



VIA ELECTRONIC FILING

February 16, 2021

Mr. James Reynolds
U.S. Department of Transportation
Docket Management System
Docket Operations (M-30)
1200 New Jersey Ave, S.E.
Room W12-140
Washington, D.C. 20590

**Re: Docket No. PHMSA-2020-0086, Pipeline Safety: Operator Qualification
Frequently Asked Questions**

Dear Mr. Reynolds:

On January 15, 2021, the Pipeline and Hazardous Materials Safety Administration (PHMSA or the Agency) published a Notification and Request for Comments (Notice) in the *Federal Register* in the above-captioned proceeding.¹ PHMSA requested comments on proposed revisions to the existing Operator Qualification Frequently Asked Questions (FAQs). PHMSA stated that the purpose of the revisions was to “replace current FAQs that are outdated or no longer relevant and will ensure that each FAQ is tied to a specific regulatory requirement.”²

The GPA Midstream Association (GPA Midstream) appreciates the Agency’s efforts to update the Operator Qualification FAQs.³ As explained in more detail below, GPA Midstream is submitting comments on two of the proposed FAQs: (1) FAQ #9 (O&M Tasks) and (2) FAQ #12 (Emergency Responders).

¹ Pipeline Safety: Operator Qualification Frequently Asked Questions, 86 Fed. Reg. 3,956 (Jan. 15, 2021).

² *Id.* at 3,956.

³ GPA Midstream has served the U.S. energy industry since 1921 and has nearly 70 corporate members that directly employ more than 75,000 employees that are engaged in a wide variety of services that move vital energy products such as natural gas, natural gas liquids (NGLs), refined products and crude oil from production areas to markets across the United States, commonly referred to as “midstream activities”. The work of our members indirectly creates or impacts an additional 450,000 jobs across the U.S. economy. GPA Midstream members recover more than 90% of the NGLs such as ethane, propane, butane and natural gasoline produced in the United States from more than 400 natural gas processing facilities. In 2017-2019 period, GPA Midstream members spent over \$105 billion in capital improvements to serve the country’s needs for reliable and affordable energy.

I. FAQ# 9 What operations and maintenance activities must be included in a compliant OQ program? (§§ 192.801, 195.501)

In FAQ #9, PHMSA proposes new guidance for determining if an activity meets the definition of a covered task for purposes of the operator qualification requirements in 49 C.F.R. §§ 192.801 and 195.501. Specifically, the Agency’s proposed guidance provides that “[t]he OQ regulations require operators to identify covered tasks for all O&M activities that are performed as a requirement of parts 192 and 195, without regard to whether such activities arise from performance-based or prescriptive requirements.”⁴ PHMSA also states that “tasks are ‘performed as a requirement of this part’ if they are integral to meeting the requirements of the regulations.”⁵

While GPA Midstream supports updating the Operator Qualification FAQs to reference specific regulatory requirements, several of the statements made in the proposed FAQ do not qualify as proper exercises of agency guidance. There is no support in the text, structure, or history of the OQ regulations for the assertion that O&M activities derived from “performance-based regulations” are covered tasks “if they are integral to meeting the requirements of the regulations.” Nor is there support for the notion that the two examples identified in the proposed guidance, “pipefitting and removal of a casing,” are covered tasks derived from performance-based O&M regulations.

The OQ regulations do not distinguish between prescriptive and performance-based regulations and afford no special status to “integral tasks.” A covered task is generally defined as “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 [49 C.F.R. Part 192 or Part 195]; and (4) Affects the operation or integrity of the pipeline.”⁶ For purposes of the second and third criteria in this definition, the operations or maintenance tasks performed as a requirement of Part 192 or Part 195 are generally those specified in Subparts L and M for gas pipelines and Subpart F for hazardous liquid or carbon dioxide pipelines. Tasks that an operator performs to comply with other regulations, such as the design or construction requirements, should not be treated as operations or maintenance tasks under the OQ regulations.⁷

PHMSA suggests in the proposed FAQs that there is a difference between operations or maintenance tasks that arise from prescriptive or performance-based regulations. The Agency does not provide any further context for understanding whether a regulation is prescriptive or performance-based, and it is worth noting that a recent PHMSA-sponsored report from the National Academy of Sciences specifically declined to reference these terms because of

⁴ PHMSA, Proposed Operator Qualification Frequently Asked Questions at 4 (Jan. 5, 2021), <https://www.regulations.gov/document?D=PHMSA-2020-0086-0001>.

