OPS and the pipeline industry; the pertinent portions of that section are *paraphrased* below:

- 1) *OPS must develop “standards and criteria” within one year of enactment (not later than December 17, 2003)*⁸.

Following the 2002 fact-finding inspections, the Federal OQ Inspection Team was expanded to include five state enforcement agency representatives. This work group then updated and refined the inspection protocols and guidance material to address the implementation shortcomings that had been identified. OPS began conducting formal inspections in December of 2002, after the regulatory compliance date had passed and a year ahead of the statutory deadline (three inspections were conducted that month). These inspections validated the refined protocol set, and provided additional insight to the inspection team regarding operator strengths and weaknesses in their OQ program implementation.

The pipeline industry became concerned over the perceived unauthorized “expansion” of the OQ Rule, as represented by the inspection protocols and associated guideline materials. A

⁵ Initially, the work group consisted of Richard Sanders, Manager of the Pipeline Division of the Transportation Safety Institute (TSI); Sharon Webb, Administrative Support Assistant, TSI; Warren Miller, Sr. Engineer, OPS Central Region (now relocated to the Southwest Region); and Paul Wood and Dave Waters, OPS contractors (Cycla Corporation).

⁶ OPS has five regions across the U.S. – Eastern, Central, Southern, Southwestern and Western.

⁷ as the Pipeline Safety Improvement Act of 2002 (PSIA). This law (enacted as Public Law 107-355,) is available for review and downloading at http://ops.dot.gov/Pub_Law/107_cong_public_laws.pdf.

⁸ The inspection protocols and guideline material supporting them are the “standards and criteria”. OPS beat this deadline by more than a year.

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series of public meetings⁹ were announced, and were held in each of the first four months of 2003 to discuss and clarify the issues. The concerns raised by industry in that first meeting have been collected into thirteen “OQ Implementation Issues”. The position taken by OPS on each of these issues has been posted on the afore-mentioned website.

Most of these issues were resolved in the public meetings; the rest are to be addressed in a new ASME B31Q Standard, which is currently nearing completion. This is another public/private sector joint effort, as the drafting committee of 32 includes ten regulatory community members (five federal and five state). It is anticipated that OPS will act to adopt this work product (in total or in part) as a referenced standard, after it has been approved by the American National Standards Institute (ANSI) as a National Consensus Standard, and after OPS has been petitioned to adopt.

- 2) *Each pipeline operator must develop and adopt, not later than two years after the date of enactment of this section (by December 17, 2004) a qualification program that complies with the standards and criteria described (in the OQ Rule).*

Note that the OQ Rule was promulgated in 1999 under the 1992 PSA, as amended by the 1996 APSA (see footnotes 3 and 4). The 2002 PSIA amended these requirements after the OQ Rule had been in place for over three years. The date set for operator compliance with this requirement had already been set by the OQ Rule as April 27, 2001 (18 months after the rule’s effective date).

- 3) *Each pipeline operator must complete the qualification of all individuals (who independently perform covered tasks on regulated facilities) not later than 18 months after the date of adoption of the qualification program.*

Although the time limit described by the PSIA is measured from an operator’s “adoption” of its OQ Plan, OPS’s pre-existing OQ Rule had already established a uniform “compliance” date for all operators - as 18 months after the plan was required to be in place by rule (i.e., 18 months after April 27, 2001, or October 28, 2002).

- 4) *A periodic requalification component that provides for examination or testing of individuals in a manner similar to that established for initial qualification.*

It is the intent of OPS to publish a supplemental rulemaking (referred to internally as the “mini-rule”) which would amend the OQ Rule to incorporate the added requirements of the PSIA. Among these will be a requirement that the operator justify the basis for the reevaluation interval established for each covered task. That is, to define “periodic” in terms of an analysis that relates the complexity of the task and the frequency with which it is performed to the anticipated consequences of performance errors¹⁰. Where the consequences of performance errors are deemed to be great (e.g., could result in an incident or accident as those terms are defined in Parts 191 and 195), reevaluation intervals should be shorter than for those tasks which, if performed incorrectly, would (at most) require that the task be repeated to correct the errors made.

⁹ January in San Antonio; February in Houston; March in Phoenix; and April in Atlanta. A fifth meeting, originally proposed to be held in Washington, D.C., was deemed to be unnecessary.

¹⁰ Acceptable justifications will include those based on proper application of a “difficulty-importance-frequency” (DIF) analysis (also known as a “complexity-consequence-frequency” analysis) or comparable methodologies.

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Since re-evaluation intervals are to be addressed within the B31Q Standard (when adopted), operators electing to adopt the recommendations of that standard will be deemed to have met this requirement (depending, of course, upon which portions of that code are ultimately incorporated by reference into Parts 192 and 195). Others, wishing to retain or establish reevaluation intervals longer than recommended by the standard, will be required to justify those intervals using methods comparable to those just described. The reasonableness (rationale) of those re-evaluation intervals (including the analyses supporting them) is subject to review by OPS during OQ Plan inspections.

- 5) *Each operator's OQ Plan must include a provision to provide training, as appropriate, to ensure that individuals performing covered tasks have the necessary knowledge and skills to perform the tasks in a manner that ensures the safe operation of pipeline facilities.*

This is the second of three subjects to be addressed in the “mini-rule”. Operators must provide training to their employees, when necessary, to ensure that individuals are fully qualified to perform covered tasks. One area in which such training needs are obvious is in the development of new hires to fill positions of responsibility in the workforce. To be fully qualified, each individual must be able to demonstrate, through an appropriate evaluation, an understanding of the operator's procedures for each covered task assigned. Understanding the procedures to be followed to perform each covered task without error includes:

- Which steps (if any) of the procedure must be performed in sequence.
- Which steps are deemed by the operator to be “critical” (e.g., an error in performance of that step could result in an incident or accident). and
- The abnormal operating conditions (AOCs) which might be incurred during the performance of the covered task and the appropriate response(s) to each.

The AOCs addressed in the training provided must include not only those that may arise as a result of task performance (“specific”), but also those that may be observed or encountered because the task is being performed on the pipeline facility (“generic”). By placing the qualified individual in the vicinity of an abnormal condition (not related to the current performance of a covered task), the recognition and reaction of the individual should and must provide the operator with the means of responding to these generic AOCs, so that corrective action may be taken before the condition progresses to a more serious state - becoming an emergency and/or a reportable incident or accident.

Contractor training must also be addressed, where appropriate, to ensure that contractor-furnished qualified individuals are adequately trained – not only to competently perform specific covered tasks, but also to recognize and react properly to both specific and generic AOCs. It is anticipated that most operators will require somewhat different “reactions” (to recognized AOCs) of qualified contractor employees than they would of their own qualified employees.

- 6) *If the operator of a pipeline facility significantly modifies a program that has been verified under this subsection, the operator shall notify the Secretary of the modifications.*

This is the third of three subjects to be addressed in the “mini-rule”. If an operator makes “significant” changes to its OQ Plan subsequent to a formal inspection by OPS or a state

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agency, the operator will be required to submit those changes to the inspecting agency for review. (Note: Also see item #8 below.)

The three requirements just discussed are performance requirements placed on the operator by the PSIA, and will apply regardless of whether or not OPS has promulgated the “mini-rule” addressing them. See item #11 below for additional guidance on this point.

- 7) *OPS must review the qualification program of each pipeline operator and verify within three years of enactment (by December 17, 2005) that it complies with the inspection protocols and includes all the elements of the OQ Rule.*

Throughout 2003, the OQ Inspection Team inspected the larger, inter-regional gas and liquids systems operators. Each member of the team gained experience and practice in refining their questioning and commenting skills, so that each could conduct inspections independently thereafter. Each team member has been, and will continue, to train other inspectors to conduct OQ Plan inspections within their areas of responsibility (OPS inspectors for interstate operator plans and state agency inspectors for intrastate operator plans). OPS and the various state enforcement agencies have been posting OQ Plan inspection results in a web-based database, so that the inspection results (the potential issues found) are available to all regulators having an interest in a particular operator (or any affiliate covered by the same OQ Plan).