⁵ *Id.* at 4-5.

⁶ See 49 C.F.R. § 192.801(b) (2019); *see also*, 49 C.F.R. § 195.501(b).

⁷ The Agency acknowledged in the preamble of the Operator Qualification rule that “[c]ertain tasks performed on pipeline facilities may be covered tasks when performed in the course of operation and maintenance activities, but may not be covered tasks in the course of other activities. For example, ‘welding’ could be a covered task when performed as an operations and maintenance activity on a pipeline, such as when installing a weld-over sleeve to repair an anomaly. However, ‘welding’ is not a covered task under this subpart when performed during the fabrication of new installations, because this would not be an operations and maintenance task.” Pipeline Safety: Qualification of Pipeline Personnel, 64 Fed. Reg. 46,853, 46,860 (Aug. 27, 1999).

“ambiguities in the meaning and inconsistencies in the uses of these common regulatory labels.”⁸ Nor does the Agency explain why making the prescriptive-versus-performance-based distinction is necessary or appropriate given the explicit text of the regulations. The only consideration that is relevant under the four-part test is whether the operations or maintenance task is performed as a requirement of Part 192 or Part 195. That principle should be the primary focus of any guidance provided in the FAQs, not whether the requirement creates a prescriptive or performance-based obligation.

To the extent that distinction is relevant, PHMSA cannot use the FAQs to add a new criterion to 49 C.F.R. §§ 192.801(b) or 195.501(b) for operations or maintenance tasks that are “integral” to complying with performance-based requirements. There is no language to that effect in the OQ regulations; and, as the Agency acknowledged in the Notice, “FAQs are not rules, nor do they create legally enforceable rights, assign duties, or impose new obligations that are not contained in the existing regulations and standards.”⁹ If PHMSA wants to alter or amend the current criteria in the four-part test, the proper course of action is to pursue those changes in a rulemaking proceeding.

PHMSA cites two enforcement decisions (*Colonial*, CPF Nos. 1-2017-5015 and *Enterprise*, 3-2009-5022) to support its position that a covered task is not just an activity that meets sections 192.801 and 195.501 but also includes tasks integral to meeting those requirements.¹⁰ In the first case, the Agency ultimately withdrew the allegations.¹¹ Although the Agency stated in that decision that it was not precluded for bringing a similar case, PHMSA should not base a policy change impacting the entire industry on allegations that were ultimately withdrawn. In the second case, PHMSA issued a finding but acknowledged that “this finding does not reach the larger issue of whether pipefitting must always be treated as a covered task for other operators or for all repairs.”¹² It is unclear why PHMSA is citing the equivocal resolution of this case as support for proposed agency guidance, which by definition is a statement of general applicability.¹³

The two activities that led to these enforcement actions demonstrate why the effort to add the “integral tasks” concept to the OQ regulations is fundamentally flawed. There is nothing

⁸ Transportation Research Board, National Academy of Sciences, *Designing Safety Regulations for High-Hazard Industries* at 1-2 (2018), <https://www.phmsa.dot.gov/sites/phmsa.dot.gov/files/docs/technical-resources/hazmat-technical-resources/70131/designing-safety-regulations-high-hazard-industries.pdf>.