Having prior inspection results readily available eliminates the need for duplicate inspections of an operator’s OQ Plan at the Headquarters level. Field verifications of each OQ Plan will continue to be made as often, and at as many locations, as is deemed necessary to assure that plans are being properly implemented throughout the field organizations of each operator.

- 8) *OPS must review and verify modifications to OQ Plans made subsequent to a formal inspection of that Plan. Such review and verification shall be made on the same basis as the previously conducted inspection.*

OPS (or the responsible state agency, if the previous inspection was performed by them) will review operator-submitted (significant; see item #6 above) changes to the plan in to ensure that an adequate level of safety has been maintained (or that previously found potential issues have been adequately addressed). Note that there is no time limit specified for such reviews. It is anticipated current workloads will delay this review process until after the congressional mandate for the initial review of all operator’s OQ Plans has been met (see item #7 above).

- 9) *A Pilot Program for Certification of Control Panel Operators must be completed not later than 36 months after the date of enactment of this Act (by December 17, 2005).*

While added to Section 60131 of the PSIA as a conforming amendment, the requirements of this paragraph have been delegated by OPS to a special task force, and have not been incorporated into the OQ Plan inspection protocols. This “controller certification” task force is conducting it’s own fact-finding inspections, and this work is taking place independently

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of the OQ Plan inspection process (although this task force has been reviewing and commenting on the B31Q standard development as information becomes available).

- 10) *If the Secretary decides that a qualification program is inadequate for the safe operation of a pipeline facility, the Secretary shall act as under section 60108(a)(2) to require the operator to revise the qualification program.*

This provision makes clear that OPS has the responsibility to ensure that each operator's OQ Plan provides for the safe operation of its pipeline facilities. Thus, OPS (or state enforcement agencies, where appropriate) have the right to *require* an operator to make those changes deemed necessary to protect the public, the environment, or property. This includes the right of OPS to require operators to include items deemed to have been overlooked when the operator compiled its covered task list. The preamble correctly observes (on page 46859, near the top of the right column):

Although operators are responsible for identifying covered tasks for which individuals must be qualified, regulators remain responsible for reviewing operator qualification programs and ensuring that federal regulatory standards are applied and met nationwide. Regulators may question an operator's inclusion and exclusion of particular activities as covered tasks. Regulators may require modifications to programs that fail to meet the requirements of the rule.

An example of oversights in the covered task lists compiled by many of the operators is one generally characterized as "Excavation". OPS has provided a definition on the OQ Website of "Excavation within a Pipeline Facility", and has been enforcing its inclusion in covered tasks lists. It basically presumes that a prudent operator will accumulate (under some phrase including the term "Excavation") in its covered task list those procedures which it is required to follow to comply with the requirements of §192.614 and/or §195.442, "Damage Prevention Program". This expectation was implied within the "Rulemaking Analyses and Notices" section of the OQ Rule's preamble, on page 46864 beginning near the bottom of the left column and continuing into the center column:

In 1997, there were 354 reportable pipeline incidents/accidents. Of these, 87 gas pipeline incidents and 40 hazardous liquid pipeline accidents were attributed to outside force damage. Although most outside force damage is caused by persons not covered by this rule—as when a third party disregards one-call procedures—damage sometimes results when a pipeline worker fails to follow one-call system procedures or from improper marking of the pipeline prior to excavation. Consequently, while third parties causing damage will not be better prepared to prevent pipeline damage, they will potentially reap the benefits of this rule by working around pipelines that are more clearly marked.

OPS does not require or expect individuals to be qualified to operate heavy-duty excavation equipment. However, the evaluation criteria for the "excavation" covered task should include those procedures which are necessary to protect the operator's buried pipelines from excavation damage, regardless of who performs the actual excavation (third parties, who may or may not be under the control of the operator, or the operator's own personnel). OPS will supplement operator efforts in this area by continuing to promote the improvement of existing state one-call / underground facility damage prevention laws where deemed needed, and the promulgation of effective laws in those states where they do not currently exist.

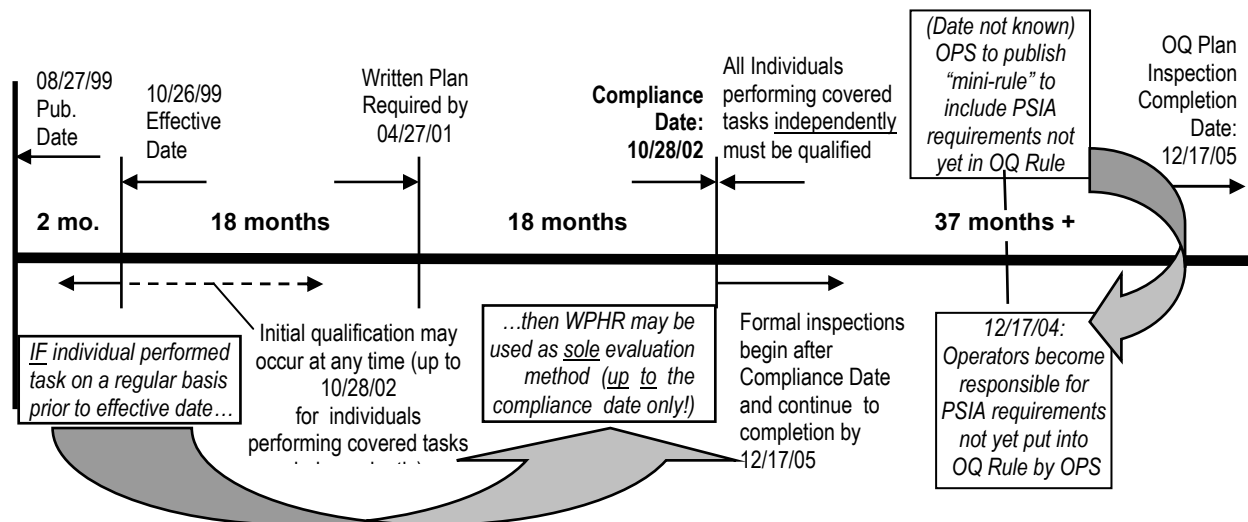
In general, activities that must be considered as forming a part of this task would include verification of line location and depth and marking of the pipeline in conformance with locally applicable one-call laws; one-call and underground facility owner/operator

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notifications and receipt thereof; proper techniques to avoid pipeline damage (e.g., restrictions on how close to the line mechanized excavation may take place, baring of backhoe teeth within the confines of the pipeline right of way, procedures for crossing loaded pipelines with heavy equipment, etc.); sloping and shoring considerations necessary to prevent unintended movement of pipe segments; water removal from the ditch prior to backfill; and other inspection responsibilities during the actual excavation process.

- 11) *Failure of OPS to act does not excuse operators from the requirement to comply with the requirements of the PSIA applicable to them; that is, they must shall develop and adopt a compliant qualification program not later than 2 years after the date of enactment of this section (i.e., by December 17, 2004).*

Given this provision of the PSIA, it is incumbent upon operators to have their OQ Plans address each of the inspection protocols, including the requirements previously designated as being “non-enforceable”. Although it is OPS’ intent to issue a supplementary rulemaking (the “mini-rule”) that will provide additional guidance to operators regarding the remaining requirements of the PSIA (not previously addressed by the OQ Rule; see items #4, #5 and #6 above), OPS cannot circumvent the congressional intent and fail to inspect for operator compliance with the PSIA requirements applicable to them after the mandated compliance date of December 17, 2004.



COMPLIANCE TIMELINE FOR BOTH OPERATORS AND OPS

Discussion of the OQ Rule Preamble Statements Now Considered to be In Error

Having described the regulatory developments and common understandings that have taken place subsequent to the issuance of the OQ Rule¹¹, we may now comment on:

¹¹ All references are to the OQ Rule published as Amendments 192-86 and 195-67, on Friday, August 27, 1999 at 64 FR 46853 and subsequent pages; available for download at <http://ops.dot.gov/document/OpQualFinal.pdf>. The rule was corrected (minor corrections, not affecting rule substance) by Amendments 192-90 and 195-72 at 66 FR 43523-4, also available for download from the Government Printing Office at <http://www.gpoaccess.gov/fr/advanced.html>.

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- Those portions of the preamble that were misstated at the time of publication.
- Those statements that have, since publication, been determined to be at odds with current interpretations.