⁹ Pipeline Safety: Operator Qualification Frequently Asked Questions, 86 Fed. Reg. at 3,957; *See also* 49 C.F.R. § 5.85 (“Guidance documents cannot create binding requirements that do not already exist by statute or regulation. Accordingly, the Department may not use its enforcement authority to convert agency guidance documents into binding rules. Likewise, enforcement attorneys may not use noncompliance with guidance documents as a basis for proving violations of applicable law. Guidance documents can do no more, with respect to prohibition of conduct, than articulate the agency or Department’s understanding of how a statute or regulation applies to particular circumstances. The Department may cite a guidance document to convey this understanding in an administrative enforcement action or adjudication only if it has notified the public of such document in advance through publication in the FEDERAL REGISTER or on the Department’s website”).

¹⁰ Proposed Operator Qualification Frequently Asked Questions, at 5.

¹¹ *In the Matter of Colonial Pipeline Co.* CPF No. 1-2017-5015, Decision on Petition for Reconsideration at 3 (June 26, 2020).

¹² *In the Matter of Enterprise Products Operating LLC*, CPF No. 3-2009-5022, Final Order at 8 (Aug. 14, 2012).

¹³ 49 C.F.R. § 5.25(c) (The Department’s definition of guidance includes “any statement of agency policy . . . that is intended to have general applicability”).

remarkable about casing removal and pipefitting from an operations or maintenance perspective and citing these activities as examples of integral tasks does not illustrate any broader principle or provide meaningful guidance to the regulated community. In fact, the opposite is true; the examples indicate that the Agency views any operations or maintenance task as a requirement of Part 192 or Part 195, a position that is not consistent with the text, structure, or history of the OQ regulations. Nor do the examples provide operators with fair notice of what generally qualifies as an “integral” operations or maintenance task.¹⁴

Rather than attempting to amend the four-part test by adding a new criterion in a guidance document, PHMSA should emphasize in these FAQs that operators are responsible for identifying covered tasks, and that the Agency will review the provisions in an operator’s written OQ program to ensure compliance with that obligation. Since the inception of the operator qualification rules, PHMSA has consistently stated that it is the operator’s obligation to identify covered tasks.¹⁵ PHMSA should ensure that this concept is reflected in these FAQs by not identifying certain tasks that the Agency deems covered. Instead, PHMSA should reiterate that it is the operator’s obligation to determine which tasks are covered, and that the Agency’s role is to review and confirm that the four-part test has been applied.

GPA Midstream recommends the following changes to the proposed guidance:

Any activity meeting the four-part test, as defined in 49 CFR §§ 192.801 or 195.501 is considered a covered task, ~~regardless of whether it is already specifically defined in an operator’s operations and maintenance (O&M) manual.~~ Reliance on an off-the-shelf OQ program does not excuse the operator from its regulatory obligation to identify a covered task, even if such a program does not offer operator qualification and training for a particular task.

The OQ regulations require operators to identify covered tasks for ~~all~~ O&M activities that are performed as a requirement of parts 192 and 195, ~~without regard to whether such activities arise from performance based or prescriptive requirements. For performance based regulations, such as § 195.422: Pipeline Repairs, tasks are “performed as a requirement of this part” if they are integral to meeting the requirements of the regulations. If such tasks also meet the other parts of the definition of covered tasks, they must be treated as covered tasks under the four-part test. For example, PHMSA considers both pipefitting and removal of a casing to make repairs to be covered tasks. See, e.g., CPF Nos. 3-2009-5022 (issued August 14, 2012) and 1-2017-5015 (issued August 15, 2019, and June 26, 2020) on the PHMSA Enforcement Transparency website for further information.~~

¹⁴ *ExxonMobil Pipeline Co. v. U.S. Dep’t of Trans.*, 867 F.3d 564, 578-579 (5th Cir. 2017).

¹⁵ In the 1999 Final Rule introducing the first operator qualification rules, the Agency acknowledged that “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.” Pipeline Safety: Qualification of Pipeline Personnel, 64 Fed. Reg. at 46,859.