References are given to that portion of the preamble to which the comments apply.

Part IV. Discussion of Comments In Response to NPRM

General Comments

Last full paragraph in the center column of Page 46856:

“A commenter said RSPA should clarify how individuals involved in emergency response, who do not perform covered tasks, would be subject to the qualification requirements. The Committee agreed not to re-write the qualification requirements of emergency response personnel. The rule applies only to personnel performing operations and maintenance activities.”

This portion of the OQ Rule’s preamble does state the common understanding existing at that time regarding the rule’s applicability to emergency response activities. This understanding was reflected in the concurrent issuance of a revised §195.403, which revised the section’s title (from “Training” to “Emergency response training”) and content (the “operating and maintenance” training requirements were removed, leaving only the “emergency response” training requirements in place). This action was taken because “qualification” requirements (at least for covered operations and maintenance tasks) had superseded the “training” requirements previously in place.

OPS realized early in 2003 that this blanket exemption for emergency response activities was inappropriate. The “emergency response” portions of the pipeline safety regulations reside within, and are an integral part of, the “operations and maintenance” sections of each pipeline code:

- In Part 192, emergency plans are specifically addressed at §192.615 and the emergency response procedures developed there under must be contained within the procedural manual required by §192.605 [as detailed in paragraph (e) of that section]. Both requirements reside in Subpart L, “Operations”.
- In Part 195, emergency training is addressed at §195.403 (as noted above), and the procedural manual required by §195.402 must contain procedures for handling emergencies as detailed in paragraph (e) of that section. Both requirements reside in Subpart F, “Operation and Maintenance”.

OPS acted to inform industry of this change of position regarding emergency response at each of the four public meetings held in 2003. In addition, definitions were posted on the OQ website so that operators could understand the current position taken by OPS on this and other subjects. In essence, the current position taken by OPS is that those activities undertaken to respond to emergencies within a “pipeline facility” should be considered “covered tasks” if they involve the same, or substantially the same, actions that were determined to be covered tasks under the 4-part test when performed as maintenance and operation activities. In addition, covered emergency response tasks include those tasks which are listed in §192.615(a) or §195.402(e) that meet the 4-part test specified in §192.801 or 195.501§ (as applicable). Unqualified individuals responding to emergencies must be directed and observed by a qualified individual when performing covered tasks.

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Activities normally undertaken by emergency response personnel belonging to local law enforcement, fire department, and rescue organizations are not covered by this rule. That is, these public sector “emergency responders” are not *required* to be qualified – and, if they are not, must not be allowed to perform covered tasks. “Offsite” activities undertaken by emergency response personnel (crowd, traffic and access control, fire containment and extinguishment, rescue and evacuation of injured individuals, etc.) and environmental containment and cleanup contractors (placing absorbent booms and pads across creeks and rivers, collecting and recycling spilled product, etc.) that take place at some distance from the pipeline facility, or do not involve the performance of tasks required by either Part 192 or Part 195, are not covered by the OQ Rule.

However, if the operator can foresee instances in which individuals from this type of organization may be called upon to respond to an emergency and perform “covered” emergency response tasks on the pipeline facility (such as operating specific valves), the responding individuals must be qualified. That is, they must be:

- trained (if necessary to assure competent, independent performance of a covered task, in the performance of the task and in the recognition of and appropriate reaction to AOCs)
- by the operator (or a third party acceptable to the operator),
- evaluated, using a method appropriate to the task assigned, and
- determined to be qualified for the tasks they are expected to perform, and
- records of their qualifications maintained in the same manner as done for other contractor or mutual assistance organization employees.

Comments to §§ 192.801/195.501 - Scope

Next to last full paragraph in the left column of Page 46857:

“...This operator also stated that the concept of a task not being covered when performed on an unattached pipeline component was confusing, and asked for clarification. The Committee decided that when pipeline facilities are not physically attached to the pipeline, work on these facilities should not be “covered,” such as a manufacturers repair work off site.”

This response given by OPS in this instance was misstated and is misleading. The rule clearly provides that the first part of the 4-part test for covered tasks is performed on a pipeline facility”. In both Parts 192 and 195 the definition of “pipeline facility” is clear and pre-dates the OQ Rule by many years. OPS cannot change, and operators of jurisdictional pipeline facilities are not free to modify, pre-existing definitions to agree with comments made in the preamble to the OQ Rule. In this case, the phrase used in the preamble quote above, “when pipeline facilities are not physically attached to the pipeline”, is inappropriate given the wording of the rule, even though the example provided (“such as a manufacturers repair work off site”) is appropriate, assuming that the phrase “off site” is equivalent to “away from the pipeline facility”. Operator definitions constructed to take advantage of this misstatement in the preamble will be required to remove them from their OQ Plans upon review by OPS or the applicable state agency.

Whether or not the “facility” (pipe segment, component, etc.) has been *disconnected* from the remainder of the pipeline has no bearing on whether or not the work in question is “performed on a pipeline facility”. All that physical separation, removal of gas or product, etc. has done is to render performance of the task less hazardous. If the work is still to be done within the confines of the pipeline facility (upon the right-of-way or in a building that is part of the pipeline facility),

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there remains the opportunity for the individual performing the task to be exposed to an AOC. That individual must be able to recognize such conditions and appropriately react to them, whether the AOC is specific (arising as direct result of the task being performed), or generic (arising independently of the task being performed, but still observable by the individual because it occurs in the vicinity). That is, if the individual performing the task must be qualified if the component being serviced remains “in service”, an individual performing the same task on a component taken “out of service” must also be qualified if the component remains within, and the task is “performed on the pipeline facility”.

Removal of the component from the pipeline facility for work to be performed at a remotely-located site removes both the first part of the four-part test from consideration and the “AOC recognition and reaction” component from the qualification requirement of the individual performing the task. The individual performing the task under these circumstances should of course be “competent” to perform the task, but does not have to be “qualified” under the rule, in that AOCs will not be observable from that site.

Part V. Scope

C. Identification of Covered Tasks¹²

Last paragraph in the right column of Page 46859:

“1. *Tasks Performed on a Pipeline Facility.* The phrase “performed on a pipeline facility” means an activity that is performed by an individual whose performance directly impacts the pipeline facility. An individual who works on a pipeline component that is physically connected to the pipeline system is performing work “on a pipeline facility” and may be subject to the final rules, regardless of whether or not product is flowing through the pipeline. However, a person who repairs a pipeline system or appurtenance, that has been removed from the system, would not be performing work on the pipeline, and therefore would not be performing a covered task.”

This is a statement that is not only misleading, but confusing as well. The first sentence misses the point of part 1 of the 4-part test entirely. That question does not address whether the individual’s performance “directly impacts the pipeline facility”, but is a simple question regarding *where* the work is performed: Is the activity performed within the confines of the “pipeline facility”, or outside of it? The remainder of this paragraph includes a mixture of terms (“physically connected to the pipeline system”; “on a pipeline facility”; “removed from the system” and “on the pipeline”) in a way that skates around the definitions given in §192.3 (pipeline, pipeline facility) and in §195.2 [component; pipeline (or pipeline system); pipeline facility] without respecting the implications of using terms already defined by regulation. This subject was covered in detail in the previous topic, and will not be repeated here.

D. Amendments to Section 195.403 (Training)

Last paragraph in the left column of Page 46861:

Section 195.403 currently prescribes the training requirements for operations, maintenance, and emergencies for operators of hazardous liquid pipelines. Because the final rule includes a qualification process for operations and maintenance activities, but does not address emergency response qualification, 49 CFR §195.403 is amended to retain emergency response training requirements. This rule removes the specific operations and maintenance training requirements addressed in 49 CFR §195.403. Persons performing operations and maintenance tasks need to be

¹² Labeled as “B” as published, but “B” was already used to describe “*Operators are Responsible for Identifying Covered Tasks*” on the same page.

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qualified in accordance with the final rule. This amendment is not effective until October 28, 2002.