~~Similarly, While the operator has discretion industry standard such as ASME B31Q: Pipeline Personnel Qualification may be useful starting point in identifying industry accepted covered tasks, PHMSA may question an operator's inclusion or exclusion of particular activities as covered tasks.~~

II. FAQ#12 - Do emergency responders need to be qualified under the operator's program? (§§ 192.801, 195.501)

PHMSA should revert to the language in its existing FAQ #2.6 covering emergency responders and rescind this latest proposal. In FAQ #12, PHMSA proposes that “emergency responders, such as firefighters and company personnel who would reasonably be expected to perform covered tasks, are required to be qualified under the operator’s OQ program.”¹⁶ This is a significant change from PHMSA’s current statement, which is couched as a recommendation. In FAQ #2.6, the Agency provides that “Professional emergency responders, such as fire fighters, need not be qualified by the operator to perform their jobs; however, if there is any reasonable expectation that they may be called upon to perform a covered task (e.g., close a specific valve located remotely from the operator's closest field office), those persons should be included within the coverage of the operator's OQ program and qualified to perform that task.”¹⁷ PHMSA offers no explanation of why the Agency has changed its position and is now issuing a new mandate in a guidance document. Such a change warrants rulemaking.

The Agency has consistently stated that third-party contractors working on behalf of a pipeline operator must comply with the pipeline safety regulations.¹⁸ That is an entirely reasonable position that reflects the nature of the activities being performed and contractual relationship between the two parties. However, first responders do not generally arrive on the scene of a pipeline emergency as a result of a contractual obligation. Nor is the first responder acting as the pipeline operator’s agent in taking whatever actions may be necessary to address the situation. In other words, a first responder is not akin to the third-party contractor performing an operations or maintenance task. The first responder is not fulfilling a contractual obligation to the pipeline operator or otherwise acting to satisfy any legal duty that arises under the Pipeline Safety Laws or Regulations.

By suggesting that the OQ regulations apply to first responders, the Agency is attempting to exercise jurisdiction over persons that do not own or operate a pipeline facility and are not engaged in the transportation of gas or hazardous liquids by pipeline. PHMSA is also implying that operators are legally responsible for the actions that a first responder takes during a pipeline emergency. Neither of these assertions is appropriate for an agency guidance document that is

¹⁶ Proposed Operator Qualification Frequently Asked Questions at 6 (emphasis added).

¹⁷ PHMSA, OQ Frequently Asked Questions at FAQ 2.6 (last updated Apr. 25, 2017) (emphasis added), <https://www.phmsa.dot.gov/pipeline/operator-qualifications/oq-frequently-asked-questions>.

¹⁸ In a 2016 interpretation, PHMSA confirmed that “‘operator personnel’ refers to both the operator’s and its contractor’s employees” and “any work done on behalf of the operator must comply with applicable federal pipeline safety regulations.” PHMSA Letter of Interpretation to Mr. J. Douglas Lindsay, Petersen Engineering, PI-15-0014 (Sept. 27, 2016).

intended to clarify the OQ regulations.¹⁹ GPA Midstream urges PHMSA to reconsider this FAQ and allow operators to manage their relationships with emergency response personnel through the existing public awareness regulations.²⁰

III. Conclusion

GPA Midstream appreciates the opportunity to submit comments in response to the Notice. If you have any questions, please feel free to contact me at 202-279-1664 or mhite@gpamidstream.org.

Sincerely,



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¹⁹ GPA Midstream notes that there are also significant logistical concerns with the guidance provided in the proposed FAQ. PHMSA states that “Any emergency responder who could be reasonably expected to perform manual valve closures or any other covered tasks must be qualified under the operator’s OQ program.” Proposed Operator Qualification Frequently Asked Questions, at 6 (emphasis added). This statement is overly broad. An operator may not be able to predict which individual will be the first emergency personnel to respond to the scene. Even if an operator qualified certain first responders, those individuals might not be the first to arrive.

²⁰ There may be specific situations where a pipeline operator has voluntarily qualified a first responder to perform certain operations or maintenance tasks. To the extent that these voluntary arrangements exist, they do not support the position that all pipeline operators have a legal obligation to ensure that first responders are qualified under the OQ regulations.