The subject of emergency response activities was previously addressed in this discussion under the topic “**Part IV. Discussion of Comments In Response to NPRM**” and will not be repeated here. Suffice it to say that emergency response activities, if they had been properly addressed from the beginning, would have been recognized as part of the general operating and maintenance requirements of the regulations. This implies that the above statement would have been modified to reflect that §195.403 was being deleted in its entirety, for the same reasons that operations and maintenance training was deleted, and the entire section would have been deleted effective October 28, 2002 (i.e., “when all personnel performing operations, maintenance and emergency response tasks need to be qualified in accordance with the final rule”).

Since that did not occur, however, the current interpretation of emergency response activities and their relationship to the OQ Rule will be included within the preamble to the “mini-rule”, which will, therefore, include an Amendment to Part 195 to delete the remaining portion of §195.403 (which retained training requirements for emergency responders). The effective date of that deletion will be specified as December 17, 2005, the date by which all operators must have their OQ Plan inspected by OPS (or the responsible state enforcement agency). This inspection process will ensure that all operators have had notice and opportunity to correct their plans (if needed) to include applicable emergency response activities within their “covered task lists”.

Discussion of the OQ Rule Preamble Statements Relating to the Application of Work Performance History Review

Part VI. Definitions

Evaluation

Last four full paragraphs in the left column of Page 46862:

The operator must establish the parameters for the work performance history review. For example, a work performance history review may include:

- (1) A search of existing records for documentation of an individual's past satisfactory performance of a covered task(s);
- (2) verification that the individual's work performance history contains no indications of substandard work or involvement in an incident (part 192) or accident (part 195), caused by an error in performing a covered task; and,
- (3) verification that the individual has successfully performed the covered task on a regular basis prior to the effective date of the rule.

This portion of the preamble is repeated here not because of misstatements or errors of rule interpretation by OPS. It is included because many of the operators inspected to date obviously failed to grasp the significance of the guidance provided. That is, despite the clear and careful guidance provided in the preamble [for those operators choosing to use Work Performance History Review (WPHR) as a stand-alone evaluation method during the “transitional phase” (the option for which ended on October 28, 2002)], many inspections performed to date have revealed a consistent lack of a bona-fide effort to fully:

- (1) Conduct a search of existing records that document each individual's past satisfactory performance of each covered task to be evaluated using WPHR.

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(2) Verify that each individual's work history contained no evidence of substandard work, or involvement in an incident or accident.

(3) Verify that each individual evaluated by this method successfully performed each covered task (evaluated using the WPHR method) on a *regular basis* prior to October 26, 1999.

As a result of little to no documentation of a realistic effort being made to address these minimum compliance requirements, these operators were deemed to have engaged in the practice of "grandfathering" employees. This practice is not permitted by any reasonable interpretation of the rule's requirement that each individual must be "evaluated", prior to the compliance date, to determine the individual's *current* ability to perform a covered task. That is, an evaluation must show that a qualified individual "can perform assigned covered tasks" (at the time the evaluation is conducted).

Some examples of Notices of Proposed Violations resulting from the misuse of WPHR follow:

- Use of WPHR as a sole evaluation method after 10/28/02.
- Use of WPHR as an evaluation method for individuals hired after 10/26/99.
- Failure to document which (if any) records were researched to conclude an individual was qualified.
- Failure of the OQ Plan to include any direction for the application of WPHR to those who were charged with using the method to qualify employees/
- Failure to show that the task was performed on a regular basis prior to 10/26/99 (e.g., having performed the task once or twice in the preceding 5 to 10 year period is insufficient).
- WPHR qualification base solely on the individual's recollection of the tasks performed, and that they were performed satisfactorily, over the years preceding the 10/26/99 cutoff date and the (i.e., an individual's "self-assessment" was deemed sufficient for qualification).
- Two individuals agreeing to qualify each other using WPHR (this "brother-in-law" treatment could not represent a dispassionate opinion from either party).
- An individual evaluated himself, and (to no one's surprise) deemed himself qualified.

Operators who have not yet been inspected and who have misused WPHR in this (or any similar manner) should begin at once to fully document their records to better support their qualifications. Failure to do so may result in a Consent Order being issued to require new evaluations of employees previously qualified under insufficiently strong WPHR procedures, and a possible Civil Penalty that reflects the egregiousness of the violations found.